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Blood and borders

Blood and borders: The responsibility to protect and the problem of the kin-state

Edited by Walter Kemp, Vesselin Popovski and
Ramesh Thakur



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Endorsements

“It is vital to protect national minorities. But history shows us that when states take unilateral steps to protect ‘their kin’ outside their borders, there is a risk of tensions. This book highlights the dilemma of how protecting national minorities can affect inter-state relations.”

Knut Vollebaek, *High Commissioner on National Minorities, Organization for Security and Co-operation in Europe (OSCE)*

“For two centuries the history of Europe – and latterly the world – has been bedevilled by the emergence of nations (‘imagined communities’) whose borders do not coincide with those of sovereign states. This timely book examines that problem from a new angle – that of the international ‘responsibility to protect’ populations threatened by mass atrocities – and suggests ways of ensuring that action by one state claiming kinship with a threatened minority in another state can help resolve such conflicts rather than make them worse.”

Edward Mortimer, *Senior Vice-President, Salzburg Global Seminar*

“This compilation juxtaposes thorny issues which have persistently troubled international relations. Indeed, misunderstood and unchecked, both the notions of ‘kin-state’ and ‘responsibility to protect’ can cause harm. Yet, they are ideas that motivate and mobilise, and so merit careful examination in context. Those concerned with complex inter-ethnic situations within and between states should read this book to note both what to avoid and what to secure. The new multilateralism of this century requires reflections and approaches as the authors of this book share and advocate.”

John Packer, *Professor and Director, Human Rights Centre, University of Essex*

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1

The responsibility to protect minorities: Is the kin-state a problem or a solution?

Walter Kemp

States have a responsibility to protect all people at risk from atrocities living on their territories – be they citizens or non-citizens, indigenous people, majorities or minorities. But sometimes states may be too weak to do so. Or they may act in a way that endangers part of the population, for example persons belonging to a national minority.

What happens when states do not fulfil their responsibility to protect their own citizens? History shows that repeated discrimination against minorities and oppression of cultural, linguistic and other rights can lead to inter-ethnic tensions, violence and atrocities. The worst-case scenario involves genocide, ethnic cleansing, crimes against humanity or war crimes.

After so many atrocities in the past, the international community has vowed not to look away in the future. Thanks to a decision taken at the 2005 World Summit on the responsibility to protect (R2P), gone are the days when states could tell others not to interfere in their “internal affairs”. Now, according to the 2005 *Outcome* document, if states abrogate their responsibility to protect, others must act to prevent atrocities, either by providing assistance and building capacity or through a timely and decisive response.¹

But who can intervene, and how? Surely a state in which a large percentage of the population shares the same ethnicity or culture of the group under threat would have a strong interest in defending “its kin”. Yet, history shows that the intervention of a so-called “kin-state” or “motherland” to defend a threatened minority in a neighbouring state

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can increase rather than defuse conflict. Instead of helping find a solution, the interested party exacerbates the problem. But if it does not act, who will?

This book examines the following dilemma: how can the protection of national minorities be strengthened (internally) to prevent inter-ethnic conflict, and, if that is insufficient, what are the possibilities and limitations of “kin-states” in defending the interests of people sharing cultural, linguistic, ethnic or historic bonds in a way that does not provoke bilateral or regional tensions?

This is not just a philosophical question, it goes to the heart of peace and security and the protection of human rights. For example, Hitler invoked the concept of *Schutzmacht* as an ethnically based “right” of Nazi Germany to protect “its” kin in Poland and Czechoslovakia. India and Pakistan have fought wars in Kashmir in defence of their respective kin. Wars in the Balkans demonstrated what happens, both when minority protection fails and when kinship ties lead to inter-state conflict. Cyprus is another classic “kin-state” crisis. Russia’s relations with Russophones in its “near abroad”, particularly the Baltic states and the Caucasus, also highlight the potential for tensions, as do Hungary’s attempts to strengthen ties with Hungarians abroad. Kosovo’s future will hinge on the relationship between Kosovo’s Serbian community and its links with Serbia. China’s treatment of national minorities and its policies towards Tibet and Taiwan demonstrate the complexities of internal and external R2P. Failure to protect minorities has led to atrocities in Africa, tensions in the Middle East and border conflicts in South America. As the case studies in this book demonstrate, this is an issue of international significance.

What international laws and mechanisms exist to deal with such cases where kinship ties complicate minority protection and bilateral relations? That is the main focus of this book.

The book addresses the dual responsibility of states: (a) towards minorities within their sovereign jurisdiction, and (b) as responsible partners of the international system. The premise, central to R2P, is that sovereignty and responsibility are mutually reinforcing principles. But how does this work in practice? Since the boundaries of nations are seldom perfectly congruent with the borders of states, nationally defined interests may spill over into the sovereignty of other countries. The feeling of responsibility to protect the nation (and co-nationals who are nevertheless citizens of other countries) is therefore potentially explosive, and may lead to tensions between states. If a country violates responsibility (a), a kin-state feels entitled to violate responsibility (b). This is a lose–lose situation. To prevent this situation, what leverage does the international

community have to help states improve minority protection and good-neighbourly relations?

The book is inspired by contributions made at a workshop on R2P and national minorities that took place at the European Centre for Minority Issues in Flensburg, Germany, in October 2008. It is part of a project co-funded by the United Nations University (Tokyo) and the Centre for International Governance Innovation (Waterloo, Ontario).

The book is divided into three parts. Part I looks at conceptual aspects of R2P in the specific context of minority protection, including the role of “kin-states”. Part II presents case studies that illustrate the complexities of the issue in practice. Part III contains a concluding chapter that explores these various insights and their implications.

Part I begins with a chapter by one of the founders of R2P, Ramesh Thakur. He explains the concept, its origins and what steps have been taken to apply it in practice. He looks in particular at the political and legal arguments that have been made for and against R2P since the adoption of the *Outcome* document in 2005.

In Chapter 3, Bogdan Aurescu looks at how the concept of sovereignty has evolved from the imperative of control to the need for responsibility. He underlines the primary character of the responsibility of the home-state in protecting individuals belonging to national minorities, and the scope for international intervention when this fails. He coins the expression “kinterested” state to suggest that states sharing kinship ties with a minority under threat may have an interest in the latter’s fate (and well-being), but he argues that such states cannot intervene unilaterally to protect “their kin”.

Walter Kemp (Chapter 4) considers “upstream” R2P, namely the responsibility to prevent, and what happens when states fail to live up to their obligations. He highlights how R2P can be abused by states defending the interests of nations, and how the international community – such as the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe – can defuse tensions before they become conflicts.

Bilateral treaties and mechanisms such as joint commissions are one way of building confidence across borders and enabling interested states to play a role in protecting and promoting the national identity and human rights of national minorities. Elizabeth F. Defeis (Chapter 5) explores the history of how minority protection has been internationalized and has become the subject of bilateral agreements and peace treaties, for example in South Tirol.

Part II of the book presents particular cases that relate to R2P and kin-states. Emma Lantschner (Chapter 6) provides an analysis of Hungary’s

bilateral agreements with its neighbours, and how the minority issue has both caused tensions and built confidence among states in Central Europe. Particular attention is paid to the role played by joint international commissions for defusing tensions and protecting minorities.

The Middle East is also a theatre for R2P tensions. As described by Joshua Castellino in Chapter 7, kinship issues within and between states – for example Syria and Lebanon – define the region’s cultural diversity, and can sometimes cause frictions. Castellino analyses Syria’s motivation for intervening in Lebanon in 1975–1976, in terms of both Realpolitik and R2P.

Ho-Ming So Denduangrudee looks in Chapter 8 at Viet Nam’s intervention in Cambodia in 1978, particularly in relation to its desire to protect the Vietnamese minority from the atrocities of the Khmer Rouge. In Chapter 9, Olena Shapovalova considers Russia’s role as a kin-state since the collapse of the Soviet Union, particularly in respect to protecting “compatriots” in Ukraine. This chapter begs the question: is kinship based on language, ethnicity or citizenship? In the case of Russia, and other countries, what is the bond that unites so-called compatriots or kin, and what is the right of the “motherland” to protect them? How does this affect stability within these countries and bilateral relations between them and the “kin-state”? The Georgia–Russia conflict in 2008 highlights the sensitivity and potential explosiveness of this issue.

James Tiburcio (Chapter 10) brings to light a lesser-known case, namely that of Brazilians in Paraguay. He demonstrates how demographic and economic factors have created a large Brazilian population in Paraguay, and looks at how these *Brasiguaios* relate to the Paraguayan population as well as to neighbouring Brazil. He shows how issues of land, citizenship and culture – if left unresolved – can potentially develop into crises within and between states. The final case study by Rhuks Ako (Chapter 11) examines the dispute between Nigeria and Cameroon over the Bakassi peninsular, focusing on the role of Nigeria as a kin-state.

Some of the chapters appear critical of R2P, particularly the potential abuse of the concept as a cover for hegemony or interference in the internal affairs of another (usually neighbouring) state. But the criticism is of those who misuse the concept, not of the concept itself. Furthermore, the focus is more on sovereign responsibility, prevention and strengthening the capacity of states to protect persons belonging to national minorities (the first two pillars of R2P), rather than intervention after things go horribly wrong (the third pillar). These aspects of R2P, often overlooked because of debates about how states should respond to R2P situations in a timely and decisive manner, deserve greater understanding and elaboration.

When opening the debate on R2P in the United Nations General Assembly in July 2009, UN Secretary-General Ban Ki-moon reminded member states about their failure to act in the past to prevent atrocities and crimes and to protect the lives of millions of victims. “Together, in this century, we can chart a different course . . . Join me in the search for a better way.” This book is part of that search.

Note

1. UN General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005; available at <<http://www.un.org/summit2005/documents.html>> (accessed 9 December 2010).

Part I

Problems and perspectives

2

The responsibility to protect: A forward-looking agenda

Ramesh Thakur

One of the most dramatic normative developments of our time relates to the use of military force to protect human beings by finessing the tension between state sovereignty and international intervention through a re-definition of “sovereignty” and “humanitarian intervention” as the “responsibility to protect”, the title of the 2001 report by the International Commission on Intervention and State Sovereignty (ICISS).¹ Traditional warfare is the use of force by rival armies of enemy states fighting over a clash of interests: us against them. Collective security rests on the use of force by the international community of states to defeat or punish an aggressor from within the community, whoever that may be: all against one. Peacekeeping involves the insertion of neutral and lightly armed third-party soldiers as a physical buffer between enemy combatants who have agreed to a ceasefire: us between formerly fighting enemies.

The “responsibility to protect” redefines sovereignty as responsibility and locates the responsibility in the first instance with the state. If, but only if, the state is unwilling or unable to honour the responsibility, or is itself the perpetrator of atrocities, then the residual responsibility to protect victims of atrocity crimes shifts to the international community of states, acting ideally through the United Nations Security Council. Thus, the “responsibility to protect” refers to the use of military force by outsiders for the protection of victims of mass atrocities: us against perpetrators, as protectors of victims of mass atrocities.

When UN Secretary-General Kofi Annan issued his famous “challenge of humanitarian intervention” in September 1999, he provoked a furious

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backlash from many countries around the world. Yet, a mere six years later, the R2P norm was endorsed by the world leaders gathered at the United Nations. Annan called it one of his “most precious of all” achievements.² The idea has taken such rapid and seemingly firm hold as to have its own distinctive acronym, R2P; its own new journal, with the inaugural issue published in 2009;³ and even T-shirts for university students.⁴ Sovereignty no longer implies the licence to kill: “We are all atrocitarians now – but so far only in words, and not yet in deeds.”⁵

Therein lies the rub, and that is the subject of this chapter. I will first situate R2P in the context of the so-called “challenge of humanitarian intervention” in the 1990s and trace the displacement of the challenge with the responsibility to protect and its adoption by world leaders in 2005, then bring it up to date with the report of the UN Secretary-General in January 2009, before outlining, as the main task of this chapter, the unfinished agenda of operationalizing the norm.

From the 1990s challenge of humanitarian intervention to the 2005 World Summit

Created from the ashes of the Second World War, with the allies determined to prevent a repeat of Adolf Hitler’s abominations, the United Nations for most of its existence has focused far more on external aggression than on internal mass killings. Yet Nazi Germany was guilty of both. Unlike aggression against other countries, the systematic and large-scale extermination of Jews was a new horror. In this new century, the world organization is at long last elevating the doctrine of preventing mass atrocities against people to the same level of collective responsibility as preventing and repelling armed aggression against states.

The attributes and exercise of sovereignty have softened significantly since 1945. The use of force, both domestically and internationally, was an acknowledged attribute of state sovereignty, and war itself was an accepted institution of the Westphalian system with distinctive rules, etiquette, norms and stable patterns of practices to govern armed conflicts.⁶ In that quasi-Hobbesian world barely removed from the state of nature, the main protection against aggression was countervailing power, which increased both the cost of victory and the risk of failure. Since 1945, the United Nations has spawned a corpus of law to stigmatize state use of force and create a robust norm against it. Today there exist numerous and significant restrictions on the authority of states to use force either domestically or internationally.

A further challenge to the Westphalian order came with the adoption of new standards of conduct for states in the protection and advancement

of international human rights. Individuals became subjects of international law as bearers of duties and holders of rights under a growing corpus of human rights and international humanitarian law treaties and conventions.

Third, over time, the chief threats to international security have come from violent eruptions of crises within states, including civil wars, while the goals of promoting human rights and democratic governance, protecting civilian victims of humanitarian atrocities and punishing governmental perpetrators of mass crimes have become more important. Moreover, noncombatants dying from conflict-related starvation and disease now vastly outnumber troops killed directly in warfare, by a ratio of up to 9:1. The “maintenance of international peace and security”, for which primary responsibility is vested in the Security Council, in practice translates into the protection of civilians. In a number of cases in the 1990s, the Security Council’s imprimatur covered the use of force with the primary goal of humanitarian protection and assistance.⁷

Fourth, the proliferation of complex humanitarian emergencies after the end of the Cold War, and the inappropriateness of the classical tenets of UN peacekeeping for dealing with them,⁸ highlighted the inherent tension between the neutrality and impartiality of traditional peacekeeping and the partial consequences of peace enforcement. The Brahimi Report confronted the dilemma squarely and concluded that political neutrality has often degenerated into military timidity and the abdication of the duty to protect civilians. Impartiality should not translate into complicity with evil.⁹

Fifth, it has become commonplace to note that, under the impact of globalization, political, social, commercial-economic, environmental and technological influences cross borders without passports. The total range of cross-border flows and activities has increased while the proportion subject to control and regulation by governments has diminished. National frontiers are becoming less relevant in determining the flow of ideas, information, goods, services, capital, labour and technology. The speed of modern communications makes borders increasingly permeable, while the volume of cross-border flows threatens to overwhelm the capacity of states to manage them.

The cumulative effect of these changes has posed significant conceptual, policy and operational challenges to the notion of state sovereignty, which is considerably less sacrosanct today than in 1945. ICISS responded to a series of military–civilian interactions in humanitarian crises that confronted directly the egregious non-reactions by the Security Council, as epitomized in particular by the Rwanda genocide in 1994 and the intervention in Kosovo in 1999 by the North Atlantic Treaty Organization (NATO). In both cases, many human rights advocates and humanitarian agencies supported the military protection of civilians whose lives were

threatened, thereby exposing the glaring normative gap for collective action more clearly than in the past. If the United Nations was going to be relevant, it had to engineer a basis for international involvement in the ugly civil wars that produced such conscience-shocking suffering.

Norms neither arise nor are converted into laws and regimes by some mysterious process. They require identifiable agents. The crucial actors promoting and shepherding R2P through the maze of UN politics can be broken down into norm entrepreneurs, champions and brokers.

As a *norm entrepreneur*, the UN Secretary-General is a unique international actor with distinctive characteristics and bases of authority and influence, albeit with limitations.¹⁰ Annan was driven both by character and by his experience of being in charge of peacekeeping at the time of the Rwanda and Srebrenica massacres in 1994 and 1995. It helped also that, as the only UN insider to have held the organization's top job, he had an unmatched grasp of UN politics.¹¹ The other two norm entrepreneurs crucial to the R2P story are Lloyd Axworthy and Gareth Evans, the activist foreign ministers of Canada and Australia who respectively set up and co-chaired ICISS.

R2P's state *champion* from start to finish was Canada, a country strongly committed to UN-centred multilateralism, with a history of close engagement with the world organization, political credibility in both North and South and a proud tradition of successful global initiatives. There were several other like-minded countries such as Norway and Switzerland, as well as major foundations such as MacArthur and other actors such as the International Committee of the Red Cross, which worked closely with ICISS in supportive advocacy.

The *norm broker* was ICISS. Its mandate was to reconcile the tension between "intervention" and "state sovereignty" and to find common ground for military intervention to support humanitarian objectives. Humanitarian imperatives and principles of sovereignty are reconciled through "the responsibility to protect", a paraphrase of "sovereignty as responsibility" with some conceptual and enormous political consequences.

The ICISS Report was published with exceptionally bad timing in December 2001. It suffered from attention deficit disorder because the world was preoccupied with "9/11" and its aftermath.¹² The subsequent invasion of Iraq and the ousting of Saddam Hussein by a US-led coalition acting without UN authorization had a doubly damaging effect. First, as tensions mounted in 2002–2003, few had the time to focus on R2P. Second, as the weapons of mass destruction justification for the war fell apart and claims of close links between Saddam's regime and al-Qaeda also proved spurious, the coalition of the willing – Australia, the United Kingdom and the United States as the three main belligerent states – began retroact-

ively to use the language of humanitarian intervention and R2P as the main plank of justification for their actions in Iraq.

Some of the ICISS Commissioners argued strenuously in the public debate that Iraq would not have met the R2P test for intervention.¹³ Co-chair Gareth Evans, Commissioner Ramesh Thakur and Research Director Thomas Weiss spoke and wrote extensively in the years following the publication of the report to multiple audiences: policy (intergovernmental and government officials), scholarly and civil society.¹⁴ The Canadian government organized an extensive series of consultations with governments, regional organizations and civil society forums, typically using the two co-chairs, as well as Thakur and Weiss (and some other ICISS members within their regions), to help promote the report. As the message resonated, many civil society organizations began advocacy and dissemination work on their own as well.

The Secretary-General's High-Level Panel on Threats, Challenges and Change, which included Evans, reaffirmed the importance of the terminological change from "humanitarian intervention" to "the responsibility to protect". It explicitly endorsed the ICISS argument that "the issue is not 'the right to intervene' of any State, but the 'responsibility to protect' of every State".¹⁵ It proposed five criteria of legitimacy: seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences.¹⁶ China's formal paper on UN reforms noted that "[e]ach state shoulders the primary responsibility to protect its own population. . . . When a massive humanitarian crisis occurs, it is the legitimate concern of the international community to ease and defuse the crisis."¹⁷ In the United States, the Gingrich-Mitchell Task Force too endorsed the responsibility to protect.¹⁸ In his own report before the World Summit, Annan made an explicit reference to ICISS and R2P as well as to the High-Level Panel, endorsed the legitimacy criteria and urged the Security Council to adopt a Resolution "setting out these principles and expressing its intention to be guided by them" when authorizing the use of force.¹⁹

R2P was one of the few substantive items to survive the negotiations at the World Summit in New York in September 2005. Some R2P enthusiasts criticized the summit's emphasis on the state and the requirement for coercive measures to be authorized by the Security Council as constituting "R2P lite", while others thought that paragraphs 138-139 of the World Summit *Outcome* document were wordier and woollier than the ICISS version.²⁰ The already high ICISS bar was raised again with the emphasis on states "manifestly failing" in their responsibility to protect. At the same time, the circumstances justifying international intervention were narrowed down from large-scale killings and ethnic cleansing to the four specified cases of genocide, war crimes, crimes against humanity and

ethnic cleansing – and nothing else. And the emphasis on atrocities being apprehended, not necessarily actually occurring, was lost in translation.

This does not diminish the importance of the achievement. The concept was given its own subsection title. The document marks a clear, unambiguous acceptance by all UN members of individual state responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Member states further declared that they “are prepared to take collective action, *in timely and decisive manner*, through the Security Council . . . and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations”.²¹ However, the legitimacy criteria – which would simultaneously make the Security Council more responsive to outbreaks of humanitarian atrocities than hitherto and make it more difficult for individual states or ad hoc “coalitions of the willing” to appropriate the language of humanitarianism for geopolitical and unilateral interventions – were dropped.²²

The Report of the UN Secretary-General, 2009

Ban Ki-moon succeeded Kofi Annan as UN Secretary-General a little over a year after the 2005 World Summit’s endorsement of R2P. Ban has not been shy of adopting R2P as his own cause, confident enough of his own worth not to worry that he will merely be advancing his predecessor’s legacy. (There is a lesson in this for the Harper government in Ottawa. Instead of embracing R2P proudly and celebrating it as a Canadian success, it has kept its distance because it was the Liberal government’s initiative.) His task was the harder for so many countries seeing him as Washington’s choice (and in particular the choice of UN-sceptical US Ambassador John Bolton). The problem was compounded by choosing an American, Professor Edward C. Luck, as his Special Adviser with a focus on R2P, one with little professional background on the subject.

Ed Luck did come to the post with several key assets and advantages: a deep knowledge of UN–US relations; intimate familiarity with the UN system and structures, including the institutional bottlenecks to reform; the ability to think, speak and write clearly and succinctly; and the confidence of Ban. Despite ceding ground to critics and dropping R2P from Luck’s title, Ban remained focused on the issue and fully supported Luck’s efforts to talk through the agenda with the various UN constituencies. In sharp contrast to Bolton’s suspicion of the principle, US Ambassador Susan Rice endorsed the norm and, in a closed door session of the Security Council on 29 January 2009, affirmed that the new Obama administration took the responsibility to protect very seriously.

Drawing on Luck's wide-ranging consultations and reflections, in January 2009 Ban published his report on implementing R2P.²³ It rightly takes as its key point of departure not the original 2001 ICISS Report but the relevant clauses from the 2005 *Outcome* document. It clarifies and elaborates some things, for example the fact that because force is the last resort does not mean we have to go through a sequential or graduated set of responses before responding robustly to an urgent crisis (para. 50). But in practice, as Washington discovered in 2003, it will be exceedingly difficult to get UN agreement to the use of force other than as the last resort, after all other options have been seen to be tried, exhausted and failed. Ban's report does not add much to the substance of what was said in 2001, and therefore could have been shorter instead of exceeding the length guidelines instituted by Annan for such reports. But it does flesh out in greater and clearer detail many of the ideas of the 2001 report. It notes explicitly that all peoples inside a state's territorial jurisdiction, not just citizens, must be protected by a state (para. 11.a). Following both the Brahimi and ICISS reports and the 2005 *Outcome* document, it reiterates the requirement for early warning capacity (annex) – without explaining how the politics of the UN community will be overcome to achieve this.

Moreover, it is a good read, eschewing bureaucratise. It notes "the brutal legacy of the twentieth century" that "speaks bitterly and graphically of the profound failure of individual States to live up to their most basic and compelling responsibilities, as well as the collective inadequacies of international institutions" (para. 5). It asks if in the new century we cannot find the will and the capacity to do better. It notes "clarity, simplicity, and lack of qualifications or caveats" in the *Outcome* document's adoption of R2P in 2005 (para. 13). And it points out that "the choice need not be a stark one between doing nothing or using force" (para. 11.c).

Ban's report is effective and clever in repackaging R2P in the language of three pillars: the state's own responsibility to protect all peoples on its territory; international assistance to help build a state's capacity to deliver on its responsibility; and the international responsibility to protect. If the metaphor helps to garner more widespread support, all praise to Ban and his team.

Still, the report goes over the top in elaborating on the metaphor by insisting that the "edifice" of R2P will tilt, totter and collapse unless all three pillars are of equal height and strength (para. 12). This is simply not true. The most important element – the weightiest pillar – has to be the state's own responsibility. And the most critical is the international community's response to fresh outbreaks of mass atrocity crimes. Although the resistance of people to abbreviating the norm into R2P is understandable, reformulating R2P as "RtoP" as a distinguishing contribution

(Summary and para. 2) is petty and just plain silly. It confuses rather than helps and is also less elegant.

Mercifully, and contrary to what many of us feared, Ban's report does not retreat from the necessity for outside military action in some circumstances. But it does dilute what was the central defining feature of R2P. The ICISS was called into existence to deal with the problem of brutal leaders killing large numbers of their own people. It built on the landmark Brahimi Report of 2000, which noted that the United Nations cannot be neutral between perpetrators and victims of large-scale violence. We are all happy to assist the good guys build state capacity. The challenge is what to do with the bad guys, those intent on grave harm who use sovereignty as a licence to kill with impunity.

R2P's added value is that it crystallized an emerging new norm of using international force to prevent and halt mass killings by reconceptualizing sovereignty as responsibility. It aims to convert a shocked international conscience into timely and decisive collective action. This requires urgent clarification with respect to both when it should kick in as an international responsibility and when not; who makes these decisions; and on what basis. Do R2P operations require their own distinctive guidelines on the use of force? How and where can we institute systematic risk assessments and early warning indicators to alert us to developing R2P-type crises? How do we build *international* capacity and will to protect at-risk populations when state authorities are complicit through either incapacity or, more culpably, direct complicity?

On these key issues, we are no further ahead today: we seem to be re-creating the 2005 consensus instead of operationalizing and implementing the agreed collective responsibility. The use of force by the United Nations against a state's consent will always be controversial and contested. That is no reason to hand over control of the pace, direction and substance of the agenda of our shared, solemn responsibility to the R2P sceptics.²⁴

From words to deeds, principle to practice: An unfinished journey

R2P is a call to action on prevention, intervention and post-conflict reconstruction. There is always a danger with radical advances that commitments at grand summits will suffer many a slip after the champagne flutes are stored. R2P is not just a slogan. Failure to *act* will make a mockery of the noble sentiments. The implementation and compliance gap is especially distasteful when mass murder and ethnic cleansing are the result of sitting on the sidelines.

The 2005 *Outcome* document notwithstanding, some national diplomats insist that the heads of state and government rejected R2P in 2005.²⁵ The first danger thus is that of rollback: a shamefaced edging back from the agreed norm of 2005, a form of buyer's remorse. The need exists for continued advocacy and activism by civil society and for concerned governments to remain steadfast and hold all governments' feet to the fire of individual and collective responsibility to protect at-risk populations. After a lecture in Colombo, Sri Lanka, Gareth Evans armed with R2P in 2007 was flatteringly compared to the coming of Christopher Columbus in 1492 and Vasco da Gama in 1498 armed with the Bible and the sword.²⁶ One newspaper reported on "crackpot ideas" such as R2P that have been "dismissed in academic and political circles as the latest 'neo-imperialist' tactic of the big powers to intervene in the affairs of small nations".²⁷

Many regimes that fear the searchlight of international attention being shone on their misdeeds will try to chip away at the norm until only a façade remains. The advocates of R2P cannot allow them to succeed. Better that the serially abusive regimes live with this fear of international intervention than that their people fear being visited by death and disappearance squads. Of course, members of such regimes could remove the cause of such fear by working, by themselves (Pillar I) or in concert with international friends (Pillar II), to remove the causes and prevent a crisis from arising.

A second, opposite danger of rollback lies with the aggressive humanitarian warriors who gave "humanitarian intervention" such a bad name in the first place. Iraq is the best example of why the authors and promoters of R2P fear certain "friends" as much as opponents. Developing countries' histories and their peoples' collective memories are full of past examples of trauma and suffering rooted in the white man's burden. The weight of that historical baggage is simply too strong to sustain the continued use of the language of humanitarian intervention.

Another danger from over-enthusiastic supporters is misuse of the concept in non-R2P contexts. A group of retired NATO generals, including an ICISS Commissioner, for example, used it to justify the first use of nuclear weapons to prevent nuclear proliferation.²⁸ Others have used the label to refer to action to halt the spread of HIV/AIDS or to protect indigenous populations from climate change.

An admittedly tougher case arose in 2008 with Myanmar's deadly Cyclone Nargis, when principles, politics and practicality nonetheless converged in counselling caution in invoking R2P. There is no *morally* significant difference between large numbers of people being killed by soldiers firing into crowds and the government blocking help being delivered to the victims of natural disasters.

Conceptually, the shift from the crime of mass killings by acts of commission such as shooting people to acts of omission such as preventing them from getting food and medical attention is a difference of degree, not of kind.

Legally, the four categories where R2P apply are genocide, war crimes, ethnic cleansing and crimes against humanity. The original ICISS Report (para. 4.20) explicitly included “overwhelming natural or environmental catastrophes” causing significant loss of life as triggering R2P if the state was unable or unwilling to cope or rebuffed assistance. This was dropped by 2005. But “crimes against humanity” were included and could perhaps apply to the Burmese generals’ actions in blocking outside aid.

Politically, however, one cannot ignore the significance of the exclusion of natural and environmental disasters in 2005. Clearly, the normative consensus on the new global norm did not extend beyond the acts of commission of atrocity crimes by delinquent governments. To attempt to reintroduce it by the back door today would strengthen suspicion of Western motivations and reinforce cynicism of Western tactics. The United Nations must base its decisions on the collectively expressed will of its member states, not on that of an independent commission or individual member states. Unlike previous decades, the new unity of the global South, led by Brazil, China, India and South Africa, is based on a position of strength, not weakness. The West can no longer set or control the agenda of international policy discourse and action.

Practically, there is no humanitarian crisis so grave that it cannot be made worse by military intervention. Unappealing as they might be, the generals are in effective control of Myanmar. The only way to get aid quickly to where it is most needed is with the cooperation of the authorities. If they refuse, the notion of fighting one’s way through to the victims is ludicrous. The militarily overstretched Western powers have neither the capacity nor the will to start another war in the jungles of Southeast Asia. If foreign soldiers are involved, it does not take long for a war of liberation or humanitarian assistance to morph into a war of foreign occupation in the eyes of the local populace.

There is also the question of which is more damaging to R2P in the longer term: invoking or ignoring it in the context of natural disasters such as Cyclone Nargis. If the invocation does not help in the immediate emergency, this may indeed cause even more determined opposition and intensify the backlash against R2P; then the painfully forged consensus on the R2P norm will fracture without any material help being provided to the displaced and distressed. That is, help will be less forthcoming to the next group of victims of large-scale killings. The correct equation thus is that invoking R2P in Myanmar would have endangered lives elsewhere in the future, without saving any and possibly even delaying help for the

Nargis victims in 2008. Feeling good about one's own moral superiority by accusing others of privileging a norm over saving lives is a peculiar form of self-indulgence that perpetuates the killing fields without alleviating anyone's suffering.

Diplomatic pressure was better exerted on the basis of humanitarian principles enshrined in a number of UN General Assembly resolutions than on the coercive language of military intervention for which no one had the stomach and few had the capacity. These include the Guiding Principles for humanitarian assistance of Resolution 46/182 in 1991, the 2005 World Summit *Outcome* document, Resolution A/RES/61/134 of December 2006, and, most recently, Resolution A/RES/62/93 of December 2007. There are also the agreed norms and guiding principles in relation to internally displaced persons. All of these recognize and reaffirm the norm of state sovereignty and the principle of state consent. But they also call on the afflicted states to facilitate the work of humanitarian actors providing relief and assistance and to provide safe and unhindered access to humanitarian personnel. In the end, Secretary-General Ban's use of the bully pulpit, good offices and personal on-the-spot diplomacy did make a difference that may not have been enough to satisfy the habitual UN critics but was nonetheless crucial in helping many in distress through relaxing some curbs on international relief efforts.

A related danger is seeking remedy in R2P when better or more appropriate tools and instruments are available for dealing with the crisis at hand. A good example of this occurred in 2009 when Israel launched a massive offensive in Hamas-ruled Gaza, putatively in response to rocket attacks from Gaza against civilian targets in Israel. There were issues of *international and UN Charter law* involved: the well-established rights to self-defence against armed attack and to resist foreign occupation; the validity of these justifications for the resort to violence by Israel and Palestinians; and the limits to the exercise of these rights. There were issues of *international humanitarian law*: regardless of whether or not the use of force itself is lawful, the conduct of hostilities is still governed by the Geneva laws with respect to proportionality, necessity and distinction between combatants and civilians. There were charges and counter-charges, including by responsible UN officials and special rapporteurs,²⁹ of the possible commission of *war crimes*. In the midst of all this, the invocation of R2P did not seem to be the most pressing or most relevant contribution to the solution. At the same time, the debate over Gaza also raised the further question of occupying powers' responsibility to protect all peoples living under their occupation, be they Palestinians or Iraqis or Afghans.

To return to the point about Ban's 2009 report not providing a sharp enough clarification of the use of force to save lives, the original ICISS

report could rightly be said to be the root of this problem. For it failed to make a forceful distinction between state incapacity, on the one hand, and state complicity through unwillingness or perpetration, on the other hand. A good example of the latter would be the killing of up to 2,000 Muslims in the state of Gujarat in India in 2002 under the baleful influence of a Hindutva government in the province. The distinction is fine in principle but enormously consequential for policy.

As noted earlier, external military intervention to protect civilians inside sovereign borders without the consent of the state concerned differs from traditional warfare, collective security and peace operations. The protection of victims from mass atrocities requires different guidelines and rules of engagement as well as different relationships to civil authorities and humanitarian actors. These differences need to be identified, articulated and incorporated into officer training manuals and courses.³⁰ For example, recalling the tragedy of Rwanda in 1994: how does a UN peace operation, sent to supervise a peace agreement and process, recast its task on the fly to prevent an unfolding genocide?

Operationalizing R2P with respect to the protection agenda in the field will mean adopting a bottom-up approach that brings together the humanitarian actors on the ground in conflict zones.³¹ Each context requires its own specific protection actions against threats to the people at risk there. The United Nations can provide the normative mandate at the global level for their protection and the forces necessary for intervention if need be. The action to prevent and rebuild has to be undertaken by UN agencies acting collaboratively with local civil society actors, non-governmental organizations and representatives of the Red Cross and Red Crescent movement. They can be brought together in a distinct protection cluster to assess needs and priorities for each vulnerable group requiring protection and identifying, in advance, the custom-tailored responses for prevention and rebuilding.

At the same time, opponents have a point in cautioning about the moral hazard that would result from over-enthusiastic recourse to international intervention. It can create perverse incentives for rebels and dissidents to provoke state retaliation to armed challenges. This was recognized by Kofi Annan just one year after his “challenge of humanitarian intervention”. In his Millennium Report, he conceded that his call for a debate on the challenge of humanitarian intervention had led to fears that the concept “might encourage secessionist movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions that would aid their cause”.³² This needs further research as well.³³

So too does the question of whether groups who constitute a minority in one country and are targeted for killings or ethnic cleansing based on

their group identity are owed any responsibility by their kin-state: China vis-à-vis overseas Chinese, say in Indonesia, or India vis-à-vis ethnic Indians in Fiji³⁴ or Tamil Hindus in Sri Lanka, or Pakistan vis-à-vis Muslims in India, or Russia vis-à-vis Russians in the Baltic states, or Albania vis-à-vis Albanians around the Balkans, or the West vis-à-vis the whites in Zimbabwe. This, of course, is the subject of detailed exploration – historical, philosophical, normative and legal – in this volume. Inter-ethnic conflict and genocide have demonstrated the dangers of failing to protect people targeted by their fellow citizens. The general international opinion around the world in 2008 was that Russia invoked R2P to camouflage highly traditional geopolitical calculations in launching military action against Georgia in defence of its interests in South Ossetia.³⁵ But unilateral intervention by a kin-state can lead to conflict within and between states. This presents a dilemma: although the world cannot stand by when minority rights are being trampled, the protection of national minorities should not be used as an excuse to violate state sovereignty. Therefore, how can R2P be applied to the protection of persons belonging to national minorities? Whose responsibility is it to protect such persons? A sensible answer might come from the formula that France uses to describe its relationship with Quebec in Canada: *ni ingérence ni indifférence* (neither interference/intervention nor indifference).

Of course, the question of protecting members of the kin group in neighbouring or distant locations outside the territorial borders is conceptually linked also to the question of protecting one's citizens who come under attack overseas. Thus the United States invaded Grenada ostensibly with the goal of protecting US citizens, and Israel has sometimes exercised the right to use its military forces to rescue its nationals from foreign trouble spots and dangers.

As the Burmese, South Ossetian and Gaza conundrums show, to date our responses have typically been ad hoc and reactive, rather than consolidated, comprehensive and systematic. We need a paradigm shift from a culture of reaction to one of prevention and rebuilding.

Yet another item on the research agenda would be to examine past iconic examples of horrific atrocities and genocidal killings in twentieth-century history, including the Holocaust, Bangladesh, Cambodia, Rwanda and the Balkans. Conversely, there are some iconic cases of “bad” interventions, such as that to remove the Marxist Allende regime in Chile, that could also be studied with respect to what, if any, difference R2P would or might have made. This would apply especially if legitimacy criteria could be approved by consensus.

This extensive research agenda will help to build a caseload of R2P-type situations as a guide to future deliberations, evidence-based analyses and robust action. Civil society continues advocating on this issue. For

example, a sub-unit within the World Federalist Movement's office in New York has been engaged in support of R2P for several years. Recognizing that the global endorsement of the norm in 2005 was but the prelude to translating it into timely action to prevent crises and stop atrocities, the Global Centre for the Responsibility to Protect (GCR2P), based at the Ralph Bunche Institute for International Studies at the Graduate Center of the City University of New York (CUNY), was launched in February 2008 at the United Nations. Ban Ki-moon welcomed the Global Centre's establishment as "an effective advocate in the struggle to prevent the world's most heinous mass crimes".³⁶ Supported by several governments, foundations and private donors, it will generate research, conduct high-level advocacy and facilitate the activities of those working to advance the R2P agenda.

Conclusion

"I saw the crisis in the R2P prism with a Kenyan government unable to contain the situation or protect its people. . . . I knew that if the international community did not intervene, things would go hopelessly wrong. The problem is when we say 'intervention', people think military, when in fact that's a last resort. Kenya is a successful example of R2P at work." (Kofi Annan³⁷)

R2P is much more fundamentally about building state capacity than undermining state sovereignty. The scope for military intervention under its provenance is narrow and tight. The instruments for implementing its prevention and reconstruction responsibilities on a broad front are plentiful. When post-election violence broke out in Kenya in December 2007–January 2008, Francis Deng urged the authorities to meet their responsibility to protect the civilian population.³⁸ Archbishop Emeritus Desmond Tutu interpreted the African and global reaction to the Kenyan violence as "action on a fundamental principle – the Responsibility to Protect".³⁹ Called in to mediate, Annan too saw the crisis in R2P terms. His successful mediation to produce a power-sharing deal is the only positive R2P marker to date.

One possible means of entrenching the norm in public and policy discourse would be to cite paragraphs 138 and 139 of the *Outcome* document in the preambular paragraphs of all relevant Security Council resolutions creating or renewing UN peace operations, and the operative paragraphs could contain the protection of civilians in armed conflict as part of the mandate of UN missions. This could help to generate the sort of norm entrapment that is familiar from the human rights literature. That is, every time that a state protests that R2P is not applicable to it,

that critics have misunderstood the facts or not taken due account of the context, it acknowledges and reinforces the global norm even while questioning its applicability in the specific case to hand. Similarly, much as imitation is the sincerest form of flattery, Russia's invocation of the R2P norm in its 2008 invasion of Georgia was a tribute to the moral power of R2P.

History proves that, sovereignty and the norm of non-intervention notwithstanding, regional and global powers have intervened, repeatedly, in the affairs of weaker states.⁴⁰ After the end of the Cold War, the Security Council experienced a spurt of enforcement activity within civil wars to provide international relief and assistance to victims of large-scale atrocities from perpetrator or failing states. From Liberia and the Balkans to Somalia, Kosovo and East Timor, conscience-shocking humanitarian catastrophes were explicitly recognized as threats to international peace and security requiring and justifying forceful responses. When the Security Council was unable to act owing to lack of enforcement capacity, it subcontracted the military operation to UN-authorized coalitions. And if it proved unwilling to act, sometimes groups of countries forged coalitions of the willing to act anyway, even without Security Council authorization.

R2P offers developing countries better protection through agreed and negotiated-in-advance rules and roadmaps for when outside intervention is justified and how it may be done under UN authority rather than unilaterally. It will thus lead to the "Gulliverization" of the use of force by major global and regional powers, tying it with numerous threads of global norms and rules. Absent R2P, they have relatively more freedom, not less, to do what they want. R2P is rooted in human solidarity, not in exceptionalism of the virtuous West against the evil rest. And, contrary to what many developing country governments might claim, it is rooted as firmly in their own indigenous values and traditions as in abstract notions of sovereignty derived from European thought and practice. Many traditional Asian cultures stress the symbiotic link between duties owed by kings to subjects and loyalty of citizens to sovereigns, a point made by civil society representatives who accordingly conclude that, far from abridging sovereignty, R2P *enhances* it.⁴¹ Even in a modern context, India's constitution imposes R2P-type responsibility on governments in its chapters on fundamental rights and the directive principles of state policy.⁴²

By the same token, however, Westerners need to recognize and accommodate developing country sensitivities. The crisis over "humanitarian intervention" arose because too many developing countries concluded that a newly aggressive West, intoxicated by its triumph in the Cold War, was trying to ram its values, priorities and agenda down their throats. Even today, differences within both camps notwithstanding, the global North/

South divide is the most significant point of contention for “the international community”.⁴³ With regard to the use of force, for example, advocates of the right to non-UN-authorized humanitarian intervention in essence insisted that the internal use of force by the rest would be held up to international scrutiny, but the international use of force by the West could be free of UN scrutiny. For developing countries, the United Nations was a key instrument for the protection of vulnerable nations from predatory major powers; for many Westerners, it was acting to thwart forceful action to forestall or stop the killing of vulnerable people.

ICISS engaged in an extensive outreach exercise involving a cross-section of governmental and civil society representatives in every continent, in which it listened to and often incorporated ideas expressed by others instead of simply talking to them.⁴⁴ The overwhelming dominance of Westerners in global intellectual discourse and civil society influence is an unfortunate fact of life. A major reason for the failure of the 2005 *Outcome* document to include a single reference to the nuclear weapons challenge was the backlash against the unilateral reinterpretation by the five NPT-licit nuclear powers of the Nuclear Non-Proliferation Treaty that it was solely about non-proliferation obligations by the rest instead of a package bargain between non-proliferation and disarmament obligations. In a Security Council debate on the protection of civilians in armed conflict on 4 December 2006, Chinese ambassador Liu Zhemin warned that the 2005 *Outcome* document was “a very cautious representation of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity . . . it is not appropriate to expand, wilfully to interpret or even abuse this concept”.⁴⁵ Yet that is precisely what was suggested in 2008 in the context of Cyclone Nargis and more recently by the London-based One World Trust.⁴⁶ Ban is surely right in warning that “it would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraphs 138 and 139 of the Summit Outcome”.⁴⁷

Notes

1. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).
2. Kofi Annan, “A Progress Report on UN Renewal”, Speech to the UN Association – UK, London, 31 January 2006, *New World*, April–June 2006, p. 8.
3. *Global Responsibility to Protect* (GR2P).
4. At the 2009 symposium entitled “Responsibility to Protect” of the *Harvard Human Rights Journal*, Cambridge, MA, 20 February 2009.
5. Gary J. Bass, *Freedom’s Battle: The Origins of Humanitarian Intervention* (New York: Knopf, 2008), p. 382.

6. See Kalevi J. Holsti, *War, the State, and the State of War* (Cambridge: Cambridge University Press, 1996).
7. See Brian D. Lepard, *Rethinking Humanitarian Intervention* (University Park: Pennsylvania State University Press, 2002), pp. 7–23.
8. See Ramesh Thakur and Carlyle A. Thayer, eds, *A Crisis of Expectations: UN Peace-keeping in the 1990s* (Boulder, CO: Westview, 1995).
9. *Report of the Panel on United Nations Peace Operations*, UN Doc. A/55/305-S/2000/809, 21 August 2000.
10. See Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2006), ch. 14; and Simon Chesterman, ed., *Secretary or General? The UN Secretary-General in World Politics* (Cambridge: Cambridge University Press, 2007).
11. For a discussion of UN policy-making, see Ramesh Thakur and Thomas G. Weiss, “United Nations ‘Policy’: An Argument with Three Illustrations”, *International Studies Perspectives* 10:1 (2009), pp. 18–35.
12. See Ramesh Thakur, *War in Our Time: Reflections on Iraq, Terrorism and Weapons of Mass Destruction* (Tokyo: United Nations University Press, 2007).
13. Gareth Evans, “Humanity Did Not Justify This War”, *Financial Times*, 15 May 2003; Ramesh Thakur, “Chrétien Was Right: It’s Time to Redefine a ‘Just War’”, *Globe and Mail*, 22 July 2003, and “Iraq and the Responsibility to Protect”, *Behind the Headlines* 62:1 (Toronto: Canadian Institute of International Affairs, October 2004). However, one of the Commissioners, Michael Ignatieff, now a Member of Parliament in Canada, justified the war.
14. The full list of Evans’ extensive speeches and writings on R2P can be found in his book *The Responsibility to Protect* and on the website of the International Crisis Group: <<http://www.crisisgroup.org>>. Thakur’s writings encompass a wide range of products from newspaper op-eds and scholarly articles to his book *The United Nations, Peace and Security*. Weiss’s writings are mainly academic, especially *Humanitarian Intervention: Ideas in Action* (Cambridge: Polity Press, 2007).
15. High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565, December 2004, para. 201, emphasis in original.
16. *Ibid.*, para. 207.
17. *Position Paper of the People’s Republic of China on the United Nations Reforms*, Beijing, 7 June 2005, Part III.1, “Responsibility to Protect”; available at <http://news.xinhuanet.com/english/2005-06/08/content_3056817_3.htm> (accessed 30 November 2010).
18. *American Interests and UN Reform: Report of the Task Force on the United Nations* (Washington, DC: US Institute of Peace, 2005), p. 15.
19. Kofi A. Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All. Report of the Secretary-General*, UN Doc. A/59/2005, 21 March 2005, paras. 122–135.
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22. For a sceptical note on the utility of such criteria, see Alex J. Bellamy, “R2P and the Problem of Military Intervention”, *International Affairs* 84:4 (2008), pp. 625–630.
23. UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677, 12 January 2009; available at <<http://www.unhcr.org/refworld/docid/4989924d2.html>> (accessed 10 December 2010).
24. Compare: “while the Secretary-General’s focus on assistance and capacity-building has been a prudent strategy for gaining buy-in from reluctant members of international

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25. See the discussion in the Fifth Committee of the General Assembly at its 28th meeting on 4 March 2008 (UN Doc. GA/AB/3837) in the context of the publicly announced intention of the Secretary-General to appoint Edward Luck as his special adviser with a focus on R2P.
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3

The borders of sovereignty: Whose responsibility is it to protect national minorities?

Bogdan Aurescu

The place of sovereignty in international law

Sovereignty is at the same time a concept, an institution, the most important characteristic of the state and, in the consecrated form of “sovereign equality”, a fundamental principle of international law.

As a concept, it has both legal and political dimensions. As a legal concept, it has both a domestic and an external projection, these two components or facets being in permanent communication. As an institution, it can be considered as the oldest or, in other words, the primordial one. Indeed, sovereignty appeared at the same time as the state and international law. Nevertheless, despite certain superficial perceptions to the contrary, sovereignty is one of the most dynamic legal concepts.

The emergence of sovereignty was an effect of the efficiency canon that characterized the whole evolution of international law. It was the solution to an issue of the power relationship between the persons belonging to, and inside, a certain group. It involved a transfer from a system of exercising authority on the basis of blood (thus ethnic) relations to a model of exercising authority on the basis of the necessity to control the territory in order to control the individuals of the group within that territory. At the same time, it was also a matter of a power relationship in relation to other (similar) communities.

Before the appearance of the state in its classic parameters – territory, population and authority exercised over that territory and over the population living in that territory (authority exercised in relation to a certain

territorial organization of the population) – the political system in the pre-state tribal society was based on blood relationships, with the hierarchies and the authority enforcement models being built on kinship and the primacy of age. The conflicts between or among the pre-state societies/entities started out of the necessity to control and appropriate the resources needed for the survival of the various social communities.¹

As long as these resources were enough for the needs of the reduced number of individuals composing the various communities, these communities remained autarchic, quasi-isolated and essentially based on a natural self-sufficient economy. When the resources in question – located on a certain piece of territory – were exhausted, the pre-state community would abandon that location for another area rich in resources. As long as the spatial transfer of the community was unproblematic, thus ensuring easy access to newly available resources, there were no reasons for the territory to represent per se an essential factor for the exercise of authority within the particular community.²

But when the population of these pre-state communities grew in number and the available resources became insufficient – thus disputed by and among competing communities – the territory where they were located started to be perceived as more important than before, both within the community and in the relations among these communities. A contest for territory began, producing an important transformation in the way the basis of authority was conceived inside the pre-state communities. This evolution concerning the population and the territory – two of the elements defining the state as we know it – provoked the transformation regarding the exercise of authority over these two elements: inside the community, power started to be defined more authoritatively in connection with the ability to control a territory rich in resources (thus allowing control of the population) and was not any more based on kinship.³

The inherent struggle between or among various communities for control over territory (and thus for its resources needed by the pre-state society) produced not only a transformation inside the respective entities in the way power was exercised, but also a coalescence of the particular identity of each community in contrast with the identities of other competing communities. The disputes, conflicts and competition stimulated interaction and thus the perception of the difference in the features of these communities. The state itself is the expression of growing solidarity inside the community, having to compete efficiently (the efficiency criterion being of the essence) with other similar entities for the control of territories with resources. This transformation inside the community, stimulated by the unavoidable interaction with other communities, marks the birth of the state, of the new way authority is exercised inside and

outside the state, of sovereignty, with its domestic and external dimensions, and of international law – the first rules regulating conduct between and among these entities, contacts among which will incessantly multiply.

It is clear that, from the very first day of statehood, sovereignty defined the way the state exercised its power, and consequently its responsibilities, over the individuals composing the population living in its territory. Of course, it would be idle to pretend that the word “responsibility” properly defined from the very beginning the relation between state power and the individuals composing its population. In fact, the relationship between state and individual was always a complex one, as it is now.

At the very beginning, the state was created as a mechanism instrumental to better achieve (i.e. more efficiently) the needs of a certain society (and, of course, of its individuals). The credo of a state instrument for the benefit of its citizens was very well defined by Hugo Grotius (following Cicero’s thinking in his well-known *De Re Publica*) in his equally famous *De Jure Belli ac Pacis*: “Est autem civitas coetus perfectus liberorum hominum, juris fruendi et communis utilitatis causa sociatus” [“The state is the perfect society of free people united for the promotion of law and of the common benefit”].⁴

Nevertheless, the early ages of statehood proved that domestic sovereignty – supremacy – changed to become absolute in terms of its exercise over individuals. Jean Bodin, in his *Les six livres de la République* of 1576, showed that the prince – the absolute ruler of the state – is beyond the power of laws, and the French lawyer Charles L’Oyseau wrote in his *Traicté des Seignories* of 1609 that sovereignty is absolute, with no limitation of power and authority, with no exception to persons or matters.

But the absolute exercise of sovereignty inside the state never had, in real terms, a corresponding manifestation in inter-state relations, despite doctrinal claims to the contrary. Even Jean Bodin, often considered as the main theoretician of absolute sovereignty, underlined in his masterpiece that the prince (and his successors) had to observe the treaties concluded with other states: “le Prince souverain este tenu aux contracts par luy faits, soit avec son sujet, soit avec l’étranger” [“The sovereign prince is bound by the contracts concluded by him, either with his subjects, or with the foreigners”].⁵

In fact, absolute exercise of the external sovereignty of the state in relation to other states always was, in practical terms, an absolute impossibility.⁶ As shown above, the very emergence of sovereignty (and of the state) was the direct result of interaction between pre-state communities. This interaction is itself the expression of the external component of sovereignty. Moreover, this interaction implies a necessary accommodation – and thus an inherent limitation – of the exercise of the sovereignties involved in this process. In fact, the fundamental mechanism of norm cre-

ation in international law implies the concurring sovereign wills of states, as subjects of international law. This sovereign consensus cannot be achieved without some compromise among the states involved. Such compromise cannot, in turn, be obtained without inherent limitations on the exercise of state sovereignty. These limitations are motivated only by the common interest and by the necessity for certain values to be protected – values that are so important for the international community as to need protection by means of norms of international law.

In real terms, external sovereignty – independence – is in fact dependent on the increasing interdependence among the international actors in contemporary international relations. And one of the most important and emergent influential actors is the individual.

Sovereignty in dynamic evolution – from classic to contemporary international law

Sovereignty appeared at the same time as the state. It characterizes all state actions and functions, and will last as long as the state exists as a subject of public law, irrespective of the legal or political basis or nature of the state. But its continuing functioning as an *animus* of the state does not mean that the configuration of this essential institution remained unchanged. On the contrary, sovereignty adapted itself (or was adapted)⁷ according to the inherent transformations of domestic societies and of international relations: “the conditions under which sovereignty is exercised . . . have changed dramatically.”⁸

The “classic” international law defines sovereignty as *unique and indivisible* (it cannot be fragmented, because it can belong to only one state), *exclusive* (only one sovereignty can be exercised over a particular state territory), *inalienable* (the sovereign prerogatives cannot be abandoned or transferred to other states or entities), *self-originated* (from within the state, not assigned from outside) and *plenary* (the sovereign prerogatives cover practically all areas of activity – social, economic, political). In addition, the “classic” sovereignty presupposed certain effects or implications. It involved or implied a *presumption of regularity* of all sovereign acts (each and every act of the state on its territory is automatically presumed to be licit, so other states, as well as other actors of the international community, must respect this presumption, under the sanction of being responsible for an abuse of rights or bad faith) and the *equal legitimacy* (or constitutional autonomy) of all states (any state is absolutely free to choose its own political, economic, social and cultural systems, as well as its foreign policy, as it deems fit).

These contemporary characteristics of sovereignty are not the same any more. The transformations of international relations, including in the

last decade of the twentieth century, after the end of the Cold War, determined another – more flexible – configuration of the exercise of sovereignty. Globalization and increased interdependencies, the phenomena of state decentralization, federalization, the proliferation of autonomies and state proliferation, the weakening of the state capacity to cope with a large range of domestic problems and international threats, including non-conventional ones, stimulated certain sovereign state attributes to be redirected towards alternative intra-state or supra-state levels of authority, which took over some of the burden of state management. The European integration process is just such an example (and there are also some as yet less successful attempts of the same kind in other parts of the world, for instance in Latin America and Africa).

The new, adapted sovereignty is based on the idea of a divisible and shared exercise of state sovereignty prerogatives, which are being progressively transferred outside the sphere of exclusive state control, thus also putting into question the plenary feature. The presumption of regularity is no longer absolute, as the mechanisms of international control and the monitoring of state conduct progressively multiply in a variety of fields (especially human rights).

Moreover, the equal legitimacy of states was fundamentally replaced by the concept of *democratic legitimacy*. As a result of a global process of democratization, democracy is steadily becoming a decisive factor (a material source) in the configuration of international law.⁹ The existence in a country of a democratic regime is already a precondition for international recognition of that state, for its admission as a member within international organizations or for being granted international financial assistance. Democracy became an essential feature of the state, and a state's conduct of foreign policy has to take into account this fundamental value of the state, together with the rule of law and human rights.¹⁰

This tendency is confirmed by the Millennium Declaration (UN General Assembly Resolution 55/2 of 18 September 2000). Democratic and participatory governance based on the will of the people is considered the best means to guarantee the fundamental values of international relations in the twenty-first century, and promoting democracy and strengthening the capacity of all states to implement the principles and practices of democracy are assumed commitments.¹¹ During the same session, the General Assembly adopted Resolution 55/107 on the “Promotion of a democratic and equitable international order”,¹² which states that democracy, development and respect for human rights are interdependent, and an equitable and democratic international order – contributing to respecting human rights for all – is a right for everyone, to be achieved by the fundamental value of solidarity and by democratic and transparent international institutions.

This phenomenon of enhanced international democratization has an influence on the way new actors, including individuals, take part in decision-making on the development, implementation and enforcement of international law.¹³ This participation is more and more consistent, thus paving the way for a true international civil society (the international community).

The humanization of international law

There is a clear tendency in international law doctrine to acknowledge openly the contemporary trend towards the “humanization” of international law.¹⁴

Of course, at the very beginning, the emergence of states was determined by a factor of efficiency – to better promote and protect the interests and needs of the various human communities in their mutual relations. The emergence in the last half of the twentieth century of new actors at the international level (the so-called *sovereignty-free actors*) is nothing but another expression of efficiency – this time motivated by the need of the emerging international community of human persons, united by stronger and stronger feelings of transnational solidarity, to promote common global interests transcending those of the traditional actors. Globalization is one key factor stimulating international social cohesion, and the response of international law is towards regulating, and thus protecting, the common values of the international community (see “international community” as a further degree of evolution of the traditional “international society”). Thus, the exercise of state sovereignty in the process of international law creation is undertaken not only to the (exclusive) benefit of states (as before), but also to the benefit of the emerging international community of humankind; these two kinds of interests are not necessarily and conceptually divergent, but mutually reinforcing.

This regulation by international law of the protection of the superior common interests and values of the emerging international community, as a result *inter alia* of the actions of the new actors, witnesses a return to the human finality or aspiration of international law, a rediscovery of humanity – the marked internationalization of the human rights protection field being one example among many others. In fact, the legal norm was always a social norm – it was created by people in order to protect and promote human values and it ends in being applied (and in producing its effects) also on, or to, individuals.¹⁵

If the international community comprises not only the governments but also, and especially, the individuals belonging to various sociocultural systems,¹⁶ the sovereign states must act as agents and instruments for

ensuring the survival and prosperity of the human race.¹⁷ This increased acknowledgement of the common interests of the international community – composed not only of states but of all human persons – stimulated profound changes in the nature of international law.¹⁸ This reality determines an appropriate reaction: both the state and its sovereignty have to be adapted conceptually in order to cope with it accordingly.

The conceptual change: From sovereignty as control to sovereignty as responsibility

Both the democratization and the humanization of international law had an impact on the institution of sovereignty in the much larger context of the contemporary transformations of international relations. In the “conflict” between the two “legitimacies” of the state and of the individual, the balance is starting to tilt in favour of the latter.¹⁹ The concept of “individual sovereignty” advocated by the former UN Secretary-General Kofi Annan means that the state is now the instrument of the people, and not the opposite.²⁰ This evolution involves an “emerging transition from the culture of sovereign impunity to a culture of national and international accountability”, especially in the field of human rights protection.²¹

But this is natural. Sovereignty was always limited, and not just in terms of state power, because the mere interaction of states necessarily implies a limited or relative exercise of sovereign powers, although it was (and still is) also limited by international law.

In fact, it is more than that: it is a radical inner transformation of sovereignty, a “necessary re-characterization . . . from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties”.²² According to the Report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*,

Thinking of sovereignty as responsibility . . . has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to their citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.²³

But what determined this evolution of the very nature of sovereignty? The fact that sovereignty is limited by international law is not a new idea.

We can trace it back to, *inter alia*, Francesco de Vitoria, Bodin, Grotius or Emeric de Vattel. More recently, a resolution adopted in 1932 in Oslo by the Institut de Droit International – and reiterated in almost identical terms in April 1954 in another resolution adopted in Aix-en-Provence – stated that the competences of states are determined by international law.²⁴ International law determines not only the field of competence but also the way to exercise it, when the modality of exercise refers to other states or to the international community. Article III of this resolution mentions that *the limits within which this competence is exclusive are essentially relative – they being dependent on the development of international relations*. Article IV underlines, in its turn, that the fact of whether or not a particular issue belongs to the exclusive competence of a state cannot be decided *unilaterally* by any of the interested states.²⁵

It is not only the doctrine but also the international jurisprudence that noted the same evolution. As early as 1923, the Permanent Court of International Justice stated that “[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations”.²⁶ The International Court of Justice, in turn, concluded that it is hardly conceivable that the term “domestic jurisdiction” was intended to have a fixed content, regardless of the subsequent evolution of international law.²⁷

In fact, among the main factors determining the change in the nature of sovereignty from exclusive control to responsibility/accountability are, as shown above, the democratization and the humanization of international law and of the international community, in the larger context of promoting and protecting the common values and interests of the international community. Human rights and fundamental freedoms are predominant among such values, and their promotion and protection have primacy among such interests. That is why the last half of the twentieth century witnessed the internationalization of the human rights field concomitantly with the transformation of the character of the presumption of regularity of the sovereign acts of the state, especially in this field, from absolute to relative.

On the one hand, within the contemporary state, sovereignty implies the responsibility of the state to ensure the protection of human rights and fundamental freedoms with regard to all persons within its jurisdiction. On the other hand, within the international community, there are already bodies, instruments and mechanisms of promotion and control of the proper way for the state to fulfil its responsibility to protect human rights and freedoms. There is a functional division between the domestic and international levels, the international mechanisms coming into action whenever a state is unwilling or unable to protect human rights or even

acts against this fundamental responsibility. In such a case, this primary responsibility of the state becomes international accountability – thus entailing the subsidiary response of the international community.²⁸ “Sovereignty implies not only rights but also responsibilities” and there is a state responsibility “to protect and promote human rights, including minority rights”. Human rights are a matter of international concern: “when it comes to the abuse of human rights, including minority rights, it is also the responsibility of the international community to address such abuses.”²⁹

Indeed, in a democratic society of a state governed by the rule of law, state sovereignty naturally coincides with the national or people’s sovereignty. The national sovereignty is the sovereignty of the *civic nation*, which comprises all its citizens; these persons are entitled to the protection of their identity and of their rights and freedoms by the state, in accordance with international human rights standards.

The question then is: what happens when the state acts against the rights of persons under its jurisdiction, or does not act (omits to act) in order to ensure their protection?

Logically, the state sovereignty exercised in this way no longer corresponds to or coincides with the national or people’s sovereignty. By neglecting or violating the rights of persons within its jurisdiction, the state stops fulfilling its function as the instrument and mechanism for satisfying the interests of the individuals composing the particular nation. The non-observance by state authorities of international standards thus entails the exercise of the right of the victims to ask for international assistance and protection, and, as a corollary, the subsidiary responsibility to protect by the international community.

Indeed, the responsibility to protect “implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention”.³⁰ In practical terms, the responsibility to protect of the international community should be triggered by the exercise of the right of the victims to ask for protection. A difficult situation might occur, in this respect, when the actual exercise of this right to ask for protection is blocked by the home-state or by objective reasons. In such a case, the international community’s responsibility to protect should be conceived in a larger manner by including the development of adequate monitoring mechanisms and capabilities, under specific guarantees of objectiveness and impartiality, in order to assess properly – and thus avoiding possibilities of abuse – the necessity of granting support from the perspective of those needing it.

The sovereignty limited by international law and by the prevailing common interests of the international community was often seen or defined as *competence*. This internationally defined competence corresponds

internally with the *capacity* of effective control over the state territory, within the limits established by international law and the above-mentioned common interests. The processes of democratization and humanization of international law and of international community, in the larger context of promoting and protecting the common values and interests of the international community, led to the democratic state's sovereignty (seen as competence/capacity) becoming the *capability* to protect human rights and fundamental freedoms, and thus the *responsibility* to protect these values.

This responsibility belongs primarily to the state and, in a subsidiary manner, to the international community, when the home-state is unable or unwilling to exercise this capability in a responsible and effective way or even acts against the human rights and fundamental freedoms. That is why there is no conflict or inconsistency between sovereignty and the responsibility to protect: state sovereignty, as a concept and as a primary competence/capacity/capability of the home-state, is not only *reinforced* but also *empowered* by the responsibility to protect.

The responsibility to protect national minorities: Explaining the primary character of the responsibility of the home-state

Based on the same revised concept of state sovereignty, the responsibility to protect doctrine is also applicable to the persons belonging to national minorities. Indeed, the rights of persons belonging to national minorities are an integral part of human rights, having the same nature as "common" human rights. Moreover, the persons belonging to national minorities are, in the large majority of existing situations, citizens of the home-state in which they live, and thus full members of the civic nation of that state.

So, if sovereignty implies the responsibility of the state to ensure the protection of human rights and fundamental freedoms with regard to all persons within its jurisdiction, this responsibility includes and also extends naturally to the persons belonging to national minorities, who are an integral part of the civic nation – the one that legitimately exercises national sovereignty. These persons are entitled to the protection of their identity by their home-state, in accordance with international standards on minority protection.³¹ It should also be noted that the relationship between "sovereignty as responsibility" and "protection of national minorities" has a historic motivation as well: the moment of internationalization of the field of minority protection coincided with the end of the First World War, when the disintegration of the former empires implied territorial transformations, which "created" new national minorities in the

emerging states. These new states started to exercise their sovereignty over territories that hosted new national minorities (territorial sovereignty).

The fact that the primary responsibility to protect the persons belonging to a national minority resides “first and foremost”³² with the home-state is not only justified by the modifications of sovereignty in contemporary international law, but also a matter of *efficiency*, from two angles: from the perspective of the ones needing protection, and from the perspective of the state.

According to the ICISS Report *The Responsibility to Protect*,

This fact reflects not only international law and the modern state system, but also the practical realities of who is best placed to make a positive difference. The domestic authority is best placed to take action to prevent problems from turning into potential conflicts. When problems arise the domestic authority is also best placed to understand them and to deal with them. When solutions are needed, it is the citizens of a particular state who have the greatest interest and the largest stake in the success of those solutions, in ensuring that the domestic authorities are fully accountable for their actions or inactions in addressing these problems, and in helping to ensure that past problems are not allowed to recur.³³

These general remarks – referring to the general responsibility to protect, and approaching the issue from the perspective of those needing protection – are, of course, also valid with regard to the application of this principle to national minority protection.

In 1929, the Romanian lawyer Nicolae Titulescu³⁴ mentioned the same criterion of efficiency, but seen from the second angle – the perspective of the home-state:

Un Etat qui ne s’efforcera pas d’assurer le maximum de bien-être à ses minorités, un Etat qui ne réaliserait pas que c’est dans la loyauté de tous ces citoyens à son égard et non pas dans l’annihilation de l’individualité culturelle et religieuse de certains de ses sujets que réside son intérêt primordial, un Etat qui ne se rendrait pas compte que c’est à lui d’être le meilleur champion des intérêts bien compris de ses minorités, ne violerait pas seulement la loi d’humanité qui doit guider toute communauté civilisée, il violerait la loi de la conservation de sa propre existence.³⁵

[“A State which would not strive to ensure the maximum of wellbeing to its minorities, a State which would not realize that its primary interests are based on the loyalty of all its citizens and not in the annihilation of the cultural and religious individuality of some of its subjects, a State which would not take into account that it is up to it to become the best champion of the well assumed in-

terests of its minorities, [such a state] not only would violate the laws of humanity which should guide any civilized community, but it would violate the law of preserving its very own existence.”]

The basic reasons explaining the primary responsibility principle can be identified as follows.

First, this principle is based on the territorial character of the state’s sovereign jurisdiction. Jurisdiction exercised by states is a corollary of their sovereignty and is *prima facie* exclusive over the state’s territory and population,³⁶ including the persons belonging to national minorities. In its well-known *Report on the Preferential Treatment of National Minorities by Their Kin-State* (2001), the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe stated, in relation to minority protection by the home-state: “States enjoy exclusive sovereignty, hence jurisdiction, over their national territory. This implies, in principle, jurisdiction over all persons . . . in their territory . . . No other State . . . can exercise jurisdiction in the territory of a State without the latter’s consent.”³⁷ In the conclusions of this Report, the Venice Commission considered that the observance of the principle of territorial sovereignty is an imperative precondition for the adoption by states of measures granting benefits to persons belonging to their kin-minorities.³⁸

Various international documents on minority protection also confirm this approach. For instance, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Resolution 47/135) sets forth in Article 1 the obligation for states to “protect the existence and the national or ethnic, cultural, religious and linguistic identity of national minorities within their respective territories”.³⁹ In addition, Resolution 49/192 – “Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities” – urges states (and the international community) to promote and protect the rights of these persons in their country.⁴⁰ The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Conference on Security and Co-operation in Europe) in June 1990 provides that the “participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory”.⁴¹ These provisions are not to be interpreted as a mere indication of a geographical reference – to protect the rights of persons belonging to national minorities that may be found in the territories of certain states. It should be read as an indication that the home-state has the primary responsibility to ensure and guarantee the protection of these persons on its own territory – where it exercises its sovereign jurisdiction.

Secondly, the primary responsibility principle may be justified by the citizenship relationship between the state and the persons belonging to the national minorities. Despite recent trends to extend minority protection to non-citizens as well,⁴² citizenship still represents the best protection for persons belonging to national minorities, because it allows these people access to the exercise of political rights, which are very important for the capacity of the national minority to participate in public decision-making and to influence, to their benefit, the society in which they live and of which they are part and parcel. Citizenship implies mutual rights and obligations for the state and for the citizen, irrespective of ethnic origin, the citizen's obligation of loyalty towards the state being counterbalanced by a full set of rights guaranteed by the state. It is the home-state's duty to guarantee the exercise of these rights – including the specific kind of rights of persons belonging to national minorities – and to ensure equality among its citizens.⁴³

Thirdly, the home-state is the only one to have at its immediate disposal all instruments necessary to provide the highest level of protection for the persons under its jurisdiction belonging to national minorities. The home-state has not only the legislative power but also the executive authority, including the power of coercion, to ensure respect on its territory of the rights of persons belonging to national minorities.

Fourthly and last, but not least, it is easier – and thus more efficient – to hold the home-state responsible for alleged violations of the rights of persons belonging to national minorities.

As a result of the European debate on the limits of kin-state actions in respect of its kin-minorities residing in other states (prompted by the adoption of the Hungarian Law on Hungarians Living in Neighbouring Countries in June 2001⁴⁴), the *Report of the Venice Commission on the Preferential Treatment of National Minorities by Their Kin-State* (October 2001) concluded, in its turn, that “[r]esponsibility for minority protection lies primarily with the home-States”.⁴⁵

In October 2001, the High Commissioner on National Minorities (HCNM) of the Organization for Security and Co-operation in Europe (OSCE) stated that “[p]rotection of minority rights is the obligation of the State where the minority resides”. The HCNM also emphasized that the “legal regime [that] has been developed following the principle that protection of human rights and fundamental freedoms, including for persons belonging to national minorities, is the responsibility of the State having jurisdiction with regard to the persons concerned, . . . is not only a cornerstone of contemporary international law and a requisite for peace, it is necessary for good governance, particularly in multi-ethnic States”.⁴⁶ The 2008 “Bolzano Recommendations” of the HCNM also underline

that “respect for and protection of minority rights is primarily the responsibility of the State where the minority resides”.⁴⁷

Kin-state *versus* home-state: A shared responsibility to protect? The “kinterested” state

When the state acts against the rights of persons under its jurisdiction, including against the part of the civic nation represented by the persons belonging to national minorities, or does not act (omits to act) in order to ensure their protection, the state sovereignty exercised in this way no longer corresponds to or coincides with national sovereignty. The non-observance by state authorities of these international standards thus entails the exercise of the right of these persons to ask for international assistance and protection.

The question is: who is entitled to exercise this international protection and assistance in such a case? Is the so-called “kin-state”⁴⁸ entitled to intervene, or only the international community, which has the “residual” or subsidiary responsibility to act in the place of a home-state that does not fulfil its obligations?

The case of the Hungarian Law on Hungarians Living in Neighbouring Countries and the debate it stimulated at the European level contributed largely to clarifying this issue and providing the right answer. This debate started with the adoption by the Hungarian parliament, in June 2001, of a piece of legislation on Hungarians living in neighbouring countries.⁴⁹ This law was drafted and endorsed by the Hungarian government without any prior consultation with the neighbouring states and without taking into account their observations and objections. It was, as such, a *unilateral* measure regulating other unilateral measures to be taken by the kin-state in favour of the kin-minority abroad.

The decision to adopt this law was the result of three main factors. One was the wish of the Hungarian government to set the rules and instruments for developing a relationship with the Hungarian minorities abroad before Hungary became a member of the European Union. A second objective was to contribute to the “reunification” of the Hungarian nation, which had been “dismantled” by the Trianon Treaty, while encouraging ethnic Hungarians to stay in their native land. The 2003 general elections in Hungary were another reason for promoting this “national project”, because the then-government of Hungary considered the law a worthy electoral hit.

The lack of consultation with neighbouring countries and the unilateral character of the whole demarche were justified by the concept present in

Hungary at that time that the Hungarian state, as the “mother-state” (a concept now replaced from the legal point of view by the “kin-state” formula), has a constitutional right (set out in Article 6(3) of the Hungarian Constitution) and, at the same time, an obligation to protect Hungarian minorities abroad. It should be mentioned that at that time there were no detailed standards regulating the support that can be granted to kin-minorities abroad, despite the fact that a correct interpretation of the existing fundamental principles and rules of international law would have offered a substantive answer to this issue, and would also have led to the conclusion that consultation – instead of unilateral action – should have been mandatory.

The law, as adopted in 2001, raised a number of concerns: it produced discriminatory and extraterritorial effects and it risked creating a political (and quasi-legal) bond between the kin-state and the kin-minority.⁵⁰

This debate on the effects of the law was far from being a bilateral one between Hungary and (some of) its neighbours. The solution to this unilateral (and unilaterally created) problem was found both at the bilateral level and with the support of the international community. It became a debate at the European level – involving many organizations and bodies such as the Council of Europe (through the Venice Commission⁵¹ and the Parliamentary Assembly of the Council of Europe⁵²), the HCNM⁵³ and the European Commission⁵⁴ – regarding the standards regulating the involvement of the kin-state in granting minority protection. These organizations and bodies adopted reports, recommendations, resolutions, statements, comments, etc. that now shape these standards.

The conclusions of the 2001 Venice Commission Report – the first and most comprehensive soft law “codification” on the matter – showed that the primary responsibility belongs to the home-state, and that the kin-state “may also play a role”. The kin-state is allowed to maintain cultural links with the kin-minority and to provide for assistance in the cultural field, although several principles and rules are to be observed: respect for the territorial sovereignty of the home-state; respect for the *pacta sunt servanda* principle; and respect for friendly relations among states (including, of course, good-neighbourly relations). Preferential treatment may be granted by the kin-state in the educational and cultural fields, on condition that there exists a legitimate aim of fostering cultural links and that respect is shown for the principle of proportionality.

Based on these standards shaped at the European level, the problems created by the Hungarian law were solved bilaterally. For instance, Romania and Hungary successfully used bilateral channels (especially through the Joint Bilateral Committee on Minority Issues, established in 1997 under the Joint Intergovernmental Commission created by the Treaty on Understanding, Cooperation and Good-Neighborliness be-

tween the two countries signed on 16 September 1996), and concluded two agreements aimed at “filtering” those provisions of the law that were still not in conformity with the European principles and norms applicable to this matter. The Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania Concerning the Law on Hungarians Living in Neighbouring Countries and Issues of Bilateral Co-operation was concluded in December 2001,⁵⁵ and, after the law was amended in June 2003 (which was also the result of the adoption of general standards, as mentioned above), the Agreement on Conditions Concerning the Implementation of the Law on Hungarians Living in Neighbouring Countries with Regard to Romanian Citizens was concluded in September 2003.⁵⁶

It is important to note that the Venice Commission rejected the *unilateral* approach of the kin-state. The Conclusions of the 2001 Report provided that the “adoption by States of unilateral measures granting benefits to the persons belonging to their kin-minorities . . . in the Commission’s opinion does not have sufficient *diuturnitas* to have become an international custom”.⁵⁷ Also, the consent of the home-state, either express or implicit, is necessary prior to the implementation of any measure of support by the kin-state.

The OSCE High Commissioner on National Minorities took this a step further in his Statement issued in October 2001, in which he asserted not only that the “[p]rotection of minority rights is the obligation of the State where the minority resides” but also that “[h]istory shows that when States take unilateral steps on the basis of national kinship to protect national minorities living outside of the jurisdiction of the State, this sometimes leads to tensions and frictions, even violent conflict”.⁵⁸ The HCNM emphasized that:

Although a State with a titular majority population may have an *interest* in persons of the same ethnicity living abroad, *this does not entitle or imply, in any way, a right under international law to exercise jurisdiction over these persons.* At the same time it does not preclude a State from granting certain preferences within its jurisdiction, on a non-discriminatory basis.⁵⁹

The same distribution of roles is well reflected by the 2008 “Bolzano Recommendations” of the HCNM.⁶⁰ According to the Recommendations, sovereignty “implies the obligation of the state to respect and to ensure the protection of human rights and fundamental freedoms of all persons within its territory and subject to its jurisdiction, including the rights and freedoms of persons belonging to national minorities. The respect for and protection of minority rights is primarily the responsibility of the State where the minority resides.”⁶¹ At the same time, “[t]he protection of

human rights, including minority rights, is also a matter of legitimate concern to the international community”.⁶² Last, but not least, “[a] State may have an interest – even a constitutionally declared responsibility – to support persons belonging to national minorities residing in other States based on ethnic, cultural, linguistic, religious, historical or any other ties”. However, the Recommendations set forth that “this does not imply, in any way, a right under international law to exercise jurisdiction over these persons on the territory of another State without that State’s consent”.⁶³ The fact that certain constitutional provisions of a state provide that the state has a responsibility (i.e. it has a right) to protect its kin-minority residing abroad does not become a right to protect under international law, this being yet another expression of the principle of the primacy of international law. The kin-state is nothing more nor less than a “kinterested” state.

In conclusion, in view of the above considerations, the answer to the question of whether the responsibility to protect national minorities is a shared responsibility is positive, but the only titular subjects of this responsibility are the home-state, which has the primary role, and the international community, which has the residual or subsidiary role. The kin-state has no right (or obligation) to act, only an interest in acting within certain parameters, which exclude unilateral action.

Conclusion

In today’s international relations – in which there is a tendency towards an international community in which the individual has an increasingly influential role – the borders of sovereignty are flexible and the relative exercise of sovereign powers is more obvious than ever. Not only did the features and effects or implications of sovereignty change in order for this institution to be able to adapt itself to the substantial transformations in international relations, especially after the end of the Cold War, but there was also a transformation in the very nature of sovereignty, as a result, *inter alia*, of the processes of democratization and humanization of international relations and of international law. Human rights and fundamental freedoms, including the rights of persons belonging to national minorities, are no longer exclusively a matter for state sovereignty concern and action, but are a responsibility shared between the state and the international community.

This conceptual shift from sovereignty as control to sovereignty as responsibility also involved the promotion and protection of the rights of persons belonging to national minorities, these rights forming an integral part of human rights and having the same nature as general human rights. The protection of national minorities became a field of contemporary

international cooperation⁶⁴ and, thus, the subject of shared responsibility between the state and the international community.

In the relationship between these two actors, the home-state (i.e. the state in which the national minority lives) has the primary responsibility of protection. The subsidiary responsibility of the international community comes into play only when the state with primary responsibility cannot or does not fulfil its obligations under the international standards applicable to this matter. Although the kin-state may have an interest in maintaining cultural links with the kin-minority and in providing assistance in the cultural field, this assistance may be given only under certain strict conditions, and it cannot be done unilaterally; in any case, the kin-state does not have a right under international law to act in favour of its kin-minorities. In other words, the “kinterested” state cannot substitute for the international community and cannot act alone on behalf of the international community.

Notes

1. Bogdan Aurescu, *Noua suveranitate. Între realitate juridică și necesitate politică în sistemul internațional contemporan* [The New Sovereignty. Between Legal Reality and Political Necessity in the Contemporary International System] (Bucharest: Ed. All Beck, 2003), pp. 137–140.
2. Ibid.
3. Ibid.
4. John Bassett Moore, *A Digest of International Law*, vol. I (Washington, DC: US Government Printing Office, 1906), p. 14.
5. Aurescu, *Noua suveranitate*, pp. 43–44.
6. Boutros Boutros-Ghali, *An Agenda for Peace* (New York: United Nations, 2000), para. 17: “The time of absolute sovereignty . . . has passed; its theory was never matched by reality.”
7. Aurescu, *Noua suveranitate*, pp. 179–193.
8. International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. 7.
9. Zaki Laïdi, *L'ordre mondial relâché. Sens et puissance après la guerre froide* (Paris: Presses de la Fondation Nationale des Sciences Politiques, 1993), p. 26; David J. Bederman, *International Law Frameworks* (New York: Foundation Press, 2001), p. 43.
10. Venice Commission, *Report on the Legal Foundation for Foreign Policy of the European Commission for Democracy through Law* (the Venice Commission) of the Council of Europe, CDL-DI(1998)003e-rev-restr, Strasbourg, 11 June 1998, Para. 12 II; available at <[http://www.venice.coe.int/docs/1998/CDL-DI\(1998\)003rev-e.asp](http://www.venice.coe.int/docs/1998/CDL-DI(1998)003rev-e.asp)> (accessed 1 December 2010).
11. See Resolution 55/2, “United Nations Millennium Declaration”, UN Doc. A/RES/55/2, 18 September 2000, paras 6, 24, 25; available at <<http://www.un.org/millennium/declaration/ares552e.htm>> (accessed 1 December 2010). One important objective set forth in Section VII is the consolidation of democracy in Africa.
12. Resolution 55/107, “Promotion of a Democratic and Equitable International Order”, UN Doc. A/RES/55/107, 14 March 2001.

13. Philippe Sands, "Vers une transformation du droit international? Institutionnaliser le doute", in *Droit international*, vol. 4 (Paris: Institut des Hautes Etudes Internationales de Paris, Editions A. Pedone, 1999/2000), p. 188.
14. See Theodor Meron, *The Humanization of International Law* (Leiden, Boston: The Hague Academy of International Law, Martinus Nijhoff Publishers, 2006); Monique Chemillier-Gendreau, *Humanité et souverainetés* (Paris: Editions La Découverte, 1995).
15. Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2002), p. 3; Dominique Carreau, *Droit international public*, 9th edn (Paris: Editions A. Pedone, 2007), p. 30.
16. René-Jean Dupuy, *La communauté internationale entre le mythe et l'histoire* (Paris: Economica, 1986), p. 180.
17. Philip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990), p. 328.
18. Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des Cours de L'Academie de Droit International de la Haye* (RCADI), 250 (1994:VI), p. 234. This new international law, designated by Sienho Yee as the "international law of co-progressiveness", has as its final goal what he calls the "human flourishing"; see Sienho Yee, *Towards an International Law of Co-progressiveness* (Leiden: Martinus Nijhoff Publishers, 2004), p. 3.
19. Philippe Delmas, "La Souveraineté est-elle une intolérance?", *Revue des deux mondes* (November/December 1999), p. 118.
20. Kofi Annan, "Two Concepts of Sovereignty", *The Economist*, 18 September 1999.
21. ICISS, *The Responsibility to Protect*, p. 14.
22. *Ibid.*, p. 13 (emphasis in the original).
23. *Ibid.*
24. See Institut de Droit International, "De la détermination par le droit international du domaine laissé à la compétence exclusive de chaque Etat", rapporteur Louis Le Fur, Oslo, 22 August 1932, <http://www.idi-iil.org/idiF/resolutionsF/1932_oslo_01_fr.pdf> (accessed 14 December 2010); "La détermination du domaine réservé et ses effets", rapporteur Charles Rousseau, Aix-en-Provence, 29 April 1954 <http://www.idi-iil.org/idiF/resolutionsF/1954_aix_01_fr.pdf> (accessed 14 December 2010).
25. Marc-Stanislas Korowicz, *Organisations internationales et souveraineté des Etats membres* (Paris: Editions A. Pedone, 1961), pp. 107–108 (emphasis added).
26. Permanent Court of International Justice, Advisory Opinion No. 4, 7 February 1923, on Nationality Decrees Issued in Tunis and Morocco, Series B, p. 24.
27. *The Aegean Sea Continental Shelf (Turkey v. Greece)*, *ICJ Reports 1978*, p. 32.
28. See ICISS, *The Responsibility to Protect*, p. 17: "the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place. In many cases, the state will seek to acquit its responsibility in full and active partnership with representatives of the international community."
29. Welcoming Remarks by Knut Vollebaek, OSCE High Commissioner on National Minorities, at the Launch and Conference of the "Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations", 2 October 2008, p. 3. For the full text, see <http://www.osce.org/documents/hcnm/2008/10/33871_en.pdf> (accessed 2 December 2010).
30. ICISS, *The Responsibility to Protect*, p. 17.
31. "States have a dual responsibility: first, to protect and promote the rights of persons belonging to national minorities under their jurisdiction and second, to act as responsible members of the international community with respect to minorities under the juris-

- diction of another State.” Statement by Knut Vollebaek, OSCE High Commissioner on National Minorities, to the 718th Plenary Meeting of the OSCE Permanent Council, 26 June 2008, p. 2; available at <http://www.osce.org/documents/hcnm/2008/06/31874_en.pdf> (accessed 2 December 2010).
32. ICSS, *The Responsibility to Protect*, p. 17.
 33. *Ibid.*
 34. Nicolae Titulescu, Romanian lawyer, politician and diplomat (1882–1941), Minister of Foreign Affairs of Romania (1927–1928, 1932–1936) and President, twice (in 1930 and 1931), of the Assembly of the League of Nations.
 35. Lecture (originally in French) entitled “The League of Nations and the Minorities”, presented before the International Diplomatic Academy of Paris on 15 March 1929; cited in Adrian Năstase, Raluca Miga-Besteliu, Bogdan Aurescu, Irina Donciu, *Protecting Minorities in the Future Europe – Between Political Interest and International Law* (Bucharest: RAMO, 2002), p. 39.
 36. ICISS, *The Responsibility to Protect. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), p. 7.
 37. See Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State, Adopted by the Venice Commission at its 48th Plenary Meeting (Venice, 19–20 October 2001)*, CDL-INF(2001)19, Strasbourg, 22 October 2001, Section D (a): “The principle of territorial sovereignty of States”; available at <[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp)> (accessed 2 December 2010).
 38. *Ibid.*, Section E: “Conclusions”.
 39. Resolution 47/135, “Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, UN Doc. A/RES/47/135, 18 December 1992; available at <<http://www.un.org/documents/ga/res/47/a47r135.htm>> (accessed 2 December 2010).
 40. Resolution 49/192, “Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, UN Doc. A/RES/49/192, 9 March 1995, para. 2.
 41. “Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE [Conference on Security and Co-operation in Europe]”, Copenhagen, 29 June 1990, para. 33.
 42. See Venice Commission, *Report on Non-citizens and Minority Rights Adopted by the Venice Commission at its 69th Plenary Session (Venice, 15–16 December 2006)*, Study No. 294/2004, CDL-AD(2007)001, Strasbourg, 18 January 2007; available at <[http://www.venice.coe.int/docs/2007/cdl-ad\(2007\)001-e.asp](http://www.venice.coe.int/docs/2007/cdl-ad(2007)001-e.asp)> (accessed 2 December 2010). For a detailed presentation of the study, see Bogdan Aurescu, “The 2006 Venice Commission Report on Non-Citizens and Minority Rights – Presentation and Assessment”, *Security and Human Rights*, No. 2 (2007), pp. 150–163.
 43. Năstase et al., *Protecting Minorities in the Future Europe*, p. 41.
 44. See pp. 41–43.
 45. See Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State*, Section E: “Conclusions”.
 46. See the Statement by Rolf Ekéus, the OSCE High Commissioner on National Minorities, “Sovereignty, Responsibility, and National Minorities”, The Hague, 26 October 2001; available at <<http://www.osce.org/hcnm/53936>> (accessed 2 December 2010).
 47. OSCE High Commissioner on National Minorities, “The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note”, The Hague, June 2008. For the full text, see <http://www.osce.org/publications/hcnm/2008/10/33388_1189_en.pdf> (accessed 2 December 2010).

48. The term “kin-state” is defined by the Venice Commission (*Report on the Preferential Treatment of National Minorities by Their Kin-State*, “Conclusions”) as a state having “kin-minorities” residing abroad on the territory of another state (the “home-state”) – groups possessing the same ethnic and, in general, cultural features as the majority population in the kin-state. Kin-states “play a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong”.
49. Act LXII of 19 June 2001 on Hungarians Living in Neighbouring Countries, amended on 23 June 2003. For the text of the law and related documents, see <http://www.mfa.gov.hu/NR/rdonlyres/A08A8619-B08C-450F-A70B-0949A5467BAB/0/Statusz_EN.pdf> (accessed 14 December 2010).
50. For a detailed presentation of the debate and the legal implications of the Hungarian law, see Năstase et al., *Protecting Minorities in the Future Europe*; Bogdan Aurescu, “Bilateral Agreements as a Means of Solving Minority Issues: The Case of the Hungarian Status Law”, *European Yearbook of Minority Issues*, No. 3 (2003/4), pp. 509–530. See also Bogdan Aurescu (ed.), *Kin-State Involvement in Minority Protection: Lessons Learned* (Bucharest: International Law Section of the Romanian Association for International Law and International Relations and the Venice Commission, RAMO, 2005).
51. See Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State*.
52. See Parliamentary Assembly Council of Europe (PACE) Resolution 1335 (2003) on the “Preferential Treatment of National Minorities by the Kin-State: The Case of the Hungarian Law on Hungarians Living in Neighbouring Countries (‘Magyars’) of 19 June 2001”, <<http://assembly.coe.int/Documents/AdoptedText/ta03/ERES1335.htm>> (accessed 2 December 2010).
53. See the Statement by HCNM Rolf Ekéus, 26 October 2001; also “High Commissioner Warns of Hungarian ‘Status Law’ Precedent”, 24 June 2003; available at <http://www.osce.org/hcnm/item_1_7602.html> (accessed 2 December 2010).
54. See European Commission’s Non-Paper “Assessment of the compatibility of the revised draft ‘Law on Hungarians living in neighbouring States’ with European standards and with the norms and principles of international law (the findings of the Council of Europe’s Venice Commission) and with EU law”, reproduced in Aurescu, “Bilateral Agreements as a Means of Solving Minority Issues”, pp. 529–530.
55. For the text of this document, see Aurescu, “Bilateral Agreements as a Means of Solving Minority Issues”, Appendix 1, pp. 521–524. See also Aurescu (ed.), *Kin-State Involvement in Minority Protection*, pp. 181–184.
56. For the text of this document, see Aurescu, “Bilateral Agreements as a Means of Solving Minority Issues”, Appendix 2, pp. 525–527. See also Aurescu (ed.), *Kin-State Involvement in Minority Protection*, pp. 185–187.
57. Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State*, “Conclusions”.
58. Statement by HCNM Rolf Ekéus, 26 October 2001.
59. *Ibid.*, emphasis added.
60. OSCE High Commissioner on National Minorities, “The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note”.
61. *Ibid.*, General Principle 2.
62. *Ibid.*, General Principle 3.
63. *Ibid.*, General Principle 4.
64. As expressed, for instance, by Article 1 of the Council of Europe’s Framework Convention for the Protection of National Minorities (Strasbourg, 1.II.1995), *European Treaty Series*, No. 157, 1995.

4

Where are the borders? National identity and national security

Walter Kemp

States of mind

Many of today's borders are the result of imperfect post-conflict compromises, the collapse of empires or the artificial imposition of colonial powers. As a consequence, nations and states are seldom perfectly congruous. Almost no state is ethnically homogeneous or a "pure" nation-state – multi-ethnicity is the norm. People sharing the same ethnicity do not necessarily share the same citizenship, and vice versa. And people of one nation may be spread among many states. Think of the Serb communities living outside of Serbia, or Albanians living in Kosovo and Macedonia, or Russians in the "near abroad". In some parts of the world, borders are so vague that ethnic and tribal groups move back and forth across them and feel that they are among "kin" on both sides: for example, the Baluchis and Pashtuns straddling Afghanistan and Pakistan, or the Tuareg groups in the Sahel region of Africa.

The bold lines of statehood can thus become blurred by the blood lines of nationhood. Instead of states that are hard, opaque, unitary actors that collide like billiard balls (to use Arnold Wolfers famous analogy), nations are more fluid and amorphous. In theory, this would not present a challenge to a world where sovereignty has changed so dramatically: a world where non-state and sub-state actors have taken on many of the traditional roles of the state (including security); where transnational threats (such as climate change, terrorism and organized crime) defy borders;

and where global actors (such as multinational companies or the media) are more rich and powerful than many states.

The problem is that nations are not imagined communities (to use Benedict Anderson's expression) or "states of mind" when they are given a political and territorial expression. Romantic flag-draped castles in the sky and stories and songs of a glorious past can keep a culture alive for a national group. But, when national identity seeks more than a cultural expression, the imaginary starts to look real, even threatening: nations may pose a threat to states. History is littered with examples, from Hitler's defence of the German *Volk*, to Milosevic's ethnic cleansing, and Russia's support of "kin" in the former Soviet Union.

And yet, in a world where borders are losing their significance, why not enable people sharing the same national identity to foster closer ties? Surely every attempt to do so is not a threat to national security. What are the borders between legitimate attempts to protect and promote national identity and potentially destabilizing threats to national security?

The issue must be looked at from both inside and outside the state. In both cases there is a link to the "responsibility to protect" (R2P). This chapter will examine that dual responsibility, with particular emphasis on experience from the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe (OSCE).

"Upstream" R2P: Minority protection

There is nothing wrong with national minorities protecting and promoting their identity. Indeed, it is their right, and it is the obligation of the state where they live to defend that right.

Although most of the focus of the "responsibility to protect" is on what the international community should do to stop genocide, war crimes, ethnic cleansing and crimes against humanity, it is often forgotten – not least by the states concerned – that the protection of minority rights is the obligation of the state where the minority resides. As UN Secretary-General Ban Ki-moon put it, "prevention begins at home".¹ By the time the alarm bells start ringing about potential crimes, significant human rights abuses have already been committed. This would not happen if states enabled minorities to express, preserve and develop their cultural, linguistic or religious identity free from any attempts at assimilation against their will. Therefore, the responsibility to protect starts "upstream" with the protection of minority rights.²

Paragraph 138 of the World Summit *Outcome* document talks about the responsibility of states to prevent genocide, war crimes, ethnic cleansing and crimes against humanity, including their incitement, through appropriate

and necessary means.³ This is considered the first pillar of R2P.⁴ Indeed, it is the bedrock of R2P since heads of state and government declared that “we accept that responsibility and will act in accordance with it”.

But even this, in a sense, is reactive. Indeed, the threshold for what are described as “R2P situations” has purposely been set quite high. They are:

situations actually or potentially involving large-scale killing, ethnic cleansing or other similar mass atrocity crimes – situations where these crimes are either occurring or appear to be imminent, or which are capable of deteriorating to this extent in the absence of preventive action – and which should engage the attention of the international community simply because of their particular conscience-shocking character.⁵

Steps should be taken to prevent tensions from becoming that acute. Otherwise, the lesson that will be learned is that violence pays: only dramatic action will attract the world’s attention. That is why conflict prevention – whether or not you call it R2P – is vital. As the Report of the International Commission on Intervention and State Sovereignty (ICISS) concluded: “Prevention is the single most important dimension of the responsibility to protect: prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.”⁶

In multi-ethnic states, the challenge is to integrate diversity. States should promote the integration of society and strengthen cohesion, for example by preventing discrimination and promoting equality before the law, and by enabling minorities to express, preserve and develop their identity. Furthermore, persons belonging to national minorities should be given an effective voice at all levels of government, especially with regard to, but not limited to, those matters that affect them.

Integration is a two-way street. Minorities should participate in public life, learn the official language and respect the rules and regulations of the country they reside in. A well-integrated society is in the interests of both the majority and minorities. In Europe, the OSCE’s High Commissioner on National Minorities has issued a broad range of recommendations on how to achieve this end, including on: policing in multi-ethnic societies; the use of minority languages in the broadcast media; the effective participation of minorities in public life; the linguistic rights of national minorities; and the educational rights of national minorities.⁷

How to de-securitize?

Of course, it can happen that ethnic tensions arise, either within states or between them. When the interests and rights of national minorities are

not accommodated within the state, questions of national identity can become issues of national security. In such cases, the challenge is to “de-securitize” the issue.

A key consideration is to avoid the instrumentalization of minority issues, either by radicals in the minority community or by a big brother (often the neighbouring state) that wants to stir up trouble by championing the minority cause for its own aims.

By focusing on specifics – for example, use of minority languages (in education, in the media, on signs or in public institutions), representation, self-government – rather than vague and emotive questions of “national identity”, problems can usually be solved. The key is dialogue. There should be mechanisms through which minorities can air their grievances and the government can respond. Of course, there must also be a legal basis that protects minority rights and prevents discrimination and assimilation.

Where such laws and mechanisms are lacking, the international community should work with the governments in order to build capacity. Delay will exacerbate tensions, stoking nationalist extremism and even triggering violence. That is why, as UN Secretary-General Ban Ki-moon put it, the second pillar of the responsibility to protect is “to help states succeed, not just to react once they have failed to meet their prevention and protection obligations. It would be neither sound morality, nor wise policy, to limit the world’s options to watching the slaughter of innocents or to send in the marines.”⁸ As the ICISS Report put it, “[t]he time has come for all of us to take practical responsibility to prevent the needless loss of human life, and to be ready to act in the cause of prevention and not just in the aftermath of disaster”.⁹

The United Nations’ capabilities to provide such assistance are limited. As former UN Secretary-General Kofi Annan observed in his 2006 *Progress Report on the Prevention of Armed Conflict*:

an unacceptable gap remains between rhetoric and reality in the area of conflict prevention . . . Too often the international community spends vast sums of money to fight fires that, in hindsight, we might more easily have extinguished with timely preventive action before so many lives were lost or turned upside down. Over the last five years, we have spent over \$18 billion on United Nations peacekeeping that was necessary partly because of inadequate preventive measures. A fraction of that investment in preventive action [2 per cent was suggested] would surely have saved both lives and money.¹⁰

By its own admission, the United Nations lacks system-wide coordination on prevention issues. There is no system-wide repository or knowledge management of conflict prevention issues. There is no designated forum

to address prevention issues systematically with member states.¹¹ This is bizarre, and tragic, when one considers that Article 1 of the UN Charter says, *inter alia*, that the purpose of the Organization is “to take effective collective measures for the prevention and removal of threats to the peace”.

What is needed, according to Secretary-General Ban Ki-moon, is: (i) the timely flow to UN decision-makers of accurate, authoritative, reliable and relevant information about the incitement, preparation or perpetration of genocide, war crimes, ethnic cleansing and crimes against humanity; (ii) the capacity for the UN Secretariat to assess that information and understand the patterns of events properly within the context of local conditions; and (iii) ready access to the office of the Secretary-General.¹² Rather than creating new redundant channels, the Secretary-General has asked relevant line departments, programmes, agencies and inter-agency networks to incorporate considerations and perspectives relating to R2P into their ongoing activities and reporting procedures to the extent that their mandates permit.¹³

So far, efforts to strengthen early warning and analytical capability within the UN Secretariat have been largely denied, mostly “by member states anxious not to be seen as suitable cases for treatment”.¹⁴ Essential intelligence-gathering and analytical capacity depend greatly on non-UN sources, including non-governmental organizations such as the International Crisis Group. As a recent report by the Secretary-General makes clear, “the United Nations and its Member States remain unprepared to meet their most fundamental prevention and protection responsibilities”.¹⁵

What means are available in the United Nations to take anticipatory action and to prevent conflict? According to paragraph 139 of the World Summit *Outcome* document, the international community should use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter.

Chapter VI covers Peaceful Settlement of Disputes. Presumably, if the problems were internal, the government concerned could ask for assistance from UN “good offices” (such as a Special Representative or Special Envoy), assisted by the recently established Mediation Support Unit. If the crisis involved more than one state (in other words, if it is more than an intra-state conflict), Chapter VI encourages the parties to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The work of the Peacebuilding Commission can also be considered a type of conflict prevention – shoring up fragile states to prevent a recurrence of crisis. The preventive deployment of peacekeepers (such as the United Nations Preventive Deployment Force in Macedonia from 1992 to 1999) can cool heads and act as a

deterrent. Ultimately, if a situation is acute, it may be brought to the Security Council. Once the situation gets this far, it has clearly become “securitized”.

Regional organizations can help prevent the situation from getting out of hand. Chapter VIII of the Charter encourages regional arrangements to deal with matters relating to the maintenance of peace and security. In some cases, such as the OSCE, the regional arrangement has far more advanced tools and measures for preventing conflict than the United Nations. A good example is the OSCE High Commissioner on National Minorities.

Legitimate intrusiveness

The OSCE High Commissioner on National Minorities was created in 1992 as an instrument of early warning and early action to prevent inter-ethnic conflict. Three successive High Commissioners – Max van der Stoep (the Netherlands, 1993–2001), Rolf Ekéus (Sweden, 2001–2007) and Knut Vollebaek (Norway, 2007–) – have engaged in quiet diplomacy at an early stage to reduce tensions between minority and majority communities in the interests of good governance, security and justice. The High Commissioner’s work has been explained elsewhere.¹⁶ Less well known is the significance of his work as a forerunner – and positive example – of how the responsibility to protect can actually work. Indeed, whereas others preach about the responsibility to protect, the High Commissioner has been practising it for more than 15 years.

The High Commissioner’s engagement is a good example of the first two pillars of R2P: encouraging states to protect persons belonging to national minorities; and helping them build capacity where needed. Pursuant to his rather intrusive mandate, the High Commissioner can intervene in situations involving national minority issues that have the potential to develop into a conflict within the OSCE area. He makes recommendations – based on international norms and standards as well as good practice – and, where necessary, provides technical assistance and supports tension-reducing projects. He has the capacity to take early action, not just issue early warnings.

This constructive “interference” is possible thanks to a strong mandate inspired by an OSCE meeting in Moscow in 1991 when participating states declared “categorically and irrevocably” that “commitments undertaken in the field of the human dimension of the OSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned”.¹⁷ The pro-

tection of human rights, including minority rights, is therefore a matter of legitimate concern to the international community.

However, despite the revolutionary implications of this sentence in terms of international law, and despite the fact that it enabled the creation of a uniquely intrusive mandate for the High Commissioner on National Minorities, it is not an invitation for states to meddle in each other's internal affairs. This was made clear in 2001 when Hungary unilaterally sought to provide benefits to Hungarians living in neighbouring countries, claiming that the interests of its ethnic "kin" were not being properly protected by the governments of, for example, Romania and Slovakia.

Protecting the Hungarian nation

According to the Hungarian constitution, "the Republic of Hungary bears a sense of responsibility for what happens to Hungarians living outside of its borders and promotes the fostering of their relations with Hungary".¹⁸ In June 2001, the parliament of Hungary adopted an Act on Hungarians Living in Neighbouring Countries (Act LXII) that put this responsibility into practice. The preamble of the law states that its aim is "to ensure that Hungarians living in neighbouring countries form part of the Hungarian nation as a whole and to promote and preserve their well-being and awareness of national identity within their country".

This set off a diplomatic row between Hungary and some of its neighbours where the law was supposed to take effect, particularly Romania and Slovakia.¹⁹ The latter states resented what they perceived as Hungary's unilateral interference in their own affairs and a violation of their sovereignty. Hungary argued that it merely wanted to support ethnic kin in neighbouring countries by providing support for Hungarian language, culture and education. The implication was that Romania and Slovakia were failing to adequately protect and promote the ethnic Hungarians living in their countries, so Hungary would help.

This was, in effect, a clash of interpretations of the responsibility to protect. The state of Hungary argued that it has a responsibility to protect the Hungarian nation. Slovakia and Romania retorted that members of the Hungarian nation are citizens of sovereign states, and it is the responsibility of those governments to protect them. All right, argued Hungary, but you have failed to live up to that responsibility – we cannot stand by while Hungarian identity and culture die out.

The basic problem is that there is no definition of nation under international law: who is part of the Hungarian nation, where is the Hungarian

nation? It is very much an imagined community. Furthermore, the responsibility to protect should be pursued – under very specific conditions – by the international community or by a mandated international instrument, not unilaterally by a neighbouring state. Attempts by a “motherland” to protect other members of the nation usually end in grief. As the OSCE High Commissioner on National Minorities warned in a statement issued in October 2001, “history shows that when States take unilateral steps on the basis of national kinship to protect national minorities living outside the jurisdiction of the State, this sometimes leads to tensions and frictions, even violent conflict”.²⁰

The worst example is Nazi Germany when Hitler sought to unite the German *Volk*, claiming a responsibility – even a right (*Schutzrecht*) – to protect German kin. This abstract idea of blood ties took on political and territorial expression with the acquisition of the Sudetenland and the invasion of Poland – realizing Hitler’s desire to ensure that “German” people lived on “German” land (*Blut and Boden*). There are others, even within our lifetime, who have called for the titular state to defend the wider nation, such as Slobodan Milosevic who spoke of unifying the Serb nation – and killed thousands trying – or Russian nationalists who have rallied in support of “kin” in the “near abroad”. These were the kinds of cases that the High Commissioner had in mind as he drafted his statement.

So who is right? Does a state have a responsibility to protect people sharing the same ethnicity? Surely it cannot stand by if the rights of “its kin” are being violated. Or is this a potentially dangerous trigger for further exacerbating the situation, even causing war?

Dual responsibility

As pointed out in the ICISS Report, states have a dual responsibility: to protect and promote the rights of persons belonging to national minorities under their jurisdiction, and to act as responsible members of the international community with respect to minorities under the jurisdiction of another state.²¹ The first point is covered by pillar one of R2P. The second point prevents abuse of R2P by states seeking to assert a responsibility to protect “their” nation/kin outside their sovereign jurisdiction.

This does not close the door on contacts among people of the same nation. Indeed, international norms and standards make clear that states “should not unduly restrict the right of persons belonging to national minorities to establish and maintain unimpeded and peaceful contacts across frontiers with persons lawfully residing in other States, in particular those with whom they share a national or ethnic, cultural, linguistic or religious identity, or a common cultural heritage”.²²

So how can kinship ties across borders strengthen national identity without challenging national security? This is the central question that inspired the High Commissioner on National Minorities, in 2007, to ask a group of internationally recognized experts to come up with a set of recommendations on “National Minorities in Inter-State Relations” (also known as the Bolzano or Bozen Recommendations).

The basic tenet, as with R2P, is that, under international law, the respect for and protection of minority rights is the responsibility of the state where the minority resides. States may have an interest in “kin” living abroad, but, as the High Commissioner pointed out in his statement of October 2001, this “does not entitle or imply, in any way, a right under international law to exercise jurisdiction over these persons” on the territory of another state without that state’s consent.²³

To avoid any repeat of the Hungarian debacle, and building on recommendations made by the Council of Europe in 2001, the Bolzano Recommendations lay out the possibilities and limitations of extending benefits to persons residing abroad. The bottom line is that any support should be limited to the fields of culture and education, it must be non-discriminatory, and it must enjoy the consent of the state where the beneficiary lives.

Paragraph 15 highlights the sense of dual responsibility that states should demonstrate – towards their citizens and towards the international community. It says:

When granting benefits to persons belonging to national minorities residing abroad, States should ensure that they are consistent in their support for persons belonging to national minorities within their own jurisdiction. Should States demonstrate greater interest in minorities abroad than at home or actively support a particular minority in one country while neglecting it elsewhere, the motives and credibility of their actions may be put into question.²⁴

External assistance

To prevent national identity issues from becoming national security issues, foreign assistance for minorities should be provided transparently and within the framework of friendly bilateral and multilateral relations. This is, in a way, like an “upstream” version of the third pillar of R2P, namely internationalizing the responsibility to protect. However, in this case, the focus is on prevention and does not cover any of the four crimes that would constitute an R2P issue. But that is the point. If bilateral or multilateral cooperation can improve protection of national minorities and reduce intra- and inter-state tensions, the less likely the possibility of

discrimination, conflict, ethnic cleansing and genocide. That is why the High Commissioner has encouraged states to conclude bilateral treaties and make other bilateral arrangements that cover minority protection. These mechanisms – for example minority councils or joint commissions – offer vehicles through which states can share information and concerns, pursue interests and ideas, and further support minorities on the basis of friendly relations. Obviously, minority representatives should be part of these mechanisms.

Where bilateral solutions fail, mediation can help. When Hungary's relations with Romania and Slovakia were strained, the Council of Europe and the OSCE were able to defuse the situation. Other regions of the world have less well-developed minority standards and lack institutions such as the High Commissioner on National Minorities, although the African Union's "Panel of the Wise" offers interesting potential for conflict prevention.

Good citizenship

The bottom line is good citizenship: the responsibility of states to be good to their citizens by respecting their basic rights and dignity, and the responsibility of all citizens (regardless of nationality) to be good citizens. It is also up to states to be good citizens of the international community. As the ICISS Report observes, "[s]overeignty as responsibility has become the minimum content of good international citizenship".²⁵

However, dual citizenship makes life complicated. If you are supposed to be a good citizen of the state under whose jurisdiction you live and yet you have dual citizenship, where does your allegiance lie, and whose responsibility is it to protect you? The problem has come to light in the crisis between Georgia and the Russian Federation over Abkhazia and South Ossetia.

Over the past few years, Russia has been handing out Russian passports like candy to people living in these two breakaway regions of Georgia. Should this be allowed? The Report of the EU-initiated Independent International Fact-Finding Mission on the Conflict in Georgia is clear in its assessment: "The mass conferral of Russian citizenship to Georgian nationals and the provision of passports on a massive scale on Georgian territory, including its breakaway provinces, without the consent of the Georgian Government runs against the principles of good neighbourliness and constitutes an open challenge to Georgian sovereignty and interferes in the internal affairs of Georgia."²⁶

The policy of "passportization", which is not unique to Russia, makes neighbours nervous because it is seen as creating an excuse to defend co-

citizens and not just kin. As the International Crisis Group has pointed out, “skepticism may well be appropriate when a country first confers its citizenship on a large number of people outside its borders, and then claims that it is entitled to intervene coercively to protect them”.²⁷ International experts looking at the issue of national minorities in inter-state relations have recommended:

States may take preferred linguistic competencies and cultural, historical or familial ties into account in their decision to grant citizenship to individuals abroad. States should, however, ensure that such a conferral of citizenship respects the principles of friendly, including good neighbourly, relations and territorial sovereignty, and should refrain from conferring citizenship *en masse*, even if dual citizenship is allowed in the State of residence.²⁸

This recommendation was made to prevent the type of crisis that occurred when Russia and Georgia went to war over South Ossetia in August 2008. The origins of the conflict have been hotly debated and analysed.²⁹ In a sense, both Georgia and Russia claimed to be defending their kin. What is particularly interesting is that Moscow justified its intervention using R2P-like language, for example claiming Georgia had “lost the right to rule” South Ossetia on account of the “humanitarian catastrophe” that has taken place there.³⁰

Much of the rest of the world did not see it that way. Swedish Foreign Minister Carl Bildt, among others, condemned the aggression as “incompatible with international law and fundamental principles of security and cooperation in Europe”. He noted that “[t]he justification given by Russia is that it is protecting Russian nationals, but the obligation to protect people – irrespective of their nationality – lies with the state in which those individuals are located. No state has a right to intervene militarily in the territory of another state simply because there are individuals there with a passport issued by that state or who are nationals of that state.” Echoing Rolf Ekéus’s statement of 2001 on “Sovereignty, Responsibility, and National Minorities”, Bildt warned that “[a]ttempts to apply such a doctrine have plunged Europe into war in the past – and that is why it is so important that this doctrine is emphatically dismissed. The same doctrine can be equally dangerous in other situations.”³¹

Abusing R2P

For such a new idea, R2P has generated a lot of interest. Some have written it off as being dead at birth. Others have hailed it as a panacea for preventing future atrocities. The problem is that the idea is well-meaning

enough to make a difference but vague enough to be abused. The detailed concepts outlined in the ICISS Report were left out of the World Summit *Outcome* document. R2P's application is therefore open to interpretation – with potentially destructive consequences. As has been pointed out in the context of the South Ossetia conflict, “ultimately, if the ‘responsibility to protect’ principle is to facilitate, rather than disrupt, international cooperation in the resolution of ethnic conflicts, it will be essential for the major global players to negotiate a common understanding of its content”.³² The Bolzano Recommendations are an important step in that direction. They can help to ensure that R2P moves from promise to practice in a way that protects and promotes the rights of persons belonging to national minorities, prevents conflict, maintains inter-ethnic harmony and strengthens good-neighbourly relations.³³

The experts who came up with the R2P principle hoped that the world was moving from a culture of sovereign impunity to a culture of national and international accountability.³⁴ The point of R2P was to ensure that states did no harm, either to their citizens or to each other. But some have seized this opportunity of seeking “justice without borders” to pursue a policy of unilateral interference in neighbouring states in order to support “kin” abroad. It would be a travesty and perversion of that noble goal if states abused the principle in order to start conflicts and invade neighbouring states in the name of R2P.

Notes

1. Ban Ki-moon, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677, 12 January 2009, p. 10.
2. The distinction between “upstream” and “downstream” R2P comes from a presentation made by Edward Luck, Special Adviser to the UN Secretary-General with a focus on R2P, at a Wilton Park conference on R2P, 11 July 2008 (*Implementing the Responsibility to Protect: The Role of Regional and Sub-regional Partners*, Report on Wilton Park Conference 922, 11–13 July 2008).
3. UN General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005; available at <<http://www.un.org/summit2005/documents.html>> (accessed 9 December 2010).
4. For an explanation of the three pillars, see the address by UN Secretary-General Ban Ki-moon, “Responsible Sovereignty: International Cooperation for a Changed World”, Berlin, 15 July 2008. The idea is fleshed out in Ban Ki-moon, *Implementing the Responsibility to Protect*.
5. Gareth Evans, “The Limits of State Sovereignty: The Responsibility to Protect in the 21st Century”, Eighth Neelam Tiruchelvam Memorial Lecture, International Centre for Ethnic Studies, Colombo, Sri Lanka, 29 July 2007; available at <<http://www.gevans.org/speeches/speech232.html>> (accessed 3 March 2011).
6. ICISS, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. xi. See also Chapter 4, “Before the Crisis: Responsibility to Prevent”, in

- Gareth Evans, *The Responsibility to Protect* (Washington, DC: Brookings, 2008). The idea of “responsibility to prevent” should not be confused with what Feinstein and Slaughter have called the “duty to prevent”, which reads more like the duty to carry out pre-emptive strikes against states developing weapons of mass destruction. See Lee Feinstein and Anne-Marie Slaughter, “A Duty to Prevent”, *Foreign Affairs* (January/February 2004).
7. See the website of the High Commissioner on National Minorities at <<http://www.osce.org/hcnm>> (accessed 9 December 2010).
 8. Ban Ki-moon, “Responsible Sovereignty: International Cooperation for a Changed World”.
 9. ICISS, *The Responsibility to Protect*, p. 27.
 10. *Progress Report on the Prevention of Armed Conflict: Report of the Secretary-General*, UN Doc. A/60/891, 18 July 2006.
 11. *Ibid.*, Annex B, “Review of the United Nations system capacity for conflict prevention: key findings”.
 12. Ban Ki-moon, *Implementing the Responsibility to Protect*, p. 8.
 13. *Ibid.*, Annex: “Early warning and assessment”, pp. 31–33.
 14. Gareth Evans, “Conflict Prevention: Ten Lessons We Have Learned”, Closing Keynote Address to the University of Toronto Peace and Conflict Society Conference “Before the Crisis Breaks: Conflict Prevention, Crisis Management and Preventive Diplomacy in the 21st Century”, Toronto, Canada, 4 February 2007; available at <<http://www.gevans.org/speeches/speech403.html>> (accessed 3 March 2011).
 15. Ban Ki-moon, *Implementing the Responsibility to Protect*, p. 6.
 16. See Walter Kemp, *Quiet Diplomacy in Action* (The Hague: Kluwer Law International, 1999).
 17. Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE [Conference on Security and Co-operation in Europe], Moscow, 3 October 1991.
 18. Constitution of the Republic of Hungary, Article 6(3).
 19. For a full explanation of the legal and political arguments and how the situation was resolved, see Walter Kemp, “Kin-states Protecting National Minorities: Positive Trend or Dangerous Precedent”, in John McGarry and Michael Keating (eds), *European Integration and the Nationalities Question* (New York: Routledge, 2006), pp. 103–123.
 20. Statement by Rolf Ekéus, OSCE High Commissioner on National Minorities, “Sovereignty, Responsibility, and National Minorities”, The Hague, 26 October 2001; available at <<http://www.osce.org/hcnm/53936>> (accessed 2 December 2010).
 21. ICISS, *The Responsibility to Protect*, p. 8.
 22. OSCE High Commissioner on National Minorities (HCNM), “The Bolzano/Bozen Recommendations on Minorities in Inter-State Relations & Explanatory Note”, The Hague, 20 June 2008, para. 8; available at <http://www.osce.org/publications/hcnm/2008/10/33388_1189_en.pdf> (accessed 2 December 2010).
 23. Ekéus, “Sovereignty, Responsibility, and National Minorities”. See also OSCE HCNM, “The Bolzano/Bozen Recommendations”, para. 4. It is worth noting that the term “kin-state” is purposely not used in the text of the Recommendations since it is a contested concept and lacks agreed scientific or legal definition.
 24. OSCE HCNM, “The Bolzano/Bozen Recommendations”, para. 15.
 25. ICISS, *The Responsibility to Protect*, p. 8.
 26. Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, September 2009, Vol. I, p. 18; available at <<http://www.ceiig.ch/Report.html>> (accessed 6 December 2010).
 27. International Crisis Group, “Application of R2P to the Georgia/Russia Conflict, August 2008”, <<http://www.crisisgroup.org/en/key-issues/responsibility-to-protect.aspx>> (accessed 9 December 2010).

28. OSCE HCNM, "The Bolzano/Bozen Recommendations", para. 11.
29. See Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*.
30. Elena Jurado, "A Responsibility to Protect?", *New Statesman*, 15 August 2008.
31. Statement by Carl Bildt, Swedish Minister for Foreign Affairs, "Russia's Justification of Its Offensive Deeply Ominous", 9 August 2008, <<http://www.sweden.gov.se/sb/d/587/a/109203>> (accessed 9 December 2010).
32. Jurado, "A Responsibility to Protect?".
33. See the Introduction by Knut Vollebaek, OSCE HCNM, "The Bolzano/Bozen Recommendations", p. 4.
34. ICISS, *The Responsibility to Protect*, p. 14.

5

Minority protection, bilateral mechanisms and the responsibility to protect

Elizabeth F. Defeis

Introduction

At the United Nations World Summit, 14–16 September 2005, 150 world leaders recognized a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹ The primary responsibility rests with the individual state to protect its vulnerable population and to prevent such crimes or incitement to such crimes “through appropriate and necessary means”.² When states fail in this responsibility, other states, through the United Nations, are committed to “use appropriate diplomatic, humanitarian, and other peaceful means” to protect threatened populations.³

To what extent does the responsibility to protect (R2P) obligate a state or a so-called kin-state to take measures to address minority tensions?

The most controversial and debated aspect of R2P has centred on the use of military force, which is allowed with Security Council approval only as a last resort. However, R2P is not merely a substitute for humanitarian intervention through use of force. Rather, it entails a threefold responsibility to prevent, react and rebuild.⁴ Although norms under R2P continue to emerge and the responsibility of individual states under R2P is an evolving concept, the action required of individual states is overwhelmingly predicated on the responsibility to prevent.

Minority tensions are an ever-increasing source of conflict in the world. When a state or the majority population within the state views itself as threatened by irredentist claims or other threats to the integrity of the

Blood and borders: The responsibility to protect and the problem of the kin-state, Kemp, Popovski and Thakur (eds), United Nations University Press, 2011, ISBN 987-92-808-1196-4

state, reaction might take the form of forced assimilation, population transfers, ethnic cleansing or genocide.⁵ In such cases, the primary responsibility to protect the threatened population rests with the state where these people live. If the state is unable or unwilling, or if in fact the state is the perpetrator of these violations, the international community, through the United Nations, is required to act.

The risk of an acute R2P situation would be reduced if the state were to seek to accommodate and protect the minority population through programmes and initiatives consistent with the norms governing the rights of minorities that are now contained in numerous international instruments. In furtherance of its R2P commitments, a state might adopt preventative measures aimed, in particular, at building state capacity, remedying grievances and ensuring the rule of law. Bilateral treaties as a preventative measure, particularly as it applies to minority concerns and kin-states, have been successfully utilized in the past to defuse ethnic tensions.⁶ This deserves further exploration as a method of fulfilling a responsibility to prevent under R2P.

Not all situations of actual or potential deadly conflict or gross violations of human rights involve ethnic conflict or minority concerns or rise to the level of a R2P situation. However, minority protection, an issue that was virtually ignored in the early human rights regime after the Second World War, has provoked or contributed to some of the most violent conflicts today. Indeed, the *Venice Commission Report on the Preferential Treatment of National Minorities by Their Kin-State* notes that “[s]tability and peace . . . cannot be achieved without a satisfactory protection of national minorities”.⁷

Following the breakup of the Soviet Union and Yugoslavia, with the concomitant escalation of ethnic violence throughout the world, attention was focused on developing international mechanisms for affording minority protection. Under the auspices of the United Nations and regional organizations such as the Council of Europe and the Organization for Security and Co-operation in Europe (OSCE), multilateral and bilateral treaties and declarations setting forth standards for minority protection have been adopted and commitments undertaken. In addition, states have been urged to utilize the bilateral route to address the minority concerns of their ethnically related populations living abroad. In 1991, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti, noted that “bilateral agreements dealing with minority rights concluded between States where minorities live and the States from which such minorities originate (especially between neighboring countries) would be extremely useful”.⁸ However, he cautioned that bilateral relations must be based on respect for sovereignty, territorial integrity and non-interference in the internal affairs of the states involved.

Asbjorn Eide, in his report submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, urged a similar approach. He noted and recommended the following:

In their bilateral relations States should engage in constructive cooperation to facilitate reciprocal protection of the equality and promotion of group identities. States should conclude bilateral treaties or other arrangements on good neighborly relations based on the principles of the Charter and on international human rights law, combining commitments of strict non-intervention with provisions for cooperation in facilitating the promotion of conditions for the maintenance of group identities and transborder contacts by members of minorities.⁹

The Council of Europe's Framework Convention for the Protection of National Minorities also encourages the adoption of bilateral treaties and provides that "[t]he Parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned".¹⁰ Finally, the bilateral route has been urged by the OSCE in its "Bolzano/Bozen Recommendations on National Minorities in Inter-state Relations" as follows:

States are encouraged to conclude bilateral treaties and make other bilateral arrangements in order to enhance and further develop the level of protection for persons belonging to national minorities. These mechanisms offer vehicles through which States can share information and concerns, pursue interests and ideas, and further support minorities on the basis of friendly relations. A bilateral approach should follow the spirit of fundamental rules and principles laid down in multilateral instruments.¹¹

However, the OSCE High Commissioner on National Minorities had cautioned:

[T]he bilateral approach should not undercut the fundamental principles laid down in multilateral instruments. In addition, States should be careful not to create such privileges for particular groups which could have disintegrative effects in the States where they live.¹²

Bilateral mechanisms prior to the UN regime

Treaty protections and treaty guarantees for at-risk groups surfaced in Europe in treaties of the seventeenth century, primarily those treaties establishing peace at the conclusion of war.¹³ Historically, religious minorities were the first to be afforded international protection through

agreements between and among states.¹⁴ Agreements pertaining to territorial distribution among several states or transfer of specific property on a bilateral basis were also the subject of such guarantees.¹⁵ For example, in 1606 the Treaty of Vienna signed by the King of Hungary and the Prince of Transylvania assured the Protestant minority in Transylvania free exercise of religion.¹⁶ Similarly, the peace treaties signed in Münster and Osnabrück between France, the Holy Roman Empire and their respective allies (the Peace of Westphalia, 1648) contained provisions relating to the religious and political rights of minority communities in the ceded territories.¹⁷

Following the fall of the Napoleonic regime, boundaries in Europe were once again redrawn at the Congress of Vienna (1815). The Final Act of the Congress was the first significant international instrument to contain clauses safeguarding national minorities, and not only religious minorities. Article 1 of the Final Act provides as follows: "The Polish subjects of the High Contracting Parties shall be given institutions which guarantee the preservation of their nationality and which shall assume such political form as each of the governments to which they are subject shall deem appropriate."¹⁸ However, these treaty provisions offered little concrete protection for the minorities living in the states that had agreed to such protections. For example, treaty provisions such as those pertaining to the partition of Poland among Russia, Prussia and Austria, which contained guarantees for national minorities, were vague and implementation was left to the states involved, without external oversight.¹⁹ Thus, the system was criticized as "condemned to failure by the inadequacy of its scope, the vagueness of its substantive provisions, the rudimentary nature of its machinery and organization, and the uncertainty, ineffectiveness and susceptibility to abuse of its sanctions".²⁰

During the nineteenth century, the issue of the rights of ethnic and linguistic minorities became increasingly important, and minority protections entered into the constitutions and internal legislation of several European countries. With the disintegration of the Austro-Hungarian, Russian and Ottoman empires at the beginning of the twentieth century, a number of new states were created in central Europe and the number of persons belonging to minorities increased dramatically. For example, in Czechoslovakia 34.5 per cent of the total population were persons belonging to ethnic minorities and in Poland the figure was 36.5 per cent.²¹

Following the First World War, the issue of minority protections was taken up at the Peace Conference. Although numerous proposals for the inclusion of minority protection clauses in the Covenant of the League of Nations were considered, the proposals were rejected. Rather, through five special treaties, called the Minority Treaties, newly configured states were required to accept a set of treaty obligations to protect the interests

of minority group members. Concurrently, similar obligations were imposed by the peace treaties on the defeated states. Special provisions were thus incorporated into the peace treaties, and some states made unilateral declarations pertaining to national minorities. Additionally, in the context of bilateral agreements, provisions for the protection of national minorities were adopted within the framework of other agreements. For example, agreements containing provisions on minority protection were concluded between Germany and Poland, Austria and Czechoslovakia, and Greece and Italy, among others.²² These documents generally contained provisions relating to the acquisition and loss of citizenship, rights of inhabitants to life and liberty and the free exercise of religion, protection against discrimination, equality before the law and equal employment. The treaties also contained provisions relating to the use of one's own language and the establishment and control of charitable, religious and social institutions. Some also required the state to provide "equitable" financial support to minority schools, where instruction at the primary level would be in the minority language, and to other institutions.²³ In exceptional cases, the Minority Treaties granted a number of special rights in favour of certain minorities such as the Valachs of Pindus or the Saxons of Transylvania.

Unlike the earlier treaties, which contained guarantees that were to be implemented by the treaty parties themselves, the League system vested oversight of the guaranty in the League Council and in the Permanent Court of International Justice (PCIJ). Each state undertook to implement the treaty guarantees in its domestic legal system and to invalidate all contrary laws and regulations. If violation of rights involved persons of racial, religious or linguistic minorities, obligations of "international concern" were implicated and the League Council and the PCIJ could be called upon to enforce the international obligation. However, the minorities themselves could not directly petition the PCIJ. Rather, they and states represented in the Council could petition the League and, if deemed admissible by the Secretary-General, an ad hoc minorities committee would be appointed to investigate the matter and try to reach a friendly settlement.²⁴ Exceptionally, the German-Polish Convention relating to Upper Silesia of 1922 established the right of individuals to directly petition and appear individually or collectively before the Council and the Mixed Commission, thus foreshadowing the complaint procedures adopted under international human rights instruments in force today.²⁵

The PCIJ was vested with compulsory jurisdiction in disputes between a state member of the Council and a state in which there was a minority. Although the compulsory jurisdiction of the Court was not implemented, it delivered eight advisory opinions.²⁶ Its most important opinion was the landmark case involving minority schools in Albania, which established

the proposition that, under the League regime, the state had a twofold obligation. The first was to ensure that nationalities belonging to minorities should be granted equality before the law. The second was an affirmative duty to ensure for the minority “suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics”.²⁷

Although the League system of minority protection to some extent diminished the abuse of minority rights and unilateral intervention by states, its effectiveness was limited. The League system was resented as a violation of their sovereignty by those states that were required to agree to the League restrictions. Further, the system did not establish a general jurisprudence applicable to minority issues and applied only to a small number of states.²⁸ Finally, the system was abused by some states. For example, the issue of German minorities in the kin-states of Poland and Czechoslovakia became a significant, albeit pretextual, precipitating factor for German aggression and the Second World War.²⁹ Hitler skilfully used the nationality issue to divide Europe by claiming for Germany territories that ethnic Germans occupied. His stated ideal of uniting all Germans within the German fatherland was the basis of a policy that escalated into aggression.

It is not surprising, therefore, that the drafters of the UN Charter discarded special minority protection through international agreements in favour of a human rights regime based on equality and non-discrimination. Indeed, the treaty between Finland and Sweden on the Status of the Åland Islands (1921) is the only treaty to survive the era following the First World War that incorporated the bilateral approach.³⁰ In his report on the question of the legal validity of the League of Nations minority protection regime, the Secretary-General stated:

[The system] as a whole was overthrown by the Second World War and . . . the international decisions reached since 1944 had been inspired by a different philosophy, that is by the idea of a general and universal protection of human rights. Reviewing the situation as a whole, therefore, one is led to conclude that between 1939 and 1947 circumstances changed to such extent that, generally speaking, the system should be considered as having ceased to exist.³¹

Both the UN Charter and the Universal Declaration of Human Rights accepted the principle of equality and non-discrimination for all individuals, rather than special minority protection, and neither document contains any reference to minorities. As a consequence, issues of minority protection were left to the states to deal with, either internally or bilaterally.

South Tyrol and the bilateral approach

One early successful example of the bilateral approach is that taken by Italy and Austria in resolving the status of the German-speaking minority in Italy, a source of lingering conflict between the two states. The historic Gruber–De Gasperi Agreement in 1946 and subsequent agreements addressed the status of the German-speaking minority in Italy, but implementation was a source of contention for both parties for almost 50 years.³² With UN oversight and prodding and extensive negotiations and compromise by both parties, the final resolution of the conflict is now considered a success story in the often troubled history of ethnic relations. Indeed, it can provide guidance for contemporary bilateral agreements and their implementation as a method of preventing escalation of disputes.

The ethnic conflicts in South Tyrol, the northernmost province in Italy, have ancient roots motivated in part by its strategic location near the Brenner Pass. Varied and complex groupings of peoples settled in the tiny region, and the area's customs and languages reflected the numerous invasions, both before and after it became an official part of the Holy Roman Empire in February 1364. Though the land was then politically controlled by the Habsburgs, its culture was not. In the twelfth century, the influence of the Italian cultural presence was evident, and the Italian trade and clergy ensured that it would continue. Holy Roman Emperor Joseph's (1780–1790) attempt at state centralization failed, but the principle that public officials should be Italian in Italian-speaking areas and German in German-speaking areas, while in mixed areas officials should be bilingual, was well established.³³

From the end of the nineteenth century to the start of the First World War, Italy was a member of the Triple Alliance with Austria and Germany. However, at the outbreak of the First World War, Italy joined the Western powers and at the conclusion of the war was awarded the South Tyrol region despite the fact that for more than eight centuries South Tyrol belonged to Austria. Also, the peace programme set forth in President Woodrow Wilson's "Fourteen Points" (listed in a speech delivered to a joint session of the United States Congress on 8 January 1918), recommended a "re-adjustment of the frontiers of Italy . . . along clearly recognizable lines of nationality".³⁴ Approximately 85 per cent of the inhabitants of the region were German-speaking Austrians.³⁵ Bolzano, the largest city in the region, had 30,000 inhabitants of whom 4,000 were Italian. Since Italy was a victorious power, it was not obligated by the League of Nations to sign a minority treaty governing relations with its new citizens. However, some limited recognition of cultural and linguistic accommodation was offered. The German population in South Tyrol was

recognized as a nationality, and the German and Italian languages were to remain equal.³⁶

The rise of Italian fascism put an end to this accommodation. When Benito Mussolini seized control in 1922, his fascist regime began to “Italianize” South Tyrol. A 32-point programme for denationalization was adopted that: (1) established Italian as the only official language; (2) required the dismissal of all German clerks who did not speak Italian adequately; (3) abolished or forbade the use of the German name for South Tyrol (Südtirol); (4) encouraged Italians to move to the area; and (5) abolished the decree recognizing the legitimacy of Austrian and German diplomas and even the use of German on tombstones.³⁷ Street names were changed; surnames of German-speaking families were “Italianized”; and the German language could no longer be used in legal transactions.³⁸

Massive migration from southern Italy swelled the population and the percentage of Italian speakers in the province increased. The effect on the German population in South Tyrol was severe. The lack of German schooling and culture, as well as the removal of many promising young people of German descent from public service, took many possible leaders and politicians from the region.³⁹ The treatment of the German-speaking population in South Tyrol caused much resentment in Germany and Austria. In October 1939, an agreement between Nazi Germany and Italy was reached whereby the South Tyrolese were given the option of either transferring to the Reich and giving up their homeland or remaining and accepting complete assimilation.⁴⁰ Partly because of the pressure exerted by Germany, approximately 80 per cent opted to resettle, but the Second World War disrupted the programme and only about one-third actually left.⁴¹ Many of those who left were the young, urban residents and workers, leaving a German-speaking population without a politically active middle class.⁴²

Although, following the Second World War, a general movement for self-determination of South Tyrol was supported by Austria, South Tyrol remained part of Italy. Austria, as a defeated state, was then under four-party occupation and its future was uncertain. However, the Allies urged Italy and Austria to reach an amicable agreement on the status of South Tyrol. In September 1946, the Italian Foreign Minister, Alcide de Gasperi, and the Austrian Foreign Minister, Karl Gruber, signed an agreement, the Gruber–De Gasperi Agreement, which was annexed to the Paris Peace Treaty.⁴³ It provided that the German-speaking residents of Bolzano and Trento would receive complete equality of rights with their fellow Italians, education in the mother tongue and access to public administration, as well as special provisions to protect their ethnic character and cultural and economic development.⁴⁴

The language of the document was innovative, referring to a community of people, the “German-speaking element”, not individual members of the group. The Gruber–De Gasperi Agreement guaranteed expansive autonomy to South Tyrol, including autonomous legislative and executive power. Austria assumed the role of protecting power. The Agreement was not well received by some Austrians and South Tyrolese who insisted on a right of self-determination and reunification of South Tyrol with Austria. In the face of these continuing claims for self-determination but following minimal consultation with the population, Italy adopted the Autonomy Statute of 1948, which was, in fact, quite restrictive and linked South Tyrol with the Trento Province, where the Italian-speaking population was dominant.⁴⁵ The provincial government did not have any meaningful powers and the state was required to fund its projects. On the other hand, German cultural identity was restored through the re-establishment of German-language schools, the recognition of the German language in all official proceedings and the restoration of German names that had previously been “Italianized”.

In the 1950s, frustrations over the lack of implementation of the Agreement emerged in the form of mass demonstrations and terrorist activities involving ambushes of border patrols, bombings of trains and power pylons, and deaths of civilians, activities that continued for almost two decades.⁴⁶ There were even accusations from Rome that Austria failed to stop shipments of explosives into the region.⁴⁷ Some believed that the activities had progressed to such a level that only self-determination for the region could resolve the conflict.⁴⁸ In 1957, 35,000 South Tyrolese rallied in support of autonomy for South Tyrol and were supported in their demands by Austria.⁴⁹

Initially, in 1955 Austria proposed bilateral negotiations with Italy to resolve the issue but Italy agreed to participate only in non-binding talks. The Austrian government, in its role as protector of the province’s interests, brought the South Tyrol situation to the attention of the United Nations in both 1960 and 1961.⁵⁰ In 1960, on the General Assembly’s agenda for discussion was: “The status of the German-speaking element in the Province of Bolzano (Bozen): Implementation of the Paris Agreement of 5 September 1946.” Italy objected to placing the matter before the United Nations on the grounds that the matter was internal and suggested that issues be resolved by the International Court of Justice at The Hague. Nevertheless, the General Assembly passed a resolution calling on Italy and Austria to reach a solution by peaceful means, starting with bilateral negotiations. As a practical matter, it was necessary for Italy to arrive at an accommodation with Austria in order to remove the item from the agenda.⁵¹

Extensive negotiations continued for more than 30 years and involved, at times, not only the two states but also the Council of Europe, the United Nations and the Catholic Church. In 1969, both sides went to Switzerland's Moral Rearmament conference centre in an attempt to address the concerns regarding the improved Autonomy Statute.⁵² The understanding reached between the two countries resulted in a "Package" of 137 draft bills and administrative measures designed to give greater autonomy to the 230,000 German-speaking inhabitants in the region. The package in effect de-linked Trento from South Tyrol and gave the latter control of its own budget, economic planning and schooling, established parity in the use of the Italian and German languages in public affairs and required that two-thirds of state jobs be held by German speakers.⁵³ The Austrian parliament reluctantly approved the package after its foreign minister cautioned that Austria must be "realistic" since neither West nor East wanted a change of borders between Italy and Austria.⁵⁴ In addition, the Alto Adige region was to be officially called South Tyrol.⁵⁵

An Autonomy Statute, which amended the 1948 Statute, was adopted in 1970 and contained specific and detailed provisions. It provided that the administrative and legislative powers of agriculture and tourism, as well as other sectors previously controlled by the Italian state, be transferred to the Province of South Tyrol. German speakers were assured an ethnic proportion within the bureaucracy. The province automatically received a percentage of any state expenditure in pertinent areas of social welfare and economy. The province could contest state laws before they reached the Constitutional Court.⁵⁶

Finally a new Autonomy Statute was adopted in 1972 in which both Bolzano and Trento received autonomous status and exclusive legislative competence in several fields of regulation.⁵⁷ This Statute was to be implemented by a Joint Commission where representatives of the state and province could meet on an equal footing with respect to implementation decrees of the region and the provinces. It took 20 years for the Autonomy Statute to be fully implemented despite the fact that the Statute called for implementation of enactment decrees within two years of its entry into force.⁵⁸ Despite some setbacks, a period of collaboration began between the two ethnic groups and countries, spanning almost two decades of commitment and extensive discussion. After more than half a century of conflict, by a vote of 125 to 30 the General Assembly in 1992 declared that Italy fully complied with the Agreement of 1946 and effectively withdrew Austria's complaint to the United Nations.⁵⁹

Undoubtedly, a key to the successful resolution of the conflict was the international oversight provided by the United Nations and the establishment of the Joint Commission to oversee implementation of the Agreement.

The resolution of the South Tyrol issue demonstrates that sensitive and volatile minority issues can be addressed by bilateral mechanisms and initiatives that reflect a willingness to discuss the national minority's issues on both a legal and a political basis. It further demonstrates that kin-states can play a constructive and preventative role in resolving minority tensions.

Bilateral treaties after the Second World War

Although in the post-war years there was a reluctance to deal with the issue of minority protections at the international level, during the same period a number of bilateral treaties embodying minority protections were concluded. For example, in addition to the 1946 Agreement between Italy and Austria, Pakistan and India entered into an agreement in 1950 with provisions for religious minorities, and the London Treaty of 1954 concerning Trieste extended protections to Italians and Yugoslavians. Following the end of the Cold War, states throughout Central and Eastern Europe became increasingly concerned and involved in the protection of kin-minorities. References to kin-minorities were included in a number of national constitutions, including those of Germany, Hungary, Romania, Slovenia, Macedonia, Croatia, Ukraine, Poland and Slovakia. At the same time, a number of bilateral agreements, declarations and accords pertaining to minority rights were issued.

The European Union favoured bilateral treaties as a method of achieving stability in the region because such agreements could embody specific commitments on sensitive issues and at the same time directly reflect the specific characteristics and needs of each national minority, as well as the historical, political and social context of each situation. The majority of these instruments between the “kin-state” or “mother country” and the “home-state” of the minority population are either free-standing treaties specifically designed to deal with minority issues or contain provisions in a more comprehensive Treaty of Friendship and Cooperation. Through these bilateral agreements, kin-states seek maximum protection for their minorities, while home-states aim at achieving equal treatment and integration of the minorities, thus preserving the integrity of their borders. Bilateral agreements generally contain commitments to respect international norms and principles regarding national minorities.⁶⁰ Several bilateral agreements incorporate soft law provisions such as the principles contained in the Copenhagen Document on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE),⁶¹ thus converting soft law principles into binding legal obligations. They also give greater specificity to and implement the minority protections

contained in international agreements such as the Council of Europe's Framework Convention for the Protection of National Minorities.⁶²

Most treaties provide for the protection of classic core rights, such as freedom of expression and association, linguistic and cultural rights, educational rights and use of the media. Some also refer to transborder contacts and preservation of architectural heritage. Bilateral treaties also stress the obligation of national minorities to their home-state.⁶³

One example of a bilateral treaty that dealt with extremely divisive historical issues in an innovative and expansive way and is often considered a model for bilateral minority protection is the treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighborly Relations and Friendly Cooperation concluded in 1991.⁶⁴ Through the bilateral treaty, two historic adversaries endeavoured to "close the painful chapter of the past" and to finally "overcome the division of Europe and to create a just and lasting European peace order" with the "awareness of their common interests and their common responsibility for the development of a new and free Europe that is united by human rights, democracy and the rule of law". Indeed, the very existence and rights of a German minority in Poland and a Polish minority in Germany were disputed at various times by both parties and had been a subject of dispute between the two countries since the close of the Second World War.⁶⁵

Following the Second World War, the Potsdam Agreement provided that persons of German origin in Poland, Hungary and Czechoslovakia be transferred to Germany. The minority situation in these countries was further complicated by the German Basic Law, which provided that all persons who were nationals of the former German Reichstadt be treated as Germans under German municipal law. Thus, some persons residing in Poland could claim that they were German under German law and entitled to emigrate to Germany.⁶⁶ Although specifically not dealing with the issue of citizenship, the treaty between Poland and Germany defines members of the ethnic minority within the state as nationals of the state in which they reside. However, members of the minority group may still declare language, culture and traditions as those of the other state, depending on their origin. Thus, the individual has the right to declare minority status and does not incur any negative consequence for making such a declaration. The treaty incorporates by reference the relevant international standards for minority protections including: the Universal Declaration of Human Rights, the European Convention on Human Rights and the Basic Freedoms, the 1966 Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Civil and Political Rights, the Helsinki Final Act of 1975, the 1990 Copenhagen Document on the Human Dimension of the CSCE and the Charter of Paris for a New Europe of 1990.⁶⁷

Both countries are required to create conditions to promote the minority groups' identity, including instruction in their natural language, teaching their history and culture and encouraging participation in public affairs and decision-making.⁶⁸ Like most bilateral treaties that deal with minority issues, the treaty affirms the principle of the territorial integrity of states and requires minorities to act loyally and in conformity with the laws of the state⁶⁹ of their declared citizenship.⁷⁰ Clearly, the treaty has reduced the potential for conflict between the parties and has furthered respect for minority groups in each country.

Hungary has also utilized the bilateral treaty approach to address the issue of ethnic Hungarians living outside of its borders. At the present time, nearly one-third of the world's Hungarian population lives outside of Hungary, and substantial minority communities can be found in Romania, Slovakia, Ukraine and Serbia.⁷¹ The Hungarian Constitution (as revised in 1989) provides: "The Republic of Hungary bears a sense of responsibility for what happens to Hungarians living outside of its borders and promotes the fostering of their relations with Hungary."⁷²

In furtherance of this policy, Hungary entered into bilateral agreements with its neighbours. In May 1991, a joint declaration was issued on the principles of cooperation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic guaranteeing the rights of national minorities.⁷³ This declaration affirms the principle of the territorial sovereignty of states and requires members of national minorities to observe the laws of the country in which they live. Forced assimilation is prohibited and citizens have the right to decide to which minority they want to belong.⁷⁴ The declaration affirms the linguistic and religious rights of minorities and requires each party to forbid activities and propaganda that evoke violence, hatred and dissent on nationality grounds.

The Treaty on Good-Neighborly Relations and Friendly Cooperation between the Republic of Hungary and the Slovak Republic of 19 March 1995 contains similar provisions regarding minorities. This treaty goes further, however, and specifically incorporates the relevant international documents for minority protection, including: the Framework Convention, the Copenhagen Document, the UN Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and Recommendation 1201 promulgated in 1993 by the Parliamentary Assembly of the Council of Europe. However, subsequent to the signing of the treaty, Slovakia adopted restrictive laws in the fields of language use, administration, education and culture that were protested by Hungary.

Bilateral treaties were also concluded by Hungary with Slovenia, Russia and Croatia and incorporate by reference relevant international documents pertaining to minority protection.

In September 1996, Hungary concluded a treaty with Romania that deals with minority rights – the Treaty of Understanding, Cooperation

and Good Neighbourliness.⁷⁵ Fully one-quarter of the text pertains to national minorities, an issue of contention between the two countries. Following the First World War and again after the Second World War, Transylvania, with over 2 million ethnic Hungarians, was transferred to Romania, contributing to the tension and distrust that existed between the nations.⁷⁶ The treaty addresses minority issues in detail, applies the principles set out in the Framework Convention⁷⁷ and incorporates the relevant international human rights agreements, including documents promulgated by the United Nations, the OSCE and the Council of Europe. Similarly to the treaty between Poland and Germany, this treaty provides for freedom of expression and religious identity, and allows the creation and maintenance of institutions for educational, cultural and religious instruction. Further, it permits the use of the national language of the minority group in transactions and teaching so that the national language will be reflected in surnames, topographical locations and media information. The treaty encourages minority participation in political, social, economic and cultural life and works to preserve minority culture and tradition. It requires that members of national minorities comply with the laws under which they live.

A key component of the success of these conventions and instruments is the creation of a joint intergovernmental commission to discuss issues relevant to the minorities such as implementing obligations and recommendations. These commissions are political bodies and do not adjudicate individual complaints. They have been criticized for their lack of minority representation and for their failure to meet as often as set forth in their mandate. However, one must note that conflict in the region has been prevented over the years and that bilateral treaties with a joint oversight committee have been successful.

Russia has also pursued a specific policy of entering into bilateral treaties with its neighbours on a range of issues, including minority protection. As a result of the policy of forced relocation of national populations and mass immigration of Russians to newly annexed territories during the Stalin era, ethnic Russians are a substantial minority in many of the former Soviet republics that are now independent states. Russia has strenuously asserted its responsibility to protect Russians wherever they reside.⁷⁸ At the present time it is estimated that approximately 25 million people of Russian nationality live outside of Russia.⁷⁹ Thus, the "Russian minority question" has come to play a central role in defining relations between Russia and its former republics.⁸⁰

In furtherance of this policy Russia has entered into more treaties that attempt to address national minority issues than any other state in Central or Eastern Europe.⁸¹ Bilateral agreements containing minority protections have been concluded with former republics, the Baltic States

and other countries including Poland, Finland, Hungary, Slovakia and the Federal Republic of Germany. Russia has also concluded a Commonwealth of Independent States (CIS) convention that guarantees the rights of persons belonging to national minorities. However, the CIS standard on minority rights does not meet international standards and has been criticized as biased towards the protection of ethnic Russians. In addition, the bilateral treaties do not fully incorporate international standards on minority protections⁸² and, although Russia had previously urged that the treaties allow for dual citizenship, it has since relinquished that claim. The Russian position has been criticized as indicating a pattern that avoids full implementation of OSCE, UN and Council of Europe norms.

In May 1997, the Treaty of Friendship, Cooperation and Partnership was signed between the Russian Federation and Ukraine. While dealing with a range of issues including disarmament, coordination of economic trade and customs policy, and cooperation in relief work and rescue operations, it also addresses minority concerns. Unlike the Hungarian and the Polish–German models, the treaty does not attempt to define minority, although it does embrace the equality and non-discrimination principles of Article 27 of the International Covenant on Civil and Political Rights. However, the treaty does not specifically incorporate the relevant international documents relating to minority protection, such protection being spelled out in general terms.⁸³

The situation of ethnic minorities in the Baltic republics has been closely watched by Russia and has been the source of great tension. Russia has repeatedly accused the Baltic States of “gross violations of human rights”. In addition Russia has accused some Central Asian republics of “Islamic fundamentalism”.⁸⁴ After declaring independence from Russia, both Estonia and Latvia enacted a law on languages and restrictive citizenship laws that in effect excluded most Russians who took up residence in those countries after 1940 from becoming citizens.⁸⁵ These measures provoked a sharp reaction from Moscow, which claimed that “[t]he principle of good neighborliness has been put into jeopardy,”⁸⁶ but, after much negotiation, bilateral treaties have been concluded with each of the Baltic States.

The effectiveness of the bilateral treaties that Russia has concluded as a vehicle for minority protections has been questioned by one Russia expert as follows:

It is not clear that these agreements have resulted in reduction of tensions or improvement of the lot of minorities, nor is it clear that such was the treaties’ intention. Instead, they appear designed to further a variety of national aims and have been negotiated in parallel with discussion of what minority status means within Russia and the other former Soviet republics, most specifically

the role and status of ethnic Russians outside Russia. These unsettled conditions, the lack of specificity in treaty provisions of follow-up programs, and the tenuous sovereignty of many governments of the region set these treaties apart from the paradigmatic Polish-German treaty or the minority-specific agreements Hungary has pursued. These conditions have made Russia's treaties less than ideal, and less than effective.⁸⁷

The role of kin-states

Kin-state activism on behalf of co-ethnics abroad is a result, in part, of the redrawing of national borders or population shifts following political upheavals or war. For the purposes of this discussion, a kin-state refers to a state that shares ethnic, cultural or religious bonds with co-ethnics abroad, and in which the political actors within the state have a commitment to their well-being. As was the case in the dispute between Austria and Italy concerning the South Tyrol, the kin-state is sometimes viewed as the guardian of the co-ethnics abroad. Thus, Austria's official designation vis-à-vis the German speakers in the South Tyrol in the Gruber-De Gasperi Agreement with Italy was *Schutzmacht* or "protector power".

Kin-states and host-states can border one another, be geographically close or in some instances be geographically separated, such as the situation between Russia and some of the Baltic nations in which ethnic Russians and Russian-speaking populations now reside. Kin-state involvement on behalf of its co-ethnics abroad is usually directed towards the strengthening of co-ethnic communities abroad, promoting cross-border interaction or facilitating the movement of co-ethnics to their kin-state. These efforts might be direct, through benefit laws and preferential naturalization procedures, or indirect, through bilateral diplomacy or international initiatives. Benefit laws often provide for educational or professional training in the home-state and sponsorship of cultural events and language training. Benefits might also include material assistance and preferential treatment with respect to resettlement in the kin-state. Through indirect efforts at the international or multilateral level, the kin-state might aggressively support minority protection initiatives and intensive monitoring of minority rights.

As past events have tragically demonstrated, wholesale discrimination and even violence against a vulnerable minority are all too frequent occurrences. Thus, from the perspective of the kin-state, an active engagement with the home-state is sometimes prudent and also warranted. However, the motives of states are complex and mixed and the kin-state role can be viewed as either a constructive or a disruptive factor in the relationship among the various actors. Although kin-states have some-

times played a constructive role in resolving minority concerns, it must also be acknowledged that kin-state interest and behaviour with respect to the status of minorities in the home-state are often motivated by domestic policies and can have a destabilizing effect, and are often viewed as interfering in the domestic affairs of another state and a violation of sovereignty.

For example, although Hungary and Romania had entered a bilateral agreement that included provisions for minority protections, relations between the two countries were strained over a Hungarian law that granted special rights to ethnic Hungarians in neighbouring countries without prior consultation with Romania. The Act on Hungarians Living in Neighbouring Countries, commonly referred to as the Status Law, states that persons in those neighbouring countries who declare themselves to be of Hungarian nationality, but are not Hungarian citizens for reasons other than voluntary renunciation, and who meet other stated requirements would be entitled to special visas, work permits, scholarships and other educational assistance, preferential access to cultural facilities, access to the social security and healthcare systems in Hungary, and certain other benefits, some of which are normally available only to Hungarian citizens or residents.⁸⁸ Romania, which has the largest Hungarian minority in the region, contended that the measure was discriminatory and in violation of European standards.⁸⁹ The matter was eventually referred to the Venice Commission, which stressed the primacy of state sovereignty and human rights, and affirmed the principle that responsibility for minority protection lies primarily with the home-state. It also noted that the international community should monitor whether a state fulfils that duty and that kin-states too play a role in the protection and preservation of their kin-minorities, particularly with respect to ensuring that their genuine linguistic and cultural links remain strong. The Commission reaffirmed the importance of international standards on minority protection and the effectiveness of the multilateral and bilateral treaties in implementing these standards.⁹⁰

In the Commission's opinion, a state may adopt unilateral measures concerning kin-minorities who live in other countries provided the following principles are respected:

- the territorial sovereignty of states;
- *pacta sunt servanda*;
- friendly relations among states;
- respect for human rights and fundamental freedoms, in particular the prohibitions on discrimination.⁹¹

With respect to territorial sovereignty, if the effect of a measure takes place entirely within the kin-state – such as educational or occupational benefits in the kin-state – the consent of the home-state is not necessary.

However, when the effect of the measure would occur in the home-state – such as language training and cultural programmes in the home-state – consent of the home-state should be secured. Indeed, in all instances, the interests of the kin-state should be pursued in cooperation with the home-state. Such cooperation can include bilateral and multilateral initiatives or intergovernmental committees. Any administrative or quasi-official function performed in the home-state such as the certification of benefit eligibility would be a violation without the approval of the home-state.

Thus, it is clear that kin-states are allowed to extend benefits to persons residing abroad, and their interest in the well-being of minority groups abroad is legitimate. As noted by the OSCE High Commissioner on National Minorities in 2009, the extension of such benefits can, and often does in fact, contribute to the well-being of minority groups. However, it does not imply a right under international law to exercise jurisdiction over these persons on the territory of another state. The influence and interests of the “kin-state” can and should be pursued in cooperation with the state of residence. By doing this, benefits such as cultural and educational opportunities, travel grants, work permits, facilitated access to visas and the like can ease international relations and help minorities serve as bridges in relations between states and contribute to regional friendship and prosperity.⁹²

The issues that the Hungarian Status Law dealt with are often the subject of bilateral treaties of friendship and cooperation. Indeed, the issues that provoked the ire of the kin-state could well have been discussed and resolved in the context of treaty negotiations and dialogue on implementation of the treaty. Such treaty discussions and negotiations would have been preferable to the after-the-fact adversarial discussions and escalation of tensions that followed the adoption of the Status Law.⁹³

Structure of bilateral accords

The recent bilateral agreements embodying minority protection take different forms but arose in similar contexts and have similar characteristics that might make this approach successful in other situations of ethnic conflict. Factors common to successful bilateral treaties include:

- each situation involved a change in territorial boundaries or the disintegration of an existing state and the creation of new states resulting in national minorities within a state;
- the interest of each of the ethnic minorities involved was urged by the kin-state through international, political or legal channels;

- both states displayed a willingness to engage in dialogue and showed a commitment to arriving at an amicable solution;
- the existing norms pertaining to minority protection found in the international and regional documents were referred to; and
- irredentist or secessionist goals were specifically discarded in favour of accommodation.

In addition, the treaties and declarations embody common principles and protections. For example:

- the individual is given the option of declaring minority status and suffers no detriment for making such a determination;
- the territorial integrity of each state is respected and assured by the treaty;
- forced assimilation is not allowed;
- allegiance to the state in which minorities live is required of the minorities; and
- cultural autonomy, including language and religion, is assured.

Although bilateral agreements can contribute to regional stability and confidence-building, the drawbacks to this approach have been identified by Gudmundur Alfredsson as follows:

- the danger of reduced standards as compared with the international and regional instruments,
- the emphasis on political rather than legal commitments,
- the unequal position of the parties to the situation,
- the possible discrimination between different groups within a contracting state, prompting a proposal for the “most-favoured minority clause”, and
- the possible destabilizing effects on relations between the parties.⁹⁴

Minorities without a kin-state, for example the Roma, are unlikely to benefit from bilateral treaties. Therefore, in order to avoid “a most-favoured minority” situation, bilateral treaties should require that benefits conferred to a kin-group be applied equally to all minorities within the state. Thus, Asborn Eide has recommended that, “[w]here specific minorities are mentioned in such provisions, the treaty should contain an additional provision ensuring that minorities not mentioned in the treaty shall enjoy the same level of protection and promotion of their existence and identity”.⁹⁵ Such a provision would be in accord with the equality and non-discrimination human rights norms.

Further, in order to be effective, a dispute settlement mechanism should be included in the treaty. Bilateral treaties and, indeed, multilateral treaties that deal with minorities now generally create a complaint mechanism procedure. However, the procedure is typically a political rather than a legal process and often lacks minority representation. The

successful implementation of the treaty between Italy and Austria pertaining to South Tyrol can be attributed in part to the oversight provided by outside bodies, including the United Nations. The successful defusing of ethnic tensions through the bilateral route undertaken by Hungary and its neighbours can be attributed in great part to the inclusion of oversight mechanisms, such as the joint intergovernmental commissions, which include minority representation. Thus, bilateral treaties should provide an effective mechanism to resolve differences and, failing successful bilateral resolution, a mechanism for international or regional oversight for early prevention and dispute settlement. Although it is this feature of international oversight that would enhance the effectiveness of the treaty, it is precisely this aspect that might encounter the most reluctance based on claims of sovereignty from the interested states. Whereas in the 1990s many international actors, including scholars and governments, celebrated the “demise of sovereignty”, it has made a dramatic comeback and is forcefully advanced by powerful states such as Russia and China. Smaller states and developing countries have similarly embraced sovereignty as a principle to resist international intervention and oversight, particularly in domestic human rights policies. Thus international oversight of bilateral treaties is likely to be resisted.

Conclusion

The study of minority protection and its relation to R2P continues, but some preliminary conclusions can be drawn. Minority conflicts are sensitive to historical, social and political factors, and thus effective measures to ensure minority protection must be carefully crafted and context specific to take these factors into account. There is no uniform formula that can be applied to resolve the ever-increasing number of ethnic conflicts throughout the world; rather, a range of options and mechanisms should be implemented. These include both political and legal strategies.

The bilateral route has been utilized primarily in the European context to address minority tensions. This mechanism might be successfully utilized in other areas of the world that are also subject to minority tensions. Building on the lessons of the past and consistent with their present responsibilities, the nations involved should be encouraged to take the recommendation of various international and regional organizations and pursue a bilateral resolution of minority issues as one strategy. Models now exist and can be tailored to the unique situation of the states involved. Developed international norms and standards can be incorporated into these bilateral arrangements, either by reference or through specific text, and the bilateral treaty can be specifically tailored to ad-

dress the existing situation of the national minority involved. In addition, through this bilateral route, tensions can be reduced; each state affirms its commitment to respect borders, requires allegiance to the state of residence of its ethnic nationals, and rejects all claims of secession.

The R2P, which states have agreed to, includes the responsibility to prevent. However, it must be recognized that R2P is an embryonic doctrine and the specific obligations of individual states, absent UN involvement, to implement the R2P responsibilities continue to evolve. The adoption of bilateral treaties that address ethnic tensions that could escalate into serious conflicts should be viewed as one mechanism that could be utilized in the R2P prevention obligation, provided that the parties approach negotiations from a position of good faith and equality.

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Notes

1. UN General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005, paras 138–140; available at <<http://www.un.org/summit2005/documents.html>> (accessed 14 December 2010).
2. *Ibid.*, para. 138.
3. *Ibid.*, para. 139. The UN Security Council has since endorsed R2P in resolutions concerning the protection of civilians in armed conflict and peacekeeping in southern Sudan and Darfur. See UN Security Council Resolution 1674 (2006), UN Doc. S/Res/1674, 28 April 2006; UN Security Council Resolution 1755 (2007), UN Doc. S/Res/1755, 30 April 2007.
4. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), paras 3.1, 4.1, 5.1; available at <<http://www.iciss.ca/pdf/Commission-Report.pdf>> (accessed 6 December 2010).
5. David Wippman, “The Evolution and Implementation of Minority Rights”, *Fordham Law Review* 66 (1997), pp. 597, 598.
6. See, generally, A. Bloed and P. van Dijk (eds), *Protection of Minority Rights Through Bilateral Treaties: The Case of Central and Eastern Europe* (The Hague: Martinus Nijhoff Publishers, 2000).
7. European Commission for Democracy Through Law [Venice Commission], *Report on the Preferential Treatment of National Minorities by Their Kin-State, Adopted by the Venice Commission at Its 48th Plenary Meeting (Venice, 19–20 October 2001)*, CDL-INF(2001)19, Strasbourg, 22 October 2001; available at <[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp)> (accessed 6 December 2010).
8. Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging*

to *Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1 (New York: United Nations, 1979).

9. Asbjorn Eide, "Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities", Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Session, Agenda Item 17, addendum 4, paras 27–28, UN Doc. E/CN.4/Sub.2/1993/34/Add.4, 11 August 1993. He further states:

The contents of provisions on minorities contained in such treaties and other bilateral arrangements should be based on universal and regional instruments on equality, non-discrimination and minority rights, including the Document of the Copenhagen Meeting on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE) of 1990 and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. . . .

Such treaties should include provisions for the settlement of disputes over their implementation. Should disputes arise over the implementation of and compliance with such bilateral treaties or other arrangements, the State parties should first seek a solution in accordance with the procedure foreseen in the treaty or arrangement. When a State feels that this does not give satisfaction to its concern, it should turn to the relevant regional or United Nations bodies for assistance in conflict resolution. Such assistance could include fact-finding, monitoring, the use of advisory services and, where appropriate, other mechanisms as envisaged by the Secretary-General of the United Nations in his *Agenda for Peace*.

10. Council of Europe, "Framework Convention for the Protection of National Minorities", Art. 18(1), Eur. Parl. Ass., 95th Session (1995), 34 ILM 351; available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm>> (accessed 7 December 2010).
11. OSCE High Commissioner on National Minorities, "The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note", June 2008, para. 18; available at <http://www.osce.org/publications/hcnm/2008/10/33388_1189_en.pdf> (accessed 6 December 2010).
12. Statement by Rolf Ekéus, OSCE High Commissioner on National Minorities, "Sovereignty, Responsibility, and National Minorities", The Hague, 26 October 2001; available at <<http://www.osce.org/hcnm/53936>> (accessed 7 December 2010).
13. Danilo Türk, "Protection of Minorities in Europe", in Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, Vol. III, Book 2 (Dordrecht: Kluwer Academic Publishers, 1994), pp. 143–206, at p. 152.
14. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, p. 1.
15. Gaetano Pentassuglia, *Minorities in International Law: An Introductory Study* (Strasbourg: Council of Europe, 2002), p. 25.
16. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, p. 1.
17. The Treaty of Oliva (1660) between Sweden and Poland granted free exercise of religious rights to Roman Catholics in the territory of Livonia ceded by Poland to Sweden, and the Treaty of Nijmegen (1678) between France and Holland guaranteed freedom of worship to the Catholic minority in the territories ceded by France; see also Türk, "Protection of Minorities in Europe". Türk discusses the Protestant Reformation's effect on seventeenth-century Europe, its creation of a new religious status and the beginnings of international acknowledgement. Türk highlights that religious freedom and non-

- discrimination were bulwarks of the first international treaties. Such treaties included the Treaty of Paris (1763) between France, Spain and Great Britain, which protected Catholics' freedom of worship. For further description of provisions in treaties prior to the implementation of the minorities system of the League of Nations, see Türk, "Protection of Minorities in Europe", pp. 152–155.
18. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, p. 2.
 19. *Ibid.*, p. 3.
 20. Inis L. Claude Jr, *National Minorities: An International Problem* (Cambridge, MA: Harvard University Press, 1955), pp. 8, 9.
 21. Türk, "Protection of Minorities in Europe", p. 155.
 22. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, pp. 17–18; see also Türk, "Protection of Minorities in Europe", p. 156.
 23. Hurst Hannum, "Contemporary Developments in the International Protection of the Rights of Minorities", *Notre Dame Law Review* 66 (1991), pp. 1431, 1432–1433. Hannum cites generally: Claude, *National Minorities*, pp. 17–20; Oscar Janowsky, *Nationalities and National Minorities* (New York: Macmillan, 1945), pp. 112–115; Carlile A. Macartney, *National States and National Minorities* (London: Oxford University Press, 1934), pp. 273–294; Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, pp. 18–19; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Treaties and International Instruments Concerning the Protection of Minorities, 1919–1951*, UN Doc. E/CN.4/Sub.2/133 (1951), paras 2–12.
 24. Pentassuglia, *Minorities in International Law*, p. 28.
 25. See Petition procedures in the "Optional Protocol to the International Covenant on Civil and Political Rights", General Assembly Resolution, UN Doc. A/RES/2200(XXI)A, 16 December 1966, *General Assembly Official Records: 21st Session*, Supplement No. 16 (A/6316) (New York: United Nations, 1967), p. 59, entered into force 23 March 1976; see also "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", General Assembly Resolution 39/46, UN Doc. A/RES/39/46, 10 December 1984, *General Assembly Official Records: 39th Session*, Supplement No. 51 (A/39/51) (New York: United Nations, 1985), p. 197, entered into force 26 June 1987.
 26. For the list of advisory opinions see Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, p. 24.
 27. *Minority Schools in Albania (Greece v. Albania)*, PCIJ, Ser. A/B, No. 64, 6 April 1935, p. 14. The Treaty of Lausanne of 1923 recognized the independence of the Republic of Turkey. Although it also provided for the protection of the Greek Orthodox minority in Turkey and the Turkish Muslim minority in Greece, its effectiveness was limited since the minority populations were deported under the exchange of populations agreements.
 28. Türk, "Protection of Minorities in Europe", p. 159; Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, pp. 25–26; Pentassuglia, *Minorities in International Law*, p. 28.
 29. Pentassuglia, *Minorities in International Law*, pp. 28–29.
 30. *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, League of Nations Official Journal, Spec. Supp. No. 3 (1920).
 31. UN Economic and Social Council, Commission on Human Rights, Sixth Session, *Study of the Legal Validity of the Undertakings Concerning Minorities*, UN Doc. E/CN.4/367, 7 April 1950, and E/CN.4/367/Add. 1, 27 March 1951, Chap. XIV.
 32. For a comprehensive treatment of the South Tyrol situation, see Emma Lantschner, "History of the South Tyrol Conflict and Its Settlement", in J. Woelk, F. Palermo and J.

- Marko (eds), *Tolerance Through Law: Self Governance and Group Rights in South Tyrol* (Leiden: Martinus Nijhoff, 2008). See also Franz Matscher, "The Experience of South Tyrol", Report presented at the Venice Commission Conference on the Protection of National Minorities by Their Kin-State (Athens, 7–8 June 2002), CDL-STD(2002)032, <http://www.venice.coe.int/docs/2002/CDL-STD%282002%29032-bil.asp#_Toc182392409> (accessed 7 December 2010).
33. Antony E. Alcock, *The History of the South Tyrol Question* (London: Michael Joseph, 1970).
 34. R. S. Baker and W. E. Dodd (eds), "The Fourteen Points Speech", in *The Public Papers of Woodrow Wilson: War and Peace* (New York: Harper and Brothers, 1927); see also A. S. Link (ed.), "The Fourteen Points Address", in *The Papers of Woodrow Wilson*, vol. 45 (Princeton, NJ: Princeton University Press, 1984), pp. 534, 537.
 35. Alcock, *The History of the South Tyrol Question*, p. 496.
 36. Italy was deemed a Great Power at the end of the First World War, and, as Alcock points out, the Great Powers would "not be subjected to the indignity of the infringement of sovereignty implied by a Minority Treaty". Alcock, *The History of the South Tyrol Question*, p. 24.
 37. *Ibid.*, pp. 33–34.
 38. Richard C. Hottelet, "Finis for One Ethnic Spat", *Christian Science Monitor*, 31 December 1992, p. 19.
 39. Alcock, *The History of the South Tyrol Question*, p. 4. Moreover, the Italian-speaking people in the region centred themselves in urban areas with better housing and education. The result was an urban–agricultural divide further exaggerating the already existing ethnic divide.
 40. Conrad F. Latour, *Südtirol und die Achse Berlin–Rom, 1938–1945 [South Tyrol and the Berlin–Rome Axis, 1938–1945]* (Stuttgart: Deutsche Verlags-Anstalt, 1962).
 41. Peter J. Katzenstein, "Ethnic Political Conflict in South Tyrol", in Milton J. Esman (ed.), *Ethnic Conflict in the Western World* (Ithaca, NY: Cornell University Press, 1977), pp. 287, 290. After the war, 20,000 immigrants returned but the total loss through emigration eventually amounted to 50,000 German speakers.
 42. Katzenstein ("Ethnic Political Conflict in South Tyrol") argues that this population shift kept the German-speaking population in rural areas and further weakened an urban base from which to glean future political leadership. See also Alcock, *The History of the South Tyrol Question*, pp. 55–59, 210.
 43. For the English version of the Gruber–De Gasperi Agreement, see Provincia Autonoma Bolzano-Alto Adige, *Il Nuovo Statuto di Autonomia*, December 2009; available at <http://www.provincia.bz.it/service/publ/publ_details_i.asp?publ_id=6646> (accessed 10 February 2009).
 44. Alcock, *The History of the South Tyrol Question*, p. 5.
 45. Robert C. Doty, "German and Italian Groups Reluctantly Back South Tyrol Accord", *New York Times*, 30 November 1969, p. 7.
 46. "Italy's Proposals Backed in Tyrol", *New York Times*, 24 November 1969, p. 9. Austria's lenient treatment of a terrorist convicted of killing four Italians was protested by Rudolf Bing, then General Manager of the Metropolitan Opera in New York City. See Robert C. Doty, "8 Bombs Explode on Italian Trains", *New York Times*, 10 August 1969, p. 4; Donald Henahan, "Met's Bing Upset by Tyrol Verdict", *New York Times*, 10 January 1969, p. 39. See also Matscher, "The Experience of South Tyrol".
 47. See Hottelet, "Finis for One Ethnic Spat", p. 19.
 48. See Katzenstein, "Ethnic Political Conflict in South Tyrol", p. 291.
 49. Lantschner, "History of the South Tyrol Conflict and Its Settlement", p. 11.

50. "Questions Relating to Europe: Status of the German-Speaking Element in the Province of Bolzano (Bozen)", *Yearbook of the United Nations 1960* (New York: United Nations, 1960), pp. 176–179.
51. "Questions Relating to Europe: Status of the German-Speaking Element in the Province of Bolzano (Bozen)", *Yearbook of the United Nations 1961* (New York: United Nations, 1961), pp. 140–144.
52. Michael Henderson, "South Tyrol's Example", *Christian Science Monitor*, 1 July 1992, p. 19.
53. Doty, "German and Italian Groups Reluctantly Back South Tyrol Accord".
54. "Austrian Chamber Approves South Tyrol Pact", *New York Times*, 17 December 1969, p. 2.
55. *Ibid.*
56. *Ibid.*
57. Alcock, *The History of the South Tyrol Question*.
58. For a complete description of the implementation procedure, see Francesco Palermo, "Implementation and Amendment of the Autonomy Statute", in Woelk et al. (eds), *Tolerance Through Law: Self Governance and Group Rights in South Tyrol*.
59. Pentassuglia, *Minorities in International Law*, pp. 25, 30.
60. Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State*.
61. "Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE", Copenhagen, 29 June 1990, 29 ILM 1305. In January 1995, the Conference on Security and Co-operation in Europe became the Organization for Security and Co-operation in Europe.
62. Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State*.
63. *Ibid.*
64. Treaty on Good-Neighborly Relations and Friendly Cooperation Between the Federal Republic of Germany and the Republic of Poland [Poland–Germany Treaty on Good-Neighborliness], 17 June 1991 (No. 14) *Dziennik Ustaw* 191, Art. 20. Selected articles of the treaty are available in Bloed and van Dijk, *Protection of Minority Rights Through Bilateral Treaties*, pp. 306–314.
65. Wladyslaw Czaplinksi, "The New Polish–German Treaties and the Changing Political Structure of Europe", *American Journal of International Law* 86 (1992), pp. 163, 168.
66. *Ibid.*, pp. 164–165. The Potsdam Agreement is the title commonly used for the "Communiqué" at the end of the Berlin Conference.
67. Poland–Germany Treaty on Good-Neighborliness, Art. 2.
68. *Ibid.*, Art. 21.
69. The Poland–Germany Treaty on Good-Neighborliness Article 22(1) states:

None of the commitments in Articles 20 and 21 may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the U.N. Charter, other obligations under international law or the provisions of the Helsinki Final Act, including the principle of territorial integrity of States.

70. The Poland–Germany Treaty on Good-Neighborliness Article 22(2) states:

Every person belonging to the groups in the Republic of Poland or the Federal Republic of Germany referred to in Article 20(1) of this Treaty shall be bound, in

accordance with the foregoing provisions, to demonstrate loyalty to the State concerned like any other citizen by observing the obligations deriving from the laws of that State.

71. Bloed and van Dijk, *Protection of Minority Rights Through Bilateral Treaties*, p. 13.
72. The Constitution of the Republic of Hungary, Art. 6(3); available at <<http://www.constitution.org/cons/hungary.txt>> (accessed 8 December 2010).
73. Michael R. Geroe and Thomas K. Gump, "Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe", *Columbia Journal of Transnational Law* 32 (1995), pp. 673, 696–697. The declaration between Ukraine and Hungary adopts a "collective view of minority rights" wherein "the countries pledge to respect the rights of minorities, both as communities forming an organic part of their . . . States, as well as of persons belonging to them". "Declaration on the Principles of Cooperation Between the Republic of Hungary and the Ukrainian Soviet Socialist Republic in Guaranteeing the Rights of National Minorities"; available at <http://www.hhrf.org/html/010_ketoldal/text016/doc_upload/dec-uk-e.pdf> (accessed 8 December 2010).
74. The declaration provides further that the parties "guarantee that such a decision is in no way to their detriment".
75. "Treaty of Understanding, Cooperation and Good Neighbourliness between Romania and the Republic of Hungary" (signed at Timisoara on 16 September 1996), *United Nations Treaty Series*, Vol. 1966, I-33604 (1997); available at <http://untreaty.un.org/unts/120001_144071/17/9/00014345.pdf> (accessed 8 December 2010).
76. Geroe and Gump, "Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe", p. 692.
77. Council of Europe, *Framework Convention for the Protection of National Minorities*, Arts. 1–19.
78. Sergey Lavrov, "Russian Foreign Policy and a New Quality of the Geopolitical Situation", *Diplomatic Yearbook 2008*, Ministry of Foreign Affairs of the Russian Federation ("Firmly based on international law and the Constitution and laws of Russia, we are going to protect the life and dignity of our citizens, wherever they may be"). See also <http://www.norway.mid.ru/news_fp/news_fp_59_eng.html> (accessed 15 December 2010).
79. Lynn Shaver, "The Revocation of Dual Citizenship in Turkmenistan", *Human Rights Brief* 11:5 (2003), p. 5.
80. Ethnic discrimination in Russia continues and has escalated since the breakup of the Soviet Union. See "Russian Federation: Ethnic Discrimination in Southern Russia", *Human Rights Watch* (August 1998), p. 2. The Russian government is to blame in part because it has failed to prevent discrimination and perpetuates such practices. The discrimination includes police harassment of "ethnic Caucasians through selective enforcement of residence requirements (*propiska*) and mandatory registration of visitors". Victims are forced to pay bribes or are beaten and arrested.
81. Bloed and van Dijk, *Protection of Minority Rights Through Bilateral Treaties*, p. 55. See also Russian Federation Federal Law in Respect of Compatriots Abroad, adopted 5 March 1999, in Venice Commission Conference on the Protection of National Minorities by Their Kin-State, <http://www.venice.coe.int/docs/2002/CDL-STD%282002%29032-bil.asp#_Toc182392439> (accessed 8 December 2010).
82. See, generally, Bloed and van Dijk, *Protection of Minority Rights Through Bilateral Treaties*, pp. 55–99.
83. Similarly, Russia's earlier Treaty on the Foundations of Interstate Relations with Ukraine featured "adherence to unspecified international norms . . . and repetition or simplification of the broadest of existing minority rights norms". See Bloed and van Dijk, *Protection of Minority Rights Through Bilateral Treaties*, pp. 64–65.

84. Claire Messina, "Hostages of the Empire", *Refugees Magazine*, issue 98 (After the Soviet Union), 1 December 1994.
85. Marc Holzapfel, "Note: The Implications of Human Rights Abuses Currently Occurring in the Baltic States Against the Ethnic Russian National Minority", *Buffalo Journal of International Law* 2 (1996), p. 329; see also David Filipov, "Language Makes Some Latvians Aliens", *Boston Globe*, 3 April 1998, p. 1. ("Unlike most former Soviet republics, Latvia and Estonia granted automatic citizenship only to those who could trace their families' residence there before 1940. That was the year that the Soviet Union, in a deal with Nazi Germany at the beginning of World War II, seized the Baltic countries and ended two decades of independence. Most Latvians have a family member who was sent to Stalin's camps during purges in 1940 and 1944. Campaigns to wipe out Baltic nationalism continued until the late 1980s".)
86. General Assembly, 48th Session, "Situation of Human Rights in Estonia and Latvia", UN Doc. A/48/223, 25 June 1993, p. 2.
87. Bloed and van Dijk, *Protection of Minority Rights Through Bilateral Treaties*, p. 55.
88. Act LXII, "On Hungarians Living in Neighbouring Countries (2001)", 40 ILM 1242.
89. "The law is discriminatory and contradicts international documents with regard to the minorities", Press Release, "Declaration of the Government of Romania with Regard to the Adoption of the Law Concerning Hungarians in Neighboring Countries", 6 June 2001; available at <http://www.roembus.org/english/news/press_releases/2001/June_19-1_2001.htm> (accessed 8 December 2010).
90. Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State*.
91. Ibid. See also Christin J. Albertie, "The Act on Hungarians Living Abroad: A Misguided Approach to Minority Protection", *Michigan Journal of International Law* 24 (2003), pp. 961, 987.
92. OSCE High Commissioner on National Minorities, "The Bolzano/Bozen Recommendations", p. 2.
93. Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State*.
94. Gudmundur Alfredsson, "Disadvantages of Bilateral Agreements", in Bloed and van Dijk, *Protection of Minority Rights Through Bilateral Treaties*, p. 165.
95. Eide, "Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities".

Part II

Case studies

6

Bilateral instruments and mechanisms to protect “kin-minorities” abroad: The case of Hungary’s bilateral agreements with its neighbours and their monitoring through joint intergovernmental commissions

Emma Lantschner

Introduction

This chapter places bilateral agreements for the protection of minorities and their monitoring mechanisms within an international context and within the context of the concept of the responsibility to protect (R2P). An important element of this concept is the responsibility to prevent violations of human and minority rights. In the area of minority protection, this is ideally achieved through the implementation of appropriate protection mechanisms by the state in which the minority resides. It is, however, widely acknowledged that minority rights are also a matter of legitimate concern to the international community. When one state is home to a minority population constituting the majority in a neighbouring (or nearby) state, situations can arise in which the “home-state” is neglecting its minority, thereby causing internal unrest, and/or in which the “kin-state” is unilaterally pursuing the protection of “its” minority abroad, thereby causing bilateral tensions. Both situations can ultimately result in conflicts that would require action by the international community. This chapter suggests that bilateral agreements, and in particular the joint intergovernmental commissions established for their monitoring, are an expression of the friendly relations among states and a possible means to prevent violations of minority rights or disputes over minority issues from developing into violent conflicts.

In exploring this hypothesis, I have chosen to study the bilateral agreements and joint commissions of which Hungary is a member, because this country played a central role in boosting the idea of bilateral treaties, dealing also with minority issues, and has created over the years a region-wide network of such treaties. It is also the country with the richest documentation in terms of protocols of meetings of joint intergovernmental commissions, even if some of the commissions did not meet as regularly as they were supposed to and most of the material was not accessible to the wider academic or interested public because the protocols were available only in the languages of the contracting parties.¹

After dealing with the historical background, I shall provide a brief overview of the treaties and conventions concluded by Hungary with its neighbours and compare the substantive rights stipulated by these agreements with emerging European standards in minority protection to establish whether bilateral agreements add anything to multilateral instruments and whether they contribute to the consolidation of such standards. Implementation in good faith of bilateral instruments that are in line with or go beyond international standards may prevent conflicts from erupting.

I shall then look at the structural characteristics of the joint intergovernmental commissions that Hungary has established with neighbouring Croatia, Romania, Serbia, Slovakia, Slovenia and Ukraine, including their composition and functioning. This will be followed by an analysis of the protocols of these commissions with a view to verifying the assertion about the potential for conflict prevention and conflict resolution of such platforms.

Historical background

Hungary's loss of some 71 per cent of its territory and about one-third of its population (3.3 million Hungarians) as a consequence of the Treaty of Trianon between the Allied Powers and Hungary in the aftermath of the First World War² continues to have repercussions in the contemporary history and politics of Hungary and its neighbouring states. The Hungarian Constitution, which was amended after the fall of communism, states that "[t]he Republic of Hungary bears a sense of responsibility for what happens to Hungarians living outside of its borders and promotes the fostering of their relations with Hungary".³

The biggest Hungarian community in absolute numbers lives in Romania, accounting for 1,434,377 people, which is 6.6 per cent of the Romanian population.⁴ In relative terms, Slovakia is home to the largest Hungarian minority. Members of this minority make up 9.68 per cent of

the overall population (or 520,528 people).⁵ The Hungarian population of Serbia is concentrated in the province of Vojvodina, where, numbering 290,207, they represent 14.5 per cent of the provincial population. They make up about 4 per cent of the overall population of Serbia.⁶ The Hungarian populations in Austria, Croatia and Ukraine are comparatively small. The results of the Austrian census in 2001 show that 40,583 people (0.5 per cent of the overall population) use Hungarian as their colloquial language.⁷ In Croatia, 16,595 people indicated in the 2001 census that they are Hungarian by ethnicity (0.37 per cent), and 12,650 people responded that their mother tongue is Hungarian (0.28 per cent).⁸ In Ukraine, Hungarians number 156,566, but, owing to the large overall population, they constitute only 0.32 per cent of Ukraine's population.⁹ Slovenia also needs to be mentioned in the context of this contribution. For historical reasons, the Hungarian community (just like the Italian community) in Slovenia enjoys special protection within the national constitutional framework, although Hungarians represent only 0.32 per cent of the population, numbering as few as 6,243.¹⁰

From the above figures it becomes clear that in the 1990s Hungary was, if not exclusively, particularly concerned about the destiny of its Hungarian co-ethnics living in Romania and Slovakia. However, different Hungarian governments had different approaches in terms of their hierarchy of foreign policy goals. Whereas for the government under József Antall (1989–1993) the protection of the Hungarian minorities abroad had the highest priority, Western integration and a successful neighbourhood policy necessary for that purpose gained higher importance in the government under Gyula Horn (1994–1998).¹¹ In particular, in 1991, Antall claimed autonomy and/or collective rights for Hungarians abroad, basing his claim on the principle of the self-determination of peoples. The climax was reached in 1992, when Antall said he felt like the prime minister of 15 million Hungarians, thereby including also the Hungarians living outside Hungary's borders.¹²

According to international law, responsibility for the protection of national minorities lies within the home-state, and support by the kin-state always has to seek the consent of the state in which the minority resides.¹³ One possibility of getting this consent is by stipulating a bilateral agreement where the issue of minority protection is regulated between states.¹⁴ Such agreements typically target those minority populations that are the majority on the territory of the other contracting party. Whereas the purpose of such agreements from the Hungarian perspective was mainly the protection of Hungarian minorities living in those countries, a perhaps more important aspect for their counterparts was the stipulation that the parties have no territorial claims on each other and that they should not raise any such claims in the future.¹⁵ This was particularly the

case for countries that feared a secessionist movement from within the large Hungarian minorities. Real or hypothetical fears of secessionism on the one hand and real or hypothetical irredentist movements on the other hand clearly hold the potential to develop into serious conflicts between two states that could eventually lead to a situation in which other states feel the necessity to intervene. Bilateral agreements can dissipate these fears and thus contribute to more relaxed bilateral relations.

In the Antall period, bilateral agreements were concluded with Ukraine and Slovenia (on the protection of their mutual minority populations) and with Croatia (on friendly relations and cooperation, touching also upon minority issues), but the hard nuts – bilateral relations, including the issue of minority protection, with Slovakia and Romania, with their sizeable Hungarian minorities – were impossible to crack in the atmosphere created by the Antall government. Hardliners on the other side of the negotiating table, for instance Slovakia's Vladimir Meciar, did not ease the situation either.

The priority shift under the Horn government did not mean that the protection of the Hungarian minorities abroad was neglected; it just led to a different level of demand and a change of means to reach the goal. The search for bilateral solutions that were to be embedded into a European framework became central.¹⁶ The government programme described the relationship between neighbourhood and minority policy in the following words: "Unless Hungary's relations with its neighbours are normalized and improved, there is no chance of bringing about an improvement in the situation of Hungarian minorities in those countries."¹⁷ Moreover, it did not define autonomy based on the principle of self-government as a precondition for stability and security but focused on "close cooperation, good relations and a broad range of ties with neighbouring countries" in order to achieve that goal.¹⁸ Moving away from the claim for autonomy and collective rights based on the principle of self-determination also made it possible to conclude agreements on good-neighbourliness with Slovakia in 1995 and with Romania in 1996.

Through these treaties and conventions, and in particular through the mechanisms foreseen for their monitoring, Hungary made sure to have ways of participating in arrangements for the Hungarian minorities living abroad. The most important monitoring mechanisms were the joint inter-governmental commissions, which were given the mandate, either directly in the agreement or in an additional protocol, to discuss current issues relevant to the two minorities, to evaluate the implementation of obligations under the agreements and to prepare and adopt recommendations for the respective governments concerning the implementation and, if necessary, the modification of the agreement.¹⁹ Although these commissions are supposed to meet once or twice a year, some of them met only

irregularly. The fact that this existing channel for consultation and information exchange had not been appropriately used contributed in 2001 to an increase in tensions between Hungary and its neighbours, in particular Romania and Slovakia. The bone of contention was the adoption by Hungary of the Law on Hungarians Living in Neighbouring Countries, the so-called Status Law.²⁰ Neighbouring states particularly protested against the discriminatory and extraterritorial effects of the law and the risk of creating a political bond between Hungarians living abroad and their mother-state. On this occasion, Romania and Hungary revived their bilateral commission, which eventually led to an agreement concerning the implementation of the law.²¹ This introductory example of the Status Law shows the conflict-resolving potential of bilateral negotiations. Joint intergovernmental commissions are the ideal platform for such negotiation and consultation and therefore provide the possibility not only to resolve already erupted tensions but also to prevent them.

Based on this and similar experiences, the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe (OSCE) decided to dedicate a set of Recommendations to national minorities in inter-state relations, as he was of the opinion that “there is a need for greater clarity on how states can pursue their interests with regard to national minorities abroad without jeopardizing peace and good neighbourly relations”.²² Recommendations 18 and 19 encourage states to conclude bilateral agreements “through which States can share information and concerns” and to make use of, amongst others, joint commissions “in order to effectively address possible disputes and to avert conflicts over minority issues”.

In the following sections these agreements and commissions will be closely analysed.

The treaties and conventions

Overview of treaties and conventions concluded by Hungary with its neighbours

As already outlined in the introduction, Hungary has concluded bilateral agreements with all its neighbours.²³ On 31 May 1991 it signed a Declaration with Ukraine on the principles of cooperation in guaranteeing the rights of national minorities.²⁴ Later in the same year, on 6 December 1991,²⁵ the two countries signed a Treaty on Good-Neighbourly Relations and Cooperation, which reaffirmed the Declaration and strengthened the principles contained therein. It is worth mentioning in the context of the Declaration, first, that the parties speak about “national minorities” in

general without limiting the Declaration's application to their mutual minorities only, and, second, that the parties invite other states to join the Declaration. On 15 December 1991, the Government of Croatia and on 6 November 1992 the Government of Slovenia signed the Declaration.²⁶

Nevertheless, Hungary concluded separate conventions on national minorities with these two states. With Slovenia, Hungary first signed a convention on the protection of the Hungarian minority in Slovenia and of the Slovenian minority in Hungary on 6 November 1992.²⁷ Later in the same year, on 1 December 1992, these states also concluded a Treaty on Friendship and Cooperation,²⁸ making reference to the previously signed convention. With Croatia, Hungary first signed a Treaty on Friendly Relations and Cooperation on 16 December 1992.²⁹ Because of the war between Serbia and Croatia, which also affected the Hungarian minority living in Croatia, it was only later, on 5 April 1995, that Hungary and Croatia agreed upon a convention specifically for the protection of the Hungarian minority in Croatia and the Croatian minority in Hungary.³⁰ The conventions between Hungary and, respectively, Slovenia and Croatia are of special relevance as they are the only agreements of the 1990s that make reference to collective rights,³¹ minority self-government and cultural autonomy.³²

Reference to collective rights or autonomy was among the most disputed issues in the negotiations of Hungary with Slovakia and Romania. On the eve of the adoption of the Pact on Stability,³³ on 19 March 1995, Hungary and Slovakia signed a Treaty on Good-Neighbourly Relations and Friendly Cooperation (the Hungarian–Slovak Treaty), which contained one extensive provision on their respective minorities. On 16 September 1996, Hungary signed a Treaty on Understanding, Cooperation and Good-Neighbourliness with Romania (the Hungarian–Romanian Treaty), which also includes one article dealing with their mutual minorities. In both treaties reference is made to Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe.³⁴ Both Slovakia and Romania rejected any interpretation of this Recommendation granting the Hungarian minority collective rights or the right to set up autonomous territorial structures based on ethnic criteria.³⁵ Slovakia, after having signed the treaty, added a unilateral declaration in that sense,³⁶ whereas Romania insisted on adding a footnote referring to Recommendation 1201 (1993).³⁷

The relationship with Serbia was hampered by the fact that the constitution of 1990 practically eradicated the autonomous status of the province of Vojvodina that had been granted to it by the previous constitution of 1974. In the course of the Yugoslav wars, Serb refugees were settled in Vojvodina and “increased the pressure on the ethnic minorities in the region... Ethnic minorities ... point to how certain Serbian political

parties openly advocate ethnic cleansing in Vojvodina and systematically seek to intimidate the minorities to leave the region.”³⁸ Many Hungarians left the province in this war-torn period in order to escape conscription to the Serb army.³⁹ After Milosevic was removed from power and with some pressure exerted from outside actors,⁴⁰ negotiations started on a bilateral agreement concerning the protection of the Hungarian minority in Serbia and of the Serbian minority in Hungary and were concluded on 21 October 2003.⁴¹ In the agreement, the parties state that support of national minorities by the kin-states is a legitimate aspiration within the limits stipulated by international law. Worth mentioning also is the reference to minority self-governments and to cultural and personal autonomy.⁴² According to information provided by the Hungarian Government Office for Hungarian Minorities Abroad, this issue was controversial during the negotiation process.⁴³

Substantive rights in bilateral and European instruments

In terms of substantive rights laid down, the treaties and conventions include provisions concerning the right to non-discrimination, cultural, linguistic and educational rights, the media, the participation of minorities in economic and public life, and cross-border cooperation. In analysing the substantive provisions of the Hungarian treaties and conventions, this section will focus especially on what these documents add to already existing European standards, flowing mainly from the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) and the “soft jurisprudence” of its monitoring body, the Advisory Committee.⁴⁴

The provisions on the right to *equality and non-discrimination* occupy strikingly little space in all the treaties and conventions. Whereas the FCNM clearly requires, “where necessary, adequate measures in order to promote . . . full and effective equality between persons belonging to a national minority and those belonging to the majority”, and further provides that such affirmative action “shall not be considered to be an act of discrimination”,⁴⁵ the two treaties between Hungary and Romania and Slovakia provide only for formal equality. Substantive equality can, however, be considered to be included in those treaties because they both stipulate that the provisions contained, amongst others, in the FCNM should be applied as legal obligations.⁴⁶ The most specific on affirmative action and its non-discriminatory nature is the agreement between Hungary and Serbia, which says in Article 2(3):

The Contracting Parties shall take appropriate measures in the fields of economic, social, political and cultural life, in order to ensure equal opportunities

to persons belonging to the national minorities. They shall pay special attention in doing so to specific needs of the national minorities. Such measures may not be considered to be discriminatory against other citizens.

Concerning equality and non-discrimination, bilateral agreements therefore do not add anything to European standards, because they do not provide greater clarity as to the situations in which affirmative action could be considered “necessary” and what the “adequate measures” could consist of. On the contrary, it is only by reference to international and European instruments that substantive equality can be considered covered by the agreements.

Culture figures quite prominently in all bilateral treaties and conventions, and – as will be seen in the next chapter – also in the work of the joint intergovernmental commissions. Some of the preambles recognize that national minorities constitute an integral part of the society⁴⁷ and that their existence and culture enrich the cultural values of the respective countries,⁴⁸ and they state their conviction that “full integration of national minorities is possible only through the preservation of the ethnic, linguistic, cultural and religious identity of their communities”.⁴⁹ In the articles dealing with the culture and identity of persons belonging to national minorities, states undertake to refrain from policies or practices aimed at the assimilation of minorities against their will and to protect them from any action aiming at such assimilation.⁵⁰ The wording of these articles recalls very much that of Art. 5(2) of the FCNM, sometimes *verbatim*, including the reservation concerning measures taken in pursuance of the general integration policy.⁵¹ All bilateral agreements contain provisions on the right to express, preserve and promote the ethnic, cultural, linguistic and religious identity of persons belonging to national minorities, including the right to do so individually as well as in community with other members of their group,⁵² using formulations that are very common also in international instruments. In most of the cases, the treaties and agreements regulate in great detail what measures should be taken in order to ensure an appropriate implementation of these provisions.⁵³ Amongst those measures figures quite prominently the preservation of the cultural heritage, of architectural monuments and memorial sites related to the minority culture and history.⁵⁴ This is an area that does not get specific attention in the FCNM. In addition, the agreements with Croatia and Serbia foresee cultural autonomy.

In the area of *linguistic rights* the treaties and agreements regulate the use of minority languages in contact with public administration, for topographical indications and for the registration of first names and family names, without adding much to what is provided for also at European

level. The Hungarian agreement with Serbia goes a bit beyond the standard of the FCNM in that it recognizes the right to use first names and family names not only in the mother tongue of the minorities but also in their respective scripts. The FCNM leaves the choice of the alphabet to the discretion of the states.⁵⁵ With regard to the use of the alphabet of the minority language also for topographical indications, the Hungarian–Serb Agreement confirms the approach of the Advisory Committee on the Framework Convention for the Protection of National Minorities, which has stated that the possibility of using the minority language’s script would “better reflect the spirit of Article 10 [sic] of the Framework Convention”.⁵⁶ The provisions of bilateral treaties and agreements on the use of language in relations with judicial authorities are more extensive than the one provided for in the FCNM, in that they provide for the use of the minority language (not only for the use of a language the person understands, as foreseen in the FCNM) and cover the fields not only of criminal law but also of civil and administrative law.⁵⁷

Most of the bilateral treaties and conventions go further than the European standards when it comes to the use of language in *education*. Four of the six treaties and agreements studied here provide not only for the right to learn the minority language but also for the right to be instructed in this language.⁵⁸ The agreements with Croatia (where instruction *in* the minority language is considered an alternative only to the teaching *of* that language) and Serbia foresee that if the minority language is used as a language of instruction the teaching can be either monolingual in the minority language or bilingual, using both the minority and the majority language. In the first case, the choice of the model has to be “consistent with the requirements of the minority organizations based on the request by the parents”.⁵⁹ With regard to the curriculum, the bilateral agreements hardly add anything to the European provisions and they lack, as does the FCNM, an explicit provision that would foresee the involvement of minority representatives in the design of curriculums and their participation in decisions about other important issues in the educational field. All agreements foresee the exchange of books and materials and of students and teachers, the provision of scholarships and cooperation between schools and universities.⁶⁰

With regard to the right to access to the *media*, two groups can be distinguished: first, the two treaties on good-neighbourliness with Romania and the Slovak Republic, and, second, the minority-specific conventions and agreements with Slovenia, Croatia and Serbia. The provisions of the first group are very short and stipulate that persons belonging to national minorities shall have the right, in conformity with national legislation and international commitments, to receive and impart information in their

own language and to establish and maintain their own media.⁶¹ The agreements and conventions of the second group are more detailed and regulate in varying formulations the possibility of receiving broadcasts by the “mother nation”,⁶² which is in line with the interpretation given by the Advisory Committee to Art. 9 of the FCNM.

Three shortcomings are common to all the analysed agreements. First, they do not give any guidance on the length and airtime of broadcasts in the minority language or on minority issues. If anything, they simply state that they will make it possible to “produce and regularly broadcast programs in the mother tongue . . . in an appropriate length and at appropriate times”.⁶³ More precise provisions should have been possible, considering that the specific context of the minorities involved (size, concentration, receipt of broadcasts by private media or media of a neighbouring country, etc.) is known to the contracting parties. Second, they exclusively concentrate on the language used in broadcast media or in the press, without mentioning how relevant the content of broadcasts is or underlining the important role that the media can play both in instigating hatred and mistrust but also in fostering a climate of tolerance and intercultural dialogue.⁶⁴ And third, none of the treaties and conventions deals with the issue of active access to the media,⁶⁵ which includes participation by persons belonging to national minorities in programming, editorial control and management, regulation and oversight, and the drafting of legislation and public policies on the media.

In the field of *effective participation in public life*, bilateral agreements foresee very similar provisions to those in the FCNM, meaning that in general they do not go into further details. There are, however, a few exceptions. One of these is, for instance, the explicitly foreseen participation of minority representatives in the conclusion of treaties that directly affect the minorities’ status and rights.⁶⁶ The two treaties with Romania and the Slovak Republic further explicitly foresee the right to establish political parties on an ethnic basis.⁶⁷ Another more specific provision is foreseen in Article 8 of the Hungarian agreement with Serbia and Montenegro, which states that parties shall ensure “the appropriate representation of persons belonging to national minorities in public services, including the police”. The FCNM does not explicitly ask for representativeness of the police,⁶⁸ but the Advisory Committee has paid great attention to this issue in its monitoring.⁶⁹ With regard to facilitated or guaranteed representation of persons belonging to national minorities in elected bodies, the agreements use similarly general phrases as Article 15 of the FCNM. As mentioned above, some agreements foresee cultural autonomy but none of the agreements goes so far as to endorse the idea of territorial autonomy.

The provisions contained in the bilateral agreements concerning the *economic participation of minorities* are more specific than those of the FCNM. The Hungarian–Serb agreement, for instance, stipulates in Article 11:

Contracting Parties shall assume the obligation to take into account the interests of the minorities in their plans for economic development and to take measures, according to their abilities, in order to ensure economic and social development of areas inhabited by the minorities, thus offering fair and equal opportunities to the minorities in the economic sphere.

And, finally, the treaties and agreements deal with the issue of *cross-border cooperation*. Whereas most of the agreements simply state that the parties shall respect the right of persons belonging to national minorities to maintain free contacts among themselves and across frontiers with citizens of other states, as well as to participate in the activities of national and international non-governmental organizations,⁷⁰ some of them allow also for contacts between minorities and the state and public institutions of the kin-state.⁷¹ The agreement between Hungary and Serbia dedicates a quite detailed article to the relations of kin-state institutions with the national minority residing on the territory of the other state party. Article 10(1) provides:

Government agencies, organisations of public and private law, as well as citizens of the Contracting Parties may, for the purpose of realising the objectives specified in this Agreement and within the framework set by international law, grant assistance to organisations of the national minorities living on the territory of the other Contracting Party, and to persons belonging to these national minorities, and these organisations and persons shall be entitled to receive such assistance.

This provision can be seen as a direct consequence of the discussions around the Status Law, where precisely such direct support by the kin-state to, in particular, individuals living in another state was criticized. In the case of the Status Law, Hungary's neighbours had not given their previous consent to such support. Through a provision like the one above, this consent is explicit for assistance granted for the purpose of realizing the objectives specified in the agreement and, thus, also in line with the "Bolzano/Bozen Recommendations on National Minorities in Inter-state Relations".⁷²

With regard to cooperation in the economic field, most agreements have similar provisions to the one that can be found in the Hungarian–Croatian convention:

In the interest of their minorities the Contracting Parties shall support all forms of trans-frontier co-operation, especially in the area of economic and trade co-operation, and shall endeavour to exploit the mediating role of the minorities in this field.⁷³

It is important for both economic cooperation and contact amongst individuals that states stipulate in the agreements increasing the permeability of borders through the opening of new border crossings and the provision of transport connections. Those facilities shall be implemented “to the extent of their capacities”.⁷⁴

As can be seen from this analysis, bilateral agreements borrow much from the wording of the FCNM or other international or European documents but in some fields they manage to be more concrete and tailor the provisions of the more general instruments to their local needs. If properly implemented, they can contribute to the prevention of conflicts over minority issues. The most important players in the implementation are the joint intergovernmental commissions, which come under scrutiny in the following section.

The joint intergovernmental commission

Structural characteristics of joint intergovernmental commissions

Joint commissions are not comparable to a judicial body that supervises compliance with the law by the citizens of a certain state.⁷⁵ It is not a mechanism that assists a person whose rights have been violated. There is no formal procedure foreseen for persons who want to bring to the commission’s attention facts that run contrary to a provision laid down in a bilateral agreement. Its decisions are not directly binding on anybody.

Joint commissions are politically charged bodies, comparable to a governmental advisory organ. The delegations of the respective states bear a joint responsibility for the evaluation of the overall implementation of bilateral agreements in the field of minorities and the adoption of recommendations that are addressed to the respective governments. In this sense, they have the joint responsibility to ensure the smooth implementation of the agreements, thus contributing to the prevention of conflicts over minority issues. The destiny of the recommendations adopted by the joint commissions depends, however, on the political will of the governments. No sanctions can be imposed if the recommendations are not implemented. These are the common features of an implementation

mechanism that holds a huge potential but constantly lives with the risk of inefficiency or obstruction.

In the details, the joint commissions based on minority-specific bilateral conventions or agreements differ from the joint commissions based on the treaties on friendly relations and good-neighbourliness.

All Hungarian treaties and conventions provide for the establishment of a joint commission. However, the specificity of the respective provisions differs: whereas the minority-specific conventions contain information that ranges from their composition to the frequency of the meetings, the mandate of the commission and the way in which decisions are adopted,⁷⁶ the equivalent provisions in the good-neighbourliness treaties simply lay down that an “intergovernmental expert commission” or an “intergovernmental joint commission” will be established.⁷⁷ The details were regulated in the protocols on the establishment of the commissions.⁷⁸ Whether in the convention or in such separate protocols, the mandate of the commission is in all the cases very similar. They are to discuss current issues relevant to the two minorities, evaluate the implementation of obligations under the particular treaty or convention and prepare and adopt recommendations for their respective governments concerning the implementation and, where necessary, the modification of the convention. Decisions in the meetings are taken by consensus.⁷⁹

The commissions established in the framework of the Hungarian treaties with Romania and Slovakia, as well as the one established by the convention with Croatia, were supposed to meet twice a year. Because experience showed that this frequency could not be reached, the parties agreed to meet at least annually, as was foreseen for the other commissions, but even this was sometimes hard to achieve. The reason for this was at times attributed to a lack of interest of the other side.⁸⁰ Meetings take place alternately in the two state parties. In order to improve the reception of the work of the joint commissions within the minority group and to make it more transparent, the meetings are more and more often organized not in capitals but in areas where the respective minorities live.

The commissions established under minority-specific conventions, apart from being bigger than the ones established under general good-neighbourliness treaties,⁸¹ explicitly foresee – unlike the latter – the participation of individuals belonging to national minorities. Whereas this shortcoming had been redressed in the protocol establishing the Hungarian–Slovak commission, the establishing protocol of the Hungarian–Romanian commission foresees only that parties “may invite” people belonging to national minorities to participate in the meetings. In practice, minority representatives have participated in the meetings of this commission, but their precarious position within the commission can

be seen as a weak point of this commission. It also needs to be mentioned that the minority representatives in the Hungarian–Romanian commission do not formally have the same decision-making power as other members of the commission. They have only a consultative role. Even if, in practice, all decisions are taken by consensus, including also the point of view of the minority representatives, this fact raises further concern among the minorities involved.⁸²

In some cases the minority representatives are appointed by the government upon the proposal of the minority organization. In other cases governmental officials who belong to a minority are appointed to participate in the meetings of the joint commissions. In other cases again, the elected representative of the minority to the parliament is a member of the joint commission. In order to be representative, it is important that these individuals are able to reflect the plurality of the group's views, that they have the support of the minority group concerned and that the commissions, particularly in cases where there is more than one minority organization, seek consultation with minority members and organizations that are outside the institutional structure.

The delegations are headed by the foreign ministers, but in practice this position is normally delegated to a state secretary. The members are mainly heads of international cooperation departments or ministries dealing with the protection of minorities (ministries of education, culture and interior). Membership of the commission, especially with regard to the governmental representatives, is not attached to specific individuals, but instead to the positions that these people hold. This has the disadvantage that the continuity of the commission is constantly endangered by political changes. On the other hand, this linkage with the position might be useful and necessary in the sense that it guarantees that there will be members of the joint commission who also have the political backup to enact the recommendations adopted by the commission.⁸³

As will be seen in the following analysis of the protocols of the meetings of the commissions, the issues of the preservation of culture, language and religion and developments in the field of education receive most attention in the meetings of the commissions. The protocols of the meetings, including adopted recommendations proposing government action or legislative activity by the home-state, are forwarded to the respective governments. In Hungary, as in Croatia, Slovenia and the Slovak Republic, the recommendations adopted by the commissions are reinforced by a governmental decision determining which government departments will be responsible for the implementation of the particular recommendation. The Romanian government approves the protocol containing the recommendations as a political document. Because many of the members of the commissions themselves work in the government

departments responsible for implementation, they can follow it up on a daily basis. Moreover, the meetings of the joint commissions evaluate the implementation of the recommendations adopted during the previous session. If, in the period between one meeting and the next, a recommendation has not been implemented, it will be reiterated in the recommendations to be adopted until it has been implemented.⁸⁴

Although political pressure can be exerted on countries reluctant to implement a recommendation, there is a lack of legal means to push the other side to implement the recommendations. However, the force of the recommendations of all joint commissions, whether ones based on a bilateral agreement on minority issues or ones based on a basic treaty, lies in the consensus principle, expressing the willingness of both sides to work on the situation.⁸⁵

A role for joint intergovernmental commissions in conflict management?

In this section, the activities of the Hungarian commissions with Serbia, Romania, Croatia, Slovakia and Slovenia will be analysed, mainly by studying the protocols of their meetings. The activities of the Hungarian–Ukrainian commission are excluded from this examination because the set of protocols available in English is too limited. Whereas the sets of protocols of the Hungarian commissions with Serbia,⁸⁶ Croatia⁸⁷ and the Slovak Republic⁸⁸ are complete up to the end of 2008, minor gaps continue to persist with regard to the meeting protocols of the commissions with Romania⁸⁹ and Slovenia.⁹⁰

The focus of the analysis lies in providing evidence for the potential of joint intergovernmental commissions to de-escalate tensions and thus to prevent situations from developing into an R2P scenario. Admittedly, it is hard to imagine that contemporary relations between the countries discussed here would deteriorate so gravely that the concept of “responsibility to protect” in the sense of “responsibility to react” would need to be considered. It might also seem out of place to consider the situations that will be described in the following serious enough to be mentioned in connection with this concept. However, it seems legitimate to discuss a mechanism that, notwithstanding all its flaws, has the potential either to lessen tensions before they become serious or, even better, to make it possible that such tensions do not even arise because “burning” issues are discussed in a timely manner, involving the persons concerned, and can thus be sorted out before even becoming a source of conflict. Joint commissions perceive themselves as “important institutions for cooperation and the exchange of information”.⁹¹ If used in good faith and in a timely manner, they are thus a mechanism that can be very effective within the

realm of the “responsibility to prevent”. It is therefore suggested that such a mechanism could be applied in other contexts as well and thereby help to resolve problems before they get out of control. The role played by the joint commission between Hungary and Romania in resolving the conflict around the adoption of the Status Law is a good illustration of the potential of this mechanism in a situation in which diplomatic relations between two countries are already quite disrupted.

As a reminder: the law was criticized, in particular by Romania and Slovakia,⁹² for its allegedly discriminatory and extraterritorial effects. First, the granting of facilities in the socioeconomic field, especially the unconditional and unlimited right of ethnic Hungarians to work on Hungarian territory, was considered to be discrimination against citizens of non-Hungarian ethnic origin.⁹³ Second, the law stipulated the granting of financial subsidies to ethnic Hungarians in neighbouring countries on an individual basis for those who learn/teach in Hungarian, thus discriminating against other citizens learning/teaching together with ethnic Hungarians in the same school. Third, the law provided for the granting of the so-called “Hungarian certificate” and a “Hungarian dependant certificate” (for the non-Hungarian spouse of an ethnic Hungarian), the latter thereby creating discrimination against the non-ethnic Hungarian citizens of the neighbouring country. With regard to the extraterritorial effects, the procedure of granting the Hungarian certificate was particularly contested, because it directly involved legal persons from neighbouring states. Further, these certificates could be used on the territory of the neighbouring state to get the facilities granted by the law. A final concern was the risk of creating a political bond between people belonging to Hungarian minorities and the Hungarian state, as a consequence of two elements contained in the law: the format and contents of the Hungarian certificate, which had the characteristics of a Hungarian passport, and the inclusion of the concept of the “Hungarian nation as a whole” in the text of the law.⁹⁴

It was not just neighbouring countries that were irritated by the law, which was adopted without prior consultation with the countries concerned. International organizations too reacted. The positions taken by the Council of Europe, the OSCE High Commissioner on National Minorities and the European Union had one thing in common: they all urged the countries involved to enter into bilateral negotiations with the aim of finding a mutually acceptable solution.⁹⁵

Even before the Status Law entered into force in January 2002, Hungary and Romania agreed on a Memorandum of Understanding (MoU)⁹⁶ by which they agreed on certain conditions for the implementation of the law with regard to Romanian citizens. Formally, the Hungarian–Romanian joint commission was not involved in the drafting of the MoU.

It nevertheless had an influence on the contents of this Memorandum. In the years before the adoption of the Status Law, the commission was quite inactive. Through the tensions around the law, the commission was reactivated. Only three months after the adoption of the law, the commission met three times within a very short period⁹⁷ and discussed, amongst other issues, the Status Law. The parties confirmed "that the Joint Intergovernmental Commission and the Committee [for Cooperation on National Minorities Issues] represent ... the appropriate mechanism for examining issues related to national minorities, [and] ... for ensuring their staying and well being on their native land".⁹⁸ In the protocol of these meetings, the main points of concern of the Romanian side vis-à-vis the Status Law were included and, thus, the general lines of the content of the MoU anticipated. The MoU, for its part, underlines the importance of the bilateral commission by foreseeing that the parties would start negotiations within the framework of this commission on an agreement concerning the preferential treatment of their co-ethnics on the territory of the other state.⁹⁹

Romania (as well as the Parliamentary Assembly of the Council of Europe¹⁰⁰) continued to request such bilateral negotiations,¹⁰¹ although the Hungarian parliament adopted amendments to the law in June 2003.¹⁰² In Romania's view, the law still contained unacceptable elements. Hungary offered to convene the respective joint intergovernmental commissions of all the countries concerned. The Hungarian–Romanian commission met first in July 2003 and already in September of that year the commission had finalized an Agreement on Conditions Concerning the Implementation of the Law on Hungarians Living in Neighbouring Countries with regard to Romanian Citizens.¹⁰³ With the entry into force of the agreement on 17 December 2003, the MoU went out of force.

The joint commission also played a role in solving the issue of the Status Law between Hungary and Slovakia. Slovakia initially rejected all negotiations but, finally, the two foreign ministers met in July 2003 and agreed on the basic lines of the implementation of the law. The details, as was the case with Romania, were to be negotiated by the Hungarian–Slovak joint commission.¹⁰⁴ The commission itself had already confirmed in its fourth protocol of June 2003 that the joint commission provided for the appropriate framework for discussing the support of a kin-state for its co-ethnics abroad.¹⁰⁵ The commission met on 26 August 2003 in Budapest and on 17 September 2003 in Bratislava, where the respective positions were defined and a first rapprochement took place.¹⁰⁶ Final agreement was reached in December 2003 in the form of an agreement on mutual educational and cultural support of the national minorities.¹⁰⁷ In the protocol of the sixth session, the joint commission drew a positive conclusion from this process by stating that this agreement was "an

example of good cooperation and the satisfactory bilateral resolution of incidental open questions".¹⁰⁸

The joint commissions have, thus, proven to be an adequate mechanism for dealing with bilateral tensions and, through negotiations between the parties, coming up with solutions that are acceptable to all. However, this mechanism needs to be activated sooner in order to prevent such tensions from erupting in the first place. Although this might seem pure speculation, it is not impossible that some of the issues discussed by the commissions would have become a major problem between the parties if the commissions had not adopted recommendations to address these issues and if those recommendations had not been properly implemented. In this way, they may have contributed to avoiding the exacerbation of potential R2P situations and can thus be seen as a useful mechanism in the "responsibility to prevent".

The issue of education, for instance, has already on several occasions been at least part of the root cause of the eruption of a serious conflict within a state.¹⁰⁹ It is therefore no surprise that the joint commissions dedicate a lot of their time to the discussion of mother tongue education, the provision of textbooks, the education of teachers and support for minority schools. Most of the protocols have separate sections on education. Among the successfully implemented recommendations are, for example, the reopening of the only eight-year elementary school for Hungarians in Eastern Slavonia (Croatia); student and teacher exchanges; reciprocal invitations to minority educators for continuing education seminars; and the provision of scholarships for students belonging to a minority to study in the "kin-state".¹¹⁰

Although from reading the available protocols of the joint commission between Hungary and Romania it would appear that the situation of Romanian-language education in Hungary has improved over the years, the Romanian delegation was very critical on this issue in the first part of the seventh session of the joint commission in July 2007. It maintained that this "educational form is 'extraordinarily deficient', that the 'school consolidations seriously harm the interests of the Romanian community in Hungary' and that 'not a single textbook has been published'."¹¹¹ The Hungarian party, although it did not agree with this interpretation of the situation, declared its readiness to examine how it would be possible to improve Romanian-language instruction in Hungary. For that purpose it asked for active cooperation by Romania, in particular regarding the training of Romanian-language teachers and the preparation of textbooks.¹¹²

A commendable approach to dealing with educational issues is one recommendation of the Hungarian–Slovak joint commission, although it

still seems not to have been implemented. As early as its second meeting in 1999, the joint commission agreed on renewing the activity of a joint Slovak–Hungarian committee of historians, who would – amongst other things – work on a joint Slovak and Hungarian history handbook with the purpose of coordinating history teaching in Hungary and the Slovak Republic. The recommendation reappeared in the protocol of the fourth meeting, which took place in 2003, and has ever since been repeated in each year's protocol. It is regrettable that such an important recommendation has been waiting to be implemented for over 10 years. A study by a Slovak research institution has shown that young Slovaks aged 13–14 years have much more negative attitudes than older people towards members of the Hungarian minority.¹¹³ The important role played by the educational system, as well as the media, in this context is quite obvious and an alternative teaching of history might contribute to lessening prejudices.

The field of culture is another area that figures prominently in the work of the joint commissions. Among the successfully implemented recommendations is, for instance, the renovation of the Thália Theatre in Košice, which was recommended in the third protocol of the Hungarian–Slovak joint commission (2001) and was assessed to have been implemented in the fourth protocol (2003). A recommendation that had not been implemented for a couple of years was that the Slovak party, within the framework of the preparation of a law on the financing of culture, should regulate the financing of the development and dissemination of national minorities' cultures.¹¹⁴

Joint commissions further adopted recommendations in the field of the use of language, by encouraging the governments of Slovenia and Hungary to do everything they can to support bilingualism in practice, for instance by preparing an agreement on the organization of further training for civil servants in bilingual areas. It also recommended in this specific case that the Hungarian government should contribute to the higher costs of a bilingual public administration in the Slovene bilingual areas.¹¹⁵

An example of a successfully implemented recommendation in the field of the media is the one that asked the Hungarian government to increase its financial support for a minority radio station to broadcast for 24 hours a week.¹¹⁶ The Hungarian–Croatian joint commission was able to establish in its seventh and eighth protocols that the financial resources for publication purposes for the Hungarian minority living in Croatia had grown and made possible the publication of more papers. Based on a recommendation of the Hungarian–Croat commission, a feasibility study for a central Croatian library in Hungary was carried out.¹¹⁷ A recurring

issue in all the protocols is the request by neighbouring countries that Hungary ensure the representation of minorities in parliament.

With the accession to the European Union of Hungary, the Slovak Republic, Slovenia and Romania, the circumstances have changed for the work of the joint intergovernmental commissions. The Hungarian–Slovene commission acknowledged that membership of the European Union and of NATO, as well as membership of the Schengen area, constitutes further incentives for rapid implementation of the commission’s recommendations. It encouraged the minority communities living in mixed areas to apply for EU funds and the parties endeavoured to ensure the resources required to do so.¹¹⁸ The Hungarian commissions with Slovenia, Slovakia and Croatia recognized the potential of transborder cooperation, with the support of the European Union, for the improvement of the situation of minorities living in border regions, especially in the area of economic development, infrastructure and human resource development.¹¹⁹

As the protocols of the Hungarian–Slovak joint commission rightly point out, most of the recommendations are not “one-time tasks” but require continuous implementation by the parties. It is thus very useful to have a body that meets regularly and monitors fulfilment of the recommendations. Even if, admittedly, quite a lot of recommendations are repeated from protocol to protocol, it is better they remain on the agenda of the respective states rather than disappear under the surface and, there, develop into serious conflicts.

Conclusions

This chapter has shown that bilateral agreements can have a dual function. First, they can advance the standard of protection of minorities in comparison with European or international instruments by tailoring the provisions to the specific needs of the minorities concerned or by regulating areas that have so far been rather neglected by European mechanisms. An example of the former is the field of culture, which is regulated in much more detail by the bilateral agreements. Examples of the latter are the provisions relating to the economic development of the regions in which minorities live. Nevertheless, it can be concluded that the standard-setting potential of bilateral agreements has so far not been exhausted, because in many cases the agreements borrow very much from the wording of the FCNM or other international or European documents.

The second function that bilateral agreements, and in particular the joint intergovernmental commissions, can perform lies in the prevention or management of conflicts. The connection between bilateral instru-

ments and mechanisms and the concept of the “responsibility to protect” thus consists in the contribution of these instruments and mechanisms to the “responsibility to prevent”. Although the situations described had not yet developed into conflicts that would have required action, they all, in theory, have the potential to do so. Real or hypothetical fears of secessionism, on the one hand, and real or hypothetical irredentist movements, on the other hand, clearly hold the potential to develop into serious conflicts within or between states. In such circumstances it is important to make use of all possible existing mechanisms to mitigate tensions and to prevent further exacerbation. The use of joint intergovernmental commissions as an instrument of international cooperation is just one such mechanism. In the cases described here, the role of other mechanisms, such as the High Commissioner on National Minorities, in de-escalating the situation must not, of course, be neglected.

As in relationships between human beings, it is important for states to discuss potentially controversial issues as early as possible in order to avoid misunderstandings, distrust and frustration. It is therefore necessary that the existing channels of communication between states are used in a timely manner and that agreements reached in this way are put into practice. In this sense, it is desirable not only that the recommendations of joint intergovernmental commissions are repeated from protocol to protocol but also that they are seriously followed up and can thus contribute to a more satisfactory situation for people belonging to national minorities, as well as to harmonious relationships between states.

Notes

1. I am grateful to Dr Katalin Deak from the Department for National and Ethnic Minorities and Mr Sandor Siteri from the Department for National Policy in the Hungarian Prime Minister's Office for their kind support in collecting the protocols and to Mr Andrew Hauptert for the translation from Hungarian into English. Protocols are now in the public domain; available at <<http://www.eurac.edu/miris>> (accessed 8 December 2010).
2. Figures given in Patrick Thornberry, “Hungarian Bilateral Treaties and Declarations”, in Arie Bloed and Pieter von Dijk (eds), *Protection of Minority Rights through Bilateral Treaties. The Case of Central and Eastern Europe* (The Hague: Kluwer Law International, 1999), pp. 127–161, at p. 131, quoting Edward Chaszar, “Trianon and the Problem of National Minorities”, in *The International Problem of National Minorities*, 2nd edn (Indiana: University of Pennsylvania, 1991), p. 72.
3. Art. 6(3) of the Constitution of the Republic of Hungary; available at <<http://www.constitution.org/cons/hungary.txt>> (accessed 8 December 2010). For a collection of similar constitutional provisions see Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State, Adopted by the Venice Commission at its 48th Plenary Meeting (Venice, 19–20 October 2001)*, CDL-INF(2001)19,

- Strasbourg, 22 October 2001; available at <[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp)> (accessed 8 December 2010).
4. The official data from the 2002 census are available online at Institutul National de Statistica, <<http://www.recensamant.ro/>> (accessed 8 December 2010).
 5. The official data from the 2001 census are available online at Statistical Office of the Slovak Republic, <<http://portal.statistics.sk/showdoc.do?docid=3035>> (accessed 8 December 2010).
 6. The official data from the 2002 census are available online at Statistical Office of the Republic of Serbia, <<http://webrzs.stat.gov.rs/axd/en/popis.htm>> (accessed 8 December 2010).
 7. The official data from the 2001 census are available online at Statistics Austria, <http://www.statistik.at/web_en/> (accessed 8 December 2010).
 8. The official data from the 2001 census are available online at Croatian Bureau of Statistics, <http://www.dzs.hr/default_e.htm> (accessed 8 December 2010).
 9. The official data from the 2001 census are available online at <<http://www.ukrcensus.gov.ua/eng/>> (accessed 8 December 2010).
 10. The official data from the 2002 census are available online at <http://www.stat.si/popis2002/en/rezultati_html/SLO-T-07ENG.htm> (accessed 8 December 2010).
 11. Wolfgang Zellner and Pal Dunay, *Ungarns Außenpolitik 1990–1997: Zwischen Westintegration, Nachbarschafts- und Minderheitenpolitik* (Baden-Baden: Nomos, 1998), pp. 242–243.
 12. *Ibid.*, pp. 213–214.
 13. See, in particular, OSCE High Commissioner on National Minorities, “The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note”, The Hague, June 2008; available at <http://www.osce.org/publications/hcnm/2008/10/33388_1189_en.pdf> (accessed 8 December 2010).
 14. *Ibid.*, Recommendation No. 18. See also Asbjørn Eide, “Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, UN Doc. E/CN.4/Sub.2/AC.5/2001/2, 2 April 2001, para. 77.
 15. See, for instance, the provisions in Article 4 of the Treaty on Understanding, Cooperation and Good-Neighbourliness between the Republic of Hungary and Romania, signed 16 September 1996 [Hungarian–Romanian Treaty], and Article 3 of the Treaty on Good-Neighbourliness and Friendly Cooperation between the Republic of Hungary and the Slovak Republic, signed 19 March 1995 [Hungarian–Slovak Treaty].
 16. Zellner and Dunay, *Ungarns Außenpolitik 1990–1997*, pp. 242–243.
 17. Quotation taken from *ibid.*, p. 233.
 18. *Ibid.*
 19. See e.g. Art. 16 of the Convention between the Republic of Hungary and the Republic of Croatia on the Protection of the Hungarian Minority in the Republic of Croatia and the Croatian Minority in the Republic of Hungary, signed 5 April 1995 [Hungarian–Croatian Convention].
 20. Act LXII of 2001 on Hungarians Living in Neighbouring Countries. For details see Sergiu Constantin, “The Hungarian ‘Status Law’ on Hungarians Living in Neighbouring Countries”, *European Yearbook of Minority Issues* 1 (2001/2), pp. 593–622.
 21. For the details on the bilaterally negotiated solution between Hungary and Romania, see Bogdan Aurescu, “Bilateral Agreements as a Means of Solving Minority Issues: The Case of the Hungarian Status Law”, *European Yearbook of Minority Issues* 3 (2003/4), pp. 509–530.
 22. OSCE High Commissioner on National Minorities, “Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations”, p. 2.

23. This section is based on Emma Lantschner and Sergiu Constantin, "Comparative Summary of Bilateral Agreements for the Protection of National Minorities and the Work of the Joint Intergovernmental Commissions in the Field of Minorities", in Bogdan Aurescu (ed.), *Kin-State Involvement in Minority Protection: Lessons Learned* (Bucharest, Strasbourg: ADIRI, Venice Commission, 2004), pp. 55ff.
24. "Declaration on the Principles of Cooperation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic in Guaranteeing the Rights of National Minorities", signed 31 May 1991 [the Hungarian-Ukrainian Declaration].
25. Following the referendum on the independence of Ukraine on 1 December 1991, Hungary was one of the first states to recognize the newly independent Ukraine.
26. For further reference on the Declaration and the Treaty, see Gáspár Bíró, "Bilateral Treaties between Hungary and Its Neighbors after 1989", in Ignác Romsics and Béla K. Király (eds), *Geopolitics in the Danube Region* (Budapest: CEU Press, 1999), pp. 347–387, at pp. 349–352.
27. Convention on Providing Special Rights for the Slovenian Minority Living in the Republic of Hungary and for the Hungarian Minority Living in the Republic of Slovenia, signed 6 November 1992 [Hungarian-Slovenian Convention].
28. Treaty on Friendship and Cooperation between the Republic of Hungary and the Republic of Slovenia, signed 1 December 1992.
29. Treaty between the Republic of Hungary and the Republic of Croatia on Friendly Relations and Cooperation, signed 16 December 1992.
30. The preamble of the Hungarian-Croatian Convention states that the contracting parties agree on this Convention "with a view to implement the Declaration on the Protection of Minorities signed by the Ukraine, Croatia and Slovenia".
31. See the Preamble of the Hungarian-Slovenian Convention referring to "special individual and common rights".
32. Article 9(3) of Hungarian-Croatian Convention refers to Croatian minority self-government in Hungary, whereas in para. 4 the Republic of Croatia "shall confirm to ensure, in accordance with its domestic legislation, the right of the Hungarian minority to cultural autonomy".
33. The Pact on Stability (not to be confused with the Stability Pact for South Eastern Europe) is also known as the "Balladur Plan" because it was proposed by the French Prime Minister Edouard Balladur. The Pact was adopted by the representatives of 52 member states of the OSCE at a conference held in Paris on 20–21 March 1995. It consists of a Declaration and a list of bilateral agreements that the participating states decided to include. For more details on the Pact on Stability, the Declaration and the Agreements included, see Florence Benoît-Rhomer, *The Minority Question in Europe* (Strasbourg: Council of Europe Publishing, 1996), pp. 30–36 and pp. 81–90.
34. Parliamentary Assembly of the Council of Europe, "Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights". Article 11 of the Recommendation reads as follows: "In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state." Available at <<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/t93/erec1201.htm#1>> (accessed 8 December 2010).
35. For more on the respective declarations, see Michael Shafir, "A Possible Light at the End of the Tunnel", *Transition* 2:19 (1996), pp. 29–32; Sándor Vogel, "A Comparison of the Hungarian-Slovak and the Hungarian-Romanian Basic Treaty", *Ethnos Nation* 4

- (1996), p. 118. On the two treaties in general, including the discussion on Recommendation 1201 (1993), see Bíró, “Bilateral Treaties between Hungary and Its Neighbors after 1989”, pp. 357–371.
36. The statement reads: “The Government of the Slovak Republic emphasizes that it has never accepted and has not enshrined in the Treaty any formulation that would be based on the recognition of the principle of collective rights for the minorities and that would admit the creation of autonomous structures on (the) ethnic principle.” “Statement by the Government of the Slovak Republic on the Treaty with the Republic of Hungary”, Bratislava, 18 March 1995.
 37. The footnote reads: “The Contracting Parties agree that Recommendation 1201 does not refer to collective rights, nor does it impose upon them the obligation to grant to the concerned persons any right to a special status of territorial autonomy based on ethnic criteria.”
 38. “Report of the CSCE Exploratory Mission to Kosovo, Vojvodina and Sandzak, 2–8 August 1992”, Vienna, 9 August 1992, p. 7.
 39. Zellner and Dunay, *Ungarns Außenpolitik 1990–1997*, p. 358.
 40. According to Goran Basic from the Belgrade-based Ethnicity Research Centre, the negotiations on bilateral agreements were mainly pushed by the OSCE. The first initiative concerned the agreement with Romania; Croatia and Hungary followed. He further stated that the main motivation for all countries in the region to sign international and bilateral documents was to be offered the Stabilisation and Association Agreement with the European Union. Official Serbia had no strategy or vision for minorities in Serbia or for Serb minorities abroad. Interview with Goran Basic, 25 May 2006.
 41. Agreement between the Republic of Hungary and Serbia and Montenegro on the Protection of Rights of the Hungarian Minority Living in Serbia and Montenegro, and the Serbian Minority Living in the Republic of Hungary, signed 21 October 2003 [Hungarian–Serb Agreement].
 42. Articles 3 and 9 of the agreement. For further reference see Emma Lantschner, “Bilateral Agreements for the Protection of National Minorities”, *European Yearbook of Minority Issues* 2 (2002/3), pp. 579–604.
 43. See general information provided by Hungary in the questionnaire on bilateral agreements and joint commissions in Hungary, printed in Emma Lantschner and Sergiu Constantin, *The Work of the Intergovernmental Commissions in the Frame of the Bilateral Agreements for the Protection of National Minorities*, Directorate General of Human Rights, Secretariat of the Framework Convention for the Protection of National Minorities, SP/BA(2003)002 (Strasbourg, 2003), Chapter II, Part A, pp. 35–36.
 44. For the identification of such emerging European standards, see Emma Lantschner, “Emerging European Standards of Minority Protection through Soft Jurisprudence?”, in Emma Lantschner, Joseph Marko and Antonija Petričušić (eds), *European Integration and Its Effects on Minority Protection in South Eastern Europe* (Baden-Baden: Nomos, 2008), pp. 53–82.
 45. Council of Europe, “Framework Convention for the Protection of National Minorities and Explanatory Report”, Strasbourg, February 1995, Article 4(2–3); available at <http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/FCNM_Texts_en.asp> (accessed 8 December 2010).
 46. It has to be noted that the FCNM had not yet entered into force at the time these two bilateral treaties were concluded.
 47. Preamble of the Hungarian–Romanian Treaty.
 48. Preamble of the Hungarian–Croatian Convention.

49. Preamble of the Hungarian–Serb Agreement.
50. For example, Art. 15(9) of the Hungarian–Romanian Treaty.
51. For example, Art. 15(9) of the Hungarian–Romanian Treaty and Art. 15(2)(d) of the Hungarian–Slovak Treaty.
52. Art. 15(2) of the Hungarian–Romanian Treaty; Preamble and Art. 1 of the Hungarian–Croatian Convention; Preamble and Art. 15(2)(c) of the Hungarian–Slovak Treaty; Preamble and Art. 1 of the Hungarian–Slovenian Convention; Preamble and Art. 3 of the Hungarian–Ukrainian Declaration; Preamble, Art. 1 and Art. 3(1) of the Hungarian–Serb Agreement.
53. Among those measures are: promoting the establishment and maintenance of educational, cultural and religious institutions, organizations and associations; the exchange of books, journals, audio and video records; the exchange of theatre groups and the organization of cultural events.
54. Art. 15(6) of the Hungarian–Romanian Treaty, which is further strengthened by Art. 13, which deals in the general part of the treaty (i.e. the part not dedicated specifically to minority issues) with cooperation in the protection of the cultural heritage of the state parties on the territory of the other state; Art. 3(3) of the Hungarian–Croatian Convention; Art. 15(2)(h) of the Hungarian–Slovak Treaty, strengthened by Art. 13; Art. 11 of the Hungarian–Ukrainian Declaration; Art. 3(3) of the Hungarian–Serb Agreement.
55. See Council of Europe, “Framework Convention”, para. 68.
56. Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, “Second Opinion on Estonia, Adopted on 24 February 2005”, ACFC/INF/OP/II(2005)001, Strasbourg, 22 July 2005, para. 101.
57. Art. 15(3) of the Hungarian–Romanian Treaty; Art. 4(2) of the Hungarian–Croatian Convention; Art. 15(2)(g) of the Hungarian–Slovak Treaty; Art. 4(2) of the Hungarian–Slovenian Convention; Art. 5(3) of the Hungarian–Serb Agreement.
58. Art. 15(3) of the Hungarian–Romanian Treaty; Art. 2(1) of the Hungarian–Slovenian Convention; Art. 10 of the Hungarian–Ukrainian Declaration; Art. 4(1) of the Hungarian–Serb Agreement.
59. Art. 2 of the Hungarian–Croatian Convention.
60. Art. 12(3) of the Hungarian–Romanian Treaty (non-minority-specific part); Art. 2(3) of the Hungarian–Croatian Convention; Art. 12(3) of the Hungarian–Slovak Treaty (non-minority-specific part); Art. 2(3) of the Hungarian–Slovenian Convention; Art. 10 of the Hungarian–Ukrainian Declaration; Arts 3(2), 4(5) and 4(6) of the Hungarian–Serb Agreement.
61. Art. 15(4) of the Hungarian–Romanian Treaty; Art. 15(2)(g) of the Hungarian–Slovak Treaty.
62. Art. 5 of the Hungarian–Croatian Convention; Art. 5 of the Hungarian–Slovenian Convention; Art. 6 of the Hungarian–Serb Agreement.
63. Art. 6(3) of the Hungarian–Serb Agreement.
64. Only the treaties between Hungary and Romania (Art. 14) and Hungary and Slovakia (Art. 14) regulate in the non-minority-specific part in very general terms that states shall promote a climate of tolerance and understanding, that they condemn xenophobia and all kinds of manifestations based on racial, ethnic or religious hatred, discrimination and prejudice and will take effective measures to prevent such manifestations. Art. 4 of the Hungarian–Ukrainian Declaration is similar.
65. See, on the division between passive and active access to the media, Karol Jakubowicz, “Report: A Critical Evaluation of the First Results of the Monitoring of the Framework Convention on the Issue of Persons Belonging to National Minorities and the

- Media (1998–2003)”, in *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg: Council of Europe Publishing, 2004), pp. 113–138.
66. Art. 11 of the Hungarian–Slovenian Convention; Art. 12 of the Hungarian–Croatian Convention.
 67. Art. 15(5) of the Hungarian–Romanian Treaty; Art. 15(2)(e) of the Hungarian–Slovak Treaty.
 68. Concerning recruitment and representation in the police, see OSCE Office of the High Commissioner on National Minorities, “Recommendations on Policing in Multi-Ethnic Societies”, February 2006, Recommendations 4–7; available at <http://www.osce.org/documents/hcnm/2006/02/17982_en.pdf> (accessed 8 December 2010).
 69. See, for example, para. 103 of the Advisory Committee’s “Opinion on Serbia and Montenegro”, ACFC/INF/OP/I(2004)002, Strasbourg, 27 November 2003.
 70. See, for example, Art. 15(7) of the Hungarian–Romanian Treaty.
 71. Art. 11(1) of the Hungarian–Croatian Convention; Art. 10 of the Hungarian–Slovenian Convention; Art. 10(2) of the Hungarian–Serb Agreement.
 72. See, in particular, Recommendations No. 1 and 9.
 73. Art. 8 of the Hungarian–Croatian Convention; see also Art. 7(2) of the Hungarian–Slovenian Convention; Art. 11(2) of the Hungarian–Serb Agreement.
 74. Art. 19 of the Hungarian–Romanian Treaty; Art. 11(1) of the Hungarian–Croatian Convention; Art. 11 of the Hungarian–Slovak Treaty; Art. 10 of the Hungarian–Slovenian Convention (which does not, however, mention the limitation concerning capacities); Art. 11(3) of the Hungarian–Serb Agreement.
 75. This section is based on Emma Lantschner, “Bilateral Agreements and Their Implementation”, in Alexander Morawa (ed.), *Mechanisms for the Implementation of Minority Rights* (Strasbourg: Council of Europe Publishing, 2004), pp. 203–224, at pp. 204–210.
 76. Art. 15 of the Hungarian–Slovenian Convention; Art. 16 of the Hungarian–Croatian Convention; Art. 16 of the Hungarian–Serb Agreement.
 77. Art. 15(10) of the Hungarian–Romanian Treaty; Art. 15(6) of the Hungarian–Slovak Treaty.
 78. For more details on this, see Lantschner, “Bilateral Agreements and Their Implementation”, p. 208.
 79. Information from the questionnaires printed in Lantschner and Constantin, *The Work of the Intergovernmental Commissions*, pp. 78–79.
 80. Information from the questionnaire answered by Hungary in relation to its commission with Romania, printed in Lantschner and Constantin, *The Work of the Intergovernmental Commissions*, p. 64.
 81. The number of members present in the joint commissions is not defined in the agreements but agreed upon by the two parties. The commissions of minority-specific conventions consist of about 15 members, whereas the commissions under the treaty are composed of 8 members per party only.
 82. Lantschner, “Bilateral Agreements and Their Implementation”, p. 209.
 83. *Ibid.*, p. 205.
 84. *Ibid.*, pp. 206–207 and p. 210.
 85. *Ibid.*, p. 210.
 86. Two meetings of the Hungarian–Serb Commission had taken place as of the end of 2008: 13 December 2004 in Budapest; 10 November 2005 in Subotica.
 87. Ten meetings of the Hungarian–Croatian Commission had taken place as of the end of 2008: 25–26 September 1995 in Zagreb; 23–24 September 1996 in Budapest; 13–14 November 1997 in Zagreb; 20 December 1999 in Budapest; 25–26 January 2001 in Osijek;

- 19 December 2002 in Pécs; 5 May 2005 in Zadar; 16 June 2006 in Budapest; 2 May 2007 in Zagreb; 2 July 2008 in Budapest.
88. Eight meetings of the Hungarian–Slovak Commission had taken place as of the end of 2007: 8 February 1999 in Budapest; 29 September 1999 in Bratislava; 30 March 2001 in Budapest; 5 June 2003 in Pozsony; 15 November 2005 in Budapest; 22 September 2006 in Bratislava; 18 September 2007 in Budapest; 10 June 2008 in Bratislava.
 89. Eight meetings of the Hungarian–Romanian Commission had taken place as of the end of 2008. The protocols of the third, sixth and eighth meetings were not available. Of the eighth meeting, which took place in 2008, no protocol was signed, because some paragraphs could not be agreed upon. Therefore the analysis will cover only the protocols of the following meetings: (1) 9 October 1997 in Bucharest; (2) 13 October 1998 in Budapest; (4) 10 and 24 September and 19 October 2001 in Budapest and Bucharest; (5) 13–14 September 2002 and 21 June 2003 in Gyula and Sfintu Gheorghe; (7) 3 July 2007 in Bucharest (of this meeting only the Mission Report of a representative of the Hungarian delegation is available; this report mentions that the final text of the protocol would be finalized only during a continuation of the session, which was supposed to take place at the end of August 2007).
 90. Ten meetings of the Hungarian–Slovenian Commission had taken place as of the end of 2007. The first two protocols (of 4 April 1995 in Ljubljana, and of 20–21 May 1996 in Budapest) were not available. Therefore the analysis will cover only the protocols of the following meetings: (3) 4–5 November 1997 in Lendava; (4) 1–2 February 1999 in Szentgotthárd; (5) 3–4 February 2000 in Ljubljana; (6) 8–9 May 2001 in Szentgotthárd; (7) 23–24 April 2003 in Moravske Toplice; (8) 24 May 2005 in Budapest; (9) 21 September 2007 in Ljubljana; (10) 25 April 2008 in Budapest.
 91. See Protocol of the 6th Session of the Hungarian–Slovak Ethnic Minority Joint Committee, Bratislava, 22 September 2006, Part I.
 92. Other neighbouring countries were not so concerned about the law. The Hungarian–Croatian joint commission, for instance, welcomed the law as a contribution to the strengthening of neighbourly relations between the two countries. See Protocol of the 6th Session of the Croatian–Hungarian Ethnic Minority Joint Committee, Pécs, 19 December 2002. The Hungarian–Slovenian joint commission welcomed the endeavour of the Hungarian government to amend the act in 2003, because by this “it achieves that it will be harmonized with the laws of the European Union and the neighbouring states.” See Protocol of the 7th Session of the Hungarian–Slovenian Ethnic Minority Joint Committee, Moravske Toplice, 23–24 April 2003.
 93. For instance, a Romanian–Hungarian agreement already in force when the law was adopted provided for a certain quota of Romanian citizens to work in Hungary – 8,000 work permits per year. The number of ethnic Hungarians able to work on the basis of the law was unrestricted, but the number of other Romanian citizens was limited, thus creating discrimination on an ethnic basis.
 94. For details on the contested parts of the law, see Aurescu, “Bilateral Agreements as a Means of Solving Minority Issues”, pp. 510–511.
 95. See, for example, the Regular Report of the European Commission for 2001: “Hungary will therefore need to ... hold the necessary consultations in order to agree with its neighbours also as regards future implementing legislation.” Commission of the European Communities, *2001 Regular Report on Hungary's Progress Towards Accession*, Brussels, SEC(2001) 1748, 13 November 2001, p. 91; available at <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/hu_en.pdf> (accessed 9 December 2010). See also Parliamentary Assembly of the Council of Europe, Resolution 1335(2003), “Preferential treatment of national minorities by the kin-state: the case of

- the Hungarian Law on Hungarians Living in Neighbouring Countries ('Magyars') of 19 June 2001", 25 June 2003, para. 14; available at <<http://assembly.coe.int/Documents/AdoptedText/ta03/ERES1335.htm>> (accessed 9 December 2010): "The Assembly therefore urges the Government and Parliament of Hungary to find ways to make further amendments to the Hungarian Law on Hungarians Living in Neighbouring Countries of 19 June 2001 in such a way that it is based on bilateral discussions and agreements with the neighbouring countries . . . Furthermore, the Assembly calls on all governments concerned to enter into or to continue substantial negotiations."
96. "Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania Concerning the Law on Hungarians Living in Neighbouring Countries and Issues of Bilateral Co-operation" [MoU], signed in Budapest on 22 December 2001.
 97. The meetings took place on 10 September (Budapest), 24 September (Bucharest) and 19 October 2001 (Budapest).
 98. Quoted from an unofficial translation of the Protocol of the Fourth Meeting of the Committee for Co-operation on National Minorities Issues of the Joint Intergovernmental Commission on Cooperation and Active Partnership between Romania and Hungary, signed in Budapest on 19 October 2001.
 99. See MoU, point II.9.
 100. Resolution 1335 (2003) of the Parliamentary Assembly of the Council of Europe, based on the Report of the Committee on Legal Affairs and Human Rights, "Preferential Treatment of National Minorities by the Kin-state: The Case of the Hungarian Law of 19 June 2001 on Hungarians Living in Neighbouring Countries ('Magyars')", Doc. 9744 rev., 13 May 2003.
 101. Vilmos Szabó, "Hungary's Neighbourhood Policy and the Situation of Hungarian Minorities", *Foreign Policy Review* 2:2 (2003), pp. 3–17, at p. 12; RFE/RL [Radio Free Europe/Radio Liberty] Newline, 24 June 2003; RFE/RL Newline, 27 June 2003; RFE/RL Newline, 30 June 2003.
 102. Szabó, "Hungary's Neighbourhood Policy and the Situation of Hungarian Minorities", p. 11; RFE/RL Newline, 24 June 2003.
 103. Signed in Bucharest on 23 September 2003.
 104. RFE/RL Newline, 30 June 2003.
 105. Protocol of the 4th Session of the Hungarian–Slovak Ethnic Minority Joint Committee, Pozsony, 5 June 2003, Part I.
 106. Szabó, "Hungary's Neighbourhood Policy and the Situation of Hungarian Minorities", p. 12.
 107. RFE/RL Newline, 8 December 2003; RFE/RL Newline, 12 December 2003; for the text of the agreement in English, see Björn Arp, *International Norms and Standards for the Protection of National Minorities* (Leiden: Martinus Nijhoff Publishers, 2008), pp. 480–482.
 108. Protocol of the 6th Session of the Hungarian–Slovak Ethnic Minority Joint Committee, Bratislava, 22 September 2006, Part I. See also Protocol of the 7th Session of the Hungarian–Slovak Ethnic Minority Joint Committee, Budapest, 18 September 2007, Part I. According to Art. 6 of the agreement, the Hungarian–Slovak Minority Joint Committee, established under the Treaty on Good-Neighbourliness, is also responsible for reviewing the implementation of the agreement.
 109. Think, for instance, of the clashes between Albanians and Macedonians in Macedonia in 2001 – see, for example, Joseph Marko, "The Referendum on Decentralization in Macedonia in 2004: A Litmus Test for Macedonia's Interethnic Relations", *European Yearbook of Minority Issues* 4 (2004/5), pp. 700–702 – or the student protests in Prishtina, as early as 1981.

110. See Protocol of the 7th Session of the Hungarian–Croatian Minority Joint Committee, 5 May 2005.
111. Trip Report, 7th Session of the Hungarian–Romanian Minority Affairs and Cooperation Expert Committee, 3 July 2007.
112. *Ibid.*
113. Information provided by the director of the Center for the Research of Ethnicity and Culture (CVEK) in October 2008. For more information, see the project “Attitudes of primary schools pupils toward autochthonous [sic] and new minorities in Slovakia” on the website of CVEK at <<http://www.cvek.sk/main.php?p=projekty&lang=en&archive=2008>> (accessed 9 December 2010).
114. Protocols of the 4th to the 8th Sessions of the Hungarian–Slovak Commission, 5 June 2003 to 10 June 2008, repeat this recommendation.
115. See, for example, Protocol of the 9th Session of the Hungarian–Slovenian Minority Joint Committee, 21 September 2007.
116. Protocols of the 9th and 10th Sessions of the Hungarian–Slovenian Minority Joint Committee, 21 September 2007 and 25 April 2008.
117. Protocols of the 6th, 7th and 8th Sessions of the Hungarian–Croatian Minority Joint Committee, 19 December 2002, 5 May 2005 and 16 June 2006.
118. Protocols of the 9th and 10th Sessions of the Hungarian–Slovenian Minority Joint Committee, 21 September 2007 and 25 April 2008.
119. Protocol of the 10th Session of the Hungarian–Slovenian Minority Joint Committee, 25 April 2008; Protocols of the 7th and 8th Sessions of the Hungarian–Slovak Ethnic Minority Joint Committee, 18 September 2007 and 10 June 2008; Protocol of the 9th Session of the Hungarian–Croatian Minority Joint Committee, 2 May 2007.

7

R2P and kinship in the context of Syria and Lebanon

Joshua Castellino

Introduction

From the perspective of the protection of minorities, the case of the protection of vulnerable groups in Lebanon is particularly poignant. It could be argued that the first real treaty of public international law that concerned minorities was expressed in the context of the Lebanese ethno-religious group the Maronites.¹ This group was “adopted” by St Louis of France and was the subject of what is referred to in the literature as the “Promise of St. Louis of France 1250”.² This adoption was essentially undertaken in the context of providing the Maronites safe passage across Europe, and was renewed subsequently by Louis XVI. It is important to point out that this unilateral declaration of support for the Maronites occurred before the articulation of the concept of state sovereignty, and thereby St Louis’s promise did not incur the formal violation of the sovereignty of another state or quasi-state entity – an issue fundamental in any discussion of the responsibility to protect (R2P). Also, unlike relations between modern Syria and Lebanon, where the former’s intervention could be justified on the grounds of the protection of kin Muslim communities, St Louis’s promise was towards the Christians. Nonetheless, it could be argued that, from a historical perspective, the “Promise” was an antecedent to the R2P doctrine formulated nearly eight centuries later.

In the modern context, the state of Lebanon has had a particularly bloody history, with a long engaged civil war between its Christian and

Blood and borders: The responsibility to protect and the problem of the kin-state, Kemp, Popovski and Thakur (eds), United Nations University Press, 2011, ISBN 987-92-808-1196-4

Muslim populations that has resulted in serious violations of rights on both sides.³ The historical and contemporary tensions in the state are complicated by several factors. First, there is a general atmosphere of distrust in the Middle East associated with the entrenched Israeli–Palestinian conflict. As a neighbouring state, Lebanon has been threatened by the proliferation of this conflict, as has been demonstrated as recently as in the Israeli attacks against Hezbollah in southern Lebanon in 2005. Secondly, the relationship between Syria and Lebanon itself is problematic since there is some credence in arguing that both states had a shared history during the Ottoman period. The extent to which this ought to be a factor in determining the boundaries of a modern state is not a question that can be commented upon from any legal perspective, but nonetheless remains a backdrop to Syrian interests and views of Lebanon. Third, there are similarities or, in terms of this project, “kinship” between groups in Lebanon and Syria that fit this case within the broader study that is the concern of this volume.

With the goal of seeking to unravel some of these complexities, this short chapter will be divided into three sections. First, I offer some general observations in the context of the particular relevance of the doctrine of R2P vis-à-vis minorities. Then I shall focus in some detail on the relevant history of kinship between Syria and Lebanon, explaining Syria’s interest in Lebanon and outlining its potential in providing peace and security to the region. The third section examines the doctrine against the factual basis concerning Syria’s past intervention in Lebanon with a view to analysing the extent to which it would fit within a contemporary R2P frame. The conclusion will offer some suggestions in terms of actualizing R2P in the context of protecting minorities, especially in the context of kin-states.

R2P and minorities: Some general considerations

The end of the Cold War appears to have resulted in a degree of activism in the United Nations Security Council: the principle of the “maintenance of international peace and security”, always a key phrase in the UN lexicon, suddenly acquired prominence. Although this role had traditionally been mandated to the Security Council, Cold War politics, specifically the use or potential use of the veto by one or more of the Permanent Members of the Security Council, hampered action that could be taken by the United Nations.⁴ Instead, interventions of any kind risked escalation into full-scale war, and the few interventions that took place that could be deemed to have been on “humanitarian grounds”, such as the Tanzanian action against Idi Amin in Uganda,⁵ were usually emphasized as exceptions

that were not precedent setting.⁶ Rather, the importance of the doctrine of state sovereignty was generally accepted, as expressed in the language of Article 2(7) of the UN Charter.

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

The caveat identified to this Article is phrased:

but this principle shall not prejudice the application of enforcement measures under Chapter VII.⁷

With the Security Council unable to authorize Chapter VII actions, the default position became strong adherence to the doctrine of state sovereignty. For minorities and indigenous peoples, especially those who may have harboured notions of “self-determination” (whether justified or not), this strict adherence acted as a tourniquet.⁸ The United Nations rhetoric promised the right of self-determination to all peoples, even phrasing it as a norm of *jus cogens*,⁹ but then interpreted “peoples” narrowly as referring only to “colonial peoples”.¹⁰

This fostered resentment and tension within post-colonial states in several ways. First, it suggested implicitly that “colonization” could occur only across continents, and not by neighbouring dominant groups. Second, while raising the aspiration of submerged nations through an invocation of notions of freedom and independence, it simultaneously dampened this enthusiasm by insisting that the status quo at the time of the departure of the colonial ruler was the only criterion on which statehood could be awarded.¹¹ Thus the chasm between the rhetoric of “self-determination” in the politico-legal sense and its manifestation in reality has been growing ever since the first articulation of the notion of “minorities” and “self-determination” in the context of settlements after the First World War.¹²

Although the current discussion focuses on R2P, it is worth recalling a previous, equally important, international discussion that resulted in the passage of the 1970 “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States”.¹³ That document highlighted the key principles of international law, accepted as a statement of customary international law.¹⁴ Nestled among the key principles is the notion of self-determination, with all its contradictions. On the one hand, it guarantees the principle to all peoples, and suggests that it is of fundamental importance; on the other hand, it is mindful of the

extent to which the agenda of self-determination could undermine the principle of state sovereignty.¹⁵ In many ways, the current objections articulated by states and some commentators against R2P are on similar grounds to those articulated at the time in the context of self-determination. As the cliché goes, “international law is not a suicide club for states”: the same reluctance of states to validate a norm that could be used against their integrity in the context of “self-determination” – an amorphous political context that was being translated into legal doctrine¹⁶ – is relevant in the context of the rich discussions over the nuances of R2P.

What is of particular concern to those interested in minority rights issues is that once again the discussions over R2P were instigated as a result of the treatment of identity-linked communities and the failure of the international community to guarantee groups, minorities, indigenous peoples and, in some cases, nations adequate protection, whether in terms of self-determination, as in the debate of the 1970s, or in terms of protection against mass killings, ethnocide and even genocide in the contemporary discussion.

Chastened by the experience of these kinds of violations, usually against minorities and indigenous peoples, it appears that the international community has once again mustered a head of steam to act. The action is usually justified by an attempt at norm creation; but inevitably this breaks down in the context of the implementation of such norms. The current discussion of R2P runs the same severe risk, raising the expectations of minorities and others while ultimately failing them in being unable to create a suitable implementation and monitoring mechanism in the face of state recalcitrance to act.

From the perspective of many of these groups, especially those that have already been demonstrated to be vulnerable, the case for generating R2P cannot be stated in terms that are too strong.¹⁷ The modern post-colonial state encompasses a number of groups that it does not represent.¹⁸ These are often groups that have historically faced persistent discrimination and that maintain animosity towards the dominant majority, but that have been placed within the same state, at the mercy of the majority by virtue of colonial boundary drawing.¹⁹ The post-colonial state, on average, is about 40 years old: difficulties that have been resolved between competing groups in Europe over a few centuries and numerous wars are contested with ferociousness in the context of a few decades. The result is an inevitable risk of, if not propensity for, war.

It could be argued that, with the obvious exception of the situation in Sierra Leone,²⁰ in many of the conflicts that have merited Security Council action since the Cold War there have been underlying identity-oriented tensions. This is true in Liberia,²¹ Rwanda,²² Haiti²³ and Kosovo,²⁴ and to

an extent even in the context of Somalia.²⁵ However, although R2P has merited attention in many quarters, for it to become a cornerstone of international law with a likely positive impact on minorities it would need to generate consistent responses from states and the international community that are objective, logical, coherent and predictable. Hamilton argues that the notion of R2P has gone from “document to doctrine”, and the question of implementation has been left in abeyance.²⁶ A failure to implement it would see it continue in a state of ambiguity, with significant legal valence but functioning ultimately as value-laden political rallying call to the international community at large. One way in which this doctrine could be actualized would be through an adequate emphasis on the particular needs of vulnerable groups.

In examining the general utility of R2P vis-à-vis minorities and indigenous peoples, one final issue needs to be highlighted. Although the doctrine as currently framed addresses the various criteria that ought to be fulfilled, inadequate attention is paid to the sources of early warning that are available. The recent case in South Ossetia is instructive: it is clear that violations of peace and security and the descent into war are increasingly occurring along ethnic lines. Groups on the fringes of the large empires of the twentieth century are particularly vulnerable. This could be attributed to a haphazard transition process from empire to independence; or to a failure to deliver the values or the process of genuine self-determination. In contemporary times, one mechanism that has been mindful of the strong link between discrimination and ethnic conflict is the Committee on the Elimination of Racial Discrimination (CERD), which set up an early warning mechanism in a bid to alert the international community to potential cases where international peace and security might be at risk.²⁷ Yet, despite issuing urgent warnings in the context of Yugoslavia, Afghanistan and Darfur, there was no international mechanism to take up the concerns, until violence erupted.²⁸

Syria and Lebanon: A shared history?

In the context of understanding the situation vis-à-vis Lebanon and Syria, it is important to provide a brief historical snap-shot of their shared history with a particular emphasis on the notion of “kinship”. This historical background is particularly important for understanding how the myriads of communities that have traditionally lived in the territory of the two states are related or could be termed “kin” groups. The relevant history can be distilled into the following key elements:

1. The historical entity that pre-dated the Ottoman period was generally designed *al-Sham* and included Syria, Lebanon, Jordan and Israel, with

Damascus considered the capital of the Islamic Umayyad empire until AD 750.

2. Conquest by the Ottoman Sultan Selim I (1516) saw Syria divided into administrative units called *vilayets*, with provincial *pashas* or *walis* who were in constant competition. The original three provinces were Damascus, Aleppo and Tripoli, but a fourth province was later forged named Sidon (later to be called Beirut).²⁹
3. During the Ottoman regime, Mount Lebanon was considered an integral part of Greater Syria, and questions still remained when the French took on the Mandate for the region in 1920. It was finally resolved through French administrative law in favour of Lebanon, with Syria refusing to engage in diplomatic relations with the new state.
4. Two successive generations of Lebanese rulers (*hakims*) stressed their independence, arguing that the Mountainous Region had to be treated differently from the plains. Bashir II (1788–1840) of the Shihabi dynasty managed to gain exclusive jurisdiction of Mount Lebanon and also incorporated some coastal towns into his territory, despite objections from Damascus.³⁰

After a brief period of Egyptian rule over Syria and Lebanon (1832–1840), Ottoman control was restored with the creation of new administrative divisions across the region. The territory of Mount Lebanon was included within these new divisions, though it was further divided into two distinct districts. One of these was governed by a Maronite Christian and the other by a Druze. Thus the sectarian division of Lebanon that so characterizes the state's modern history got under way, accompanied by the emergence of a social structure, referred to as the “confessional system”, that was common to Syria and Lebanon and ostensibly motivated by the drive to maintain the protection of religious minorities.

The “confessional system” derives from the Ottomans viewing their empire as a religious state, wherein the Sultan's mandate derived from his role as the temporal and spiritual head of the population. Since the Ottomans were Muslims, the law administered was law derived from Islam and was not considered as applying to non-Muslims. Thus non-Muslims (Christians and Jews) lived within the Ottoman empire under the direct protection of the Sultan, but were not really considered members of the political community. Rather, Christians and Jews had autonomous communitarian structures (*millets*) administered under their own religious laws, especially in the areas of personal and property matters, including the administration of education through special religious schools. Those Muslim sects that did not conform to the orthodox Sunni faith of the rulers (especially the Shiite and the Druze) were not given special treatment but were placed under the jurisdiction of the Sunni, with their different interpretation of the religion not officially accepted.³¹

By far the most dominant group in the region of Syria and Lebanon was the Sunni, and the Christians formed the largest minority. The Mount Lebanon area had the highest concentration of sectarian minorities, something historians attribute to the policy of the Lebanese *hakims*, notably Shihabi, who encouraged religious minorities and political refugees from Syria to settle within his jurisdiction.³²

The Maronites formed the largest “minority” in Mount Lebanon, a fact attributed to the active role played by the Maronite Church from the seventh century onward.³³ The Druze community was the second-largest community and, though officially subsumed under the label of “Sunni”, there were doubts and suspicions as to the extent to which they could be considered truly “of the faith”. In a modern context, it is the Druze who could be considered a classic kin-minority, straddling the southern part of the Mount Lebanon area as well as the western Syrian provinces of Hawran and Jabal al-Duruz. Mount Lebanon was also home to significant communities of Shiite Muslims, Greek Orthodox and Greek Catholic communities, and similar communities also existed across the border in contemporary Syria. As described by Weinberger, the gradual change from a “feudal” to a “confessional” order was accompanied by a change in society-wide structures:

In the earlier phase, horizontal (socioeconomic) cleavages prevailed, reflecting distinctions between the dominant feudal lords and their tenants. Vertical (sectarian or confessional) cleavages only gradually became politicized, emerging as the most salient social divisions in Mount Lebanon by the mid-nineteenth century. The interplay between the two dimensions of social cleavage ultimately exploded in civil strife. Social unrest was first sparked by horizontal cleavages within the Maronite community, challenging the bases of the feudal order. In later decades, socioeconomic grievances were overshadowed by intersectarian strife.³⁴

The active role of the Maronite Church attracted Maronite migration, and the organization of this ethnic group was reflected in the Druze community, which began to mobilize in a bid to counteract the spread of Maronite influence in the Mountain Region. The result was significant ethnic strife between 1820 and the 1840s.³⁵ In response, the Ottomans divided the Mountain Region into two administrative regions (*kaymakate*), with the Beirut–Damascus road bisecting the northern Maronite zone and the southern Druze zone. However, the solution was always likely to be contentious in terms of implementation since the two communities lived interspersed among each other, leading to a complex interwoven web of kinship in both new states. Unsurprisingly, the system failed to prevent the outbreak of regular bouts of violent ethnic conflict. The Ottomans once again intervened, sending in battalions commanded with the task of

disarming local militias and restoring peace. It could be argued that this was the first real “intervention”: though the Mountain Region was considered part of the Ottoman empire at the time, there remained questions about its status in the eyes of local militia.³⁶

By 1845 a new administrative scheme had been introduced in the form of a council within each of the two zones that had representatives from all the communal groups and not only the Maronites and the Druze. This system brought the Mountain Region in line with the Syrian administration, where these kinds of consultative councils (*meclis*) had been functioning with a degree of success.³⁷ The Ottoman intervention in 1845 succeeded in restoring an uneasy peace and brought about unification in the systems of governance in Lebanon and Syria. These measures had partial success in dampening down the ethnic tensions that continued throughout the rest of the century. One particular episode in this bloody history concerned the refusal by Damascene Christians to pay a conscription tax on the grounds that such a tax was not being charged of their kin-communities in the Mountain Region. This led to resentment among the Muslims on both sides of the border and sparked further tension. Showing the kinships that exist between the two regions, Weinberger narrates:

Significant transnational linkages surfaced in the outbreak of violence in the Mountain and Damascus. With the controversy over the conscription tax still unresolved, rumours reached Damascus in June 1860 that Christians in Lebanon were being massacred by Druze with government backing. Ahmed Pasha made no effort to halt the flow of men and arms from Jabal Duruz and Damascus to assist the Lebanese Druze. Nor did he prevent groups of Druze from both the Mountain and Hawran from entering Damascus and inciting Muslims against Christians. When attacks against Christians were begun by an angry crowd, composed primarily of Damascene Muslims, the *vali* refrained from using his troops to protect the Christians. Ahmed Pasha was subsequently executed by order of the Porte for his role in the Damascus massacres.³⁸

The tensions ultimately led to European intervention, with collective pressure brought to bear upon the Ottoman authorities to reconfigure the administrative arrangements in order to facilitate better representation. However, each of the European states had different national interests: the traditional French support for the Maronites was countered by Russian support for Orthodox communities and British support for the Druze.

Concerned about the situation, the Concert of Powers created a Commission to inquire into the 1860 massacres. This resulted in the recommendation of the Organic Statute of 1861, which defined the Mountain as an autonomous region (*sanjaq*). The newly appointed governor, a non-Lebanese Ottoman Christian, was charged with the role of moving

towards broader representation. A central Administrative Council was created, based on a complex formula of proportional representation derived from the confessional system. The formula used the population sizes of the different sects to yield different numbers of seats for the Maronite, Druze, Greek Orthodox, Greek Catholic, Shiite and Sunni Muslim communities. Thus, according to the system, each representative on a governmental body was in fact a trustee of the interests of the community that she or he represented.³⁹

The success of the system and the Organic Statute is reflected in the relative tranquillity in the aftermath of its introduction, until 1915 when it was revoked by the Ottomans under the shadow of the threat of the First World War. Lebanon was absorbed back into the provincial system that existed for the rest of the empire. The defeat of the Ottomans in the war once again opened the door on the administrative arrangements for the territory, and the region was carved up between Britain and France through the secret Sykes–Picot Agreement of 1916.⁴⁰ In keeping with the Wilsonian vision of self-determination,⁴¹ a Commission (King–Crane) sought to determine the aspirations of the population.⁴² A Mandate for Syria and Lebanon was created and attributed to France in 1920, a decision confirmed by the League of Nations in July 1922.⁴³

Under the French Mandate, Lebanon's territorial dimensions were augmented, with the additions of the coastal regions and parts of the Biqa Valley. Each additional region dramatically changed the overall ethnographic demography of the country: the Maronites, accounting for nearly 60 per cent of the population in the Mountain Region, were reduced to becoming a minority (albeit the largest such minority) of 29 per cent in Greater Lebanon.⁴⁴ Despite this reduction of influence, the argument for Greater Lebanon was advocated by the Maronites who were keen to gain independence from Syria, and to that extent appeared to be confident that their interests in the consolidated state would be protected by the French. The larger state with the coastal areas was also seen as economically more viable.

The notion of Greater Lebanon was not to the liking of all. The Sunni Muslims were set to lose their status as part of the majority population of Greater Syria, and there was the added suspicion that Lebanon was envisaged by the French as a Christian state in which they were likely to have second-class status. This Muslim Sunni population could ultimately be identified as forming an important factor in the identification of kinship between Syria and Lebanon. They, like many other smaller Muslim sects, would have preferred to see a united Lebanon–Syria come to independence, rather than becoming a visible minority in a new overtly Christian state. Within the Syrian part of the French Mandate, the Syrian

nationalist movement had begun to get mobilized in the spirit of Arab nationalism. They were enraged by what they considered an attempt to partition Syria, having already had to relinquish a part of Palestine (to the British Mandate), which they had considered part of the Syrian state. However, the French were unwilling to acquiesce to Syrian aspirations and, in addition to expanding the territorial dimensions of Lebanon, designated separate Alawi and Druze “states” (administrative units) by 1922 in the name of minority protection. This gave credence to the belief held by Syrian nationalists that the French were concerned with “divide and rule”.

The Syrian territorial claim to Lebanon was reflected in Article 2 of the 1928 Constitutional Draft, framed by the Constituent Assembly of Syria. This draft article emphasized Syrian “unity” and independence, considering all the Syrian territories that were part of the Ottoman empire to be an indivisible entity.⁴⁵ The article was found unacceptable to the French High Commissioner, who omitted it from the constitution he imposed on Syria in 1930. It could be argued that the issue vis-à-vis the Syrian claim to Lebanon was finally resolved by 1936 in a negotiation between the French and the Syrian Chamber of Deputies.⁴⁶ France agreed to the annexation of the Druze and Alawi areas, albeit under a special administrative regime, and the Syrian claim to Greater Lebanon was dropped. The result was the independence of both Syria and Lebanon and their subsequent membership of the League of Nations as independent sovereign states. By 1941 the governments also officially recognized each other, and by 1944 the Arab states collectively recognized Lebanon through the Alexandria Protocol.⁴⁷ Nonetheless ambiguities and claims did occasionally surface in post-war history.

Irrespective of the positions in “high politics”, it is clear that the transnational links between the different communities on either side of the border continued to grow. The Lebanese Druze communities in the Mountain Region maintained strong links with the Druze in the Syrian south, and there were similar ties of kinship between the Christians and between Sunni Muslims on either side of the border. Also unsurprisingly in view of the troubled history and complex mixture of populations, both states faced regular sectarian strife throughout the twentieth century.

Having examined the history between the states, it could be argued that there were strong “kin” relationships between communities across the border, if not necessarily recognized in the high politics between the two states. In addition, it is important to note that the irredentist Syrian claim to Greater Lebanon, although largely dissipated in the latter half of the twentieth century, continued to be a factor in subsequent interactions between the states. Having established this, it is now time to turn to the

fundamental question of the nature of Syrian intervention in Lebanon, especially in 1975, in order to explore whether there could be a kin-based reason for Syrian intervention in Lebanon in the future.

Syrian “intervention” in Lebanon: Exercising a duty to protect or unjust interference?

Writing in the context of the wider struggle for power in the region, one author argues that this provided a great opportunity for Syria, in that a successful resolution of the crisis would contribute to Syrian ambitions for leadership of the Arab world.⁴⁸ This ambition is also tempered by the Syrian desire to assert control over its immediate neighbour and to be involved in the discussion vis-à-vis the Palestinian question.⁴⁹ Against this, the Syrians appear mindful that a failure to intervene would result in a handover of crucial regional influence to other power brokers in the region;⁵⁰ there was the additional fear of the negative implications of strife in Lebanon leading to instability with the power to disrupt the Syrian leadership. In the case of the 1975–1976 intervention, Syrian action was also interesting from the perspective that it did not necessarily act in support of “traditional allies” in Lebanon, but rather, having received appeals for help from both pro-establishment and anti-establishment forces, it shifted its allegiance from the insurgents to the incumbents.⁵¹

From a Realist perspective, it could be argued that a state intervenes in other states to seek an outcome to a conflict that would maximize its own influence within the target state and the wider community. With Syrian foreign policy becoming increasingly expansionist since the ascendancy of President Hafiz al-Asad, this aspiration ought to be considered crucial in Syria’s actions. However, some stress that defensive ambitions were equally at stake: the “fear of contagion”⁵² from unrest in a neighbouring state that mirrored population dynamics in some parts of Syria was always an important underlying factor to intervention.⁵³ As Weinberger narrates:

Beyond a doubt, Syria’s leaders were apprehensive about repercussions of turmoil in Lebanon for stability in Syria. Both Lebanese and Syrian societies are fragmented along religious and – to a lesser extent – ethnic, regional, and socio-economic lines. In each country, predominant political influence has been exercised by members of one sectarian minority group. Syria’s oft-cited determination to prevent partition of Lebanon along sectarian lines reflected anxiety over Syria’s vulnerability to a similar fate.⁵⁴

In the context of its intervention, Syria argued that it was responding to pleas for assistance from Lebanese groups. On this ground it is argued

that Syrian intervention was desired by the majority of the Lebanese population, using the analogy of the Big Brother responding to its sibling in a time of need. This was also the reason the Syrians felt their intervention was morally justifiable, irrespective of other motivations for the intervention. Yet, although there may be some basis to the original invitational aspect of this intervention, it is equally clear that by 1976, when Syria raised its commitment to Lebanon and decided to maintain a presence in the state, this was motivated by its own policy imperatives and not the pleas of a stricken neighbour.⁵⁵

The twists to the intervention are discussed in some detail by Weinberger, including the collapse of the Lebanese army in 1976 and the strength of the opposition to the regime, both of which are cited as taking Syria by surprise and leading to a miscalculation on its part of the cost of the intervention. Weinberger also argues that these events were a spur for the Syrian leadership to adopt moral responsibility for the survival of the Lebanese state – in order to guarantee peace and stability in the region if not for ulterior motives of gaining control.⁵⁶ The Syrians also appeared surprised at the lack of leverage they could exercise over the leader of the Lebanese National Movement (LNM), Kamal Junbalat, who was unwilling to compromise on his goal of a radical redistribution of power within the state, effectively refusing to accept proposals put forward by the Syrians in 1976 for rebuilding the Lebanese political system.⁵⁷

As Weinberger stresses, the Syrian intervention in Lebanon thus went against the conventionally accepted understandings of interventions. She uses Rosenau's generally accepted definitions, for instance:

an intervention begins when one national society explicitly, purposefully, and abruptly undertakes to alter or preserve one or more essential structures of another society through military means, and it ends when the effort is either successful, abandoned, or routinized.⁵⁸

And the concept of intervention “refers to an action and not a process – to a single sequence of behavior, the initiation and termination of which is easily discernible and the characteristics of which are dependent on the use or threat of force”.⁵⁹

Yet the Syrian action in Lebanon changed allegiances mid-way and used numerous tools other than force, which could not adequately explain Syria's different perspectives as the conflict unfolded.⁶⁰ Weinberger's analysis also tracks the factors that focused Syrian perspectives, arguing that the regime always selected a strategy that involved the lowest costs and risk.⁶¹

It could be argued that a key feature of the intervention is a kin-related issue, though not one focused on the kin relationship between

communities in Lebanon and Syria. In the years leading up to the outbreak of the Lebanese civil war, there was a fierce discussion within the state as to the extent to which the state of Lebanon ought to condone the launching of attacks by Palestinian guerrillas against Israel from the south of Lebanon. Many in Lebanese society believed that these attacks, subsequently organized under the auspices of Hezbollah, had the backing of the Syrian regime *ab initio*. Although the ostensible reason for such backing is always given as being kin based, it could be argued that Arab regimes in general have always been mindful of the need to combat Israeli influence through pan-Arabism. One argument supported by relatively less evidence is that Syrian intervention in Lebanon was part of a proxy Cold War intervention wherein the Syrians sought to intervene on the basis of a Soviet-inspired attempt to garner influence in the region.⁶²

Instead it could be argued that what was at stake was not a question of “human rights” in its narrow sense⁶³ but a question more of “human security”⁶⁴ in its old traditional sense rather than its more contemporary, broader sense. Thus the outbreak of civil war and the attendant ethnic tension accompanying it could well pose a threat to regional peace and security in the same way that the crisis in Bangladesh (then East Pakistan) posed a threat to India.⁶⁵ As the Commission examining the question of R2P stated in 2001:

Based on our reading of state practice, Security Council precedent, established norms, emerging guiding principles, and evolving customary international law, the Commission believes that the Charter’s strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds. The degree of legitimacy accorded to intervention will usually turn on the answers to such questions as the purpose, the means, the exhaustion of other avenues of redress against grievances, the proportionality of the riposte to the initiating provocation, and the agency of authorization.⁶⁶

Another important lens through which to examine the Syrian intervention is on the basis of the established principles that the Commission was seeking to articulate, namely:

- (a) from the perspective of the state needing support, i.e. Lebanon, and on the groups needing protection, i.e. civil society;
- (b) on the primary bearer of the duty to protect, i.e. the state of Lebanon and the Lebanese armed forces;
- (c) on the extent to which these actors could not only react but also seek to prevent and rebuild.⁶⁷

From this context, Syrian action is easily justifiable, since the state of Lebanon had been brought to a standstill and there was a risk to the general population from the onset of a civil war in a society that was intrinsi-

cally mixed in ethno-religious terms. Secondly, the collapse of the political system of the Lebanese state and the subsequent collapse of the Lebanese army meant that the primary duty bearers were no longer in a position to act to prevent wide-scale conflict. Finally, as a consequence of that collapse, the question of prevention and rebuilding could no longer be directed to Lebanese institutions. It could thus be argued that (a) Syria had a duty to intervene to protect wider civil society from mass killing, especially given that it might have taken on the dimension of ethnocide since the groups were being mobilized on the grounds of religion and ethnicity; (b) this responsibility was accentuated in the face of the collapse of the state institutions and political system, which left a vacuum in which violence could flourish; and (c) the need to prevent and rebuild was a justification against the continued occupation by Syria of parts of Lebanon.

What of the responsibility of the wider community? The Middle East brings together such a tangle of issues that intervention in a state could easily escalate into a larger conflict, depending on the identity of the intervener. Thus, perhaps unlike in other parts of the globe, overt intervention by either of the superpowers of the time would inevitably have led to the mobilization of the other together with opposing factions. In addition, the use of the veto made Security Council intervention inconceivable. All of these factors appear to provide arguments in favour of Syrian action in Lebanon.

A related question that would need to be addressed was whether, having determined that Syrian intervention was *prima facie* justifiable, the military option was the only one available to it. For this it would be necessary to examine the different tools that are identified as being useful in such a scenario. The Commission's report suggests that such a toolkit comprises political, diplomatic, economic, legal and, finally, military options.⁶⁸ Yet, in the context of the events that transpired in 1975, it is hard to see how any measures short of military intervention could gain traction. It is of course arguable that, prior to the escalation of the conflict, such measures might have been engaged, but the inevitability of that statement is that it could have signalled an early intrusion into the sovereign realm of Lebanon. Once an appeal for help was made, it was already too late to unpick the options short of military force that could restore the balance. It is clear that intervention in a society where entrenched ethnic tensions combine with the easy availability of weapons is always likely to need the use of military force.

The decision to intervene applies in extreme cases only,⁶⁹ thus raising the question of whether this crisis could have been considered "extreme". Subsequent events around the Lebanese civil war have shown that the situation was urgent and ought to have been considered extreme enough

for intervention.⁷⁰ Yet, at the time, it was difficult to gauge how extreme it was likely to be, especially in light of the regular sectarian skirmishes that have existed in the state. Thus the counter-argument that it was Syrian intervention that made the conflict more intractable also ought to merit due consideration. In any case, once the military option was the only course of action decided upon, it is important to see how the intervention measures up against the six criteria selected as applicable. These six criteria are: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.⁷¹

The issue of the “right authority” has been justified above, on the basis of the impossibility of action by the primary duty bearer, i.e. Lebanon, the divided Cold War nature of the secondary bearer of responsibility, the Security Council, and the undesirability of action by either of the superpowers owing to the potential risk of escalation. This suggests that the only option was either Syria, which as a kin-state and the nearest neighbour was best placed to exercise its responsibility, or another Arab state in the neighbourhood. Intervention by Israel, also a neighbour, would clearly have led to another region-wide war, and therefore that option could easily be eliminated from the equation.

The Commission suggested that military intervention for human purposes was justifiable in the context of two identifiable broad sets of circumstances:

- (a) large-scale loss of life, actual or anticipated, with genocidal intent or not, which is the product either of deliberate state action or of state neglect or inability to act, or of a failed state situation; or
- (b) large-scale “ethnic cleansing”, actual or anticipated, whether carried out by killing, forced expulsion, acts of terror or rape.⁷²

From the perspective of the events at the time, it is clear that both these possibilities were real, and subsequent events showed that there was an element of each of these in the context of the unfolding Lebanese civil war, thus crossing the “just cause” threshold subsequently identified by the Commission.

The issue of intention has been discussed above. Syrian intervention could be explained in terms of its national interest: (a) the need to contain the conflict; (b) the desire to exercise control over a territory over which it once entertained irredentist claims; (c) the wish to bolster claims for Arab leadership. It is, however, equally credible to suggest that Syria was keen to avoid replicating the tensions in Lebanon among its own mirrored populations. After all, there is a history of such events in the Mountain Region being replicated in Syria among the different kin-communities. To the extent that Syria was keen to prevent further bloodshed and loss of life and to restore peace and security, its intentions

would have to be considered against the test established within the R2P doctrine.

The criterion of last resort can also be dealt with relatively easily, since the widespread nature of the conflict and the high incidence of civilian victims caught in the crossfire of the militias would easily justify armed intervention. The collapse of the Lebanese army meant that there was anarchy, where war was the natural state and the only way to curb it in the short run would be the use of superior armed force. In addition, it could be argued that such action had reasonable prospects of succeeding in stopping the killing in the short run. The attempts by the Syrians to restore governmental institutions would also suggest that they had identified a stake in rebuilding security within Lebanon.

It is in the context of the requirement of proportionality that questions remain to be answered. Although there is no doubt that the Syrian intervention at the time was in line with the doctrine of proportionality in terms of the use of force, the continued occupation of the state raises other questions about whether the requirement of proportionality was in effect met. In the aftermath of the intervention, Syrian forces remained in Lebanon until very recently and were accepted as a presence, despite the antipathy of the international community. This naturally resulted in the continuing violation of Lebanese sovereignty, long after peace had been restored.

Conclusion

It is clear that the Syrian–Lebanese relationship presents an interesting insight into how R2P can be actualized. What we see in this particular context are two independent states that have emerged out of a significant shared history and where a number of historically antagonistic groups live in close proximity within each of the two neighbouring states. The two states have kin-communities tied to each other through a shared history and religious and cultural bonds. In addition, the two states themselves are located in a wider region that is particularly well endowed with natural resources (namely oil), with the result that the territorial stakes are raised. The proximity of Israel and the unresolved question of the Palestinians constitute a crucial backdrop that adds to the complexity of this particular case study.

It is clear that when Syria intervened in Lebanon in 1975 there were few other options for resolving the crisis. Even Syrian intervention did not succeed in preventing significant loss of life during the subsequent civil war. Although it remains impossible to conjecture whether non-

intervention on the part of Syria would have saved lives, it does seem that the intervention was, at the time, the only feasible option. It is clear that subsequent Syrian behaviour towards Lebanon has violated its state sovereignty, and allegations of Syrian interference in the internal affairs of the Lebanese state are never far from the surface. The killing of former Lebanese Prime Minister Hariri, allegedly with Syrian connivance, in the aftermath of the Syrian withdrawal from the region suggests that Damascus retains significant political muscle within the state. The question we are faced with in these circumstances, as in the general situation, is: how can the international community implement the doctrine of R2P in the context of minorities?

In answering this, one caveat needs to be identified: the use of the term “minority” in the Lebanese context is largely meaningless, owing to the history explained above. In a society riven by sectarianism and division, the standard dynamic of “minority versus majority” seems an inappropriate framework of analysis. Nonetheless, it is clear that some ethnic groups remain more vulnerable than others and that a significant number of ethnic groups would immediately become vulnerable should an armed conflict erupt. Arguably, the best way to protect these communities would be through preventive measures. There has been an attempt to eliminate the confessional system that grew out of the feudal society, and significant concerns have been expressed over the legal definition given to ethnic groups and the manner in which they gain protection in domestic law.⁷³ In addition, questions around “minorities” remain problematic, with a lack of recognition for ethnic origins alongside “religious” and “community” recognition for groups such as Syrians, Greeks, Armenians, Copts, Kurds, Jews, Maronites, Sunni and Shiite.⁷⁴ The decision to eliminate the confessional system in accordance with the Taif Agreement of 1989 and through Article 95 of the Lebanese Constitution remains to be implemented fully.⁷⁵ It is clear, however, that any implementation would need to be accompanied by significant reforms in the legal, educational and political systems and is thus a significantly complicated task. In addition, the significant presence of Palestinians in Lebanon and the close geographical and ideological proximity to the Israel–Palestine conflict are likely to be further factors that negatively affect the security felt by “minorities” and “majorities” in Lebanon.

The international community needs to be particularly vigilant when ethnic tensions begin to simmer in places such as Lebanon, which has a history of such tensions spiralling out of control. One way to do this is to monitor relations between the communities through reports before bodies such as CERD. CERD’s early warning procedures have drawn attention to conflicts, but this information appears not to merit further ac-

tion until the conflict is upon us – when it is too late to do anything other than use force. Indeed, CERD’s early warning mechanism, together with the preventive diplomacy that is often engaged in by the OSCE, could prove a far better tool in containing future crises in Lebanon. In places such as Lebanon, where ethnic communities live in close proximity and maintain historical tensions, the slightest spark could trigger war.

The proposal tabled by the “Group of Small Five” (S5) in the context of UN reform⁷⁶ may also be worth considering. In this proposal, Switzerland, Singapore, Liechtenstein, Jordan and Costa Rica suggested that attention ought to be focused on Security Council methods rather than on membership.⁷⁷ In this light, the suggestion was to ban the use of the veto by the five permanent members of the Security Council in cases involving genocide, crimes against humanity or serious violations of international humanitarian law.⁷⁸ Despite its failure, this proposal did merit mention in a Note by the President of the Security Council in July 2006, which outlined commitments by the Council in these contexts, though it stopped short of banning the veto.⁷⁹

The range of scholars writing and debating the value of the R2P framework is impressive: this short chapter has not sought to comment on or review much of this work because of lack of space.⁸⁰ Hamilton suggests that there are three crucial issues that need to be resolved in order to bolster the future of the doctrine: (a) the lack of political will; (b) the lack of authorization and (c) the question of operational capacity.⁸¹ In the context of minorities in general, these issues provoke disappointing responses. First, there appears to be a lack of focus on the plight of indigenous peoples and minorities, until such time as conflict breaks out. Secondly, it is usually difficult to focus international attention on situations that states argue fall within their domestic jurisdiction. Finally, unlike the Promise of St Louis of France in 1250, there is no belief in the operational capacity of an organization such as the United Nations to make good on the responsibility to protect. Thus, in cases such as Syria–Lebanon, it could be suggested that “political will” is always likely to depend on narrow motives of “national interest”, and, in the absence of other protectors, living with the lesser evil of protection driven by concerns of national interest may be preferable to not having any protection at all.

Notes

1. See Patrick Thornberry, *International Law & the Rights of Minorities* (Oxford: Clarendon, 1991), p. 26.

2. General background information on St Louis and the Treaty can be found on the website of the *Encyclopaedia Britannica* at <<http://original.britannica.com/eb/topic-348849/Louis-IX>> (accessed 8 August 2008).
3. For a moving account of the Lebanese civil war, see Robert Fisk, *Pity the Nation: The Abduction of Lebanon*, 4th edn (New York: Thunder Mouth's Press, 2002). For an earlier version of ethnic strife in the region, see Fahim I. Qubain, *Crisis in Lebanon* (Washington, DC: Middle East Institute, 1961).
4. As Thomas Weiss demonstrates, the end of the Cold War led the Security Council to pass twice as many resolutions between 1990 and 1994 as it had done in the entire previous history of the United Nations. See Thomas Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", *Security Dialogue* 2 (2004), pp. 135–136.
5. See H. B. Jansen and M. Twaddle, *Uganda Now: Between Decay and Development* (London: James Currey Publishers, 1988).
6. See, generally, J. M. Welsh, *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004), and N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2002).
7. *Charter of the United Nations*, 1945, Article 2(7). For an interpretation, see Bruno Simma et al., *The United Nations Charter: A Commentary* (Oxford: Oxford University Press, 2002).
8. See Joshua Castellino, "Conceptual Difficulties and the Right to Indigenous Self-determination", in Nazila Ghanaea and Alexandra Xanthaki (eds), *Minorities, Peoples and Self-determination* (Leiden/Boston: Martinus Nijhoff, 2005), pp. 55–74.
9. See General Assembly Resolution 2625 (XXV), "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", UN Doc. A/RES/2625(XXV), 24 October 1970. For more, see Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (London: Routledge, 1994).
10. For a general reading on self-determination, see G Binder, "The Case for Self-determination", *Stanford Journal of International Law* 29 (1993), pp. 223–270; Lee C. Buchheit, *Secession: The Legitimacy of Self-determination* (New Haven, CT: Yale University Press, 1978); A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995); Hurst Hannum, *Autonomy, Sovereignty and Self-determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990); Joshua Castellino, *International Law & Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity* (The Hague: Martinus Nijhoff Publishers, 2000); and David Raič, *Statehood & the Law of Self-determination* (The Hague: Kluwer Law International, 2002).
11. See Joshua Castellino and Stephen Allen, *Title to Territory in International Law: An Inter-temporal Analysis* (Dartmouth: Ashgate, 2003).
12. See Stephen Ratner, "Drawing a Better Line: *Utī Possidetis* and the Borders of New States", *American Journal of International Law* 90:4 (1996), p. 590; Malcolm Shaw, "The Heritage of States: The Principle of *Utī Possidetis Juris* Today", *British Yearbook of International Law* 67 (1996), p. 75.
13. For the value of this document in international law, see, generally, Lowe and Warbrick, *The United Nations and the Principles of International Law*.
14. General Assembly Resolution 2625 (XXV).
15. Patrick Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments", *International and Comparative Law Quarterly* 38:4 (1989), p. 867.

16. See J. L. Holzgrefe and R. O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); L. Feinstein and A. Slaughter, "A Duty to Prevent", *Foreign Affairs* (Jan/Feb 2004) and M. Ayoub, "Third World Perspectives on Humanitarian Intervention and International Administration", *Global Governance* 10 (2004), p. 99.
17. For an interesting study on risk assessment of minority communities, see the Minority Rights Group International project on "Peoples Under Threat"; available at <<http://www.minorityrights.org/837/peoples-under-threat/peoples-under-threat-2008.html>> (accessed 9 December 2010).
18. See Siba Grovogui, *Sovereigns, Quasi-Sovereigns & Africans: Race and Self-determination in International Law* (Minneapolis: University of Minnesota Press, 1996).
19. See Castellino and Allen, *Title to Territory in International Law*.
20. Security Council Resolution 1181 (1998) on the situation in Sierra Leone, UN Doc. S/RES/1181, 13 July 1998.
21. Security Council Resolution 788 (1992) on Liberia, UN Doc. S/RES/788, 19 November 1992.
22. Security Council Resolution 929 (1994) on establishment of a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded UN Assistance Mission for Rwanda, UN Doc. S/RES/929, 2 June 1994, para. 3.
23. Security Council Resolution 940 (1994) on authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti, UN Doc. S/RES/940, 31 July 1994, para. 4.
24. Security Council Resolution 1244 (1999) on the situation relating to Kosovo, UN Doc. S/RES/1244, 10 June 1999, para. 9.
25. Security Council Resolution 751 (1992) on Somalia, UN Doc. S/RES/751, 24 April 1992, para. 2; Security Council Resolution 814 (1993) on Somalia, UN Doc. S/RES/814, 26 March 1993, paras 5–6.
26. Rebecca J. Hamilton, "The Responsibility to Protect – From Document to Doctrine but What of Implementation?", *Harvard Human Rights Law Journal* 19 (2006), pp. 289–297.
27. These mechanisms are analysed in some detail in J. Castellino, "A Re-examination of the International Convention for the Elimination of All Forms of Racial Discrimination", *Revista Iberoamericana de Derechos Humanos* 2 (2006), pp. 1–29.
28. For a list of the decisions adopted by CERD under this mechanism, see <<http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about>> (accessed 9 December 2020).
29. See Moshe Ma'oz, *Ottoman Reform in Syria and Palestine, 1840–1861* (Oxford: Clarendon Press, 1968), pp. 31–32.
30. P. Hitti, *History of Syria, Including Lebanon and Palestine* (London: Macmillan, 1951), pp. 679–684.
31. For more on the discussion of "identity" in this context, see Caesar Farah, *The Politics of Interventionism in Ottoman Lebanon, 1831–1861* (London: Centre for Lebanese Studies; Oxford: I. B. Taurus, 2000).
32. The policies of this ruler are addressed by Albert Hourani, "Race, Religion, and Nation-State in the Near East", in Abdullah Lutfiyya and Charles Churchill (eds), *Readings in Arab Middle Eastern Societies and Cultures* (The Hague: Mouton, 1970), pp. 1–4. Also see S. H. Longrigg, *Syria and Lebanon under the French Mandate* (New York: Octagon Books, 1972), pp. 6–14.
33. Farah, *The Politics of Interventionism in Ottoman Lebanon*, pp. 40–48.
34. Naomi Joy Weinberger, *Syrian Intervention in Lebanon: The 1975–76 Civil War* (Oxford: Oxford University Press, 1986), pp. 35–36.
35. As discussed in detail by Farah, *The Politics of Interventionism in Ottoman Lebanon*.

36. Samir Khalaf, *Civil and Uncivil Violence in Lebanon: A History of the Internationalization of Communal Conflict* (New York: Columbia University Press, 2002), pp. 62–102.
37. *Ibid.*, pp. 64–70.
38. Weinberger, *Syrian Intervention in Lebanon*, p. 36.
39. *Ibid.*, p. 45.
40. This is discussed in the context of Palestine by G. Bigerb, *The Boundaries of Modern Palestine 1840–1947* (London: Routledge, 2004).
41. See Anthony Whelan, “Wilsonian Self-Determination and the Versailles Settlement”, *International & Comparative Law Quarterly* 43:1 (1994), pp. 99–115.
42. H. N. Howard, *The King–Crane Commission: An American Inquiry in the Middle East* (Beirut: Khayats, 1963).
43. As part of the politics of the time, Britain was awarded the mandate for Palestine and Iraq. For more on this issue, see M. Kent, *The Great Powers and the End of the Ottoman Empire* (London: Frank Cass, 1996).
44. For more on the impact of this demographic change in Lebanon, see Enver M. Koury, *The Crisis in the Lebanese System: Confessionalism and Chaos*, Foreign Affairs Study 38 (Washington, DC: American Enterprise Institute, 1976).
45. See S. H. Longrigg, *Syria and Lebanon under French Mandate* (London: Oxford University Press, 1958), pp. 259–292.
46. The antecedents to the cementing of this identity are discussed in detail by Fruma Zachs, *The Making of a Syrian Identity: Intellectuals and Merchants in Nineteenth Century Beirut* (Leiden/Boston: Brill, 2005).
47. This protocol was signed in the context of the creation of the Arab League, which met on 28 September 1944 in Alexandria, a meeting with representation from Egypt, Iraq, Syria, Lebanon, Transjordan, Saudi Arabia and Yemen, and a representative of the Palestinian Arab parties. For more see A. H. Hourani, *Syria and Lebanon: A Political Essay* (Oxford: Oxford University Press, 1946), especially pp. 303–307.
48. M. Ma’oz, *Syria and Israel: From War to Peacemaking* (Oxford: Clarendon Press, 1995).
49. *Ibid.*
50. *Ibid.*
51. *Ibid.*
52. This notion has been discussed in some detail by Yaacov Bar-Siman-Tov, *Linkage Politics in the Middle East: Syria Between Domestic and External Conflict, 1961–1970* (Boulder, CO: Westview Press, 1983), pp. 9–57.
53. Weinberger, *Syrian Intervention in Lebanon*, p. 4.
54. *Ibid.*
55. *Ibid.*, p. 6.
56. *Ibid.*, pp. 6–7.
57. *Ibid.*, p. 7.
58. James N. Rosenau, “Theorizing across Systems: Linkage Politics Revisited”, in Jonathan Wilkenfield (ed.), *Conflict Behavior and Linkage Politics* (New York: David McKay, 1973), p. 38.
59. *Ibid.*
60. Weinberger, *Syrian Intervention in Lebanon*, p. 10.
61. *Ibid.*
62. Weinberger agrees with this view; see *ibid.*, p. 19.
63. As discussed in International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. 14.
64. *Ibid.*, p. 15.
65. For a discussion of the case of Bangladesh, see Ved Nanda, “The Tragic Tale of Two Cities”, *American Journal of International Law* 66 (1972), and Joshua Castellino, “Hu-

- manitarian Intervention in Bangladesh”, *Asian Yearbook of International Law* 7 (2000), pp. 83–104.
66. ICISS, *The Responsibility to Protect*, p. 16, para. 2.27.
 67. *Ibid.*, p. 17, para. 2.29.
 68. *Ibid.*, p. 23, para. 3.25.
 69. *Ibid.*, pp. 31–32, paras 4.10–4.14.
 70. See Fisk, *Pity the Nation*.
 71. ICISS, *The Responsibility to Protect*, p. 32, para. 4.16.
 72. *Ibid.*, p. 32, para. 4.19.
 73. CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: Lebanon”, UN Doc. CERD/C/304/Add.49, 30 March 1998, para. 9.
 74. *Ibid.*, para. 12.
 75. CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: Lebanon”, UN Doc. CERD/C/64/CO/3, 28 April 2004, para. 10. For an analysis from a national perspective, see Latif Abul-Husn, *The Lebanese Conflict: Looking Inward* (Boulder, CO: Lynne Rienner, 1998).
 76. See Elvira Domínguez Redondo, “Reform of the United Nations”, unpublished work, undertaken in the context of a British Academy grant studying “UN Reform and Its Impact on Human Rights”. Copy on file with author.
 77. “Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: Draft Resolution – Improving the Working Methods of the Security Council”, UN Doc. A/60/L.49, 17 March 2006. In addition to this proposal, the main proposals on Security Council reform are those submitted by the G4, Germany, Brazil, India and Japan (Draft Resolution “Security Council Reform”, UN Doc. A/60/L.46, reissued for technical reasons in January 2006 when Japan withdrew from this proposal), by the Uniting for Consensus Group (Draft Resolution “Reform of the Security Council” submitted by Argentina, Canada, Colombia, Costa Rica, Italy, Malta, Mexico, Pakistan, Republic of Korea, San Marino, Spain and Turkey, UN Doc. A/59/L.68, 21 July 2005) and by the African Group (Draft Resolution “Reform of the Security Council”, UN Doc. A/59/L.67, 18 July 2005). On 8 February 2007, the government of Panama introduced a new proposal at the Open Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council (“Discurso del Embajador Ricardo Alberto Arias, Representante Permanente de Panamá durante la reunion del Grupo de Trabajo abierto de la Asamblea General, sobre la cuestión de la representación equitativa en el Consejo de Seguridad y del aumento del número de sus miembros y otras cuestiones”, New York, 8 February 2007). All these documents are available at <http://www.reformtheun.org/index.php?option=com_content&view=article&id=14&Itemid=36> (accessed 9 December 2010).
 78. “Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: Draft Resolution – Improving the Working Methods of the Security Council”, para. 14: “No permanent member should cast a non-concurring vote in the sense of Article 27, paragraph 3, of the Charter in the event of genocide, crimes against humanity and serious violations of international humanitarian law.”
 79. UN Security Council, “Note by the President of the Security Council”, UN Doc. S/2006/507, 19 July 2006.
 80. Joelle Tanguy, “Redefining Sovereignty and Intervention”, *Ethics & International Affairs* (Spring, 2003), pp. 141–142; D. Vesel, “The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World”, *Bingham Young University Journal of Public Law* 18 (2003), pp. 1–19.
 81. Hamilton, “The Responsibility to Protect”, p. 296.

8

Problems and prospects for R2P: The unilateral action of Viet Nam in 1978

Ho-Ming So Denduangrudee

Throughout the Cold War, conflicts became increasingly contained within the borders of sovereign states. The concept of “humanitarian intervention” arose in response to the question of when, if ever, it is appropriate to override the notion of national sovereignty. The World Summit *Outcome* document of 2005 articulated the responsibility inherent in sovereignty, that of a state’s responsibility to protect (R2P) all peoples living within its borders.¹ R2P arose from the clear need to strengthen international norms and standards around humanitarian intervention, the continued failure of which has seen large-scale crimes against humanity continue to be perpetrated by states against those living within their borders. The genocides in Rwanda in 1994, Kosovo in 1999 and Darfur from 2003 and the continued ruthless rule of the Burmese military junta are but a few stark reminders.

Despite a universal commitment to human rights by all member states of the United Nations party to international human rights instruments, the international community’s acknowledgement and addressing of state-perpetrated violence has always faced challenges given the complexities of global politics and the historical primacy of respecting state sovereignty. Humanitarian intervention has often been perceived as inherently in conflict with state sovereignty. To grapple with reconciling these two concepts, the International Commission on Intervention and State Sovereignty (ICISS, or the Commission) was established as an independent international body with a one-year mandate to build global political consensus and support action within the United Nations (UN) system for a

Blood and borders: The responsibility to protect and the problem of the kin-state, Kemp, Popovski and Thakur (eds), United Nations University Press, 2011, ISBN 987-92-808-1196-4

better response to humanitarian crises. ICISS completed its work during the 2000/2001 Millennium Assembly year and reported back to the UN Secretary-General and the international community in December of 2001.² The resultant report, *The Responsibility to Protect*, outlines the basic principles of R2P in two points. First, “[s]tate sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself”. Second, “[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect”.³

In many ways, R2P can be seen as an attempt to reconcile the responsibility of the international community alongside that of the individual sovereign state, both of which have had, in principle, a longstanding commitment to the protection of human beings as articulated by the Charter of the United Nations and by existing international human rights instruments. Humanitarian intervention, then, when adopted within the stipulations outlined by the ICISS Report can be viewed as a mechanism to support a complementary commitment of both the international community and the state to protect – for the former all peoples and, for the latter, all peoples residing within its borders.

This reaffirmation of state responsibility is, in part, a response to the unfortunate reality that states are often the primary perpetrator in gross violations of human rights. The R2P doctrine posits that, when states fail to fulfil their responsibility to protect, it is yielded to the international community. In cases involving ethnic minorities, the impact of a state failing to practise its responsibility to protect tends to affect kin-states more adversely than other members of the international community.⁴ Although kin-states often have special interests in the protection of minority ethnicities in other countries, this chapter supports the principle that, in the proper practice of R2P both by the international community and by states as members of that community, kin-states should have no special responsibility to protect such groups, beyond their responsibility as a nation-state member of the international community.

However, discussions on regulating kin-state interest must confront real-world examples that challenge the R2P assumption. For one, the ICISS Report has noted the potential utility of regional organizations such as the Association of Southeast Asian Nations (ASEAN) in the case of Viet Nam in potentially supporting right-intentioned humanitarian intervention. But the events of 1978 demonstrate an unfortunate reality where regional organizations are subject to the influence of similarly divisive political interests of big powers at the international level. The unilateral Vietnamese intervention in Cambodia in 1978 exposes the

limitations of multilateral action, a reality that ICISS was, of course, aware of. As the Commission report states:

Millions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse. This is a stark and undeniable reality, and it is at the heart of all the issues with which this Commission has been wrestling. What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.⁵

In this spirit, the case of Viet Nam brings to the fore the practical question of what, if any, action can be taken when both the international community and the perpetrating state are unwilling or unable to protect those living within its borders. At what point – if any – can a kin-state legitimately act unilaterally? If we accept that there is no legitimate unilateral invasion of one sovereign state by another, whatever the context, does R2P successfully support the elimination of this possibility?

The case of Viet Nam and Cambodia in 1978 saw the actions of a kin-state mitigating human suffering within a neighbouring state. Although multilateral inaction should not justify unilateral intervention, the expectation that there need be no safeguards against failures of multilateral action is equally faulty given the reality of past and present global political structures. Does R2P provide sufficient recourse in cases where both the state and the international community fail to intervene on behalf of those who are not protected or who are even attacked by the state responsible for their safety?

In a world where states fulfil their responsibilities, there would be no need to pronounce on the actions to be taken in the case of states being unwilling or unable to protect those within their borders. We accept that state failure to protect occurs, and even that a state often is the chief party responsible for inflicting violence on the very population it is meant to protect. R2P has been articulated to mitigate the most egregious impacts of states' failure to protect, but given the fallibility of multilateral action, especially for time-responsive action that can successfully navigate the political processes of the United Nations, there is reason to doubt that the norms of international law are a sufficient failsafe to protect the most vulnerable when they are neglected or under attack by their own government. The reality is that there have been and continue to be instances where multilateral inaction has failed to actualize R2P, and these failures have resulted in millions of deaths.⁶ Many of those failures have occurred in the years since the R2P doctrine was defined, and its

authors and proponents in the West have themselves failed to uphold its principles.

In the ideal actualization of R2P, kin-states should not play a special role regarding R2P and minority protection in other states. Kin-states should have an equal obligation to support R2P both domestically and internationally. This chapter supports timely and appropriate multilateral responses to ensure the protection of peoples in cases of state failure to protect those living within its borders. It also aims to examine the realities of multilateral action, and the consequences and possibilities in the absence of such action. Until adherence to international rule of law is strong enough to ensure consistent implementation of R2P, there is a need to acknowledge that, though unilateral action in the name of “humanitarian intervention” may conjure up episodes such as the Nazi annexation of the Sudetenland, failure by all to act resulted in the massacre of Tutsis and moderate Hutus by Hutu extremists in Rwanda. It is hoped that acknowledgement of failures in the past in both extremes will strengthen the ability to build global consensus and good faith for meaningful actualization of R2P.

The examination of the case of the Vietnamese invasion of Cambodia in 1978 through the lens of R2P will provide a basis for examining whether international standards have evolved to support effective multilateral action against regimes such as the Khmer Rouge’s in Cambodia. If not, where do particular weaknesses remain so we might address and prevent acts of brutality by the state against the very people it is responsible for? The subject of humanitarian intervention remains as complex and controversial today as it has since the Westphalian notion of sovereignty emerged as the foundation of polities. Though events in Southeast Asia in 1978 were not couched in R2P terms, the case provides a basis for examining one example of unilateral action where circumstances highlight gaps in the commitment by the international community to actualize R2P.

The responsibility to protect: Premise, principles and applicability

R2P is based upon the understanding that sovereignty entails the responsibility of states to protect all peoples residing within their borders. Failure to do so – from inability, unwillingness, or a combination – yields R2P to international actors, specifically the United Nations, led by the Security Council (UNSC), which, under obligations outlined in the UN Charter, Article 24, is responsible for the maintenance of international peace

and security.⁷ The foundation for this comes from the legal obligations inherent in sovereignty, specific obligations within human rights and human protection declarations, covenants, treaties and national and international human rights law, and the developing practice of states, regional organizations and the UNSC.⁸ For the international community, R2P is a three-pronged principle: the responsibility to prevent, to react, and to rebuild. The focus of R2P is ideally the first prong – the responsibility to prevent both internal conflicts and crises that put populations at risk. If prevention fails, the international community has a responsibility to react and respond to situations of compelling human need with applicable measures. Military intervention is reserved for the most extreme cases, a last resort if other coercive measures such as economic sanctions yield no results. Finally, in the aftermath of intervention designed to halt or avert “genocide, war crimes, ethnic cleansing and crimes against humanity”,⁹ the international community has a responsibility to rebuild, to support post-conflict reconstruction and to assist in recovery and reconciliation.

Where the responsibility to react and respond necessitates military intervention, this must fulfil several criteria. There must be “serious and irreparable harm occurring to human beings” in the form of large-scale loss of life or ethnic cleansing.¹⁰ Intervention must be based on right intentions, and the primary motive must be to stop human suffering. The intervention should be a last resort, when every non-military option has been exhausted. Military intervention should be proportional and involve a minimum amount of force to secure a defined human protection objective in order to support post-conflict recovery. Last, there should be a reasonable prospect of recovery, a reasonably attainable goal of halting or averting human suffering, and it must be clear that the consequences of intervention will not be worse than inaction. These precautionary principles upheld by R2P are noted by ICISS as better assured by multilateral operations, especially where clearly supported by regional opinion and the victims concerned, although how this support is to be measured is not clear.

The authority for military intervention in the case of state failure in R2P rests with the United Nations Security Council. As the ICISS Report states, the task is not to find alternatives to the UNSC, but to make it work better. This is in response to the criticisms levelled by state and multilateral bodies over past UNSC failures and ongoing violations of R2P since the World Summit *Outcome* document of 2005. Member states are responsible for strengthening UN institutions or reaching consensus on improving or altering them. In the context of R2P and its suggested structure, this means supporting the UNSC by upholding its primacy as the right authority to grant assent for military interventions carried out in the name of humanitarian objectives. The UNSC, for its part, has a re-

sponsibility to be prompt when facing large-scale losses of human life or ethnic cleansing. Its five permanent members should not apply their veto to obstruct intervention for human protection where their vital state interests are not involved and for which there is otherwise majority support. In the case of Viet Nam, the Cold War context rendered the UNSC unable to support intervention in Cambodia, begging the question of how to measure “vital state interests” and what to do when this conflicts with the effective halting of humanitarian crises. When the UNSC rejects proposals for intervention or fails to deal with them in a timely way, the Commission suggests that the best alternatives are to take the matter up for consideration in the General Assembly in an emergency special session under the “Uniting for Peace” procedure, or to take action through a regional or sub-regional organization, in accordance with Chapter VIII of the UN Charter, subsequent to authorization from the UNSC.

The principles articulated by R2P are a laudable attempt to reconcile the rights and responsibilities of member states, as part of the international community, in actualizing universal principles supporting the inalienability of each individual human being’s rights. In order to prevent a repetition of past tragedies, however, R2P implementation has a long and difficult road ahead to build political consensus for mechanisms that will truly hold all states equally accountable for its enforcement. Big powers will have the difficult task of generating public support and political consensus for the responsible exercise of and contribution to global security, not least in actualizing adherence to international instruments. Smaller states must work on good faith that the big powers will hold themselves equally accountable for adherence to humanitarian intervention stipulations, and will demonstrate a commitment to actualizing the protection of all of those residing within their borders. These challenges have prevented meaningful international cooperation and inclusive multilateral processes, and there is reason to doubt R2P’s ability to overcome these challenges. The examination of the case of Viet Nam in 1978 will support the actualization of R2P in the hopes that the confrontation of past difficulties will serve as a lesson for bringing a better reality to bear. At the very least, it is yet another reminder of the consequences of continued roadblocks to a more responsible and equitable international community.

Cambodia, the Khmer Rouge and Viet Nam as a kin-state

Southeast Asian nation-state formation following colonialism is complex, but scholars note that the articulation of Khmer or Cambodian identity has, particularly in recent times, been based on a constructivist rather than an essentialist perspective in that Khmer identity, though linked to

language and culture, was not inherent or inherited through birth. Indeed, throughout the Sangkum period (1953–1970), one could become “Khmer” (*coul kmae*) by adopting Khmer language and customs.¹¹ This remained true, to some degree, during the Khmer Rouge’s regime, when the persecution of non-Khmer minorities sometimes ceased when individuals or groups agreed to adopt a Khmer identity.¹²

One exception was the Vietnamese minority. The rapid end to French colonialism, the disintegration of French Indochina and Cambodia’s regained independence strengthened nationalist sentiments. During the Sangkum period, ethnic Khmer residing on the Vietnamese side of the Mekong Delta were designated Khmer Krom, or lowland Khmer, and rallied to the nationalist cause espoused by the Cambodian government under Prince Norodom Sihanouk.¹³ The geographical, historical and cultural ties contributed to a view of Viet Nam as the primary threat to Cambodian sovereignty. The brunt of these rising anti-Vietnamese sentiments became increasingly borne by the minority Vietnamese residing within the newly defined borders of post-colonial Cambodia. Anthropologists, sociologists, historians and political scientists alike have commented on the tensions provoked by Khmer fears of Vietnamese invasion based on a complex history of influence and subjugation.¹⁴ This, in addition to a significant number of ethnic Khmer groups residing in Viet Nam, led to the basis of the complex kin-state relations between Viet Nam and Cambodia.

Viet Nam did not remain passive. The communist government in North Viet Nam, under the leadership of Ho Chi Minh, had actively supported the communist movement in Cambodia, contributing to its initial growth and to the rise of the Khmer Rouge. The tensions between Vietnamese and Cambodian left-wing groups demonstrate the complex relations between the countries. Though the initial Khmer Issarak (Independence) Association – an independence movement against French colonization – was backed by the Vietnamese victors of the battle of Dien Bien Phu, two of its earliest members, Thiounn Thioeunn and Thiounn Chum, had refused to meet the Vietnamese-led Indochinese Communist Party (ICP), led by Ho Chi Minh, on nationalist grounds. This was despite the fact that both had studied in Hanoi from 1942 to 1945, and that the Khmer Issarak Association was supported by its communist backbone, the Khmer People’s Revolutionary Party (KPRP), established in 1951 under the mentorship and supervision of the Vietnamese. Between 1951 and 1954, the KPRP recruited over 1,000 members – largely from the peasantry and the monkhood – and had an army of 5,000 fighters and numerous village militias.¹⁵ From the start of post-colonial Cambodia’s struggle to define Khmer nationalism, the influence of Viet Nam could already be felt.

The initial development of Khmer communism occurred within two contexts: first, the end of the colonial era and a national awakening under the direction of Prince Sihanouk and, simultaneously, the setting of the Cold War. In domestic Khmer politics, the influence of the Vietnamese victors against French colonialism and the rise of Khmer nationalism went hand in hand with the emergence of a viable communist front, fanning the fire amongst younger communists determined to battle Sihanouk's commitment to Cambodian neutrality and "feudalist autocracy".¹⁶ Sihanouk, for his part, walked a precarious line on the geographical and ideological nexus of the Cold War, with the Vietnamese receiving support from the communist Sino-Soviet bloc, and the French supported by the United States.

During the first Indochina War (1946–1954), Cambodian communists were not antagonistic towards Hanoi. Many went willingly to North Viet Nam, and many stayed to "carry out the political struggle" under Tou Samouth. The lack of anti-Vietnamese sentiment may have been caused by the mere possibility of the communists seizing power, particularly in 1954–1955, with the imminent collapse of pro-Western regimes in Indochina. That collapse was delayed by US intervention in Laos and Viet Nam, and in Cambodia by Sihanouk's deft political manoeuvring, the popular appeal and sacredness of the monarchy, and the effectiveness of his security apparatus. By 1956, the Cambodian communist movement was underground, cut off from its patrons in Hanoi and seemingly on its last legs. At this moment, an infusion of freshly graduated Cambodian communist students returned from France. Many took positions in the civil service or teaching professions, and most joined the underground communist movement. Reflecting their youth, education and patriotism, these recruits were anxious to propel the communist revolution forward while disavowing external guidance, ensuring that the movement would be home-grown. Influenced by the theories of French communism instead of the revolutionary practice of the Vietnamese, the returnees perceived the older generation of Khmer communists to be subservient to Hanoi. But, with the movement under pressure, support from Viet Nam was accepted given that a political struggle without arms offered limited chances for success in Sihanouk's police state.¹⁷

A secret meeting of the KPRP's 21 leaders in 1960 was convened to discuss whether the party would cooperate with or resist the existing regime. The party was renamed the Workers' Party of Kampuchea (WPK), shifting the Cambodian communist movement onto an equal footing with the Vietnam Workers' Party. Until then it had been a subordinate chapter within the ICP, under the acknowledged leadership of General Secretary Ha Noi Tou, who advocated cooperation with his ally, Deputy General

Secretary Nuon Chea (also known as Long Reth). Also significant was a young man named Saloth Sar, who occupied the third-highest position in the party's hierarchy. He would later become known as Pol Pot.¹⁸

Two years later, Tou died in mysterious circumstances. In February 1963, at the WPK's second congress, Pol Pot was chosen as his successor and Tou's allies were replaced. From then on, the WPK was controlled by a younger generation, without influence from the "pro-Vietnamese" veterans. That same year, Pol Pot and most of the central committee left Phnom Penh to establish an insurgent base in northeast Cambodia, winning support from ethnic minorities traditionally subjected to harsh treatment by Sihanouk's government, in part for their failure to adapt to the Prince's vision of a Khmer identity. In courting ethnic minorities as the basis of a burgeoning military force, Pol Pot's strategy mirrored that of the Vietnamese communists.¹⁹ Simultaneously he courted established regional communist powers, including the People's Republic of China and North Viet Nam. Pol Pot and his closest advisers spent nearly two years in a Vietnamese communist military base that moved back and forth across the Vietnamese–Cambodia border, benefiting from Vietnamese patronage and protection.²⁰ In 1965, he made visits to China and North Viet Nam and, though well received, Beijing kept its support of Pol Pot a secret from Sihanouk. After a four-month trek up the Ho Chi Minh Trail to Hanoi, Pol Pot was told that his party agenda was "irrelevant, amateurish, and chauvinistic". In Vietnamese records, he "said nothing" in response.²¹ After several months in Hanoi, he proceeded to Beijing, then in the grip of the nascent Cultural Revolution, and was warmly received by party leaders appreciative of his "more authentic", independent notions of revolution, as contrasted with the pragmatism and patience espoused by Hanoi.²² These varied receptions, and his exposure to the ideological fire of the Maoist Red Guards, further shaped the form of Cambodian communism and defined its relations with its regional patrons.

In 1966, the WPK changed its name again to the Kampuchean Communist Party (KCP, or the Khmer Rouge), elevating the party from equality with Viet Nam to on a par with China.²³ Despite subtle defiance, Pol Pot was careful to preserve relations with Viet Nam, knowing that when the opportunity arrived it would likely be Hanoi that could provide resources to support a communist rise to power in Cambodia. Indeed, in 1970, when the nationalist General Lon Nol ousted Sihanouk in a coup, the Vietnamese provided arms, training and military support to defeat the new leader's army. Vietnamese assistance to the Cambodian communists cost the nation dearly. The South Vietnamese communist movement, the Viet Minh, was supplied by the Ho Chi Minh Trail, which ran through Cambodia, linking the insurgents in the south to their patron government in the north. With the rise to power of the ineffectual Lon Nol, the alli-

ance between the Cambodian communists and Hanoi gave Sihanouk an opportunity to avenge his overthrow. In March 1970, after China's Premier Zhou Enlai suggested Sihanouk join forces with the Khmer Rouge, the Prince publicly allied with the KCP and declared the formation of the National United Front of Kampuchea (Front uni national du Kampuchéa, or FUNK), in which royalists would join with the communists to oust Lon Nol. Hanoi severed ties with the government in Phnom Penh, and savage battles were fought along the eastern frontiers of Cambodia. Cambodian troops fought in joint operations with South Vietnam's Army of the Republic of Vietnam (ARVN) against Cambodian and Vietnamese communist guerrillas.²⁴

China championed the FUNK, whereas the United States lent support to the new and anti-communist Lon Nol. Although there is disagreement on how much support Lon Nol received from the Americans in coming to power, it is certain he immediately developed an alliance with the United States and South Viet Nam, embarking on a bloody five-year anti-communist war. The new regime was naive about the threat posed by the up to 40,000 battle-hardened Vietnamese communists and their 4,000-strong Khmer Rouge allies.²⁵ On 1 May 1970, the United States launched Operation Shoemaker, a short-lived invasion of Cambodia from South Viet Nam, intended to disrupt the Ho Chi Minh Trail. The primary aim of the invasion was, as President Richard Nixon said at that time, "to protect our men who are in Vietnam and to guarantee the success of our withdrawal and Vietnamization programs".²⁶ US diplomatic staff in Phnom Penh acknowledged that the operation would force Vietnamese communists deeper into Cambodia, and that Cambodian national forces were too weak to resist.²⁷ Still, Lon Nol took the invasion as a personal favour from Nixon and wrote him a letter of gratitude. The US Air Force stepped up aerial bombardment throughout the early years of Lon Nol's government, dropping a total of 540,000 tonnes of bombs on Cambodia, 260,000 tonnes in 1973 alone.²⁸ The civilian casualties and economic havoc wreaked by the US carpet-bombing strategy to support efforts to flush out the Vietnamese communists from Cambodia had disputed effects, with some citing total devastation and others noting that the bombings were concentrated in lightly populated far-eastern Cambodia. What is undisputed is that refugees from these areas flooded Phnom Penh.²⁹ Unsurprisingly, the strategy also had the effect of drawing recruits for the FUNK.

Given the complexity of kin-state relations between Viet Nam and Cambodia, ethnic Vietnamese in Cambodia and the Khmer Krom in Viet Nam suffered disproportionately relative to other minorities. In Cambodia, the persecution of the Vietnamese became pronounced following the fall of Sihanouk. Where the Prince had used Khmer identity

as a rhetorical rallying point, Lon Nol extended it to government policy. Shortly following his ascension to power he ordered “Vietnamese communists”, or North Vietnamese and National Liberation Front troops, to leave the country within 48 hours. The command spurred a pogrom against all Vietnamese – numbering about 450,000 at the time – on Cambodian territory. Thousands of civilians were massacred and almost half of the ethnic Vietnamese population was expelled to South Viet Nam. Five months after Lon Nol’s coup, an additional 100,000 Vietnamese had left the country, reducing the minority to about 140,000.³⁰

In the early 1970s, the United States, seeking to extricate itself from its failing offensive in Viet Nam, withdrew support from the corrupt and ineffectual regime in Phnom Penh, clearing the way for the communists to come to the fore. As part of the peace agreement with the United States, the Vietnamese withdrew their troops from Cambodia. Pol Pot and his colleagues viewed the withdrawal as a betrayal and refused to join the ceasefire. By this time, the Khmer Rouge’s leadership made it clear that they shared Lon Nol’s racist antipathy towards Viet Nam. But, rather than directly attacking their former benefactors, the Khmer Rouge secretly purged over 1,000 “Hanoi Khmer” who had come from Viet Nam in 1970 to help the cause, and sidelined those Cambodian communists who had links, real or fabricated, with Viet Nam.³¹ In recounting the Khmer Rouge rise to power, Kaing Guek Eav, better known as Duch, director of the infamous Tuol Sleng prison, later noted in his testimony at the UN-assisted tribunal on war crimes committed by the Khmer Rouge that “I think the Khmer Rouge would already have been demolished . . . But Mr Kissinger (then US secretary of state) and Richard Nixon were quick [to back coup leader Lon Nol], and then the Khmer Rouge noted the golden opportunity [to take over when support for Lon Nol was abruptly withdrawn].”³²

The Vietnamese influence on Cambodian communism, and the combination of Cambodia’s post-colonial nationalism with historical fears of Vietnamese dominance, led to an uneasy partnership between the Cambodian communist movement supported by Viet Nam and the beleaguered nationalism of a post-coup Sihanouk. When the peace agreement between the United States and Viet Nam was finalized in 1975, the Cambodian communists found themselves in a similar position to Sihanouk and Lol Nol: foreign allies had supported their agenda for their own gain, and could not be counted upon. Historical mistrust of Vietnamese influence and of Vietnamese minorities in Cambodia made the community an easy target of a flailing nationalist agenda by all factions. The Khmer Rouge, unsurprisingly, would prove no better in serving or protecting the remaining Vietnamese minority or the Cambodian population as a whole.

The Cold War further complicated tensions between Viet Nam and Cambodia. Under Sihanouk, Cambodia led a precarious existence as a non-aligned country, ending up as “the ant under the feet of elephants”, as he often noted. Viet Nam, following reunification and the withdrawal of US troops, quickly became entrenched in the communist bloc, and, with the Sino-Soviet split, firmly in the Soviet camp. Lon Nol’s coup and his corrupt and unpopular authoritarian rule, coupled with the mismanagement, disorganization and lack of capacity of the armed forces under his command, opened the political and military doors for the rise of communism and the ultimate victory of Pol Pot. Initially, Pol Pot had sought Vietnamese support in the continued development of Khmer communism, but the seeking of assistance, though initially masked, was not without tension and a nationalist belief that Cambodian communism and nationalism should not be subjugated to Vietnamese directives or influence. Thus, although initially the Cold War context extended the notion of “kin” between the two states as one based not only on shared ethnic minority groups but also on membership in the international communist movement, the splits within that movement and the historical tensions between the two states ultimately meant that more grounds for kinship resulted in greater enmity and conflict.

Cambodia’s Vietnamese minority

Following the withdrawal of Vietnamese and US forces, the battle between the Khmer Rouge and Lon Nol was short and decisive. The Khmer Rouge seized power in April 1975 and established a renamed country, Democratic Kampuchea (DK). Many have detailed the atrocities that followed between 1975 and 1979.³³ Although the exact number is contested, deaths from executions, disease, starvation and overwork numbered around 1.8 million.³⁴

The brutality of the Khmer Rouge regime is almost beyond comprehension. In less than four years, a quarter of Cambodia’s population was killed. A now declassified memo to then President Gerald Ford described conditions inside Cambodia one year after the Khmer Rouge takeover. Dated 10 May 1976, the memo details that:

Since January 1 the Communists have executed former teachers, students, and even low ranking enlisted men of the Lon Nol military forces. Moreover, anyone who shows any sign of being educated also risks arrest or execution. . . . Almost all executions occur in the same manner: several Communist cadre beat the person to death with hoe handles or other blunt instruments. . . . The regime is extremely anti-intellectual. . . . Education has virtually ceased to exist

... Organized religion is being eradicated. ... Virtually everyone has been made a member of a "production cooperative" and forced into agricultural work. ... Work hours are from dawn to dusk and sometimes even longer. ... Standards of health have declined drastically and disease [malaria, dysentery and cholera] is rampant. ... [T]he family unit is being destroyed with children permanently separated from their parents and husbands and wives placed in separate work groups. ... In its determination to achieve results, [the leadership] appears willing to use any means possible. Other reports reaching us confirm the level of brutality which this Embassy Bangkok airgram portrays.³⁵

With the exception of China, Cambodia cut off ties with foreign states. The United States had extracted itself from direct involvement in Indochina and focused on distributing military aid to allies in Indonesia, Malaysia and Singapore, and boosting relations with Thailand, the Philippines and the Republic of Korea. In effect, Cambodia was no longer within the scope of relevance or interest to the big powers.

The international community has debated whether or not events in Cambodia between 1975 and 1979 constitute genocide. Many scholars agree that, technically, the atrocities do not meet the definition.³⁶ Some 80–85 per cent of the victims were ethnic Khmer, who comprised almost 90 per cent of the country's population.³⁷ Other historians have posited that the Khmer Rouge pursued ethnic cleansing against, in particular, the ethnic Vietnamese and, to a lesser extent, the Cham (a Muslim minority). Whether genocide or not, the regime's responsibility for 1.8 million deaths classifies this as a crime against humanity.³⁸ The Khmer Rouge clearly violated the mandate of sovereignty, failing to protect those living within its state borders and murdering a quarter of the population. Although the R2P mandate did not exist at the time, later standards of international humanitarian law were expanded by cases such as that of Cambodia. On 18 July 2007, Co-Prosecutors from the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued a public statement "that serious and extensive violations of international humanitarian law and Cambodian law occurred in this country during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979", that "[t]hese crimes were committed as part of a common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of specific groups", and that "[t]hose responsible for these crimes and policies included senior leaders of the Democratic Kampuchea regime".³⁹

For the Vietnamese minority in Cambodia, the Khmer Rouge ascent to power and the brutality of the regime sadly marked an escalation of pre-existing policies. By the time the Khmer Rouge had consolidated power in 1975, the Vietnamese minority had already been drastically reduced through state persecution and forced migration. Of the remaining 10,000,

it is estimated that 2,000 survived, the 80 per cent death rate representing a higher percentage of victims than found in the population as a whole. Despite this, there are disputes over how active the state was in organizing and pursuing anti-Vietnamese policies. Directives on reporting Vietnamese whenever they were found certainly existed during the reign of the Khmer Rouge, but some argue that the regime did not vigorously pursue campaigns targeting Vietnamese minorities. As one historian noted, "the Khmer Rouge appear to have pursued an unsystematic policy of murdering Vietnamese inside Cambodia whenever they could get hold of them".⁴⁰ Leniency, for the whole population, was in short supply. It is not disputed that the Khmer spouses of ethnic Vietnamese were killed alongside their partners for being "tainted" Khmers.⁴¹

Viet Nam, newly reunified and preoccupied with consolidation and reunification, absorbed the exodus of Vietnamese refugees from neighbouring Cambodia but did not react to the continued persecution of their kinspeople across the border. Neither was the international community preoccupied with the treatment of the Vietnamese minority. Public perception in the West was skewed by the failed US invasion of Viet Nam. The Khmer Rouge's arguably genocidal treatment of the Vietnamese minority, perhaps emboldened by a lack of criticism, became increasingly open and direct. As the failures to create a utopian communist society became more pronounced, the Vietnamese were an increasingly popular scapegoat. When Viet Nam was a potential source of support for the fledgling communist movement, the bonds of kinship based on communism, a common colonial history and shared ethnic groups were painted over a history of tensions. The murderous trajectory of the Khmer Rouge and its decidedly anti-Vietnamese sentiments came to light in 1978, when the population of Cambodia's eastern zone were provided with blue scarves for their deportation and extermination on the justification that their Khmer bodies were occupied by "Vietnamese minds".⁴² The failure of the Khmer Rouge had to be blamed on someone and, with its ideology beyond question and Khmer nationalism elevated to a cult, the axe fell on a convenient historic enemy.⁴³

Viet Nam as a kin-state: Exhausting options, multilateral inaction and unilateral intervention

In examining Viet Nam's role as a kin-state, because of the existing Vietnamese and Khmer Krom minorities in Cambodia and Viet Nam respectively, it is worth examining claims of ethnic cleansing with regard to the Vietnamese minority in Cambodia. During the Khmer Rouge's rule, relations between Viet Nam and Democratic Kampuchea deteriorated, culminating in the Vietnamese military intervention in December 1978

that ousted Pol Pot. This was preceded by increasingly hostile rhetoric from the Khmer Rouge leadership towards Viet Nam, the continued persecution of the Vietnamese minority within Cambodia and a series of cross-border attacks by Cambodia against Viet Nam. The Khmer Rouge's reign and social experiment by this point had not only proven a total failure but also resulted in the disastrous destruction of any semblance of Khmer economy or society. In the face of these failures, attacking the Vietnamese as a scapegoat was one of the last policy tools available to the Khmer Rouge. The incursions began on 1 May 1975 and in the following three years resulted in an estimated death toll among Vietnamese civilians of up to 30,000.⁴⁴ The incursions were marked by their particularly provocative and vicious nature, and included the April 1978 Ba Chuc massacre, in which the Khmer Rouge killed 3,157 civilians of both Vietnamese and Khmer ethnicities, leaving only two survivors.⁴⁵ Although some analysts posit that the Khmer Rouge were prompted by concerns over increasing Soviet influence in Viet Nam, growing Vietnamese influence in neighbouring Laos and the Khmer Rouge's position as a Chinese satellite in the context of the Sino-Soviet split, none of these explanations diminishes the Cambodian aggression against its neighbour.

Prior to the invasion, the Vietnamese government had made significant overtures to negotiate an end to the conflict, but these were met with unwillingness on the part of the Cambodian regime. The Vietnamese approached Democratic Kampuchea on 5 February 1978 with a three-point peace proposal entailing an immediate ceasefire and a mutual troop withdrawal of 5 kilometres, creating a 10 kilometre wide demilitarized zone along the border. The Vietnamese also proposed negotiations for the conclusion of a peace treaty. Viet Nam made it known that it was willing to support international supervision of the truce. Copies of this proposal were sent to leading members of the Non-Aligned Movement and to UN Secretary-General Kurt Waldheim, who was requested to circulate it as an official UN document.⁴⁶

Democratic Kampuchea's failure to cooperate may have stemmed from a combination of revolutionary ideology and tacit support by China and the United States in their continued efforts to isolate the Vietnamese regime.⁴⁷ Taking into account the complexities of Cold War alliances, the Vietnamese had followed procedures to engage the international community. The international community, however, was mired in ideological divisions and self-interest. "But with Chinese backing, a desire to re-conquer the Mekong Delta from Vietnam, and internal instability within Kampuchea's ruling communist party, the Pol Pot group was not prepared to abandon [its aggression toward Vietnam]. They refused the proposal, and their conflict with Vietnam became locked into the continuous non-stop struggle."⁴⁸

The international community ignored Vietnamese efforts for a negotiated peace settlement between Viet Nam and the Khmer Rouge. In December 1978, Vietnamese troops, responding to Cambodian provocation, crossed the border and quickly defeated the Khmer Rouge, pushing its remaining forces into Thailand. In the aftermath of the international community's failure to support attempts for a bilateral or multilateral solution, and the international community's complete inaction during the murderous reign of the Khmer Rouge, what followed was widespread condemnation of Viet Nam's invasion and dismantling of the Khmer Rouge's brutal regime, including a punitive invasion by Chinese forces into northern Viet Nam during 1979. In addition, claiming unacceptable infringement of Cambodian sovereignty, the international community supported the legitimacy of the ousted Khmer Rouge throughout and beyond the 1980s, reserving Cambodia's UN seat for the Khmer Rouge coalition with Prince Sihanouk, and continuing to isolate, economically and politically, what was deemed to be a Vietnamese-installed government in Phnom Penh, led by Hun Sen.

The international community, too, continued to turn a blind eye to the persecution of the Vietnamese minority in Cambodia. Anti-Vietnamese sentiment in Cambodian politics did not stop with Vietnamese intervention. The Khmer Rouge, reformed and represented by the People's Democratic Kampuchea (PDK), continued with its anti-Vietnamese campaign. Claiming secret, continued occupation by the Vietnamese, the PDK massacred over 100 Vietnamese civilians in the area held by the United Nations Transitional Authority in Cambodia (UNTAC).⁴⁹ The protection of the Vietnamese minority in Cambodia can be said to have been a total failure over the past four decades. The objective continued to be the same as the rationale behind those fateful border incursions – to support a perception of Viet Nam as the underlying cause of Cambodia's woes and, simultaneously, of the Khmer Rouge as a defender of Cambodia.⁵⁰

By 1989, Viet Nam had gradually withdrawn all troops from Cambodia. Despite the ruinous state of affairs left to the Vietnamese-supported incoming government following the failed social experiment of the Khmer Rouge, today, although still facing many significant challenges, Cambodia is often lauded as a regional development success story. Indeed, under little changed leadership, the Cambodian economy had not only made recoveries but achieved an average 9.4 percent growth rate between 2000 and 2006.⁵¹

Standards and lessons learned from 1979

It might be argued that framing Viet Nam's intervention in 1979 in today's terms of R2P ignores the fact that the doctrine of the time was

centred upon the sanctity of sovereignty, and that the condemnations of the time sprang from what had been perceived as indefensible intrusions into Cambodian internal affairs by Viet Nam, as outlined by Article 2.1 of the UN Charter.⁵² But the notion of sovereignty as a responsibility is not new to R2P, and support for the nation-state system was, not least, on the premise of better protection of human rights, particularly following the colonial legacy that rolled to a close after the end of the Second World War. The very existence and development of R2P demonstrate that incidences such as Cambodia have prompted an evolution, a necessity for the development of an effective response by the international community in cases where the state commits gross violations and crimes against humanity. Yet R2P is also a reminder that previous notions of state responsibility have been quashed by sovereignty concerns and that the practice of state responsibility, without mechanisms for accountability for violations equally administered to all states, gives leave for many states to ignore R2P implementation on the same grounds that have allowed the shirking of responsibility through sovereignty in the past. Indeed, bad faith caused by continued interference by the big powers based on self-interest, alongside preoccupations of smaller states with a colonial past, has resulted in a lack of legitimacy for the leadership of states with the power to support the institutionalizing of R2P. The US invasion of Iraq and the continued lack of action in cases where a legitimate case for humanitarian intervention might be made – including Darfur and Myanmar – serve only to strengthen this perception. Simultaneously, the continued discourse on the premise of pitting sovereignty against humanitarian intervention and state responsibility strengthens the excuse for smaller states to ignore human rights on the grounds that it is another imposed set of ideologies, without the need to reflect on their own culpability for continuing to fail to protect ordinary people. What, indeed, has changed since the thirty-fourth session of the General Assembly of the United Nations, in September 1979, when Western and ASEAN delegates pointed out “that UN membership has never been granted or withheld on the basis of respect for human rights. If it were, a large proportion of the governments presently there would have to leave.”⁵³

Examination of Viet Nam’s course of action in 1978 demonstrates that it did utilize the available channels to attempt to engage the international community and seek multilateral action. These attempts were ignored, if not outright rebuffed. As a country that had faced incursions and conflict for the better part of the century, often involving big powers such as France, China and the United States, Viet Nam had a vested interest in extricating itself from another potential conflict, particularly with a kin-state and neighbour. In the face of inaction by the international community and with the realities of continued incursions across the border by the Khmer Rouge, what options did Viet Nam realistically have outside

taking unilateral action? Criticism has also been heaped on Viet Nam for the proportionality of its response, having occupied Cambodia for another decade after 1978. But Viet Nam also had to contend with the continued implications of what had prompted multilateral inaction in the first place: the self-interest of the big powers. As the international community condemned Viet Nam for its actions, the US military presence in Thailand continued to pose a threat, not least in arming the Khmer Rouge to continue their offensive. China, too, continued in support of the Khmer Rouge, spurred on by the humiliating defeat of its invasion of Viet Nam in 1979 on the premise of objecting to the Vietnamese actions in Cambodia. With the international community held hostage by these interests, and with the threat of continued Khmer Rouge incursions remaining very real, what options were open to the Vietnamese?

Nearly 20 years after the Khmer Rouge's bloody reign, in April 1997, the UN Commission on Human Rights adopted Resolution 1997/49,⁵⁴ which, in conjunction with a letter dated 21 June 1997 and signed by then co-Prime Ministers Prince Norodom Ranariddh and Hun Sen, requested the assistance of the United Nations and the international community in "bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979".⁵⁵ Still, the war crimes trials reflected the main challenge to the realization of R2P today. Part of the effort to support the rebuilding of Cambodia has included prosecution of Khmer Rouge perpetrators of crimes against humanity. Unsurprisingly, "[t]he Cambodian government clearly [had] no intention of focussing on the alleged culpability of international actors [for the death of a quarter of the Cambodian population]".⁵⁶ And although R2P did not exist at the time, in a retrospective perspective, in order to truly eliminate the repetition of crimes against humanity and multilateral inaction, what repercussions exist for failures by the international community to assume R2P? R2P is clear in stipulating the justification of humanitarian intervention, but what of the lack of accountability in cases where the international community fails to act to halt violations of R2P?

The retrospective examination of the Vietnamese intervention presents a case for examining a possible maximum standard, a worst-case scenario in face of mass atrocities being committed by a kin-state, of when, if ever, unilateral action on the part of a kin-state may be justified. In particular, in the event of the total failure of the international community to respond, who is responsible for defending the principles outlined in the very Charter of the United Nations in the absence of a UN body to protect and enforce the principles it was founded upon? Specifically in the case of R2P, the fundamental challenges that prevented the UNSC from overriding conflicts in national self-interest during the Cold War have not been addressed in any major structural changes in the composition or

operational principles of that body. Indeed, the UNSC has not seen major structural changes since the 1960s.⁵⁷ And just as there is no way to hold the international community culpable for its inaction with regard to the crimes against humanity committed during the reign of the Khmer Rouge, there remain weaknesses in meaningful enforcement of multilateral accountability for actualizing R2P.

Unilateral action is a bad precedent to set, whether on the basis of kin or of any categorical subscription of affinity that gives one state special status in relation to another. Indeed, the principle of equality, as enshrined in Article 2.1 of the UN Charter, reinforces this. But we do not operate in a world in which states are treated equally. Nor does the UN structure itself reflect the aspiration to state equality. Thus, within this premise, simply to roundly condemn unilateral action in the absence of multilateral action and accountability allows the very real danger of tacitly supporting international inaction while states abuse and persecute those they are meant to protect. Viet Nam's intervention in Cambodia, though in retrospect and within a framework and discourse that has since shifted, undoubtedly put an end to a murderous regime and took place under significant infringement of Viet Nam's rights as outlined by the UN Charter. Rather than legitimizing unilateral action by kin-states, what is needed is a real examination of what hinders the ability of multilateral bodies to respond to crimes against humanity in a timely manner, and to confront the realities limiting the ability of states to act for a greater interest than the individual self-interest of any individual or group of member states. Mere re-articulation of principles and the staunch commitment to state equality on paper fails to hold states accountable for the actualization of these principles.

In this, R2P perhaps presents a possibility to move forward to a situation where state sovereignty hinges on the state's responsibility to protect people living within its borders and where, in the absence of this, international intervention is justified. Moreover, a global consensus for supporting R2P will perhaps serve as a foundation for a more effective UNSC structure. But if international intervention continues to rely on the acquiescence of individual states, there remains a fundamental barrier and obstruction in that it is not in the interest of states to give up autonomy. This, perhaps, is where the UNSC needs to demonstrate leadership and to prioritize global good governance and multilateral intervention over national self-interest. Although the end of the Cold War may have ushered in an era where this is becoming ever more possible as a reality, it has yet to translate into action. Tellingly, the structure of the UNSC is still based on the power structure left in the wake of the Second World War.

The role of kin-states in R2P implementation, as for all potential actors in R2P implementation, is weakened by the continued failure of the chief

implementing body – the United Nations led by the UNSC – to be consistent and accountable and to demonstrate the will to act with the right intention. Unfortunately, the retrospective examination of Viet Nam's actions in 1978 highlights the hypocrisy and bad faith that have undermined the implementation of doctrines such as R2P. What can we hope has been changed since then?

UN Secretary-General Ban Ki-moon noted in January 2009: “The world body failed to take notice when the Khmer Rouge called for a socially and ethnically homogenous Cambodia with a ‘clean social system’ and its radio urged listeners to ‘purify’ the ‘masses of the people’ of Cambodia . . . There is some reason to believe, however, that the United Nations and its Member States have learned some painful, but enduring, lessons from these calamities.”⁵⁸ The reality remains that there is equal reason, if not more, to believe that the United Nations and its member states will have learned that there are no real repercussions for their authority if they fail to prevent or halt these calamities. The round condemnation of Viet Nam for its actions in 1978 shows, if anything, that there is little to be gained in failing to account for the strength of state self-interest, particularly of the big powers. Indeed, it cannot be in the self-interest of states to support actual implementation of R2P, if only for fear of its misuse being turned against oneself. Until there is more realistic acknowledgement of global power dynamics, mechanisms to more effectively deal with equalizing these imbalances cannot be prepared. In such circumstances, the options are to trust more powerful states to act out of benevolent self-interest, or to ensure that these states' self-interest aligns with a greater international interest. Unfortunately, the actions of Viet Nam in 1978 show that the former is decidedly unrealistic. Thus, the public in states with the power and means to lead responsible and consistent implementation of doctrines such as R2P must constitute a critical mass and demand greater accountability and a more realistic and pragmatic approach to what is, undeniably, their leadership in the international community.

The very articulation of R2P perhaps demonstrates a growing commitment and accountability by individual states to a nascent but evolving global civil society. This, in combination with the lessons learned by the interest-mongering of the Cold War and by failures of multilateral inaction, and the resulting devastation wreaked by politicization of notions of kin and ethnicity, may have led to a continuing examination of how we can avoid the mistakes committed in the past. What is less promising is that the discourse surrounding R2P since its inception and adoption continues to reflect the same debate between sovereignty and humanitarian intervention, much of it on the same grounds of criticism of R2P as yet another policy or ideological imposition by the West on the Global South.

Simultaneously, the misuse of the R2P doctrine in cases such as Russia's invasion of South Ossetia has further given cause for concern that the doctrine may be yet another mechanism for big power intervention in the affairs of others. Until the international community can demonstrate a shared concern for the long-term welfare of every state and hold every state accountable for its responsibilities to the ordinary person, R2P will remain, like many other documents before it, at best an articulation of a more ideal world without a plan for implementation, at worst a doctrine whose misuse may directly lead to mass suffering.

Notes

1. UN General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005; available at <<http://www.un.org/summit2005/documents.html>> (accessed 9 December 2010).
2. "About the Commission", <<http://www.iciss.ca/mandate-en.asp>> (accessed 10 December 2010).
3. International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. xi; available at <<http://www.iciss.ca/pdf/Commission-Report.pdf>> (accessed 10 December 2010).
4. For instance through strong public opinion supporting intervention for the protection of kin in other states or through the influx of refugees to a kin-state.
5. ICISS, *The Responsibility to Protect*, para. 2.1.
6. Examples include recent conflicts and situations in Darfur, Burma and Zimbabwe.
7. UN Charter, Article 24.1, states: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."
8. On the international level, these include the documents comprising the International Bill of Human Rights: the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966, with two optional protocols), and the International Covenant on Economic, Social and Cultural Rights (1966). On the regional level, organizations such as ASEAN have been struggling to set up human rights commissions in the style of existing national commissions established in some countries in the region. For an additional list of core international human rights instruments and universal human rights instruments, see <<http://www2.ohchr.org/english/law/>> (accessed 10 December 2020).
9. UN General Assembly, *2005 World Summit Outcome*, para. 139.
10. ICISS, *The Responsibility to Protect*, paras 4.18 and 4.19.
11. R. Kershaw, *Monarchy in South-East Asia: The Faces of Tradition in Transition* (London: Routledge, 2001), pp. 56–65. Under Prince Norodom Sihanouk's direction, Sangkum combined socialism, conservatism, nationalism, Theravada Buddhism and a populist form of fascism; for example, civil servants would be socialists for the "well-being" of the populace and royalists for the "prestige and cohesion of the nation".
12. Jan Oversen and Ing-Britt Trankell, "Foreigners and Honorary Khmers: Ethnic Minorities in Cambodia", in Christopher Duncan (ed.), *Civilizing the Margins: Southeast Asian Government Politics for the Development of Minorities* (Ithaca, NY: Cornell University Press, 2004), p. 243.

13. *Ibid.*, p. 245.
14. A representative quote by scholar Christine Leonard states: “while there are much more powerful nations which could ostensibly ‘overtake’ Cambodia politically, economically, geographically, the overwhelming nemesis as described by Khmers themselves is Vietnam”. “Becoming Cambodian: Ethnic Identity and the Vietnamese in Kampuchea”, in *Interdisciplinary Research on Ethnic Groups in Cambodia* (Phnom Penh: Center for Advanced Study, Final Draft Reports, 1996), pp. 276–305. Vietnamese influence is not only feared by Cambodia. Indeed, Thailand has historically seen Cambodia as a buffer against encroaching Vietnamese interests, and this belief was not unknown during the Cold War period.
15. Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79*, 2nd edn (New Haven, CT: Yale University Press, 2002), pp. 13–16.
16. *Ibid.*, p. 14.
17. David P. Chandler, “The Burden of Cambodia’s Past”, in F. Z. Brown and D. G. Timberman, *Cambodia and the International Community: The Quest for Peace, Development, and Democracy* (Singapore: Institute of Southeast Asia Society, 1998).
18. Russell R. Ross (ed.), *Cambodia: A Country Study* (Washington, DC: Government Printing Office for the Library of Congress, 1987); available at <<http://countrystudies.us/cambodia/>> (accessed 10 December 2010).
19. The first words of the first Communist Party secretary of the reunified state of Viet Nam, Le Duan, were: “Thanks to the solidarity of minorities, we had achieved worthy victories over the two large imperialists – France and America. Now, to construct a successful socialist society, we need to have more solidarity and unity again.” In the region, from a legislative standpoint Viet Nam has a positive history of ethnic minority rights inclusion, a history duly reflected by Viet Nam’s evolving constitution. In the 1930s, when the world accepted discriminatory policies against ethnic minorities or ignored minorities in the pursuit of national aspirations, the Communist Party of Vietnam (CPV) was already practising inclusive policies towards ethnic minorities in all aspects of its governance. The inclusion protected existing customs, where the 1959 Constitution of the then Democratic Republic of Vietnam states, in Article 3, that “nationalities have the rights to maintain or change their own customs and habits, to employ their mother languages, scripts, and to develop their distinct cultures”. Ethnic minority inclusion and protection were, in large part, driven by the need to align with groups occupying strategic mountainous hinterlands in battles first against the French and, later, against the Chinese and Americans. However, like the Vietnamese in Cambodia, the Khmer Krom in southern Viet Nam have been and remained recipients of notably harsher treatment by their respective governments.
20. David Chandler, *The Tragedy of Cambodian History: Politics, War and Revolution since 1945* (New Haven, CT: Yale University Press, 1991).
21. Thomas Englebert and Christopher Goscha, *Falling out of Touch* (Clayton, Australia: Monash University, 1994).
22. Chandler, *The Tragedy of Cambodian History*.
23. Ross, *Cambodia: A Country Study*.
24. Chandler, *The Tragedy of Cambodian History*.
25. John Tully, *A Short History of Cambodia: From Empire to Survival* (New South Wales, Australia: Allen & Unwin, 2005), pp. 157, 161.
26. Speech by President Richard Nixon on Cambodia, 30 April 1970; full transcript available at <<http://vietnam.vassar.edu/doc15.html>> (accessed 10 December 2010).
27. Lloyd “Mike” Rives, Chargé d’affaires at the US Embassy in Phnom Penh, telegraphs to Washington.
28. Tully, *A Short History of Cambodia*, p. 167.
29. *Ibid.*, pp. 166–167.

30. Ibid., p. 156.
31. Chandler, “The Burden of Cambodia’s Past”.
32. “Khmer Rouge: US Helped”, Associated Press, 6 April 2009; available at <<http://www.news24.com/World/News/Khmer-Rouge-US-helped-20090406>> (accessed 10 December 2010).
33. See, for instance, David Chandler’s many volumes on Cambodia, including *A History of Cambodia* (4th edn, Boulder, CO: Westview Press, 2007); Kiernan, *The Pol Pot Regime*; and Martin Stuart-Fox and Bunheang Ung, *The Murderous Revolution: Life and Death in Pol Pot’s Kampuchea* (Bangkok: Tamarind Press, 1986; updated edition, 1998).
34. Chandler, “The Burden of Cambodia’s Past”.
35. Brent Scowcroft, “Life Inside Cambodia: Memorandum for the President”, The White House, Washington, DC, 10 May 1976; available at <<http://www.ford.utexas.edu/library/exhibits/Vietnam/760510a.htm>> (accessed 10 December 2010).
36. Tully, *A Short History of Cambodia*, pp. 75–79, notes: “The atrocities committed against the Cambodian population under the Khmer Rouge regime have been described in detail by several scholars (e.g., Chandler [*A History of Cambodia*] . . . ; Kiernan [*The Pol Pot Regime*]), as well as by Cambodian survivors (e.g. Stuart-Fox and Bunheang [*The Murderous Revolution*]). Most leading scholars of Cambodia . . . agree the Khmer Rouge atrocities do not constitute a genocide. In terms of intent as well as outcome, the Khmer Rouge terror bears a closer resemblance to Stalin’s regime than to that of Nazi Germany. Ben Kiernan (e.g., [*The Pol Pot Regime*]) argues genocide is an apposite term because non-Khmer groups suffered disproportionately under Pol Pot and the regime pursued a deliberately chauvinist campaign couched in racial vocabulary.”
37. Duncan, *Civilizing the Margins*.
38. Suzannah Linton, “Thoughts on Schabas–Stanton–Johansen”, *Search for the Truth*, No. 25 (January 2002), Magazine of Documentation Center of Cambodia, <http://www.dccam.org/Tribunal/Analysis/Debate_Genocide.htm> (accessed 10 December 2010).
39. Kingdom of Cambodia, “Statement of the Co-Prosecutors”, Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Prosecutors, 18 July 2007, Phnom Penh, p. 3; available at <http://www.yale.edu/cgp/downloads/Statement_of_Co-Prosecutors18-July-2007.pdf> (accessed 10 December 2010).
40. Patrick Raszelenberg, “The Khmer Rouge and the Final Solution”, *History & Memory* 11:2 (1999), pp. 62–93. at pp. 81–82.
41. Ibid., pp 69–70.
42. Kiernan, *The Pol Pot Regime*, p. 408; or Mark Levene, “Why Is the Twentieth Century the Century of Genocide?”, *Journal of World History* 11:2 (2000), pp. 305–336.
43. Levene, “Why Is the Twentieth Century the Century of Genocide?”, p. 328.
44. John Pilger, “War in Vietnam – Invasion of Cambodia”, <<http://pilger.carlton.com/page.asp?partid=82>> (accessed 9 June 2009).
45. James Pringle, “Meanwhile: When the Khmer Rouge Came to Kill in Vietnam”, *New York Times*, 7 January 2004, <http://www.nytimes.com/2004/01/07/opinion/07iht-edpringle_ed3_.html> (accessed 10 December 2010).
46. Marian Kirsch Leighton, “Perspectives on the Vietnam–Cambodia Border Conflict”, *Asian Survey* 18:5 (1978), pp. 453–455.
47. Ben Kiernan, “New Light on the Origins of the Vietnam–Kampuchea Conflict”, *Bulletin of Concerned Asian Scholars* 12:4 (1980), pp. 61–65.
48. Ibid., p. 65.
49. Chandler, *A History of Cambodia*, p. 288.
50. Jay Jordens, “Persecution of Cambodia’s Ethnic Vietnamese Communities During and Since the UNTAC Period”, in Steve Heder and Judy Ledgerwood (eds), *Propaganda, Politics and Violence in Cambodia* (Armonk, NJ: M. E. Sharpe, 1996) p. 139.

51. United Nations Economic and Social Council, "Cambodia, NVP Year 2007 – Annual Ministerial Review: Executive Summary of the National Report 323"; available at <<http://webapps01.un.org/nvp/frontend!country.action?id=4>> (accessed 23 March 2011).
52. ICISS, *The Responsibility to Protect*, para. 2.7, notes: "Sovereignty has come to signify, in the Westphalian concept, the legal identity of a state in international law. It is a concept which provides order, stability and predictability in international relations since sovereign states are regarded as equal, regardless of comparative size or wealth. The principle of sovereign equality of states is enshrined in Article 2.1 of the UN Charter. Internally, sovereignty signifies the capacity to make authoritative decisions with regard to the people and resources within the territory of the state. Generally, however, the authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements."
53. William Shawcross, *The Quality of Mercy: Cambodia, Holocaust and Modern Conscience* (London: André Deutsch, 1984), p. 138.
54. United Nations Commission on Human Rights, *Situation of Human Rights in Cambodia*, Resolution 1997/49, UN Doc. E/CN.4/1997/52, 1997.
55. "Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the UN Secretary General", UN Doc. A/51/930, S/1997/488, 24 June 1997, Annex; available at <http://law.scu.edu/site/beth-van-schaack/File/June_21_1997_letters_from_PMs.pdf> (accessed 27 January 2011).
56. Susan E. Cook, "Prosecuting Genocide in Cambodia: The Winding Path Towards Justice", *The Tribunals* (May 2001), p. 5, <http://www.crimesofwar.org/tribun-mag/mag_cambodia.html> (accessed 10 December 2020).
57. "The configuration of the UN Security Council was last altered in the early 1960s, when the Council grew from 11 to 15 members. Since then, Security Council reform (which usually translates as 'give a seat to my country but not to theirs') has been a subject of desultory debate among member states. The panel itself [the United Nations High-Level Panel on Threats, Challenges and Change; report released on 2 December 2004] could not reach consensus and so presented two options: either six new permanent members together with three new two-year, non-renewable seats; or eight new seats with four-year, renewable memberships and one new, non-renewable two-year seat. None of the new seats would come with a veto, which may anger those who consider themselves 'real' permanent member material, that is, deserving of a veto. . . . Whether or not the Security Council is changed in some fashion, the tasks that it faces will get no easier. Not just the United Nations but every security provider from regional organisations to individual states has struggled with how best to prevent conflict; to intervene, if necessary, to save lives; and to provide support to war-torn states as they emerge from conflict. No provider or collection of providers presently has sufficient public security resources to devote to these tasks or a good doctrine or strategy for the effective collaboration of military, police, and non-security civilian resources. The United States, United Kingdom, European Union, African Union, and the United Nations are all scrambling to address these issues." William J. Durch, "Securing the Future of the United Nations", *SAIS Review* 25:1 (2005), pp. 187–191, on *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change (New York: United Nations Department of Public Information, 2004); available at <<http://www.un.org/secureworld/report2.pdf>> (accessed 10 December 2010).
58. UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677, 12 January 2009, p. 24; available at <<http://www.unhcr.org/refworld/docid/4989924d2.html>> (accessed 10 December 2010).

9

The role of Russia as a kin-state in protecting the Russian minority in Ukraine

Olena Shapovalova

The collapse of the Soviet Union led to a situation in which Russians living in former republics of the USSR, including Ukraine, became national minorities – so-called “compatriots”. Russia had no experience of networking with compatriots abroad, even though that was the Soviet thinking. Nowadays, Russia is a dominant, strong and powerful state with a kin-state interest in Ukraine, maintaining a unique post-Soviet position.

According to the 2001 census, 37.54 million Ukrainians lived in Ukraine (77.8 per cent of the population) and 8.33 million Russians (17.3 per cent). The 2001 census revealed that 29.6 per cent of the population of Ukraine considered Russian to be their native language; Ukrainian was the native language of 67.5 per cent of the population. However, many independent analysts believe that the census data do not reflect the actual situation, and the number of “exclusively Ukrainian speakers” actually amounts to only 40–50 per cent of Ukrainian residents.¹ However, Russians in Ukraine rarely form an independent diaspora; they assimilate easily because there is no great difference in cultural orientation and in cultural behaviours (customs, traditions, religion).

After the collapse of the Soviet Union, the difficulties of the promotion and protection of the rights and freedoms of Russian compatriots in Ukraine were raised. Beleaguered by its own economic difficulties in the 1990s, the Russian leadership hesitated to take on the problem of compatriots. Finally, work in this direction began to acquire concrete shape. In 1994, the Governmental Commission for the Affairs of Compatriots

Blood and borders: The responsibility to protect and the problem of the kin-state, Kemp, Popovski and Thakur (eds), United Nations University Press, 2011, ISBN 987-92-808-1196-4

Living Abroad was established, but its activities remained extremely weak and limited.

The first serious step was the adoption of Federal Law 99, “On the State Policy of the Russian Federation with Respect to Compatriots Abroad”. It was adopted by the Russian State Duma on 5 March 1999 and by the Council of Federation on 17 March 1999, and became law on 24 May 1999. It was amended on 31 May 2002, 22 August 2004, 29 December 2004, 31 December 2005, 18 July 2006, 23 July 2008, 25 July 2009 and 23 July 2010.² This law was to regulate and deal with the problems of compatriots living abroad. According to the law, relations with compatriots abroad are an important aspect of the Russian Federation’s foreign and domestic policy.

According to Article 1 of the Federal Law on Compatriots Abroad adopted in 1999 (with the most recent amendments made in 2006), “compatriots who are resident abroad are entitled to rely on the Russian Federation’s support in exercising their civil, political, social, economic and cultural rights, and in preserving their distinctive identity”, but also it is stressed that “the Russian Federation’s activities in respect of relations with compatriots abroad shall be conducted in accordance with the universally recognized principles and standards of international law and the Russian Federation’s international treaties, and shall take into account the legislation of the countries in which compatriots are resident”.³

According to this law, compatriots are individuals who were born in a particular state and who live or have lived in it and share a common language, religion, cultural heritage, traditions and customs, as do their direct descendants. The concept of “compatriots abroad” refers to: citizens of the Russian Federation who are resident on a permanent basis outside the Russian Federation; individuals who were citizens of the USSR and live in states that were formerly part of the USSR, who have become citizens of those states or become stateless persons; expatriates (emigrants) from the Russian state, the Russian republic, the Russian Socialist Federal Soviet Republic, the USSR and the Russian Federation, who had the corresponding citizenship and have become citizens of a foreign state, have a residence permit in one of these states or have become stateless persons; the descendants of individuals belonging to the above-mentioned groups, with the exception of descendants of individuals from the titular nation of the foreign state.⁴

In 2006, several important documents were adopted, such as the Program of Work with Compatriots Abroad for 2006–2008, the “Russian Language” Federal Target Program (2006–2010), and the National Programme to Assist the Voluntary Resettlement in Russia of Compatriots Currently Living Abroad.

The Federal Law on Compatriots Abroad was the first Russian legal document to regulate the kin-state relationship with its diaspora. However, some parts of the law had critics from both the experts and the compatriots. For example, the definition of “compatriot” is rather ambiguous, multifaceted and controversial. However, Russia has taken the first steps towards improvements. The Russian government recognized the importance of work for further improving the Russian legislation in respect of compatriots, in particular, changes and additions to the Federal Law.

Since then, some weaknesses and gaps in the law have been filled with the adoption of the concept of support for compatriots abroad, which was approved by the President of Russia on 30 August 2001.⁵ A new direction for the Russian Federation’s state policy with respect to compatriots living abroad was launched in Moscow on 11 October 2001 in a speech by the President of the Russian Federation, Vladimir Putin, at the Congress of Compatriots Living Abroad. Putin emphasized that “our compatriots abroad must have equal rights with the citizens of the countries in which they live. And for this we have the right (when I say ‘we’, I mean the public authorities of Russia) to fight consistently, professionally, competently, persistently and firmly.” The Russian President was not satisfied with the previous work of the state bodies. From his point of view, there were still gaps in the law and the legislation itself was confusing and not committed.⁶

According to Vladimir Putin’s speech on 24 October 2006, “observance of the rights and freedoms of compatriots is a serious problem. To contribute to their protection is our moral obligation, and we will strive to implement it permanently.”⁷ The next President of the Russian Federation, Dmitry Medvedev, in his message to the World Conference of Compatriots Living Abroad on 31 October 2008, stated that “protecting the lives and dignity of our citizens, wherever they may be, is an unquestionable foreign policy priority for our country. Our foreign policy decisions will be based on this need. We will also protect the interests of our business community abroad. It should be clear to all that we will respond to any aggressive acts committed against us.” Medvedev said that “the development of relations and liaison with compatriots will always be a priority of Russian foreign policy. Today, not only at the federal, but also at the regional level, support programs, which are designed to fully protect the rights of Russian citizens, are realized, and implementation of the projects in the sphere of culture, information, education and social welfare takes place. Activities in this regard will only be enhanced.”⁸

However, after the conflict in August 2008 in South Ossetia and Abkhazia, the practical realization of the statements by the Russian President

and the Russian legislation on Russian compatriots abroad may cause concern. After all, the Russian government has argued that the military operation in Georgia (South Ossetia) in August 2008 was justified by the “responsibility to protect” (R2P) principle. However, the version of R2P adopted at the 2005 World Summit is limited to situations of genocide, ethnic cleansing, crimes against humanity or war crimes. To prevent escalation towards such crimes, states should protect all people living in their own territories – including national, ethnic and religious minorities. The host-states have a primary responsibility to protect minorities. But if they fail in this task, the R2P shifts to the international community, not just to a kin-state. A kin-state can engage and offer assistance only at this stage and only as part of the international community. It may have an interest – more or less strong – to protect kin people as compatriots abroad, but this interest needs to be properly regulated. The role that a kin-state can offer (and be allowed to play) should be limited and exercised only through multilateral diplomacy.

The final response to Russia’s reliance on the R2P resolution is that there was no Security Council resolution giving it legal authority for military intervention – an omission that Moscow complained about long and hard when the United States ignored this requirement in Kosovo in 1999 (not to mention Iraq in 2003). The 2005 General Assembly position was very clear that, when any country seeks to apply forceful means to address an R2P situation, it must do so through the Security Council.

The Russia-Georgia case highlights the risks of states, whether individually or in a coalition, interpreting global norms unilaterally. The sense of moral outrage at reports of civilians being killed and ethnically cleansed can have the unintended effect of clouding judgment as to the best response, which is another reason to channel action collectively through the United Nations. That other major countries may have been indifferent to this constraint in the past doesn’t justify Russian actions in Georgia.⁹

The Russian authorities have described Georgia’s initial actions against the local population of South Ossetia as “genocide”.¹⁰ Russian Foreign Minister Sergey Lavrov stated that “Georgia’s aggression against South Ossetia did not achieve its goals thanks only to the actions of Russia, which fully in line with our international obligations suppressed this illegal move”.¹¹ Is this really true?

Russian officials rigidly defend their positions. Thus, Deputy Minister of Foreign Affairs G. Karasin, at a Regional Conference of Compatriots Living in Europe, in Berlin on 18 September 2008, stated that the decisive and entirely fair actions of Russia to curb the aggression and to support the peoples of South Ossetia and Abkhazia have shown that Russia

can stand up for stability and international law for its citizens, whether they are peacekeepers or civilians. In his view, the response of Russia to the Georgian aggression was in full conformity with applicable international law, including the right to self-defence as enshrined in Article 51 of the UN Charter. All measures taken by Russia were directed to one goal, which was dictated by the need for effective guarantees of non-aggression by Georgia against South Ossetia and Abkhazia. Now Russia is continuing this work through political and diplomatic means.¹² It is important to remember that politicians' unconsidered statements can cause the death of innocent people and shock or psychological damage to those who survive. The leaders of a country should primarily be responsible for peace, calm and a decent life for their people.

Mutual accusations by the leaders of Russia and Georgia cannot bring back to life those who were killed during the conflict. Dmitry Medvedev said that the decisions taken by Russia in relation to South Ossetia and Abkhazia were necessary and sufficient. Russia laid the blame on the Georgian side, which reportedly gave no opportunity for the separation of the conflicting parties.

The President of Georgia, Mikheil Saakashvili, on the other hand, said that it was "a Russian campaign of disinformation". He told the Temporary Parliamentary Commission studying the events of August 2008 that "his decision to launch a military operation on August 7 was 'unavoidable' because Russian troops were already advancing into breakaway South Ossetia and Georgian-controlled villages inside the breakaway region were under heavy shelling. However, whilst admitting that the restoration of Georgia's territorial integrity had been 'complicated' by the war, he claimed that, as the war had demonstrated Russia was an aggressor rather than a peacekeeper, it would ultimately make the reunification of Georgia easier to achieve."¹³ Alexander Lomaia, the Secretary of the National Security Council, said that "Russia seems intent on overthrowing the democratically elected government of Georgia and occupying the country".¹⁴ According to the Ministry of Foreign Affairs of Georgia, it was a well-known fact that Russia's official structures were "patronizing, whether openly or secretly, the organizations promoting ethnic and racial hatred and carrying out acts of violence against people of different racial or ethnic origin".¹⁵

South Ossetia and Abkhazia were recognized by the Russian Federation as independent states. Russian President Medvedev stated that:

Russia has already taken all the main steps that were necessary in this situation. As you should realise, this was not an easy decision, but it was necessary. Reactions in other countries have indeed varied, and this was probably to be expected. Our closest neighbours have been completely objective in their reac-

tion. I met with most of these countries' leaders at the Shanghai Cooperation Organisation summit. They understand the motivations for the decisions Russia has taken.

Recognition is a separate issue. I want to remind you that each country makes its own individual decision on recognition. There is no collective action in this situation. Take the example of Kosovo. It is clear that in this situation some countries will agree to emergence of new states, while others will consider their emergence untimely. But according to international law, a new state becomes a subject of law, as the lawyers say, from the moment it gains recognition from at least one other country.

From a legal point of view these new states have come into existence now. The process of their gaining recognition might be a long one, but this will not affect our position. We have made our decision and it is irreversible. Our duty is to ensure peace and calm in the region, and this is the basis for our position.¹⁶

A year later, the war between Russia and Georgia was among highlights of the autumn session of the Parliamentary Assembly of the Council of Europe (PACE) in Strasbourg (28 September–2 October 2009). The Monitoring Committee stated that little tangible progress had been achieved in addressing the consequences of this war.

Therefore we can see how the Russia–Georgia situation highlights the risks of states interpreting global norms unilaterally. Russia forgets that the kin-state can play a part in the responsibility to prevent stage, but only by exercising its responsibility to cooperate with the host-state and the international community.

A lot of questions have been raised by the resolutions of the World Conference of Russian Compatriots Living Abroad, which have expressed support for the state policy of the Russian Federation to enhance cooperation with the Russian diaspora abroad and to protect its rights and freedoms, including the highest of human rights – the right to life. The prevention of the genocide of the people of South Ossetia was an example of Russia's commitment to these values.¹⁷ In my opinion, the problem is that it is not up to one state to decide whether or not there has been a genocide in another country. There are appropriate international organizations such as the United Nations and the Organization for Security and Co-operation in Europe (OSCE) that have not only the appropriate legal authority but also the means to resolve conflicts.

Instead, more attention should be paid to prevention. One of the positive actions by Russia as a kin-state to prevent violations of human rights and to protect minorities is organizing various conferences and forums to exchange information and take new positive steps in future.

The strong wish to deal independently with their opponents – the “might makes right” principle – can lead to unpredictable consequences. The example of the military conflict between Russia and Georgia has scared the population of Ukraine. Could Ukraine be next? There are some problems between Russia and Ukraine such as using the Russian language in Ukraine, the Crimean problem, Russian naval vessels at Sevastopol and gas disputes. Could the R2P principle be used to hide aggression against another state?

Bilateral relations between Russia and Ukraine in the sphere of protecting minorities are in the early stages of development. A strong legal base in this sphere needs to be created for the future. Ukraine is a democratic country. There are about 90 non-governmental organizations (NGOs) working with Russian compatriots in Ukraine.¹⁸ The authorities have not prohibited the establishment of appropriate work with all segments of Russian compatriots. On the other hand, some of these organizations do not operate transparently, efficiently and on an ongoing basis. There is a lack of control and many of the organizations exist only on paper, their main (unwritten) purpose being to make money.

Since 2006, there have been congresses, conferences, forums, seminars, training sessions, roundtables, festivals and other events in Russia and in compatriots’ countries of residence that contribute to the institutional strengthening of public associations of Russian compatriots and enhance their quality of life in Ukraine. They also help to create legislation for the protection of the rights of the Russian minority in Ukraine.

The Ukrainian government has made positive efforts to prepare legislation for the general protection of national minorities and has demonstrated its implementation. On 4–5 November 2005, a roundtable on “The Organization of Russian Compatriots – Russian and Slavic Associations: Principles and Ways of Consolidating” was held in Kiev.¹⁹ The main objectives of the Organization of Russian Compatriots in Ukraine were:

- (a) promoting the values of Russian culture, a truthful history of the Russian and Russian-speaking population of Ukraine, the protection of the historical truth and the publication of relevant literature;
- (b) the conservation and protection of the Russian language;
- (c) the protection, preservation and further development in Ukraine of the achievements of Russian science, culture and arts;
- (d) the organization of legal protection for compatriots.²⁰

During the roundtable, it was decided to create the Coordinating Councils of Compatriots’ Organizations. Later, on 18–19 October 2008, the Ukrainian Coordinating Council of Compatriots’ Organizations was created. The objective of the Coordinating Council is not only to coordinate the actions of compatriot organizations, but also to provide them with

substantial support in developing cooperation with government bodies and agencies in Ukraine and Russia.

Roundtable participants urged all Russian compatriots in Ukraine to contribute fully to the publication of Russian newspapers and magazines, in particular the newspapers *Russian Truth* and *Russian Culture of Ukraine*, as well as regional publications.²¹ Participants in the roundtable also supported the initiative to establish an Association of Russian Cultural Centres, believing that activities in this direction are among the most promising for protecting the Russian cultural heritage and for promoting the values of Russian culture in Ukraine.²²

Subsequently, roundtable discussions have been held annually in Kiev for Ukraine's Russian compatriots. On 8–9 December 2007, a roundtable was held on the theme "A year after the Second World Congress of Russian Compatriots in St Petersburg". It was attended by over 140 representatives of Ukrainian and regional organizations of Russian compatriots. The chief subject of virtually all the speeches was the need for greater interaction between the organizations of compatriots and the importance of holding a Ukrainian conference of compatriot organizations. This conference should identify the basic principles and directions of this cooperation, such as the establishment of the Coordinating Council for compatriot organizations.

On 11 February 2007 in Kiev, organizations were established to merge compatriots in the "Russian Community", connecting nearly 40 community organizations across the country. In June 2007 it received official registration. On 15–16 December 2007 in Yalta, a conference held by Russian Ukrainian organizations established a Ukrainian Council of Russian Compatriots, whose task was to coordinate the efforts and interactions of Russian organizations in Ukraine. The plan was to create a three-tier management structure.²³

In December 2007, the Ukrainian Council of Russian Compatriots created a draft "Declaration on the Rights of Russian Culture in Ukraine", which was adopted during the All-Ukrainian Conference of Organizations of Russian Compatriots in 2008 ("the humanitarian congress of Russian public organizations in the city of Severodonetsk"). The event involved congress deputies at all levels, representing the interests of local communities of south-east and central Ukraine.²⁴

During the 2008 Conference of Russian Compatriots Living Abroad, Russian compatriots "expressed their protest against Ukrainian policy that aimed at reducing access to the Russian information and cultural space".²⁵ However, in Ukraine it is not forbidden to organize the Russian Centres and other organizations of Russian compatriots in Ukraine, which are able to make information from Russian sources available to all

segments of the population and allow people greater access to the Russian media. Yet they accuse the authorities in Ukraine of limiting access to Russian information and replacing the Russian language; in other words, they do not do the work they should do.

One of the main problems for Russian compatriots in Ukraine is the issue of the Russian language. In November 2002, under the auspices of the Council of Europe, a seminar was held in Kiev that discussed the future role of the European Charter for Regional or Minority Languages. In particular, the European experts at the seminar insisted that the state is obliged to act in such a way that the language used not only at home but also at work and in public life is of the people's own choosing.

When Ukraine was part of the Soviet Union, the Russian language was compulsory in the administration and in public life. On 23 April 2008, the government of Yulia Tymoshenko approved the project of the Concept of Realization of State Language Politics. According to former Prime Minister Tymoshenko, there was no Russian language problem for the Ukrainian people: the languages are related so people can understand each other without difficulty. "The problem, of course, is that politicians use the language issue to win elections", said the Prime Minister. She continued, "segregation is artificial and criminal". The Prime Minister also stated that the new generation of Ukrainian children is trilingual, speaking Ukrainian, Russian and English, with no psychological problems. Tymoshenko believed that the country had enough Russian-language schools, even though the official language is Ukrainian.²⁶

However, Vadim Kolesnichenko, People's Deputy of Ukraine, believes that the content of the project can justifiably be called "the concept of total Ukrainization".²⁷ For 10 years, the status of the Russian language in Ukraine has been a subject of political speculation. Before every presidential or parliamentary election, the issue of new opinions in the press regarding language policies arises. However, those who were defenders of the Russian language during the campaign often neglect their promise once they come to power.

New laws, such as those on "Advertising" and "Justice", require the whole population of Ukraine to use only the Ukrainian language in the organs of state power. This has created a tense situation because not all people in Ukraine can speak and understand Ukrainian fluently. The director of the Institute of Archaeology of the National Academy of Sciences of Ukraine, Academician Petr Tolochko, believed that "the Russian language in Ukraine was held hostage to the ambitions of politicians and intellectuals seeking speedy integration with the West". He was convinced that Ukraine's cultural and linguistic war, whose objective was fully recognized to be the elimination of the Russian language, would change the identity of 50 million people. History would need to be re-

written and a visa introduced, creating artificial conflicts between Russia and Ukraine.²⁸ Sergei Markov was confident that the struggle for the Russian language was purely political. He stated that it was necessary to protect the Russian language through political not philological methods. Russia, in his view, should make every effort to protect the right to use the Russian language. For that you need to develop educational programmes, expand the Russian information space and, most importantly, actively develop business cooperation.²⁹

“Ukrainization” was to occur in other areas. To this end, a bill was introduced to amend the Law of Ukraine “On public service” (regarding the use of languages). Public servants were given the responsibility of ensuring “compliance with constitutional standards regarding the statehood of the Ukrainian language”. But, in doing so, the assigned duties of a public servant in enforcing the rules of Article 10 of the Constitution of Ukraine were forgotten. This article guarantees the free development, use and protection of Russian and other languages of national minorities in Ukraine.³⁰

There were five other bills. According to these bills, only the Ukrainian language can be used in the fields of advertising (Law 2558 of 23 May 2008), tourism (Law 2559 of 23 May 2008), public information (Law 2546 of 23 May 2008), the print media (Law 2549 of 23 May 2008) and consumer law (Law 2545 of 23 May 2008). As a result of these bills, legislators hoped to promote the Ukrainian language in the following areas:

- advertising;
- scientific and technical publications, including software translation, which are to be printed exclusively in the Ukrainian language;
- tourism information, including the creation of special groups for citizens who do not speak the Ukrainian language;
- the translation of print media;
- the dissemination of information about goods and services, including price lists and prices;
- the transport industry of Ukraine – rail, road, aviation, and the like – in which information is to be distributed exclusively in Ukrainian;
- all Ukrainian court proceedings (administrative and civil), which are to be exclusively in the national language;
- bank contracts, which are to be concluded in Ukrainian;
- field of pharmacology and medicine, in which all information is to be presented only in Ukrainian.³¹

There have been reports of some cases of enforced changes to the Ukrainian version of the names of individuals who belong to national minorities, including Russians. Of particular concern are cases of writing the Ukrainian version of names in official documents such as passports without the prior consent of the person concerned.

Yet the Ukrainian government does not limit compatriots' conferences. Thus, on 22–23 May 2008 in Minsk (Belorussia), a regional conference of compatriots from Belorussia, Moldova and Ukraine was held. A resolution at this conference stated the desire to strengthen ties with their historical homeland, to preserve their linguistic and cultural identity, to strengthen unity and cohesion and to continue the process of consolidation in the interests of ensuring the legitimate rights and freedoms of compatriots. To improve the role of organizations in public life, these countries considered it necessary to:

- (a) establish centres of Russian science and culture and develop the conservation and study of the Russian language and the Russian literary and historical-cultural heritage;
- (b) increase the use of organizations in the territories of Belarus, Moldova and Ukraine, for international and regional festivals, exhibitions, conferences and other sociocultural and educational activities;
- (c) organize seasonal (summer and winter) training and health camps for youth leaders and talented young people in the territories of Belarus and Ukraine;
- (d) develop and strengthen Russia's unified information space, improve information for compatriots, increase subscriptions to Russian newspapers, continue the development of libraries, educational curriculums, teaching, history and historical and children's literature, ask the relevant Russian authorities for the restoration of public broadcasting radio stations and television channels for the territories of Belarus, Moldova and Ukraine (if necessary providing compatriots' organizations with equipment for receiving satellite programmes), increase the use of the Internet, and so on.³²

Currently in Ukraine, information in Russian can be found through the Government Commission for the Affairs of Compatriots Living Abroad. It has established websites ("Russian Movement in Ukraine", "Russian Community", "Russia and Compatriots") and produced newspapers (*Russian Pravda*, *Russian World*, *Russian Culture of Ukraine*, *Rossiyskaya Gazeta*, etc.). It has also created a specialist magazine for compatriots, *Russian Century*.

Of particular importance was the "Year of the Russian Language Abroad" in 2007. Much has been done to preserve the Russian language and to maintain and enhance the status of the Russian language abroad. In May 2007, the Russian Ministry of Foreign Affairs organized an international conference with Dmitry Medvedev and Sergey Lavrov. The Crimea also holds an annual festival of the Russian language and literature called "The Great Russian Word".³³

Since late July 2006, a programme supported by the Governmental Commission for the Affairs of Russian Compatriots Abroad has been ad-

dressed to schoolchildren and teachers in particular. Annually over the past 10 years, about 230 Russian-language teachers and teachers in primary schools in Ukraine where the language of instruction is Russian, have an opportunity to improve their skills in the best Russian institutions in Rostov-on-Don, Voronezh and Moscow. In 2006, teachers from Ukraine were hosted at the Moscow Academy of Training for the retraining of workers in education.

The programme for the social support of compatriots annually offers 110 junior school children from socially vulnerable families in Ukraine the opportunity to attend recreational camps in Russia. In addition, in 2006, 250 Ukrainian senior schoolchildren and high school students, who had received an award in competitions based on their knowledge of Russian history and culture, as well as in regional Olympiads on the Russian language, organized by the Embassy of Russia and the Russians Abroad Center, visited the Golden Ring of Russia (a ring of cities north-east of Moscow) and saw the unique monuments of ancient Russian art.

In Ukraine, anniversaries of Russian history and anniversaries of eminent personalities in Russian culture are freely observed. For example, on 5 July 2008, the town of Vinnytsia marked the 125th anniversary of the birth of Ivan Ilyin. Every year, however, there are anniversaries that do not receive proper attention in the Ukrainian media and educational institutions. On 18 July 2008, a Russian society named after Alexander Pushkin in Lviv turned 20 years old. In connection with the anniversary, members were awarded high honours. On 25 June 2008, the Russian Embassy in Ukraine provided material assistance to 24 veterans and awarded medals to four veterans of the Great Patriotic War of 1941–1945. It should be noted that arrangements for awarding material assistance to veterans in the Vinnytsia region were widely publicized in the Ukrainian media with the direct participation of the local leadership.

However, in Ukraine there are politicians who use these issues for their own interests. For example, the leader of the Progressive Socialist Party of Ukraine, Natalia Vitrenko, stated that “there is a problem in the Crimea, and it cannot be ignored. You can only solve it by creating a new alliance. The Union of Ukraine, Russia and Belarus would immediately remove tension around the Crimea. And then the decision of 1954 would not be so painful any longer for some people.”³⁴ Thus, we can see that the issue is politicized, and politicians are playing on the fears of people, trying to score cheap points before the elections by provoking the people of Ukraine. Some politicians make irresponsible, provocative statements, taking advantage of parliamentary immunity. Progressive Socialist Party Deputy Konstantin Zarudnev said that, “if Russia is really not going to fight for Sevastopol, it shows that Vladimir Putin is repeating the ‘feat’ of Boris Yeltsin, who sold and gave the Russians to the Baltic region

countries”. “We do not propose to go in with tanks and create a revolution. But we would like to see the position of the Russian leader, who is elected by the Russian people when Russian people believe that the city of Sevastopol is a part of Russia’s glorious history and we cannot lose it”, stressed the Crimean deputy.³⁵

Why do some politicians in Ukraine not think that such statements might provoke terrible conflicts, which could lead to bloody events and the escalation of new conflicts? The promotion of such ideas among the population of Ukraine by irresponsible politicians might lead to the establishment of organizations or groups that would be prepared to act in a particular situation.

The request of the World Conference of Compatriots Living Abroad (31 October–1 November 2008) to consider the possibility of a simplified procedure for granting Russian citizenship to compatriots is rather interesting. What is behind this request? The granting of Russian passports to the local population, as occurred in South Ossetia? What would be the consequences? Representatives of the United Nations, OSCE and other international organizations would be required to monitor events in “hotspots” such as the Crimea in order to prevent conflicts and resolve them through diplomatic means. In addition, deputies who make provocative and aggressive statements that could affect the territorial integrity of Ukraine must bear the responsibility.

Consequently, if the organizations and centres working with compatriots want to provide access to information and education in Russian, they need to improve their efforts. If people were satisfied with the informational, educational, cultural and educational needs of the Russian-speaking population, even irresponsible politicians would not be able to create a conflict situation. The people of Ukraine are peaceful and do not want military conflicts.

The Russian President has reiterated the country’s stance of full support of compatriots, thereby indicating the importance of this topic to Russia. In accordance with a decision of Congress, the Coordinating Council of Compatriots was established in the Russian Ministry of Foreign Affairs (MFA), and first met in March 2007. This structure was specifically designed to deal with the rights of compatriots abroad and the Coordinating Council’s work coordinates with that of the International Council of Russian Compatriots. In the MFA, a Department for Work with Compatriots Abroad, which was created in 2005, began active work. It began studying the Russian diaspora, undertaking integrated monitoring (“The dynamics of the political behaviour of Russian diasporas in the states of the European Union”, “The Russian diaspora”, etc.).

The participants at the 2006 meeting of the World Congress of Russian Compatriots Living Abroad in St Petersburg declared their full commit-

ment to the goals of enhancing interaction between the Russian diaspora and the historical homeland, preserving the ethno-cultural identity of Russians living abroad, and further collaboration to create a powerful intellectual, economic, spiritual and cultural Russian-speaking space in their countries of residence, thereby protecting their legitimate rights and freedoms. The Program of Work with Compatriots Abroad (2006–2008), the “Russian Language” Federal Target Program (2006–2010) and the National Programme to Assist the Voluntary Resettlement in Russia of Compatriots Currently Living Abroad were all very important.³⁶

In 2006, Russia finally established systematic links with the Russian diaspora. In 2007 a series of activities were organized in connection with the announcement of the “Year of the Russian Language Abroad”. On 21 July 2007, the Russian World Foundation was created to support the use of the Russian language. On 4 November 2007, at Moscow State University, the Foundation held the first “Russian World Assembly”. The World Conference of Compatriots Living Abroad in November 2008 was a rehearsal for the World Congress of Russian Compatriots Living Abroad scheduled for 2009. According to Alexander Chepurin, Director of the Department for Work with Compatriots Abroad, “it can be said that the Russian diaspora is waking up”. It is very important for the nature of the cooperation between Russia and its compatriots to change; the emphasis has shifted from questions of the implementation of humanitarian assistance to mutual partnerships. Chepurin noted that “we want the Russian diaspora in any country to rally for the most common values and interests of compatriots”.³⁷ However, some problems still remain: the formulation of these goals and the awareness of common interests.

Much more attention has been paid by the Russian embassies to work with compatriots. In November 2007, Vladimir Putin, in his Kremlin speech to the heads of diplomatic missions, added the establishment of sustainable mechanisms for ensuring the legitimate rights of compatriots living abroad to the priorities of Russian foreign policy. In 2007, approximately 60 conferences and 7 regional conferences of compatriots were held.³⁸

Relations between Russia and its diaspora have not yet emerged from the preparatory stage, but the realities of modern policy increasingly require their early formation and utilization. All kinds of NGOs, conferences and meetings on Russian–Ukrainian relations are very important at this stage. They help in the analysis of feedback and create a common strategy and policy for protecting the interests of the Russian minority in Ukraine.

At a meeting in July 2008 of ambassadors and permanent representatives of the Russian Federation to international organizations, Russian

President Medvedev drew attention to the fact that in many cases the issue is abuses against Russian and Russian-speaking populations, stating that “protecting and defending those rights is the element of our overall integrated work”.

In Moscow on 7 July 2008, an international conference entitled “Compatriots – Descendants of Great Russians” was held. In a congratulatory message to the conference participants, President Medvedev noted that “interaction with compatriots allows us to unite our efforts to advance the usage and acceptance of Russian language and Russian culture, which helps to maintain the high international authority of Russia”.³⁹

Compared with previous similar events, the results of this international conference contain several new provisions that address the basic task of consolidating the compatriots’ organizations and their media, so that they can more fully realize their ethnic, cultural, economic, political and public information rights. In accordance with the decision to facilitate the establishment of regular dialogue, compatriots’ associations introduced a system of country, regional and global diaspora conferences whose purpose was to define fundamental interests and to consolidate positions. Those interests were more fully integrated through various channels of dialogue with the authorities of the countries in which they live.

Moscow Mayor Yuri Luzhkov actively took part in finalizing the medium-term public policy programme with respect to compatriots abroad for 2009–2011, paying special attention to Ukraine. According to the metropolitan mayor, the Ukrainian authorities’ policy of displacing Russia, and in particular the Russian language, from Ukraine should not be allowed.⁴⁰ Luzhkov also believed that, when finalizing the programme, particular consideration must be given to working with young compatriots. He stated: “we should strengthen the aspect of working with young compatriots. This is very important because here we can just talk about strengthening the Russian language abroad.” He maintained that the age of compatriots should not be ignored by the Moscow authorities. In support of compatriots abroad in 2009–2011, the Moscow authorities decided to allocate 804 million roubles.⁴¹

However, a survey conducted by the Russian Public Opinion Research Center found that nearly half of Russians believe that the authorities are not ineffective in protecting the rights of compatriots abroad. The poll, which took place on 12–13 July 2008, involved 1,600 participants in 153 settlements in 46 areas, in the regions and the republics of Russia.⁴² More than one-third (37 per cent) of those surveyed stated that work to protect Russians abroad was inefficient and 12 per cent said it was extremely inefficient; 8 per cent believed that the government “left them to their fate”. Another 18 per cent of survey participants assessed the protection

of the rights of Russian citizens abroad as satisfactory, and 3 per cent as “very effective”; 21 per cent of respondents had difficulty answering. Nearly half (53 per cent) of those surveyed believed that Russia should adopt political measures to protect Russians abroad: 23 per cent voted for economic sanctions and another 2 per cent were not opposed to the use of military force.⁴³

In conclusion, it should be noted that Russia had no previous experience of working with compatriots abroad. There is no “post-Soviet space” any more – the collapse of the Soviet Union created a new reality of sovereign, independent countries. There was almost no reporting on the situation of Russian compatriots in Ukraine between 1991 and 2005. The regulatory framework for work with compatriots abroad had not been developed to appropriate Russian standards, and key concepts such as “compatriots abroad” were not defined. However, Russia paid considerable attention to improving the regulatory framework on this issue. On the other hand, supporting media – especially print – are provided as an afterthought. There is a lack of a well-designed system to support public associations of compatriots living abroad and their media (not just conferences and meetings). In Ukraine at the local level, there is also a great shortage of support programmes for Russian compatriots. The World Congress of Russian Compatriots Living Abroad held in Moscow on 1–2 December 2009 has shown that there remain a lot of problems in protecting the Russian minority in Ukraine.⁴⁴ One country alone cannot solve them – only Russia and Ukraine together can do it.

The analysis in this chapter shows that the chief problem for Russian speakers and Russian compatriots in Ukraine is political. It is particularly acute during election campaigns, as was seen during the Ukrainian presidential elections in 2010. Viktor Yanukovich promised to initiate legislation to raise the status of the Russian language in Ukraine and that was one of the main reasons people in the eastern part of Ukraine voted for him.

Yet problems persist in education and the right of Russians to obtain an education in Russian, in cultural development, in Russian-language publications, in the registration of research results, in the imposition of the Ukrainian version of names, and so on. The full substitution of the Russian language by the Ukrainian language creates disquiet for the Russian minority in Ukraine, especially in obtaining vital information in medicine and pharmacology.

In Ukraine, the existence of these problems concerning Russian compatriots, especially in the use of the Russian language and in reducing the information space, could create a tense situation. To ease this tension it is essential that legislative and practical initiatives in the area are carried out in accordance with rulings on the protection of national minorities by

the United Nations, the OSCE, the Council of Europe and other international organizations.

R2P efforts between Russia and Ukraine need to address not just politicians but, above all, lawyers and diplomats in accordance with international law. The people of Ukraine are very tolerant, wanting peace, tranquillity and a guarantee of their rights. Russia's role in protecting minorities in Ukraine has been neutral. What the Russian minority in Ukraine really needs is assistance in organizing different kinds of activities, greater mobility and free access to information from Russian sources.

A lot of conflicts could be prevented and solved with the help of the younger generation. The constructive exchange of views and a joint search for an understanding is essential. Young Russians in Ukraine would greatly benefit from communicating with students from Russia and the government should provide such an opportunity. Moreover, making contact with Russian students can provide the occasion to develop joint international projects for young people in Ukraine and Russia.

The problems of Russian compatriots in Ukraine should be resolved in a spirit of understanding and tolerance in accordance with the principles of good neighbourly relations between states. The kin-state can have an interest, but cannot take unilateral responsibility for protecting minorities abroad. Solving the problems between Russia and Ukraine by diplomatic means would promote political and social stability, and would lead to a strengthening of friendship and cooperation between the two countries and their peoples.

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10

Brazilians in Paraguay: A growing internal problem or a regional issue?

James Tiburcio

Introduction

Brazilians in Paraguay represent a prominent minority, a minority from the most powerful country in the region, which is eager to spread its influence, albeit through peaceful means. A number of incidents of a political, social and economic nature have reignited tensions on the two sides of the border. The April 2008 elections in Paraguay, won by Fernando Lugo, a former Roman Catholic bishop, supported by a broad coalition of mostly leftist opposition parties led by the Patriotic Alliance for Change (Paraguay's second-largest party), increased expectations surrounding the rights and demands of the so-called *Brasiguaios*. Legislation concerning land and social rights has been passed, aimed at curbing the influence of Brazilian immigrants in agriculture. Although the Brazilian government has had a history of dialogue and accommodation towards its neighbours for more than a century, stronger words and attitudes in order to protect its citizens in the neighbouring country might appear to be justifiable in the long run.

Brazil's role and dilemma in Paraguay

Since 1994, Brazil has increasingly come to assume a renewed role as a regional leader in the Southern Cone and, to some extent, in the whole of South America. Brazilian President Luiz Inacio Lula da Silva's nearly

nine years in office were marked by accommodation, articulate diplomacy and constant consultation with leaders of neighbouring countries. At the same time, Lula da Silva actively worked to make Brazil not only a nominal but a tangible economic, political and military power in the region. This increased role has not come without a price in Brazil's relations with its neighbours. On various occasions, new and old issues have come to the fore and threatened not only Brazil's commercial interests in the region, including a hydroelectric plant in Ecuador and gas supplies from Bolivia, but also the situation of hundreds of thousands of Brazilians in neighbouring countries, particularly in Paraguay.¹

In 1943, there were only 513 Brazilian farmers in Paraguay. That number had risen to 636 by 1956, and by 1962 there were 2,250 Brazilians in the Eastern Border Region – 4 per cent of the region's population.² In 1969, the number was 11,000; 10 years later it was 150,000, and today some claim there are up to 500,000 Brazilians and their descendants, representing 10 per cent of Paraguay's population, and most of them concentrated within 200 kilometres of the shared border.³ Brazil, Latin America's sole Portuguese-speaking country, is also its largest and most economically powerful, bordering 10 different countries, among them Paraguay. The contemporary border line was established in 1872, following the War of the Triple Alliance, the bloodiest conflict in Latin American history, which pitted Paraguay against an alliance featuring Brazil, Argentina and Uruguay, from 1865 to 1870.⁴ The war changed the region forever and Paraguay is yet to fully recover from it, as the conflict annihilated as much as 69 per cent of its population and reduced its territory by 140,000 square kilometres (roughly one-fifth of its former size).⁵ Paraguayans fought another inter-state war 62 years later, this time against Bolivia (1932–1935). Known as the Chaco War, it was apparently over territorial issues, and turned out disastrously for both sides.⁶

From 1870 to 1954, the country experienced a period “between dictators”, during which much of Paraguay's land was sold to foreign corporations and individuals while the political arena was dominated by two antagonistic groups: the Liberal Party and the Colorado Party.⁷ Brazilian and Argentine occupation following the War of the Triple Alliance lasted until 1876, though their entanglement permeated Paraguay's contemporary history to the point that Argentina supported the Liberals whereas Brazil sided with the Colorados, finally leading to a coup in 1954, headed by Lieutenant Colonel Alfredo Stroessner from the Colorado Party. He remained in office until 1989 by winning, unchallenged, one election after another, every five years until 1988. Stroessner was overthrown by the father of his daughter's husband, General André Rodríguez in 1989.⁸ An uneasy transition to democracy has been slowly taking place, with the most recent elections held in May 2008. They were won by Fernando

Lugo, bringing to an end 61 years of Colorado rule, the longest a political party has been in office in the world to date.⁹

The host country

Paraguay has been plagued by political instability and imprisoned by the lack of a maritime harbour since the colonial period. With a gross domestic product amongst the lowest in South America (agriculture, livestock and forestry account for 29 per cent; industry 14 per cent; the service sector 52 per cent), the dynamic force in Paraguay's economy is agriculture, which accounts for 90 per cent of the total merchandise exports and employs 36 per cent of the workforce. A significant proportion of the population, 46 per cent, lives in rural areas; 41.2 per cent lack a monthly income, although in urban areas this figure drops to 27.6 per cent. Inequality is amongst the world's worst, with 43.8 per cent of the national income held by 10.0 per cent of the population, while the poorest 10.0 per cent holds only 0.5 per cent. At the same time, 10.0 per cent of the population owns 66.0 per cent of the land, and 30.0 per cent of the rural population is landless.¹⁰

Paraguay's indigenous people are the Tupi-Guarani. The Spanish began arriving from 1524, and the following 200 years were dominated by the Society of Jesus (the Jesuits), who organized 100,000 previously seminomadic Guarani in over 30 *reducciones* (communal townships).¹¹ The country became independent in 1811 without recourse to war, and by that time most of its estimated 500,000 inhabitants were of mixed Guarani and Spanish ancestry, or *mestizos*.¹² The War of the Triple Alliance, from 1865 to 1870, reduced Paraguay's population to 200,000; two-thirds of all adult males and much of its territory were lost.¹³ A high birth rate combined with a decreasing mortality rate throughout the twentieth century has brought today's population to 6,831,306 (July 2008 estimate).¹⁴

Today's indigenous population of 85,000¹⁵ does not reflect the strength of the Guarani language, which was declared an official language of Paraguay in 1992 and has been part of the school curriculum since 1994. According to a World Bank survey, 50 per cent of Paraguay's population speaks Spanish and Guarani in customary speech, while 37 per cent speak Guarani as their first language.¹⁶ Guarani provides Paraguay with a unique linguistic culture, as it is the only country in the Americas that has both a European and an indigenous language as its official languages. The language lends Paraguay an added sense of national pride and identity, and is used as a national symbol against foreign interests, cutting across social cleavages.¹⁷

Informal relations dominate Paraguay's political and economic systems, to the extent that it can be defined as an oligarchic society. Institu-

tions are generally frail; in particular, the judicial system, the tax and customs administration and government expenditures are made within a context of patronage in the public sector.¹⁸ Since 2003, there have been improvements in most governmental sectors, the public sector pension system has been reformed, the fiscal situation has been steadily stabilized, and progressive public servants have been appointed to key positions in government.¹⁹ The year 2008 was considered a landmark in Paraguayan history, as on 15 August a new government was democratically elected in free and fair elections and sworn into office. The new government was formed by a broad umbrella coalition, bringing together socialists, communists, landless workers' movements, indigenous groups and traditionalists in a successful bid to end the 61-year rule of the Colorado Party.²⁰

Until the mid-1970s, Paraguay's economy was based on cattle herding, manioc, yerba mate, cotton and sugarcane, but since then soy has become the most important export.²¹ This economic shift started in the early 1960s, when the rightist Paraguayan dictator, Alfredo Stroessner, and his foreign relations minister, Sapena Pastor, introduced a series of policies aimed at harnessing the country's economic structures to those of its regionally dominant neighbour, Brazil. Those policies resulted in a number of projects and initiatives, such as the bi-national hydroelectric plant of Itaipu, Paraguayan use of the Paranaguá Harbor in the state of Paraná, Brazil, the construction of roads in Paraguay, loans, military, technical and moral support, and, most importantly, the creation of some of the conditions necessary for mass immigration from Brazil to Paraguay.²²

Through the past 40 years of Brazilian immigration, thanks to the introduction of intensive soy monoculture, Paraguay has become economically integrated into the macro-regional and world commodities market.²³ But that has come at a price for Paraguay's sovereignty, as it hosts a new, increasingly powerful minority from a kin-state that once very nearly destroyed it, and also with a cost for the Brazilian nationals and descendants living within Paraguay's borders.

The creation of an immigrant minority

Three parallel processes helped to catalyse Brazilian immigration to Paraguay:

1. land policies in Brazil and Paraguay aimed at expanding the occupation of their respective national territories;
2. land issues and their consequences in different Brazilian states; and
3. regional cooperation and integration projects.

The former Eastern Border Region of Paraguay – now the administrative departments of Amambay, Canendiyú and Alto Paraná – was until the 1960s one of the few remaining frontier areas suitable for intensive

agricultural development in South America. It had remained largely undeveloped owing to a lack of resources and interest from the Paraguayan elite.²⁴ The region has the most fertile lands in Paraguay, and, by the beginning of the Stroessner government in 1954, a small group of investors, many of them Brazilian, had already purchased extensive areas of land in the region. In order to clear the land, most investors attracted increasingly destitute subsistence farmers from the other side of the border, in Brazil, which was experiencing continued internal migration motivated by a conjunction of climatic, land, economic and cultural phenomena that would last until the early 1980s. These landless farmers had been migrating since the early 1930s from other states of Brazil, such as Minas Gerais, and from the north-eastern states towards the south-eastern and southern states of Brazil.²⁵

In 1940, Getúlio Vargas' Brazilian government created the programme "Marcha para o Oeste" (March to the West), in order to incentivize the occupation of Brazil's central-western region. Two projects were organized, one in the state of Goiás and another in the state of Mato Grosso do Sul, which borders Paraguay. They attracted impoverished rural workers from the north-eastern states and from the neighbouring state of Minas Gerais. The Vargas and subsequent governments invested heavily in advertising focused on southern farmers, emphasizing the fertility of the soil, the low price of the land, the subtropical climate similar to that of their state of origin, the abundance of water, the level topography of the land and the natural subtropical soil cover.²⁶

A decade later, the "Plano de Metas" (Plan of Deadlines) led to more westward migration. Concomitantly, different federal administrations implemented macroeconomic development programmes aimed at financing the expansion of Brazilian agricultural capacity and encouraging the implementation of storage networks, roads, new agricultural techniques, general mechanization and industrialization. Myriad programmes with conflicting objectives were initiated between 1940 and 1980. Some of them promoted the mechanization of agriculture, while others encouraged migration.²⁷

Between 1966 and 1983, a wave of immigration from Brazil to Paraguay was set in motion, aided by close ties between the two military regimes, especially from the "Act of Iguazu" onwards, which acted as a facilitator of a largely spontaneous flow of people. The most important factors that combined to provoke the phenomenon were probably (1) a friendly Paraguayan government, (2) the existence of a vast, fertile and relatively unoccupied area along the border of the two countries that was suitable for agriculture, (3) land price arbitrage opportunities for increasingly land-scarce southern Brazilian farmers, and (4) a surplus of farmhands in Brazil owing to increased mechanization in agriculture.

Composition of the Brazilian minority in Paraguay

Different groups coexist within the Brazilian minority in Paraguay. Considering that Brazil itself was a recipient of large numbers of immigrants up to the 1950s, the makeup of Brazilian immigrants to Paraguay was also diverse. Therefore, it is extremely important to differentiate and avoid generalizations that lead to misperceptions, which are common in the literature studying the Brazilian presence in Paraguay.

The socioeconomic makeup and geographical origin of Brazilian immigrants in Paraguay varied throughout the first 20 years. Although the immigrants included successful farmers, politicians and businessmen, who influenced Paraguay's whole economy and political spectrum, most Brazilians and Paraguayans of Brazilian descent of the first, second and even third generation are farmhands.

The largest group is composed of first and subsequent generations of *Nordestinos* (North-easterners), the majority of whom are ethnically mixed – European and Amerindian – and are from the Brazilian states of Pernambuco, Paraíba and Bahia. They went to Paraguay in stages, first migrating from the north-eastern states of Brazil to central states such as Goiás, then to the south-eastern states of Minas Gerais and São Paulo, and then just across from the border to Paraná, in an overlapping and relatively continuous flow. Most remained disenfranchised and landless, working on seasonal harvests such as that of sugarcane, while others were absorbed into the growing industries, flooding the slums of the big cities. Those who crossed the border into Paraguay in that period had a defined role, namely to prepare the land for the soy monoculture. They worked under different contract systems and most remained in the country illegally. For that reason, they had no protection whatsoever against exploitation, forced eviction and other forms of abuse by powerful Brazilian landowners and Paraguayan authorities. After the first five to eight years, most land had already been cleared and immigrants were forced to resort to subsistence farming, cultivating cotton and manioc, or offering their manpower as day workers in various occupations, directly competing for employment with similarly impoverished Paraguayans.²⁸

The second, less numerous, Brazilian group is composed of second- and third-generation German immigrants, some Italians and a small number of different Slavic descendants, known as *Sulistas* (Southerners). They are the offspring of the pioneers in the Brazilian south in the states of Rio Grande do Sul, Santa Catarina and Paraná who had first started immigrating to Brazil from the 1810s.²⁹ These immigrants imposed a new model of intensive monoculture, and by the 1990s they dominated the Eastern Border Region, both economically and socially. Taking advantage of land prices in Paraguay that often were 10 times lower than prices

in their states of origin in Brazil,³⁰ the members of this group were able to purchase a significant area and transform the country into the world's fourth-largest soy exporter.³¹

For a 20-year period starting in 1970, these two groups – which had a common nation-state entity as their origin, a common nationality and a common language (Portuguese), but differed in almost every other aspect, such as ethnic origin, economic situation and skills – coexisted peacefully. They complemented each other as rural employer and employees, reproducing a Brazilian socioeconomic model in Paraguay. As well as the *Nordestinos* and *Sulistas*, Brazilian small farmers, farmhands and adventurers from other states, such as Minas Gerais, Mato Grosso do Sul, São Paulo and Paraná, also immigrated to Paraguay, attracted by the land rush.³²

A third group that is not usually regarded as such and is consequently ignored consists of the 'borderline' Brazilian workers. They work and often live in Paraguay, but formally are still domiciled in Brazil. They send their children to study across the border in Portuguese-speaking schools, receive medical treatment in Brazil and are registered in the Brazilian social security system, but they in fact live in Paraguay.

The three groupings have by no means remained stable over the years. It is estimated that 300,000 people emigrated and then returned to Brazil, especially in the early 1990s, although the community continued to grow as the balance remained positive.³³

United and divided by soy

The Brazilian minority in Paraguay, therefore, cannot be understood and studied without its *raison d'être*, soy. In 1982, US farmers produced 80 per cent of the world's soybeans. Today, US farmers produce only 37 per cent, as Argentina, Brazil and Paraguay, among others, increased cultivation and processing by almost 250 per cent, especially between 1990 and 2004.³⁴ Soy, which is used in hundreds of food and drink preparations (natural and industrialized), is regarded by some as either a miracle food or a dangerous carrier of natural toxins.³⁵

There are Brazilian farmers engaged in cattle grazing, cotton growing, dairy farming, corn growing and other activities, but in 2005, of an estimated 600,000 soy producers in Paraguay, 40 per cent were Brazilian, German Paraguayans, Japanese Paraguayans and Mennonite farmers constituted 36 per cent, and native Paraguayans accounted for the remaining 24 per cent.³⁶ An increase of 300 per cent in international soy prices between 1970 and 1977 became the driving force in the new community's quest for economic and political power. Nowadays, China's

growth, though less rapid with today's global financial crisis, ensures international soy prices remain relatively high and is likely to keep fueling soy's expansion.³⁷ Soy production has proven to be a profitable activity but, owing to a narrow tax base and high levels of tax evasion and informality, the economic benefits have not spread evenly to other sectors of society and other regions of the country.³⁸

In a predominantly agricultural country, critics see soy as the greatest threat to the environment and to the livelihood of thousands of *campesinos* (small farmers). Activists accuse Brazilian *sojeros* (soy producers), supported by biotech and agrochemical corporations, local and national authorities and the local financial sector, of violence against small farmers, brutal land evictions and indiscriminate fumigation with potentially harmful chemicals.³⁹ In addition, small subsistence farmers have been displaced by the production of soy, and other farming enterprises such as cotton growing and cattle rearing that employ comparatively larger numbers of rural workers have lost ground to an activity that is greatly divorced from the rest of the Paraguayan economy and more intimately linked to Brazil.⁴⁰ On the other hand, supporters insist that soy means progress, bringing prosperity and development to the country in the not too distant future.⁴¹

Minority issues: Land and sovereignty

The Brazilian minority in Paraguay faces a number of problems that are interconnected and must be seen in the context of soy and economic issues. Although Brazilians are a minority in Paraguay, in some towns along the border they constitute the majority and are seen as the oppressors rather than the oppressed. Jorge Mañach developed a theory in the context of the United States–Mexican border in which the distribution of power between neighbouring nations determines the nature of their border situation, leading to balanced versus unbalanced borders, equal and unequal relationships. In his model, when a smaller nation shares a border with a stronger economic and political entity, the stronger will supplant the weaker, turning the border into a migratory region where languages, customs and people blend and come into conflict.⁴²

Despite conflicting interests between the local population and the new immigrant minority, the situation remained relatively stable prior to 1989. The Stroessner dictatorship was friendly towards the new community and quickly drew it into the ranks of the Colorado Party. Meanwhile, mainly between 1971 and 1975, *ligas campesinas* (peasant agrarian associations) were repressed and persecuted by the government, and violent land evictions and illegal land distribution became commonplace. Tensions erupted

as soon as the 1989 coup sent General Stroessner into exile in Brazil and, since his death in 2006, long-suppressed social demands have finally had the chance to be voiced.⁴³

Since 1990, clashes over land between landless peasants, small farmers, indigenous communities and the Brazilian minority *sojeros* have intensified, although so far the most powerful farmers have been left largely undisturbed. In 2004, an especially violent year, dozens of people were wounded and public buildings were occupied by protesters – including landless organizations. The pattern has been recurrent since then. The International Committee of the Red Cross (ICRC) travelled to various parts of the country visiting farmers held in prisons and police stations in connection with one of the most difficult land crises in contemporary Paraguayan history. In total, ICRC delegates visited 621 farmers arrested by police and military forces during evictions from illegally occupied land.⁴⁴

Renewed hope of land reform with the election of Fernando Lugo has encouraged more frequent land invasions. Combine harvesters are burnt, hostages taken and farming tools and cell phones stolen. The new government plans to buy or expropriate unused and illegally acquired land and redistribute it to small farmers.⁴⁵ The 1967 real property law was revised and in 2005 a new law was passed prohibiting foreigners from owning land within 50 kilometres of the borders. The law was not enforced during the Nicanor Duarte government, and the new Paraguayan government has affirmed that, when it does come into effect, it will not be retroactive.⁴⁶

Leaders of peasant organizations defend land reform by force if necessary, because they see the land situation in Paraguay as part of “Brazilian imperialism”. Violence against Brazilian farmers, including assassinations, has occurred, although there is a lack of evidence linking the violence to the victims’ minority status.⁴⁷ The most radical landless movement in Paraguay, Mesa Coordinadora Nacional de Organizações Camponesas (National Coordination Board of Peasant Organizations), supported by the Federação Nacional Camponesa (Peasants’ National Federation), has vowed to press on with new invasions, agreeing to negotiate with the government only in a “crusade to expel” Brazilian farmers from Paraguay. The Federation accuses the *Brasiguaios* and international corporations such as Monsanto and Cargill of environmental irresponsibility and charges them with the destruction of the lifestyle and livelihood of small farmers. Owing to soy’s continuing advance, more and more families are forced to move to slums, mainly around the capital, Asunción. In response, the more powerful *Brasiguaios* soy producers have since organized themselves and hired armed militias to guard their property.⁴⁸

Most farmers believe that the current government is encouraging land invasions by promising a piece of land to all landless Paraguayan people.

According to some farmers, peasants camped around the farms are said to be waiting for a government command to break into the Brazilian farms and repossess what was taken illegally. Local law enforcement officials have declared that they do not have the means to ensure the safety of farms and farmers, and have already requested reinforcements from the capital. A common practice exacerbating land issues is the denial of notary services to Brazilians, making it difficult to register land titles in a country beset with land-related conflicts. At the same time, farmers demand the presence of the National Guard to protect them and evict occupiers.⁴⁹ Both sides have legitimate claims and a solution remains to be found. The current Paraguayan government has shown a moderate face in all its public statements and has promised to uphold the constitution, noting that it guarantees private property but also guarantees land for all.⁵⁰

Language and identity

In the past four decades, settlements in Paraguay along the border with Brazil have come under a strong Brazilian cultural influence through open Brazilian television channels and radio stations and the use of Portuguese by the Brazilian minority. The strong economic, political and cultural power of the immigrant minority places a constant strain on Paraguay's national heritage and pride. As occurs in most recent immigrant minority processes, the construction of social, ethnic and territorial identities is undistinguishable from symbolic and real economic and cultural power relations. As members of a prominent minority, immigrant children are encouraged by their parents to maintain their roots through traditions and memories linking them to their parents' origins. At the same time, they are compelled to assimilate into their surrounding environment and build new identities in order to have a more "normal" life in their adopted country.⁵¹

Santos analysed the formation of the *Brasiguayo* identity and described two experiences: (1) an essentialist tendency and (2) a fragmented identities view.⁵² The essentialist tendency aims to establish inherent, shared and permanent characteristics of the group, resulting in the emergence of prejudice and the stigmatization of the Brazilian immigrant in Paraguay. The non-essentialist, i.e. fragmented, view is an attempt to provide a more pragmatic analysis. The essentialist tendency is associated with the diverse ethnically based identities created by the Paraguayan and Brazilian media, especially the printed media, and subsequently appropriated by different interests. Brazilians in Paraguay, especially the *Sulistas*, also make use of a sense of unity and ethnic homogeneity in order to present

a unified front when defending their interests before the host-state authorities, as well as when demanding more protection from their kin-state, Brazil. Concurrently, Paraguayan landless movements have justified their xenophobic and arbitrary actions by relying on the perceived unpatriotic behaviour of the *Brasiguayo* identity to justify demands for the transfer of the land occupied by the “invaders” and their subsequent expulsion from Paraguay.

The *Brasiguayo* hegemonic identity falls apart when confronted by the divisions within the minority community itself. The Brazilian authorities have been called upon to defend not only the rich and landed *Sulista* community but especially the disenfranchised *Nordestino* part of the minority, which presently has a strong Afro-Brazilian and low-income component. The term *Nordestino* itself is an inappropriate label because an undetermined percentage of this section of the community is categorized as such without any empirical basis. Brazilian diplomatic authorities have been called upon to defend *Brasiguayo* from *Brasiguayo*, clearly demonstrating the divisions within the division, although such episodes are rare and possibly of minor importance. Still, the situation is further complicated by the municipal authorities on the Brazilian side who refuse to accept more returnees owing to the already complex land and social issues plaguing the border regions in the Brazilian states bordering Paraguay.⁵³

Citizenship and legality

When compared with other recent immigrant minorities around the world, *Brasiguayos* rank amongst the highest in terms of the number of individuals living illegally within a host-state in relation to its total population.⁵⁴ In 2006, of an estimated 500,000 members of the Brazilian minority in Paraguay, 300,000 were illegal residents.⁵⁵ Their illegal status undermines the immigrant community’s claims for recognition of land titles, access to rural credit and legitimacy in the eyes of Paraguayan society. Paraguayan authorities blame the lack of precise statistics for the inadequacy of governmental programmes that try to address growing social problems.⁵⁶ At the same time, Brazilian government officials maintain that Paraguayan bureaucracy makes it virtually impossible for most Brazilian immigrants to obtain permanent resident visas to live legally in the country, even those who have been in the country for many years and have contributed towards Paraguay’s strong soy economy.⁵⁷

The Asunción Treaty, signed on 26 March 1991 by Argentina, Brazil, Paraguay and Uruguay, establishing the Common Market of the Southern

Cone (Mercosul) as from 31 December 1994, and consolidated by the Protocol of Ouro Preto of 1994, also addresses immigration issues among its members. All member states advocate equality of treatment of foreign workers as signalled by membership in international treaties and in the conventions of the International Labour Organization, while reserving some professions to nationals. The advent of Mercosul has increased the porosity of the borders. Agreements that allow for shared social security and bi-national use of medical facilities on both sides are already effective in some border towns, further blurring national identities and boundaries in these regions.⁵⁸ The Multilateral Agreement on Social Security of Mercosul of 14 December 1997 grants migrant workers and their families access to social security as available in the host country. In the Mercosul Social-Labour Declaration, signed by the presidents of the member states on 10 December 1998 in Rio de Janeiro, member states agree to uphold equality of treatment, rights, protection, information and aid recognized by the host-state regardless of nationality.⁵⁹

A technical working subgroup (SGT) with specific thematic committees dedicated to labour, employment, social security and immigration issues was created within the Mercosul framework in 1991. The subgroup has been studying border migration and its impacts on the labour and service markets, and has elaborated guidelines for future common normative instructions regarding worker movement between member states.⁶⁰

For the Brazilian minority in Paraguay, a different approach must be envisioned because most members of the community live illegally and carry out their activities in the unofficial economy. Increasingly, Brazilian labourers spend part of the year in Paraguay and part in Brazil, limiting the accuracy of existing studies and the effectiveness of proposals and recommendations based on them. Agriculture is followed by the service industry as the biggest employer of Brazilians in Paraguay. Brazilians living near the border are routinely employed in Paraguay, especially in the storage sector of the contraband industry in Ciudad del Este.⁶¹

Far from being a homogeneous minority, *Brasiguaios* are divided along several lines, including their region of origin in Brazil, ancestry, land ownership, assimilation into Paraguayan society and proficiency in local languages. Economically, they are the driving force behind one of the two powerhouses of the country, responsible for making Paraguay the fourth-largest soy exporter in the world today.⁶² The other side of the coin is that their presence has disrupted the livelihoods of local peasant populations. Subsistence farming is threatened by the omnipresence of soy plantations. Natural ecosystems have been destroyed and what remains is under constant threat owing to widespread and indiscriminate use of fumigation by producers who use genetically modified as well as unmodified soy seeds.

Although Brazilian immigrants are a minority, their language and culture have supplanted those of their Paraguayan counterparts in some areas, creating a gaping wound in that country's national pride, which in turn generates social unrest and discontent. The Brazilian minority in Paraguay has become a regional issue to which there is no easy solution. Indeed, Paraguay's failure to protect this national minority may lead to an escalation of land conflicts in the Eastern Border Region.

Soy milk kinship and Brazil's responsibility to prevent

Despite clear divisions within the minority, there are also overlapping economic and kinship ties among Brazilians in Paraguay. A soy kinship coordinated by farmers has played a relevant economic and political role in the community. Kinship ties have given the Brazilian community a "comparative advantage", to the detriment of Paraguayan society at large, in performing some social and economic roles, especially those connected with the soy production chain.⁶³ The basic social institutions – kinship, economics, politics and religion – have supplied the necessary means to create a perception of separation. Economics, in the sense of provision for a group, forming the structure for it to adapt to its new environment, took precedence over other basic institutions, unifying an objectively disparate migrant group and generating a possible case for the explicit application of the principle of the responsibility to protect (R2P).⁶⁴ At this point, although it is not part of the R2P criteria, some claim that the Brazilian government has a responsibility to protect the land of the Brazilian minority and their way of life, even though its location happens to be across the border.⁶⁵

The Brazilian government, however, has demonstrated its commitment to fulfilling its responsibility to prevent further violence against Brazilians in Paraguay by supporting the democratic Paraguayan government both politically and financially. Direct political, diplomatic and economic prevention measures are being utilized. In July 2009, Brazil agreed to change a three-decades-old agreement concerning the Itaipu dam and hydroelectric plant, a joint bi-national venture located on the shared border, bringing to an end a prolonged dispute.⁶⁶ The new deal will inject an additional US\$240 million a year into a small economy dependent on soy and with a significant informal sector. Brazil has also agreed to build a higher-capacity electricity line to Asunción, valued at US\$450 million over three years. Most Brazilian analysts were sceptical of the readiness of Lula da Silva's government to accept Paraguay's demands. Some even saw the agreement as a pronounced sign of weakness and as reason for a

potential loss of credibility before international creditors.⁶⁷ However, the Brazilian government has justified its actions as signifying support for and confidence in the present Paraguayan government, in line with its responsibility to protect the Brazilian minority in Paraguay. In so doing, the Brazilian government hopes “to address both the root causes of problems and their more immediate triggers”.⁶⁸

Negotiations related to the *Brasiguaios* situation were halted before the agreement and, following it, various pre-agreements related to the right of Brazilians to live and work in the neighbouring country have been signed. The Paraguayan president, Fernando Lugo, declared that the supplementary revenues would be directed to social programmes such as healthcare, poverty relief and nutrition for school children. The new 500 kilowatt transmission line will allow the establishment of more industries and create more jobs, as well as attract much-needed foreign investment.⁶⁹

There is growing evidence that Brazil’s vote of confidence in the Paraguayan government is bearing fruit. The first year of Fernando Lugo’s government marked the end of a 61-year military dictatorship. New legislation aimed at ensuring accountability and good governance was passed, which in turn is contributing to the generation of improved investor confidence in Paraguay. Most encouragingly, trade between the two countries increased by 51 per cent in 2008, despite the global economic crisis.⁷⁰

Effective cooperation and intelligence-sharing have become possible with the successful negotiation concerning Itaipu. Preventive measures on Brazil’s part go beyond energy policy. Both countries have a mutual interest in fighting the smuggling of arms, illegal drugs, electronic equipment and a multitude of other contraband. The deal also presents South America with a successful model of a mutually beneficial venture in relation to shared natural resources that can be followed by other countries in the region.⁷¹

There has also been progress on direct prevention measures on the legal front through regional integration. Mercosul has gained momentum, at least in the Southern Cone, with increased participation by member states’ citizens in supranational forums such as the Foreign Trade Meeting (Encomex) and in organizations such as the Training Center for Regional Integration (CEFIR), among other initiatives that are playing an important role in strengthening regional institutions that have a direct impact on root causes.

Despite all these positive prevention initiatives, much remains to be achieved. The Brazilian media, the business sector and some well-known academics are generally highly critical of any preventive efforts towards Paraguay, even those clearly labelled as measures aimed at protecting the

Brasiguaios. Paraguay's internal political problems and corruption scandals provide plenty of ammunition for Brazilian opinion-makers to oppose policies and programmes of both state and non-state actors designed to ensure stability in the region.

The responsibility to react

Tensions can lead to potential R2P situations if these tensions are aggravated and remain unaddressed. Nonetheless, the probability of the present Brazilian government intervening in Paraguay is at best remote, even if preventive measures fail to improve the living conditions of Brazilian nationals across the border. Lula da Silva's foreign policy has been repeatedly described as consensual, pragmatic and peaceful, and mostly unaffected by national opinion. There is no evidence to support any abrupt changes in policy over the Brazilian minority in Paraguay unless a significant and unlikely escalation in violence were to take place.⁷²

However, a different scenario might develop in the post-Lula era. According to a decree sanctioned by President Lula da Silva in October 2008, the Brazilian state defines foreign aggression as, "among others, hostile prejudicial acts against Brazilian sovereignty, territorial integrity or the Brazilian people, even when they do not imply the invasion of the national territory", and it provides for a system of national military and civil mobilization against foreign aggressions.⁷³ Thus, it allows the government to act in the event that preventive measures and coercive political, economic and judicial measures fail to address a perceived foreign aggression, such as unfair treatment of the Brazilian minority in Paraguay.

Nonetheless, the present Brazilian government seems to be willing to wait for preventive measures to take effect in preventing further violence against the Brazilians in Paraguay. There are no reasons to believe that future governments will come to regard the *Brasiguaios* issue as a threat to Brazil's sovereignty or to the Brazilian people in general. And, although a number of Paraguayan landless peasants' organizations constantly threaten to dispossess Brazilian farmers, the Paraguayan constitution advocates respect for private property. Despite continued political turmoil in Latin America, land nationalization in Paraguay seems to be a long way off.⁷⁴ Supporting a moderate or democratic left-wing government and steering it away from more radical influences is certainly beneficial for Brazil, which has preferred to intervene in a benign fashion in economic and political areas, thus generating goodwill towards Brazilians in Paraguay.⁷⁵

The responsibility to rebuild

South America's deadliest conflict, the War of the Triple Alliance (Paraguay against Brazil, Argentina and Uruguay), still stirs national resentment in Paraguay. In the 1870s, Argentina and Brazil made as little effort as possible to rebuild the devastated country, exiting after six years of parasitic occupation and leaving behind a traumatized population that to this day struggles to overcome past and present difficulties that have their root causes in the war. Faced with such historical warnings, Brazil has added reasons to invest in preventive measures and "soft" intervention, rather than military intervention and its overlapping responsibility to follow through and rebuild.

On the other hand, through the years, state and non-state actors in Brazil and Paraguay have taken tentative steps towards true reconciliation, and the new Itaipu deal can be seen as long overdue reparation. The R2P literature supports the notion that redressing even centuries-old embedded issues can provide the necessary preconditions to prevent the resurfacing of the situation that led to military intervention or, even better, "to prevent conflicts and humanitarian emergencies from arising, intensifying, spreading, persisting or recurring".⁷⁶ Brazilian civil society mostly does not acknowledge Brazil's role in destroying Paraguay during the War of the Triple Alliance and does not approve of unilateral donations. Surveys have shown that Brazilians believe they have enough internal problems not to waste resources on their neighbours, even if this involves Brazilian nationals. Such attitudes can be changed by implementing continuous grassroots social and economic cooperation programmes designed to break conflict-generating prejudices and misconceptions.

National interest and the responsibility to protect

Brazil's greatest dilemma in terms of its kin-state interests in Paraguay is guaranteeing the livelihood of half a million Brazilians and Brazilian descendants in its neighbour's territory, while simultaneously respecting the host government's sovereignty, and this warrants further research and reflection. Until now, the government of Brazil has regarded its responsibility to protect as a responsibility to prevent. Empowering the Paraguayan government to fulfil its responsibility as a sovereign state to ensure fair treatment and promote economic development and wealth redistribution is Brazil's best option for avoiding any possibility of invoking R2P. Direct intervention is not seen as an acceptable option by Brasília. Rather, financial, political and diplomatic incentives are presently understood to

be “commensurate with the ends, and in line with the magnitude of the” situation.⁷⁷ Kin-states dealing with minorities abroad can learn from Brazil’s policies towards its migrant workers in Paraguay, in their own efforts to prevent tensions rising to create R2P-triggering threats.

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11

The responsibility to prevent conflicts under R2P: The Nigeria–Bakassi situation

Rhuks Ako

Introduction

Nigeria and Cameroon, two neighbouring countries in West Africa, have been involved in border disputes and conflicts over the ownership and administration of the resource-rich Bakassi Peninsula. Following several failed diplomatic attempts to resolve the ownership of the disputed Bakassi Peninsula, which was under Nigerian administration until the early 1980s, Cameroon approached the International Court of Justice (ICJ) to determine the legal ownership of the peninsula. The ICJ decided that Cameroon owns the resource-rich peninsula and directed Nigeria to hand over the territory to Cameroon. However, the judgment did not end the hostilities between the two countries because Nigeria refused to give up the peninsula and maintained a visible military presence in the region, ostensibly to protect its citizens from the Cameroonian authorities. In 2006, Kofi Annan, former Secretary-General of the United Nations, successfully brokered diplomatic negotiations between the two countries, which produced the Greentree Agreement (GTA) signed by both countries at Greentree, New York, on 12 June 2006. The terms of the GTA laid down procedures for a peaceful handover of the territory from Nigeria to Cameroon.

That notwithstanding, the prospects for peace in the resource-rich region are still elusive, if not hopeless, given the frequency of violent clashes between both countries. This chapter provides a critical perspective on the recent developments in the region, showing, in particular, the possi-

bility of Nigeria re-intervening as a kin-state in the territory on the pretext of acting to protect the interests of its nationals who are resident there. It draws heavily on the notion of the responsibility to protect (R2P) to argue that, even though both countries contributed to the current situation by not adhering strictly to the terms of the GTA, they can still act to prevent a recurrence of violent confrontation. The chapter posits that, although the prospects for conflict prevention are tied to the dispositions of Abuja and Yaoundé, Abuja bears a greater responsibility to achieve this, mainly because it has been at the forefront of promoting the responsibility to prevent conflicts in the continent within the frameworks of the African Union (AU) and the Economic Community of West African States (ECOWAS).¹

Indeed, Nigeria has acted promptly by deploying its resources to support security frameworks within the sub-continent.² However, the dispute over the Bakassi Peninsula is unique because Nigeria is a party and so it presents a different situation for Nigeria, which usually plays a mediatory or monitoring role in disputes in which it is not directly involved. The Bakassi situation thus presents a quandary for the Federal Government of Nigeria, which has to decide whether to act decisively as demanded by a large section of its citizens or to be more diplomatic in handling post-GTA incidents occurring in the Bakassi Peninsula. It is suggested that Nigeria should show consistency in its commitment to the R2P principles, particularly the “responsibility to prevent”. Discharging the responsibility to prevent in effect repudiates the need to engage in the further responsibilities (by the international community) to “intervene” and/or “rebuild”. It is opined that Nigeria was motivated by the responsibility to prevent conflicts in its about-turn decision to exit the peninsula without much ado. Besides, Nigeria’s re-intervention in the Bakassi Peninsula as a kin-state will be outside the confines of the R2P norm, as evidence from the Russia–Georgia case suggests.³

This chapter is structured as follows. The first section highlights the close kin-state relationship that exists between Nigeria and its citizens resident in the Bakassi Peninsula through a synopsis of the political history of the peninsula. The second section draws upon and interrogates the notion of R2P in the context of a unique African political, economic and diplomatic environment. It is within the R2P context that the notion subsists of the “responsibility to prevent”, which this chapter argues it is essential to exercise in the Bakassi issue. The third section examines the extent to which both Nigeria and Cameroon have adhered to the terms of the GTA, which they agreed would form the basis of a peaceful resolution of the conflicts between them over the resource-rich territory. It specifically examines the difficulties that the Nigerian government has encountered and overcome in the bid to adhere to the provisions of the

GTA and to prevent further conflicts with Cameroon. This reveals that, despite pressure from its citizens to act decisively, the Nigerian government has acted maturely by seeking alternative means to end the occurrence of violent conflicts with Cameroon. However, as the section further reveals, neither country, *stricto sensu*, has adhered strictly to the terms of the GTA and, thus, they have both contributed to the resurgence of conflicts in the Bakassi Peninsula. The final section concludes the chapter.

Nigeria as a kin-state

This section examines the political history of the Bakassi Peninsula, mainly to highlight the close kin relationship that exists between Nigeria and its citizens who inhabit the territory. The Bakassi Peninsula is a region of water-logged mangrove forest with an area of approximately 1,000 square kilometres extending into the oil-rich waters of the Gulf of Guinea.⁴ The Bakassi Peninsula boasts a submarine bank that is rich in fish, shrimps and a rich diversity of other aquatic species, owing to two great ocean currents – the warm east-flowing Guinea current and the cold north-flowing Benguela current. This makes the Bakassi area a very fertile fishing ground, comparable only to Newfoundland in North America and Scandinavia in Western Europe.⁵ In addition to its proven marine resources, the region is believed to harbour large deposits of crude oil owing to its proximity to the Gulf of Guinea, which accounts for an estimated 10 per cent of the world's oil and gas reserves.⁶ The Bakassi Peninsula is particularly strategic to Nigeria because it provides access from the open sea into Cross River State in Eastern Nigeria, which is the location of Nigeria's Eastern Naval Command and the multi-million Naira Calabar Export Processing Zone. Based on these geostrategic ramifications, a major implication of the conflict between Nigeria and Cameroon over the ownership of the disputed territory is that it unduly exposes Nigeria's naval and economic capabilities.⁷

Before the formal handover process, the population of the Bakassi Peninsula was estimated to be between 250,000 and 300,000, the majority of them Nigerian.⁸ Though a post-handover census of the region is unavailable, it is believed that the peninsula is still inhabited for the most part by Nigerians. A huge number of the Nigerian population in the peninsula reportedly chose to remain in Bakassi, and many of those who went back to Nigeria following the ICJ's decision have since returned to Bakassi, mainly for economic reasons. Some returned because of the inadequate assistance with resettlement that the Nigerian authorities offered repatriated Nigerians.⁹ The failings of the Nigerian government towards its returnee citizens notwithstanding, most of the Nigerian residents of the

peninsula want to remain Nigerian and associated with Nigeria.¹⁰ Consequently, one may argue that, although the Nigerian government's attitude towards this group of its citizenry may have diminished their expectations of the federal government, it has not extinguished them. It appears that they have identified themselves as Nigerians, want to remain as such and expect the federal government of Nigeria to recognize them as such. This may be attributed to the strong visible presence that Nigeria maintained in the region while it was a subject of dispute between it and Cameroon. What may be deduced from the above is that the Nigerian inhabitants of the region, beyond their concerns about the conflict between the two countries over the ownership of the territory, expect the Nigerian government to continue to guarantee their security.

This expectation is not misplaced because the relationship between the Bakassi Peninsula and Nigeria dates back to the colonial period. It is important to note that many of the conflicting claims between Nigeria and Cameroon regarding the ownership of the Bakassi Peninsula are intricately linked to the political history of the territory. Perhaps this is why much of the literature on this topic is prejudicial. This section relies extensively on Cornwell's non-prejudicial account regarding the political history of the Bakassi Peninsula in his article "Nigeria and Cameroon: Diplomacy in the Delta".¹¹ As Cornwell recounts, the German government proclaimed a protectorate over the Cameroon region in June 1884, while Great Britain had similar agreements with Old Calabar signed on 23 July and 10 September 1884. Also in September 1884, Bakassi acknowledged that its territories were subject to the authority of Old Calabar, thus effectively being under the British Protectorate.¹² The Berlin Conference of 1884–1885 recognized Bakassi as part of the British Protectorate of territories that were unified in 1913 as a single Nigerian Protectorate.¹³ Bakassi remained under Nigeria's administration till 1954 as part of the administrative "Southern Cameroons", which was attached to the Eastern Provinces of Nigeria. Southern Cameroon achieved a limited form of self-government and full regional status in 1958¹⁴ and had a parliamentary democracy that lasted until 1961. It conducted its first free and fair election in which power changed hands peacefully in 1959.¹⁵ In 1961, Southern Cameroon, buoyed by the prospect of self-autonomy, decided to join French Cameroon under a United Nations plebiscite.¹⁶ At that time, the prospect of having a degree of self-autonomy within a loosely proposed Federal Republic of Cameroon was preferred to being completely absorbed by Nigeria, where such a prospect did not exist.

Nigeria continued to maintain a close relationship with the Bakassi Peninsula, which witnessed a massive influx of many Igbo- and Efik-speaking Nigerians from secessionist Biafra during the Nigerian civil war between 1967 and 1970. During this period, Nigeria provided state

services and collected taxes in the eastern and southern areas of the peninsula. This state of affairs continued until the early 1980s, when the Cameroonian government began to challenge Nigeria's presence in the peninsula against the backdrop of the discovery of large oil deposits in the Gulf of Guinea just south of the Bakassi Peninsula.¹⁷ Cameroon attempted to assert administrative control, including tax collection. The local population rebuffed the Cameroonian attempt and between 1992 and 1993 made entreaties to the Nigerian government to protect them from harassment by Cameroonian tax officials.¹⁸ Nigeria responded to the requests by its citizens resident in the Bakassi Peninsula by deploying its military to the contested area to "protect Nigerian fishing vessels and traders from harassment by Cameroonian gendarmes".¹⁹ This resulted in one of the protracted violent conflicts between the two countries over the then-disputed Bakassi Peninsula. Clashes between security agents from Nigeria and Cameroon continued as diplomatic attempts to resolve the territorial dispute between the two countries failed.²⁰

The ICJ determined ownership of the disputed territory in 2002 after Cameroon approached it in 1994 to settle the border disputes. Following the Court's decision, Nigeria gave up villages and territories located further north that were affected, but retained a visible military presence in the Bakassi Peninsula. The maintenance of security personnel in the peninsula was undoubtedly in consideration of the economic and security importance of the Bakassi Peninsula to Nigeria. To avoid further violent clashes between the two neighbouring countries, Kofi Annan (then the UN Secretary-General) convened a summit in November 2002 where the presidents of both countries agreed to establish a commission to facilitate the peaceful implementation of the ICJ decision. Further summits were held in 2004 and 2006 and culminated in the GTA, signed by both presidents. The GTA provides the modalities for the peaceful handover of the Bakassi Peninsula from Nigeria to Cameroon. However, before examining the relevant provisions of the GTA, Nigeria's commitment to R2P is highlighted with particular reference to its activities within the continent through the African Union and ECOWAS. The concluding part of this section highlights how the Bakassi Peninsula came under Cameroonian administration, thus giving rise to the possibility of a kin-state relationship between Nigeria and its citizens resident in the peninsula.

In 1884, when the initial protectorate agreements were made between Germany and Cameroon and Great Britain and Old Calabar (including the Bakassi Peninsula), the recognized boundary between the British- and German-controlled areas ran along the west bank of the Rio del Rey. However, agreements signed between Germany and Great Britain on 11 March and 12 April 1913 redefined the maritime boundary as the Akpayafe River, placing the Rio del Rey and the entire Bakassi Peninsula

under German authority. Complaints from Old Calabar that the British did not have the authority to sign away their territories went unheeded.²¹ The Bakassi Peninsula was back under British control in 1919 after British and French colonial forces conquered the German forces in 1916. The territories that were held by Germany were divided between Great Britain and France, with the Bakassi Peninsula forming part of the British Cameroons, which was administered from Lagos “virtually as an integral part of Nigeria”.²² The 1913 agreements appear to be the determining factor in the ownership tussle over the Bakassi Peninsula between Nigeria and Cameroon. Whereas Nigeria based its arguments on its historical ownership of the territory, its administrative control and the Nigerian citizenship of the majority of the inhabitants, Cameroon relied extensively on the 1913 treaties. The ICJ concurred with Cameroon’s position and awarded the peninsula to it. A corollary of the ICJ’s decision is that the Bakassi Peninsula is “foreign territory” to Nigeria and thus creates a situation where a kinship relationship can be, and is, claimed to exist between Nigeria and the Nigerian citizens who remain resident in the peninsula.

The responsibility to protect in Africa

The R2P norm was first conceived by the International Commission on Intervention and State Sovereignty (ICISS) in 2001,²³ and thereafter eagerly promoted by the United Nations.²⁴ As adopted in the 2005 World Summit *Outcome* document and subsequent resolutions of the General Assembly and the Security Council, the concept of R2P rests on three pillars: “first, an affirmation of the primary and continuing obligations of states to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitement; second, a commitment by the international community to assist states in meeting their obligations; and third, an acceptance by Member States of their responsibility to respond in a timely and decisive manner, in accordance with the UN Charter, to help protect populations.”²⁵

The fundamental, distinct but interrelated dimensions of R2P as enunciated by the ICISS Report include:

- **“The responsibility to prevent:** to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.”
- **“The responsibility to react:** to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.”

- **“The responsibility to rebuild:** to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.”

The report emphasizes that prevention is the single most important dimension of R2P.²⁶ In other words, the fundamental essence of R2P is to prevent genocide, war crimes, crimes against humanity and ethnic cleansing. It is important to note that whereas the responsibilities to react and to rebuild are the responsibility of the international community, this is not the case for the responsibility to prevent – here, the responsibility lies with the home-country. Where there are complications owing to kin-state interests, the responsibility to prevent conflicts (arising from allegations of acts by the host-country tantamount to genocide, war crimes, ethnic cleansing and/or crimes against humanity) should, out of necessity, be borne by both the home-country and the relevant kin-state. It is on this basis that this chapter examines Nigeria’s role as a kin-state in the prevention of further conflicts in the Bakassi region, where Nigerians are allegedly persecuted on the basis of their ethnicity/nationality. It is posited that these acts perpetrated by the Cameroonians not only are contrary to the GTA but fall within the scope of ethnic cleansing and crimes against humanity required to invoke R2P mechanisms.

The “R2P” terminology is not expressly used in African regional charters, even though its principles are recognized, at least, in the framework of the Constitutive Act of the African Union (CAAU) adopted in 2000 and the Revised Treaty of the Economic Community of West African States. It is pertinent to note that these African frameworks were constructed before the ICISS completed its work on the formulation of the norm. Although this provides a plausible explanation of why the R2P terminology was not expressly used, it also reveals that Africa has been progressively recognizing the primary importance of conflict prevention and management.²⁷ The African conception of R2P is discussed against the backdrop of the activities of Nigeria and Cameroon towards preventing the occurrence of further conflicts over the Bakassi Peninsula.

The African Union (AU) was created in 2002 to replace the Organization of African Unity (OAU), whose core mandate at inception included accelerating decolonization on the continent.²⁸ Unlike the OAU, which focused primarily on the security and territorial integrity of states, the AU reconceptualized security by de-emphasizing territorial integrity. This progressive change is noteworthy given OAU’s history of considerable failure to avert intra- and inter-state conflicts, with far-reaching implications for the continent.²⁹ Article IV(h) of the CAAU expressly grants the right of the AU to intervene in a member state, while recognizing the principles of territorial independence and sovereignty, pursuant to a

decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.³⁰ To give effect to this provision, the Peace and Security Council (PSC) was constituted as “a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa”.³¹ Specifically, the Protocol Relating to the Establishment of the PSC, which came into force in January 2004, mandates the Council to engage in:

- the anticipation and prevention of disputes, conflicts and policies that may lead to genocide and war crimes;
- peacemaking and peacebuilding functions to resolve existing conflicts;
- the authorization and deployment of peace support missions;
- the recommendation to the Assembly of intervention in the case of “grave circumstances”;
- the support and facilitation of humanitarian action.³²

In 2004, the African Union concluded a framework document on the establishment of the African Standby Force (ASF) to comprise soldiers drawn from member countries for the purpose of deployment for peacemaking and peace support duties as authorized by the AU’s Peace and Security Council.³³

The Economic Community of West African States, on the other hand, was founded in 1975 primarily to promote economic integration among the 16 original member countries.³⁴ In 1999, however, and against the backdrop of the outbreak of violent civil wars in Liberia and Sierra Leone, ECOWAS adopted the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security.³⁵ Article 3 of the Protocol provided the following objectives:

- “prevent, manage and resolve internal and inter-State conflicts under the conditions provided in Paragraph 46 of the Framework of the Mechanism”;
- “strengthen cooperation in the areas of conflict prevention, early-warning, peace-keeping operations, the control of cross-border crime, international terrorism and proliferation of small arms and anti-personnel mines”;
- “maintain and consolidate peace, security and stability within the Community”;
- “establish institutions and formulate policies that would allow for the organisation and coordination of humanitarian relief missions”;
- “promote close cooperation between Member States in the areas of preventive diplomacy and peace-keeping”; and,
- “constitute and deploy a civilian and military force to maintain or restore peace within the sub-region, whenever the need arises”.

The conditions for the application of the Mechanism as provided for in Article 25 include:

- “In cases of aggression or conflict in any Member State or threat thereof”;
- “In case of conflict between two or several Member States”;
- “In case of internal conflict:
that threatens to trigger a humanitarian disaster, or
that poses a serious threat to peace and security in the sub-region”;
- “In event of serious and massive violation of human rights and the rule of law”;
- “In the event of an overthrow or attempted overthrow of a democratically elected government”;
- “Any other situation as may be decided by the Mediation and Security Council”.

The ECOWAS Mediation and Security Council decides when intervention through ECOWAS’s multinational Monitoring Observer Group (ECOMOG) is necessary. ECOMOG has intervened in conflict zones in the sub-continent to carry out intervention, peace enforcement and peace-keeping missions.³⁶

Clearly, these regional organizations – the AU and ECOWAS – contain a set of rules and guidelines aimed at preventing conflicts that are similar to the principle to prevent conflicts under the R2P norm. Consequently, even though the R2P terminology is not expressly referred to in the charters of organizations, the essence and goals fit comfortably with the global R2P nomenclature.

The responsibility to prevent: Nigeria, Cameroon and the GTA

This section highlights the key provisions of the Greentree Agreement. Thereafter, it discusses the obstacles that Nigeria’s government has overcome in the determination to abide by the principle of conflict prevention as enunciated in the AU and ECOWAS charters, which are identical to the R2P norm. Article 2 of the GTA provides that Nigeria would withdraw from the northern part of the Bakassi Peninsula within 60 days of the signing of the agreement and would leave the region completely under Cameroonian control within two years.³⁷ Within this period, Nigeria was to maintain a civil administration and a police force necessary for the maintenance of law and order in the “Bakassi Zone” – the tiny southern tip of the peninsula that Nigeria was to control until June 2008 – subject to restrictions contained in section 3 of Annex 1 of the GTA. These include Nigeria protecting against any activities that might prejudice Cameroon’s peace or security; stopping the transfer or influx of Nigerian citizens into the region; not engaging in any activities that might

hinder the transfer of authority to Cameroon; equipping its police force with only light equipment strictly necessary for the maintenance of law and order and for personal defence; guaranteeing to Cameroonian nationals wishing to return to their village in the Zone the exercise of their rights; and not positioning any armed forces in the Zone. Following the transfer of the Bakassi Peninsula to Cameroon, resident Nigerian citizens are free to remain in the Zone and are guaranteed the exercise of their fundamental rights and freedoms as recognized under international law. Article 3(2) expressly states that Cameroon shall:

- (a) not force Nigerian nationals living in the Bakassi Peninsula to leave the Zone or to change their nationality;
- (b) respect their culture, language and beliefs;
- (c) respect their right to continue their agricultural and fishing activities;
- (d) protect their property and their customary land rights;
- (e) not levy in any discriminatory manner any taxes and other dues on Nigerian nationals living in the Zone; and
- (f) take every necessary measure to protect Nigerian nationals living in the Zone from any harassment or harm.

Annex 1 of the GTA prescribes a special transition regime for a period of five years, during which officers and uniformed personnel of the Nigerian police may access the Zone, in cooperation with the Cameroonian police, with the minimum of formalities when dealing with enquiries into crimes and offences or other incidents exclusively concerning Nigerian nationals. At the end of the special transitional regime, Cameroon is to fully exercise its rights of sovereignty over the Zone.

It is worth stating at this juncture that it is Nigeria's presidency that is the driving force of the commitment to adhere to the terms of the GTA to avoid further conflicts with Cameroon over the Bakassi Peninsula. The first obstacle faced by Nigeria in implementing the GTA was the legality of implementing the bilateral agreement. Section 12(1) of the 1999 Nigerian Constitution provides that: "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".³⁸ In essence, the National Assembly's ratification of the GTA is a prerequisite to the implementation of the GTA. Nevertheless, the incumbent president (Yar'adua), like his predecessor (Obasanjo) who signed the GTA, has maintained that this legal loophole will not deter him from implementing the GTA.³⁹ In the interim, President Yar'adua has sent the GTA to the legislature for its approval.⁴⁰ The Senate public hearing into the issue has been characterized mainly by criticism from the political and military establishments alike that they were not properly consulted

prior to the signing of the GTA by the previous president, Obasanjo.⁴¹ While a decision from the legislature is pending, President Yar'adua has continued to implement the GTA.

The second dilemma that Nigeria faced internally was the constitutionality of ceding a territory that was still recognized by the country's Constitution as part of Nigeria. Bakassi is listed as a Local Government Area of Nigeria;⁴² thus, if the Bakassi Peninsula were to be ceded to Cameroon in accordance with the ICJ's decision and the terms of the GTA, Nigeria's Constitution would have to be amended to delist Bakassi as being a Nigerian territory. The process to amend the Constitution for this purpose is convoluted and would not be completed in time to meet the period set by the GTA.⁴³ In any case, it was (and remains) unlikely that the presidency would garner the required support to amend the Constitution, given the local opposition to the ICJ's decision, the terms of the GTA and the mode of its implementation. The presidency, however, found an ingenious solution to overcome this obstacle. It moved the physical boundaries of the Bakassi local council to a new location carved out from the Akpabuyo Local Government Area, which was well within Nigeria. This "new Bakassi" is expected to be the new home for Nigerians who return to Nigeria from "Cameroonian" Bakassi.

Thirdly, Nigeria has had to cope with vociferous opposition from within of its decision to abide by the ICJ's decision and the handover process as prescribed by the GTA. Nigerians have expressed their antagonism to the handover decision and process through various means including newspaper publications, pressure group activities, litigation and militant activities.⁴⁴ The lawsuit instituted by eight indigenes of the Bakassi local government to challenge the president's decision to implement the GTA is most pertinent at this point. The plaintiffs are claiming 356 billion *naira* from the federal government for the compulsory ceding of their ancestral home and land, as well as their source of livelihood, to Cameroon in an unconstitutional manner. They are also claiming 100 billion *naira* damages for the infringement of their human rights to dignity, to acquire and own immovable property and to self-determination.⁴⁵ In its decision made two weeks before the official date slated for the handover, the court gave a restraining order to stop the federal government from going ahead with the planned handover. The presidency nonetheless went ahead with the handover as planned and described the judge's order as a bad one that could not be respected. The federal government thereafter applied to another federal High Court to stay proceedings on the suit and appealed against the decision purportedly restraining it from ceding the Bakassi Peninsula to Cameroon.⁴⁶ While the legal battles persist, Nigeria's Minister for Justice has restated the President's intention to adhere to the bilateral agreement with Cameroon to peacefully hand over the hitherto

disputed territory. Nigeria's intention, according to the minister, is to abide by the GTA to promote peace in the region and "advance the cause of African brotherhood and good neighbourliness among countries of the continent".⁴⁷

However, it is argued that Nigeria and, indeed, Cameroon have not adhered strictly to the provisions of the GTA. Specifically, Article 3(a) of the GTA provides that Nigeria shall not conduct or allow any activities in the Zone that will prejudice Cameroon's peace or security for the period of two years that the GTA permitted Nigeria to keep its civil administration and police force necessary for the maintenance of law and order in the Zone.⁴⁸ Given the rise in militant activities in the Bakassi Peninsula in that period, it is questionable whether Nigeria discharged this responsibility adequately. Indeed, the rise in militant activities by Nigerian groups is a direct consequence of Nigeria's agreement to hand over the territory and its unconcerned attitude towards its nationals who chose to return "home" to Nigeria. The militant groups, allegedly mainly from the troubled Niger Delta, had vowed to make the region ungovernable should Nigeria go ahead with the process.⁴⁹ The manner in which Nigeria treated Bakassi returnees, some of whom originally hailed from the Niger Delta, has further heightened tensions between the government and militants, whose activities have cut Nigeria's oil production in the Niger Delta by at least one-quarter. One of the complaints of the returnees in the "new Bakassi" where the government plans to resettle them is that it is landlocked and therefore unsuitable for their traditional lifestyles, which revolve around fishing and other water-based subsistence activities. Secondly, the government's arrangements to resettle them can only be described as shoddy and uncoordinated,⁵⁰ with recent reports from "new Bakassi" claiming that influential government officials and politicians are battling to buy the government-constructed houses to the detriment of the returnees.⁵¹

The link between these occurrences in Nigeria and militant activities in the Bakassi Peninsula is captured by the demands of militant groups – the Niger Delta Defence and Security Council and the allied Bakassi Freedom Fighters – which kidnapped 10 oil workers off the coast of Cameroon on 31 October 2008. The militants' demands included that the Nigerian government renegotiate the GTA, compensate the Bakassi returnees adequately and release two militia members seized by Cameroon during a series of militant attacks on Cameroonian security forces before and since the handover.⁵² An interesting twist to the militant activities in the Bakassi Peninsula is the allegation by the militants that the Nigerian military is also involved in targeting Cameroonian nationals in the Bakassi Peninsula. The Movement for the Emancipation of the Niger Delta (MEND), denying allegations by Nigeria's military command that the

militants were responsible for the attack on Cameroonian nationals in the Bakassi Peninsula, blamed the Nigerian military instead.⁵³ MEND claimed that the Nigerian military was angered that the Cameroonian troops had ignored weapons deliveries received by MEND through the estuary by Bakassi and was seeking revenge.⁵⁴ The veracity of this claim is not as important as the fact that it raises the prospect that Nigeria's military was involved in activities in the Bakassi region contrary to the provisions of the GTA. This, in addition to the Nigerian government's failure to prevent or control militant activities in the Bakassi Peninsula, suggests that Nigeria failed in its obligations not to allow activities that would prejudice Cameroon's peace or security. However, Nigeria could argue that Article 3(d) of Annex 1 permitted Nigeria to equip its police force in the Zone only with light equipment necessary for the maintenance of law and order and for personal defence. From experience in the Niger Delta where full military action has failed to bring militants under control, Nigeria could argue that the mandate to ensure that Cameroon's peace and security were not prejudiced, as provided in the GTA, was inadequate. In other words, inadequacy in the GTA, not Nigeria's ineptitude, is responsible for the rise in militant activities that are having unpleasant repercussions for both countries and possibly the sub-region in the near future.

Cameroon has also not fulfilled its obligations under the GTA with regard to the protection of the human rights of Nigerians resident in the peninsula. Article 3(1) of the GTA provides that "Cameroon, after the transfer of authority to it by Nigeria, guarantees to Nigerian nationals living in the Bakassi Peninsula the exercise of the fundamental rights and freedoms enshrined in international human rights law and in other relevant provisions of international law". Article 3(2) lists some of these rights, which include the protection of Nigerian nationals' property; not levying discriminatory taxes and dues; and taking every necessary measure to protect Nigerian nationals from any harassment or harm. However, soon after the handover of the territory, Cameroonian gendarmes began to pursue Nigerian citizens resident in the Bakassi Peninsula for taxes. For instance, residents of Archibong Town, the main town in the section from which Nigeria withdrew, claimed that, after Nigerian troops left, Cameroonian gendarmes moved in and started harassing the residents – seizing their boats and nets and demanding back taxes.⁵⁵ This attitude is a major reason the inhabitants of the Bakassi Peninsula opposed the ceding of the territory to Cameroon and Nigeria's implementation of the GTA.⁵⁶ As a result of continuing persecution after the handover,⁵⁷ Nigerian nationals who still reside in the Bakassi Peninsula live in constant fear, despite the assurances made by President Biya and the GTA. Following reports of continued maltreatment of Nigerians by

the Cameroonian authorities, the Nigerian government deployed its troops to the Nigerian side of the border. Cameroon responded by closing the border, patrolling the waterway, shooting sporadically and threatening to shoot any Nigerian who breached their territorial integrity – a response reminiscent of the incident that culminated in the killing of more than 10 Nigerian soldiers by Cameroonian gendarmes in the early 1980s.⁵⁸

Before Cameroon shut the border, it declared that Nigerians in the ceded territory would not be allowed to cross over and those on the Nigerian side would not be allowed to enter Cameroon. The decision to shut the border, particularly against the backdrop of other acts of violence and harassment perpetrated specifically against the Nigerian population resident in the Bakassi Peninsula by the Cameroonian government, is construed as intending to drive Nigerians out of the region. Thus far, over 3,300 Nigerians have reportedly been forced to leave the area owing to incessant harassment, while approximately 300 were allegedly tortured and about 23 killed between October 2009 and January 2010.⁵⁹ The constant and consistent acts of killing, rape and harassment of Nigerians aimed at eradicating them from the hitherto contested region undoubtedly fall within the scope of ethnic cleansing and/or crimes against humanity. Although a universal definition of “ethnic cleansing” does not exist, it is understood to broadly encompass the planned deliberate removal from a specific territory of persons of a particular ethnic group by force or intimidation, in order to render that area ethnically homogeneous. Crimes against humanity, on the other hand, are defined as the ongoing perpetration of particularly odious offences (including murder, extermination, torture, rape and political, racial or religious persecution) that constitute serious attacks on human dignity or grave humiliation or a degradation of one or more human beings as part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a *de facto* authority.⁶⁰ However, what is more worrying at this juncture is the fact that, if the Nigerians “trapped” in the Bakassi Peninsula continue to be maltreated, Nigeria may be forced to react as it had in the past by deploying troops offensively.⁶¹

Although Nigeria’s commitment to the GTA thus far is a positive action from an R2P angle, the failure to act decisively may prompt further militant groups to engage the Cameroonian authorities on behalf of their kin. This will raise further complications and challenges to the ways that Nigeria handles the situation. Some of the complicated issues that may arise if militants organize themselves to react as an alternative to the government include: Will Nigeria permit the Cameroonian authorities to enter Nigerian territory in pursuit of these elements? If Nigeria should

deny the Cameroonians entry, as it is most likely to, to what extent will this further compromise the safety of its citizens residing in the Bakassi Peninsula who may then suffer reprisal attacks? Will the Nigerian government at this stage be forced to react to protect its innocent nationals from reprisal attacks? All these questions should be considered against the backdrop of continuing opposition from Nigerians and the fact that the GTA is still awaiting legislative assent. If the legislature refuses to assent to the GTA, this will raise further questions about the legality of the entire handover process, which has been pursued exclusively by Nigeria's presidents. One cannot rule out the Bakassi issue being used as a campaign point in the next elections should legislative assent stall for a couple of years, as it very well may.

Consequently, it is imperative that both Nigeria and Cameroon reassess their obligations under the GTA, which assigns roles and responsibilities to both countries for a peaceful handover of the Bakassi Peninsula from Nigeria to Cameroon. Both countries must continue to cooperate towards achieving this aim, particularly as the region is still under a special transition regime regulated by the GTA. Under this regime, which is to last for five years after Nigeria transfers authority to Cameroon, Cameroon is to:

- (a) Facilitate the exercise of the rights of Nigerian nationals living in the Zone and access by Nigerian civil authorities to the Nigerian population living in the Zone;
- (b) Not apply its customs or immigration laws to Nigerian nationals living in the Zone on their direct return from Nigeria for the purpose of exercising their activities;
- (c) Allow officers and uniformed personnel of the Nigerian police access to the Zone, in cooperation with the Cameroonian police, with the minimum of formalities when dealing with inquiries into crimes and offences or other incidents exclusively concerning Nigerian nationals; and
- (d) Allow innocent passage in the territorial waters of the Zone to civilian ships sailing under the Nigerian flag, consistent with the provisions of this Agreement, to the exclusion of Nigerian warships.⁶²

After this period, it is the responsibility of Cameroon to take effective control of and sovereignty over the region. However, the success of the GTA is to be measured not by Cameroon taking full control of the territory but by the establishment of peace during the process and afterwards. Nigeria can promote this goal by reassessing its treatment of its Bakassi returnees and ensuring that it acts to promote their human security. This includes resettling them and compensating them adequately. The possibility of this being done now appears slim as many of the returnees have left the resettlement camps to fend for themselves following the neglect

they suffered whilst there. Militants' activities in the Bakassi Peninsula are bound to continue if nothing is done to ameliorate the suffering of the returnees whose interest they claim to advance. The Cameroonian authorities bear the responsibility to ensure that the human rights of Nigerians who choose to remain in the Bakassi Peninsula are protected. Furthermore, the Cameroonian government should provide infrastructure necessary to develop the area. Indeed, rapid infrastructural development in the area will encourage trade and integration between people on both sides, thereby de-emphasizing the significance of the border, promoting peace in the region and preventing the spread of violent unrest.⁶³

Highlighting the role of a kin-state in preventing conflicts does not in any way suggest that the responsibility the international community bears in this regard is diminished. The international community must still act proactively in carrying out this responsibility to ensure that the relationship between Nigeria and Cameroon does not degenerate any further. Of course, the international community played a vital role in encouraging peace talks and agreements between the two countries, but it must continue to show interest in their post-agreement relationship to ensure it does not break down irretrievably. All the more so, considering the fact that the region is of great economic and security interest to both countries and neither has absolute jurisdiction over the territory yet.

Conclusion

This chapter has highlighted the unspoken yet important role that kin-states can play in preventing conflicts under the R2P norm. Indeed, the role of kin-states was unanticipated until Russia invaded Georgia on the basis that it was protecting its citizens under the application of the R2P norm. The chapter, focusing on the Nigeria–Cameroon imbroglio over the resource-rich Bakassi Peninsula, highlights some of the hurdles that kin-states must overcome to prevent conflicts as anticipated by the R2P norm.

The chapter specifically examines some of the lingering issues arising from the chaotic handling of the Bakassi Peninsula dispute between Nigeria and Cameroon, which the United Nations has hailed as exemplary for the way it helped to resolve a long-standing and protracted border conflict. It posits that neither country has adhered strictly to the terms of the GTA, which provides the basis for the peaceful transition. While Nigeria has been negligent in its responsibility to ensure that activities would not compromise Cameroon's peace or security, Cameroon has not abided by the terms of the GTA to ensure that the rights of Nigerian citizens residing in the peninsula are not abused. The chapter argues that

these failures have contributed to the exacerbation of militant activities in the Bakassi Peninsula. Specifically, the long-term targeting of Nigerian citizens in the peninsula by Cameroonian gendarmes, ostensibly to force them out of the region, is tantamount to crimes against humanity and/or ethnic cleansing. This situation presents an excuse for the Nigerian government to claim that it must intervene in the region to protect Nigerian citizens from continued harassment by the Cameroonian authorities despite an agreement to the contrary.

Indeed, whether this is enough of an excuse for Nigeria to venture into foreign territory is debatable. Although Nigerians would generally define this as a change of direction in their government's actions towards safeguarding Nigerians resident abroad, the international community will not share this sentiment. This is particularly so since the Bakassi Peninsula is no longer disputed territory following the ICJ's judgment awarding the territory to Cameroon. Thus, any attempt by the Nigerian government to re-intervene in Bakassi will be interpreted as an invasion of sovereign territory. Nigeria may argue that it is responsible for the welfare of its citizens – at home and abroad – particularly where they are the targets of attacks, but it would be against the Law of Nations to decide unilaterally to enter into the geographical territory of another state without permission. The global castigation of the Russian government following its invasion of Georgia in August 2008 is a reminder of the reception Nigeria (in this instance) or any other country that intends unilaterally to enter foreign territory forcibly is likely to face. Nigeria can ill afford this sort of international reprimand or blacklisting at a time when the country is looking for foreign investments to boost its economy and diversify its oil-reliant economy. This is all the more so now that oil revenues are dwindling as a result of militant activities in the oil-rich Niger Delta region. Militant attacks against the oil industry have precipitated a drop in oil production from the budget benchmark of 2.2 million barrels per day (bpd) to 1.4–1.5 million bpd. In monetary terms, Nigeria is reportedly losing approximately 8 billion *naira* a day after the militant attacks on oil installations in the Niger Delta crippled the country's exports.⁶⁴ Also, Nigeria's reputation as a promoter of the peaceful resolution of conflicts will have some bearing on its decision on whether or not it is proper to re-intervene in the Bakassi Peninsula. Based on its preference for diplomatic resolution of conflicts within the continent, it is highly unlikely that the military option would be the main one.

The prevention of conflicts over the Bakassi Peninsula is advantageous not only to Nigeria and Cameroon but to the international community as a whole. The attendant losses from conflicts – including loss of life (military and civilians alike), the displacement of affected populations, increased rates of refugees and poverty across the continent, and the

financial costs and consequences of the hostilities (which could be channelled to development projects) – can certainly be avoided. The GTA is a ready framework for preventing further outbreaks of violent conflict between the two countries but, as revealed earlier, neither country has adhered strictly to its provisions. The situation as it stands presents an opportunity for Nigeria to prove that preaching the notion of conflict prevention is not rhetoric, particularly as Nigeria prides itself on being the “Giant of Africa” and operates a foreign policy that projects the country as a frontline country within the continent. This is not to suggest that Cameroon and the international community at large do not share the responsibility to prevent. Article 3.3 of the ICISS Report explicitly states that, “for prevention to succeed, strong support from the international community is often needed, and in many cases may be indispensable”.⁶⁵ Although the role of the international community in preventing further conflicts in the Bakassi Peninsula has been acknowledged, the signing of the GTA by both parties is not an end in itself. Instead, it should be considered, as indeed it is, as a sign of the commitment of both countries to exert their responsibility to prevent conflicts and the beginning of a process to achieve this. All the stakeholders – Nigeria, Cameroon and the international community – need to exercise the political will that is required to persevere with the early initiatives under the responsibility to prevent in order to prevent what may be another catastrophe in the making.

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Part III

Conclusion

12

Blood across borders: The role of the kin-state in minority protection

Vesselin Popovski and Nicholas Turner

State borders do not match the borders of nations. The global map is an inherited historical mismatch of states – as artificial constructs with arbitrary borders – and nations – broad groupings with social, cultural and linguistic ties. Hence there exists a rich tapestry of various national, ethnic, religious and linguistic minorities, with many people residing outside their “kin-state”.

But the blood ties of the nation remain, and transcend the hard borders of the sovereign state. Ideally, these connections between people across borders would create friendly relations between their states; sharing the same language, culture and traditions encourages mutual understanding. People belonging to the same community should enjoy reunions, common festivities and celebrations. However, connections across borders can also be abused and manipulated for political purposes, through aggressive speeches and appeals for historical revenge. If not resisted, such rhetoric can escalate, producing tensions, conflict and even mass atrocities. Past stories of violence and intolerance are brought to life and often exaggerated in order to create grievances.

Ethnic conflict, as such, does not exist a priori – it has always been constructed, first implanted in imagination and then produced in real life. Differences in blood and ethnos alone do not create reasons for people to fight each other. But failing to adequately protect the rights of ethnic, religious, cultural and linguistic groups or to eliminate discriminatory laws and policies makes these minorities vulnerable and raises grievances that can be exploited by violent extremists or instrumentalized by

kin-states. Indeed, there is a clear link between violations of minority rights and conflict.¹

A common misconception of nationalists is that allowing rights and freedoms to minorities will challenge the sovereignty and territorial integrity of the state. On the contrary, denying rights and freedoms to minorities will make them vulnerable and insecure; they will organize protests and demand autonomy. The Kosovo drama started when a simple need – to study the Albanian language in schools – was denied. Trying to assimilate the Albanian minority in Greater Serbia, Milosevic gradually denied minority rights and this escalated the demand first for autonomy and then for full independence. History demonstrates that, if a government satisfies minority rights, there will not be a demand for autonomy. Or, if a government satisfies the demand for autonomy, there will not be a demand for full independence.

This book has explored how blood relationships across borders can contribute to the prevention of conflicts and, in particular, what role kin-states should play in the protection of minorities. A kin-state may have strong ethnic, cultural, religious or linguistic links to minority populations in neighbouring or nearby states, and a legitimate interest in their protection. Indeed, the kin-state may be directly affected if a nearby state is failing to satisfy the rights of people belonging to minorities. It may anticipate an influx of refugees, or experience a rise in nationalistic voices that advocate intervention to protect kin-minorities abroad.

Kin-states may also be well placed to offer advice or assistance to improve the economic, social and cultural life of the related minorities abroad. One example of the potential constructive role for kin-states in resolving sensitive and volatile minority issues, examined by Elizabeth Defeis in Chapter 5, is the successful resolution of the long-running disagreement between Italy and Austria over the status of the German-speaking minority in the South Tyrol region of northern Italy. Following the Second World War, Austria pursued its kin interest through bilateral negotiations with UN oversight, leading to the eventual implementation of a treaty giving greater autonomy to the region.

International norms affirm the rights of persons belonging to minority groups to establish peaceful contacts across borders with those of a common identity or heritage. But the strengthening of bonds between a kin-state and a nearby minority, when pursued individually, may risk creating or exacerbating tensions with their state of residence, resulting in a deterioration in bilateral relations. If the interest of the kin-state extends to attempts to take unilateral action on the basis of kinship to protect national minorities living abroad, the prospect of conflict can arise.

A clear example of the divisive effects of pro-minority activities by a kin-state is Hungary's adoption of the Act on Hungarians Living in

Neighbouring Countries (known as the “Status Law”) in June 2001, addressed in some detail by several of the preceding chapters. The law unilaterally granted special rights for the significant ethnic Hungarian minority populations in neighbouring Romania, Serbia, Slovakia, Slovenia and Ukraine to work within Hungary, referring to them as part of the “unified Hungarian nation”. The Status Law was strongly criticized by the neighbouring states, particularly Romania and Slovakia, as interference in their domestic affairs and a violation of their sovereignty. Among the law’s provisions were special visas, work permits, educational assistance and access to the Hungarian social security and healthcare systems for ethnic Hungarians living in neighbouring countries. To receive these special rights, individuals simply had to voluntarily declare themselves as being of Hungarian nationality. Neighbouring states considered these provisions – in particular those concerning employment – discriminatory against their citizens of non-Hungarian ethnic origin. With tensions rising, international organizations including the Council of Europe, the Organization for Security and Co-operation in Europe’s High Commissioner on National Minorities and the European Union pressured the states involved to start bilateral negotiations, which eventually defused the situation.

Cases such as South Tyrol and Hungary illustrate the dilemma of kin-state involvement in minority protection abroad: although kin-states can provide much-needed assistance, fill capacity gaps and prevent minority tensions, their interference in the domestic affairs of other states can also present a destabilizing threat to regional security. Should states be permitted to contribute to the protection of their kin abroad and, if so, how? Can there be a universal norm for such situations? Or must they always be considered case by case?

Minority protection in international law

The rights of people belonging to minorities have been a matter of concern for centuries. Since the 1648 Treaty of Westphalia this concern has been set in the context of state sovereignty, and accordingly the principle of granting a sovereign title to a territory on the basis of respect for minorities has evolved. In the 1878 Berlin Treaty (Art. 62), the independence of Bulgaria, Serbia and Romania was linked to the respect of the rights of minorities. After the First World War, the new independent states were urged to acknowledge the minority clauses of the Peace Treaties and make them part of their domestic laws. The Peace Treaties contained a reconciliatory procedure between affected states that often worked – most cases were resolved by negotiations. The Treaties became

an important step in the evolution of minority protection: for the first time they recognized that people living outside usual domestic jurisdiction may need additional guarantees of their fundamental rights from an external body, if protection within individual states fails. They also allowed the subject of violations to be brought (collectively, if not yet as individuals) to an international forum.² With the decline of the League of Nations in the 1930s, however, the minority clauses increasingly became unenforceable, the League's Council often failed to act upon complaints from minorities, discriminatory state policies were ignored and cultural assimilation was seen as contributing to internal stability. The few cases brought to the Council were dominated by countries whose ethnic groups were affected, but they did not care about minorities – rather, they pursued other political goals. The crisis of the system deepened when the issue of German minorities in Poland and Czechoslovakia was abused as a pretext for aggression by the Nazi regime.

In 1945 the UN Charter discarded special provisions on minorities in favour of general human rights law, based on the principles of equality and non-discrimination. Minority issues were thereby left for states to deal with internally, bilaterally or regionally. The first global document exclusively and comprehensively addressing the rights of minorities was the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.³ In 2007 the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which recognized the need to respect and promote the rights of indigenous peoples and noted that these rights are matters of international concern, interest and responsibility.⁴

In Europe, minority protection also developed first as part of general human rights law, applicable to all, and more recently minority-specific conventions such as the 1995 Framework Convention for the Protection of National Minorities have recognized the need for extra measures of protection for minorities as vulnerable groups. The Convention has come under criticism for not being robust enough, for adding little to existing international treaties, for producing recommendations rather than obligations, and for weak language that requests states to fulfil its provisions “as far as possible”.⁵ Overall, however, the flexibility of the Convention has allowed a large number of states to ratify it and it can be considered as setting standards and commitments to be implemented in good faith with the political will to support a commitment to minority rights.

As well as legal conventions, there have also been political agreements and mechanisms that, although not legally binding, have contributed to the protection of minorities. In 1992 – recognizing that ethnic differences are often instrumentalized resulting in large-scale violence, and with the aim of preventing such violence – the Organization for Security and Co-

operation in Europe (OSCE) established the post of High Commissioner on National Minorities (HCNM). Its mandate, accordingly, is to identify and seek early resolution of ethnic tensions that might endanger peace and friendly relations between OSCE participating states.

In international law, responsibility for the protection of minority rights clearly lies with the state in which the minority resides. States may have an *interest* in kin-minorities living abroad but they have no legal *right* of interference. But, if the host-state fails to protect a minority group or groups, what role, if any, can the kin-state play? In tackling this central question, this book draws upon the responsibility to protect (R2P) norm, which is particularly relevant to the protection of vulnerable communities, and therefore to the possibilities and limits for state involvement in the protection of their kin-minorities abroad.

The responsibility to protect (R2P)

Affirmed by the UN General Assembly at the 2005 World Summit, the R2P norm emerged to reconcile tensions between state sovereignty and the need for robust action to halt genocide, war crimes, ethnic cleansing and crimes against humanity. R2P firmly places primary responsibility for protecting people from these atrocity crimes with the state. If the state is unwilling or unable to fulfil this responsibility, it falls to the international community to take appropriate action to protect threatened populations – with the possibility of coercive measures including intervention. R2P can be seen as the culmination of an evolution towards sovereignty as responsibility, away from the historical conception of sovereignty as a function of power or control over territory.

R2P understandably attracts most attention related to its provision for intervention to halt atrocity crimes, or the so-called “third pillar”. Recently, however, a stronger emphasis has been placed on the responsibility to *prevent* significant crimes from occurring in the first place, so that intervention is not required – a priority reaffirmed in the 2009 report of the UN Secretary-General on implementing R2P.⁶ With the “third pillar” seen as too interventionist and the “first pillar” limited to domestic measures, the “second pillar” – providing assistance to states that lack the capacity to protect populations at risk – offers promising opportunities to improve implementation of R2P. Along with a general focus on prevention rather than reaction, this also seems the most appropriate and desirable model for kin-states to exercise R2P.

The responsibility to prevent requires effective protection of minority rights. The root causes of atrocities can often be found in prolonged policies of minority discrimination that lead to ethnic conflicts. If minority

rights are adequately protected, there are fewer opportunities for manipulation of minority issues by radicals in the minority community or in kin-states. States must therefore support minority groups in expressing and preserving their identities, while promoting integration and equality before the law to strengthen social cohesion and prevent discrimination. The cases explored in this book suggest that language is particularly important – from the integration of minority languages into educational curriculums and media content, to the general involvement of minority language speakers in public life. Wider minority participation in public institutions should also be encouraged.

The state is clearly the most appropriate actor to implement these functions as part of its primary obligation to protect its population and, in particular, vulnerable groups such as minorities. But when the state is weak or fails in this responsibility, other states, including neighbouring states, can assist by building the capacity of the host-state to implement the responsibility to protect. It is here through the “second pillar” of R2P that the kin-state can play an important role, but it must do so only multilaterally, as an integral member of regional or global international organizations. A kin-state should have no special responsibility to protect minority groups abroad, beyond its responsibility as any other state in the international community.

The role of the kin-state can therefore be seen within a broader understanding of the responsibility to prevent: preventing tensions from escalating to R2P situations by contributing to international efforts to protect minorities. And the same principle applies – the state in which minority populations reside has the responsibility to protect minority rights, but, if it fails to do so, this obligation shifts to the international community.

Multilateral and bilateral mechanisms

As described above, a range of multilateral treaties and declarations setting forth standards for minority protection have been adopted by states under the auspices of the United Nations and regional organizations. The latter may be particularly well placed to implement the responsibility to prevent, whereas the early warning and conflict prevention capacity of the United Nations is relatively limited. Indeed, Chapter VIII of the UN Charter specifically encourages the use of regional arrangements for conflict prevention. The OSCE is one example of a regional organization with advanced conflict prevention capacity and tools. Its HCNM can take early diplomatic preventive action, as well as providing early warning and technical assistance. As Walter Kemp observes in Chapter 4, while others

preach about the responsibility to protect, the High Commissioner has been practising it for more than 15 years.

Nevertheless, international capacity for minority protection is still generally limited because the standards laid out in international agreements are non-binding. To implement these international standards, and thereby actively prevent minority issues from developing into R2P situations, more specific, binding agreements between states have proved necessary.

Bilateral agreements on minority issues serve to build confidence for both sides. For the kin-state, they provide a means through which to legally and legitimately improve protection of kin-minorities in the host-state. Perhaps more importantly, for the host-state they relieve concerns about interference by the kin-state. Indeed, they can expressly stipulate that the parties have no territorial claims on each other – a particular concern where there are fears of secessionist movements. Bilateral agreements affirm the right of individuals to express, preserve and promote ethnic, cultural, linguistic and religious identity individually and as a member of a group. There is no uniform model or procedure for bilateral agreements because, by their very nature, they are specific to the region and the parties they address. However, they generally build upon existing (non-binding) international or regional standards, tailoring these to reflect the historical, political and social context.

Treaties can also provide for legitimate cross-border cooperation between national minorities or minority organizations and the kin-state, avoiding tensions such as those caused by Hungary's introduction of direct cross-border support in its Status Law without the consent of neighbouring states.

The implementation of minority-specific bilateral agreements – or of minority provisions within general treaties on friendly bilateral relations – must also be monitored to avoid further disputes, through mechanisms such as joint intergovernmental commissions. With mandates to facilitate cooperation and the exchange of information, these commissions allow pressing minority issues to be debated and resolved in a timely manner before such issues have the opportunity to become a source of conflict. For example, Hungary's joint commissions with its neighbours, particularly Romania and Slovakia, were effective in resolving the conflict related to the adoption of the Status Law.

The case studies in this book suggest that both bilateral and multilateral mechanisms for minority protection must focus on specific, practical difficulties and solutions, such as minority languages and representation in public institutions. If the dialogue is dominated by vague, emotive questions of “national identity”, minority issues will be vulnerable to instrumentalization. At the same time, nationalist rhetoric must be countered

by emphasizing that a diverse, well-integrated society is in the interests of both the majority and minorities, and that the existence of minority groups enriches the cultural values of the respective countries.

Conclusion

Although the world cannot stand by when minority rights are being violated, neither can the protection of national minorities be used by kin-states as an excuse to violate state sovereignty. The analyses undertaken in this book show that applying the R2P doctrine to this dilemma reinforces the primacy of host-state responsibility; as affirmed in numerous international instruments, the responsibility for minority protection lies primarily with their state of residence. If a state fails to fulfil its responsibility, whether it is unwilling or unable, the subsidiary responsibility shifts to the international community as a whole, *not* to the kin-state in particular. States have a dual responsibility: firstly to protect and promote the rights of minorities under their jurisdiction; and secondly to act as responsible members of the international community with respect to minorities under the jurisdiction of other states.⁷

There is a clear need to ensure that the interest of the kin-state in protecting minorities abroad is pursued through constructive engagement rather than unilateral interference. In this way, the kin-state's interest can be utilized as a means to stimulate efforts to improve the general level of minority protection in both states. It is crucial that, in all cases, kin-state support is offered only with the full cooperation and consent of the host-state in which the minority resides, to avoid escalating tensions. Bilateral treaties and intergovernmental commissions between committed states have proven effective tools to facilitate such constructive engagement by the kin-state; providing a legitimate means for active involvement of the kin-state enables improvements in minority protection while alleviating concerns and suspicions on both sides.

For the wider international community, efforts to improve minority protection by building domestic state capacity are the primary means to implement R2P in this context. International and regional organizations must also strengthen the tools and political will to implement timely and decisive collective responses when states are manifestly failing to protect minorities.

Effectively mobilizing international efforts requires accurate risk assessment and early warning for minority-related conflicts. Recognizing the need to strengthen and improve the coordination of these mechanisms within the UN system, in his 2009 report on R2P the Secretary-General proposed establishing a joint office on genocide prevention and R2P, bolstering the Office of the Special Adviser on the Prevention of

Genocide. The initiative will need to overcome political resistance from member states desperate to avoid such scrutiny. The Secretary-General's report also rightly emphasizes the need to ensure the two-way exchange of information and analysis with regional organizations, bringing local knowledge and perspectives to UN decision-making. Inputs from other institutions should also be incorporated. As noted by Joshua Castellino in Chapter 7, the Committee on the Elimination of Racial Discrimination set up an early warning mechanism for cases in which international peace and security may be at risk, acknowledging the link between discrimination and ethnic conflict. Although it issued urgent warnings in the contexts of Yugoslavia and Darfur, these concerns were not acted upon until violence erupted. This underlines the need to ensure that effective early warning mechanisms are complemented with a strong capacity to implement timely, collective responses when necessary, if we are to avoid the risk of further such atrocities in future.

Notes

1. A survey by Minority Rights Group International, quoted in the latest report of the UN independent expert on minority issues, Gay McDougall, finds that over 55 per cent of violent conflicts between 2007 and 2009 were caused by violations of minority rights (UN General Assembly, *Report of the Independent Expert on Minority Issues*, UN Doc. A/65/287, 12 August 2010).
2. The League's minority treaties are still relevant: when the International Court of Justice analysed the status of Palestine (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *ICJ Reports 2004*, paras 69, 70, 129), in addition to the general guarantees of freedom of movement, it stressed specific guarantees of access to Holy Places, quoting that minority and religious rights had been placed under international guarantee by Art. 62 of the 1878 Treaty of Berlin, and preserved in accordance with the safeguarding provisions of Art. 13 of the League of Nations Mandate.
3. United Nations General Assembly, "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", UN Doc. A/RES/47/135, 18 December 1992.
4. "United Nations Declaration on the Rights of Indigenous Peoples", Adopted by General Assembly Resolution 61/295 on 13 September 2007.
5. See Art. 9.3, Art. 10.2 and Art. 14.2 of the Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995; available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>> (accessed 20 December 2010).
6. UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677, 12 January 2009.
7. This dual responsibility is highlighted by Walter Kemp in Chapter 4. OSCE High Commissioner on National Minorities, "The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note", The Hague, 20 June 2008, and International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. 8.

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