

## **Mainstreaming Protection: Protection as a New Global Normative Order?**

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**Draft – comments welcome!**

## 1. Introduction

Since the end of the Cold War human rights have become a focal point of debates about the relationship between security and ethics. As a concept, human rights benefited from greater cooperation in the international realm that was possible after 1990. Moreover, an increasing transparency through media coverage and transnational civil society actor's advocacy led to better visibility of human rights and their violations compared to the previous decades. The effects were disillusioning. Though more states than ever joined relevant human rights treaties, it did not lead to an obvious enhanced compliance with human rights. Quite the contrary, situations like in Rwanda, Srebrenica and Darfur exposed a magnitude of human rights violations that shocked the human consciousness. These events underlined that in the face of mass atrocities, acts of genocide and ethnic cleansing, we must:

“Distinguish between what we might call the ordinary routine abuse of human rights that tragically occurs on a daily basis and those extraordinary acts of killing and brutality that belong to the category of ‘crimes against humanity’. Genocide is only the most obvious case but state-sponsored mass murder and mass population expulsions by force also come into this category” (Wheeler 2000: 34).

Instead of violations of specific human rights in the aforementioned conflicts, huge parts of the concerned population were under the imminent threat to lose their lives. Since the *Convention on the Prevention and Punishment of the Crime of Genocide* has no determined procedures regarding what to do in cases of an occurring genocide and since other mass violations of human rights are not subject to a specific convention of its own it was the Security Council's initiative that led to groundbreaking rearrangements in the field on UN peacekeeping. Particularly the use of force to protect human rights in the context of so-called humanitarian interventions stimulated a broader discussion on the responsibilities of states and the international community in the protection of foreigners. But unlike political or legal discussions on the legitimacy or legality of these interventions, from an ethical perspective it is the people who have to stand in the centre of all deliberations on protection. Captured in the mere numbers of deaths, victims or refugees, the shocking atrocities of the last centuries first of all represent masses of individual protection needs that were not met. These protection gaps are a moral problem that has not only to be addressed but to be closed appropriately. Ultimately, there is no persuasive argument for denying protection to people in need and therefore ‘protection’ as an (international) responsibility has to be understood in a nexus of legal as well as moral issues. From a perspective of this moral/legal nexus one can only endorse the following claim:

“The central question is no longer whether third-party states have a role in the protection of civilians in other countries, but the extent of this role, and the most effective means of fulfilling it” (O’Callaghan/Pantuliano 2007: 6)

Due to the often witnessed gap between rhetorical references to human rights or protection and their actual compliance, we state that there is a need for exploring the ethical dimension of protection as a moral human right. ‘Protection’ is, thus, understood as a claimable right of the individual but also as a responsibility of the international community. While the concept of the ‘Responsibility to Protect’ (R2P) may be the most obvious indicator for a growing acceptance of this idea, we stress the necessity to broaden the understanding of ‘protection’ beyond the narrow concept of R2P and treat protection as a ‘leitmotif’. Besides R2P several other developments and historical roots towards the protection of individuals can be traced – such as the concept of human security, the foundation of the International Criminal Court or the ongoing discussions within the Security Council on the ‘Protection of Civilians in Armed Conflict’. Therefore we argue for ‘Protection Mainstreaming’ as a new approach to international security that includes the consideration of ‘protection’ constantly and habitually in all relevant politics and policies by the international community. This would strengthen the compliance and implementation of a human rights core on a global level. For developing our argument we proceed as follows: Firstly, the paper will develop an understanding of protection as a moral human right that has to be put into practice and that relies on Rainer Forst’s argumentation on a basic right to justification as well as on Toni Erskine’s and Andrew Linklater’s thoughts on embedding cosmopolitanism. Secondly, it highlights the idea of protection within the core human right treaties at the centre of a moral/legal nexus. Thirdly, it analyses how the developments in international politics after 1990 helped to establish the idea of ‘protection’ in the international realm. Special attention will be given to programmatic progress made through reports such as the ‘Agenda for Peace’ or ‘The Responsibility to Protect’ and the first steps of putting ‘protection’ into practice like humanitarian intervention or the establishment of the International Criminal Court. Finally, we outline new trends of ‘Protection Mainstreaming’ within the humanitarian system, but also within the Security Council. Although, much needs to be done to establish ‘Protection Mainstreaming’ as a universal principle, we certainly see a growing importance and acceptance of the protection of individual human rights since 1990.

## **2. Protection as moral rights in use**

The literature within IR theory on protection issues has a vested interest to understand protection in legal terms. From a classical perspective, problems of protection are primarily discussed as a lack of compliance with human rights. Our opinion is that the treatment of protection is both too narrow

and too wide. First, a restriction to legal issues shies away the human reality of civilians facing armed conflicts and secondly, implies a variety of codified human rights as the normative goal of protection efforts. However, in situations of mass atrocities civilians are left without a basic level of protection, which does not mean that their lives are missing dignity or human rights as such, but that they have to fear for their lives. In this perspective, protection needs are much more fundamental as some of the academic and political discussions on the so-called generations of human rights suggest: “Protection is fundamentally about people. At its simplest, it is the challenge of helping people affected by conflict to stay safe” (Bonwick 2006: 271).

### *2.1 The moral/legal nexus: Denying protection needs justification*

The protection of people is as much a legal issue as it is a moral one. Besides being a cornerstone of many human rights treaties and international humanitarian law, “protection” has its discrete moral capability to practice. By examining protection as a right in a legal/moral nexus this assumption will be unfolded in the following. In recent years, Andrew Linklater brought forward an argument for a special focus on harm in international politics and thus turns to the flipside of protection. His rationale for harm is based on the current practice of states. Apparently, the international community is unable to come to an understanding on what conception of “good” it shall actively promote, but on the other side it has “succeeded in reaching a global moral consensus about certain forms of harm that should be eradicated from international society” (Linklater 2006: 330). This disparity in willingness may correlate with a divide between positive and negative formulations of duties discussed in international law and rational choice literature on compliance. Negative duties are seen as having a better record in international compliance since they were on the cheaper side of international agreements. In a protection context that means, for most states, a duty to avoid direct harm is not as costly as a duty to actively engage in promotion of well being. There is nothing wrong with this argument. In an ideal world where all states act in accordance to Linklater’s do no harm principle, there would be little to no suffering and protection for people would therefore be a byproduct. But what seems to be comprehensible from a motivational perspective on the behaviour of most states looks quite different from a systemic or sub-state view. Even if most actors try to avoid harm, protection of people may fail due to unintended consequences or sheer unwillingness of some. In the end, providing protection may become an essentially moral question. If there is human suffering and something can be done against it, to concentrate one’s efforts rather passively on harm is hardly persuasive. Genocide is an example where the legal/moral nexus of protection is quite obvious: As a party to the convention, every state is bound not to plan or conduct genocide. However, if genocide does take place in a foreign country, what shall be done about it? The convention is rather shallow regarding the role of distant parties, stating that the UN shall be informed. Having done that, the statutory duty of that actor is fulfilled – but not so his/her moral one. “Whatever one’s moral theory [...] *this* kind of suffering cannot be morally tolerated” (Donnelly

2003: 252). After all, present harm can only be mitigated through protection put to practice. To reconcile the legal with the moral perspective in theory, we suggest applying an approach to human rights that sheds light on that moral/legal nexus like the practice of protection requires.

As Rainer Forst notes, a demand for human rights arises when a social structure is in question because it is seen as inappropriate by individuals or groups.

“The demand springs up where people ask for *reasons*, for the *justification* of certain rules, laws, and institutions, and where the reasons that they receive no longer suffice; it arises where people believe that they are treated unjustly both as members of their culture and society and also simply as *human beings*. They may have no abstract or philosophical idea of what it means to be a ‘human being’, but in protesting they believe that there is at least one fundamental human-moral demand which no culture or society may reject: the unconditional claim to be respected as someone who deserves to be given justifying reasons for the actions, rules, or structures to which he or she is subject. This is thus the most universal and basic claim of every human being, which other human beings or states cannot reject: *the right to justification*, the right to be respected as a moral person who is autonomous at least in the sense that he or she must not be treated in any manner for which adequate reasons cannot be provided” (Forst 1999: 40).

The advantage of this account of human rights is its moral/legal focus on the actors concerned – may it be as an addresser or an addressee of claims. Morally, every person has the right to be treated as an autonomous agent and may put this basic right into practice through acts of communication, especially by claiming and/or justifying reasons for certain behaviour, acts, laws and so on. Thus, Forst’s argument relies strongly on the human person as the moral basis of all human rights which is, according to Forst, also the foundation of their emancipatory impetus.

As a consequence of placing protection (and human rights as whole) within a moral/legal nexus, one has to engage in the troubled water of international ethics or moral values. Morality and ethics in international relations are mostly discussed in terms of cosmopolitanism versus communitarism, universalism versus particularism, solidarism versus pluralism or deontological versus teleological. Each of these terms is a focus in political and/or philosophical discussions of its own. Contrary to this breadth, the right to justification seems very basic and universal due to its applicability to everyone (be it Western or Non-Western, men or women etc.). Forst himself proposes his approach to human rights “to be interculturally non-rejectable, universally valid, and applicable in particular cases” (Forst 1999: 36). From his perspective human rights need a moral or ethical foundation, which does not necessarily lie in some moral theory but in the normative principles of the process itself. Even the reasons given to answer a claim gain their normative power from an evaluation by the arguing actors

and not from a set of moral and ethical norms. So, ostensibly non-moral values like reciprocity and generality are basic criteria in Forst's account of acceptable reasons in the discourse of justification:

“Reciprocity means that no one may make a normative claim (such as a rights claim) he or she denies to others (call that reciprocity of content) and that no one may simply project one's own perspective, values, interests, or needs onto others such that one claims to speak in their 'true' interests or in the name of some truth behind mutual justification (reciprocity of reasons). Generality means that the reasons that are to ground general normative validity have to be shareable by all affected persons, given their (reciprocally) legitimate interests and claims” (Forst 2010: 719f.).

The emphasis on processes of communication, on giving reason or justifications and a tight relation between discourse and ethical or moral issues suggest a strong linkage between this conception of human rights and Habermas' discourse ethics. A Habermasian tradition becomes even more apparent when Forst lays out these criteria for acceptable reasons in justification discourse which to a certain degree resemble the principles of universalisation and discourse. At that point of our argumentation it is required to underline that this road to discourse ethics should not be followed in the remaining pages. This is not alone due to the fact that apparently any attempt to apply discourse ethics to international (speech) acts is ridden with preconditions (Müller 2004; Deitelhoff/Müller 2005). Furthermore, our focus is not the situation of discourse itself but the normative responsibility to give protection to those who are facing a risk to their lives. Therefore we emphasize Forst's very basic and normatively open stance on human rights which refrains from prioritizing certain substantial or procedural values (Forst 2010: 718).

Now, what can the right to justification add to a more theoretical perspective on protection? Firstly, it establishes an understanding of fundamental human rights that lays on a moral/legal nexus as the foundation for practice. Secondly, it is sensitive to the needs of people since they were central to its conception. Thirdly, it treats protection as an acceptable reason in Forst's terms because it is a legitimate claim and thus can be applied to the two basic criteria. To illustrate the potential of the right to justification for protection: A person under threat of losing her/his life claims protection and therefore asks why s/he has to suffer serious harm or why s/he does not receive any help and protection. Due to the right to justification as a reflexive basic human right the addressee has to react appropriately. By answering that claim the addressee is bound to the reciprocity of content and the reciprocity of reasons as well as to generality. Regarding the content, protection claims are acceptable because if the addressee denies protection s/he accepts as well that there will be no help if s/he is in a similar situation. Hence, it is likely that the addressee will engage in justification. Furthermore, since a victim or at least a person concerned is directly asking for reasons it should be regarded as an authentic expression of interest. And lastly in this case, an authenticity of reasons comes along with generality. To sum up, protection claims from people under imminent threat

embody the very fundamental right to justification, as they presuppose making claims and giving reasons.

## 2.2 *The moral/practice nexus: "Embedding" protection*

Speaking of a moral/legal nexus in theory does not necessarily make a difference in practice. In the next section, therefore, we will examine the chances for bringing protection as a moral right into practice. As a basic form of moral responsibility, the right to justification is, in Forst's words, intercultural and universal. The same could be assumed regarding the protection of people. As Linklater argues, a universal human rights culture has emerged that "may be seen as evidence that radically different societies have agreed on the moral imperative of eradicating serious mental and bodily harm from world society" (Linklater 2006: 336; see also Linklater 2007). Since avoiding harm and granting protection are opposites of one coin, the moral imperative may extend to protection also. Therefore, to think that all people have a moral right of protection is a deeply cosmopolitan argument. Cosmopolitanism as such takes everyone in the common humanity as an object of moral considerations. However, not only in this realm is cosmopolitanism universal. Moreover, it argues that some obligations result from that common humanity which are more often formulated in deontological than teleological terms (Erskine 2008: 1, Dobson 2006: 167). Even if we tend to think of protection issues as being universal or cosmopolitan, we do see the problems with this account. A repeated critique of cosmopolitanism comes from the communitarian spectrum of international ethics. By focussing on socially and spatially bound communities, communitarians argue for an assumingly more natural and workable perspective on morality, norms and values. Accordingly a community creates these normative issues just for themselves, which individuals adopt through a process of socialization. It is this congruency of individual and communal perspectives on duties that led to compliance and that cosmopolitan obligations are missing.

"An important question for both moral philosophers and normative theorists of international relations is how we get from where we are currently standing, steeped in our own immediate circumstances, with our own particular ties and commitments, to concern for those with whom we share neither kinship nor country, neighbourhood nor nation" (Erskine 2002: 459).

In light of distant suffering of strangers there seems to be no adequate ties to motivate action. In other words, not only because we argue or maybe feel like cosmopolitans in principle we will act like ones in practice (Dobson 2006: 169). Once again we can turn to Andrew Linklater and his work on harm for inspiration since he is fully aware of this problem at cosmopolitanism's heart. His preference on harm instead of protection rests exactly on this awareness by casting doubts on the persuasive power of positive cosmopolitan duties. Central to this caveat is the assumption of a shared, albeit virtual vulnerability to mental and bodily harm that is able to enhance "a shared

capacity for empathy” (Linklater 2007: 22). This idea should be explained in the following paragraphs, even if we – unlike Linklater – think that providing protection, not the “harm principle”, is morally binding.

Both, Andrew Linklater and Toni Erskine, propose an idea for cosmopolitan practice that may help to bridge the gap between thinking/feeling and doing something. Where Linklater suggests an “embodied cosmopolitanism”, Erskine argues for “embedding” it. The labelling acknowledges the slight differences between their approaches already. In Linklater’s conception questions of causality arise for they are seen as a vehicle to connect people with distant suffering. As Linklater and Dobson argue alike people are especially willing to change behaviour if they “understand how their actions affect other people” (Linklater 2006: 338; Dobson 2006: 172). Aside from this rather individualistic perspective on motivation which argues with rational reasoning and emotional ties, Toni Erskine proposes a form of reasoning that is labelled “embedded cosmopolitanism”. Her main argument is that one’s identity is neither spatial nor globally bound but embedded in different communities, experiences, wishes and so on. Based on feminist theory, she differentiates between communities that are based on shared space and communities that actors freely choose to belong. Rather than concentric circle of identity belongings from the municipal and regional level to the nation-state, these new communities form belongings in unsystematic and almost unbound ways. In the end, “a web of intersecting and overlapping morally relevant ties” will arise with large potential for cosmopolitanism in practice (Erskine 2002: 474, see also 471-474). At the same time, spaces and borders are losing their constitutive meaning and give way to new constitutive factors. Thus, protection issues must be based on individual or group experiences, solidarity and a multitude of belonging.

“While moral commitments cannot be derived from our ‘common humanity’, inclusion arises from respect for the ethical standing of a fellow moral agent with whom one shares membership in any one of a multitude of particular, often transnational, overlapping, territorial and non-territorial morally constitutive communities” (Erskine 2002: 475).

From this perspective, (spatial) distant suffering and harm of strangers have to be re-evaluated since the once defining borders of space and moral communities seem to disintegrate noticeably. Formerly distant moral agents identify each other in new communities around the globe without the need for the pure existence of hard, physical boundaries. Neta Crawford summarises these changes in a recent essay she pointedly titled “No borders, no bystanders” (Crawford 2009).

### 2.3 *Practices of protection: A new normative order through mainstreaming?*

In the remaining paragraphs we are going to unfold some implications of the aforementioned perspective on protection as a moral right in use. First, against communitarians it is possible to

discuss moral problems aside from specific boundaries of nature. Moreover, global problems should be addressed on a global level which means in terms of cosmopolitanism. Second, protection as a basic moral right links both ends of the individual-global spectrum in their complementary roles as addresser and addressee of claims and justifications. Although people may turn their complaints primarily towards the state concerned, the wider international community has a cosmopolitan obligation to help or at least a duty to justify its inaction if the state in question is unwilling or unable to provide protection. Third, existing moral communities overlap in scope and space. Therefore, moral questions on a global level can be addressed due to their “embeddedness” in routine, knowledge and practice. Fourth, to turn protection into practice needs actors that actively build new grounds for moral spheres and communities. These efforts can rely on transnational spaces of human interaction, an evolving international legal system and deliberations in global institutions, but have to find an appropriate strategy to embed protection. Our suggestion to put protection as a moral right in use can, thus, best be summarised by using the term “mainstreaming”. It implies a continuing consideration of moral reasons in policy processes relevant to protection since it argues from the basic right of the individual itself; the right to justification. By mainstreaming a moral right in use, the realms of both the moral-legal nexus and the moral-practice nexus are shaped. Since morality is at the centre of these embedding processes, mainstreaming fosters the establishment of new normative orders. When it comes to processes of protection mainstreaming, new embedded communities arise through claiming and justifications. In the end, the awareness of the respective moral right in use grows, which then may led to a new normative order.

### **3. Protecting Human Rights or the human right of protection**

Human rights are rights which one has simply because one is human and are therefore held by every human being. Even while most countries recognize many of the basic human rights in their legal system they are held with respect to, and exercised against the sovereign territorial state (Donnelly 1989: 122; Donnelly 2007: 21; Hamm 2003: 30). When human rights are not guaranteed by national law a ‘need’ arises and human rights claims are possibly advanced. Jack Donnelly therefore highlights: “Human rights is the language of victims and the disposed” (Donnelly 2007: 22). The claim for human rights often is a call for protection of those whose rights are already been abused.

In contrast to others who stated that human rights can be divided into rights of forbearance (negative rights) and rights to aid (positive rights); Vincent and Shue argue that all basic human rights have three correlative duties. These are the duties to avoid deprivation, the duties to protect from depriving and the duties to aid the deprived (Shue 1996: 51-64; Vincent 1986: 11). In their understanding the claim for a right inherently contains the demand for the protection against the breach of the right (Vincent 1986: 11). In that context “Right and Duty are different names for the same normative relation according to the point of view from which it is regarded” (Benn/Peters

1959: 88f.). The obligation to protect requires states to prevent human rights violations and thus demands positive actions by the states, as for example the creation of laws protecting against violations and to guarantee access to legal means (McClellan 2008: 144).

Discussion about the providence and protection of basic human rights began after the Second World War. Before, individual human rights did not play an important role in international relations (Donnelly 1999: 71).<sup>1</sup> Pogroms against the Jewish population in Russia or the Turkish slaughter of Armenians in the beginning of the 20<sup>th</sup> century only lead to weak statements of disapproval by the international community. The Second World War and the millionfold mass murder committed by the Nazis catapulted human rights and their protection into international debates. While during the war the Massacring of large parts of its citizens was understood as the sovereign right of the German government, that appreciation changed when the world started to recognize that it had ignored the genocidal murder of more than six million Jews, Gypsies, communists and others.

Still, human rights did not easily enter the international sphere. During the course of negotiations about the construction and the competences of the UN in 1945, human rights and their emphases in the organisation were discussed controversially (Weston 2006: 296). Only after long and exertive debates the fathers of the *UN Charter* agreed that the document should contain references to human rights and fundamental freedoms among the principal goals of the organization – even if the idea of the protection of the sovereign state remained.

These statements – which rest relatively vague – provided the cornerstone for some revolutionary developments throughout the following years (Weiss et al. 1997: 131). As Kofi Annan highlighted in 1998 the human rights references implemented the idea of protection as an underlying feature of the Charter. Annan states that Article 1 (3), the last sentence of Article 2 (7) and Article 55 revealed that the Charter was designed to "protect the sovereignty of peoples" and was "never meant as a licence for governments to trample on human rights and human dignity" (Annan 1998). Furthermore, Article 56 provides that "all Members pledge themselves to take joint and separate action in co-operation with the Organization" to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The formulation "to take separate action" implies that states have the obligation to effect the protection of human rights in their own legislation and administration (Guradze 1956: 110f.). Even if the Charter does not annul the classic understanding of sovereignty – the protection of human rights is attributed to the states domain reservé – an active understanding of protection is identifiable. In the

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<sup>1</sup> In the seventeenth century belligerent states were obligated to allow medical assistance for their prisoners of war. Also so called legal aliens were granted some minimal civil rights. The Hague Conventions and the Geneva Conventions made first important steps, however, with a very limited scope. From the 1920s onwards labour rights became legally protected under conventions developed by the International Labour Organization (ILO). Furthermore since the 1919s certain minorities were afforded certain international rights (Forsythe 2000: 21; Stahn 2007: 111f.).

first years of its organization the human rights provision did not prove to have “real consequences”.<sup>2</sup> Still, the Charter provided the legal authority to develop further lawmaking efforts to define and codify human rights (Buergethal 2006: 787).

A further important development after 1945 which implemented the idea of protection in the international sphere was the adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide* on the 09 December 1948 by the UN General Assembly. The convention criminalized the systematic killing of peoples and even made individuals responsible for prosecution if they tried to destroy a social group in whole or in part. In Article 1 the convention implemented the idea of protection by making governments accountable for the prevention of genocide and the punishment of the perpetrators. However, the question of the grade of protection rest contended. While some authors deduce that the language in the convention permits an active engagement of the international community to protect people from genocide (Scheffer 1992: 289) others point to the conventions Article 8. Article 8 states, that the only way in which the state parties may act to protect foreign citizens of genocide is by calling upon the competent organs of the UN to take such action as they consider appropriate (Holzgreffe 2003: 44). So, even if the language of the convention remains indirect and relatively weak concerning an active protection of the individual, first whispers of an international duty to protect civilians can be detected in the convention (Barnett/Weiss 2008: 27).

One day after the adoption of the Genocide Convention the Assembly adopted the *Universal Declaration of Human Rights* without a negative vote. By codifying the emerging view that the manner in which states treat their citizens is not only a legitimate international concern but subject to international standards the adoption declaration was a decisive step forward for the promotion of human rights and their protection in the international community (Donnelly 1999: 73; Forsythe 2000: 39).<sup>3</sup> In the Declaration there are several explicit passages in which the fundamental idea of protection of people is reflected. In the section of the declaration which is concerned with civil and political rights, for example Article 7 states that all humans are entitled to the equal protection of the law against any discrimination in violation of the declaration. Furthermore Article 12 highlights that every individual has the right to the protection of the law against arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

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<sup>2</sup> While the idea of the protection of human rights was “out of the bottle”, the vagueness of the Articles concerned with human rights obligations and the strict non-intervention clause of the Article 2 (7) lead to a situation in which the normative claims did not have significant consequences. This became apparently clear when the famine in China between 1958 and 1962 induced by Mao’s regime claimed approximately 30 million lives without any reaction from the international community (Forsythe 2000: 5).

<sup>3</sup> The declaration endorsed rights of political participation and of civic freedom, rights to freedom from want in the form of entitlements to adequate food, clothing, shelter and health care. In addition the right of freedom from fear in form of a pursuit of an international order in which all other rights could be realized is promoted by the declaration (Forsythe 2000: 38).

Since the adoption of the UN Charter, the Genocide Convention and the Universal Declaration on Human Rights additional human rights treaties have been adopted within the UN. The most important are the *International Covenant on Political and Civil Rights*, the *International Covenant on Economic, Social and Cultural Rights*,<sup>4</sup> the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention on the Rights of the Child* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

The principle of the protection idea is highlighted in all these covenants. For example the Convention on the Elimination of All Forms of Racial Discrimination states in Article 2 (2) that all state parties to the convention shall ensure the adequate protection of certain racial groups or individuals belonging to them. Furthermore in Article 5 (b) the convention highlights the right to security of person and protection by the State against violence or bodily harm. The Convention on the Elimination of All Forms of Discrimination against Women urges state parties in Article 2 (c) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination. Within the Convention on the Rights of the Child the idea of protection is mentioned in several parts. For example in the preamble of the document it is highlighted that state parties to the convention should afford children with the necessary protection. In Article 2 (2) it is further highlighted that the state parties should ensure that children are protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of their parents, legal guardians, or family members.

While these different treaties reflect the principle of protection we now take a look at the mechanisms which are used to put the idea protection into action. The primary responsibility for the promotion and protection of human rights under the Charter rests with the General Assembly and in the Economic and Social Council (ECOSOC). Furthermore the UN Commission on Human Rights, which was an intergovernmental subsidiary body of ECOSOC that held its first meeting in 1947, was a central organ in the field of human rights which drafted several human right treaties. But still it must be highlighted that the Commission as it stated itself had “no power to take any action in regard to any complaints concerning human rights” (UN Document E/259 Para. 22). Consequential, the UN Human Rights Council replaced the often criticised UN Commission on Human Rights in 2006. While this can be understood as an important step, especially due to new procedures as the universal

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<sup>4</sup> The two conventions elaborate the rights which are highlighted in the Universal Declaration. They also differ in several aspects. They do not include the right to seek asylum, the right to nationality and the right to property. The Covenant on Political and Civil Rights further adds to the Universal Declaration that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and that no one shall be liable to be punished again for an offence for which he already been convicted (Baer 1999: 3f.)

periodic review, critics still see a need of further strengthening the authority of the Human Rights Council.

While the Commission on Human Rights had followed a doctrine of “No Power to take Action” since its foundation in 1947 the ECOSOC Resolution 1235 of the 6 June 1967 authorized the Commission to make investigations on human rights violations.<sup>5</sup> This resolution was followed by the ECOSOC resolution 1503 on 27 May 1970 which empowered a sub commission of the Human Rights Commission to develop a mechanism for dealing with communications from individuals and groups revealing a consistent pattern of gross and reliably attested violations of human rights (Buergethal 1997: 710). These two ECOSOC resolutions “have given birth to an ever expanding institutional mechanism within the UN framework for dealing with large-scale human rights violations” (Buergethal 1997: 710).

Since the 1970s several so-called “treaty bodies” came into being. These bodies monitor the compliance of state parties with the obligation they committed themselves to by ratifying the covenants.<sup>6</sup> Furthermore their powers are limited, the treaty bodies were able to gradually to examine the human rights policies of the state parties. Because the bodies work within the global structure of sovereignty, they cannot impose sanctions on noncompliant states. They try to operationalise the idea of protection by putting pressure on states through exposure, shaming, and appeal to the international standards articulated in the signed convention.

Under a protection perspective the developments presented in previous paragraphs made two points exceedingly clear: First, in the legal realm ‘protection’ seems mostly about protecting human rights and not so much about a human right to protection. But within the different treaties, covenants and conventions, there is also strong evidence for a right-based argument towards protection which relies mainly on their content. Since all of these described human right arrangements focus either on the individual or on serious bodily harm a human right to protection can in sum be distinguished, even if it is implicit. Second, the international recognition of a moral right to protection is rather marginal, even if this could not be said for all these institutions mentioned above. From a perspective on the legal/moral nexus and a right to justification, an individual has the right to ask for reasons and may be answered by moral agents because the addresser is a moral fellow. As shown, many treaties were supported by treaty bodies and therefore have an international addressee where claims can be made to – even if the nation-state in charge is not willing or not able to justify or answer the claims. Only a few are missing such a treaty institution for monitoring and claiming purposes. Sadly, these were the most fundamental legal cornerstones for a protection perspective as

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<sup>5</sup> The first subject of investigation was the racial discriminative apartheid system in South Africa and South Rhodesia.

<sup>6</sup> The treaty bodies apply their respective conventions in reviewing and commenting on the periodic reports that the state parties provide to them. Also some of the treaty bodies are authorized to deal with complaints they receive from individuals. Buergethal argues that the treaty bodies have played an important role for the strengthening of the international human rights system (Buergethal 2006: 791).

it applies to the International Covenant on Political and Civil Rights and the Genocide Convention. This lack of moral concerns regarding protection (and therefore too little protection in practice) shall be addressed by scrutinizing the moral/practice nexus in the next section in order to conceptualise ways of improving protection.

#### **4. Scrutinizing the moral-practice nexus**

Referring again to Andrew Linklater and Toni Erskine, the moral rights and cosmopolitan duties must be put into practice by processes of embedding. In first instance, there is no clear-cut way to achieve progress in that way. But according to the authors, integrating perspectives via community-building is central for embedding or embodying cosmopolitan ideas. At first abstract duties thereby become part of both, the community and the individual. After the end of the Cold War, the international community ran through such processes of deepened integration and inclusion, at least in some thematic areas. To some part this was the result of severe crises where some kind of common values were in danger as peace, human rights, international law or security. On the other hand, there were several attempts to broaden an understanding of the international communities as a society actively by some international commissions and reports. The next section will underline the importance of programmatic and practical developments to evolving ideas of protection and, moreover, to take the first steps towards its embeddedness.

##### *4.1 Programmatic development of the protection idea*

While the idea of protection was already envisaged in the core body of human rights, it was not until the 1990s that the idea gained public and political prominence on the international stage. After the Cold War ended unexpected dynamics within the United Nations started to grow and made it possible to establish the idea of protection in several key documents. We regard these developments as a crucial part of the moral-practice nexus of protection. All these programmatic developments were inspired by a perceived lack of practical measures to ensure protection. But given their content they cannot only be viewed as attempts of operationalisation, but have to be understood as representing the protection discourse after the end of the Cold War.

##### *4.1.1 Protection is mentioned – sometimes, somehow*

The first programmatic efforts of putting protection into practice can be identified soon after the end of the Cold War, when then-Secretary General Boutros Boutros-Ghali published his *Agenda for Peace* in 1992, in which he initiated a discussion regarding how the United Nations should be reorganised for dealing with future challenges in the post-bipolar world. While the *Agenda for Peace's* purpose was to indicate political and institutional reforms of the United Nations, the idea of protection

became visible occasionally throughout the document. Although Boutros-Ghali refers to a traditional understanding of state sovereignty, which will remain the “fundamental entity” of the international community (UNSG 1992: §10) he had a limited understanding of its scope:

“The foundation-stone of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.” (UNSG 1992: §17).

Furthermore, he underlines the importance of protecting minorities (UNSG 1992: 18) and stresses the need for respecting human rights, especially of targeted groups like women and children (Boutros-Ghali 1992: §81). This tendency became even stronger in his subsequent Agenda for Development in 1994 and his Agenda for Democratization in 1996. Although all three agendas are focused on the international community, Boutros-Ghali already makes explicit references to the individual dimension of protection, stating:

“Indeed, the notion that individual human rights can be protected by the international community is one of the great practical and intellectual achievements of international law.” (UNSG 1994: §190).

Pointing out individuality in international law marks a significant step forward, since international law is still often regarded as a law designed by and for states. Despite this fact Boutros-Ghali understands human rights as well as the protection of them as an expression of the individual right to be protected, which has to be considered as a landmark development.

Simultaneously to the publication of the Secretary’s agendas the UNDP published its 1994 Human Development Report, which introduced the idea of human security to the international community. Besides the UNSG’s agendas, human security was the main programmatic concept focusing on protection and bringing an individual perspective to international politics. While the concept is mostly acknowledged for combining security and development and is often criticised for its vagueness and omnipresence (Paris 2001: 92; Buzan 2004: 369, Christie 2010: 170)<sup>7</sup> one should not underestimate its importance for shaping security discourses in the 1990s towards the protection of individuals. The widely cited UNDP definition of human security included a broader and a more narrow understanding of the term:

“Human security can be said to have two main aspects. It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life-whether

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<sup>7</sup> In a widely cited article Roland Paris states: “Human security seems capable of supporting virtually any hypothesis – along with its opposite – depending on the prejudices and interests of the particular researcher.” (Paris 2001: 93).

in homes, in jobs or in communities. Such threats can exist at all levels of national income and development.” (UNDP 1994: 23).<sup>8</sup>

Similar to the discussion of the UNSG’s agendas, protection is barely mentioned explicitly within the human security discussions. However, developing a security concept that is inherently focused on the individual was a novelty and crucial catalyser for the practice of protection. Following former Canadian Foreign Minister Lloyd Axworthy human security means: “a growing recognition that the protection of people must be a principle concern.” (Axworthy 2001: 19).<sup>9</sup> Protection thus is an integral part of human security due to its individual perspective and the different notion of security. However, it was not the purpose of the concept to foster protection, but to show the linkages of developmental and security concerns.

#### 4.1.2 *Protection becomes rhetorically visible*

The 50<sup>th</sup> anniversary of the United Nations marked another break within the programmatic developments within a moral-practice nexus of protection. With the experience of a decade of peace operations including severe cases of failure – as in Somalia, Rwanda, Srebrenica or Kosovo – the discussions shifted towards a much more explicit mention of “protection” within United Nations’ discourses. Debates and reports around the millennium are characterized by mentioning protection more explicitly than previous attempts and by relating it not only to human rights, but more directly to people.

The report *We the people: The role of the United Nations in the 21<sup>st</sup> century*, which was presented to the international community by Secretary General Kofi Annan in preparation of the Millennium summit was clearly shaped by the salience of human security during the years of preparation. Nevertheless, the report was an important promoter of the protection idea and a new understanding of security, since it explicitly referred to the idea:

“[...] a new understanding of the concept of security is evolving. Once synonymous with the defence of territory from external attack, the requirements of security today have come to embrace the protection of communities and individuals from internal violence.” (UNSG 2000: 43).

While the report is still following the logic of human security, it is evidence for the growing idea of protection as a future key element of international security, which marked a shift towards a “people centred approach” (Chandler 2001). The international community discussed the recommendations made by Kofi Annan at the Millennium summit and unanimously adopted on 8 September 2000 the

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<sup>8</sup> Drawing on this differentiation the discussion on human security led to two separate “schools” loosely associated with the key proponents of a broader (Japanese) and a narrow (Canadian) version (Krause 2005).

<sup>9</sup> Axworthy’s quote is remarkable, because usually during this period protection is explicitly linked to human rights and not to a rather abstract protection of people.

United Nations Millennium Declaration (A/RES/55/2). Unsurprisingly the resolution did not refer to all the recommendations made by the Secretary General, although, the international community made reference to the idea of protection. It is, however, remarkable where in the document the recommendations were made. Instead of mentioning the idea in the section on Peace, Security and Disarmament they were enlisted under the umbrella of Protecting the Vulnerable stating:

“We will spare no effort to ensure that children and all civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies are given every assistance and protection so that they can resume normal life as soon as possible.” (UNGA 2000: §26).

Again the idea of protection is linked to humanitarian emergencies, but the international community makes a clear reference here to protecting civilians from gross human rights violations like genocide or armed conflict. By doing this the international community introduced the following discussions that shaped the agenda between the Millennium summit and the Millennium+5 summit in 2005.

#### 4.1.3 *Is it responsibility, or is it protection?*

Throughout the years between 2000 and 2005 a number of commissions were created for two reasons: furthering the ideas and recommendations from the Millennium summit and facing major crises of legitimacy in UN peace operations, most notably by NATO's intervention in Kosovo in 1999. As a consequence of the failures in Rwanda, Bosnia and especially Kosovo the *International Commission on Intervention and State Sovereignty* (ICISS) was initiated in 2000. Despite the previous programmatic discussions, it was the ICISS report that was solely concerned about the idea of protection. Usually viewed as a reaction to the failure of robust peacekeeping (Brunnee/Toope 2005), the commission had a broader scope. Discussions about internally displaced persons (IDP) by special representative Francis M. Deng already mentioned the term “sovereignty as responsibility” (Deng et al 1996) during the midst of the 1990s. The work of the commission was shaped by the programmatic developments throughout the 1990s and the commission was aware of it (Thakur/Weiss 2009). The report of the commission was submitted in September 2001, but due to the events of 9/11 it was largely ignored. The ICISS report associated protection with the principles of humanitarian intervention (Bellamy 2009: 112), and consequentially the focal point of the report was not so much defining protection, than redefining sovereignty:

“The Commission is of the view that the debate about intervention for human protection purposes should focus not on ‘the right to intervene’ but on ‘the responsibility to protect.’” (ICISS 2001: 17).

The report develops an understanding of protection based on three different conflict phases and thus sees a responsibility to prevent, a responsibility to react and a responsibility to rebuild.<sup>10</sup> Most importantly the report, following Francis Deng, formulates a new understanding of “sovereignty as responsibility”. Sovereignty as responsibility means that states bear a primary responsibility to protect their people otherwise the international community would exercise this responsibility (ICISS 2001: 69). Two implications can be drawn from the ICISS report: First, the importance of protection is enhanced. While we clearly see the ICISS in the context of a longer ongoing development of the protection idea, it was ICISS’s effort to promote the idea that led to a broad and intensive debate as to whether there is a new norm in the making (Brunnee/Toop 2005; Bellamy 2005; Chandler 2004; Weiss 2004; Wheeler 2004). Second, the international community’s authority has expanded tremendously. Since the concept is mainly concerned about humanitarian intervention, the international community has the duty to use force in cases of severe human rights violations. For this, the commission developed its concept of the use of force based on six criteria drawn from just war theory.<sup>11</sup> By avoiding the term “humanitarian intervention” and instead focusing on a responsibility of states to protect its people, the concept acknowledged the controversies on humanitarian interventions and tried to develop an alternative concept. The canonization and remarkable success of the concept is omnipresent (Bellamy 2010), however, for the purpose of the paper its importance cannot be limited to developing the *Responsibility to Protect* (R2P). The ICISS report was the programmatic concept that clearly focused on protection and the discussion that was triggered by it went far beyond the topic of humanitarian interventionism.

Although in the early aftermath of publication the ICISS report triggered only low attention, the concept started to diffuse in academia and politics. Most importantly it was picked up by the High Level Panel on Threats, Challenges and Change, which was designated in 2003 in the forefront of the Millennium+5 summit.<sup>12</sup> One main reason for the panel’s endorsement of the R2P was the personal continuity of Gareth Evans, who co-chaired the ICISS and also became a member of the high level panel. The report of the panel “A more secure world: Our shared responsibility” was critically acclaimed, sometimes said to be Kofi Annan’s best legacy: “Its combined political and analytical significance exceeds that of any other of the ‘Blue Ribbon’ panels established in the last 30 years.” (Prins 2005: 374). The report’s aim was to prepare the world summit 2005 and it thus includes thoughts on the future of collective security in the 21<sup>st</sup> century, organised crime, disarmament and recommendations for strengthening the institutional capacities of the United Nations. However, the report was the first key document by the UN referring to the ICISS concept in the report:

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<sup>10</sup> By these interrelated responsibilities one can see a conception of protection throughout the different stages of conflict that goes back to the Agenda for Peace.

<sup>11</sup> For a detailed discussion of the commission’s concept on the use of force see Bellamy 2008; Macfarlane/Thielking/Weiss 2004.

<sup>12</sup> The report by the Panel on United Nations Peace Operations under the auspices of Algerian diplomat Lakdar Brahimi is not mentioned in the paper due to its focus on the operative level of peacekeeping. But the report is part of the protection discourses around the Millennium+5 summit.

“The Panel endorses the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large -scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.” (UN 2004: §55).

The high level panel follows the ICISS report in its understanding of a primary responsibility of the states and a subsequent responsibility of the international community. Furthermore, the high level panel also made recommendations to adopt criteria for the use of force that are quite similar to the ones of the ICISS report, stressing the right authority and the proportional use of means (UN 2004: §207).

Before the world summit was held in September 2005 Secretary General Kofi Annan submitted his report *In larger freedom: Towards development, security and human rights for all*, which was based upon the report of the high level panel. Protection plays an important part in the report and Annan argumentation followed the ICISS conception (Evans 2008: 46). But due to the different aims of the reports, the Secretary General used a more diplomatic language for promoting the idea of protection. The most important difference is that he split up the recommendations for the use of force and for the adoption of the R2P. The report picks up the human security concept and is thus structured along freedom from want, freedom from fear, freedom to live in dignity and finally a part on strengthening the United Nations. While recommendations for the use of force were made under the label “freedom from fear” the recommendation to adopt the principles of the R2P were explicitly stated in the section “freedom to live in dignity”: “We must also move towards embracing and acting on the “responsibility to protect” potential or actual victims of massive atrocities.” (UNSG 2005: §126).

The world summit 2005, which was designated to review the implementation of the Millennium Summit, discussed the recommendations made by the Secretary General and finally adopted the World Summit Outcome Document. The summit was shaped by heated debates about the adoption of the R2P and several states, especially from the South, were reluctant to it. As a result debates about a draft document went on throughout summer 2005 and it was not clear whether the R2P would find international acceptance formally. When the World Summit Outcome Document was finally adopted, the idea of protection was included. However, changes were made until the very last moment to guarantee consent and critics mourned about an “R2P lite” (Weiss 2007) in the aftermath. Protection was narrowed down by the international community in two distinctive ways: the use of force was regarded as political decision: “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis [...]” (UNGA 2005: §139) and the causes for the use of force were limited to four types of human rights violations: genocide, war crimes, ethnic cleansing and crimes

against humanity. However, for establishing the idea of protection the World Summit Outcome Document should not be underestimated:

“True, this was much less than had been envisaged by the ICISS, but it marked an important milestone in the normative development of international society and it pointed towards a weighty policy agenda [...]” (Bellamy 2008: 91).

While the concept of the responsibility to protect was maybe watered down by the international community, the idea of operationalizing protection was acknowledged and significantly strengthened by the outcome document.

The importance of the world summit’s consensus how to understand protection became clearer in 2009 when the Secretary General prepared a report *Implementing the Responsibility to Protect* (UNSG 2009), which was to be discussed at the 2009 General Assembly.<sup>13</sup> Ban Ki Moon directly refers to paragraph 138 and 139 as reason for the necessity of developing a coherent strategy by the United Nations to implement the responsibility to protect. While following the understanding of protection as defined by the outcome document the Secretary General developed a strategy based on three pillars, which he saw envisaged in the outcome document: First a responsibility of the state to protect, second, a responsibility of the international community to assist states in bearing their responsibility, and third a responsibility to timely and decisive response to gross human rights violations (UNSG 2009).

The word summit 2009 was the first time since 2005 that the international community discussed about the principles of protection on the highest level. The discussions were shaped by the ongoing appreciation of the concept in academia and civil society as well as by negative experiences like Darfur or positive ones like Kenya. While some of the former contested topics – especially the Security Council’s legitimacy and authority to authorize the use of force and the criteria on which decisions should be based – were continuously discussed without any clear progress, the general evaluation of the summit remains positive:

“What emerged was a clear commitment from the vast majority of member states [...] UN members from north and south were overwhelmingly positive about the doctrine.” (Global Centre 2009: 1).

Despite the broad support of a practice of protection ongoing discussions about the crisis in Darfur unfolded and the idea still suffers from weak implementation. In the respective Security Council debates on Darfur since 2003 nearly every speaker referred to the responsibility of the Sudanese government to protect its citizens, which underlines the shared perception of responsibility. However, while Western countries saw a breach of the Sudanese government’s responsibility and

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<sup>13</sup> For a discussion about the report see Chandler 2010; Serrano 2010; Welsh 2010.

strongly pointed to the responsibility of the international community, China argued with the need to support the Sudanese government to foster its duties (Debiel/Goede/Niemann 2009: 24).

So although the concept of the R2P established the idea of protection in the field of humanitarian intervention, the used language also perverted the underlying idea of protection:

“While the ICISS was right to be concerned about reducing the danger that states might abuse humanitarian justifications to legitimate unjust wars, it evidently should have paid more attention to the danger that responsibility to protect language could itself be abused by states keen to avoid assuming any responsibility for saving some of the worlds most vulnerable people” (Bellamy 2005: 53).

To sum up, why it may be still not be clear how protection can be guaranteed best and how it should be operationalised, by the World Summit Outcome Document the international community expressed its essential consensus to brining the protection idea into practice.

#### 4.2 *First Steps of a Practice of Protection?*

While the programmatic developments, although concerned with a failed practice of protection, refers to the ideational level, first steps of a practice of protection can be scrutinized already. We regard the practices of humanitarian intervention and international criminal justice as representing steps within the moral-practice nexus towards a new normative order about a practice of protection. Both developments are inseparably connected with the programmatic steps of the 1990s, but are more focused on the practice dimension. However, as the course of the paper shows, these are only first steps which were important precedents for the current dynamics of mainstreaming protection, we will discuss later.

##### 4.2.1 *Humanitarian Intervention<sup>14</sup> – Pushing Protection to the Extreme*

While we discovered important steps in the development of the idea of protection since 1945, the struggle between the superpowers in the Cold War led to a situation where the idea of protection could not be sufficiently put into practice. In conflicts like in Biafra (1967-1970) or Cambodia (1975-1979) the need for protection of human beings was fundamental.<sup>15</sup> However, in the Security Council

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<sup>14</sup> A Humanitarian Intervention is defined by Holzgrefe as “the threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own state citizens, without the permission of the state within whose territory force is applied” (Holzgrefe 2003: 18).

<sup>15</sup> During the Biafra conflict from 1967 to 1970, the Security Council refused to discuss the plight of civilians as it did not want to infringe Nigeria's sovereignty (Bonwick 2006: 272). When Pol Pot's Khmer Rouge killed about two million Cambodians between 1975 and 1979, the international community did nothing (Finnemore 2003: 77f.; Wheeler 2000: 78). When the Vietnamese finally intervened in Cambodia their justification that their invasion was aimed to protect the people in Cambodia was not accepted by the

a military intervention to protect foreigners from massive human rights violations was still portrayed as an outrageously perpetration of the existing rule of sovereignty in international relations.

Just at the end of the Cold War this situation changed. Within the first years after the cold war the Council authorised as many missions as in the previous decades. Next to the quantitative change there were also important qualitative changes concerning the task that UN Peace Operations were mandated to fulfil. Missions such as the UN Transition Assistance Group (UNTAG 1989/1990) in Namibia, the UN Transitional Authority in Cambodia (UNTAC 1992/1993) or the United Nations Operations in Mozambique (ONUMOZ 1992/1994) were characterised by duties and responsibilities such as the protection of civilians from human rights violations and the safeguard of democratic elections (Talentino 2005: 33; Paris 2003: 450). While most of the missions were launched in accordance with the respective governments, several interventions did not have the permission of the target states but were authorized by the Security Council.<sup>16</sup>

The new quality of UN conflict management became obvious after the Security Council not only answered the Iraqi invasion in Kuwait with the authorisation of a military intervention led by the USA, but also addressed the suffering of Iraqi civilians in the aftermath of the intervention by the adoption of Resolution 688. The Resolution provided the legal basis for the implementation of safe havens in Northern Iraq and was adopted against the will of Saddam Hussein's government. The success of saving strangers provided the ground for politicians like the former French secretary of state Roland Dumas, who called not only for a right but for a duty of intervention in cases of massive human rights violations (Wheeler 2000: 141). The idea of protection was reflected in several further Security Council resolutions which authorized the use of force for example in Iraq, Somalia, Rwanda, Bosnia or Haiti directly referred to the "further deterioration of the humanitarian situation" (S/RES/940, 31.07.1994) or "the widespread violations of international humanitarian law" (S/RES/794, 03.12.1992). The idea of active (and enforced) protection seemed to be in action after more than 40 years of normative development. The Security Council started to face the challenge of helping people affected by conflict to stay safe.

When the Independent International Commission on Kosovo Commission argued in 2000 that the NATO intervention was illegal, because it did not have prior approval from the UN Security Council, but that it was legitimate, because it addressed a humanitarian emergency that all realistic diplomatic channels had failed to address the idea of enforced protection seemed to be in full

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international community and Vietnam had to refer to the Article 51 of the UN Charter (UN Document S/PV.2109, 12.01.1979, para. 36).

<sup>16</sup> The enlarged activity of the Council also labelled as "new interventionism" (Mayall 1996; Stedmann 1992) was characterised by the use of humanitarian justifications for the use of force by the international community (Finnemore 1996 153).

affect.<sup>17</sup> The idea of helping strangers affected by conflict seemed not even to need authorisation by the Security Council but was legitimate due to the suffering of innocent civilians.

In retrospect it became apparent that the Kosovo intervention was not a starting point for a superior role of human rights in international relations but a rear up of a tendency which already began to decline after the failure of the UN to stop the genocide in Rwanda in 1994. This was followed closely by the failed peace operation in Somalia 1993 and the failure to prevent the genocidal massacres of Srebrenica in 1995 (Sutterlin 2003: 73). As a result of the experiences in the 1990s the ICISS developed its above mentioned concept of the R2P. This has to be understood as an expression not only of the programmatic developments within the United Nations, but also as a consequence of the failures and flaws of humanitarian interventionism, as shown in Rwanda and Kosovo.

After Kosovo the so labelled “new Interventionism” (Mayall 1996; Stedman 1992) ebbed away. While the protection politics of the Security Council were already highly selective during the 1990s after the Kosovo intervention even massive humanitarian crisis like in Darfur do not provoke an active enforcement to stop the genocidal crimes of the Sudanese government (Binder 2007; Boulden 2006). After the Cold War came to an end, the idea of protection seems only to have real consequences to some suffering under grave human rights violations while others crisis remained unaddressed.

#### 4.2.2 *Protection through criminal justice*

International criminal justice is distinctive, because it strengthened protection and responsibility from an individual perspective (Kamminga 2001). The idea of criminal justice, as it evolved after World War II, is based upon a dual relevance of both individual responsibility of perpetrators and protecting the individual as a victim of gross human rights violations.

Realizing protection through criminal justice came from the aftermath of Second World War when the idea emerged to hold the perpetrators of the war crimes personally accountable. As a consequence the international military tribunals in Nuremberg and Tokyo were installed by the allied powers. Specifically the Nuremberg trials and the prosecution of Nazi leaders was a seminal, historical moment in the history of criminal justice, which has to be considered as groundbreaking for the practice of protection. Although both tribunals are often regarded as a jointly way of prosecuting atrocities of the Second World War, in fact, they differed largely. Due to the control of Japanese territory by the US, continuations in politics and the missing withdrawal of the Emperor, and a more divided judgment, the Tokyo trials suffered from a lack of recognition (McGoldrick 2004: 21). Both trials developed a new legal framework for crimes against humanity and, through this, broadened the horizon of the traditional laws of Geneva and The Hague. Moreover, discussions around the

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<sup>17</sup> Bellamy argues that the rejection of the Russian draft resolution which condemned the intervention as unlawful reflected the growing consensus, that states have the moral right to intervene to save strangers in massive humanitarian crisis (Bellamy 2005: 34).

military tribunals led to the formulation of the above mentioned Genocide Convention in 1948. In article VI the Convention mentions the possibility of establishing an international tribunal for prosecuting genocide: "Persons charged with genocide [...] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal [...]". Thus, the military tribunals did not only for the first time realize the idea of protection through criminal justice, but they also had a tremendous influence on the institutional framework - which decades later led to the establishment of the International Criminal Court.

While the UN War Crimes Commission, which preceded the military tribunals, already made suggestions for a permanent court, it was the International Law Commission (ILC), mandated by the General Assembly in 1948, that developed the statute of a court as envisaged in the Genocide Convention (Schabas 2007: 8). But due to the bipolarity it was not until 1989 that the ILC re-activated its efforts to develop such a statute. While the ILC and a growing NGO community developed ideas for an International Criminal Court, the post-bipolar world order was challenged by the outbreak of the civil wars in Yugoslavia and Rwanda. Due to its commitments in the context of UN peacekeeping the international community decided to establish the ad-hoc tribunals for Yugoslavia in 1993 and Rwanda in 1994. While they were, on the one hand, a result of the ongoing activities of the ILC to conceptualize international criminal justice, the ad hoc tribunals, on the other hand, significantly shaped the design of the later ICC (Fehl 2004: 361; Schabas 2007: 13). Despite some similarities with the international military tribunals, the ad-hoc tribunals were a novelty in international politics (Schabas 2008). They were installed by and responsible to the UN Security Council, they represented the entire international community and fostered an individual perspective on gross human rights violations – both from a victim's and a perpetrator's perspective. However, their mandate and scope was limited, which only strengthened the supporters of a permanent international criminal court.

The ICC was established in 2002, after the Rome statute came legally into force. Despite the international military tribunals and the ad-hoc tribunals, the ICC has to be viewed as the cornerstone of a practice of protection that is based on legal justice and universal jurisdiction. According to the Rome statute the ICC has jurisdiction in the crimes of genocide, war crimes, crimes of aggression and crimes against humanity. Given its universal mandate, its permanent existence and its independent prosecutor, the ICC thus will be the future key actor in the practice of protection. The ICC deals with individual perpetrators, which is an important enlargement of an individual perspective on protection. Not only do victims have an individual right of protection, but individual perpetrators also have an individual responsibility to bear. Especially by defining the four crimes within the jurisdiction, the ICC directly refers to an understanding of protection, which centres the fundamental effort to help people to stay safe (Bonwick 2006: 271).

Despite the existence of the ICC, a number of hybrid tribunals have been installed since the end of the 1990s - most notably the Special Court for Sierra Leone in 2002 and the Extraordinary Chambers in the Courts of Cambodia in 2006. While the ICC is a subsidiary court, hybrid tribunals are

characterized by a cooperation of national and international jurisprudence (Knoops 2004: 537). Hybrid tribunals should therefore be regarded more as an addition and not a challenge to the system of international criminal justice represented by the ICC. The debates about referring the case of Darfur to the ICC or instead installing a hybrid court, an idea that was promoted by the US, shows the international community's awareness of the mandate of the ICC. And since the landmark UNSC resolution 1593, by which the situation in Darfur was referred to the ICC, was not vetoed by ICC opponents as the US or China, even opponents do not deny the existence of the ICC any longer.

International criminal justice became a key feature of the practice of protecting people in the 1990s and reflects a growing importance of moral responsibilities by individuals to ensure protection. However, international criminal justice also furthered the scope of protection by bringing an individual perspective into collective human rights violations like genocide and crimes against humanity.

## **5. First Steps of Mainstreaming Protection**

As the previous section could highlight the two decades following the end of the Cold War were shaped by significant programmatic and practical efforts to fill the moral-practice nexus of protection. As a consequence of these developments dynamics within the United Nations can be scrutinized that shows a tendency to further promote the idea of protection. In this section we want to highlight some core elements that play a decisive role for the current importance of protection in the international realm and may be explained best by the idea of mainstreaming protection. Again, we understand mainstreaming as the process of embedding a moral right in use into practice. Mainstreaming thus means the ongoing consideration of protection in a broad variety of policies and programmes. While there were already first steps of mainstreaming protection earlier, we state a new dynamic since the Millennium, which significantly differs from previous activities.

### *5.1 Thematic resolutions of the UNSC*

Starting in the 1990s the debates about protection were shaped by a number of particular topics which became topics of the agenda of the Security Council: civilians, children and women in armed conflict. In several landmark decisions the UNSC adopted thematic resolutions focusing solely on the protection of these groups. These thematic resolutions were based on several commonalities: All three targeted groups were subject of intensive discussions within the international community. International law and human rights offer legal frameworks for all targeted groups by respective conventions and the subsequent treaty bodies. The Secretary General is expected to publish regular reports on the ongoing efforts in promoting protection of the respective groups, the Security Council holds regularly thematic meetings focusing solely on one of the issues and most importantly these

meetings are open to all member states. They thus offer a rare possibility for deliberating Security Council topics without the usual restrictions. For establishing awareness about the necessity to mainstream protection these meetings play a tremendous part within the international community (Loges 2010).

### 5.1.1 *Protection of Civilians in Armed Conflict*

By far the broadest and best developed protection approach is concerned with the protection of civilians in armed conflict. Two reasons can be identified for this popularity: First, civilians are primarily the subject of international humanitarian law and a sound body of human rights is concerned how to protect them. Second, within the United Nations protecting civilians became popular, since it is a very broad and uncontested concept (Lie/de Carvalho 2009: 12). While first attempts to introduce the term “protection of civilians in armed conflict” were already made by Kofi Annan in his 1998 report *The causes of conflict and the promotion of durable peace and sustainable development in Africa* (UNSG 1998), it was his 1999 *Report on the protection of civilians in armed conflict* (S/1999/957) that led to the landmark UNSC resolution 1265. The resolution started a vibrant discussion within the Security Council and the international community including actors from civil society and humanitarian assistance (Schmid 2009: 360). Kofi Annan highlights two causes of current conflicts that have severe consequences for civilians in armed conflict, a lack of compliance on the growing human rights treaties body and an intentionally harmful and violating targeting of civilians (UNSG 1999a: 2). As requested by the Security Council the Secretary General also made concrete recommendations for measures the Security Council could adopt. Besides strengthening the legal protection, through compliance with and broadening of international humanitarian law, Annan also mentioned explicitly the Council’s responsibility to take care of the improvements and by this made references to the future formula of the R2P: “If a State is unable to fulfil its obligation, the international community has a responsibility to ensure that humanitarian aid is provided.” (UNSG 1999a: 14). The resolution inspired the ICISS report and established a now common routine of the Security Council to deal with the issue: “The prominence given to PoC [Protection of Civilians] in UN documents is symptomatic of a new awareness of protection issues within the international community.” (Vogt et al. 2008: 14). Also resolution 1674, one of the most important resolutions that underline the Council’s acceptance of the principles of the R2P, directly referred to the POC discussions:

“[The Security Council] Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” (S/RES/1674: 2).

Besides the discussions of POC by the Secretary General and the UNSC there are a number of other institutions involved and especially OCHA plays a lead role. In 2002 it submitted the first edition of its "Aide Memoire" to the UNSC<sup>18</sup>, which is designated to give the Council guiding principles regarding the protection of civilians: "The Council adopted the Aide Memoire as a practical guide for its consideration of protection of civilians issues and agreed to review and update its contents periodically [...]" (S/PRST/2009/1: 3). Besides a growing recognition of protecting civilians in peace operation mandates by the Security Council a number of humanitarian organisations contribute to an active debate regarding how to best define and ensure the protection of civilians in armed conflict (Bellamy/Williams 2010: 342).<sup>19</sup>

### 5.1.2 Protection of Children in Armed Conflict

Despite being considered throughout the discussions regarding the protection of civilians, there is also a growing importance of protecting children in armed conflict as an issue of mainstreaming protection. A number of institutions exist within the United Nations dealing with children's rights, most of all the United Nations Children's Fund (UNICEF) and the High Commissioner for Refugees (UNHCR). Children's rights were mentioned in the UDHR, and the covenants on Economic, Social, and Cultural Rights and on Civilian and Political Rights. The most notable human rights body on children, however, is the Convention on the Rights of the Child (CRC) which is still the only legally binding framework solely focused on children's rights. Despite the sound legal framework, protecting children remains an issue where "those who are supposed to do the job are the same claiming that the job is not done" (Ayissi 2002: 6). Civil wars in Liberia, Sierra Leone and elsewhere shifted the international attention to the two-sided situation of children being perpetrators and victims of cruelty and human rights violations at the same time. In 1996 Graça Machel submitted her report *Impact of Armed Conflict on Children (A/51/306)* to the General Assembly, which recommend the Security Council to mainstream child protection:

"[...] the Council should therefore be kept continually and fully aware of humanitarian concerns, including child specific concerns, in its actions to resolve conflicts, to keep or to enforce peace or to implement peace agreements." (UNGA 1996: 78).

The report also recommended establishing a Special Representative for Children and Armed Conflict, which was appointed in 1999 and since then the General Assembly has extend his/her mandate

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<sup>18</sup> Updates of the Aide Memoire were made in 2003 and recently in 2009.

<sup>19</sup> However, despite the different efforts there are criticisms pointing out the vagueness and lack of a common definition of protection (Schmid 2009), as well as the difficulties of authorising humanitarian agencies to provide protection beyond the scope of traditional impartial humanitarian assistance (Bellamy/Williams 2010: 354). As a result of these discussions proposals were made to establish a "Human Protection Council" besides the UNSC to deal with the encounter of military and humanitarian realm (Nasu 2009).

regularly. Close to the establishment of a Special Representative, protecting children also gained attention by the ratification of the Rome Statute and the ILO Convention 182 on eliminating the worst forms of child labour. These events were summed up by the landmark resolution 1261 of the UNSC, the resolution was shaped by the tenth anniversary of the date the Convention of the Rights of the Child came into force. Furthermore, resolution 1612 established a “monitoring and reporting mechanism” (MRM) and a respective Security Council Working Group as a consequence of the slow progress as it was documented by the annual reports of the UNSG (S/RES/1612: 1). As a consequence, a “shaming list” and country report system was established that should help to point out progress and reluctance to the protection of children. Although resolution 1612 intended to protect children from a broad variety of violations (including sexual violations, recruiting and use of child soldiers, denial of humanitarian access to children, attacks on schools, killing and maiming children) the country reports focused only on recruiting and using children as child soldiers. The current discussion of protecting children in armed conflict is significantly shaped by resolution 1882, which made considerable expansions of the scope of the UNSG’s country reports. They now include sexual violence in the context of armed conflict as a grave violation of children rights, which will be listed in the annexes to the UNSG’s reports.

### *5.1.3 Women, Peace and Security*

The protection of women in armed conflict is the third thematic issue that has a growing importance within the Security Council. Although discussions are focused mostly on the outstanding resolution 1325, since the 1970s the United Nations adopted a number of resolutions regarding the conditions women have to face in warfare (Bellamy/Williams 2010: 361). The seminal Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that came into force 1981 and the fourth World Conference on Women in Beijing 1995 played an important role for establishing awareness on the protection of women in armed conflict. While the discussion was mainly focusing on sexual violence in the last years, there are also a growing body of literature dealing with the consequences of women in peace operations and positive effects of women in Peacebuilding. As a consequence of debating gender and the construction of it, constructivist approaches highlight the framing processes and elements in IHL that led to equalizing women and civilians (Carpenter 2005: 303) or stressing “femininity” in IHL (Gardam/Charlesworth 2000: 159).

What distinguishes the growing importance of protecting women from other issues is the combination of protection and empowerment of women. Therefore, the accordant framework of the international community is also designated to promote equal rights, gender mainstreaming and promoting women’s rights, which are considered to be part of protecting women in conflict. It was the landmark resolution 1325, which introduced a gender perspective to the international community. The resolution focused not exclusively on women as potentially victims of violent

conflict, but also on the need of strengthening women's rights. It created a clear commitment of the Security Council to mainstream a gender perspective in all relevant decisions regarding conflict, which includes peace operations:

“[The Security Council] Expresses its willingness to incorporate a gender perspective into peacekeeping operations, and urges the Secretary-General to ensure that, where appropriate, field operations include a gender component.” (S/RES/1325: 2).

Since UN peacemaking was severely affected by atrocities and sexual exploitation of women in UN missions, as well as missions lacking a satisfying number of female troops, decision-makers, and head of missions (Williams/Bellamy 2010: 361), the issue gained special attention in the DPKO and guidelines for field operations were developed. The claims from resolution 1325 were further elaborated in subsequent resolutions, combining recommendations for dealing with women as victims of violence as well as promoting equal rights and a gender perspective. Most notably the Security Council adopted resolutions 1820 in June 2008 and resolution 1888 in September 2009, dealing with the consequences of sexual violence and stressing the importance to strengthen women's rights as a core part of protecting them in armed conflict. In October 2009 the Council tremendously strengthened resolution 1325 by resolution 1889, which was designated to initiate a follow-up to resolution 1325 and requests the UNSG to develop indicators for implementing resolution 1325. By doing this, the international community significantly strengthened the idea of protection of women in armed conflict.

## 5.2 *Protecting Civilians in the Context of UN Peacekeeping Operations*

Peace operations are an important tool for the management of armed conflicts and humanitarian crises. While early operations such as the UN Operation in the Congo (ONUC) and the UN Peacekeeping Force in Cyprus (UNFICYP) took on limited protection roles, it is now the norm for missions to be explicitly mandated for the protection of civilians (Bellamy/Hunt 2010: 9).

This development was especially encouraged by the failures of peacekeeping missions in the 1990s where UN troops were not able to protect civilians due to the absence of mandates in addition to sufficient human and materiel resources. The underlying concept of impartiality averted the temptation to take active measures to protect civilians (Barnett/Finnemore 2004: 133). Due to the experiences in the 1990s the *Brahimi Report* stresses in 2000 that Peacekeepers should be able to “silence a deadly source of force that is directed at UN troops or the people they are charged to protect” in Article 49. This development was already perceptible in 1999 when the Security Council has expressed its willingness to respond to situations where civilians are being targeted in its resolution 1265 (S/RES/1265, 17.09.1999). The resolution took an integral approach by calling states to ratify key human right treaties and work towards ending the culture of impunity by prosecuting those who are responsible for committing genocide, crimes against humanity and serious violations

of international humanitarian law (Bellamy/Williams 2010: 338). In April 2000 the resolution 1296 focused on operational matters to improve the protection of civilians by United Nations Peacekeepers (S/RES/1296, 19.04.2000). Among the most important was resolution 1674 in which the Council acknowledged that the deliberate targeting of civilians and other protected persons and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights laws in situations of armed conflict may constitute a threat to international peace and security. The Security Council further highlighted in the resolution that it would take appropriate steps in situations where it seems necessary (S/RES1674, 28.04.2006).

In 2009 the independent study *Protecting Civilians in the Context of UN Peace Keeping Operations* highlights three arguments why the protection of civilians is an indispensable feature of Peacekeeping Operations. Firstly it is argued that the safety and security of civilians is critical to the legitimacy and credibility of any peacekeeping missions. Secondly it is argued that the protection of civilians is a critical component for a sustainable political peace. Finally the study highlights the importance of protection of civilians by peacekeeping missions for the legitimacy and credibility of the entire United Nations system (Holt et al. 2009: 3f.). The study highlights the idea of protection as an overriding importance which is not only in the interest of the persons who should be protected but also of the United Nations system as a whole.

The study also discovers several shortcomings in the current practice of the protection of the civilian. Firstly it is highlighted that the planning committee that informs Security Council deliberations and peacekeeping mandates does not consistently take into consideration the nature of the threats to civilians. Secondly the Secretariat and peacekeeping missions do not have a clear understanding of the Council's intent regarding 'protection of civilians' mandates. Thirdly the study highlights that the confusion over the Council's intent is evident in the lack of policy guidance, planning and preparedness. Fourthly, it detects that the gaps in policy guidance, planning and preparedness fundamentally hamper the implementation of mandates to protect civilians by peacekeeping missions (Holt et al. 2009: 5-8).

### 5.3 *Agenda for Protection*

The idea of protection plays a significant role in the field of refugees which are under the most vulnerable people worldwide. The United Nations General Assembly already adopted on 14 December 1950 the resolution 428 which established the United Nations High Commissioner for Refugees (UNHCR). Already in the following year the Convention Relating to the Status of Refugees was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in Geneva. As noted in the Preamble the convention's purpose is to assure refugees the widest possible protection of their fundamental rights and freedoms. In the shadows of the Second World War the focus on refugee protection under the convention was on questions how to

integrate and resettle refugees in a new country (Kneebone 2006: 699). The 1951 Convention gave a voice and force to the rights of refugees for the first time. But it fails to say how states should put the protection of refugees into practice. As Feller argues the convention is clear in terms of rights but it is close to silent about whose responsibility it actually is to protect them (Feller 2006: 525).

On the 50<sup>th</sup> birthday of the convention the UNHCR launched a two year process of global consultations on international protection which was designed as a commitment to the principles of the convention and especially to stimulate thinking on new ways to ensure international protection. These global consultations paved the way for the *Agenda for Protection*,<sup>20</sup> which sets out concrete actions to strengthen the principle of protection (IOM 2003: 108) and which is framed against a background of human rights protection (Kneebone 2006: 702). The Agenda focuses the question how practical aspects of international protection can be improved and highlights that international protection is more than the promotion of legal rights. The Agenda points out that protection includes a complex of activities such as the improvement of states asylum procedures and the harmonization of these procedures among states. Furthermore the agenda takes an integrative approach by calling on states and intergovernmental organizations to examine the root causes of refugee movements, particularly armed conflict, and to devote greater resources in developing respect for human rights democratic values and good governance in refugee-producing countries and in supporting the work of the United Nations in conflict-prevention, conflict-resolution and peacekeeping. The idea of protection is thereby not only applied to refugees and their special situations. The Agenda for protection urges states to protect their citizens of human right violations and armed conflicts.

#### 5.4 Protection Cluster

There is a fourth area of international practice where some kind of “protection mainstreaming” already takes place: within the humanitarian system of the UN. According to Jan Egeland, then UN Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs, the handling of the situation in Sudan’s Darfur region in 2004 demonstrated a need for better coordination between the various organizations to help effectively. As a consequence, Egeland commissioned a study on the short-comings of the humanitarian system of the UN. Titled *Humanitarian Response Review*, a report was issued in 2005 that examined the accountability and performance of the international response system as well as the international preparedness and response capacity in humanitarian crises. One of its most urgent recommendations was the following: “The IASC should identify and assign lead organizations with responsibility at sectoral level, especially in relation to IDP protection and care and develop a cluster approach in all priority sectors” (UN 2005: 16). Hence, responsibility to improve coordination endeavours was directed to the Inter Agency Standing Committee (IASC)

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<sup>20</sup> The Agenda for Protection is a non-binding document adopted by UNHCR and States, providing an ambitious yet practical programme of action to improve the protection of refugees and asylum seekers around the world.

which itself was established in the early 1990s as an instrument and a platform for information.<sup>21</sup> In December 2005 an IASC working group presented the first version of a cluster approach to strengthen capacities and enhance the impact of humanitarian work. A few months later the IASC principals explicitly welcomed that cluster approach that led to intensified efforts of the working group. Finally, so-called “cluster leads” were presented as the basic idea of the cluster approach in an IASC guidance note from November 2006. Specific organisations should be assigned with responsibilities for particular sectors or areas of activity. Only four of these areas already had an organisation to actually lead efforts in some sector: FAO in agriculture, UNHCR regarding refugees, UNICEF regarding children and WFP in food. But in 2005, nine areas of humanitarian activity did lack such a leading organisation: nutrition, health, water/sanitation, emergency shelter as technical areas, camp coordination/mamangement, protection and early recovery as cross-cutting areas and logistics and emergency telecommunications as common service areas (IASC 2006: 3). Another conclusion from the report stated, that the establishment of the IASC was apparently not enough to advance coordination on the country level since its scope was limited to just a few NGOs and, moreover, to issues that were mostly within the UN system. So the IASC distinguished responsibilities on different levels: Whereas the global “cluster leads” coordinate the efforts of different agencies from the headquarters concerning standards and policy-setting, the building of response capacity and operational support, cluster leaders on a country level might differ in their sphere of activity or regarding their participants. It is up to the individual Humanitarian Coordinator on the ground to organise an effective cluster structure, in which specific aims (nutrition, health, protection etc.) are best coordinated. The IASC has released precise manuals for this task. To sum up, the cluster approach is aiming to ensure sufficient global capacity and predictable leadership, to deepen the concept of partnership between UN, IFRC and NGOs, to enhance accountability on the global and the country level and to improve strategic field-level coordination and prioritization (<http://oneresponse.info/Coordination/ClusterApproach>).

As mentioned above, the IASC drew attention to gaps in the protection performance of the humanitarian system altogether. A cross-cutting area of protection was lacking a central cluster, this lead to a response to protection crises appropriately. For the global level, the responsibility for protection was assigned to the United Nations High Commissioner for Refugees as the “provider of

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<sup>21</sup> Full members of the IASC are the Food and Agriculture Organization (FAO), the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the United Nations Development Program (UNDP), the United Nations Population Fund (UNFPA), the United Nations Human Settlements Programme (HABITAT), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children’s Fund (UNICEF), the World Food Programme (WFP) and the World Health Organization (WHO). Standing invitees of the IASC are the International Committee of the Red Cross (ICRC), the International Council of Voluntary Agencies (ICVA), the International Federation of Red Cross and Red Crescent Societies, the American Council for Voluntary International Action (InterAction), the International Organization for Migration (IOM), the Office of the High Commissioner for Human Rights, the Office of the Special Representative of the Secretary General on the Human Rights of Internally Displaced Persons, the Steering Committee for Humanitarian Response and the World Bank.

last resort” who has an operational as well as an advocacy role in protections issues. September 2005 saw the establishment of the Protection Cluster Working Group (PCWG)<sup>22</sup> to:

“facilitate a more predictable, accountable and effective response by humanitarian, human rights and development actors to protection concerns within the context of humanitarian action in complex, emergencies, disasters and other such situations” (PCWG 2007: 1).

Being mainly an idea at first, protection was put into rhetoric and practice gradually through standard setting and strategic planning of the PCWG. By dealing with the global and the country level alike, the guiding principles of the PCWG were the following commitments: to develop and apply a comprehensive and holistic view of protection, to promote rights-based and community-based approaches to protection, to support national authorities and transnational actors in their efforts for protection, to build complementarities and thereby avoid duplications or gaps and, finally, to develop “an approach by which all humanitarian actors share responsibility for ensuring that activities in each cluster and other areas of the humanitarian response are carried out with ‘a protection lens’” (PCWG 2009: 2). Particularly the last commitment corresponds with our protection perspective. To support a protection lens is a promising way of embedding protection as a moral right in use. Moreover, the PCWG explicitly refers to mainstreaming as an effective tool for putting protection in practice as their homepage shows. Here it is stated regarding “Mainstreaming protection”:

“Protection is not only the concern of the protection cluster; it is also a cross-cutting issue that should be integrated into the work of all aspects of humanitarian response. All humanitarian actors share a responsibility for ensuring that their activities do not lead to or perpetuate discrimination, abuse, violence, neglect or exploitation; they should promote and respect human rights and enhance protection. The Protection Cluster exercises a ‘*droit de regard*’ in this respect, meaning it has a role in ensuring that protection is integrated into the work of other clusters and sectors” (<http://oneresponse.info/GlobalClusters/Protection/Pages/The%20role%20of%20the%20PCWG.aspx>).

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<sup>22</sup> The PCWG is chaired by the United Nations High Commissioner for Refugees. Participants are: Office for the Coordination of Humanitarian Affairs, Office of the High Commissioner for Human Rights, United Nations Children’s Fund, United Nations Development Programme, United Nations Human Settlements Programme, United Nations Population Fund, United Nations Mine Action Service, United Nations Relief and Works Agency, World Food Programme, Office of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, International Organisation for Migration, Concern Worldwide, Danish Refugee Council, Human Rights Watch, Interaction, International Catholic Migration Commission, International Council of Voluntary Agencies, International Rescue Committee, Jesuit Refugee Service, Women’s Commission for Refugee Women and Children, Norwegian Refugee Council/Internal Displacement Monitoring Centre, Oxfam, Save the Children Alliance, Steering Committee for Humanitarian Response, Terre des Hommes, World Vision International. The International Committee of the Red Cross participates as an observer.

In the meantime, these protection clusters have been implemented at the global level as well as at the country level. In particular, these protection clusters on the ground show that the approach was adapted to local circumstances. In an area of enduring conflict like the Democratic Republic of the Congo, UNHCR and the peacekeeping operation MONUC shares jointly the lead for protection (Murthy 2007). In other countries, UNHCR is joined by organisations like NRC, UNICEF or OHCHR.

## **6. Conclusion**

The first and foremost conclusion of our considerations is: Protection is a right of individuals that can be claimed in legal as well as in moral terms. The suffering of foreign people, therefore, cannot be tolerated in any instance. Our argument was made in four steps: Firstly, we outlined the role protection has in international human rights law from the UN charter to the treaty bodies. Even if these specific covenants rarely focus on protection itself, most agreements had a strong protection component given their references to individuals and/or bodily harm. Therefore a right-based argument for protection can be made. Aside from that legal perspective, we concluded a lack of moral concern regarding the protection of distant strangers. Since we argued from the normative stance of Rainer Forst's 'right to justification', people claiming assistance, help or protection cannot be left unheard. At least, they are entitled to reason-giving and justifications. If their situation cannot be justified with acceptable reasons of reciprocity and generality their protection claims are legitimate and, therefore, ought not to be rejected by an addressee. Yet a sheer declaration of a moral right to protection will not necessarily put that right into practice – even if it is seen as universal. In terms of Toni Erskine and Andrew Linklater, cosmopolitan duties need to be embedded. Arguing from a context-sensitive perspective on ethics, moral duties may well emerge on a global scope but have to be actively brought into communities of belonging. In this regard we, secondly, identified first steps of community-building efforts on a global level. As an early example we acknowledged the 'Agenda for Peace' by Boutros Boutros-Ghali and the Human Development report on Human Security by UNDP. Both set the individual at the centre of security endeavours and added an ethical perspective by stressing the legal and moral responsibilities of different actors like nation-states, international organisations or the international community in this area. Sometime later, the ICISS reformulated the different layers of moral agency more pointedly in connecting the individual in need with an international responsibility to protect that has to be carried out by the Security Council or the international community as a whole. These rather programmatic efforts to embed protection were deeply intertwined with actual humanitarian catastrophes that the growing international moral community had to face. As the paragraphs on humanitarian intervention and international criminal law underline, moral arguments were in fact a motivation to engage at all in the protection of distant people but led to selectivity or inactivity as well. Therefore, we concluded,

that these attempts of community-building were simply not enough to put the moral right to protection into practice. A look at the dynamics within the UN, thirdly, showed remarkable evolving processes of embedding a cosmopolitan duty to protect that we have characterised as mainstreaming. The thematic meetings and resolutions of the Security Council on the protection of civilians, children and women, the improvements made in the consultation between the humanitarian and security/military arm of the UN and the cluster approach altogether established protection as a cross-cutting issue. The international community is apparently starting to consider 'protection' constantly and habitually in their politics and policies. Finally, what needs more exploration is the process of protection mainstreaming itself. Our examples indicate that embedding or mainstreaming takes place where different experiences, backgrounds and (organisational) cultures intersect. Claims, justifications and deliberation apparently need an arena to evolve which has to span from the individual/field-perspective to global/headquarter-sight. Further research has to analyse the circumstances in detail in order to help closing the protection gap.

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