Who Cares: The Limits of Responsibility in International Law

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*Isn’t the fulfilment of our duty towards our neighbour an expression of our*

*deepest desire? It very well may be.*

*In any case, why torture ourselves in order to hurt others*

Dag Hammarskjöld, *Markings*, 2006, 14

*Assenting to his possibility – why? Does he sacrifice himself for others* yet for his own sake – *in megalomania? Or does he realize himself for the sake of others? The difference is that between a monster and a man. “A new commandment I give unto you: That you love one another*.”

Dag Hammarskjöld, ibid, 69

Introduction

Dag Hammarskjöld was a deeply spiritual and caring man. His writings in his private diary, published posthumously as *Markings,* reflect the life of a man dedicated to self-sacrifice in service of others. This ‘spiritual memoir’ betrays the inner turmoil of such sacrifice and his dedication to faith.[[1]](#footnote-1) It represents the private thoughts of an individual who was committed to work for others. According to Hammarskjöld himself, he inherited “a belief that no life was more satisfactory than one of selfless service to your country – or humanity”[[2]](#footnote-2) And it was to humanity that Hammarskjöld dedicated himself. He was truly a “servant of peace”.[[3]](#footnote-3)

Hammarskjöld was, additionally, a responsible man both in private and in his public role. He believed fervently in ‘the moral sovereignty of the responsible individual’ as well as the importance of integrity and personal ethics.[[4]](#footnote-4) He believed in the independence and international responsibility of the international civil servant as well as the personal responsibility of the Secretary-General.[[5]](#footnote-5) He worked to develop the legal and political responsibilities of the UN Secretariat as well as that of the United Nations itself.[[6]](#footnote-6) But Hammarskjöld was not only concerned with these narrow concepts of political and legal responsibility, he was concerned also with the broader responsibilities of the international community, not only to states, but also individuals, particularly through the securing of peace and human rights. His work in developing the executive role of the United Nations contributed to many innovations in UN practice, such as UN diplomacy and peacekeeping as well as, ultimately, to the development of the concept of responsibility to protect. Hammarskjöld did not engage directly in his speeches and writings with the concept of responsibility but it is asserted that responsibility was at the heart of his personal and political philosophy.

This essay is focussed, in particular, on the importance of the concept of responsibility in international legal discourse. It will first analyse the traditional approach to responsibility and it’s purported ‘radical reconceptualization’ around the idea of objective state responsibility. The essay will then consider the recent rise of responsibility discourse in international law, focusing, in particular on the significance of responsibility to protect. It will be argued that responsibility to protect is best understood through the lens of existing responsibilities regimes in international law. Thereafter, drawing on insights from analyses of responsibilities within domestic law, in particular in relation to the notion of family responsibility, the essay will highlight the importance of prospective responsibilities and the question of what it means be responsible in the context of international relations. Finally, the essay suggest that one possible approach to strengthening responsibility in international law is to recognise the relational foundations of the concept of responsibility and relating this to the moral framework of the ethic of care.

2. Responsibility in International Law

*2.1 The Traditional Definition of International Responsibility*

The concept of responsibility is the subject of considerable historic and contemporary discourse across a range of disciplines, including philosophy, political science and law. Within legal discourse the concept of responsibility is most commonly bound up with the concept of liability. Thus, according to Peter Cane, ‘as a first reaction one might be tempted to say that “responsibility” is not a legal concept at all. “Liability” comes much more readily to the legal mind than “responsibility”.[[7]](#footnote-7) In this way, responsibility is perceived of as an historic notion of answerability for past events, deriving as it does from the Latin *respondeo* meaning I answer.[[8]](#footnote-8)

The linking of responsibility to historic liability is particularly apparent in international legal discourse. International law has long been criticised as lacking the necessary secondary rules to transform it from a system of rules into a fully functioning legal system.[[9]](#footnote-9) The development of the rules of state responsibility have been characterised, most notably by the International Law Commission when drafting its articles on State Responsibility, as an attempt to ‘define those rules which, in contradistinction to the “primary” rules may be described as “secondary”, inasmuch as they are aimed at determining the legal consequences of failure to fulfil obligations established by the “primary” rules. Only the “secondary” rules fall within the actual sphere of responsibility for internationally wrongful acts.’[[10]](#footnote-10) The criticism that international law lacks secondary rules has been addressed not only through the codification of the rules on state responsibility but also in relation to diplomatic protection, the responsibility of international organisations, as well as more specific projects on ‘liability’ for trans-boundary harm.[[11]](#footnote-11) Similarly, the development of new courts and tribunals has provided the institutional framework for the determination of responsibility in international law.[[12]](#footnote-12)

In a recently published analysis of *The Law of International Responsibility,* the authors highlight the many recent developments in international law concerning the entire field of international responsibility, which regulates not only states but also the broad range of actors encompassed within the international legal system,[[13]](#footnote-13) including, most notably international organizations[[14]](#footnote-14) and individuals.[[15]](#footnote-15) Accordingly, the book purports to examine ‘many aspects of international responsibility which may arise in a multifaceted legal system’.[[16]](#footnote-16) For the authors, generally speaking, international responsibility is co-extensive with liability, the word responsibility being a reflection of how the concept of liability is understood in non-English translations of liability. Thus, ‘these rules [of state responsibility] have been progressively developed by the [International Law Commission] under the English rubric of “liability”; in all other official languages of the United Nations they are covered under the same wording as the consequences of wrongful acts (eg *responsibilité’ responsabilidad*).’[[17]](#footnote-17)

*2.2 Responsibility and Legality: The Emergence of Objective Responsibility in International Law*

That having been said, it is important to recognize that the law on international responsibility has undergone significant development in recent years and now includes rules applying to liability for activities which are not prohibited under international law but which may entail special consequences both on the ground of prevention and of compensation’.[[18]](#footnote-18) In his opening chapter of *The Law of International Responsibility* defining responsibility in international law, Alain Pellet emphasizes the ‘objectivization of international responsibility’[[19]](#footnote-19) by questioning the traditional definition of responsibility which he considers has been subject to a ‘radical reconceptualization’[[20]](#footnote-20) through ‘the exclusion of damage as a condition for responsibility’.[[21]](#footnote-21) The resulting regime, while primarily directed at liability for injury, recognises that ‘responsibility can arise regardless of legal injury of any particular state’.[[22]](#footnote-22) The impact of this development cannot be underestimated. It potentially transforms the notion of responsibility from a private law analogy of rights and duties between individual states to a more structural process involving the responsibility of states, or other actors, to a larger groups of states or, more obviously, to the international community. As Koskenniemi puts it, ‘is the proper analogy with domestic private law or domestic public law?’[[23]](#footnote-23)

The potential transformation of the law of state responsibility from a purely private law model to a model that is capable of undertaking functions of a more public law nature has been commented upon by André Nollkaemper. For Nollkaemper, the traditional law of state responsibility is more concerned with protection of subjective rights than with illegality. Thus, ‘acts that transgress the legal power of a state, yet do not cause legal injury to another state, generally have not been treated as issues of international responsibility’.[[24]](#footnote-24) However, the removal of the requirement of injury, coupled with the recognition of the existence of *erga omnes* obligations and *jus cogens* norms, has opened up the possibility of a state invoking the responsibility of another state for a breach of an obligation owed to the international community as a whole.[[25]](#footnote-25) The development of state responsibility in relation to serious violations of peremptory norms of general international law is particularly important in this regard in that the law requires all states to cooperate to bring such breaches to an end and not to recognize as lawful a situation created by a serious breach.[[26]](#footnote-26) Nollkaemper concludes that:

The removal of the concept of legal injury, the recognition of the rights of all states to invoke responsibility in case of breached norms protecting the collective interest, and the formulation of obligations on all states to respond to a serious breach of peremptory norms, have added a stronger constitutional nature to the law of responsibility. This strengthens the organizational power of the law of responsibility, adds to its power to control illegal acts, and at the same time reflects and contributes to the recognition of public interest norms in international law.[[27]](#footnote-27)

The development of the law of international responsibility to include not only bilateralism but also to recognize community interests has given rise to serious debate about the unity of responsibility in international law. For Pellet, the unity of the notion of international responsibility cannot be re-established given the different foundations of the different forms of accountability in the international legal order. Nollkaemper, on the other hand, argues that international law does not distinguish between various types of responsibility, such as ‘contractual or tortuous responsibility, or between civil, criminal or other forms of public law responsibility’.[[28]](#footnote-28) Furthermore, for Nollkaemper, ‘the various forms of responsibility (strict liability, ordinary wrongs, wrongs arising out of serious breaches of peremptory norms) are subject to the same general principles of responsibility, and that they form a relatively coherent whole’.[[29]](#footnote-29) More importantly, for present purposes, it is submitted that what ensures the unity of analysis and understanding of responsibility in contemporary international law, is that it remains essentially historic and focused on the idea of breach. Pellet summarizes the position as follows:

The international law of responsibility has distanced itself from the ‘civil law’ model which previously characterized it, and not longer solely plays the role of a compensatory mechanism, to which it was for a long time confined. It is now also, and perhaps principally, a mechanism having as its function the condemnation of *breaches* by subjects of international law of their legal obligations and the restoration of international legality, respect for international law being a matter in which the international community as a whole has an interest.[[30]](#footnote-30)

3. Emerging Discourses of Responsibility in International Law – The Responsibility to Protect

*3.1 The Responsibility to Protect*

In differentiating between the extreme positions that ‘*all* responsibility exists in individuals state-to-state relationships’ and ‘the opposite view that *all* responsibility involves a breach of the objective legal order’,Koskenniemi has identified that ‘a more or less vaguely articulated moral cosmopolitanism has been an indissociable part of the 20th century academic international law‘[[31]](#footnote-31). This idea of moral cosmopolitanism has contributed to the increased assertion of broader notions of responsibility in international law. In June 2004, the notion of ‘shared responsibility’ was placed at the heart of the United Nations Secretary-General’s High Level Panel Report on Threats, Challenges and Change entitled ’A More Secure World: Our Shared Responsibility’[[32]](#footnote-32). Recent academic literature has sought to draw on the concept of ‘shared’ or ‘global’ responsibility in relation to discourse around a number of sub-fields of international law including, most notably, human rights.[[33]](#footnote-33) Arguably the most controversial example of this ‘rise of responsibility’ in recent years has revolved around the concept of responsibility to protect. This concept will provide the focus for the following section of this essay not only because of the controversy surrounding it, but also because the development of the concept can be traced back to the work of Dag Hammarskjöld in his exposition of the notion of international executive authority and is, accordingly, of particular importance to this volume.

The importance of the work of Dag Hammarskjöld to the development of the idea of responsibility to protect has been fully illustrated within the pages of this volume and elsewhere. In an address entitled ’Human Rights and the Work for Peace’ delivered to the Fiftieth Anniversary Dinner of the American Jewish Committee in April 1957, Hammarskjöld told his audience that:

The work for peace is basically a work for the most elementary of human rights: the right of everyone to security and to freedom from fear. We, therefore, recognize it as one of the first duties of a government to take measures in order to safeguard for its citizens this very right. But we also recognize it as an obligation for the emerging world community to assist governments in safeguarding this elementary human right without having to lock themselves behind the wall of arms.[[34]](#footnote-34)

Although Hammarskjöld did not refer directly to the concept of responsibility, it is asserted that inherent within this quote are two notions of responsibility: the notion of ’sovereignty as responsibility’, and the idea of the broader responsibility of the international community to assist governments in the fulfilment of their primary responsibility. These two principles constitute the two basic pillars of the concept of responsibility to protect.[[35]](#footnote-35)

It is worth noting Hammarskjöld’s use of the word ‘assisting’ in the quoted passage. Hammarskjöld did not envisage a role for the international community in intervening in states that were not securing the protection of their civilians but was asserting, rather, an ‘obligation’ on the international community, primarily through the United Nations to assist states in providing for the security and protection from fear of their populations. Hammarskjöld’s use of the words ‘duty’ and ‘obligation’ in this passage is also interesting. Although a firm believer in the rule of law, he was, however, conscious of the limits of international law, which he described elsewhere as embryonic and in need of significant strengthening.[[36]](#footnote-36) Nevertheless, in presenting the duty of governments and the obligation of the world community in such terms, he was asserting a putative rule of international law based around the responsibility of both governments and the international community to protect civilians. He recognised the difficulties in developing these new ‘rules’ of international law based on peace and human rights. Indeed, he acknowledged that the endeavour ‘may seem hopeless’.[[37]](#footnote-37) Nevertheless, he was certain about the need to assert the law of the future arguing that ‘it would be treason to the future not to state the law simply because of the difficulties of the present’.[[38]](#footnote-38) The obvious question concerns the extent to which international law has managed to live up to Hammarskjöld’s expectations

The concept of responsibility to protect was formally proposed in the Report of the International Commission on Intervention and State Sovereignty in 2001.[[39]](#footnote-39) It has been the subject of considerable academic and practical debate since then. It has been strongly endorsed in a number of subsequent reports and international instruments[[40]](#footnote-40) and has arguably moved from the status of an idea to an operational process. However, recent experience in Libya and Syria have called into question both its conceptual significance and its practical relevance. More importantly for the present discussion, the legal status of the concept remains unsettled. In particular, the assertion by Gareth Evans, that the responsibility to protect might ultimately become a rule of customary international law seems remote.

*3.2 The Normative Status of Responsibility to Protect*

One of the most useful analyses of the normative status of responsibility to protect is provided by Carsten Stahn. Stahn has suggested that the idea of shared responsibility for the protection of civilians can be described in five propositions each of which enjoys different levels of support. These are, first, that ‘the host state has a duty to protect civilians on its territory’; secondly, that ‘states failing the duty to protect have a weak sovereignty defence’; thirdly, that ‘foreign entities may intervene non-forcibly’; fourthly that ‘foreign states may intervene forcibly’; and finally ‘that foreign entities have a positive duty to act’.[[41]](#footnote-41) Stahn makes clear that each of these propositions can be seen on a sliding scale of acceptance with the greatest support around the first proposition and the least, if any, around the last.

It is submitted that the idea of ‘responsibility’ that is at the heart of this analysis is primarily one concerning liability responsibility and the extent of permitted responses to a breach of the primary responsibility of the host state to protect civilians on its territory. This primary duty, referred to as ‘sovereignty as responsibility’, will be considered later in this essay. Stahn’s remaining propositions constitute examples of possible countermeasures in response to a breach of that primary duty to protect. The legal basis for such countermeasures is contained in Article 54 of the Draft Articles on State Responsibility, which provides that states other than an injured state may take lawful countermeasures against a breaching state to ensure cessation of the breach. This right to take countermeasures is directly linked to Article 48 paragraph 1 of the Articles discussed earlier.

If understood in this way the argument about the normative status of responsibility to protect could be considered as a reframing of the debate about the existence, or otherwise, of state responsibility for international crimes.[[42]](#footnote-42) This is supported by the decision in the World Summit Outcome to limit the ambit of the responsibility to protect to four situations involving genocide, crimes against humanity, ethnic cleansing and war crimes, which constitute both crimes subject to individual criminal responsibility, and, for the most part, *jus cogens* norms. It is further supported by the direct linkage in the discourse of responsibility to protect between breach of the primary duty of protection and the jurisdiction of the International Criminal Court in respect of the individual criminal responsibility of state officials who are accused of committing the relevant crimes.[[43]](#footnote-43)

This understanding of responsibility to protect as an example of liability responsibility is well illustrated by the example of the international response to the Libyan situation in the summer and autumn of 2011. It is apparent that even in relation to the “commonly accepted proposition” of the responsible state attending to the needs and protection of its citizens, Libya has been allowed, over many years, to ignore their obligations under international law in relation to human rights protection and indeed in relation to their engagement in criminal activities directed against their citizens.[[44]](#footnote-44) The Gaddafi regime could not, ultimately rely on the sovereignty defence and yet the sovereignty of Libya remains intact and is cited as the primary justification for the cessation of UN action in Libya, in spite of questions being raised as to the activities of Transitional National Council forces dealing with detained Gaddafi loyalists. The ‘intervention’ in Libya was dependent upon a UN Security Council resolution – a good thing one might say – as opposed to unilateral military action. But what led the UNSC to back the necessary resolution? Was it the need to protect the citizens of Benghazi? Yes to some extent, but it also depended on the support of the key regional body, the Arab League, as well as the almost depraved level of rhetoric from Gaddafi himself who threatened to hunt down like dogs those who opposed him and to wipe them out. Crucially the result of intervention was nothing more than a holding to account of Gaddafi and his supporters. This was, in effect, the ultimate form of liability responsibility for the crimes of the Gaddafi regime, with the individual criminal responsibility of the key member of that regime being pursued under the rubric of international criminal law.

An alternative understanding of the meaning of responsibility within responsibility to protect is provided by Ann Orford. According to Orford, responsibility to protect should best be understood as ‘a form of law that confers powers “of a public or official nature” and that allocates jurisdiction’.[[45]](#footnote-45) Thus the ‘responsibility’ element of responsibility to protect becomes a question of public law relating to the allocation of responsibility between different actors. In making this argument, Orford draws directly on Hart’s distinction between law that confer powers and law that impose duties, as well as on Nollkaemper’s constitutionalization analysis referred to earlier in this essay to conclude that: ‘The vocabulary of “responsibility” works here as a language for conferring authority and allocating powers rather than as a language for imposing obligations and commanding obedience’[[46]](#footnote-46)

Orford’s analysis is to be welcomed, not least on the basis that it recognises Hammarskjöld’s role in developing the powers of international executive action under the UN Charter and based on Articles 97-101 of the UN Charter.[[47]](#footnote-47) For Orford, the development of international executive action by the United Nations occurred in practice during the process of decolonisation and beyond but without the normative framework that the responsibility to protect now provides.[[48]](#footnote-48) Building on the works of Thomas Hobbes and Carl Schmitt, Orford argues that the conceptual foundation for this new authority is not to be found in any framework of responsible behaviour but is, rather, grounded on the capacity to guarantee security and protection. While she recognises and details the authoritarian potential of the turn to protection, she argues, from a more optimistic perspective, that regarding responsibility to protect as the basis for international executive action provides a lens through which to assess and control the practice of international executive action.[[49]](#footnote-49)

Unfortunately, the recent experience of attempts by the international community to deal with repeated attacks on civilian populations and the apparently unrestrained commission of war crimes and crimes against humanity in Syria by Syrian government authorities appears entirely to have undermined the concept of responsibility to protect. Like Libya, Syria has been allowed for many decades to ignore its human rights obligations.[[50]](#footnote-50) In the face of massive human rights violations, the failure of the UN Security Council to pass a resolution supporting a military intervention against, or even a resolution condemning the actions of the Syrian government appears to undermine the whole focus of responsibility to protect.[[51]](#footnote-51) It certainly goes against the claims of many that the introduction of responsibility to protect would avoid situations akin to Rwanda, Srebrenica and Kosovo arising in the future where the international community had to sit back and watch atrocities taking place without being able to do anything about it. To be sure, regarding the responsibility to protect as a mechanism for the allocation of responsibilities strengthens the claim of the United Nations to involve itself in the dispute. However, without the required institutional power to operationalize the responsibility to protect and overcome the sovereignty claims of Syria, it is questionable how responsible the responsibility to protect is.

Furthermore, the notion of responsibility in the context of both Libya and Syria appears increasingly complex and gives rise to conflicting responsibilities. In terms of the possibility of intervention, to prevent genocide, crimes against humanity, ethnic cleansing or war crimes, any sense of there being a ‘responsibility’ is wholly undermined by the legal prohibition against intervention, except where authorized by the United Nations Security Council. In the case of Libya, many factors rather fortuitously came together to bring about the passing of Resolution 1373, which ‘legalised’ the NATO led intervention in that state. However, drawing on the assertions made above, it is at least questionable whether the primary motivation for NATO’s intervention in Libya constituted an example of the prospective shared responsibility of the international community to protect Libyan nationals. It was, instead, an example of retrospective liability responsibility designed to punish (and ultimately to depose) the Gaddafi regime. In the case of Syria, the effect of the failure of the Security Council to pass a resolution authorizing intervention was to ensure that the *legal* responsibility on states and other international actors was *not* to intervene, even in the face of substantial human rights violations taking place against the civilian populations of parts of Syria. To this extent it might reasonably be argued that international law, far from providing a normative framework for the development of responsibility to protect, in fact constitutes a significant barrier to the implementation of the concept.

So where does this leave broader the notion of responsibility in international law? In a trenchant critique of the concept of responsibility in his book *Law and Irresponsibility: On the legitimation of human suffering* Scott Veitch argues that far from providing for responsible behaviour, law generally, and international law in particular, legitimates human suffering. In what is an extremely challenging and uncomfortable analysis, Veitch cites a range of examples of where international law legitimates human suffering, including, for example, the sanctions regime, as well as the failure of international law to deal with gross violations of human rights. The use of force in international law is capable of providing great misery and even in the aftermath of the “successful” Libyan intervention, the cost to human life remains unclear. The examples of Iraq and Afghanistan provide two recent examples of the suffering caused by arguably ‘responsible behaviour’. On the other hand, the failure to intervene in Syria has arguably caused greater suffering than intervention would have done. Thus, the idea of responsibility has, at best, failed to provide any answers; at worst, it has proliferated suffering, particularly in the decolonised world.

For Veitch the concept of responsibility is a concept that has no core meaning and indeed is fragmented and always has been so. Each invocation of responsibility involves particular forms and functions that are not subject to philosophical inquiry and which are subject to manipulation. Thus Veitch argues that ‘far from organising responsibility, legal institutions are centrally involved in organising irresponsibility’.[[52]](#footnote-52) He continues:

In order to understand the asymmetries between suffering and the ability to establish responsibility for it, we must understand how these very ‘technologies of responsibility’ themselves, as part of the broader social forms of power, also provide some of the major resources through which dispersals and disavowals of responsibility in society can occur. It is through analysing the complicitous relationship with these broader forms of power – in their diversions and distinctions, their priorities and interests – that we will come to a fuller understanding of the proliferation of irresponsibilities in the rise of responsibilities

4. Re-imagining Responsibility in International Law

In light of this analysis, it might seem prudent to assert simply that international law should steer clear of responsibilities discourse both generally and more specifically in relation to the responsibility to protect. On the contrary, however, it will be argued here that responsibilities discourse has an important role to play in the future development of international law, especially beyond the traditional focus of responsibility on liability. Rather than being concerned with the question of liability or the distribution of responsibilities in international law, the focus here will be on the role of law in the securing of responsible behaviour.

In pursuing the question of how to secure responsible behaviour, many scholars are willing to look beyond the admittedly substantial empirical evidence that states only act in rational self-interest, to look to the possibilities for states and the international community to take responsibility for the well-being of others. Communitarian scholars, such as Amitai Ezioni, look to the shared norms and social values of communities, including the international community of states.[[53]](#footnote-53) This is taken a stage further by scholars concerned with the notion of solidarity, including Ronald St J Macdonald[[54]](#footnote-54) and Karel Wellens[[55]](#footnote-55) who argue that solidarity is a fundamental principle of cooperation in international law “which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states”.[[56]](#footnote-56) This is further developed by Laurence Boisson de Chazournes who defines solidarity as ‘a form of help given by some actors to other actors on order to assist the latter ...to recover from a critical situation’,[[57]](#footnote-57) and asserts that solidarity and responsibility to protect can be regarded as ‘matched notions’[[58]](#footnote-58) that are intertwined. Indeed she asserts that ‘the notion of responsibility to protect … [can] be considered as one of the forms that international solidarity can take.’[[59]](#footnote-59) However, even if solidarity can properly be regarded as a structural principle of international law,[[60]](#footnote-60) it is not yet itself a positive obligation of international law but rather, a moral obligation.[[61]](#footnote-61) Accordingly it adds little to the sense of there being a legal obligations on states either to act in solidarity with one another or to act responsibly to one another.

Of course many positive rules of international law are aimed at securing responsible behaviour in international relations, for example through the development of human rights, humanitarian law, international environmental law, and international criminal law. On the other hand, the practice of international law remains firmly state-centric, having at its core the notion of state sovereignty.[[62]](#footnote-62) This has always caused difficulty in international law in relation to the balancing of state interests with both the interests of individual human beings as well as the interests of the international community. In this final section it will be argued, first, that international law has an important role in determining and delimiting prospective or future responsibilities, especially those relating to the protection and security of human beings. Secondly, it will be argued that the moral theory of ethics of care should be considered as a possible basis for the development of international law relating to the future responsibilities of the international community.

*4.1 The Importance of Prospective Responsibility*

In a seminal article published in 1967, H.L.A. Hart proposed a taxonomy of responsibilities which included not only liability responsibility, which he considered as being ‘the primary sense of responsibility’, but also other senses of responsibility, ‘variously derived from this primary sense of liability-responsibility’, which include role responsibility, causal responsibility and capacity responsibility.[[63]](#footnote-63) Causal and capacity responsibility are directly linked to liability responsibility insofar as the idea of being ‘”responsible for” should be used to signify causal connection and the possession of these capacities outside contexts of blame and punishment’[[64]](#footnote-64) or, in other words, outside the context merely of liability, but inherently linked to it. However, the notion of role responsibility seems to suggest something separate from liability responsibility. It suggests that responsibility can be prospective as well as historical. Thus, according to Hart, ‘whenever a person occupies a distinctive place or office in a social organisation to which specific duties are attached to provide for the welfare of others, or to advance in some specific way the aims or purposes of the organisation, he is properly said to be responsible for the performance of those duties or doing what is necessary to fulfil them’[[65]](#footnote-65) The problem here is in distinguishing specific legal duties, linked to a particular role, from what might be considered as the ‘responsibilities’ of a particular role. Hart indicates that he thinks, though he is admittedly not sure, that what distinguishes duties from responsibilities is that the latter are ‘duties of a relatively complex or extensive kind, defining a “sphere of responsibility” requiring the exercise of discretion and care usually over a protracted period of time’[[66]](#footnote-66)

In the context of the present discussion it seems clear that Orford’s analysis of responsibility to protect as a mechanism for the conferring authority and allocating powers is a prime example of role responsibility insofar as it assigns responsibilities[[67]](#footnote-67) between states, who are ‘responsible for their own citizens and populations’ and the United Nations, ‘which is responsible for the international community as a whole’.[[68]](#footnote-68) As noted above, according to Orford, the determinant factor in terms of the securing of responsible behaviour is the ability to provide protection and security.[[69]](#footnote-69) For Hart, the mere delimitation of responsibilities appears to be sufficient to secure responsible behaviour in so far as a responsible person is one who takes his role seriously: Thus he asserts that:

A ‘responsible person,’ ‘behaving responsibly’ (not ‘irresponsibly’) require for their elucidation a reference to role-responsibility. A responsible person is one who is disposed to take his duties seriously; to think about them, and to make serious efforts to fulfil them. To behave responsibly is to behave as a man would who took his duties in this serious way.[[70]](#footnote-70)

But is this enough? Cane too draws a distinction between historic responsibility covering ideas such as answerability, accountability and liability, and what he refers to as ‘prospective responsibility’ which encompasses the ‘roles and tasks [that] look to the future, and establish obligations and duties’[[71]](#footnote-71) Cane considers prospective responsibility to be a much more important element in the concept of legal responsibility than does Hart. For Hart, prospective responsibility is merely a mechanism leading to the attribution of primary responsibility, that is, liability. Thus, he concludes his article by noting that: ‘Role responsibility is perhaps less directly derivable from the primary sense of liability-responsibility: the connection is that the occupant of a role is contingently responsible in the primary sense if he fails to fulfil the duties which define his role and which are his responsibilities’[[72]](#footnote-72) Cane is critical of this limited understanding of the importance of prospective responsibility.

Cane argues that prospective responsibilities can be divided into two categories – ‘productive’ responsibilities that are directed to the production of good outcomes and ‘preventive’ responsibilities directed to the prevention of bad ones. This latter category might also include ‘protective’ responsibilities.[[73]](#footnote-73) In relation to all of these categories of prospective responsibilities, Cane accepts that ‘the idea of responsibility does not provide a complete conceptual apparatus for analysing the law’s productive, preventive and protective functions.’ Concepts such as rights and powers are also required.[[74]](#footnote-74) Nevertheless, he argues that this does not mean that prospective responsibility is less valuable than historic responsibility. Indeed, he makes clear that historic responsibility is, in fact dependent upon prospective responsibility.[[75]](#footnote-75)

According to Cane, the failure of responsibility narratives that focus primarily on historic responsibility is that they pay insufficient attention to the law-making institutions and, thus, ‘the facilitation of cooperative and productive behaviour’.[[76]](#footnote-76) As he notes: ‘A well-functioning and successful legal system is one in which non-compliance with prospective responsibilities, and hence occasions for the imposition of historic responsibility, are minimised.’ Crucially, for Cane, it is at the level of law-making that the lack of responsibility is most apparent. As Cane notes of law generally, ‘[responsibility] is rarely an “active ingredient” in legal rules’.[[77]](#footnote-77) This is particularly the case in relation to international law especially in relation to the idea of sovereignty as responsibility.

*4.2 Sovereignty as Responsibility as an Example of Prospective Responsibility?*

The International Commission on Intervention and State Sovereignty recognised the importance of state sovereignty to narratives of international law when first proposing the concept of responsibility to protect. It sought to reformulate sovereignty into two concepts revolving around the idea of responsibility noting that

‘sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship.’

If this is correct then, as suggested above in relation to the Libyan intervention, sovereignty as responsibility may constitute the primary rule of international law, or at least its component parts may collectively constitute primary rules of international law, from which liability responsibility might flow. However, given the atrocities committed in Libya and Syria, as well as the many other human rights atrocities committed by governments against their citizens that occur around the world on a regular basis, it is questionable whether there is, indeed, any acceptance of this reformulation of sovereignty as responsibility. Indeed, far from supporting the idea of an existing or even emerging norm of sovereignty as responsibility, state practice around the concept of responsibility to protect appears significantly to limit the key foundational principle of sovereignty as responsibility. This is most clearly apparent from the wording of the World Summit Outcome in 2005. Paragraph 138 of that document, which has somewhat tersely been described by Gareth Evans, one of the foremost proponents of responsibility to protect, as ‘quite strong’[[78]](#footnote-78) far from endorsing the idea of sovereignty as responsibility, accepts a fundamentally more limited commitment in the following terms:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.[[79]](#footnote-79)

It is clear that states were unwilling to commit to anything more than responsibility to protect populations from the four listed crimes. Although the resolution refers to the prevention of these crimes, it is only genocide which clearly includes within its legal parameters, any form of duty to prevent. It is of course possible to argue that, although the World Summit Outcome takes the form of a General Assembly Resolution, it is, nevertheless, evidence of customary international law and is therefore sufficient to infer an obligation on states to prevent war crimes, ethnic cleansing and crimes against humanity as well. In terms of there being an obligation on states not to commit these crimes, the International Court of Justice accepted in the *Bosnian Genocide Case* that ‘the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide [by states]’.[[80]](#footnote-80) The logic of this analysis should equally apply to the other three crimes, if a legal obligation to prevent can be established. But this is not the key issue for the purposes of this present argument. The key issue concerns the fact that the approval of the concept of sovereignty as responsibility accepted by states in the World Summit Outcome falls significantly short of the notion of sovereignty as responsibility envisaged in the Report of the International Commission on Intervention and State Sovereignty, which had been proposed a mere four years earlier.

To be sure, the concept of sovereignty as responsibility had been mooted before the invocation of the concept by the ICISS. Francis Deng and his colleagues at the Brookings Institute had developed the concept during the 1990s and produced a book *Sovereignty as Responsibility: Conflict Management in Africa*[[81]](#footnote-81) in 1996. It would seem from the ICISS report that much of their thinking was significantly influenced by this work. However the ideas in the book not only appear aspirational, they in fact conflict with existing and long established rules of international law. Thus, the assertion that ‘sovereignty carries with it responsibilities for the population’ may be generally recognised but the assertion arising therefrom that ‘it is from this acceptance that the legitimacy of a government derives’ is of questionable validity in international law.[[82]](#footnote-82) Similarly, the assertion that ‘the validity of sovereignty must be judged by reasonable standards of how much of the population is represented, marginalized or excluded’[[83]](#footnote-83) is not supported by existing rules of international law dealing with matters of statehood and recognition (although some developments towards such a position are visible). Finally, by way of example, the call for the dominant power or authority in a state to ‘assume responsibilities that transcend parochialism or exclusive national interests ... and serves the broader interests of the community’[[84]](#footnote-84) would be better secured by the development of relevant laws supporting such an aspiration.

This is not to suggest that international law is incapable of responding to calls such as these, it is merely to point out, in support of Cane’s assertion, that insufficient attention has been paid so far to the development of prospective responsibilities in international law that support the notion of sovereignty as responsibility. Of course one might argue that the combination of primary and secondary rules in any legal system, including international law, may be enough to secure responsible behaviour. Thus, the primary rules provide for the desired outcome while the law of secondary rules provide for liability in the event of a breach or, where appropriate, non-breach, whether through act or omission. The combination of the two serves as a facilitator of responsible behaviour, or at least behaviour that is in compliance with the legally agreed expectations. Merely signing up to international agreements may be enough. Additionally, a range of ‘responsibility mechanisms’ already exists in international law. These include diplomatic methods, such as negotiation – states holding each other to account by reference to legal obligations often before the violations occur - as well as other, more centrally organised governance mechanisms, such as for example, the various human rights bodies associated with the monitoring of the implementation of the key human rights conventions.

A particularly important development in this regard is the creation of the system of universal periodic review. According to the UN website:

The Universal Periodic Review is one of the key elements of the new Council which reminds States of their responsibility to fully respect and implement all human rights and fundamental freedoms. The ultimate aim of this new mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur.[[85]](#footnote-85)

Although directed to addressing human rights violations, the process is prospective insofar as it does not wait for such violations to occur. Accordingly one way to address the perceived limitations of responsibility and, in particular, prospective responsibility in the context of international law is through the further development of governance mechanisms such as these.

Nevertheless, although many rules and processes exist in international law aimed at ensuring a minimum level of human rights protection in all states, it remains the case that international law is extremely limited in the ways in which it can ensure that states comply with human rights norms, even the most basic norms of security and protection from fear enunciated by Hammarskjöld. Ten years after the creation of the responsibility to protect, the central component of sovereignty as responsibility has yet to be fully analysed and theorised. This essay is, to some extent, a call for work on the concept of sovereignty as responsibility to become a much more important and focussed discourse in international law.

*4.3 Responsibility and the Ethic of Care*

As has been noted above, the concept of responsibility is not unique to international law. It is a concept that has been explored and analysed in many different areas of domestic law, most notably in the realm of criminal law, but increasingly in other areas of domestic law that are, in a similar way to international law, seeking to move away from the idea that responsibility is best understood as a form of liability. One area in which this has been most apparent has been in the area of family law.

Family scholars have, for some time, sought to re-direct the law from a “rights” based model to one based on responsibility and connection.[[86]](#footnote-86) Thus, according to Katherine Bartlett writing in the context of parenthood, ‘the law should focus on parental responsibility rather than reciprocal “rights” and express a view of parenthood based on the cycle of gift rather than the cycle of exchange’.[[87]](#footnote-87) The positive conception of responsibility as involving both obligation and freedom to act is highlighted by Bartlett in the following way:

“[R]esponsibility means more than fulfilling some precise set of pre-defined role requirements. A responsible person cares not only about doing “her part” (or “his part”) in a limited sense, but also about outcome, and is disposed toward expanding or perhaps re-defining the demands of role as necessary to accomplish that outcome. Responsibility, in other words, is a self-enlarging, open-ended commitment on behalf of another. [[88]](#footnote-88)

Scholars concerned with the concept of responsibility in family law, have highlighted the importance of considering responsibility as a relational concept. Thus, according to Bartlett, ‘[a]lthough some notions of social responsibility have associated duty or obligation with individual autonomy, responsibility ... is grounded in relationship rather than autonomy. Responsibility describes a certain type of connection that persons may experience in their relationships with one another.’[[89]](#footnote-89) Drawing on Cane’s insight that responsibility ‘concerns the three-way relationship between agents, “victims” and the wider community’,[[90]](#footnote-90) three leading family law scholars have, more recently argued that ‘there is much for the family lawyer to consider in an approach that sees responsibility as prospective, contextual and relational’. Taking this a stage further, these and other family law scholars have pointed to the importance of care as an element in the conceptualization of responsibility within families.[[91]](#footnote-91) Bringing the idea of responsibility as a relational concept together with the importance of the caring, Jo Bridgeman has suggested that ‘we can understand, conceptualize and develop a discourse of responsibility in relationships and within family life through a conceptual framework of relational responsibilities, derived from the feminist ethic of care.’[[92]](#footnote-92) It is submitted that if the use of the concept of responsibility in international law is to move beyond the historic notion of liability and is to be more productive than merely existing as a tool for the development of prospective responsibility mechanisms then international lawyers might draw on these insights from domestic law and pay more attention to the relational aspects of responsibility.

The moral theory of ethic of care developed as a feminist alternative to dominant moral approaches, such as Kantian moral theory, utilitarianism or virtue ethics.[[93]](#footnote-93) For Carol Gilligan, the ethic of care signifies ‘the different voice of women’ as does ‘the tie between relationship and responsibility’.[[94]](#footnote-94) More controversially, for Sara Ruddick, the idea of caring is best symbolized through ‘the work of mothering’.[[95]](#footnote-95) It is centrally focused on ‘the compelling moral salience of attending to and meeting the needs of particular others for whom we take responsibility’.[[96]](#footnote-96) Furthermore, according to Held,

Among the characteristics of the ethics of care is its view of persons as rational and interdependent ... the ethics of care sees persons as enmeshed in relations with others. It pays attention primarily to relations between persons, valuing especially caring relationships ... but the ethics of care is not limited to such contexts. It understands how our ties to various social groups and our historic embededness are also part of what makes us who we are.

The theory has often been conceptualized as an alternative to ethics of justice, although it has been highlighted that both justice (dealing with questions of equality and inequality) and care (dealing with questions of attachment and detachment) can arise in any context.[[97]](#footnote-97) The theory has been criticized by some feminists on the grounds that ‘the ethics of care amounts to a resuscitation of traditional stereotypes of women, stereotypes which are used to rationalize the subordination of women’.[[98]](#footnote-98) On the other hand, as Clement makes clear, while use of the ethic of care can be ‘distorted … we can look for the moral and political possibilities implicit in the ethic of care while actively addressing its dangers’.

The idea of ethic of care being limited to motherhood and, indeed, to women has been gradually discarded, partially as a response to the feminist criticisms outlined above. Similarly, the focus of the ethic of care has moved away from the personal and parochial in order to address large-scale social or global problems.[[99]](#footnote-99) Thus, according to Held: ‘[the ethic of care] has been developed as a moral theory relevant not only to the so-called private realms of family and friendship but to medical practice, law, political life, the organization of society, war and international relations’.[[100]](#footnote-100) Similarly, Fiona Robinson, has argued that the values of a ‘critical ethics of care’ are relevant not only to small-scale or existing personal attachments but to all levels of social relations and, thus, to international or global relations’[[101]](#footnote-101) Building on this assertion, Robinson has applied the ethic of care directly to humanitarian intervention.[[102]](#footnote-102) More recently, Daniel Engster although rather surprisingly not referring directly to responsibility to protect, has provided an analysis of the relevance of ‘care theory’ to that concept and, in particular, the ‘residual responsibility’ of the international community to secure the rights of people within states that have failed in their primary duty to do so.[[103]](#footnote-103) Thus, he asserts that ‘[u]nder care theory, individuals and governments have a responsibility to provide resources and other forms of support to distant people when distant peoples and their governments are unable to support their survival, development and functioning by their own means.’[[104]](#footnote-104)

Of course it may be that proponents of the ethic of care expect too much of governments and their leaders. In setting up care and responsibility in this way, the suggestion is that there is a universal obligation on states to intervene, by whatever means possible, to provide for the survival, development and functioning of distant others. This does little to advance us beyond the narrow conceptualization of responsibility and, in particular, responsibility to protect as it is currently understood. Indeed, it is probably the case that, in its current state of development, it is unrealistic to expect the ethics of care to be taken seriously in international law discourse. Thus one response to this discourse is simply to assert that states are rational self-interested actors and to expect more of them is folly, as is asserted by Jack Goldsmith and Eric Posner, among many others.[[105]](#footnote-105) If this is right, then not only the ethic of care but also the concept of responsibility itself is truly limited in international law. On the other hand, it is clear that the notion of taking responsibility for others and the idea of caring for those in need underpinned the thinking of the developers of the responsibility to protect concept as it does many other scholars and practitioners within the realm of international law and international relations more generally. Most notably, for present purposes, it is clear that Dag Hammarskjöld cared. He cared about the plight of individuals in war-torn countries and was clear about the responsibility of the international community to help those in need, particularly those whose own government was unable to provide security and human rights.

Responsibility and the ethic of care are not the panacea to the world’s troubles. They cannot, and indeed, can never be seen as the basis of international legal obligations to intervene in every case of state failure to protect their citizens, not least because in many cases, the responsible thing to do might be not to intervene, particularly if this involves military intervention. Furthermore, as noted above, the ethic of care is not without its critics, nor indeed without its dangers. Specifically, the ethic of care, if misused, can be seen as paternalistic, if not imperialistic. It is therefore important in developing a discourse of responsibility and care that these dangers are identified and addressed in order to ensure that ‘morally admirable impulses to help are not naive and misplaced but do lead to effective care’.[[106]](#footnote-106) Nevertheless, it is asserted here that notions of responsibility and the ethic of care can provide a lens through which to further develop international law, particularly in the face of massive human rights atrocities and the violation of established international criminal law norms. From the perspective of the development of international law more specifically, regarding responsibility as a relational concept derived from the ethic of care, provides a framework for the further development of prospective responsibilities.

As well as being a relational concept, responsibility is also, as a result, multilayered. Thus, where no relationship exists between individuals or states, then responsibility can legitimately be considered to be lower than where a relationship is apparent. If we are properly to speak about responsibility in international law there are many questions that we must address. For example, what responsibilities do we in fact owe to distant others? What is the basis of those responsibilities? On what basis can those responsibilities be established in morality or, indeed, in law? What is the role of law in strengthening such responsibilities? In the case of the responsibility to protect, we should seek to move away from the idea of a single responsibility and consider in more depth specific responsibilities inherent in the concept. For example, does the responsibility of the international community actually mean the responsibility of a specific organisation such as the United Nation? What are the responsibilities of individual states in this context? In particular, and in light of the experiences in Libya and Syria, what are the responsibilities, if any, of the permanent five members of the United Nations Security Council? It is not intended here to address these specific questions. Rather the intention is to highlight the limits of the present responsibilities discourse and call for further analysis of what actually is meant by the concept of responsibility in international law.

5. Conclusion

The concept of responsibility is at the heart of international law. However, it is generally regarded as a mode of securing liability or as a mechanism for the allocation of responsibilities within international law. This essay, by analysing the emerging discourses of responsibility in international law, in particular the concept of responsibility to protect, has imagined a broader role for the concept of responsibility in international law. Drawing on discourses in family law and feminist scholarship around the ethic of care, it has been argued that if responsibility is to move from the historic to the prospective, in terms of securing responsible behaviour, more attention should be paid to the role of responsibility as a relational concept giving rise to various levels of responsibility. These levels of responsibility can be strengthened by the development of prospective obligations within the law but also depend on moral commitment.

Throughout the essay, reference has been made to the ideas and work of Dag Hammarskjöld. It is asserted that Hammarskjöld would have recognised the significant developments in international legal discourse since 1961 and would have been pleased by the continued relevance and importance of the United Nations as an actor within international relations. Nevertheless, he would be disappointed at how little had changed in relation to the specific development of the responsibilities of both states to their own citizens and the residual responsibility of the international community for the protection of citizens not protected by their own governments. The purpose of the essay has been to highlight the limitations of the concept of responsibility in international law as well as the need for further development of a number of elements of responsibilities discourse in international law, particularly in relation to the attempt to reconfigure sovereignty from ‘sovereignty as control’ to ‘sovereignty as responsibility’ and the conceptualization and development of the broader responsibility of the international community to support the survival, development and basic functioning of all citizens. It is asserted that one way to address these limitations is to analyse and conceptualize responsibility in international law is through the lens of the ethic of care.

1. Hammarskjöld’s faith was a faith in God but his faith was a tolerant faith. When asked once why the UN Charter did not contain any reference to God, he drew attention to the Preamble of the Charter ‘where the nations express their ”faith in the dignity and worth of the human person” and pledge themselves “to practice tolerance and live together in peace with one another as good neighbours”’ He felt sure that this was a recognition of ‘the will of God: that we should love our neighbours as ourselves” From Address before the Second Assembly of the World Council of Churches, Evanston, Illinois, 20 August 1954 in H. Wilder Foote (ed.), *The Servant of Peace Dag Hammarskjöld* (1962), 56. [↑](#footnote-ref-1)
2. Contribution by Hammarskjöld to an Edward Murrow radio programme shortly after his taking on the role of United Nations Secretary-General. Quoted by W H Auden in the Foreword to *Markings* (2006) vii [↑](#footnote-ref-2)
3. W. Foote, *The Servant of Peace Dag Hammarskjöld*  (1962) [↑](#footnote-ref-3)
4. D. Hammarskjöld, ‘International Service’ in Wilder Foote, ibid, 80 at 83. [↑](#footnote-ref-4)
5. D. Hammarskjöld, ‘The International Civil Servant in Law and in Fact’ in Wilder Foote, ibid, 329 at 331-337 [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Ibid [↑](#footnote-ref-7)
8. J R Lucas, *Responsibility* (1993), 5 [↑](#footnote-ref-8)
9. See, in particular H L A Hart, *The Concept of Law* 1961, 95 and Chapter X [↑](#footnote-ref-9)
10. Report of the ILC, 32nd Session, *ILC Yearbook 1980*, Vol II92), 27 (para 23) [↑](#footnote-ref-10)
11. J Crawford, A Pellet and S Olleson, *The Law of International Responsibility* (2010), v [↑](#footnote-ref-11)
12. See, for example, S Linton and F.K. Tiba, ‘The International Judge in an Age of Multiple International Courts and Tribunals’ 9 *Chicago Journal of International Law* 407 (2009) [↑](#footnote-ref-12)
13. J Crawford et al, ibid [↑](#footnote-ref-13)
14. ILC Draft Articles on the ‘Responsibility of International Organizations’ Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 87).

    See http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\_11\_2011.pdf. See also Pellet, ‘The Definition of Responsibility in International Law’ in J. Crawford et al, ibid, 3, at 6-7. [↑](#footnote-ref-14)
15. The question of responsibility of individuals is largely, if not exclusively dealt with as a matter of international criminal law. See A. Pellet, ibid, 7-8. See also A. Cassese, *International Criminal Law* (2008); R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2010) [↑](#footnote-ref-15)
16. Crawford et al, ibid, v [↑](#footnote-ref-16)
17. Ibid, vi [↑](#footnote-ref-17)
18. Ibid, v-vi [↑](#footnote-ref-18)
19. A. Pellet, ‘The Definition of Responsibility in International Law’ in J. Crawford et al, ibid, 3, at 8 [↑](#footnote-ref-19)
20. Ibid. [↑](#footnote-ref-20)
21. Ibid, 9 [↑](#footnote-ref-21)
22. A Nollkaemper, ‘Costitutionalization and the Unity of the Law of International Responsibility’ 16 Indiana Journal of Global Legal Studies 535 (2009), 546. [↑](#footnote-ref-22)
23. M. Koskenniemi, Doctrines of State Responsibility’ in Crawford et al, 45 at 47. [↑](#footnote-ref-23)
24. Nollkaemper, ibid, 543 [↑](#footnote-ref-24)
25. See Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts 2001 which permits states other than an injured state to invoke the responsibility of another state but only where the obligation is owed to a group of states including the invoking state or where the obligation breached is owed to the international community as a whole. See also ILC Draft Articles on Responsibility of International Organisations 2009, Article 42 [↑](#footnote-ref-25)
26. Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts 2001. [↑](#footnote-ref-26)
27. Nollkaemper, ibid, 549 [↑](#footnote-ref-27)
28. Nollkaemper, ibid, 552-3 [↑](#footnote-ref-28)
29. Ibid, 553 [↑](#footnote-ref-29)
30. Pellet, ibid, 15 (italics added) [↑](#footnote-ref-30)
31. Koskenniemi, ibid, 48. [↑](#footnote-ref-31)
32. Available at www.un.org/secureworld/ [↑](#footnote-ref-32)
33. In addition to the numerous books and articles dealing with the responsibility to protect (see further below) See, also, A. Kuper, *Global Responsibilities: Who Must Deliver on Human Rights* (2005); M.E. Salmon, *Global Responsibility for Human Rights*(2007). [↑](#footnote-ref-33)
34. D. Hammarskjöld, ‘Human Rights and the Work for Peace’ in Wilder Foote, ibid, 126 at 127 [↑](#footnote-ref-34)
35. See further below. [↑](#footnote-ref-35)
36. D. Hammarskjöld, ‘The Development of a Constitutional Framework for International Cooperation’ in Wilder Foote, ibid, 251 [↑](#footnote-ref-36)
37. Hammarskjöld, ‘Human Rights and the Work for Peace, ibid, 127 [↑](#footnote-ref-37)
38. Ibid [↑](#footnote-ref-38)
39. http://responsibilitytoprotect.org/ICISS%20Report.pdf [↑](#footnote-ref-39)
40. See [↑](#footnote-ref-40)
41. Stahn, ibid, 118-120 [↑](#footnote-ref-41)
42. For a critical review of the controversy over state responsibility for international crimes see Koskenniemi, ibid, 48-9. [↑](#footnote-ref-42)
43. See United Nations Security Council resolution 1970 of 26 february 2011. [↑](#footnote-ref-43)
44. See, for example, the response of the United Nations Human Rights Committee to the fourth periodic review submitted by Libya (CCPR/C/LBY/4) on 10 May 2007 that was highly condemnatory of Libya’s repeated failure to implement its previous recommendations.( CCPR/C/LBY/CO/4 of 17 November 2007) [↑](#footnote-ref-44)
45. Orford, ibid, 25 [↑](#footnote-ref-45)
46. Ibid, 26. [↑](#footnote-ref-46)
47. See Introduction above. [↑](#footnote-ref-47)
48. Thus, according to Orford: ‘Over time, the practices of executive action initiated by Hammarskjöld have led to the creation of a new form of administrative rule. As that form of rule began to be consolidated and centralised, it began to seem necessary to develop a full conceptualisation of the normative basis for executive authority ... The responsibility to protect concept can best be understood as offering a normative grounding to the practices of international executive action that were initiated in the era of decolonisation and that have been gradually expanding ever since.’ Ibid, 10-12. [↑](#footnote-ref-48)
49. Ibid, 210. [↑](#footnote-ref-49)
50. See the response of the United Nations Human Rights Committee which condemned the failure by Syria to implement its previous recommendations on the occasion of the submission by Syria of its third periodic review to the HRC in 2004. See CCPR/CO/84/SYR of 9 August 2005. [↑](#footnote-ref-50)
51. On 4 October 2011 the UN Security Council voted on draft resolution S/2011/612. The draft was vetoed by China and the Russian Federation woted against the resolution and Brazil, India, Lebanon and South Africa abstained. On 4 February 2012 the UN Security Council voted on draft resolution S/2012/277. The resolution, which took place at the time of the attack on the city of Homs was vetoed by China and Russian Federation. All of the other members of the Security Council voted in favour of the resolution. On 19 July 2012, the UN Security Council voted on draft resolution S/2012/538. The draft resolution was vetoed by China and Russian Federation with Pakistan and South Africa abstaining. [↑](#footnote-ref-51)
52. S. Veitch *Law and Irresponsibility*: *On the Legitimation of Human Suffering* (2007) 1. [↑](#footnote-ref-52)
53. Etzioni, A. (1995) *New Communitarian Thinking: Persons, Virtues, Institutions and Communities* (Charlottesville: University Press of Virginia) [↑](#footnote-ref-53)
54. St J Macdonald R. (1996) ‘Solidarity in the Practice and Discourse of Public International Law’ 8 *Pace International Law Review* 259. [↑](#footnote-ref-54)
55. Wellens K, (2005) ‘Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations’, in: R. St. J. Macdonald/D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 775 and Wellens K, (2010) ‘Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections’ in R. Wolfrum and C. Kojima (eds.), *Solidarity: A Structural Principle of International Law* (Berlin: Springer-Verlag) [↑](#footnote-ref-55)
56. St J. Macdonald, ibid, 259-60 [↑](#footnote-ref-56)
57. Boisson de Chazournes L, ‘Responsibility to protect: reflecting solidarity?’ In Wolfrum R & Kojima C. ibid, 93 at 94. [↑](#footnote-ref-57)
58. Ibid, 102. [↑](#footnote-ref-58)
59. Ibid, [↑](#footnote-ref-59)
60. See UN General Assembly Resolutions 56/ 151 of 19 December 2001 and 57/213 of 18 December 2002. [↑](#footnote-ref-60)
61. Boisson de Chazournes, 95 [↑](#footnote-ref-61)
62. See *Immunities Case*, especially Trinidade’s dissenting opinion [↑](#footnote-ref-62)
63. H.L.A. Hart ‘Varieties of Responsibility’ 83 LQR 346, 363 [↑](#footnote-ref-63)
64. Ibid. [↑](#footnote-ref-64)
65. Ibid, 347 [↑](#footnote-ref-65)
66. Ibid [↑](#footnote-ref-66)
67. D. Miller ‘The Responsibility to Protect Human Rights’ in L.H. Meyer, *Legitimacy, Justice and Public International Law* (2009) 232 at 235. [↑](#footnote-ref-67)
68. Orford, ibid, 27 [↑](#footnote-ref-68)
69. See above, p ? [↑](#footnote-ref-69)
70. Ibid, p. 348 [↑](#footnote-ref-70)
71. Cane, p. 31 [↑](#footnote-ref-71)
72. Ibid, 364. [↑](#footnote-ref-72)
73. Cane, ibid, 31-2 [↑](#footnote-ref-73)
74. Iibid, p. 34 [↑](#footnote-ref-74)
75. Cane notes that ‘there is an important sense in which historic legal responsibility is parasitic on and subsidiary to prospective legal responsibility. Historic responsibility enforces, reinforces and underwrites prospective responsibility. Historic responsibility is not an end in itself, but only a means to the various ends the law seeks to further by creating and imposing prospective responsibilities. Historic responsibility, we might say, is the pathological form of legal responsibility.’ Ibid, 35 [↑](#footnote-ref-75)
76. Ibid, 35. Compare rhetoric of compliance theorists in international law [↑](#footnote-ref-76)
77. Cane, ibid, 1 [↑](#footnote-ref-77)
78. Evans, G. ‘From Humanitarian Intervention to The Responsibility to Protect’ 24 Wisconsin International Law Journal 703 (2006) at 715 [↑](#footnote-ref-78)
79. G.A. Res. 60/1, U.N. Doc. A/RES/60/I (Oct. 24, 2005). [↑](#footnote-ref-79)
80. *Application of the Convention for the Prevention and Punishment of the Crimes of Genocide, Merits (Bosnia-Herzegovina v Serbia and Montenegro), Judgement,* 26 February 2007, para. 166. [↑](#footnote-ref-80)
81. The notable exception here is F. Deng, S Kimaro, T. Lyons, D Rothchild, and W Zartman, *Sovereignty as responsibility: Conflict Management in Africa* (1996). [↑](#footnote-ref-81)
82. Deng et al, ibid, 32 [↑](#footnote-ref-82)
83. [↑](#footnote-ref-83)
84. Ibid, 33 [↑](#footnote-ref-84)
85. See http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx [↑](#footnote-ref-85)
86. See, for example, Katherine Bartlett, “Re-Expressing Parenthood” 98 *Yale Law Journal* 293 (1988) [↑](#footnote-ref-86)
87. Ibid, 295. According to Bartlett, the parents as exchange model is premised on the notion that ‘Parents have rights with respect to their children in exchange for the performance of their parental responsibilities’ She continues: ‘As in the case with other individual rights claims, parents asserting righte to children tend to emphasise what is due to them rather than what they owe to others ... The rights generated within this view stress entitlement over responsibility, autonomy over connectedness, self over others.’ 297-8. [↑](#footnote-ref-87)
88. Ibid, 199. [↑](#footnote-ref-88)
89. Ibid, 299. [↑](#footnote-ref-89)
90. Cane, ibid, 56. [↑](#footnote-ref-90)
91. See, for example, Eekelaar ‘Are Parents Morally Obliged to Care for their Children?’ 11 *Oxford Journal of Legal* Studies 340(1991), Tronto, J. *Moral Boundaries: The Political Argument for an Ethic of Care* (1993), Maclean M and Eeckelaar *The Parental Obligation* (1997), Fineman M. *The Autonomy Myth: A Theory of Dependency* (2004), Bridgeman, J, Keating H, & Lind, C *Responsibility, Law and the Family* (2008), Lind, C, Keating, H & Bridgeman, J *Taking Responsibility, Law and the Changing Family* (2011) [↑](#footnote-ref-91)
92. Bridgeman J, ‘Parental responsibility, Responsible Parenting and Legal Regulation’ in Bridgeman et al, ibid, 234 at 243. [↑](#footnote-ref-92)
93. V. Held, *The Ethics of Care* (2006) 3-4. [↑](#footnote-ref-93)
94. C. Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (1982), 173 [↑](#footnote-ref-94)
95. S. Ruddick, *Maternal Thinking: Towards a Politics of Peace* (1989) [↑](#footnote-ref-95)
96. Held, ibid, 10 [↑](#footnote-ref-96)
97. G. Clement *Care, Autonomy, and Justice: Feminism and the Ethics of Care* (1996) 1. Quoting Carol Gilligan who notes that: ‘All human relationships, public and private, can be characterized *both* in terms of equality and in terms of attachment, and … both inequality and detachment constitute grounds for moral concern. Since everyone is vulnerable both to oppression and to abandonment, two moral visions – one of justice and one of care – recur in human experience. The moral injunctions, not to act unfairly toward others, and not to turn away from someone in need, capture these different concerns. C. Gilligan, ‘Moral Orientation and Moral Development’ in E. Kittay and D. Meyers *Women and Moral Theory* (1987) 20. [↑](#footnote-ref-97)
98. Ibid, 6. [↑](#footnote-ref-98)
99. F. Robinson, *Globalizing Care: Ethics, Feminist Theory and International Relations* (1999) 2 [↑](#footnote-ref-99)
100. Clement, ibid, 9 [↑](#footnote-ref-100)
101. Robinson, ibid, 2 [↑](#footnote-ref-101)
102. Ibid, 142-6 [↑](#footnote-ref-102)
103. D Engster, *The Heart of Justice* (2007), 166. Engster moves beyond the feminist foundations of ethic of care and has conceptualized ethic of care or ‘care theory’ as a reciprocal concept built upon shared needs and experiences. Thus, according to Engster: ‘We all make (or at least have made or will make) claims on others to help us survive, develop and function. No one could survive, develop or function during infancy, grave illness, disability, frail old age, or other periods of particular hardship without the care of other human beings. We all further depend on the care of others to sustain the social network that we require to survive and function. In attempting to justify our claims for care on others, we have all implicitly appealed to the general moral principle that capable individuals should care for individuals in need when they are able to do so. Because we have all necessarily appealed to this moral principle, we may all be said to recognize it as valid; and if we all recognize this principle as valid, then we should – out of a sense of consistency and morality – recognize and respond to the claims of other individuals in need for care when we can help them. We behave hypocritically and inconsistently when we refuse to care for individuals whom we are capable of helping and violate our own implicit moral beliefs.’ [↑](#footnote-ref-103)
104. Ibid 171 [↑](#footnote-ref-104)
105. J. Goldsmith and E. Posner, *The Limits of International Law* (2005) [↑](#footnote-ref-105)
106. Held, ibid, 165 [↑](#footnote-ref-106)