14 Understanding the Responsibility to Protect: Textual Anomalies and Interpretative Challenges in the 2005 World Summit Outcome

Gábor Sulyok[*]

14.1 Introduction

The emergence of the responsibility to protect is generally considered a welcome development in international relations. The concept had originally been crafted by the International Commission on Intervention and State Sovereignty to reconceptualize the debate on humanitarian intervention and to marginalize the role of the ancient but controversial doctrine in state practice.[1] It was subsequently endorsed by the High-level Panel on Threats, Challenges and Change[2] and the United Nations Secretary-General.[3] The moment of official recognition came in September 2005, when Heads of State and Government of Members of the United Nations adopted by consensus the General Assembly resolution entitled '2005 World Summit Outcome'.[4] Paragraphs 138 and 139 of the document spell out the responsibility to protect:

> 138. 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

* Head of department, Senior research fellow, Hungarian Academy of Sciences, Centre for Social Sciences, Institute for Legal Studies; Associate professor, Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences. E-mail: Sulyok.Gabor@tk.mta.hu.

1 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001.

2 A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc. A/59/565, Paras. 201-203. *See also* The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus", 7-8 March 2005, AU Doc. Ext/EX.CL/2 (VII), at 6.

3 In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, 21 March 2005, UN Doc. A/59/2005, Para. 135, and Annex, Para. 7(b).

4 2005 World Summit Outcome, GA Res. 60/1, 16 September 2005.

> will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
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> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[5]

The appealing new concept rapidly became an established ideal and basis of reference for a wide range of actors in the international plane. Still, the apparent success story is slightly overshadowed, *inter alia*, by various theoretical issues that partly originate from the wording of the World Summit Outcome. The present study seeks to contribute to a better understanding of the responsibility to protect by identifying and examining textual anomalies and interpretative challenges in the description of the concept.[6] The investigation focuses on the quoted paragraphs of the World Summit Outcome, utilizes the conventional tools of interpretation, and is structured along the commonly applied division of the responsibility to protect.

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5 *Id.*, Paras. 138-139.

6 These issues had initially been exposed in an earlier paper, but were left unexamined due to thematic constraints. G. Sulyok, 'Delimitation of Humanitarian Intervention and the Responsibility to Protect: A Conceptual Approach', in V. Sancin and M. Kovič Dine (Eds.), *Responsibility to Protect in Theory and Practice*, GV Založba, Ljubljana, 2013, pp. 727-761.

14.2 Pillar One

From the three equally important, mutually reinforcing, independent and non-sequential pillars of the responsibility to protect, pillar one covers 'the protection responsibilities of the state'.[7] This pillar is described in the first three sentences of paragraph 138 of the World Summit Outcome. Though they seem to convey a message unmistakably clear, these sentences immediately pose at least two major interpretative challenges; both reside in the initial sentence of the paragraph, and both pervade the other two pillars, as well.

The first challenge concerns the scope of beneficiaries of pillar one. The text designates 'populations' as the recipients of measures taken by states in fulfilment of their primary responsibility to protect. 'Population' is a rather problematic term that can be found in the vocabularies of a variety of disciplines, such as biology, sociology or law. In social sciences, it is often regarded as an empirically existing, directly observable entity. However, 'population' is more of a theoretical construction, which offers a way to organize social observations by localizing the subjects of investigation in space and time.[8] Therefore, the term may have numerous layers of meaning even within the same discipline, and its scope may radically change with the context. These features also affect its usage in international law. Here 'population' is habitually associated with an essential conceptual element, a constituent part of 'state'. For example, the Montevideo Convention on the Rights and Duties of States provides that:

> The State as a person of international law should possess the following qualifications: *(a)* a permanent population; *(b)* a defined territory; *(c)* government; and *(d)* capacity to enter into relations with the other States.[9]

If 'population' is taken as a constituent part of 'state', the term must be used in singular, for a state can have one population only.[10] This population, along with the territory it

7 Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, UN Doc. A/63/677, Paras. 11-12.

8 B. Curtis, *The Politics of Population: State Formation, Statistics, and the Census of Canada, 1840-1875*, University of Toronto Press, Toronto, Buffalo, London, 2002, pp. 24, 26-27.

9 1933 Convention on Rights and Duties of States, 165 LNTS 19, Art. 1. These criteria largely draw on G. Jellinek, *Allgemeine Staatslehre*, 3. Aufl, Verlag von O. Häring, Berlin, 1914, pp. 394-434. *See also* M. Ganczer, *Állampolgárság és államutódlás (Nationality and State Succession)*, Dialóg Campus Kiadó, Budapest, Pécs, 2013, p. 9; T.D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents', 37(2) *Columbia Journal of Transnational Law* (1998-1999), pp. 403-457.

10 '[T]he State has one territory only, so it has only one people […]', H. Kelsen, *General Theory of Law and State*, Transaction Publishers, New Brunswick, London, 2006, p. 233. It would exceed the limits of this section to provide a detailed delimitation of 'population' and 'people'. Suffice it to note that, depending on the context, the two terms may or may not be synonymous with each other. In the quoted remark, they are interchangeable.

inhabits, forms the object of sovereignty, and encompasses every individual permanently settled at any given moment in the territory of a state – nationals, foreigners and stateless persons alike. The size of this community and its fluctuations bear no relevance.[11] But frequently 'population' has a more restricted scope, and stands for a mere fragment of the total inhabitants of a state. Examples are abundant. In a narrow sense, the term may refer to nomadic populations, minority populations, indigenous and tribal populations, populations of occupied territories, and so forth.

The World Summit Outcome declares that the bearer of responsibilities under pillar one is '[e]ach individual State'. This grammatical structure demands the use of singular, and the entire sentence is formulated accordingly. Such context is bound to draw attention to the plural use of 'population'. The implication that states have more than one population to protect leaves room for no less than four different interpretations as to the scope of beneficiaries of pillar one.

First, one should not automatically dismiss the possibility of a drafting error. Though detailed information on the creation of the World Summit Outcome is hard to obtain, it has become common knowledge that the paragraphs on the responsibility to protect had been fiercely debated, substantially watered-down and finalized in the last minute. It has also been disclosed that the brackets around the text indicating the lack of general consent had simply been removed by the United Nations leadership right before the scheduled start of the summit meeting.[12] Under these circumstances the possibility of a drafting error, no matter how unusual, does not look entirely far-fetched. Its likelihood is further strengthened by a discrepancy between the authentic languages: for example, the English and French versions use 'population' in plural, but the Russian and Spanish versions use it in singular.[13] If the plural use of 'population' was indeed unintentional in the relevant languages, particularly in English, the term must be construed as the totality of inhabitants of each individual state.

However, if the plural use of 'population' was intentional, two alternative interpretations come to mind. The postulate that a state has more than one population gains plausible meaning only if the totality of its inhabitants can be divided in a way that is lawful under both domestic law and international law (e.g. it does not amount to discrimination), and produces subsets that can reasonably be called 'populations'. This division may rest on geographical or personal factors. Hence it may be argued that the plural use of 'population' either refers to the inhabitants of certain administrative or geographical units, or certain

11 J. Crawford, *The Creation of States in International Law*, 2nd edn, Clarendon Press, Oxford, 2007, p. 52; G. McNicoll, 'Population Weights in the International Order', 25(3) *Population and Development Review* (1999), p. 411.

12 A.J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, Polity Press, Cambridge, Malden, 2009, p. 90.

13 *Cf.* 'its populations' (English), 'ses populations' (French), 'svoye nasyelyeniye' (Russian), 'su población' (Spanish).

groups of persons or communities living in a state. Yet this train of thought is open to criticism on the basis that such a division would be utterly unrealistic in a large number of states, and would be incompatible with the universal aspirations of the responsibility to protect.

This brings us to the fourth possible interpretation that subsumes all three previously outlined options. In light of the purposes of the responsibility to protect, it is most likely that the plural use of 'population' is meant to tackle the complexity of the international community, and to achieve the highest degree of comprehensiveness. For that reason, 'populations' should probably be interpreted in an extremely broad manner so as to embrace every layer of meaning of the term – the totality of inhabitants and its potential subsets. This interpretation facilitates best the fulfilment of the responsibility to protect worldwide.

Knowing the permanency inherent in the notion of population, the status of foreign nationals temporarily staying in a state poses a curious dilemma. Unlike their permanently settled counterparts, such foreigners do not belong to the population of the territorial state, but might as well require effective protection against mass atrocities. The state of nationality, being the bearer of the primary responsibility to protect, has limited means at its disposal due to obvious normative constraints. Despite their belonging to another population, are these persons entitled to the same treatment as the population of the territorial state? The only sensible answer is in the affirmative. During their short stay, these persons should enjoy, as appropriate, the protection of not only the state of nationality, but also the territorial state in line with the personal jurisdiction of the former and the territorial jurisdiction of the latter. Though this interpretation admittedly breaches the ordinary meaning of 'population', there is hardly any other way to alleviate the tension between the purposes and the wording of the responsibility to protect, and to derive the protection of persons concerned from the text.

The second and less problematic interpretative challenge lies in the list of calamities from which the populations need to be protected. Four crimes and violations stand in the centre of the responsibility to protect, that is, genocide, war crimes, ethnic cleansing and crimes against humanity. This catalogue reflects a narrow but deep approach:[14] the concept merely envisages the complete elimination of events that are globally condemned, uniformly characterized and reckoned among the gravest forms of mass atrocities. Notwithstanding demands to that effect, the United Nations is reluctant to extend the scope of the concept to cover further perils, such as natural disasters, climate change or diseases,[15] for fear that

14 Implementing the Responsibility to Protect, Para. 10(c).

15 For a glimpse into the debate, *see* L. Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice', 34(3) *Review of International Studies* (2008), p. 458; G. Evans, 'The Responsibility to Protect in Environmental Emergencies', 103 *Proceedings of the Annual Meeting of the American Society of International Law* (2009), pp. 27-32; E.C. Luck, 'Environmental Emergencies and the Responsibility to Protect, A Bridge Too Far?', *id.*, pp. 32-38; L.A. Malone, 'Green Helmets: Eco-Intervention in the Twenty-First Century', *id.*, pp. 19-27.

any deviation from the original approach would undermine its widespread recognition and effectiveness.

From the four crimes and violations only genocide, war crimes and crimes against humanity can be considered as established categories of international law.[16] Detailed information on their exact nature can readily be obtained from the major instruments that provide for their prevention, punishment and prosecution, and from the decisions of international, mixed or domestic criminal courts and tribunals.[17] These sources suggest that the degree of development and clarity the regulation of the three crimes has now attained is more than sufficient to forestall great disturbances in the interpretation of the responsibility to protect. The same does not hold true for 'ethnic cleansing'. This abhorrent practice or policy has always been part of the history of human conflicts,[18] but it does not have an independent standing in international law. The phrase (*etničko čišćenje*) itself became generally known and applied only in the recent past, during the crisis in the former Yugoslavia, at the end of the 20th century. Though it is exceedingly hard to define, it usually describes violent and systematic measures taken with a view to homogenize the diverse ethnic composition of a given territory by destroying, deporting or expulsing persons belonging to other ethnic communities.[19] These measures often involve the destruction of

16 These crimes had already been recognized in the African continent as potential grounds of collective intervention prior to the adoption of the World Summit Outcome. *See* 2000 Constitutive Act of the African Union, 2158 UNTS 3, Art. 4(h), and 2003 Protocol on Amendments to the Constitutive Act of the African Union, Art. 4.

17 E.g. 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279, and 1945 Protocol Rectifying Discrepancy in the Text of the Charter; Charter of the International Military Tribunal for the Far East, Supreme Commander for the Allied Powers, General Order Nos. 1 and 20, 19 January and 26 April 1946; 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; 1949 Geneva Conventions I-IV, 75 UNTS 31, 85, 135, 287, and 1977 Protocols I-II, 1125 UNTS 3, 609, and 2005 Protocol III, 2404 UNTS 261; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, in Report of the International Law Commission, Second Session, 5 June – 29 July 1950, UN Doc. A/1316, at 11; 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 754 UNTS 73; Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 827 (1993), 25 May 1993, as amended; Statute of the International Tribunal for Rwanda, SC Res. 955 (1994), 8 November 1994, as amended; Draft Code of Crimes Against the Peace and Security of Mankind, in Report of the International Law Commission, Forty-eighth Session, 6 May – 26 July 1996, UN Doc. A/51/10, at 14; 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3; UNTAET Reg. No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000, UN Doc. UNTAET/REG/2000/15; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001, NS/RKM/0801/12, as amended; 2002 Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), 2178 UNTS 137; Law of the Iraqi Higher Criminal Court No. 10, 9 October 2005, 47(4006) *Official Gazette of the Republic of Iraq*.

18 A. Bell-Fialkoff, 'A Brief History of Ethnic Cleansing', 72(3) *Foreign Affairs* (1993), p. 110.

19 G. Sulyok, *A humanitárius intervenció elmélete és gyakorlata* (*The Theory and Practice of Humanitarian Intervention*) Gondolat Kiadó, Budapest, 2004, pp. 272-273. *See also* R. Geiss, 'Ethnic Cleansing', in R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. 3, Oxford University Press, Oxford, 2012, pp. 681-684; J. Hagan and T.J. Haugh, Ethnic Cleansing as Euphemism, Metaphor, Criminology,

habitation, infrastructure and facilities, particularly social, cultural and religious installations, as well.

Legally speaking, ethnic cleansing may designate several crimes under international law, which entails the risk of an unwanted extension of the scope of the concept. The Secretary-General, as if striving to prevent such an occurrence, hurriedly stated in his first report on the responsibility to protect that '[e]thnic cleansing is not a crime in its own right under international law, but acts of ethnic cleansing may constitute one of the other three crimes'.[20] This understanding of ethnic cleansing corresponds to the common international usage of the phrase, and intends to preserve the narrow but deep approach. Whether it will be able to withstand efforts to the contrary remains to be seen. Taking into account its multiple layers of meaning[21] and modest normative value,[22] it is not entirely clear why 'ethnic cleansing' was incorporated into the description of the responsibility to protect. The wording of reports preceding the World Summit Outcome and symbolic/emotional considerations may equally come to mind, but do not alter the fact that the exclusion of the phrase from the list of calamities would hardly compromise the integrity and merits of the concept.

Finally, it should be recalled that the interpretative challenges that have been identified in the initial sentence of paragraph 138 are not confined to pillar one. These challenges surface for the first time in the exposition of pillar one, and they have been treated accordingly, but they reside in textual elements that are common to all three pillars. For that reason, they pervade the responsibility to protect completely.

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and Law, in L.N. Sadat (Ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, Cambridge, 2011, pp. 177-184; D. Petrovic, 'Ethnic Cleansing – An Attempt at Methodology', 5(3) *European Journal of International Law* (1994), pp. 343-352; J. Jackson Preece, 'Ethnic Cleansing', in D.P. Forsythe (Ed.), *Encyclopedia of Human Rights*, Vol. 1, Oxford University Press, Oxford, New York, 2009, pp. 164-165.

20 Implementing the Responsibility to Protect, Para. 3. *See also* Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), 10 February 1993, UN Doc. S/25274, Para. 56; Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), 27 May 1994, UN Doc. S/1994/674, Para. 129; Responsibility to Protect: State Responsibility and Prevention, Report of the Secretary-General, 9 July 2013, UN Doc. A/67/929 – S/2013/399, Para. 14, note 2.

21 'Practically every case prosecuted before the International Tribunal has involved ethnic cleansing, in which particular groups have been specifically targeted […].' *Prosecutor v. Duško Sikirica et al. ('Keraterm Camp')*, Judgment on Defence Motions to Acquit, Case No. IT-95-8-T, T.Ch. III, 3 September 2001, at 35, Para. 89.

22 'In fact, in the context of the [Genocide] Convention, the term "ethnic cleansing" has no legal significance of its own.' *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, 2007 ICJ Rep. 43, at 123, Para. 190. (Insert added.)

14.3 Pillar Two

The second pillar, known as 'international assistance and capacity-building', is the most elusive constituent part of the responsibility to protect, and the wording of the World Summit Outcome does little to improve that image. Two sentences of moderate length are devoted to the description of this pillar, both fraught with textual anomalies and structural flaws. Paragraph 138 designates the 'international community' as the bearer of responsibilities under pillar two. Unfortunately, the document fails to clarify the content of this fairly obscure phrase, and allows for divergent interpretations in a field of utmost practical importance. In a narrow sense, 'international community' typically refers to the totality of states. If greater precision is required, it may be provided with an appendage so as to form 'international community of States'.[23] In a much broader sense, however, the phrase refers to a range of actors, some of whom do not even possess international legal personality. These actors include, *inter alia*, states, international organizations, non-governmental organizations, transnational corporations, churches, nations, peoples, individuals, mankind, and the media. The nature of the responsibility to protect dictates, and reports of the Secretary-General confirm, that the phrase should be interpreted, with reasonable limitations, relatively broadly to embrace states, universal, regional and sub-regional organizations, and their civil society and private sector partners.[24] Selected special subjects of international law, such as the Holy See,[25] might as well be added to the list.

This undeniably rational and expedient reading, when placed into the context of the document, nevertheless points out an anomaly. The exposition of pillar two continues at the end of paragraph 139 in the following manner: 'We also intend to commit ourselves […] to helping States build capacity to protect their populations […] and to assisting those which are under stress before crises and conflicts break out.'[26] It can only be deemed a structural flaw that this sentence was chosen to be separated from the preceding paragraph and located after the description of pillar three. Expectedly, this flaw is not without consequences. The pronoun 'we' makes it clear that the quoted pledge comes from 'the Heads of State and Government, [who] have gathered at United Nations Headquarters'[27] to adopt the World Summit Outcome. Hence there is an obvious discrepancy between paragraphs

23 E.g. 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 53.

24 Implementing the Responsibility to Protect, Paras. 11(b), 68; Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect, Report of the Secretary-General, 11 July 2014, UN Doc. A/68/947 – S/2014/449, Paras. 20-27.

25 *See* Pope Benedict XVI, Meeting with the Members of the General Assembly of the United Nations Organization, Address of His Holiness Benedict XVI, in Pope Benedict XVI, *Pope Benedict in America: The Full Texts of Papal Talks Given during His Apostolic Visit to the United States*, Ignatius Press, San Francisco, 2008, pp. 94-95, 100-101.

26 World Summit Outcome, Para. 139.

27 *Id.*, Para. 1. (Insert added.)

138 and 139 as regards the bearer of responsibilities under pillar two, and the latter erroneously suggests that the burden of helping states build their capacities and assisting those under stress is exclusively laid on Member States, not on the wider international community.

Remarkably, the problems do not cease here. The World Summit Outcome, similarly to pillars one and three, offers very few guidelines for the implementation of pillar two. It merely requires the international community to encourage and help states to fulfil the responsibility to protect. This call is augmented by the cautious pledge of Member States to help and assist states in capacity-building and stressful situations. The Secretary-General, for his part, had originally identified these forms of assistance under pillar two:

> (a) encouraging States to meet their responsibilities under pillar one (para. 138); (b) helping them to exercise this responsibility (para. 138); (c) helping them to build their capacity to protect (para. 139); and (d) assisting States "under stress before crises and conflicts break out" (para 139).[28]

These activities were subsequently rearranged into three large groups: encouragement, capacity-building and assisting states to protect their populations (protection assistance).[29] The request to the international community to 'support the United Nations in establishing an early warning capability'[30] is noticeably missing from the enumerations.[31] The curious omission is all the more surprising in view of that the appeal actually forms the second half of the sentence that introduces pillar two in paragraph 138, and the required behaviour is closely associated with the implementation of that pillar. (The Secretary-General claimed that the desired early warning capability demands the timely flow of information to decision-makers in the organization, the capacity of the Secretariat to assess that information and understand the patters of events, and ready access to the office of the Secretary-General.[32]) The sentence under deliberation, therefore, is nothing short of bizarre. It addresses the request to support the United Nations to the wider international community, of which the organization also forms part. For calling upon the United Nations to support itself would surely not make sense, the phrase 'international community' can hardly cover the

28 Implementing the Responsibility to Protect, Para. 28.

29 Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect, Paras. 28, 70.

30 World Summit Outcome, Para. 138. There exists an apparent nexus between this part and Para. 140: 'We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.'

31 The recent report of the Secretary-General on pillar two only mentions the support of the United Nations in passing. Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect, Para. 1.

32 Implementing the Responsibility to Protect, Para. 10(d). *See also id.*, Annex; Early Warning, Assessment and the Responsibility to Protect, Report of the Secretary-General, 14 July 2010, UN Doc. A/64/864.

organization in this particular regard, and as such, it has slightly different scopes in the first and second halves of the sentence.

14.4 Pillar Three

Due to its specific content and sensitive nature, it is arguably pillar three, dubbed 'timely and decisive response', which has drawn the most attention, suffered the most watering-down, and stirred the most controversy among the constituent parts of the responsibility to protect. For all the increased scrutiny, however, the two relatively long and detailed sentences describing this pillar likewise abound with textual anomalies.

The bearer of responsibilities under pillar three, similarly to pillar two, is the 'international community', but here it is required to act in a more centralized fashion: 'through the United Nations'. This requirement would normally be expected to reduce the kaleidoscopic variety inherent in the phrase, and to diminish the challenge its interpretation is bound to pose. Nevertheless, a closer examination, taking into account the references in the text to Chapters VI, VII and VIII of the Charter and the relevant reports of the Secretary-General, prove that expectation to be false. The requirement to act 'through the United Nations' does not entail that every single measure must be taken by the organization, or must be formally recommended or authorized by the competent principal organ to make it available for the international community. (Numerous measures, particularly under Chapter VI, do not demand recommendation or authorization.) Instead, it entails that the implementation of pillar three must fit into the general normative framework provided by Chapters VI, VII and VIII of the Charter. Therefore, in spite of appearances, the United Nations only plays a primary, not exclusive role under pillar three. The efforts of principal organs and other bodies are supported by a range of actors, such as states, regional and sub-regional organizations, humanitarian agencies, civil society and private sector partners, and individuals.[33]

Pillar three comprises two sets of measures: diplomatic, humanitarian and other peaceful means and collective action. The former includes, for example, negotiation, monitoring, enquiry, on-site investigation, fact-finding, mediation, good offices, preventive diplomacy, public advocacy, conciliation, arbitration, judicial settlement, international criminal prosecution, and resort to regional or sub-regional organizations.[34] The latter includes, for example, the freezing of financial assets, the imposition of travel bans, the

33 Implementing the Responsibility to Protect, Paras. 59, 68; Responsibility to Protect: Timely and Decisive Response, Report of the Secretary-General, 25 July 2012, UN Doc. A/66/874 – S/2012/578, Paras. 38-48.

34 Implementing the Responsibility to Protect, Paras. 51-55; The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect, Report of the Secretary-General, 28 June 2011, UN Doc. A/65/877 – S/2011/393, Paras. 30-34, 37; Responsibility to Protect: Timely and Decisive Response, Paras. 21-30.

suspension of credits, aids and loans, the control of availability of luxury goods, weapons, related materials and high-value commodities, the limitation of diplomatic contact, the application of embargoes, the restriction of scientific and technical co-operation, the deployment of multinational forces for the creation of security zones, the imposition of no-fly zones, and the establishment of a military presence for protection or deterrence.[35] Thus collective action is not synonymous with the use of force; military coercion is merely an optional instrument in a large inventory of measures.

The World Summit Outcome specifies the threshold of collective action only. It may be employed if peaceful means are inadequate and national authorities are manifestly failing to fulfil the responsibility to protect.[36] The insertion of this threshold into the text was a commendable move, but its wording has a minor imperfection. It appears as if though the drafters had been oblivious to the fact that the real difference between diplomatic, humanitarian and other peaceful means and collective action lies in coercion rather than peacefulness, as certain types of collective action are equally peaceful (i.e. non-violent). For that reason, to posit the inadequacy of peaceful means as a prerequisite of collective action is not entirely correct.

The most difficult interpretative challenge is perhaps posed by the way the World Summit Outcome defines the normative framework of collective action. The second sentence of paragraph 139 strives to link such action, military and otherwise, to the Security Council ('through the Security Council'). It also makes clear that the responsibility to protect neither creates a new exception to the prohibition of the threat or use of force ('in accordance with the Charter') nor compels the Security Council to automatically authorize collective action, if peaceful means are inadequate and national authorities are manifestly failing to protect their populations ('on a case-by-case basis').[37] These textual elements

35 Implementing the Responsibility to Protect, Paras. 56-60; The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect, Paras. 35-36; Responsibility to Protect: Timely and Decisive Response, Paras. 31-32.

36 World Summit Outcome, Para. 139.

37 *See* A.J. Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention', 84(4) *International Affairs* (2008), p. 623; L. Boisson de Chazournes and L. Condorelli, 'De la «responsabilité de protéger», ou d'une nouvelle parure pour une notion déjà établie', 110(1) *Revue Générale de Droit International Public* (2006), p. 13; J. Brunnée and S.J. Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', 2(3) *Global Responsibility to Protect* (2010), p. 208; M.W. Doyle, 'International Ethics and the Responsibility to Protect', 13(1) *International Studies Review* (2011), p. 82; A. Kapur, 'Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters', 20(3) *European Journal of International Law* (2009), pp. 562, 565; E.C. Luck, 'The United Nations and the Responsibility to Protect', *The Stanley Foundation Policy Analysis Brief* (2008), pp. 7-8; Á. Prandler, 'The Concept of 'Responsibility to Protect' as an Emerging Norm Versus 'Humanitarian Intervention', in I. Buffard et al. (Eds.), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Martinus Nijhoff Publishers, Leiden, Boston, 2008, pp. 718-719; C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', 101(1) *American Journal of International Law* (2007), pp. 109, 120; A. Szalai, 'A védelmi felelősség koncepciója, avagy van-e új a nap alatt?' (The Concept of the Responsibility to Protect, or Is There Anything New under the Sun?), 3(1) *Pro Futuro* (2013), pp. 76-77; Cs. Törő, 'R2P Without UN Security Council Mandate – Sub-

strongly suggest that the legal basis of collective action is Chapter VII of the Charter. The sentence concerned does refer to that chapter, but in a curiously exemplificative manner: 'including Chapter VII'. This formula leaves room for three different interpretations.

First, it may be taken at face value to mean that collective action 'through the Security Council' must be in accordance with the Charter, and within the Charter, with Chapter VII. The word 'including' here only serves to describe the whole-part relationship between the Charter and Chapter VII, and the latter is implicitly considered as the sole legal basis of collective action 'through the Security Council'. This overcomplicated reference to Chapter VII shows a departure from the formulation of the previous sentence, which refers to Chapters VI and VIII with much greater simplicity and accuracy. The departure is hard to explain: it breaks the aesthetics and consistency of the text only to add a superfluous fragment ('the Charter, including'). In short, if this reading is correct, it reveals another drafting error.

Yet the formula may also carry a meaning, which is incomparably deeper than a plain description of the whole-part relationship between the Charter and Chapter VII. It may indicate that Chapter VII, regardless of its importance that warrants express mentioning in the text, is but one of many sets of provisions in the Charter that play a critical role in the context of collective action 'through the Security Council'. This train of thought inescapably leads to the question: Which provisions of the Charter were left uncited?

There are two alternatives. If Chapter VII is considered as the sole legal basis of collective action, the uncited provisions of the Charter must be of special relevance, but can and do not substantiate the legality of such action *per se*. These provisions form a 'halo' around Chapter VII and include, for example, the articles on the purposes and principles of the organization (Chapter I), the composition, voting and procedure, and functions and powers of the Security Council (Chapter V), and the conduct of co-operation with regional arrangements or agencies (Chapter VIII). Still, it remains beyond comprehension why the drafters made a totally dispensable hint at provisions that are directly related to the invoked chapter of the Charter, if they had not deemed the same necessary just a few lines above, in the previous sentence. The coercive nature of collective action can hardly provide a convincing explanation. Hence this reading should be taken with reservations.

Conversely, if Chapter VII is not considered as the sole legal basis of collective action, and is really mentioned as an example, the uncited provisions of the Charter must be of such content and character as to be able to substantiate the legality of such action. Now

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sidiary Action as the Possible Way Out of Institutional Deadlock?', in Sancin and Kovič Dine 2013, pp. 242-243; I. Winkelmann, 'Responsibility to Protect', in Wolfrum 2012, Vol. 8, pp. 969-970. For other opinions, *see* Arbour 2008, pp. 453-454; A. Peters, 'Humanity as the A and Ω of Sovereignty', 20(3) *European Journal of International Law* (2009), pp. 539-540, 544. (It should be noted that whether the responsibility to protect compels the Security Council to authorize collective action, and whether it can be bypassed in cases of blatant inaction are related but separate matters.)

the question is whether there are any provisions in the Charter, apart from those in Chapter VII, which can possibly meet that requirement. The answer is surely in the negative. There are a few likely candidates, particularly Articles 25[38] and 106,[39] but even a superficial analysis reveals that they do not offer a viable solution. In sum, it appears that the definition of the normative framework of collective action is indeed flawed, for such action can only be taken 'through the Security Council' under Chapter VII of the Charter.

This brings us to the last textual anomaly. The World Summit Outcome, as has been pointed out, strives to link collective action to the Security Council. The motivations are obvious: to preserve the primary responsibility of that principal organ for the maintenance of international peace and security, to ensure the integrity of the prohibition of the threat or use of force, to prevent the unilateral application of coercive means, and to win the favour and support of disinclined governments. But an early report by the Secretary-General paints a slightly different picture of the scope of organs empowered to initiate collective action. The report submits that such action can be authorized or recommended, as appropriate, by the Security Council under Chapter VII of the Charter, by the General Assembly under the 'Uniting for Peace' resolution,[40] or by regional or sub-regional organizations with prior and express authorization by the Security Council.[41] This submission is in conformity with the established rules and principles of international law, the provisions of the Charter, and the practice of the United Nations.[42] It is further reconcilable with the motivations that seem to have driven the drafters of the World Summit Outcome. The only thing it is in conflict with is the restrictive wording of the document, which completely ignores the role of the General Assembly, and insists that collective action must be taken 'through the Security Council'. (It should also be noted that the involvement of regional and sub-regional organizations, albeit duly observed, is envisaged fairly inconsistently in

38 UN Charter, Art. 25: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' *See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, 1971 ICJ Rep. 16, at 52-53, Paras. 113-114.

39 UN Charter, Art. 106: 'Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, shall […] consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.'

40 Uniting for Peace, GA Res. 377A, 3 November 1950.

41 Implementing the Responsibility to Protect, Para. 56.

42 The General Assembly may recommend coercive measures, regardless of the 'Uniting for Peace' resolution, solely on the basis of the Charter. These recommendations are, of course, not legally binding. *See* UN Charter, Arts. 10, 11(2), 12, 14. *See also Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151, at 163; K. Hailbronner and E. Klein, 'Article 10', in B. Simma (Ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford, 1995, pp. 231-235; H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, Stevens & Sons Ltd., London, 1951, pp. 203-205.

paragraph 139. First it makes a numerical reference to Chapter VIII with respect to diplomatic, humanitarian and other peaceful means, then a textual reference to 'cooperation with relevant regional organizations' with respect to collective action.) No doubt the uncertainty surrounding the role of the General Assembly will be dismissed by future practice. Indications are that the Secretary-General has already adopted a more cautious approach: while the cited report repeatedly recalls the 'Uniting for Peace' resolution, his subsequent report on pillar three conspicuously avoids naming it.[43]

14.5 Conclusions

The responsibility to protect holds great promises for the future, but its ultimate success depends on its effective operationalization. This delicate process demands an appropriate and standardized interpretation of the text, in which the concept is officially recognized and authoritatively spelled out: paragraphs 138 and 139 of the World Summit Outcome. However, the interpretation is not as simple a task as it ought to be. The foregoing investigation has revealed that the document is fraught with several interpretative challenges and textual anomalies that affect, one way or the other, every single pillar of the concept.

The specific issues that have been disclosed and briefly analysed concern the bearers and beneficiaries of the responsibility to protect, the calamities from which the beneficiaries need to be protected, the exposition of international assistance and capacity-building, the status of the requested support of the United Nations, the threshold and normative framework of collective action as well as the scope and role of organs empowered to authorize or recommend such action.

The number of issues so identified is nine, but the total amount of conceivable interpretations reaches considerably higher, and exceeds a dozen. Given that the whole description of the responsibility to protect only consists of eight sentences or two hundred sixty-seven words, these figures are truly disturbing – even for a document that was never intended to be legally binding. (The textual elements to possible meanings ratio is, in fact, worse still. The third sentence of paragraph 139 tells virtually nothing about the concept, and was consequently excluded from the investigation. In addition, the figures above do not reflect the sheer volume of potential combinations of different interpretations.)

The theoretical and practical gravity of interpretative challenges and textual anomalies ranges from negligible to extreme: some are plainly insignificant, others perturb critical segments of the concept. These latter issues attach all the more importance to the task of interpretation, and signal that scholars of international law have an essential role to play in the implementation of the responsibility to protect. It is mainly up to them to make

43 Responsibility to Protect: Timely and Decisive Response. The emphasis is noticeably placed on the Security Council. *See* Paras. 31-32.

virtue of necessity by addressing problems in the core document of the concept, by developing and promoting its proper understanding, and by safeguarding it from witting or unwitting misinterpretations. The present study is hoped to be a modest contribution to that global effort.