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Master thesis

Towards a collective responsibility to protect refugees

Redrawing borders

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paz

*para todo el trigo que debe nacer,
para todo el amor que buscará follaje,
paz para todos los que viven: paz
para todas las tierras y las aguas*

Pablo Neruda

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General Introduction

Massive human rights violations of the 1990s and partial, or inaction by the international community to halt these, triggered the emergence and consolidation of the principle of Responsibility to Protect (RtoP), which was endorsed by the United Nations General Assembly at the World Summit in 2005. RtoP mainly emphasises out how first every state has the primary responsibility to protect its population from genocide, ethnic cleansing, war crimes and crimes against humanity; second, the international community has a responsibility to assist states in fulfilling this protection role; and third, the international community has a responsibility to take timely and decisive action if the state has failed to fulfil its responsibility to protect its population from the mentioned severe harm. Such action may involve peaceful diplomatic and humanitarian means and if that fails, means including the use of force consistent with Chapters VI, VII and VIII of the UN Charter.

Most of the debate surrounding RtoP focused on the latter part, which at times is interpreted as legitimising non-consensual military intervention, touching upon the corollary of relations between sovereign states: the principle of non-interference in internal affairs of another state. It can be said however, that the progressive development in the international human rights regime over the past century has reversed the hierarchy between the protection of individuals over protection of state borders, in favor of the former.

In this sense RtoP builds forth on the concept coined in the 1990's of understanding 'sovereignty as a responsibility', which was phrased to address the plight of internally displaced persons (idp's), persons who are in a refugee like situations, but have not crossed an international border and therefore still seek protection from the same sovereign state that was initially unable to safeguard their protection. The case made for these populations involves how states to be deserving the label of legitimate sovereign, have to live up to state

responsibilities towards their population. Furthermore, if necessary the international community should have access to assist such populations, and the state in question on whose territory they find themselves should not invoke its sovereignty to prevent this outside 'interference'.

Nonetheless, rather than being about non-consensual intervention, RtoP can be understood as concerning prevention and protection. In this light it is important to understand how in the area of international human rights the problem is not so much about standards but about implementation. The debate should not be about an existence of a right to intervene, but about the rights of the vulnerable populations in question. Also, their problem often is not the rights, but the vagueness of whom should take responsibilities to guarantee these, through what measures and to what extent. The space between rights and responsibilities is phrased as the gap, which needs to be bridged to safeguard protection and human rights.

Far less controversial than the issue of idp's and intervention, but very much connected because of evidencing a smaller or greater gap in a state's capacity to fulfil its responsibility to protect its population, are international state obligations towards refugees. Refugees fleeing their country are a clear sign of ongoing human rights violations and therefore their case is connected although not directly included in the promulgated RtoP framework. What distinguishes refugees from RtoP populations is the individual fear of persecution that defines the refugee, and the massive violations that define the RtoP crimes. While RtoP situations often occur in relation to a territory where violations are actually (or perceived to be) occurring, as is also the case for idp's, refugee situations is mainly some side effect of such. Affecting neighbouring, or farther away states.

However, if RtoP seeks to prevent and protect, it does not make sense to wait until violations become massive, and therefore refugee protection is maybe indirect, but intrinsic

to the RtoP framework if it wants to be successful. Furthermore, as stated by the UNSG: Not all armed conflict generates atrocity crimes and not all the atrocity crimes occur within a context of armed conflict. What distinguishes atrocity crimes is the deliberate targeting of specific groups, communities or populations, including persons protected under the Geneva Convention, and sometimes cycles of reaction and counter-reaction between communities” (A/67/399, 2013:3). This sentence clarifies the link with refugees, and forced displacement, which may originate from armed conflict, but this is not a necessity, their profile however often does include being targeted as part of a group and being excluded.

The international refugee regime has established and institutionalised practice to respond to refugees, this regime in no manner should be weakened or narrowed by RtoP practices. The bad taste which RtoP may give in the mouth of some, should not poison refugee protection advocacy. The grant of refugee status, and according the refugee his rights and duties as such, should not be watered down. Nevertheless, both regimes can and should be approached as complementary, as this thesis will argue.

What is interesting in this light is how on the one hand increasing attention for the plight of vulnerable populations on a state’s territory makes the state border less a sanctifact in terms of human rights protection and outside interference in this regard. On the other hand there is a redrawing or border taking place, virtual borders such as in the case of the CEAS and related measures and a renewed emphasis on borders, such as to pinpoint responsibility for a particular population or refugee.

An RtoP perspective can be used to address gaps in the present refugee regime. Gaps that can be identified involve the overburdening of Southern refugee host states and Northern states concerns with mixed refugee-migration flows and secondary movements. Security concerns regarding extremists trying to appear as refugees also apply to both. For the individual refugee, flight in the present system often reflects a long journey and/or an

extended period of time waiting for a durable solution to his situation. Lives are put on hold. A durable solution to flight involves a reintegration into some society, with the according citizenship rights.

In this thesis I will argue how RtoP can be understood as a concept with two basic normative underpinnings emphasizing: 1) a state's primary responsibility and 2) the international community's secondary responsibility and as such to strengthen the international community's collective responsibility to protect refugees. Slightly adjusted, the same underpinnings of RtoP can also be found in the present international refugee regime and eventually emphasise commitments that states have taken upon themselves, which underpins also both regimes.

Seen from this perspective, general gaps or weaknesses can be identified in refugee protection. To reflect on these gaps, the concept deriving from RtoP will be used as a tool to reflect on European Union responses to refugees since 1999, particularly measures taken in the process towards a Common European Asylum System (CEAS).

The RtoP framework and the emergence of different practices in refugee responses in the European context both derive from an understanding of the need to learn from a memory of failed attempts in exercising a shared responsibility to protect. Some of the policies applied more so caused responsibility shifting or shirking than sharing, to the detriment of individual victims and lives.

By seeing into the European practice through this concept, practical lessons of how applying RtoP can strengthen or weaken prospects for the international community as a whole to stronger commitments to share responsibilities on refugees.

The international refugee regime builds on asylum and burden sharing. Asylum, and its corollary the principle of non-refoulement, appeals to international obligations of states to protect refugees that arrive at their territory and refrain from returning the individual to

territories where his or her life and freedom may be at stake. Asylum is sovereignty as responsibility.

Burden sharing, refers to the need for cooperation between states to address the ‘problem of refugees’. Burden sharing is reflected in financial assistance for example through for example contributions to UNHCR; assistance in hosting refugees physically through a shared commitment to seek durable solutions for refugees such as local integration, voluntary repatriation and importantly resettlement; and practical assistance in terms of material or knowledge. Burden sharing is responsibility sharing.

In the European Union different tendencies are to be identified. One of the main instruments on the road towards the CEAS is the Dublin Directive of 2003 which seeks to define which EU Member state is responsible for assessing a refugee claim, to prevent secondary movements of refugees within the EU. Furthermore, as part of the CEAS is an envisioned burden sharing system for refugee responses between different Member states, which may be physical burden sharing, and/or financial and/or practical: responsibility sharing.

On the other hand the EU looks over its borders to cooperate with other states, mainly (almost) neighboring states, to address the wider development-migration-security nexus, which may have positive effects for addressing root causes of the existence of mixed flows. This can be understood as assistance in capacity building, which in turn could support states to exercise their ‘sovereignty as responsibility’.

Adverse policies are simultaneously applied however, such as the safe country concepts and containment measures to control people’s movement within the EU and towards the EU territories. These practices conclude in responsibility shifting rather than sharing.

The relevance of this topic is reflected by human rights violations and forced displacement occurring at this very moment. There is a legitimate and urgent need to explore how these situations can be addressed, vulnerable population can be protected and these situations in the longer run prevented. RtoP, even if fiercely justifiably criticised, is at the forefront of international politics, as evidenced by a yearly publication of a UN Secretary General report on an aspect of how to implement RtoP. Increasingly the concept is referenced to in UN Security Council resolutions as well. One can disagree with the framework, but not ignore it. Furthermore, even if RtoP is labeled as a Western concept, Southern states have promoted the UNSC resolutions in which reference is made to RtoP and have coined proposals for adjustments of the RtoP concept (as endorsed in 2005). Proposing adjustments implies recognition of the core values underpinning RtoP. One can criticise the concept and its application, but not deny its presence in international debates.

The relevance of making a connection to the plight of refugees is reflected in the current state of affairs where industrialised states cry out loud being overburdened by refugees, and claiming to be victimised, while the great majority of the real victims, the forcibly displaced actually finds him or herself in the global South, without near future prospects for a solution to their situation of being uprooted. Many put their lives at risk searching for different horizons, but even if arriving at further away borders, there is no guarantee to be admitted to become a fully acknowledged member of the host society.

All in all the links between human rights violations, forced displacement and conflict are also intrinsically in connection with the absence of peace. In his latest 2013 report on RtoP, the UNSG states the following: “Beyond moral and legal obligations, history has shown that building societies that are resilient to atrocity crimes reinforces State sovereignty and increases prospects for peace and stability (A/67/929, 2013:2).

From the foregoing follows that according to the UNSG we draw from history that rather than taking a topdown approach and looking at the necessity of strong state power and institutions to impose the sovereignty of a state over its citizens, we take a bottom up approach focusing on the need to build society, inclusive ones, to construct from thereon the state and consequently prospects for a situation with absence of direct, structural and cultural peace. In other words, a 'state of peace' originating from a peaceful society, which would also lead to the so sought for 'stability', which for many world leaders is still a primary goal in International Relations and Foreign Policy.

My interest in this topic would I trace back to experiences in Europe, but foremost in South America, which have left deep impression of the impact it can have on an individual life, if your life and dignity are not safe or guarantee the moment you go to sleep and often even behind your own front door. I would refer to moments lived in the Netherlands, but also when I was in Chile for a university exchange programme, in Venezuela for an internship at UNHCR, or in Colombia for travels. Traveling and getting to know different people and places is great, but it is not when you are forced to leave family, friends and your home behind.

There is a responsibility here for governments to take measures to prevent such situations from happening and to mitigate impacts when gaps in protection do occur. Concerted action is needed within the international community to enable these measures as many protection problems are intertwined with many factors at different levels. Inclusion of different levels of governance therefore is also crucial, which would be exemplified by regional organisations, civil society and norm entrepreneurs.

The debate on the implementation of RtoP in this thesis is valid as the topic is on the international agenda, as is the fact that emphasis should be on prevention and the exemplary 'failure' of the concept as set out on paper in the case of Syria. Even if RtoP is a normative

progress of its importance for the humanitarian debate and the present day foreign policy, it remains to be seen what effects this has in practice (DÍAZ BARRODO, 2012:3).

How this connects to the plight of refugees is clear as the international community faces one of the biggest humanitarian emergencies in the records. The aspect of the thesis which will deal more with the stance of the European Union on refugees also comes into play here, as European states so far have not been too forthcoming with resettling refugees from the Syrian region and hosting of the displaced populations is provided mainly by neighbouring states which luckily increasingly do receive financial and material support from other states/ the international community. This is also going to be a topic high on the agenda of the upcoming ministerial week of the 68th session of the United Nations General Assembly, and therefore my thesis links in interestingly with the internship that I have been fulfilling the last months and at present which consists of providing support in the preparations (contentwise and logistically) for the Dutch delegation that will attend the UNGA ministerial week.

The multidisciplinary approach taken in this thesis is justified as the causes and consequences of forced displacement, violence state responses and interstate relations are increasingly complex and interconnected. Combining elements of politics, law, international relations and peace and conflict studies will provide insights from each discipline to address strengths and weaknesses in present day state practice to address human rights violations. At the same time it reflects my multidisciplinary academic background of International Relations; Peace, Conflict and Development Studies, combined with additional courses on humanitarian assistance.

This thesis is a literature review, based on secondary resources. For the first chapter a foundation is made based on what may be regarded as the founding fathers of RtoP, the almost not to be missed authors on RtoP, particularly when the concept was still ‘emerging’

and not yet so consolidated. Included here are references to many documents from the United Nations and well known scholars on RtoP such as Gareth Evans and Alex Bellamy. As these authors are advocates of RtoP, clearly critical voices are also included. The beginning of this chapters sets out some of the crucial 'borders' we deal with in this thesis, conceptually and literally, when dealing with the topic of refugees, state sovereignty and human rights.

The second chapter more so brings a perspective from international law and sets out the legal framework of international protection. Here we will also distinguish the gaps in this framework. The latter part deals with the European Union and sets both RtoP and gaps in international protection in this regional perspective.

For the third chapter more recent publications were consulted, as well as more critical ones, ie scholars who propose adjustments of existing concepts and frameworks which the international community has as parameters at present. Therefore, in this chapter more use is made of online resources and newer initiatives of open academic sources.

The scope of this thesis is mainly from 1998 onwards, when RtoP and practices in the European Union towards the CEAS started to crystallize. However for the broader framework of the emergence of the human rights regime and tendencies in state responses to refugees, a broader picture is given, focusing on the 20th century. As RtoP and the European asylum framework are both regimes that are in ongoing development, also recent references will be used, until mid 2013.

For the purpose of clarity a distinction will be made between the RtoP, when referring to the responsibility to protect as promulgated in international politics, i.e. referring to RtoP as endorsed in 2005 with the World Summit. When referring to a responsibility to protect more literally, or applied as a concept referring to the fact that states have committed

themselves to protect their populations, it will be fully written out, i.e. a responsibility to protect.

The main question that this thesis will seek to answer is: to what extent can the Responsibility to Protect strengthen state commitment towards a collective responsibility to protect refugees? Founded on three sub questions an argument will be developed of how RtoP can be approached as a political instrument to remind states of the need to implement commitments towards vulnerable populations, particularly refugees for the purpose of this thesis. States have to live up to commitments made for bearing collective responsibility among the international community to bridge gaps in refugee protection which have emerged from practises that leave space between norms and their implementations, between the refugees' rights and clear responsibilities of whom should guarantee those. Eventually collective sharing of responsibilities will result more beneficial for both the international community as the individual refugee in question than responsibility shifting such as at present results from some practices. Nevertheless, one has to be conscious that gaps will never disappear, but quick availability of solutions has to be provided and the individual concerned needs agency in this process, also in the seeking of the solution itself.

There will be a division into three chapters, each chapter will address a part of the main question to eventually address the main question. Each chapter will count with short chapter introduction and at the end of each chapter a chapter conclusion will sum up the main findings on the question that each respective chapter seeked to address.

The first chapter will introduce some features of the main structure of the outlook of international politics and interstate relations in a system of legal equality and state sovereignty and the definition and role of the refugee and how progressive developments in the human rights regime are changing some of these features. Then the emergence of the RtoP doctrine will be explained and outlined. In the latter part of the first chapter a

comparison will be made to what extent the figure of the refugee is included in the RtoP framework, and to what extent RtoP in maybe a slightly different interpretation could be applied to the benefit of refugee protection and research into refugee protection. The first chapter will seek to answer the following question: To what extent can the responsibility to protect doctrine be applied to study state responses to refugees?

The second chapter will build on the main foundations of the international refugee protection regime, the main guarantees and rights that play a role and the framework of interstate cooperation as envisioned in the Geneva Refugee Convention. Furthermore, insights will be given into state practises regarding (non)cooperation that affect refugee protection policies at different levels of analysis, the international, the regional and the statal, sometimes to the better or worse, situated in the latter part of this chapter in broader development in contemporary causes and consequences of forced displacement. The second chapter will seek to address the following question: To what extent are protection gaps attributable to a lack of a responsibility to protect refugee?

The last chapter will go forward with concepts touched upon in the first two chapters, it will return to mention the dilemma that provided the impetus for the emergence of RtoP and then try to situate the strength of this doctrine in the sense that its presence in policy documents and international discussions cannot be denied but it remains a concept difficult to enforce its application and implementation. It may guide state practice, but not oblige states (yet) to act against their interests. Regarding this dilemma alternative interpretation of RtoP have been coined such as Responsibility While Protecting (RWP) or Responsibility to Prevent (RtoPrev), the question is what the value is of such initiatives, or are they redefining the problem without solving it., what is the role of prevention in preempting the situation where the international community is face with dilemmas hat are hard to respond to. The latter part will situate the debates on RtoP and refugee protection in the broader context of

the interconnectedness of different aspects that possibly lead to risk human rights guarantees. Solutions cannot be found in isolation and therefore nor RtoP nor refugee protection can be approached in isolation. The third chapter will seek to address the question: to what extent can RtoP strengthen the protection offered by states to refugees?

The expected outcome based on the answers found to each question will form an argument of how aspects of RtoP can be regarded as an approach to research protection gaps in the international refugee regime, contradictions in state policies may be identified as well as good practices. However, the author is aware of how in social sciences and literary research clear cut answers are quite illusory and will build on interpretations. Available time and linguistic limitations also always limit to a certain extent the opportunity to make valuable comparisons and gain insights from different contexts.

Chapter One - The responsibility to protect and the refugee

Chapter Introduction

In this part we will explore the relation between the individual refugee and the sovereign (nation) state, actors that simultaneously constitute and undermine each other's meaning. We will shortly discuss the basic understanding of the sovereign state, and of the refugee, and then look into the tension between the territorially bound sovereign state and the progressive development of universal, thus cross border, human rights. On the one hand the border becomes more transparent and blurred, but meanwhile remains crucial to the refugee and the sovereign state.

Subsequently we will discuss the emergence of the concept of Responsibility to Protect (RtoP), a concept that emerged in the late 1990s and was adopted by the UN General Assembly in 2005, which draws upon this tension that arises when a sovereign state is unwilling or unable to halt massive human rights violations on its territory, triggering a prospective duty for the international community to act.

In the latter part, it will be tried to connect the RtoP framework to the plight of refugees. First will be considered to what extent refugees so far have actually been included in the mainstream RtoP framework. Then an understanding of RtoP as a concept will be developed, bringing it down to the most basic underpinnings, in order to devise a research framework to build on in the following chapters. The answer which we will seek to answer in this chapter is the following: To what extent can the responsibility to protect doctrine be applied to study state responses to refugees?

A) The refugee in a society of sovereign states

1. The sovereign state

The State, defined through territory, population and administration is what captures our political imagination (BIGO and GUILD, 2005:49). If we compare this characterisation with the 1933 Montevideo Convention on the definition of rights and duties of states, we see how statehood involves a *permanent* population and besides territory and an administration, also adds the ability to enter into relations with other states. Building upon this last aspect, in interstate relations states are considered equal (legal) sovereigns. When entering into relations with another state, this is a sign of reciprocal recognition of such sovereignty (WHEELER, 2000:22). State sovereignty in turn refers to the right enjoyed by states to territorial integrity, political independence and non-intervention (BELLAMY, 2009:8). State sovereignty can be understood as a principle (GOODWIN GILL, 2007:2), as a norm (EVANS, 2008), or as a concept.

The reciprocal recognition of sovereignty between states has been labeled as a basic rule for coexistence (BULL, 2002:35). Depending on one's take on interstate relations, it can also be said that such coexistence is founded upon (unequal) military power, or (limited, economic) cooperation, or shared understandings of some sense of community of states. These underpinnings have repercussions for the prospects of interstate cooperation and compliance with negative (refraining from) and positive (create) state duties, which in turn affects the prospects for international order and justice, or security and peace.

An important aspect of authority in statehood is the credible claim to monopoly over the legitimate use of violence within the territory of the state, which equals the capacity of the state to determine and enforce its internal order. National order in turn can also be

understood as sovereignty (GUILD, 2009:177). In a Hobbesian society, order equals security and the individual person sacrifices its natural freedom in return for such security as given by the sovereign. The sovereign was entitled to take whatever means necessary to preserve the peace (BELLAMY and REIKE, 2010:271). Therefore, sovereignty includes the capacity to decide on the state of exception that gives legitimacy to the norm (BELLAMY and REIKE, 2010:306).

The outer limits of the power of a sovereign state over a population on a specific territory are its borders (BIGO and GUILD, 2005:54). It is taken for granted that the state has the right to control these borders, to monopolize the regulation of movement of people, opposed and superior to the right of the individual to move freely. In this process citizens and foreigners are differentiated (BIGO and GUILD, 2005: 49). The monopolization process by states of legitimizing movement is crucial to comprehend how modern states actually work (BIGO and GUILD, 2005: 53).

The emergence of the modern European state system as we know is often traced back to the Peace of Westphalia of 1648 (BETTS, 2011:6). Nevertheless, it has been argued that the idea of effective enforcement and control of the national state since that point in history is only a suitable fiction for IR theory specialists. Effective border control has only appeared in the nineteenth century (BIGO and GUILD, 2005:55). The state was a territorial state before being a population state (BIGO and GUILD, 2005:54). What is meant here is how states increasingly define themselves not through defending the physical state borders, but rather by controlling their populations, its insiders and outsiders, a process that becomes detached from the actual territory, and borders, of the state.

2. The refugee

The key legal definition of a person considered to be a refugee is to be found in the 1951 Geneva Convention Relating to the Status of Refugees, and its 1967 Protocol (from now on, Refugee Convention). The term 'refugee' applies to any person who: "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality or habitual residence, and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country. It is clear that being outside of one's country of nationality, or habitual residence, in other words, the crossing of an internationally recognized state border, is a crucial component of this definition.

In crossing such a frontier, the individual fleeing persecution becomes an international concern (HADDAD, 2003:311). The movement represents an example of failure by the state of origin, forsaking on protection of this person. The refugee is the consequence of an incomplete monopoly on violence, evidenced by insufficient protection, in the state of origin. The refugee embodies this lack of order, and is therefore sometimes accused of possibly exporting the disorder from one state to another, creating potential problems for other states. Particularly in case of moving in larger numbers, these persons are seen as representing a possible threat to international order, due to a destabilizing effect on the state system (HADDAD, 2003:311). The situation is slightly different in the case of persecution by the state, where precisely a strong monopoly on violence is what creates fear, and flight.

Refugees have been described as being the side-effect of the creation (and consolidation) of separate sovereign states (HADDAD, 2003:297). Processes of inclusion and exclusion are important in the formation of solid nation states, their borders are designated lines with people either belonging on one side or the other. The system of modern

states, the Westphalian system as mentioned before, builds upon the assumptions that every individual would be assigned to a territory, a state, and protected as a citizen (HADDAD, 2003:297). The refugee however, can be seen as a victim of exclusion in the state of origin, and crossing the border does not automatically lead to inclusion on the other side. The border has a double meaning for the refugee, it can guarantee safety, but when access is denied, the border becomes an obstacle.

Upon crossing the border an individual makes use of its human rights of freedom of movement; the right to leave any country, including its own; and furthermore; the right to seek asylum. When claiming the need for asylum, the individual calls upon a need for international protection and international obligations of states, either by treaty or international customary law are triggered.. Particularly, we have to make reference to the principle of non-refoulement, which means that an individual cannot be returned to a place where there is reasonable doubt that his life or dignity might be at stake.

Convention obligations regarding the treatment of refugees ultimately fall upon states, or representing these states, upon the United Nations High Commissioner for Refugees (UNHCR). The international refugee regime represents the set of norms, rules, principles and decision-making procedures that regulate states' responses to refugees. It comprises two main norms: asylum and burden sharing (HURRELL, 2011:56-57). The refugee regime was envisioned to ensure that all states would make a collective contribution to overcoming a shared humanitarian and political problem, initially in the aftermath of World War II.

The concept of the refugee since its inception has been formalised and normalized through regime activities by intergovernmental activity, depending on agreement and co-operation (HADDAD, 2003:316). The regime is founded upon the underlying concern with international order, i.e. the individual that has lost connection with territory has to be

reterritorialised, be reintegrated into order. On the other hand there is the concern with justice, i.e. human rights (BETTS, 2011:8).

Nonetheless, the right of states to *grant* asylum takes precedence over any right of the individual to be granted asylum. Sovereignty remains a reciprocal relationship between states as states (HADDAD, 2003:320). The many clear examples of protection gaps in the refugee regime show this. With gaps are meant the weaknesses in the present day refugee regime that is supposed to offer solutions to the situation of the uprooted. Therefore, refugees have been defined as victims of the international system made up of modern states that brings them into being and then fails to take responsibility for them, as a consequence they fall into the gaps and spaces between states, between borders, outside the normal citizen-state-territory hierarchy (HADDAD, 2003: 297).

3. The dilemma of the state and the human rights of the refugee

The state and the refugee are mutually constituted (BETTS, 2011:15). They are concepts that bring each other into being and at once they challenge each other. Controlling territory and population movement is part of what defines our historical notion of the sovereign state. The state is connected to a designated territory, while the refugee is a person who has *de facto* lost its connection to a territory, or has ceased to belong to a political community.¹The person fleeing persecution evidences a lack of protection by the home state, creating the need to cross the state border to be eligible for international protection. It also shows of how some persons are excluded from their home societies due to different race,

¹ *De jure*, many refugees are still connected to a territory, because of their nationality. Such nationality becomes ineffective however if the person cannot count with protection by his state. Therefore, refugees at times are also called *de facto* stateless persons.

ethnicity, nationality, political opinion or social membership. On the flip side, the granting of asylum is again a demonstration of state sovereignty by the host state.

However, state sovereignty is not a physical object that we can touch, feel or measure. It is conjured into existence by intersubjective meanings (WHEELER, 2000:22). It is not something permanent or static, but changes with history and varying practices (HADDAD, 2003:317). Former Secretary General of the United Nations Boutros Boutros Ghali wrote in his 1992 Agenda for Peace: “The theory of sovereignty never matched reality” (WEISS, 2007:12). Furthermore, International Relations scholar Stephen Krasner called sovereignty ‘organized hypocrisy’ referring to the fact that the common ignorance or violation of Westphalian sovereignty has always been a fact (WEISS, 2007: 12). While often is said how (maybe rather recent) processes of globalisation has been responsible for the erosion of sovereignty, in the Westphalian system, states never could completely be immune for what was happening in neighboring states and the rest of the world and interference has been a fact, either motivated by colonial conquest, or ‘spillover’ of for example epidemics of sicknesses. For now we just have to keep in mind that if we understand state sovereignty as a concept, it can be reconceptualised.

In more general terms population movement has become a very different political problem in the second half of the twentieth century. This is due to the changing notion of political community and the broader transformation of the role of the state. Legitimacy of governments has become to depend on the capacity to meet a vastly increased range of needs, claims and demands. This development has sharpened questions of what is owed to self and others (HURRELL, 2011:91). It is claimed that the concept of a state defined as: having some success of the monopoly of violence upon a population on a defined territory, is in danger. Practices of control persist, but professionals of politics cannot implement what

they pretend, namely, controlling the movement of persons (BIGO and GUILD, 2005:90-91).

Also within the refugee regime, state responses to refugee situations, changes took place. In the 1970's the existence of refugees became to be understood as potentially a permanent problem, rather than a purely post Second World War consequence. It turned out how many refugees did not eventually repatriate to their countries of origin, as was envisioned, but sought local integration into their host societies. From this development emerged the approach that solutions to refugee situations were rather to be found outside states, i.e. in the international community, and refugee protection became closely connected to growing field of human rights legislation and the emerging principle of individual rights (HADDAD, 2003:319).

The decade of the 1990s drew attention of the international community to causes and consequences of internal armed conflict rather than purely intrastate conflict, and to the role of nonstate actors in such conflicts (GOODWIN GILL and MCADAM, 2007:3). The state border no longer was sufficient to keep scrutiny from the international community out, due to the progressive development of universal human rights across borders and the understanding that respect for these are in the interest of the whole of international society.

Human rights guarantees and compliance are intrinsically inked to refugee flows and displacement. Today's human rights abuses are tomorrow's refugee movements (UNHCR, 1995:57). Or the other way around: refugees are *prima facie* evidence of human rights violations and vulnerability (BETTS, 2011:1). The human rights crises of the 1990s, showed flaws in terms of inaction on part of the international community, just as well as there were flaws when action was undertaken to halt these violations.

To any extent, the right to seek asylum from persecution or any other right that falls upon the refugee, is no substitute for the fullest protection of human rights at home

(GOODWIN GILL and MCADAM, 2007:4). The vulnerability of forcibly displaced persons not able to leave their home state gained recognition over the 1990s. Internally displaced persons (IDP's) find themselves in refugee like situations, thus they have left their home because of a lack of protection, but these persons have not crossed an international border.

Therefore, they still seek protection in the same state where they suffered the initial fear or persecution, and the same state that was unable or unwilling to protect the individual. If an inability to protect is the case, aiding displaced populations only adds even more strain on limited statal resources. If the state is unwilling or even itself persecuting the individual, the person's life is at clear risk. Such a situation would be considered an internal matter of sovereign states, where other states shall not interfere. However, increasingly these situations have become an international concern. Insights regarding the vulnerability of IDP's resulted in the conceptualizing of (state) sovereignty as a responsibility. Sovereignty becomes linked to legitimacy, which involves respect for the basic human rights of a state's population.

From the aftermath of the 1990's and the understanding that non-interference in internal affairs of a state cannot be a permissive condition for a state to commit massive human rights violations on its territory, nor can the international community use it as an excuse to turn its back on such situations when occurring, emerged the concept of the responsibility to protect (RtoP). RtoP as envisaged in the 2005 Outcome Document of the World Summit mainly reconfirms existing obligations of states towards their populations. Most importantly however, it also seeks to strengthen the commitment of the international community, either by consensual or by non-consensual measures to halt situations where mass atrocities are occurring, or prevent them before occurring.

Nonetheless, even if circumstances, the causes and consequences of refugee flows might have altered, as have some of the solutions and measures taken by states, the essential ontology of the refugee, and the preferred solution of reterritorialization has not changed.

The advent of some future global society where the borders of the individual sovereign state are not longer significant is a possibility, but for now not a reality (HADDAD, 2003:321). Non-statist possibilities of solving the refugee “problem” are inconceivable in a world of sovereign states, just as the refugee is inconceivable outside a world of sovereign states (HADDAD, 2003:321). Therefore, for the time being, we have to work within existing frameworks. Even if it is argued that states still prefer the solution of reterritorialization, it is important to note that precisely because refugees are supposed to fall into the gaps as mentioned before, the reterritorialization process at times takes a very long time, no to say years, if it will take place at all. If the individual refugee does not belong to any state, it may be tempting for states to forsake on taking responsibility for this person. Even more so, we have seen how states have a legal obligation to support refugees on their own territory, they have no legal obligation to support refugees on the territory of other states (BETTS, 2011:19).

The recognition that refugee flows might be a permanent phenomenon in International relations between states unfortunately was not accompanied by more readily available solutions. On the contrary, increasingly attention is drawn to the ways and means of preventing refugee from arriving at a state’s borders, or from even leaving their state or region of origin. Many initiatives for more international cooperation on providing solution for refugees have met with the absence of will, or inability and therefore, other ways of regulating people movements have taken prevalence (GOODWIN GILL and McADAM, 2007:3). These other ways refer to the policing of borders. Although we have become accustomed such control, some authors state how states do not have the right, but simply the habit to control population movements. Freedom of movement should be the norm and control the exception (BIGO and GUILD, 2005:57).

Closer convergence between the refugee regime and the international human rights regime on the one hand might strengthen visibility of the vulnerable position of certain populations before flight, and thus, before crossing the border, and thus before becoming refugees, or maybe during flight. Increased visibility would have to equal more measures by the home state to safeguard protection, assisted by the international community. Stronger human rights protection at home, might lessen the need for a person to take lengthy and dangerous journeys crossing international borders, to claim its need for international protection in him being a refugee. Nevertheless, a common and still persistent problem of the human rights regime is the gap between theory and practice and the difficulties of guaranteeing compliance if states are unwilling or unable. The right to have (human) rights still depends on state guarantees. Therefore, we need to recognize how for some persons access to international protection is crucial, and how the well established institution of asylum must not be undermined by blurring the distinctions between different regimes.

However, if we return to the emergence of the before mentioned RtoP concept, it becomes clear that there is an ever stronger recognition that no longer we can turn away from massive human rights violations, regardless of whether they have come to our borders as refugees or are still within their home states. As a concept, RtoP tries to allocate responsibility for preventing and halting mass atrocities; to strengthen accountability in the international affairs of states, for states towards their populations and towards other states. It seeks to create prospects for collective action and shared responsibilities by states as part of the international community. To some extent however, the international community still needs to define what protection involves. It has been argued that the manner in which states have collectively responded to refugees, serves as a barometer of wider change in the state system (BETTS, 2011:6).

For the purpose of this thesis we will use an understanding of the international community as forming an international society of states. An international society approach stresses the multiple roles played by norms, rules, institutions in international life. These serve as the parameters within individual actors can pursue their own interests (HURRELL, 2011:87). Interests and identities of actors are not granted and it is important to understand the processes by which they change and originate (FINNEMORE and SIKKINK, 2001:394). Norms and rules help to define who can act and through what forms of social and political action (HURRELL, 2011: 88).

For the study of ideas, it is argued how one should to look at their emergence, how they become institutionalized and why they matter in any particular circumstance. Such a vision goes against the contention that ideas are imposed by those with political, economic, military power, but rather involve processes of learning (FINNEMORE and SIKKINK, 2001:405). A principled idea, the believe of an individual about what is right and wrong, may become a norm, and create collective expectations about proper behavior for a given identity (RISSE and SIKKINK, 1999:7). An interesting contention is that international organizations can ‘teach’ states new forms of behavior (FINNEMORE and SIKKINK, 2001: 401).

We will now seek for a better understanding of the emergence and institutionalization of the idea of a collective responsibility to protect persons from harm and particularly of RtoP, what I have chosen to label a concept and apply it as such. Then we will see to what extent refugees are actually included in the main interpretation of RtoP. In the final part we will see how RtoP could be used to address refugee situations, where we will see how the concept of RtoP can be understood as a political tool to seek commitment by states to fulfil their existing obligations towards their populations, including refugees and for commitment by other states to assist and encourage a state in fulfilling these obligations, including

cooperation on finding durable solutions for refugees, i.e. the reterritorialization and financial support.

B) The Responsibility to Protect

1. Antecedents

In the before going we have set out the debate surrounding the contention that the principle of non-interference in internal affairs of sovereign states at times may yield to the safeguarding of universal human rights. With the ending of the Cold War, armed conflicts became a concern of their own, no longer placed within the greater political power dynamics. The same accounted for action taken on behalf of the international community in instances of conflict, no longer had actions to be balanced with the broader divisions. Human rights gained stronger presence on the international political agenda. The tension between the protection of human rights and the concept of the sovereign state in the international system can be explained as the sovereign state being concerned with the protection of its borders, and thus its internal jurisdiction, while on the other hand, the rules making up the protection regime, i.e. the human rights regime, are fundamentally concerned with protecting not state borders but individuals (WELSH and BANDA, 2010:216).

When sovereign states are either unwilling or unable to protect the fundamental freedoms of their citizens, sovereignty and human rights come into conflict (BELLAMY, 2009:8). This tension in interstate relations between privileging either the protection of borders or of individuals can be explained by different understandings of order and justice in world politics and brings up the question whether sovereignty, and the basic order it brings to world politics, should be privileged over the rights of individuals (BELLAMY, 2009: 10).

Justice and order are two values to which international conduct can be shaped. By international order is meant a pattern or disposition of international activity that sustains those goals of the society of states that are elementary, primary, or universal (BULL, 2002:16). In the 1970's International Relations scholar Hedley Bull argued how the framework of international order is inhospitable to demands for human justice. He stated: "If the priorities at the UN would be reversed while there is no agreement upon what human rights are, or in what hierarchy of arrangement they should be placed, the result would be to undermine international order and thus coexistence" (BULL, 2002:85). Furthermore he stated: "Justice is realizable only in a context of order" (BULL, 2002:83). Such an argument has become criticised however, the decade of the 1990s arguably have shown how "the norm of nonintervention has softened and that of human rights has hardened" referring to the possibility of a new hierarchy between these norms (WEISS, 2007:18).

Nevertheless, if a reversing of hierarchy has come about, this came at great costs. Particularly cooperation through the UN and the balancing of order and justice has been difficult when faced with crisis. Apologies expressed by the UN, after the Rwandan Genocide were a tacit acknowledgement of how this organization had forfeited on its responsibilities (quote). The late 1999s and the NATO campaign in Kosovo renewed the debate on the legitimacy of humanitarian military intervention. These cases strengthened the awareness of the impact on civilians of conflict. Increased participation of nonstate actors blurs the lines between civilian targets and combatants, and according to some, therefore increased the number of victims. The cases of Bosnia and Kosovo brought the recognition that forced displacement of populations was not only a form of collateral damage, but actually applied as instrument of war (BETTS, 2011:15).

In 1999 Kofi Annan in his function as Secretary General of the UN proclaimed his reading of two conceptions of sovereignty: the traditional one, which involves a people's

right to self determination,² and a second one, sovereignty as responsibility, which considers sovereignty only as legitimate on the condition of fulfillment of state responsibilities towards its population and builds forth on the ‘sovereignty as a responsibility’ as coined by Sudanese diplomat Francis Deng expressing his concern with the vulnerability of IDP’s. Annan pointed out how the UN Charter was devised to protect individual human beings, not to protect those who abuse them (BELLAMY, 2009:17-19). If a state does not live up to its responsibilities as a sovereign, that sovereignty might be suspended and therefore accompanying corollaries such as the principle of nonintervention becomes suspended too, or may be overruled.

Annan made a call upon the international community to unravel means of aligning sovereignty and responsibility. In 2001 this resulted in the creation of a report by the International Commission on State Sovereignty (ICISS) and the coining of the phrase: the responsibility to protect, reflecting the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe (...) and if they are unable or unwilling to do so, that responsibility must be borne by the broader community of states (ICISS, 2001:VIII). The report challenges what it calls, the intervention dilemma of the 1990s, and recognizes how new realities and challenges have emerged since the founding of the UN, as have likewise expectations for collective action and new standards of conduct in national and international affairs (ICISS, 2001:1-3). In this report different elements of RtoP were distinguished, which are: prevention, reaction and rebuilding. Actions within each category were to be applied simultaneously, not sequenced.

The ICISS report has been championed and criticized. On the one hand it represented an important brick stone in placing the understanding of such a thing as a responsibility to

protect populations on the international agenda, as did it coin this term which now seems there to stay. On the other hand, his report has been criticised because it overly focuses on the principle of non-intervention, and does not address on what grounds there is a prospective international responsibility to protect, for example deriving from our common humanity (WELSH and BANDA, 2010:217). Furthermore, the report is lacking in terms of proposals, sanctions and innovation by taking in many of the already developed responses in broader conflict studies (HUISINGH, 2013:15).

The presentation of ICISS the report in 2001 was overshadowed by the events of 9/11 and the implications for international politics. Due to the proclaimed War on Terror, the responsibility to protect lost momentum (HUISINGH, 2013:). Nevertheless, the term RtoP and the basic preoccupations and urge for solutions behind the idea gained ground and support. At the 2005 World Summit, the UN General Assembly unambiguously recognized a collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity (BARBOUR and GORLICK, 2008:1). The respective articles state the following:

“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 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.

“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.

“140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.”

(A/63/677, 2009:4)

This version of RtoP was narrowed down from the one envisioned by the ICISS and has therefore been labeled RtoP lite. Rather than an *obligation* to act in case of massive human rights violations, the international community pledged to stand ready to react, and

furthermore, it was established that action has to be authorized by Security Council resolutions. On the other hand, this tying to the UN system, and to particular cases and defined crimes such as the four mentioned, bears the strength to transform moral commitments into political ones.

The World Summit interpretation of RtoP has been reaffirmed by the UN Security Council at various instances in resolutions. Explicit references to the responsibility to protect appear in the UNSC resolutions on Libya (in UNSC res 1970 and 1973) and Ivory Coast (UNSC res 1975) (HUISINGH, 2013:4). In practice however, some opportunities have been missed to actually live up to this commitment. Missed opportunities between 2007 and 2009 include Kenya, Darfur, Burma, DRC, Somalia, Sri Lanka.

The situation as presented in Libya and Syria represent important test cases for the duress of responsibility to protect. With regard to the upheaval in these states it has been concluded that the responses by the international community have been conditioned in their scope and nature and the institutions involved by considerations of international politics and geopolitics, than by the severeness of the crimes being committed against the civilian population (MARRERO ROCHA, 2013:130). This could be interpreted as undermining the RtoP principle itself, states moulding the concept to their own interests, intervention in Libya, political solution in Syria.

A still weak duty to protect is demonstrated by the inaction regarding Syria. On the other hand, one could also understand the different stance of the international community towards these situations as evidence of the importance given to context and the need to treat different situations distinctly, on a case-by-case basis. Intervention is not necessarily the best solution, or even a solution. RtoP may be considered a universal principle, but for its application institutional and cultural differences have to be respected (MARRERO ROCHA, 2013:141-142). Seen in this light the absence of application may also be application of RtoP.

Nevertheless, it is pertinent to take note that while the number of instances rises in which the application of R2P would be appropriate, the greater the uncertainty about its nature and content becomes (MARRERO ROCHA, 2013:145). So let us see what is this exact nature and scope of RtoP?

2. Characteristics

New ideas often emerge in response to crises, and therefore make old ideas lose influence. Regarding the content of new models that are adopted, what makes an idea persuasive is the way the idea relates to the economic and political problems of the day (FINNEMORE and SIKKINK, 2001:406). The challenge therefore, is to seek how an RtoP framework, as an idea, would respond to the current challenges faced by the international community. Is it so controversial, because it proposes a new model and will it make old ideas lose influence?

We have seen that sovereignty as an ordering principle in International Relations is not becoming less relevant (WEISS, 2007:22). Nevertheless, there are already widely accepted limits on state sovereignty, flowing forth from the UN Charter, international customary law and treaty obligations (WEISS, 2007:16-17). In this sense RtoP is not necessarily an assault on the current state of affairs in the relations between states. Furthermore, there is no intrinsic competition between sovereignty and collective protection of human rights, because sovereignty can exist without the nonintervention rule (BELLAMY, 2009:12). As we have seen above, state sovereignty could be reconceptualised, without undermining the whole of international order.

RtoP does not create new legal duties, but is more so to be understood as a political commitment to implement existing ones, to act upon shared moral beliefs (BELLAMY and REIKE, 2010:267). The concept of RtoP, as set out in the World Summit Outcome report

rests on three equally important and no sequential ‘pillars’. First, there is the responsibility of a state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. Second, there is the international community’s duty to assist the state to fulfill its responsibility to protect. Third, the international community has a responsibility to take timely and decisive action, through peaceful and humanitarian means and, if that fails, other more forceful means, in a manner consistent with Chapters VI, VII and VIII of the UN Charter in situations where a state has manifestly failed to protect its population from the four crimes (BELLAMY and REIKE, 2010:270).³

Many authors coincide that RtoP actually is a way to reaffirm existing commitments, particularly if making reference to the first pillar. Nevertheless, the possibility of a responsibility of the international community towards populations in other states, is a far less established doctrine (BELLAMY and REIKE, 2010: 267). States have legal obligations to protect endangered civilians, while the international community’s responsibility is more of a moral nature (BANDA, 2010:218). Nevertheless, legal responsibilities falling upon the international community do exist, for example in international humanitarian law, and are evolving, particularly in relation to genocide and war crimes, and to a lesser extent regarding crimes against humanity and ethnic cleansing (BELLAMY and REIKE, 2010:275-276).

The controversy around RtoP has most strongly focused on the third pillar, either a right/responsibility/obligation for the international community to intervene by economic, diplomatic or military sanctions and measures in the internal affairs of a state to halt massive human rights violations. This debate builds forth on the legacy of debates surrounding the legitimacy of (humanitarian) intervention, and considerations of what constitutes a just war. On the one hand, the fact that authorization for such coercive measures has to be given by the UN Security Council, as established in the World Summit Document, is supposed to give

³ Divisions into pillars are usually devised to indicate how all pillars are necessary at the same time in order to maintain the edifice, in this case of RtoP.

legitimacy to the measures taken. On the other hand, the legitimacy of the UN Security Council itself is under scrutiny for more than one reason.

A well known difficulty is the risk of deadlock in its deliberations because of the veto power of 5 of the permanent members. Nevertheless, even if authorization takes place through the UN system, this still does not guarantee the eventual fulfillment of the executive action (WELSH and BANDA, 2010:225). Any resolution in turn also has to be executed, which in turn asks for financial, material and physical commitment of states.

Opposite to concerns of those who believe RtoP is all about humanitarian intervention, are those who argue that it is about prevention and protection (BELLAMY, 2009:33). The latter align with some thoughts as spelled out in the ICISS report: “Prevention is the single most important dimension of the responsibility to protect” (ICISS, 2001:XI). We will now explore on a deeper level the controversy surrounding RtoP.

3. Controversy

The *responsibility to protect* nowadays is often described as being a principle (BELLAMY and REIKE, 2010:267). Gareth Evans, co-chair of the ICISS, affirms the RtoP principle as a new international (emerging) norm, well on its way to becoming a rule of customary international law (EVANS, 2008:286). At times RtoP is labeled a ‘concept’ as said by Edward C. Luck, the former Special Advisor to the Secretary General on RtoP: “The Responsibility to Protect is a concept in search of a definition, in search of consensus.” (BARBOUR and GORLICK, 2008:5). Often it is also written *responsibility to protect*, without further qualifications.

Either way, the debate regarding RtoP holds strong, not just on how to qualify this policy, but more so on its substance. For some RtoP either does not go far enough, for others it goes too far, is useless, or just nothing new. The narrow interpretation of RtoP as set out in

the World Summit Outcome document has been most commonly endorsed because it tries to draw the attention away from the discussion on a right of states to intervene in other states, rather to give prominence to the persons that are actually in need of protection. Military interventions over the past two decades have been controversial both when they happened and when they have failed to happen (ICISS, 2001:85). Debating RtoP was a chance for the international community to take deliberations away from the hardened debate on humanitarian intervention, which was a legacy of the nineties.

Nonetheless, much of the initial criticism on RtoP kept emphasizing precisely the third pillar and the possibility of (humanitarian) intervention. RtoP would be an open invitation for intervention by the powerful states against the weaker states, under the banner of humanitarian intervention but actually willing to serve their own interests. RtoP would erode sovereignty, particularly a concern to countries that are former colonies and seeked to defend their hard gained independence (EVANS, 2008:21). Without a further elaboration on the legal framework and operational application, the R2P concept can be interpreted in many ways to fit any political agenda (BARBOUR and GORLICK, 2008:13).

Not only is this a very limited take on what RtoP involves, it also contradicts the exact underpinnings from which the concept emerged, i.e. the problem of partial action, or inaction by the international community when confronted with mass atrocities. Returning to the origins of the concept, it can well be argued how it was intended to avoid inaction by the international community when massive human rights violations are occurring (WELSH and BANDA, 2010:215). The problem was not too many interventions, but too less commitment. RtoP is envisioned to strengthen state sovereignty. Compliance with the RtoP framework contributes to a state's legitimacy, and will lessen the need for foreign intrusion, or intervention, by other states ((A/63/677, 2009:6). Eventually, the overall aim of RtoP is to reduce the frequency with which the protection of civilians is dependent on nonconsensual

force by outsiders, as force is a very unreliable means of human rights protection (BELLAMY, 2009:). Therefore, human rights interventions are justified only when human life is at risk, thus only in strictly defined cases of necessity (IGNATIEFF, 2001:18).

There is nothing in the RtoP principle that expands the *rights* of states to interfere coercively in the domestic affairs of other states. The question should be whether the principle creates a legal *duty* for states to take coercive measures in cases of massive human rights violations (BELLAMY and REIKE, 2010:282). Such a development fits within emerging trends spearheaded by the International Law Commission and the International Court of Justice which may see the evolution of a legal duty to respond decisively to genocide and mass atrocities that inheres on member states in general and the UN Security Council in particular (BELLAMY and REIKE, 2010:286) Some authors connect such a duty to protect, to moral considerations, deriving from common humanity. Seen in this light this duty may be even that strong to overrule the right of other states to stay disengaged (WELSH and BANDA, 2010: 218).

Along these lines precisely it is argued how the RtoP lite version, and thus the absence of a real duty to protect, does not go far enough in creating real commitments. It is an imperfect duty to protect as it does not specify exactly who is responsible to take measures and what kind of measures would be required in terms of action. These ambiguities limit its capacity to entrench new obligations for states in terms of protection (WELSH and BANDA, 2010:214).

Principles, norms and rules of customary law reflect different degrees of legal standing in international relations between states and non-state actors, as well as different levels of support and in turn, compliance in practice. Endorsement of General Assembly resolutions may provide evidence of customary international law when accompanied by general practice and opinion juris, but they cannot create new law in themselves (BELLAMY and REIKE,

2010:268). Once political commitments would become legal ones, chances become greater to hold one responsible for his actions, or in this case, inaction and therefore the international community has been cautious to consider RtoP as a legal norm.

The heterogeneity in interpretation and enforcement of RtoP makes that it changes little in the behaviour of states compared to other periods in history (MARRERO ROCHA, 2013:145). The application of RtoP in practice has been limited, inconsistent, and in the few instances that it has been applied, incomplete (MOONEY, 2010:77).

The question is also, who is exactly the international community, the sum of all individual states, or the UN as its representative of the collective? (BARBOUR and GORLICK, 2008:19).

The unallocated responsibility to protect rather encourages inaction on part of other states than rampant interventionism (WELSH and BANDA, 2010:219-222). When it is not clear who should act, and what the actor should have done, it becomes difficult to hold anyone responsible for staying disengaged. Even when it is argued that it is not the nature of responsibility that changes, but the means (DAVIES, 2010: 5). We have to remember, that at present time, the means, in other words, the money and material often are lacking in terms of putting into practice the international community's political, or even moral, commitments. The international community often promotes universal values, but chooses risk averse means to defend them (IGNATIEFF, 2001:43).

RtoP, as set out in the World Summit Outcome Document, has been qualified as an instance of soft law, which means that it can be accepted as an authoritative interpretation of the UN Charter 's provisions on sovereignty, human rights, and the use of force, but so far cannot bind unwilling states to norms to which they have never consented (WELSH and BANDA,2010:230). Soft law can signal the direction of future legal developments, act as a

precursor to binding treaties, or harden into custom. This last aspect is why some states prefer to deny the existence of soft law (WELSH and BANDA, 2010).

Regardless of a wide array of controversy and debate surrounding many aspects, namely status, scope and the attribution of RtoP, there is little doubt that RtoP has become a central piece of the vocabulary used by members of international society in debating the appropriateness of an international response to humanitarian crises. It can be said that it has become a social fact (WELSH and BANDA, 2010:231). Social facts things such as money, sovereignty, and rights, which have no material reality but exist only because people collectively believe they exist and act accordingly. Understanding how these social facts change and the way these influence politics is the major concern of constructivist paradigm within International Relations studies (FINNEMORE, 2001:393). Therefore, the concepts of state sovereignty, international law, or war are not given by power politics, such as scholars within the realist paradigm of International Relations studies would argue, but rather are founded on shared and historically grounded understandings, and how these shape the nature of the game of interstate relations, and how this has changed and evolved (HURRELL, 2011:87).

The purpose of the responsibility to protect is not to impose a legal doctrine, or to justify a right to intervene, but to commit states to no longer pursue internal power and authority through practices of violence and exclusion. The essential is to align sovereign statehood with responsibility to safeguard the rights and needs of all citizens (DAVIES, 2011:11).

The ICISS report divided prevention efforts into the following elements: early warning, root cause prevention efforts (including addressing political, economic, military and legal needs) and direct prevention measures. Prevention would be focused on internal conflict, or more broadly, unrest. Support in the area of prevention can come in the form of

development assistance and assistance to local efforts to advance good governance, the rule of law and human rights, and mediation. Such an international commitment to supporting local initiatives arguably would add credibility to broader international efforts in terms of advancing human rights (ICISS, 2001:19-23). It has been argued however, how in terms of prevention, the international community rarely commits resources to a problem before violence breaks out (IGNATIEFF, 2001:45).

We have mentioned before how RtoP can be understood as being about prevention and protection. Prevention involves creating conditions that safeguard against any possible commitment of human rights violations. Protection involves to be safe from human rights violations. Furthermore, the idea underlying RtoP is to support and assist states in fulfilling such an obligation. Existing obligations in international protection come into play. Therefore we deal with the prevention of creation of refugees in the first place, and also, with strengthening the capacities of states to receive and host refugees, i.e. provide protection. In achieving protection and prevention more solidarity and burden sharing is needed. The current framework of responses to refugee situations evidence many gaps or weaknesses.

Thus, RtoP can be understood as a catalyst for reform and innovation to the international architecture for protection (WELSH and BANDA, 2010:215). In any sense, the need for collective responsibility and cooperation is only more emphasized and more legitimate because of the gaps that are exposed of its weakness and flaws.

C. The responsibility to protect and the refugee

1. Refugee protection as part of RtoP

Ban Ki Moon in his report implementing the responsibility to protect, mentions how the protection of refugees and the internally displaced is a goal related to RtoP (A/63/677, 2009:29). Others state that refugee protection and IDP protection is peripheral to the RtoP

doctrine (HARRIS RIMMER, 2010:15). We have to explore therefore, to what extent the way refugee protection is included into either narrow or wider interpretations of RtoP.

RtoP as derived from the World Summit Outcome document does not directly mention refugees, or displacement. Derived from the manner in which RtoP has been endorsed by the international community, it applies to genocide, war crimes, ethnic cleansing and crimes against humanity. Furthermore, it has been argued that RtoP can, or should, only be triggered if murder or extermination is committed as part of a widespread or systematic attack against the civilian population. Seen in this light only the most serious and extensive of violations would come into reach of RtoP (BELLAMY and REIKE, 2010: 277).

The four crimes as mentioned are recognized as international crimes entailing responsibilities under both treaty and customary law for states to prevent and punish their occurrence, by way of the 1948 Convention on the prevention and punishment of the crime of Genocide, the Geneva Red Cross Conventions of 1949 and their 1977 protocols, and were reaffirmed in the 1998 Rome Statute of the ICC. The precise nature of acts constituting these crimes and the scope of the state's responsibility to prevent them and protect vulnerable populations is still debated however (BELLAMY and REIKE, 2010:276).

If we try to connect the characteristics of these crimes to the issue of forced displacement and refugee movement, we can see some overlap. Ethnic cleansing is associated with forced displacement of civilians (BELLAMY and REIKE, 2010: 278). For example ethnic cleansing itself is a rather recent label, and involves actions that more broadly would also fit in the category of crimes against humanity.

We can find a definition of crimes against humanity in the Rome Statute of the International Criminal Court, it includes: "persecution against any identifiable group or collective on political, racial, national, ethnic, cultural, religious, gender (..), but as such must be part of systematic or widespread attack which is directed against a civilian

population. The definition of crimes to humanity has been broadened, as the necessary link to the occurrence of an armed conflict has been removed (BARBOUR and GORLICK, 2008:12).

However, one can also argue that additional requirement has been added in terms that the violations have to be systematic or widespread. Also we have to keep in mind that the Rome statute only binds signatories as there exists no specialized convention on crimes against humanity. There is a responsibility to refrain from committing these crimes, but no duty to prevent their commission (BELLAMY and REIKE, 2010:279).

Regarding genocide, legal standard are more strongly established. States have a legal duty to take peaceful measures to prevent genocide whenever they have relevant influence and information. (BELLAMY and REIKE, 2010:281).⁴ Also there is a doctrine regarding war crimes which has a long tradition, although clearly, this connects the crime to the occurrence of armed conflict. It is not difficult to connect displacement to human right violations, or ongoing war. Situations of genocide, war crimes, crimes against humanity almost invariably will result in mass displacement. With ethnic cleansing this is the very aim (MOONEY, 2010:65).

As mentioned before, the definition of a refugee is based on a well-founded fear of persecution on grounds of race, religion, nationality, political opinion or social group. This definition is based upon an individual fear, and there is no necessary connection to human rights violations on a wider scale, or the occurrence of armed conflict.

There are however also broader definitions of what constitutes a refugee, where for example generalised violence in a particular state can also be a valid reason to be recognized as refugee or at least receive temporary protection. Moreover, the ground 'social group' if

⁴ Referring to Bosnia vs. Serbia ICJ ruling that Serbia had political, military and financial influence over the Bosnian Serb army and yet took no action to prevent the genocide in Srebrenica (BELLAMY and REIKE, 2010: 281).

often broadly defined and thus could for example include gender and cultural practices, such as included in the definition of crimes against humanity. Implications of a certain identity or belonging in refugee status determination are evidenced by country of origin information. Individual refugees are not necessarily part of broader flows and a signal of broader occurring or imminent mass atrocities. Protecting a refugee also may not directly help halting such violations. But at least consequences may be mitigated, and potential victims may receive protection. The cases of Rwanda, and the 'safe heavens' in Former Yugoslavia emphasize the need of guaranteeing effective protection for potential victims.

It has been brought up how the word 'asylum' or discussion of the grant of asylum as a preventive element to the R2P framework does not feature in the core R2P documents, nor does it feature in the emerging literature on the subject (BARBOUR and GORLICK, 2008:22). Refugees are often still considered a side effect of greater politics. Even if there is the tendency that states increasingly are held responsible to refrain from committing either of the four RtoP crimes, and at some instances, an obligation to prevent them from happening, there is a contradiction in interpreting RtoP narrowly, especially when focusing on prevention. The occurrence of these crimes can only be established after the fact, which is precisely to be prevented.

Nonetheless, if RtoP is about prevention and protection of mass atrocities, it has been raised how the grant of asylum is, or would be, in many cases the most practical, realistic and least controversial response to assisting victims of mass atrocities. In many cases the absence of, or inadequate response to, asylum-seekers fleeing genocide and human rights atrocities has resulted in significant loss of life (BARBOUR and GORLICK, 2008:23).

On that note it has been argued how such wide scale atrocities, and for example instances of ethnic cleansing, at times more easily trigger measures of temporary protection

or other humanitarian assistance, directed at what is termed ‘mass influx’ rather than recognition as Convention refugees (GOODWIN GILL and MCADAM, 2007:342).

The RtoP agenda has been separated from the civilian protection agenda by the General Secretary of the UN, emphasizing how civil protection is a legal concept founded upon international humanitarian law, human rights norms and refugee law, while the responsibility to protect is a political concept (MARRERO ROCHA, 2013:145).

Also the need for Security Council authorization of measures implies a quite high threshold for RtoP action and does not seem to point in the direction that refugee issues are to be included directly under the RtoP banner on a permanent basis. The actual displacement of populations has been seen as a threat to international peace and security, or as contributing to such as threat and therefore has come to the attention and authority of the Security Council. Even the situations triggering Security Council deliberation and resolutions would include drastic and case by case measures, fitted to halt mass atrocities but arguably not adapted to address refugee situations, especially on a more long term basis. Also at times it has been cautioned how widening its scope, would undermine the 2005 consensus (A/63/677:8).

However, as mentioned above, RtoP was built on the antecedent of ‘sovereignty as responsibility’, a concept envisioned to address the plight of IDP’s, and thus forced displacement of populations.

2. RtoP to protect refugees

Despite of the above, the fact that at first sight refugee protection is not directly included in a more narrow interpretation of RtoP, there is a widely shared expectation among advocates of the plight of refugees and IDP’s that RtoP will be beneficial, even revolutionary

in enhancing the protection of people who are forcibly displaced (MOONEY, 2010:62). Forced displacement should be the central focus of RtoP (HARRIS RIMMER, 2010:20).

The Secretary General report ‘implementing the responsibility to protect’ points out how refugees and IDP’s are populations most often seeking protection from the four RtoP crimes and that mainstreaming the protection of refugees and the internally displaced among the priorities of UN agencies and programmes will make an important contribution to the elimination of mass atrocity crimes (A/63/677, 2009:29). Therefore, they would indirectly but logically be part of the RtoP framework. Refugees are often the persons most at risk for genocide and mass atrocities (DAVIES and GLANVILLE, 2010:2). Implementing and operationalising RtoP should therefore, include measures for the protection of refugees.

When a state commits himself to protect IDP’s and refugees, he is exercising his responsibility to protect. The adoption of the African Union Convention for the protection and assistance of internally displaced persons in Africa, also known as the Kampala Convention, has been qualified by UN High Commissioner for Refugee (UNHCR) Antonio Guterres as a demonstration of how RtoP is fully compatible with national sovereignty (DAVIES and GLANVILLE, 2010:1).⁵

The RtoP framework would be apt for improving the refugee regime, as we have seen that the system of state sovereignty is here to stay at least for a while more, and thus solutions have to be sought within this system. RtoP and the refugee regime more or less fall back on the same considerations, not higher moral or humanitarian imperatives, but protecting the international system of states that is threatened when states fail to fulfill their roles (DAVIES, 2010:14). Both would therefore be compatible. The quest is to bring sovereignty, political will, mandates and resources into alignment with better protection (DAVIES and GLANVILLE, 2010:2). Regional organizations are seen as potential partners of the UN for

the implementation of RtoP (MOONEY, 2010:81), which also could be a good level for implementing measures for refugee and IDP protection, as evidenced by the Kampala Convention..

It is important to note that RtoP in no way is envisioned to reemplace, nor undermine the existing international refugee framework. If RtoP is connected to the four crimes, in no manner it covers the situations of all (potential) refugees. Refugees have a special place in international law, they are at risk because of who they are, or what they believe (MARTIN, 2010:29). Nevertheless, it has to be recognized how protection gaps currently exist in the system of international refugee protection and how this system is facing many challenges. To explore emerging new concepts are therefore valid and there is a need to deploy all available tools and resource, without the intentions however, to replace tried and true measures. Even if new concepts that focused on prevention of displacement may prove useful, ensuring and granting asylum may still be the best, and necessary, protection option (BARBOUR and GORLICK, 2008:). Prevention and protection for the displaced can be focused on the region or state of origin, but the opportunity to seek and be granted asylum remains crucial. Measures taken under different frameworks have to be seen complementing each other and RtoP can ensure and strengthen accountability, particularly of the international community to fulfill its own responsibilities (MOONEY, 2010:83). Still there will be gaps left,

Making a connection to the interest to protect people inside their borders, i.e. their basic human rights, is linked to preventing refugee flows. This effort can reflect good intentions and bad intentions however. Again, UNHCR Refugees Antonio Guterres argued how attempts by the international community to devise policies to preempt, govern or direct population movements, have been erratic. New patterns of movement have emerged, including forms not envisaged by the Refugee Convention, for example when we speak

about persons that are displaced because of environmental factors. Therefore, it is argued that RtoP will at best offer a partial response, because it does not capture the range of scenarios in which displacement occurs (MARTIN, 2010:17).

Success of RtoP for strengthening protection for refugees is not guaranteed. Another issue to consider is how RtoP may be invoked not to protect refugees, but to protect the actors own interest and security, when great numbers of refugees may create a danger for regional instability, noting here particularly the case of Libya and its geographical cercanity to Europe (MARRERO ROCHA, 2013:132). Refugee protection may be used as an excuse.

Nevertheless, while there is still controversy whether the international community has the right or duty to enter a state's territory when it is failing to protect its own citizens, the duty is quite clear and unequivocal when those people have crossed an international border (HADDAD, 2010:86) States have a principal obligation to refrain from forcibly returning persons to countries in which they would face persecution. However, there is no obligation to grant asylum, or to admit them for permanent settlement. Relocating refugees in safe third countries that are willing to accept them is not irregular.

The validity in RtoP lies in strengthening the positive obligations inherent in the concept of sovereignty, as well as the positive obligations of the international community to ensure international protection. Furthermore it focuses on the protection of potential victims rather than the rights of one sovereign to another, although we have seen how the decisions taken within the refugee regime still depend on the sovereign state, emphasising the victim, the refugee, fits within the progressive development of human rights regime. RtoP can be seen as a concept that requires implementation of certain measures, imposes rights and duties, places emphasis on certain obligations and fills protection gaps (BARBOUR and GORLICK, 2008:18).

Broadly set out by UNSG Ban Ki Moon, again in the report implementing the responsibility to protect, the four elements of RtoP are: encouraging states to meet their pillar one responsibilities; helping them to exercise this responsibility; helping them to build their capacity to protect; assisting states under stress before crisis and conflicts break out (A/63/677:). Phrased this way, RtoP seems easier to implement than a strict focus on either the pillars as envisioned by the ICISS, or Articles 138-140 of the World Summit Outcome Document.

For the purpose of this thesis, to apply RtoP concept in a beneficial way for refugees, we will approach it conceptually, mainly focusing on the normative underpinnings, beliefs and its political strength to gather commitment for implementation. Conceptually there exists a notion of a responsibility to protect that is much broader than the officially endorse RtoP (MOONEY, 2010:67). It is argued how trying to devise some kind of morally satisfying general theory which will delineate our duties to and responsibilities for refugees is almost certainly a waste of time. Rather a political approach is advocated to focus on the problem that actually exists (BROWN, 2011:162-166). The problem that actually exists are the weaknesses in the present day refugee regime, where states are failing to fulfill their responsibility to protect refugees and the need to design solutions for such situations. As we have seen, in the international community, as a collective, the problem often is not standards, but implementation. The power of RtoP is political, not legal (MOONEY, 2010: 72).

The collective responsibilities to protect refugees are at least twofold: first, not to 'create' IDP's and refugees, and second, to protect refugees arriving at one's border. Stated differently, it is first about states complying fulfilling their obligations towards their own populations, including refugees⁶, and secondly, about the international community assisting, supporting and encouraging states in doing so. I can be argued how these are similar

norms to those underlying the international refugee framework, namely *asylum* (responsibility of states to comply with international obligations towards refugees, i.e., asylum seekers), and *burden sharing* or cooperation between states in receiving and protecting physical numbers of refugees, support to build protection capacity and the financial aspects.

The R2P doctrine could be more important if it moved beyond the concept of passive protection needs to a focus on the rights of those affected by conflict to design solutions for its resolution. This may be the real test of R2P (HARRIS RIMMER, 2010:16).

Chapter conclusion

We have seen in this chapter how in the international system of modern states, the sovereign state has been concerned with the protection of its borders, and thus its internal jurisdiction, protected by the principle of non-interference. Nevertheless, over the past century a human rights regime developed, which rules are fundamentally concerned with protecting not state borders but individuals. When sovereign states are either unwilling or unable to protect the fundamental rights and freedoms of their populations, state sovereignty and human rights come into conflict.

As internal practices of states are increasingly subjected to international scrutiny, the state border seems to become less important. However, slightly contradictory, for the refugee the crossing of the state border is imperative and is what brings the figure of the refugee into being and hopefully into safety. Traditional state solutions to the problem of the refugee, a person *that de facto* has lost connection to the territory of his or her former state or origin, have involved to re-territorialize a person, either through local integration, resettlement, or (voluntary) repatriation. However, there seems to be a tendency in

international responses to increasingly focus efforts on managing population movements, rather than providing solutions for the refugee.

The impact of mass atrocities in the 1990s gave way to the endorsement of the concept of the responsibility to protect over the first decade of the new millennium. It was envisaged to coin state sovereignty as involving responsibility to fulfill obligations deriving from international law and custom towards the population. Such behavior within limits set by international agreements is what strengthens sovereignty and creates legitimacy. It also seeks commitment of the international community to support and assist states in upholding their obligations. Most of the controversy regarding RtoP has surrounded whether the international community has the right or duty to enter a state's territory when that state is failing to protect its own citizens. The concept of RtoP is connected to the crimes of war, crimes against humanity, genocide and ethnic cleansing, and acting through the UN system. RtoP also involves prevention and rebuilding aspects, added to reaction.

Strictly defined, the persons involved in situations that would trigger RtoP, i.e. persons at risk of the mentioned four crimes, and the refugee are not fully of the same category. The definition of RtoP crimes involve references to either ongoing armed conflict, or widespread and systematic human rights violations, while the definition of the refugee is individualized and grounded in a fear of persecution because of nationality, race, religion, political opinion or belonging to a particular social group.

Another important distinction is how the refugee is constituted by crossing an international border, while RtoP is often invoked to assist populations within their country of origin. Nonetheless, refugees are often an indication of (massive) human rights violations and on the flipside (massive) human rights violations result in refugees. Furthermore, forced population displacement has come to the attention of the UNSC as possible threat to international peace and security.

Also instruments in the matter of prevention, which is meant to constitute an integral part of RtoP, thus protection of refugees after flight and addressing root causes before flight, link refugee protection and the prevention pillar of RtoP. Although norms and practices of refugee protection are well-established, RtoP instruments could enhance additional refugee protection and diminish emerged gaps between standards and implementation. Furthermore, the granting of refugee protection (asylum) can be a rather straight forward less controversial manner or putting RtoP into practice.

Along broader lines, the underlying norms of the international refugee protection regime and of RtoP are similar. In the latter part of this chapter I have set out how RtoP can be understood as a concept to be applied to research the collective international responsibility to protect refugees. In broad lines this concept can be divided into two parts:

A) States have obligations towards (potential) refugees, which are at least twofold: first, not to ‘create’ refugees⁷, and second, to protect refugees arriving at one’s border. The duty of states towards refugees is well-established and quite clear and equivocal when people have crossed an international border fleeing persecution. Stated differently, RtoP can be understood to be about states fulfilling their obligations towards their own populations, including refugees⁸.

B) RtoP is about creating a commitment or duty for the international community in assisting, supporting and encouraging states in fulfilling obligations stated under A, for example within the framework of the current refugee regime. We recall how states have no legal obligation to support (potential) refugees on the territory of other states, but the human rights regime and RtoP’s underpinnings try to bring internal human rights violations on the international agenda.

What makes a new idea persuasive is the way it relates to the economic and political problems of the day. The current refugee regime definitely faces protection gaps, weaknesses, which are mostly to be borne by the individual refugee him or herself. These individuals have a problem that urges for durable solutions. An important weakness we have identified in the application of RtoP is the fact how the framework fails to create a commitment on behalf of the international community to assist states in upholding their human rights obligations. Rather than devising morally satisfying general theories to delineate our duties to and responsibilities for refugees, RtoP can offer a political approach to address a problem that actually exists.

Therefore, what answers the question we posed at the beginning of the chapter is that at this point we cannot conclude that RtoP will strengthen the protection of refugees, however RtoP can be approached as a concept to research tendencies in state responses to the problem of refugees. In the following chapter we will use the devised conceptual understanding of RtoP as consisting of two norms to further explore the existing obligations of states (A) and the international community (B) towards refugees, and how assistance and cooperation is coming about, and may offer or complicate solutions.

Chapter Two - The international protection of refugees

Chapter introduction

In the foregoing chapter we have seen the characteristics of the RtoP framework, its endorsement by the international community, and also the ongoing criticism. Furthermore, we addressed the way in which refugee issues are considered part of RtoP, and in turn how RtoP could be applied to refugee and displacement issues.

We chose to frame the debate around RtoP away from revolving around the debate of legitimacy of humanitarian intervention but rather to focus on prevention and protection of civilian populations from mass atrocities and to apply it as such a concept to research broader trends in state responses to refugees, broadly to be divided into A) Strengthening basic human rights obligations of states towards their populations, including refugees and including the assertion of not creating refugees, and B) strengthening support to states from the international community to fulfill A.

Along broad lines this is the same divide as the underpinnings of the refugee regime, built upon the norms of A) asylum (existing obligations that fall upon states to protect refugees) and B) understandings of cooperation between states in addressing the problem of refugees, of burden sharing within the refugee regime (working towards collective responsibility). Such cooperation involves for example strengthening the capacity of states to host refugees, financial cooperation, but also importantly, cooperation in term of finding durable solutions to the situation of refugees, as most refugees are actually being hosted in the global south.

Therefore, in the first part of this chapter we will set out the existing obligations at present for states towards refugees. Here we will consider the current international refugee regime, deriving from treaties and conventions, such as the Geneva Convention on the status

of refugees; principles of established practice such the principle of non-refoulement. After that we will look into established mechanisms of cooperation and the strengths and weaknesses of the present refugee regime. We will look at cooperation through the UN system, via UNHCR, and the measures that are being applied to solve a person's status of refugee, mainly opportunities to integrate into the local host community, voluntary repatriation to the country of origin, or resettlement in a third country. Here we will see the dilemma's in cooperation that are present between the world's industrialised states and the global south where most refugees are hosted.

Some problems and protection gaps will already become clear from these parts, however in the latter part of this chapter will place findings within the broader international context of peace, conflict and North-South relations, and the problems actually faced by the individual refugees, and seek to distinguish trends in state responses. Focus on existing problems, which is clearly connected to prevention, but prevention itself is too broad.

To eventually consider if RtoP may contribute to strengthening the protection of refugees, and the prevention of forced displacement, we will seek to address the following question: To what extent are protection gaps attributable to a lack of a responsibility to protect refugee?

A) State obligations towards the refugee

1. Antecedents

(a) Hospitality

We have already seen how the emergence and consolidation of the international system of nation states went hand in hand with processes of inclusion and exclusion. Universal human rights come into tension with the principles of self-determination of national

communities as represented in the form of sovereign (nation)states. The way in which sovereign state defends its right to control its borders, and control the quantity and quality of those admitted is at times at direct contradiction with universal human rights declarations (BENHABIB, 2005:14).

This has not always been the state of affairs at different points in history. Seyla Benhabib explained how Kant wrote on the right to hospitality for a visitor to another territory, which can be understood as a right to temporary stay. Such temporary stay cannot be refused in case such rejection would represent the destruction of the visitor involved. The right to hospitality is reflected in not receiving hostile treatment, however, it does not involve any additional rights such as to be treated as a guest (BENHABIB, 2005:31). The right to remain is to be separated from being granted a residence permit (HURWITZ, 2009:134).

Benhabib therefore considers this right to hospitality as an imperfect moral duty to help and offer refuge, stating that the duty is conditional, exceptions may exist. The right to hospitality can be seen as subordinate to considerations of self-preservation for the receiving community (BENHABIB, 2005:36). According to Benhabib this perspective of Kant derives from a consideration of a shared earth surface. She cautions how the territorially based, statal perspective is very limited to address present day human and global interdependence (BENHABIB, 2005:37).

Temporary hospitality is not sufficient; from our shared common humanity we should derive a right to enter societies, to become part of them. In this light, Benhabib builds further on the thinking of philosopher Hannah Arendt, emphasizing the importance of belonging to a community, and to be judged within such a framework based upon your actions and opinions, rather than the condition you obtained at birth (referring to nationality). Not so much the right to freedom should be primary, but the right to action (BENHABIB, 2005: 46-52).

A right to freedom here refers to the freedom of the visitor to visit different societies and enjoy temporary stay. The right to action is more encompassing, upon visiting the individual should have a right to enter into a dialogue on why he or she should be, or not be, allowed to remain in the community. The 'right to have rights' was also phrased by Hanna Arendt to refer to the need for recognition as a citizen and statal guarantees of human rights, such as we have also seen in the first chapter. Even if human rights are inherent to our being humans, if no entity guarantees us these rights, they are worthless.

The primacy of the need for statal guarantees rather than having faith in the human right that naturally would be inherent to the human being, is reflected in the example of how colonialized groups, and minorities often seeked statehood of their own rather than relying on protection of the international human rights regime (IGNATIEFF, 2001:15). The challenge ahead for the international community in terms of responses for persons that have left their home communities, either as a migrant or a refugee, as envisioned by Benhabib is therefore to develop an international regime that separates 'the right to have rights' from the national condition of the individual (BENHABIB, 2005:58).

(b) Underpinnings

Above was stated how the international refugee regime represents the set of norms, rules, principles and decision-making procedures that regulate states' responses to refugees. It comprises two main norms: asylum and burden sharing (HURRELL, 2011:56-57). Asylum is governed by a strong normative framework, underpinned by the principle of non-refoulement. Burden sharing however, is governed by a weak normative and legal framework (HURRELL, 2011:57).

The norms of the refugee regime have also been defined as concerning not only asylum and burden sharing but in addition to those also assistance. Assistance according to this

author refers to material assistance, and repatriation or resettlement which can be seen as physical assistance. Burden sharing in this definition refers to the imperative to keep in mind some distributional equity so that no state bears overwhelming political, legal and financial responsibility (SKRAN quoted in UCARER, 2006:222). Defined as such, a principle of burden sharing is thus to be applied to asylum and to assistance alike, rather than assistance in terms of resettlement and repatriation being an example of burden sharing in itself. As the permanent solution of local integration is left out among examples of assistance, this likely is covered by asylum in this definition. This definition seems to move towards the acceptance on checks upon sovereignty through imposing burden sharing also upon the notion of asylum, which essentially is an obligation upon states, as the notions of assistance and burden sharing still are at the discretion of states.

Assistance on different terms could also be seen as a different category, and arguably constitutes an additional norm, but often more defined as responses in times of mass influx and humanitarian emergencies. Repatriation however, could be a valid element here in this light as it represents cooperation between states in readmitting their own citizens. In consenting and cooperating in repatriation are more elements reflected of assisting in solving a refugee situation by restoring the situation before a crisis broke out, rather than burden sharing which more so refers to solving a problem that has emerged by creating a new situation as solution.

The fact that this definition when referencing to burden sharing distinguishes between legal and political and financial responsibility is also interesting, as often the separation is made between physical, financial and material responsibility. Although political responsibility could refer to physical sharing, and legal in this case to the assessment of the asylum claims. In theory resettlement would take place after a claim has been assessed, but initiatives have been coined to transfer persons before processing of claims. For now,

however we will work with the separation in two norms, asylum and burden-sharing and consider assistance as a very much connected but somewhat separate rule.

We will now first focus on the norm of asylum, setting out the definitions of the refugee and the main rights and obligations that are at the core of refugee protection, such as non-refoulement, the right to seek and enjoy asylum; the right to leave any country, including your own; and in more general terms, the freedom of movement. We will work towards an understanding of a trend of shifts in state responses to refugees, such as the concept of safe third countries, situated within the broader political context and debates surrounding causes and consequences of forced migration and the interconnectedness with state's concerns in the areas of security, migration and development.

(c) Emerging refugee regime

The question posed by refugees to the international community emerged as an international legal issue in the nineteenth century with the development of extradition treaties and the non-extradition of political offenders. Extradition refers to the institution we now commonly known as political asylum (HURWITZ, 2009:10). The aftermath of World War I with the large number of displaced persons motivated the development of new international instruments of protection that further developed during the interbellum period, in between the two World Wars, eventually leading up to the establishment of the Office of the UNHCR in 1950, the signing of the Geneva Convention Relating the Status of Refugees in 1951, and the later 1967 Protocol (HURWITZ, 2011:10-13). Gradually the practice of asylum became codified as refugee law.

The 1951 Geneva Convention was characterised as emerging from a dual concern in post-Second World War Europe. Previous ad hoc norms of protection were turned into international law (UCARER, 2006:222). On the one hand there was concern with

international order. Response to the refugee problem was a means to contribute to stability and security. On the other hand there was a concern with justice. The establishment of a refugee regime could be a way of promoting human rights within the context of the emerging United Nations system by ensuring collective state contributions to overcome common humanitarian and political problems (BETTS, 2011:8).⁹ Stated in this manner, the Geneva Convention starts from the premise to align state interests with human rights and the insight that common problems have to be overcome by collective contributions. On the other hand, it has also been characterized as: “evolving out of humanitarian desire to improve the fate of the dispossessed” (UCARAR, 2006:222). The development in terms of the emergence of an international refugee regime has been posed as: “the international community’s recognition of its collective responsibility to protect refugees” (HURWITZ, 2009:9).

The Office of the UNHCR was established by the UN General Assembly to provide international protection, and “to seek permanent solutions for the problem of refugees”, as defined in the annex to the Statute of this agency (GOODWIN GILL and MCADAM, 2007:20-21). The wording ‘the problem of refugees’, may imply how refugees are a (the) problem to the international community that UNHCR should tend to. Otherwise, it could have stated: “seek permanent solutions to the problems of the refugee”. Permanent solutions include voluntary repatriation, or assimilation in new national communities, which can involve either local integration in the host country or resettlement to a third state. Importantly, the work of the UNHCR agency should be of a non-political character (GOODWIN GILL and MCADAM, 2007:1).

Developments within the United Nations system and the emergence and consolidation of a human rights regime base for protection have had an impact on the scope and extent of the

mandate of UNHCR (GOODWIN GILL and MCADAM, 2007:20). Situated in context, the second half of the twentieth century witnessed a transformation in ideas about the nature and possibilities of international order and justice. Progress in the field of human rights is exemplary (HURRELL, 2011:93). It is important to note how prior to 1973 international human rights treaties had not yet entered into force. Accordingly, after 1985, the world began a process of what has been called a international 'norms cascade', as the influence of international human rights norms spread rapidly (RISSE and SIKKINK, 1999:21). Although interpretation and application of agreements in this field are debated, they are vanguards of the acknowledgement of the limits and conditions of sovereign states power over individuals (BENHABIB, 2005:18). In this context and for sake of the following of this chapter, it is important to mention the 1948 Universal Declaration of Human Rights (UDHR), the 1948 Genocide Convention, the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR) and the 1984 Convention Against Torture, and other Cruel, Degrading or Inhumane Treatment (CAT).

2. Guarantees

(a) Definition of the Refugee

As mentioned in the foregoing chapter, according to the Geneva Convention, a refugee is a person who is outside his country of origin and who lacks protection by his state of origin or habitual residence. In addition, there is the condition of a well-founded fear of persecution on grounds of nationality, religion, race, political opinion, or membership of a social group. The determination of refugee status is carried out by state parties which are free to institute procedures as they consider appropriate for this purpose (HURWITZ, 2009:14). This determination should occur on an individual, case by case basis, examining a

combination of subjective and objective elements (HURWITZ, 2009:23). Subjective elements for example can be the element of membership of a social group, which can be real membership, or perceived membership, as seen here from the perception of the persecutor. The contention of fear also has an subjective element and therefore usually the check of well-founded is considered, which is based on objective information about the country of origin. Furthermore, the Geneva Convention lays out the legal grounds for exclusion of refugee status, and also the rights that shall be accorded to the refugee, based solely on his or her presence on the state's territory (HURWITZ, 2009:14). One should think here of social and economic rights. If the state determines that the person does not fulfill the requirements to be recognized as a refugee, or falls into one of the elements eligible for exclusion, he or she becomes irregular, unless finding a different category to legalize his status (GUILD, 2009:70).

As the Geneva Convention was drafted to address the post World War II refugee problem in the geographical region of Europe, it therefore contained limits in time and space. These limits were 'removed' by way of the 1967 Protocol, signalling the recognition that the problem of refugees was not 'solved' that easily, nor was solely a European phenomenon. Instruments to address refugee situations drafted in and for the purpose of other regions also became devised. Some of these instruments at times broaden the elements that define the refugee, such as the 1969 Organisation of African Union (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, which refers to: "those compelled to leave their country of origin on account of external aggression, occupation, foreign domination, or events seriously disturbing public order in either part, or the whole of his country of origin or nationality"; the 1984 Cartagena Declaration drafted for Latin America, which includes generalized violence and massive human rights violations.

For Member states of the EU, the treaty of Amsterdam, adopted in 1997 and entered into force in 1999, moved asylum and immigration into the area where legally binding instruments of harmonisation can be legislated by the Council of Ministers, and a measure of judicial control can be exercised by the European Court of Justice. In the 2004 EU Qualification Directive incorporates and interprets the 1951 Convention/ 1967 Protocol refugee definition. It provides for subsidiary protection for persons who do not qualify as refugees, but would face serious harm if returned to their country of origin. Individuals also receive additional protection against removal under the European Convention on Human Rights. The EU Qualification Directive can be seen as the most ambitious attempt to combine refugee law and human rights law...to date (GOODWIN GILL and MCADAM, 2007:37-41).

In the definition of the refugee, the fact of having crossed an internationally recognized border is a crucial element. If a person has not yet left the country of origin, but the host state cannot secure his protection, the foremost human rights instrument to derive protection from would be enshrined in Article 14 of the Universal Declaration of Human Rights that declares the human right to seek and enjoy asylum. The terminology of ‘enjoying ‘asylum’, could refer to temporary stay, but also the granting of a recognition of the status of refugee. However, contrary to the right of individuals to seek asylum, there is no international legal obligation upon states to grant asylum to any refugee who seeks it. It has been argued how the phrasing of freedom from, rather than freedom to is what makes human rights universal (IGNATIEFF, 2001:75). however

The reference to asylum in the context of a refugee regime might appear a little bit muddy, but is inescapable. Part of the practice within the refugee regime derives from earlier state to state practice as regards asylum. European countries continue to use the term asylum seeker to describe a person who has made an application for international protection but

whose application has not yet been determined (GUILD, 2009:82). The difference between asylum and refugee protection can be explained as the granting of asylum being a discretionary act of states, reflected in domestic law, more so than in international law. Therefore, the notion of asylum seeker is commonly used to identify refugees whose formal status has not yet been recognized. It can be described as a: “semantic slip, which originates from domestic legal systems, reflecting an approach where asylum remains the primary institution” (HURWITZ, 2009:16-17). This recognition of the status of a refugee for many domestic legal systems is constitutive; it brings the refugee into being. On the other hand, from a perspective of international law such a recognition is declaratory, acknowledging a condition that was actually obtained upon leaving one’s country because of the fear for persecution.

The Geneva Convention’s first point of reference is the individual, as a rights holder (GOODWIN GILL and MCADAM, 2007:10). The rights bearer is the state. We have to keep in mind how was argued that UNHCR was supposed to solve the problem of refugees, not the problems of the refugee. It reflects the original thinking of how refugees can be seen as destabilizing international order. Nowadays there is a tendency of state practice that tends to move away from emphasizing the individual in need of international protection, towards focusing on the state of origin and its capacity, actual or supposed, to provide protection (GOODWIN GILL and MCADAM, 2007:10). States seek to define the individual as part of a group or flow, framed by the state’s definition of belonging or foreignness (GUILD, 2009:68). The concepts of safe first country of asylum and safe third countries mark this trend, which will be further explored below.

(b) Non refoulement

The main normative underpinning of the international refugee regime is the principle of non-refoulement, which is set out in Article 33 of the Geneva Convention. It prohibits the expulsion or return (refoulement) in any manner whatsoever of a refugee to the frontiers of territories where his life or freedom would be at risk on the grounds stated in Article 1, to be: race, nationality, religion, political opinion, membership of a particular social group. Refoulement includes summary refusal of admission at the state border (HURWITZ, 2009: 174).

Other human rights instruments also enshrine this principle which has thus passed to become a broader principle of human rights, creating window opportunities as they add grounds on which account a person cannot be returned or removed. We can mention the 1984 Convention against Torture, proscribing the return of persons to territories where there is a likeliness of being subjected to torture, cruel, inhuman or other degrading treatment or punishment (GOODWIN GILL and MCADAM, 2007:354).

The safeguard against refoulement is also included in the 1966 ICCPR, and regional instruments such as the 1950 ECHR and fundamental freedoms, which bind states not to transfer individuals to another country where they would be exposed to serious human rights violations (HURWITZ, 2009:188). The principle of non-refoulement thus applies to all refugees, but not all persons to whose situation applies the principle of non-refoulement are refugees.

Non-refoulement is now widely recognized as a principle of customary law, meaning that among states there is an acceptance of the legally binding character of the rule, as evidenced by state practice and demonstrated by declarations, statements, and agreements. It therefore binds all states, not only signatories to the treaties and convention mentioned (HURWITZ, 2009:204). Furthermore, the principle applies to situations of mass influx and

individual cases alike (HURWITZ, 2009:209). The principle can be understood as an application of a preventive tool to the protection of human rights (HURWITZ, 2009:188). By not returning the persons to a situation of risk, the human rights violation is prevented.

State practices undermining this principle often involve either the state questioning the status of the individuals in question (and thus duties and obligations towards him or her), or involve invoking exceptions to the principle regarding the situation at hand, most often invoking the argument of the individual posing a possible threat to national security, and therefore excluded from the non-refoulement principle (GOODWIN GILL and MCADAM, 2007:224).

That states feel that they have to legitimise themselves and invoke exceptions, rather than question non-refoulement in itself, can be understood as exemplary of the strength of the principle. Such behavior is common for actor's stance towards international human rights norms. In cases where an actor allegedly is violating one of these norms, the actor in its reaction can either accept the validity of the norm, but claim that violation did not occur because the situation is defined differently (i.e. not a situation where the norm would be invoked), or challenge the validity of the norm itself (RISSE and SIKKINK, 1999:13).

At times states interpret life and liberty according to their purposes, particularly the concept of safe third countries undermines the principle of non-refoulement (BENHABIB, 2007:36). Non-refoulement involves direct return (to the country of origin) and indirect refoulement (to a third state). Indirect refoulement is the case when a person is returned to a state where effective protection is not guaranteed, or where the risk exists of eventually being returned to the country of origin (HURWITZ, 2009:180-181). Non refoulement only concerns the country where a refugee cannot be send to, not where a refugee may not be send from (29).

The principle of non-refoulement reflects some of the thinking of Kant as set out above, emphasizing a right of a visitor to visit a territory. Particularly, Kant stated how such a right may not be denied in case this may result in the destruction of the person involved. Such destruction, in the wording of the principle of non-refoulement is translated as ‘the existence of a threat to life and freedom’. In Kant’s considerations again, this right could be denied for reasons of self-preservation of the receiving society. This is also reflected in Article 33 of the Geneva Convention: if a person represents a danger to the security of the receiving community or the host state, the person may not claim the benefit of this provision.

Besides the Geneva Convention there are other instruments that also implicitly or explicitly prohibit refoulement, as mentioned CAT and for example Article 3 of ECHR states that the prohibition of removal is absolute, no matter how dangerous or undesirable an individual’s conduct (GOODWIN GILL, 2007:211). Article 33 of the Geneva Convention has been instrumental in the development of complementary forms of protection at the EU level, although there is a high threshold (HURWITZ, 2009:191).

It has been argued that the principle of non-refoulement might constitute a *de facto* right to asylum (HURWITZ, 2009:190). Even if the individual does not fulfil the requirements to be recognized as a *de jure* refugee, he cannot be returned based on the fear for his life and freedom. This may result in problematic situations, because when an individual is not recognized as a refugee, but receives only some subsidiary protection on the condition of being not returnable to his state of origin, the person is not accorded the additional economic and social rights enshrined in the Geneva Convention, as such rights are not specified in for example the CAT, or ECHR (GUILD, 2009:84). Only recognizing the person as refugee, or some other type of regularization, or a change of circumstances in his or her state of origin would change this.

(c) The right to seek and enjoy asylum from persecution

As provided for in Article 14 of the Universal Declaration of Human Rights it is a declared human right to seek and enjoy in other countries asylum from persecution. Unless, the exceptions enumerated in 14.2: “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”.

We have noted how this human right is not complemented by a right to be granted asylum. It is not specified where the refugee should file the asylum claim, or which state is responsible for addressing the claim. A valid question is therefore, whether refugees have a choice of their country of asylum. Should a person go to the authorities in the first state where one could possibly claim asylum? Under International Law there is no such obligation (HURWITZ, 2009:211). Not every state offers similar conditions and accessibility for presenting an asylum claim. Nevertheless, states should not abuse their right to (not) grant asylum (HURWITZ, 2009:212).

There is a close connection between the right to seek and enjoy asylum and the right to leave any country, including your own, as enshrined in Article 13 UDHR. Reading Article 13 and 14 UDHR together with the right to freedom of movement (UDHR Art 13.1) and the totality of rights protected in UDHR and ICCPR implies an obligation for states to respect an individual’s right to leave his or her country in search of protection (GOODWIN GILL and MCADAM, 2007:370). The right to leave any country, including one’s own, is restricted if considered necessary for protection of national security, public order, public health or morals, or the rights and freedoms of others (GOODWIN GILL and MCADAM, 2007:381). Nonetheless, as the UDHR is a declaration rather than a convention or treaty, therefore this guarantee has somewhat limited force (BIGO and GUILD, 2005:36).

Also, it has been argued however how many of the states which contributed to the drafting of the UDHR saw no contradiction between endorsing international norms abroad, while continuing oppression at home (IGNATIEFF, 2001: 6).

It is not guaranteed that states will allow citizens to leave their home country in order to seek refuge and it is not easy for other state to oblige a state to do so. Interesting is the argument therefore, that one could interpret a right to leave one's country to seek asylum as imposing a duty on other states, or in case the international community as a whole, than the state of origin, precisely because we speak about persons who cannot claim the protection of their home state and these persons are thus are the responsibility of the international community (HURWITZ, 2009:214).

During the Cold War, border closures not allowing citizens to leave their country, and the international community concerns for these populations where connected to ideology. There has been a tendency however the closure on part of the state of origin towards closure on part of receiving states. This is connected to a fear of states neighbouring a state where is instability to mass influx of refugees as a security concern. On the other hand, the progressive development of human rights and RtoP may induce a necessity for the international community when a state facing massive human rights violations, closes his borders, to broker a solution, with at last instance intervention to end the situation. We have seen however how military measures are not the best way to address human rights violations.

Barriers imposed on the freedom of movement, such as interception, visa restrictions, carrier sanctions, may breach the obligation set out above, and more generally, demonstrate a lack of good faith in implementing treaty obligations (GOODWIN GILL and MCADAM, 2007:370). These practises lead to situations where refugees are *de facto* prevented from seeking asylum (HURWITZ, 2009:211).

B) International cooperation in the refugee regime

1. UNHCR

The preamble of the Geneva Convention emphasizes how refugee concerns are to be addressed through collective endeavors and international cooperation (HURWITZ, 2009:183). The decision by one state to grant or deny a person the opportunity to enter its territory, or to grant or deny the status of asylum, has consequences for the individual, but also for other states, and is thus not a unilateral act.

UNHCR is an international actor in its own right, but also represents the states as an intergovernmental agency. It has to balance the interest of the individual refugee, its responsibility as deriving from its mandate, with the interests of states. UNHCR is governed by the UN General Assembly and the Economic and Social Council (ECOSOC). The UNHCR Executive Committee (EXCOMM), consisting at present of 87 states, approves the agency's biennial programmes and the corresponding budget (UNHCR). UNHCR is not a fully autonomous actor because the agency depends for 98 percent on voluntary contributions from states and other donors. This institutional setup was chosen to ensure long term relevance and survival of the agency, but also limited powers (LONG, 2012:3).

We have seen how UNHCR is entrusted the responsibility to find durable solutions to refugee situations such as for example through resettlement. The provision of resettlement is based on double voluntary rule urging for a consent on part of the receiving state and the individual, UNHCR works as the contact person in between. Consent in voluntary repatriation is also important, and consent ideally also comes into play in local integration. In 2003, UNHCR's mandate was extended by the General Assembly "until the refugee problem is solved." (UNHCR).

Alongside refugees with a well-founded fear of persecution, in practice, persons that are eligible for protection and assistance by the international community (and thus UNHCR), often include persons who lack protection of their state of origin when reasons of flight can be traced to conflict, human rights violations, breaches of international humanitarian law or other serious harm resulting from radical political social or economic changes in their own country. The main trigger of the international protection regime remains violence, or risk of threat of violence (GOODWIN GILL and MCADAM, 2007:49).

It has been noted how most states want the UN to assume responsibility for a broad category of persons obliged to flee countries for a variety of reasons. Particularly, UN endorsement of UNHCR activities in situations of complex humanitarian emergencies can be explained as a response to protection gaps in the existing international refugee regime (GOODWIN GILL and MCADAM, 2007:427).

Considering its broadening mandate and growing population of concern and dependency on voluntary contributions, UNHCR needs to be aware of the broader political context of its work and recognize and channel states' interests into a commitment for protection (BETTS, 2011:77). In the past, the cooperation problem has been overcome by what have been called substantive cross issue area linkages, this in combination with an important role for UNHCR in making states recognize the relationship between burden sharing in terms of refugees and their interests such as immigration, security and trade, even if these connections are uncertain and ambiguous (BETTS,2011:64-65). Thus the role of UNHCR was considered crucial to point out how these different areas could be positively linked.

Between 2002 and 2005 UNHCR launched the Convention Plus initiative, which is an example of how the agency tried to enhance the quality of protection, and achieve responsibility sharing between Northern donors and Southern host states. Convention Plus

focused on the themes of resettlement, targeted development assistance, and irregular secondary movements (BETTS, 2005). The initiative appeals to state's interest in the areas of containment, security and development, building upon the understanding that forced migration cannot longer be seen in isolation from the broader context of North-South relations and other areas of national and global governance, given the extent to which asylum and refugee issues have become politicised. In this light it is important, not only to find solutions for the uprooted, but also to solve the crisis that caused the movement in the first place (BETTS, 2005). Eventually, this initiative resulted in limited new commitments, but it has been innovative in creating new norms for extra-regional commitments to protection, and thus the envisioned North-South cooperation, which is important in a regime dominated by the principle of proximity, Furthermore, it has been successful in appealing to state interests in the mentioned areas (BETTS, 2005).

Deriving from UNHCR's mandate and responsibility to oversee the application of refugee law, the agency is assumed to act on behalf of the international community. Therefore, if individual states do not protest directly against certain (object able) acts of others states, but acquiescence in the protest channeled through UNHCR, they indirectly signal their consent with the criticism voiced by UNHCR (GOODWIN GILL and MCADAM, 2007:228).

2. States

We have seen how the refugee regime places an obligation on states to protect refugees who reach their territory, but sets out few obligations on states to protect refugees on the territory of other states. This is not solely worrisome in terms of the 'burden' or responsibility of hosting refugees falling upon a few states, geographically close to states of origin of larger numbers of refugees, but also resulted to have had the adverse effect of

inducing other states, mostly industrialized states, to devise measures to make it more difficult for refugees to reach their territory. Particularly, because it is extremely difficult to remove these persons from the state territory once they are there present. Although debated

If every single state would effectively protect the life and dignity of all persons on its territory, there would not be refugees in the first place, so much is clear. Civilian populations are to be protected by constitutional guarantees, and secondly by international human rights obligations of the state in question (GUILD, 2009:74). If this protection cannot be upheld, a person will see himself obliged to flee. After international flight, if every host state would treat every single refugee arriving at his territories in a fair manner, offering effective protection and supporting durable solutions, these refugees would not pose a problem (anymore) to other states. However, not all states can offer such effective protection for every single case, even less so if refugees arrive in greater numbers.

Furthermore, geographical proximity to the state of origin arguably reflects how the initial source of persecution is still close. The first neighbouring host country where a refugee flees to therefore cannot always guarantee safety. This is reflected in some of the legal instruments regarding refugees state how refugees should be hosted not too near to the state border.¹⁰ Insufficient or ineffective protection induces onward movement, also known as secondary movement. Cooperation rather than containment is necessary to find solutions to such situations.

The dilemma in refugee protection deals with the fact that the majority of the world's refugees are originating from and are hosted in the global south, namely 72 percent, and the existing regime places no clear obligations on the northern states to engage in burden sharing to support protection in the south (BETTS, 2011:54). Primary territorial and jurisdictional responsibility for refugee protection is designated to the states often least economically,

politically and socially capable of assuming this role. This can be seen as an accident of geography (BETTS, 2011:77).

At times refugees in host countries are confined to camps or settlements. Due to a lack of available solutions, their situations can become long term and come into what is defined as protracted refugee situations (prs). PRS occur when 25.000 persons are counted who have been in a situation of displacement for five years or longer, without the immediate prospects for implementation of durable solutions (quote). The lives of these displaced may not be directly at risk, but their basic rights and essential economic, social, and psychological needs remain unfulfilled after years in exile (LONG, 2010). In 2011, more than 7.2 million refugees were trapped in prs (LONG, 2010).¹¹ Not only are the lives of these people put on hold, for the hosting state, these camps may represent a security threat for the host society as it can be a place for rebels groups to be grouped or hide, or post 9/11 terrorist concerns, a source of environmental degradation, a drain on scarce resources.

The consequence is that in some regions the presence of refugee settlements have become a permanent reality that has also been defined as “accidental cities”. UNHCR High Commissioner Antonio Guterres, noted this in 2012: "The number of asylum claims received across all industrialised countries [in 2011] is still smaller than the population of Dadaab", Dabaab is Kenya's largest refugee settlement (quote!!). The approach to the problem of refugees still reflects an emphasis on it being a temporary problem, and the preferred solution by states is voluntary repatriation. The lack of solutions such as integration into the host society or availability of resettlement is reflected in the argument how the average length of a refugee or IDP's displacement is now approaching 20 years (LONG, 2010).

¹¹ It has been proposed however to exploit the economic possibilities. In the case of Dabaab, if counted as a city, it would be Kenya's third largest, the current situation is unsustainable and returning the inhabitants is also not an option, within international norms, but also logistically (teff,2012). Furthermore: “A 2010 study commissioned by the Kenyan, Danish and Norwegian governments showed that the Dadaab camps bring about \$14m into the surrounding community each year. The study also found that the annual turnover of refugee-run, camp-based businesses in Dadaab is around \$25m. Continuing to run these camps as emergency operations after 20 years is not in anyone's interests”(Teff,2012).

Capacity sharing or responsibility or burden sharing for the protection of refugees can be understood as financial aid, as practical and material assistance, and in terms of physical numbers of persons that are granted refuge. Of importance here are the asymmetric power relations within the refugee regime. There are no legal norms on responsibility sharing within the international community on refugees (BETTS, 2005:1-2). Moreover, states will not altruistically contribute to refugee protection (BETTS, 2011:77).

In a broader sense this account for the human rights regime in a broader sense. In international politics as has been said: pure idealism begets idealism. To establish binding international commitments, much more is required (MORAVCSIK, 2000:249). Nevertheless, to an extent burden sharing does take place by way of states financial contributions to UNHCR, and by states accepting repatriation for examples in mutual agreements, and by states offering refugees to be resettled from their first country of asylum. However, commitments are not sufficient. The global regime is weak in terms of capacity to enforce and finance protection. Moreover, burden sharing objectives are vaguely conceptualised and likewise not enforceable. There are difficulties in assuring resettlement. In this light one should note how disbursing funds is often easier accomplished than moving people (UCARER, 2006:235).

3. The European Union

The Geneva Refugee Convention emerged out of collective concern to solve the post WWII refugee problem in Europe. At present the Convention has 145 state parties, against 146 for the 1967 protocol. Between 2008 and 2012 the 27 EU members received 64 percent of all asylum applications in industrialized states (UNHCR).

Often it is pointed out how regional burden sharing arrangements could and should be complementary to global burden sharing. Therefore, the EU provides a good case study of

how concepts of protection and responsibility are evolving in a world of increasing political and economic integration (HADDAD, 2010:86). Like the UN, and perhaps more successfully, in its policy the EU is engaged in innovation, rule articulation and rule diffusion. International governmental organizations have a policy pushing agenda (UCARER, 2006:220). The EU as a specific regime is nested in a 'superstructure' which has been (and continuously is) negotiated in a multilateral setting. The specific regime is constrained by norms, principles and at times the rules and decision making procedures of the superstructure (UCARER, 2006:221). Changes in the superstructure would therefore, shift the boundaries between which the specific regimes can devise their policies.

Human rights and humanitarian principles are considered the foundation of the EU and respecting them is a condition for new membership. Activities to safeguard human rights have been progressively increased with the adoption of the EU Charter of Fundamental Rights (VANDVIK, 2008:34)

Nevertheless, it is argued how the EU is developing practices that signal departure from the global refugee regime and norms, as part of the attempts to create a common European asylum framework. These efforts have received the label of responsibility shirking and responsibility shifting, rather than commitment to the sharing of responsibilities. Shirking responsibilities, because of collectively implementing exclusionary policies for eligibility as refugees; responsibility shifting refers to the shifting of financial, physical or material burden to other member states, or states outside the EU; in terms of responsibility sharing in the EU there are limited (additional) commitments that indicate as such (UCARER, 2006:236). We will now turn to the practices that might have led the author to these contentions.

Differing visions of responsibility in recent years have been played out regarding burden sharing in the EU. The Southern EU Member states seek shared responsibilities on

the physical presence of refugees, while Northern members prefer an emphasis on the provision of practical assistance to the Southern states in order for the refugees to remain hosted in the South.

These stances of the Northern vs. the Southern states are connected to different types of protection and responsibility as promoted by the EU. On the one hand, there is the inwards turned vision focused on the development of the Common European Asylum System (CEAS) and the relocation of those granted international protection within the EU. On the other hand, there is a outwards looking vision, over EU borders, with an emphasis on addressing root causes of refugee flight (HADDAD, 2010:86). There is a recognition that responsibility should be shared, but there is uncertainty whether this is best done by moving people around within the EU, or to promote protection *in situ* either at the place of arrival in the EU or before doing do so, thus en route to the EU (HADDAD, 2010: 90). There are five elements to the EU policy: fair and fast asylum systems, returns, practical assistance, financial assistance, and the external dimension (HADDAD, 2010:88-89).

Therefore, different responsibilities to protect can be identified within the EU policy, first whether the mechanism of responsibility sharing should be through physical burden sharing or through practical assistance, secondly, whether there is debate about the way in which the EU should provide protection to refugees, through the CEAS, or based on an external relations approach on engagement with countries and regions of origins. The latter approach is argued to be more so in line with what has been termed the interventionist principle underlying the Responsibility to Protect (HADDAD, 2010:98-99).

However, the question that can be asked here is whether engagement with countries and regions of origin should always be equaled to intervention as they would interfere with understandings of non-interference in internal affairs of other states. Especially if such cooperation takes place based on cooperation based upon mutual consent, which points more

in the direction of phrasing sovereignty as responsibility, which includes a responsibility of the sovereign to recognize a need for assistance from external actors in certain matters at certain moments.

Antecedents of present understandings and dilemma's within the EU policy towards refugees can already be found in the late 1980s and in the 1990s. In the Schengen agreement a principle of 'responsible state' is present, and the Dublin Convention of 1990 builds forth on this understanding of 'responsible states'. Also regarding the Schengen agreement (devised to respond to refugee inflows originating from Eastern Europe, it contains the premise that the decision of one member state is valid for all member states.

The Dublin Convention involves a pooling of responsibilities in the EU in refugee matters and in the determination of which EU member state would be responsible for assessing an asylum claim (GUILD, 2005:36-37). Under the Dublin Convention, a decision upon a claim taken by another member state, is a final decision, and therefore a new claim cannot be filed afterwards by the claimant in another member state. This may lead to practices where the asylum seeker does not have a choice of where to seek asylum and file a claim. Recalling the Dublin Convention of 1990 is relevant as its provisions and the provisions of its sequel, the so-called Dublin Regulation, adopted in 2003, rely on the same principle (HURWITZ, 2009:3).

At the 1999 meeting of the European Council in Tampere, Finland, the establishment of a CEAS was elaborated and a commitment was made by the European Union members states to respect the right to seek asylum by the European Union Member. Besides the phrase of a 'responsible state', also in the late 1980's a plan for harmonized asylum had already come up (VANDVIK, 2008:38). The Conclusion of this meeting was that it would be contradictory to EU tradition to deny freedom, which is founded on human rights, democratic institutions

and rule of law, to those whose circumstances lead them justifiably to seek access to European territory (VANDVIK, 2008:34)

From that point on, advancing towards a CEAS would include the adoption of Dublin II. Cooperation with countries of refugee origin would be intensified and common standards for fair and effective protection would be established, as well as minimum conditions for the reception of asylum seekers and harmonization of the rules applying to recognition of refugee status. Furthermore, there was a call for the adoption of a measure on temporary protection (UCARER, 2006:230). Temporary protection arises as an alternative option for refugee response in times of greater crises. The focus on temporary protection can be seen as a protection measure which is oriented towards return to the state of origin for the individual concerned and thus sets limits on time and space of protection.

At the Thessaloniki meeting of the European Council in 2003, came the understanding round of how a reduction in asylum seekers in the EU, does not necessarily represent an overall reduction in asylum seekers on the international level (LEVY, 2010:93). In response to protection gaps, i.e. the space between norms on protection and their implementation, the ideas of managed entry procedures and regional protection areas were coined as instruments to offer protection to those in need as promptly and as close to home as possible, avoiding the need for dangerous border crossings in the bid to reach Europe. (LEVY, 2010:94).

Among the EU practices emerged in response to these gaps, measures can be identified which are an extension from earlier emerged national practices in refugee responses. Many states, especially those who establish the borders of the EU have established bilateral cooperation with non-EU member states in terms of managing entry into the EU of non-EU citizens and such national practices have been adapted to the regional level.

However from bilateral readmission agreements on returns of asylum seekers or denied asylum claimants may surge the practice of receiving states to turn their back on neighbours and do the same thing, i.e. chain refoulement.

In this practice a shifting occurs of responsibility to review claims away from the core of the EU and the main critique voiced is how undocumented migrants and undocumented asylum seekers in need for international protection fall in hands of private actors (226). The practice of security is ever more often being outsourced from the state to private actors, which yet have to be subjected to norms and obligations under human rights and other treaties.

A consequence has been that the borders of the European Union have become 'de-territorialised' (VANDVIK, 2008:28). As such border control, is no longer confined to the physical borders of the EU, but entrance procedures and checks have become virtual, monitored through advanced identification technologies and databases, in order to stem flows towards the EU border at their source and let people remain as close to their country or region of origin. As such the effects of these practices are in contradiction with basic human rights such as the right to leave one's country, which is central to the right to seek asylum. Furthermore, it creates the risk of effective refoulement through absence of access to fair and efficient asylum procedures that are judged on their substance (VANDVIK, 2008:27-28).

Control on entry takes place on entrance by airline flights, over land and by sea. In this light, irregular entries by sea are less important in terms of numbers than by land, but still considerable, as is the death toll of those who try to arrive at European borders by sea but do not manage to reach land safely (VANDVIK, 2008:37). This could however be interpreted as violating Article 2 of the ECHR on the right to life. Responsibility for people intercepted, rescued, or rejected is often unclear (NAZARSKI, 2008:41). Public discourse addressing migration by sea considers this movement of persons as a menace to the receiving

society rather than taking a perspective from of the people whose lives are actually in jeopardy (VANDVIK, 2008: 31).

Eduard Nazarski argues how in-region-protection is *de facto* already in place as only a small percentage of refugees eventually reaches Europe, and ‘protection elsewhere’ understandings by the EU have induced many refugees *en route* to Europe to remain in neighboring countries, even though the international protection levels provided by states as Morocco, Algeria, Libya, Egypt and Ukraine can be questioned (NAZARSKI, 2008:41-42).

The dilemma surrounding control at the European borders can be phrased as promoting either the protection of, or protection from, refugees and the following question may be raised: “Does Europe have the intention and will to protect refugees, or is it organizing things in order to protect itself from refugees?” (NAZARSKI, 2008:42).

Importantly, the same author reminds us of how the fact that some people do not have the proper documents to stay or travel in a certain country does not mean that they do not have rights. Therefore, he calls upon the media to use more apt language when addressing these issues and calls for more transparency in state practices (NAZARSKI, 2008:42).

C) Refugee protection gaps in context

1. Contemporary refugee flight

The agenda of international politics has been broadened over the last decades. Processes of increased integration and cooperation can be distinguished but also processes of protectionism and discourses of threat and insecurity. Globalisation at once urges for a need to ‘disattach’ the state from the vulnerability that may come with it, as is a facilitating factor for many positive and constructive developments. Furthermore, other actors have come to

play a role, or more important roles. To consider state policy responses to international phenomena it is imperative to see to what extent not only responses but whether also the nature of the problem and maybe the context has changed. It was argued that it is utopian to look to an era beyond state sovereignty and how the chief threat to human rights nowadays comes not from tyranny alone but from civil war and anarchy (IGNATIEFF, 2001:35). Ignatieff further argues here how the sovereign state is exactly the building brick for maintaining order. We will now further see into the relation between the state and the challenges it faces to uphold human rights and the consequences for the forced displacement of populations.

In the debate surrounding the changing characteristics of warfare, the effects of globalisation and the argumentation how states are losing their power to influence outcomes of their policies, there has been the well-known new wars discourse, advocated by Mary Kaldor. This line of argumentation mainly refers to changed characteristics of war in terms of goals, methods of warfare and way in which they are financed (KALDOR, 1999:7). The distinctions between war, organized crime and large scale violations of human rights have become blurred (KALDOR, 1999:2). War does not revolve anymore around the capture of territory, but about political control of population (KALDOR, 1999:9). The tactics applied to achieve this, consisting of sowing fear and hatred, result in high levels of refugees and displaced persons (KALDOR, 1999:11).

The understanding of how contemporary wars are more so (not necessarily declared) internal and often protracted conflicts, thus involving different intrastate parties, implies how they do not culminate easily in victory or conquest. Although usually internationalized, these conflicts differ from interstate declared wars. Internal conflicts often last until a shared exhaustion with conflict comes about. Such mutual exhaustion has been coined a mutually hurting stalemate, with which may come in addition, a dawning mutual respect, joint mutual

recognition and a common commitment to moral universals for agreement (IGNATIEFF, 2001:21). Conflicting parties often will remain sharing the same state after the peace agreements are signed. After signature these agreements importantly still have to be implemented, which is not always guaranteed nor successful.

It is debated whether civilians are nowadays proportionately more targeted in conflict than before. Nonetheless the disagreement surrounding this contention, it is clear how there is more information available on casualties. Furthermore, some figures are inflated and thus show a distorted picture. Population displacement figures may be cumulative for example, including repeatedly displaced persons. Aspects such as advanced technology and increased interconnectedness, which can be ascribed to available means of transport and communications, also play a role in the actual displacement of populations and the visibility of such (KALDOR, 1999:214). Regarding the strong criticism that the new wars paradigm has received, Kaldor herself explained how her primary goal was to emphasize the illegitimacy of present day wars and how individual rights and importantly how the rule of law should be placed at the center of any response (KALDOR, 1999:3).

Alongside a new wars discourse there is a weak state/ failed state/ fragile state discourse, referring to states that according to the entities labeling them have difficulties fulfilling the requirements of a full-blown sovereign state. As such, weak states could be or become unstable, and therefore endanger international order and stability. In terms of rule of law, stable states provide best possibility for national rights regimes and these remain the most important protector of human rights (IGNATIEFF, 2001:23). National rule of law is important as the liberties of citizens are better protected by their own institutions than by well-meant interventions from outsiders (IGNATIEFF, 2001:35).

On the international plane, naming and shaming is an integral part of the international human rights regime and with a not so good human rights record, for states it becomes

harder to secure international loans and military help (IGNATIEFF, 2001:). At times these measures become contradictory as exactly populations that need support from the international community become subjected to the consequences of sanctions imposed on their national leaders or government. Therefore, the exercise of being part of the international community is to some degree conditional on the observance of proper human rights behaviour. When states fail, they render themselves subject to criticism, sanction and as a final resort intervention (IGNATIEFF, 2001:17).

Refugee flows are corollaries and the physical appearance to instability as represented by human rights violations. Refugee flight has also become of the securitization discourses and post 9/11 terrorist threat. The characteristics of contemporary refugee flows have been enumerated as mixed flows, irregular secondary movements, and protracted refugee situations, from these perspectives states have tried to seek responses.

2. State practice to address contemporary refugee flight

International refugee protection depends at a basic level, on the freedom of movement. Geography, poverty and conflict may make it impossible to leave a country of origin. (LONG, 2012:1). Added to such constraints, measures are taken by states to limit population movements. Often applied, or explained in discourse, as an anti-immigration measure, or in a different context, to prevent spill-over from ongoing armed conflict in a neighbouring country.

These types of limiting measures have far reaching repercussions for the individual refugee. People trying to flee will, if unable to cross the state borders, become internally displaced persons. Higher numbers of IDP's in the world in comparison to lowering numbers of refugees as a trend, could thus be understood as a self-fulfilling prophecy (GUILD, 2009:74-75). The broadened group of persons of concern to UNHCR, particularly in

countries of origin has been seen as a recognition of the consequences for the international community when internal displacement becomes external displacement (GOODWIN GILL and MCADAM, 2007:27). External displacement thus has to be avoided, and providing in country assistance can be a tool to prevent this.

The situation of IDPs is often one of hardship and vulnerability, and may have destabilizing effects on the host state. The fact that the individual still depends on the same state that was not able to safeguard initial protection creates uncertainty (GUILD, 2009:76). The international community has made efforts to reach agreement on how to respond to IDP's. These initiatives were premised on the idea that protection for IDP's is part of national sovereignty (GUILD, 2009:79). Commitments therefore reflect an affirmation of already existing ones under the UDHR, ICCPR and ICESCR setting threshold for behaviour towards all persons, not just citizens (GUILD, 2009:79). Some progress has been made by the international community on creating more safeguards for the position of IDP's, as evidenced in the guiding principles for internally displaced persons, the Kampala Convention signed by African States, and codified in a number of national laws. However, as with many documents in this area, the problem is not in standards but in implementation (GOODWIN GILL, 2007: 229).

An ultimate measure to mitigate external displacement is through border closure, which can be applied as response to humanitarian emergency (mass upheaval), or as anti-migration policy. In cases of humanitarian emergency, Katy Long showed how border closures in the face of mass refugee influx give insights into the political calculations that shape states' and UNHCR responses to refugee crises. She refers to situations that occurred in Somalia, Iraq, Kosovo, Rwanda and Afghanistan. Rather than pressuring for an opening of the border, the answer of the international community has been the establishment of alternative safe zones to host displaced populations, who in turn were dependent on the

provision of humanitarian assistance (LONG, 2012). Besides depending on the provision of humanitarian assistance, their safety also became dependent on the international community's capacity to keep safe havens safe. There is a contradiction to be discerned however in how shifting understandings of sovereignty have opened up space for additional protection of IDP's, and allow for easier delivery of humanitarian aid within conflict settings (LONG, 2012:17). On the flipside however, through containment policies to an extent the need for in country, or in region protection is first created by the same states that in turn deliver aid. Provision of humanitarian aid clearly is needed when such situations arise, but asylum should not be reduced to such aid. The right to refugee protection cannot be replaced by refugee charity (LONG, 2012.15).

Even in situations of mass influx of refugees, other states might not step up in large numbers to come to the aid. Industrialized countries have often advocated solutions that would keep the would be refugees in their place of origin or close to it while attempting to remedy the situation through political means (UCARER, 2006:223).

In a broader context it is often stated how states increasingly place emphasis on the containment of armed conflict within the territory or region where it is taking place. Limiting movement of persons can be considered part of this practice of containing armed conflict, if population movement is understood as possibly creating instability. The turn of the cold war saw a shift from communist policies for exit control, fiercely criticized by Western states, to a new emphasis on border control from host communities (LONG 2012: 5).

A great concern for industrialized states are (irregular) secondary movements, by which they mean, the onward movement after the initial movement of flight or migration. In terms of refugee flight, for prevention of such secondary movement, the protection conditions and capacity of the first country of asylum, or any other state that might be on the trajectory of the fleeing person, is important. Another concern regards mixed refugees flows,

concerning populations where it difficult to distinguish economic motivations for movement from flight due to fear of persecution. Some of those travelling in these mixed migration flows will have valid claims to international protection as refugees (LONG, 2012:16). The latter may be overlooked if these persons, and thus also the measures to address these situations, are considered migrants, particularly, irregular migrants.

As mentioned above, over the past decades, the international community came to terms in realizing how the problem of refugees would not be solved and would therefore have to be approached as something permanent. A collective responsibility as envisioned in the Geneva Convention became to be considered a collective burden. On a broader level politics and processes of globalization changed, and at the same time causes and consequences of forced migration differentiated and responses of states to refugees adapted too.

International cooperation in the refugee field has changed from an emphasis on collective assistance and protection, to transnational policies on containing refugee flows (HURWITZ, 2009:2). Over the 1970s, the era of generous asylum policies reached an end and the international attention became progressively focused on restricting access to the asylum system (HURWITZ, 2009:23). But also importantly the success of preventing the asylum seeker from having access to procedures, and from reaching the territory has driven official numbers down. Containment practices include the imposition of visa restrictions, carrier sanction, interception on the high seas and expedited procedures for manifestly unfounded claims (HURWITZ, 2009:2). Others simply die en route. Media outlets have informed us of the erection of physical walls etc. Containment policies increasingly forced refugees to travel over land, and have also placed the decision making capacity in hands of private actors such as airline officials and security companies.

There was a registered increase in asylum applications in the industrialized world from late 1970s until its peak in 1992. Then numbers decreased (HURWITZ, 2009:1). Partly this decline can be explained by the cessation of conflicts. Given the uncertain and perhaps unpromising legal situation that follows flight, increased attention is now focused on ways and means to prevent refugee outflows (HURWITZ, 2009:3). We have seen this to some extent above. A focus on prevention could achieve positive and negative results for the individual and state in question. All in all, even the best refugee protection is no substitute for human rights protection at home. Prevention can be geared towards containing refugee flows, but can also involve addressing the underlying causes of flight, also known as root causes.

Long argues how the lines between preventative protection and coercive containment have frequently been blurred. (LONG, 2012:2). She distinguishes a wider interest among states in moving away from the obligations of asylum towards a more fluid and more minimal understanding of 'safety' (LONG, 2012: 15). Many of the issues at stake within the more general human rights regime also account for the gaps between promise and practice in refugee protection. Human rights are one of the three universal languages of globalization, with money and the Internet. Human rights have gone global because it has advanced the interests of the powerless, not because it serves the interests of the powerful (IGNATIEFF, 2001:7). Nevertheless, for money, internet and human rights alike, the main difficulty may be 'access'.

3. Safe country practices in context of Europe

In Europe there seems to be a contradiction between economic integration and in that light vanishing borders, and on the other hand stronger guarded national borders in terms of migration and asylum policy (86). Furthermore, Bigo has called it the myth of political

discourse that European controls are linked with the place where borders of the EU actually run (BIGO, 49). Border controls have become disconnected to some extent from the physical borders, through controls at sea, airports and neighbouring countries before reaching EU territory. Ever since Tampere and Kosovo greater coherence between the EU's internal and external policies is sought for, however not always with success.

We have seen the different types of protection as promulgated by EU, internally the CEAS and externally the imperative to address root causes of migration. The tendencies to increasingly provide temporary protection, rather than full blown asylum, and advocating for in-country or in-region protection could be examples of how the international community stands for universal values, nevertheless, applies risk averse means to defend them (IGNATIEFF, 2001:43).

The attempt of western countries, particularly EU countries to evade obligation by ensuring that refugees are removed ever farther from the borders of the EU, challenges the very foundations of the international refugee regime. In the foregoing chapter we saw other gaps that have become increasingly visible between the international standards of refugee protection and the implementation of these. The humanitarian considerations regarding the refugee seem to have become overruled by the security agenda. One of the initiatives that have arisen to address state concerns regarding mass influx of refugees, but at the same time in theory to an extent seems to address weakness in the present refugee protection regime, is the safe country concept.

Safe third country practices have become increasingly widespread in the last 15 years (HURWITZ, 2009:170). The safe third country concepts contravene the principle of solidarity and burden sharing, particularly when applied unilaterally and on the sole basis of transitory passage (HURWITZ, 2009:171). Moreover, the EU is supporting policies to encourage neighbouring countries to adopt readmission policies towards their own

neighbours (HURWITZ, 2009:167). In this light it was argued how the EU in the case of those looking for international protection, the policy of the EU to keep them trapped in the region or country of persecution. The internal flight alternative is another policy example in this light.

On the other hand it could be argued how safe third country practices in conjunction with safe first country of asylum understandings, alleviate the 'unallocated responsibility' dilemma in international relations. In other words, these practices seem to simplify determination of the responsible state for dealing with an asylum claim and rule out how such responsibility cannot just be transferred or be left to deal with by another state. If the refugee reaches state A, which in turn does not address his claim, therefore the refugee decides to move on to state B, state B can move the refugee back to state A and tell this state to take responsibility. Clearly the issue is not this straightforward however, as we shall see in the following part.

The safe country concept seeks to allocate international legal obligations. According to Hurwitz safe third country practices are instruments of containment, limiting States' obligations to examine an asylum claim; restricting the refugee's choice of asylum country; hindering movements from the region of origin, and increasing the protection burden on first asylum States and those States situated near to the country or region of origin of asylum seekers (HURWITZ, 2009)

Safe third country practices are used by states to dismiss an asylum claim when the asylum seeker has transited through or has other connections with another country so long as that country can be regarded as safe (HURWITZ, 2009:173). The concepts of safe country of origin and safe third country concepts were adopted by the European Community in 1991 in response to perceived misuse of asylum claims and to function as a deterrent measure (228). From UN declarations it results how asylum shall not be refused solely on the grounds that it

could be sought from another state. However, where it appears that a person requesting asylum already has a connection or close links with another state, the contracting state may, if it appears fair and reasonable, require him first to request asylum from that state (HURWITZ, 2009:21). The concept of safe country is grounded on a presumption however.

Conditions of safety do not have to be the same for every individual and could change rapidly. Determination needs extensive and exhaustive information gathering systems on local conditions to make sound judgments. If standards of treatment in third or first country of asylum are inadequate, they push asylum seekers to look for better conditions.²¹⁵

The understanding of 'safe countries', departs from an interpretation of the Geneva Convention reading that only return to the country of persecution is prohibited. However, return to any other country is permissible (GUILD, 36). Such policies create an obligation to seek asylum in the first safe through which one passes. The practices are problematic for many reasons. What constitutes a safe state has to be defined, country information has to be maintained up to date, and most importantly, what represents a safe state in general terms, not necessarily is safety for all. Individual assessment is crucial to the refugee case. Moreover, the closer a first safe state of asylum is to the country of origin, geographically speaking, the greater the chance for a continuing threat. Hurwitz argues that: "safe third country practices challenge the very foundations of the international refugee regime, which is based on a collective endeavor and commitment to protect refugees, a collective responsibility of states as members of the international community which results from the unwillingness and/or inability of the country of origin to provide such protection (HURWITZ, 2009, :5).

This concept raises questions whether refugees (should) have a choice of their country of asylum, and whether the asylum claim should be filed in the first country that is

reached and considered safe. Refugees are under no such obligation in international law and the existing exceptions are spelled out (HURWITZ, 2009:211). Safe third country practices not only limit the options available for the refugee but also is it questionable to send back asylum seekers to countries where the opportunity to seek and receive asylum is limited or even non-existent (HURWITZ, 2009:211).

The European Union has attempted to define out of existence asylum seekers who are nationals of a Member state (GUILD, 2005 32). Each Member State shall be regarded as a safe country of origin as regards applications made by their nationals (GUILD, 2005 32). EU members are considered democratic enough as not to create refugees as defined by the Geneva Convention (226).

In such cases however, the risk of threat to the individual in case's freedom and life could be lessened by ensuring that the third state in question is a party to human rights instruments, importantly the Geneva Conventions. Accession to international treaties and domestic legislation is not sufficient to guarantee effective protection however. Furthermore, individual assessment is necessary (HURWITZ, 2009:198). Nonetheless, removal of refugees to third states is common practice, and seems accepted by UNHCR. Such actions preferably should also be based mutual agreement between the third state and the removing state. (HURWITZ, 2009:218-219).

The international refugee regime is premised upon the principle of cooperation and collective responsibility of states. In the protection of refugees, although it seems tempting to make states responsible to include direct, and indirect, breaches of international obligations, the latter may be a bridge too far (HURWITZ, 2009:216-217). To a certain extent developments in international law are working towards the possibility of indirect, and rejected by one state may not in principle influence adjudication in another state party (HURWITZ, 2009:182). The court argued how the operation of the Dublin Convention and

of safe third country practices does not affect states' individual responsibility for the breach of human rights obligations, such responsibility cannot be contracted out. Therefore, in case that a state decides to return a asylum seeker to the third safe country or first safe country, effectively it must be determined that in the third country the individual would enjoy protection against refoulement (HURWITZ, 2009: 197).

Chapter conclusion

In this chapter we sought to address the question to what extent responsibility allocation can bridge refugee protection gaps. Are the differences between standards of protection for refugees and the way in which they are implemented or work out attributable to unclear divisions of responsibility and this the main weakness of the international refugee regime?

We first focused on some philosophical foundations of the essence of refugee protection. From Kant we derived a right to hospitality for the peaceful visitor to temporary stay in foreign territories. According to more contemporary thinkers such a territorially constituted right to temporary stay and freedom is not sufficient to address our present day interconnectedness. The human being needs belonging, a right to enter societies, to receive recognition and to act. Furthermore, the presence of some effective (statal) mechanism is that guarantees these rights is pivotal, otherwise rights are worthless.

The international refugee protection regime represents the set of norms, rules, principles and decision making procedures which regulate state responses to refugees. We identified two norms that underpin this regime: asylum and burden sharing. Under the institution of asylum falls the quite clear cut responsibility of states towards refugees arriving to their territories. A set of norms and human rights falls under this header, most notably the norm of non-

refoulement which prohibits the return of a person to a territory where his or her life or freedom would be at risk.

Increasingly the problem of the refugee became considered by the international community not as a temporary post war readjusting measure, but as a more permanent feature of international affairs. It became regarded as a burden. The statal commitment drawing forth out of recognition of a collective responsibility to protect refugees became an approach of how to share the burden.

Unfortunately, state responsibility is weakly defined toward refugees present at other territories and international cooperation between states in this matter exists, but is weakly instituted. The vast majority of refugees are hosted in the global south and willingness of states to provide durable solutions is limited. To a certain extent the UN Refugee agency (UNHCR) has managed to broker some commitment by channeling state interest in terms of concerns with irregular secondary movements and mixed migration. However, UNHCR remains an intergovernmental agency and needs to balance between the interests of its donors with the needs and plight of the refugee.

Cooperation between states increasingly has focused on containment rather than seeking solutions. State practice has come to put asylum norms under pressure and refugee protection gaps become very visible. Especially practices are applied that curb the freedom of movement of persons, endangering guarantees for the right to leave any country including one's own and the norm of non refoulement. Such measures may de facto deprive people from the right to seek asylum. States focus on prevention in positive and negative ways, addressing root cause of flight and preventing persons from leaving either their home state or region, while trying to broker political solution to the violence that triggers flight.

However, such practices are based on emerging different understandings of safety, preferably providing temporary humanitarian assistance, providing protection elsewhere.

Addressing root causes is positive as there is no better than human rights protection at home, but refugee protection must not be turned in to refugee charity. It is important to keep clear how the refugee has an individualized fear of persecution and deserves to make use of its rights to action and rights to cross the border to seek asylum. Reconceptualising border and state victimising themselves

Regional organisations are subscribed a crucial role in present day issues of international politics. The Refugee Convention was devised to address post WWII refugee problem in Europe, and the European Union considers human rights guarantees as its foundation. However, also within the EU between Northern and Southern Member states the notions of how to safeguard refugee protection and share the responsibility to host these persons is a matter of tension. Measures taken towards achieving a Common European Asylum System, such as the Dublin Convention and Regulation have not yet effectively achieved a sharing of responsibilities towards refugees between EU member states. A notion of labeling states of origin or transit of refugees as safe country of origin, places guarantees for refugees at risk. In public discourse states are represented as victimised by who are the real victims, the refugees.

Underlying these processes is a reconceptualising of the state border. Incurring state responsibility slowly becomes disattached from territory toward different understandings of jurisdiction linked to control. However, controlling people's movement is rather unsuccessful. And rather than devising ways of how to pass on responsibility to another state, the first step is for states to take responsibility themselves for persons arriving at their territory, but also those who are under their control before they do so and for example when they present themselves at a virtual border.

If additionally cooperation will be stepped up to return to take collective responsibility for addressing refugee situations rather than cooperating on containment and

approaching the issue in a negative phrasing, as a burden, where one has to distance itself from. This will bridge refugee protection gaps. But currently many practices work the other way.

Chapter three – A memory of failed attempts the way forward

Introduction

In the foregoing we have seen the underlying norms of the international refugee regime, to be asylum and burden sharing, we went over the standards of refugee protection, but also touched upon emerging protection gaps, gaps usually defined as the inconsistency between standards and implementation, resulting in ineffective protection for refugees.

Furthermore, we referred to emerging practices and tendencies in refugee responses, within a changing context i.e. contemporary forced migration, more so focusing on the implementation of responsibility (sharing), with special attention for the European Union. Initiatives for responsibility sharing, if coined with good intentions may result in adverse effects.

From the first chapter we recall how in terms of human rights protection, the lack of clear allocation of a responsibility to protect has severe consequences for the effectiveness of this doctrine, the foregoing chapter laid out the standards in refugee protection, how the refugee problem was to be collectively addressed and the burden of the refugee problem was to be shared.

However, gaps emerged or remain, and (not always so) new practices arise that to allocate responsibility; in the end do they as such strengthen protection and bridge gaps? The question to be addressed in this last chapter is: To what extent can RtoP strengthen the protection offered by states to refugees?

A) A memory of failed attempts

Ocarer mentioned how the push forward towards CEAS arose in response to the aftermath of the Kosovo crisis and a memory of failed attempts to protect populations at risk (UCARER, 2006 234). Such a memory of failed attempts fits within the larger developments as we have also seen regarding the responsibility to protect doctrine and the initial passes of the international refugee regime, which were prompted by a consciousness of the hardships of persons fleeing persecution initiated at the turn of the 19th century and gained especially momentum after the Second World War with a resonance of ‘never again’.

In terms of the emergence of the responsibility to protect concept, failed attempt at protecting populations from mass atrocities have been at the forefront as was mentioned in the first chapter such as occurred in the nineties.

The Kosovo crisis has been an important impetus for the European Union to revise its protection framework as these atrocities happened on the European continent. Not only was considered that after the Second World War such atrocities were not to be repeated on the continent, also there were important implications in terms of persons fleeing to European Union Member states, some were over disproportionately overburdened and this revealed the lack of burden sharing.

However, at current nor the envisioned CEAS, nor the responsibility to protect doctrine is effectively addressing the causes and consequences of before mentioned crises, and forsaking on the protection of populations. Particularly, the latter is risking to become the next in line of these failed attempts, with the events occurring in Syria every day.

Therefore, what contribution has the emergence and to a certain extent consolidation of RtoP spurred at various levels and how may this have had repercussions for the related agenda on refugee protection? What is gained and where is it lacking?

1. Development of the responsibility of states as a norm

In the before going we have seen the standards that have been established for states in terms of their responsibilities towards vulnerable populations, particularly emphasising refugees for the purpose of this thesis. We have also seen however, how the understanding of incurring responsibility, likewise the possibility of looking the other way or forsaking on responsibilities, a tendency seems to evolve from sharing responsibilities to shifting burdens.

However, even if in declarations and at times treaties such collective responsibility is recognized, in the implementation phase protection gaps appear and there is still a lot to gain.

At times it is not clear what responsibility involves and for whom, also other considerations may eventually prevail over the fate of the victims. RtoP tries to strengthen a sense of responsibility allocation and to create a duty to protect for the international community. Such a duty to protect has political, legal and moral aspects. Where does the international community stand on this topic? What guides state behavior in this respect and how has this evolved, or may be, evolving? Is it politics, law or morals?

There is a growing interest in soft law as an element of modern international lawmaking in present day international relations. General norms or principles are more often found in the form of nonbinding declarations or resolutions of international organizations. Such principles are important as they may influence the interpretation, application and development of other rules of law (HURWITZ, 2009:163). Also are they helpful in the sense that they wish to promote some degree of predictability, create some expectations, and a framework for future action, helping to define a standard of good behavior. This conception is similar to that of regime theory (HURWITZ, 2009:164). We referred to regime theory before which was defined as a set of rules, norms and decision making procedures regulating state responses regarding particular topics and situations.

Furthermore, after the signing and/ or ratification of treaties, subsequent state practice has a high value in the interpretation of treaties, as is clear from Article 31 of the 1969 Vienna Convention on the Law of Treaties. State practice may reveal common intention, a nascent objective of the treaty, and may modify a conventional rule in order to adjust to new circumstances which may differ from the conditions at the time of drafting. Eventually state practice may lead to the formation of a new customary rule. Practice then however, must be common to, or at least accepted by all of the parties to the Treaty and be consistent and concordant (HURWITZ, 2009:131).

In assessing the role of norms in interstate relations first we have to further define what a norm is. Constructivists define a norm as a collective understanding of a standard of appropriate behavior for actors with a given identity (HUISINGH, 2013:7). The theory of interactional international law as developed by Brunnee and Tope, provides the step between political norms as studied by constructivism and international legal norms. They argue that norms will lead to a sense of legal obligations if they are based on shared understandings, fulfill the internal requirements of legality and are supported by a practice of legality (HUISINGH, 2013:6).

In the theory of interactional international law the certain conditions are studied that make a rule or norm a legal obligation, as opposed to common international law where compliance is difficult to explain (HUISINGH, 2013:10). The question is thus under what conditions may political norms become legal ones, whether as soft law or even eventually as legally binding ones.

Norms do not operate alone but complement each other in a broader normative framework. Only the law created through an interactional framework can be considered as legitimate and as derived from insights of social constructivism, the perceived self interest of states is not based on a rational cost-benefit analysis, but on social norms. International law

is created through interaction and reciprocity which has to be maintained by actors collectively (HUISINGH, 2013:10). Also is it argued that normative frameworks prefer stasis to change (HUISINGH, 2013:9). The extent to which international politics really is guided by social norms is debatable however, as will further be addressed below.

When discussing the emergence and status of RtoP in the international arena, Gareth Evans was cited who argued that RtoP is a new emerging norm. Evans can be considered a norm entrepreneurs, persons or organizations that try to propose and promote a certain mode of behavior in IR in line with a (emerging) norm or principle. Norm entrepreneurs need to act from an organizational platform that provides them with access to information and important audiences. To support new norms so that they can successfully compete with old norms, the norm entrepreneurs have to use language to reframe the debate and create a new way of understanding an issue (HUISINGH, 2013:7).

There is a necessity of clarification of the stage norm has achieved in order to analyse its likely political effects. Specificity, durability, concordance contribute to robustness of a norm. Specify has to be balanced with simplicity (HUISINGH, 2013).

Norm tipping, which happens when the balance shifts from being an emerging norm to a cascading norm, i.e. more rapidly spreading and adoption, rarely occurs before one third of the total states in the system adopt the norm. Furthermore, some states arguably have more weight in the process of what is called international socialization. If a norm gets adopted by a state, it becomes part of the state's habit and subsequently taken for granted. At that stage, the norm and practices in line with it are not part of public debate anymore, the norm has been internalised, and therefore becomes hard to discern (HUISINGH, 2013:8).

The redefining of responsibility of states towards their populations has already been set out above. State sovereignty increasingly is defined and explained as sovereignty as responsibility, in which light the developments in terms of responsibility to protect and IDP

protection needs can be placed. Human rights and needs are framed as being above preoccupations of pure state sovereignty interests. Non-indifference to human suffering gains prevalence over non-intervention in internal affairs of sovereign states. In this sense the physical border of states becomes less so a barrier to human rights protection.

Although human rights violations become more visible and the necessity of access to vulnerable populations is raised, still there are protection gaps, especially when states cannot safeguard human rights guarantees on their own. The responsibility to protect reminds and emphasises states of their commitments and obligations towards their populations but it is oftentimes precisely states that lack the capacity to provide effective protection where populations are at risk.

This is where support of the international community should step in. However, this is an unallocated responsibility in terms of defining who and in what manner. In terms of allocating responsibility, in the context of the responsibility to protect with (as last recourse) intervention, the following factors have been proposed as contributing to identify who should bear responsibility to act: geographical proximity, special capacities in terms of expertise or strength, existence of special ties (WELSH and BANDANA, 2010:223).

It is important to indicate how proximity cannot be the ultimate trump in terms of distributing responsibility (WELSH and BANDANA, 2010:226). Here is of importance the implications of strengthening responsibilities under the second pillar of RtoP, i.e. support from further away states, the international community to help states to uphold their obligations, as neighbouring states are often natural bearers of consequences of human rights violations and violence in other states.

From an ethical perspective it was argued that the international community's remedial responsibility needs to take some account of the existing allocations of international responsibility in international society as they may be considered to be guiding the

expectations and actions of both those who are vulnerable and those who are in a position to help (WELSH and BANDA, 2010:226).

However, competing rights claims do not occur in the abstract kingdom of ends but in the kingdom of means 21. Here is referred to what in other words is stated as that it is often not about standards but about implementation. Also could it be explained as how human rights in itself do not have to be competing, but rather the means available to achieve them. Generally, we all want to achieve the 'good' . It is a question o who has to provide and who has to pay. RtoP even as a norm would with difficulty change this situation.

Ignatieff argues how we, as mankind, are making moral progress, even if progress is a contested concept, because we have an increased ability to see more and more differences among people as morally irrelevant. Human rights is the language of this moral progress, based on historical and pragmatic grounds, drawn from the experience of understanding that when human beings have defensible rights and individual agency is protected and enhanced, they, we, are less likely to be abused and oppressed. The diffusion of human rights instruments counts as progress even if there remains a gap between human rights instruments and the actual practice of states (IGNATIEFF, 2001:4).¹²

Ignatieff further argues how human rights activism like to portray itself as an anti-politics, in defense of universal moral claims meant to delegitimize political justifications for abuse of human beings. He argues how impartiality and neutrality is impossible and such activism is bound to be partial and political, in turn disciplined by moral universals. In human rights activism the representation of universal values should not be taken for granted (IGNATIEFF, 2001: 10)

Since Helsinki Final Act of 1975 the capitalist rights tradition emphasizing political and civil rights lost counterweight of communist tradition giving primacy to economic and

social rights. This implies the danger of that this tradition may overreach itself. (IGNATIEFF, 2001:19). The global south may provide a new balance however.

Here one touches upon the broader debate on the universality of human rights. Again, Ignatieff argues that the political failure to enforce and apply human rights principles consistently and impartially caused non-western cultures to conclude that there is something wrong with the principles themselves (IGNATIEFF, 2001:48).

Limits must therefore be placed on human rights language, because means are limited even if moral ends are universal, to be less vulnerable to disappointment. The purpose of these limits is to protect and enhance individual agency in defining human rights issues and respect the agency of these agents. Therefore the human rights practice is obliged to seek consent for its norms (IGNATIEFF, 2001:8).

For advancing a responsibility to protect this means that not all rights can be included under the banner of what RtoP wants to achieve and the matters it can be applied to. There must be limits, as said, precisely to avoid disappointment with the effectiveness of the concept. The above mentioned concerns regarding the western human rights tradition all in a certain way can be translated to an advancement of RtoP.

In terms of advancing human rights guarantees, one can agree at the very least upon the right to life, in dignity. As interdependent components to the right to life we may understand questions regarding health, work and housing (CER). Although the validity of discussing the extent human rights are universal or not exists, this debate can happen elsewhere from situations where a human being's life is immediately at stake.

2. Fine tuning the responsibility to protect

We have seen in the first chapter the origins and characteristics of the responsibility to protect and also have been set out some signs of consolidation and contestation of the

responsibility to protect as an emerging principle in international relations. Furthermore, we identified two basic principal underlying norms that the responsibility to protect seems to share with the foundations of the international refugee protection regime: sovereignty as responsibility (a state has the responsibility to live up to obligations of protecting basic human rights that has committed itself to) and the sense of a collective or shared responsibility with other states to assist and support each other in fulfilling these obligations, i.e. the second pillar of RtoP.

In recent years norm entrepreneurs on RtoP have tried to move emphasis in the debate surrounding the responsibility to protect away from the discussions about the legitimacy of humanitarian intervention and of whether the responsibility to protect shall defend human rights as considered universal and deriving from morality towards a discussion about how to practically implement a responsibility to protect. Meanwhile, an annual UNSG report on the responsibility to protect has become a tradition since 2009.

The notion of committing states to obligations they have taken upon themselves (i.e., by signing a treaty for example) is an example in this case. By signing a treaty the state shows commitment in future acting in the light and purpose of this treaty, and from this is legitimacy may be derived to remind states of this commitment. The responsibility to protect itself is not sustained by its own treaty obligation, however obligations to abstain from committing mass atrocities are .

The limited successful application so far of RtoP spurred the elaboration of some alternative concepts. In the 2011 UNGA Ministerial week address, Brazil brought up the necessity of looking at responsibility in protecting. From the initial coining of this idea, it was then further developed into the Brazilian concept of responsibility while protecting (RWP). New ground was broken, first of all because Brazil had been critical of the responsibility to protect as so far has been developed but now explicitly acknowledged its

importance, furthermore it was the first time that Brazil was so outspoken on a contested debate, showing intention to be a global player and thus engaged as a norm entrepreneur. Also the timing was significant, right after the controversy over Libya (BRENNER, 2013:1-2).

An intention was identified of Brazil to live up to the responsibilities of a rising power in terms of being a full-fledged democracy looking for respect and support for human rights in its foreign policy. Furthermore, Brazil connects to the orientation of an attitude of non-indifference, rather than the principle of non-intervention (BRENNER, 2013:3). It is significant also for the North-South deadlock that to a certain extent has been at the core of the debate surrounding the RtoP concept.

Regarding UNSC authorized interventions in Libya and Ivory Coast that explicitly mention a responsibility to protect is notable how the constellation of the SC at that point included all BRIC members and they voted in favor or abstained from voting to make the resolution possible. The Cote d'Ivoire and Libya debate focuses more so on the manner of response in implementation, rather than on the concept itself. RWP can be seen as consideration of issues related to the operationalization of the responsibility to protect, not necessarily an alternative to RtoP (BRENNER, 2013:4). The Brazilians framed the RWP as having the potential to bridge the gap between the West, the proponents of absolute sovereignty (Russia, China) and possibly the in between powers (BRENNER, 2013:4-5). However, subsequent implementation of the resolutions and NATO's actions in Libya might have given R2p a bad name (BRENNER, 2013:4)

RWP sits in the middle ground between modern humanitarian principles and strict state sovereignty (AVEZOV, 2013). Modern humanitarian principles would differ from the traditional ones of humanity, neutrality, impartiality and obtaining state consent before providing humanitarian aid to victims and vulnerable populations towards placing the needs

of the human beings at risk above other considerations. In creating humanitarian space and negotiate access, modern humanitarians would argue that at times taking sides is necessary and overstepping the necessity of sovereign consent to enter a state's territory as well. Intervention under the banner cannot be taken in the name of universal rights and values, but should be partial and take the side of the victims.

The concept of Brazilian coined RWP was critiqued by the argument that it would delay action, as it requires that "all possible diplomatic solutions must be pursued and exhausted and a 'comprehensive and judicious analysis of the possible consequences' carried out". Moreover, RWP may "even back-pedal on R2P's fundamental principle of a collective responsibility to protect populations by any means necessary, stipulating that situations must be 'characterized as a threat to international peace and security' before any coercive measures can be used." In this regard the need for SC consultation adds difficult for effective rapid response to emerging situations of (possible) mass atrocities.

In addition to these identified weaknesses of the concept, the lack of success of the RWP is also attributed to what has been called the Western political imagination that sees itself as the sole dominant and relevant player in the politics of global norms, with little room for agency for non-Western actors in the stages of the norm cycle. The role of non-Western countries involves only implementing or rejecting the norm (BRENNER, 20136).

Therefore, it is important especially for the development of the responsibility to protect and the RWP to understand the importance of constructive engagement with non-Western proposals and initiatives in shaping critical norms (BRENNER, 2013:6-7). It would be interesting to look into such constructive non-western proposals of addressing refugee problems and see how they could strengthen refugee protection.

The endorsement of non-indifference replacing the doctrine of nonintervention shows that sovereignty as responsibility is not a western concept but a shared commitment

(BRENNER, 2013:13). This argument can be contested however. The notion of non-indifference may be gaining ground, but is definitely not yet implemented in all interstate relations and more importantly not regarding all matters. Speaking of non-indifference replacing non-intervention may be a bridge too far.

Nevertheless, it is crucial if the responsibility to protect should develop into a widely shared and therefore effective international norm in dealing with imminent human rights violence, that it is broadly supported in words as well as means rather than regarded as a western imposed concept. All in all, it calls upon the international community, which in ideal cases would involve all (likeminded!) states and organizations.

On the note of the hope that the international community may ever arrive at a stage where the underlying norms of the responsibility to protect are fully internalized into state practice, regardless of other interests, a very critical stance was taken by: Xenia Avezov from the Stockholm International Peace Research Institute (SIPRI), when writing on the current human rights situation in Syria and the stance of the international community as regards:

“the main obstacle to intervention in Syria is that no one wants to do it. Harsh lessons from Afghanistan, compounded by economic difficulties, have made the United States and other Western countries wary of costly long-term commitments, especially those without fairly assured and significant benefits. Inaction in the Syrian conflict is symptomatic of a growing divide between the principled, normative international debate on R2P—which assumes that we will always intervene when it is needed to protect civilians—and the reality that intervention remains a matter of choice.

While it is politically incorrect to say so, intervention is often guided by a calculation of economic, political, and human costs to the intervener. So long as the international community segregates normative discussions about intervention from these cost calculations, protecting civilians from mass atrocity crimes will continue to pose major challenges. “

(AVEZOV, 2013)

The debate on Syria is clearly about whether to intervene or not. It is beyond the point of prevention or a petition for support from the international community by a national government to aid the latter in upholding human rights guarantees.

Furthermore in connection to the above quote, in itself it makes sense that states make calculations of economic, political and human costs of intervention but also may led to conclude that a redirection of funds and measures towards a prevention of human right violations is in the end the best outcome for a cost benefit analysis.

3. The notion of a responsibility to prevent

The nascent doctrine of the responsibility to protect and the difficulty of deciding on intervention when faced with ongoing human rights violations moved the discussion towards increased interest and agreement on the importance of prevention in living up to expectations of RtoP. Initially prevention is one of the RtoP pillars which increasingly is put forward as the main one and seemingly most easily implementable pillar of the responsibility to protect. Although on the one hand the focus on prevention lessens the need for tough and difficult to execute decisions involving often military means and SC deliberation, on the flipside prevention is very broad which may also weaken the strength of responsibility to protects.

We refer back to the coining of an international (legal) duty to protect when the international community is faced with (imminent) mass atrocities. International concerted response to such situations has often been identified as the main difficulty in interstate relations, not the existence or absence of early warning mechanisms or other instruments to identify violence.

One can make a case however of the valid intention to prevent us from even reaching such a point and the importance of prevention of conflict, violence and human rights violations at an earlier stage. Here one enters into the root causes paradigm of conflict, of greed and of grievances, but also one has to keep in mind on the consensus reached on responsibility to protect involves the limiting definition of mass atrocities. The 2005 World Summit specified goals and this specification made the norm more robust and clarified what crisis situations were that states and international had a responsibility to protect (HUISINGH, 2013:16).

Although root causes can be identified and many theories have tried to do so, when restricting RtoP to prevention of mass atrocities we have to be aware of how the possibility of mass atrocities become evident once they are imminent. Furthermore, as we have seen also, the clear identification of what constitutes a genocide, is debated, the same account to a lesser extent for crimes against humanity and ethnic cleansing. Often these crimes are not even clearly to be qualified after it occurred, let thus alone beforehand. But also the contention of other defining elements of these crimes such as 'on massive scale' make the direct clear link between taking measures in the framework of responsibility to protect to prevent such crimes from happening difficult.

Nonetheless, in response to the coining of RWP by Brazil, the in 2012 appointed Special Advisor to the Security General on the Prevention of Genocide Adama Dieng argues how prevention is always the best policy. In the development of an appropriate strategy for

prevention, he calls for understanding of the nature of the problem and the root causes of the conflicts that generate mass atrocity crime. He further argues how these conflicts usually result from mismanagement of diversity, manifested in intolerance of differences defined by nationality, race, ethnicity, religion or by political factors and points to the importance of management of diversity towards inclusivity, equality and respect for fundamental rights and civil liberties (DIENG). This is also underlined by the UNSG who emphasised the importance of building societies which accept and value diversity and in which different communities coexist peacefully (A/67/399, 2013:2).

Pitfalls of prevention strategies however are that such strategies performed by outsiders can internationalize a conflict, with the fear of ending in military intervention. Other pitfalls include the breaching of sovereignty and unintentionally magnifying conflict (HUISINGH, 2013:14).

The intention of prevention and the responsibility to protect however is that states first try to implement preventive policies on their own and then if necessary seek themselves support to be able to live up to their obligations. In terms of internationalization of conflict, very few conflicts manage to stay fully internal anyways.

Nevertheless, intervention for preventive reasons could serve as an excuse in certain situations. Furthermore, even if intervention occurs by invitation of a state government this may not necessarily be approved and regarded as having positive effects in the eyes of the majority of the population.¹³

Taking things even further, the political and legal effects of a norm on responsibility to prevent has been advocated. The Emergence of R2prev as a norm would work on two planes, redefining sovereignty as responsibility and broader general development focused on

¹³ The farreaching role of the USA in internal matters of Colombia in terms of combating narco trafficking has been labelled intervention by invitation by Tokatlian. The negative effects of these practices are no secret.

preventing conflict and mass atrocities rather than reaction was argued (HUISINGH, 2013:12)

The question raised in terms of prevention is whether to include economic factors in addition to the reached consensus on the necessity of building civilian protection and rule of law. How far can and should one go in prevention efforts? There is no agreement on this. Differences of opinion between states are to be discerned, Brazil advocated a focus on socio-economical factors, while others want to focus on the rule of law and human rights. In terms of limiting the application of RtoP, it is realistic to expect a state to protect its own population, and thus not too much to ask (HUISINGH, 2013:32). However, broader application of RtoP can harm shared reached consensus in 2005.

The success of the prevention aspect of RtoP has to be seen in the longer term. Legal obligation and legitimacy do not necessarily imply compliance, interest and power may still determine state actions (HUISINGH, 2013:33). Though the SG sees the role of regional organisations as less obvious when it comes to structural prevention, they can contribute to the development of norms, standards and institutions promoting tolerance, transparency, accountability and a constructive management of diversity (HUISINGH, 2013:25).

In the case of r2prev it is argued how institutionalization, norms cascade, clarification and specification of the norm happen at same time and cannot clearly be separated (HUISINGH, 2013:34). Finnemore and Sikkink's work on norms would therefore, more so apply to constraining norms, forbidding certain behavior. But RtoPrev is a prescribing norm, leaves open space for contestation and as an international norm needs consensus every time it wants to take a step forward (HUISINGH, 2013:34). These contentions are similar to those on RtoP. On the one hand RtoP is a constraining norm, reminding state that they are

not to commit mass atrocities. On the other hand, RtoP is a prescribing norm in seeking interstate cooperation.

RtoP is a top-down norm, if a norm, in the sense that it derives from an agreement on the international level that is supposed to trickle down to have effects at the local level (at least in terms of measures to address prevention). Different from theories that study norm development from the insight of how domestic actors pressure their representatives to see through with negotiation processes at the international level.

Norms may have different challenges when they prescribe either to 'refrain from', 'require' or 'authorise'. An emerging norm on RtoP and the norm of non refoulement are different in this aspect. For a norm to consolidate, it needs clarity and transparency and regular interpretation across different cases. The question is how is dealt with challenges and violations. Inclusive participation of many actors is needed to strengthen broad application and legitimacy of the norm.

RtoP is considered a political instrument, or in the opinion of some authors, an emerging (political) norm. How to translate political norms into legal norms, needs to reflect shared understandings, fulfil internal requirements of legality and be supported by practice of legality.

So far RtoP considered a political concept or norm, and also encouraged to be understood as such rather than a legal norm. A development into a legal duty is tempting as it would increase the responsibility and accountability of states for not acting to halt mass atrocities, but it still difficult to develop.

RtoP could also be regarded as developing into soft law, no treaty signed on RtoP but the summit outcome document where states expressed acceptance of RtoP concept and other processes in international politics can be interpreted, applied and developed in the light of good faith with the purpose of RtoP.

The intention of RtoP is to place human rights over state sovereignty, there is a great importance of the second pillar. Even if states act on RtoP out of self interest under the banner of human rights, these norms are advanced in the breach. Not to argue that the goal sanctifies measures, but one can discern a tendency of how slowly through such state practice the view is promoted that human rights prevail over the non-intervention and other sovereignty principles. By invoking human rights imperatives even as an excuse, it has the capacity of becoming a self fulfilling prophecy. The increasing focus on incurring responsibility as a state, because of control, backfires in terms that when a state intervenes, also afterwards, and increasingly in the act, the practices applies to intervene or to take certain measures become subjected to scrutiny. This may make states more hesitant to intervene, but also signals the importance of human rights.

The confidence placed by the UN Secretary General for prospects of prevention efforts is reflected in the words of his last report, stating how it is tragic that part of the brutal legacy of the twentieth century could have been prevented, making referene to the situation in the Democratic Republic of Congo, Kenya, Sri Lanka, the Sudan and the Syrian Arab Republic (A/67/929, 2013).

B) A responsibility to protect bridging refugee protection gaps, strengths and weaknesses

Erika Feller, director of international protection at UNHCR, distinguished how the challenge concerning the viability of asylum is the gap, the disconnection between rights and responsibilities. The key to ensuring international protection needs to balance rights and responsibilities, it involves a better apportion of responsibilities, sharing burdens, and enabling states to identify to whom they owe protection, with what content and to whom they do not (HURWITZ, 2009:167). We remember how a right to have rights is crucial to

have human rights protection guaranteed, and someone, i.e. at present most often state, needs to provide this right to have rights.

Balancing would therefore involve also not requesting the impossible. From the latter definition one can conclude that likely the balancing is an ongoing process and thus a certain gap, the smaller the better, will always exist. The balancing between rights and responsibilities refers to the same principle as the difference between standards and implementation.

We recall here too how we quoted the argument that the reintegration into society of one displaced person, eventually will lead to the displacement of another, which also reflects the above mentioned argument that the refugee or the forcibly displaced will always exist, although our understanding of who is or what makes a refugee may change. Nevertheless, consequences of flight should be mitigate and responses must be found to prevent people from falling into the gaps between rights and implementation of these rights, for prolonged periods.

The new 'responsibility to protect' is a nascent doctrine at best and cannot be considered a substitute for the freedom of movement that provides refugees with the protection of asylum (LONG, 2012:17). Using the responsibility to protect to strengthen compliance on the implementation of norms in the international refugee regime has to be applied with caution as not to undermine a well established framework of norms and rules in this regard.

Nevertheless, we have seen how that framework definitely has weak spots, emerging also from changing state practices and changing international context. RtoP could thus be complementary, emphasising existing norms and statal commitment to protect their populations, drawing attention and thus possible funding, and reminding states of the need to share responsibilities on cross border problems. Increased commitment is necessary, as well for hosting refugees as for material nod financial support.

Furthermore, we can make a connection to the argument that international human rights institutions are not designed primarily to regulate policy externalities, but to hold governments accountable for purely internal activities (MORAVCSIK, 2003:217). Human rights regimes are not generally enforced by interstate action, but may empower individual citizens to bring suit to challenge domestic activities of their own government (MORAVCSIK, 2003:217). When looking at the responsibility to protect it does raise these questions and creates some basic lines of thinking that civil society can build forth on. RtoP is about awareness and (in theory) about accountability.

Particularly the underlying normative lines of thinking of the responsibility to protect, are to be compared to those underlying the international refugee regime and in the end envisages to strengthen human rights protection.

The European Court at Straatsburg is a case in point of where individuals can hold their states accountable. But not everyone can file claims at the Court, access to justice and the more general rule of law are particularly difficult for persons in protection gaps, such as refugees who have not been reintegrated into some society (yet). Often it is precisely the vulnerable who do not have access to such instruments. The ‘victim’ is often stripped of its agency, while no one better than the person him or herself can contribute to finding a solution to the situation one finds himself in.

The more interconnected and globalized our world, the more access becomes key for far-reaching inclusion and exclusion, whether we speak about money, internet or visa.

1. A responsibility to protect bridging refugee protection gaps, reflected in EU refugee policy

The CEAS reflects burden sharing with fellow EU members, as opposed to burden or responsibility sharing with any country as is sought for at the international level within the

international refugee regime (UCARER, 2006:233). As regard RtoP the idea is to devise regional implementation of international norms. If burden sharing on a regional level, particularly in this case, the EU, is worked out, or not, lessons can be drawn in more general terms.

In the absence of effective EU responsibility sharing instruments in addition to existing gaps in the international maritime regime causes some states to receive greater numbers of asylum seekers due to their geographical position. These states therefore are increasingly unwilling to even temporarily host these persons and prefer to halt them before arrival, rather than devising ways to share responsibility for hosting refugees. EU member states showed only political willingness to cooperate to strengthen their border controls (VANDVIK, 2008:33).

Along the same lines is argued how EU institutions agree on common plans or action when the aim is to exclude persons, but when there is a need to reach a global and comprehensive approach to the whole issue from root causes of movement of people onwards, consensus seems to be far away and states draw out the principle of sovereignty which leads to prevalence of national imperatives (NAZARSKI, 2008:39). Schengen meant to facilitate free circulation inside the EU, the result has been stronger control over EU external borders. Furthermore the institutionalization of containment measures have led to the reasoning of how North African states have become de facto schengen members (LEVY, 2010:114).

The quality of protection afforded by EU asylum law will lose part of its relevance if the persons to whom such legislation applies are excluded from ever reaching the member states territories. The CEAS risks becoming meaningless if people who need asylum are *a priori* excluded from access to the EU (VANDVIK, 2008:27). Both the EU and the member

states should recognize that the power to prevent access to the territory carries with it the responsibility to protect those in need (VANDVIK, 2008:35).

It has been argued that the Kosovo crisis could have been the push towards a supranational refugee agency and more effective burden sharing in the EU. It was a potential turning point in history of refugee policy in Europe, when history eventually did not turn (LEVY, 2010:99). Problems of enforcing cooperation between equal sovereign states at an international level are precisely the result of the fact that there is no supranational body to do so. Within the EU however, the partial transfer of state sovereignty to a supranational body could have been a resourceful opportunity. Only when a balanced and stable system is in place there then can be spoken about sharing responsibility and the possibility of burden sharing (referring to the ceas) (VANDVIK, 2008:40). More powers for supranational bodies could have provided this stability but at the same time question accountability towards checks from the national representations and the fear of possible exceptional measures.

Nonetheless, rather than stepping up in responsibility sharing on refugees, the effects of EU practice have been to weaken asylum norm and nonrefoulement, also to diminish and externalize burden, rather than sharing nor within the EU nor beyond (UCARER, 2006:237).

The package of non-entree policies (safe third countries practices, pre-screening, the farming out of border controls to the private sector, extra-territorializationtc) that prevents spontaneous and mass flows from reaching borders of countries to claim asylum has even been labeled neo-refoulement (LEVY, 2010:94). With the latter is meant to express how the measures are no direct refoulement as it does not concern people to be send back from a territory of arrival to the territory where they came from, however, effectively the end result is the same. They have just be halted before arrival at a new territory. The human cost is well known, as thousands have perished in the Atlantic, the Mediterranean and the Sahara (LEVY, 2010:114).

On the contrary, it is also claimed that the measures taken in the light of working towards a CEAS, have been somewhat successful in assigning the responsible state for processing the asylum claim, somewhat successful in readmission agreements with states of origin and transit. These practices however, may shift responsibility for assessing asylum claim to countries outside the EU. Less successful have measures been in redistributive mechanisms for countries with disproportionate numbers of asylum claims, either for other states or EU institutions (UCARER, 2006:220).

The EU was accused of hypocritical policymaking, which has made it very difficult for academic analysts to give a balanced account of the effects of the CEAS programmed, which either way is still a work in progress. Its major aims were control spontaneous movement into the EU and prevention of secondary movement inside the EU (LEVY, 2010:105-106). Either way in EU policy ideas and norms indeed matter. A major violation of legal obligations remains unthinkable for the EU as regards the self constructed normative image of the EU (LEVY, 2010:96-98)

While politicians devise ways of shifting and shirking responsibilities, the judiciary is forming a line of thinking of broadening responsibilities and more inclusive duties. The European NGO ECRE has insisted how EU Member states' obligations under international and European refugee and human rights law do not stop at the physical boundaries of the EU and can be engaged by actions states carry out outside their national and EU borders, directly or through agents (VANDVIK, 2008:28).

Court rulings work towards the insight that when states have effective control over persons, even outside the physical borders of their territory, they may incur direct responsibility. This consideration also includes actions to divert refugees, or by aiding a third state or private party in doing so. States also have to ensure that chain refoulement does

not occur. There is a high threshold here however, in terms of the nature and extent of the powers of the state in case. (VANDVIK, 2008:31).

To a certain extent this development can be linked to developments in terms of protection for idp's. The fact that the plight of idp's increasingly becomes part of the international agenda adapts the interpretation of the jurisdiction of states, instead of linked to territory, to notions of control. Examples of judicial instruments that refer to jurisdiction rather than territory are the ICCPR, CAT and CERD (VANDVIK, 2008:29)

It is interesting however the assertion that control implies responsibility, not only moral and political responsibility, but thus increasingly also legal. Notwithstanding how tempting a presumption of irresponsibility may be to policy makers to rid themselves of legal responsibilities, they can't get rid of political and moral responsibilities, in addition, there is legal duty. Control implies responsibility thus access to asylum, reception centers ensure that obligations respected guarantees against chain refoulement and the reception of medical treatment (VANDVIK, 2008:32).

In this light of legal instruments, there exists the gap that the EU as such is not liable under international law (VANDVIK, 2008:28). The supranational character is therefore a facilitating but also a complicating factor in strengthening refugee protection.

Nonetheless, these states have to deal with the fact that 'they', i.e. the persons using their right to life and to seek asylum, will try time and again because of persecution or living in very harsh conditions (NAZARSKI, 2008:39). Therefore turning the blind eye and shirking responsibilities won't solve anything for anyone in the longer term.

The EU and its member states are bound by the Geneva Convention, but must also grapple with the phenomenon of mixed flows that encompass refugees, economic migrants and many categories in between (HADDAD, 2010:98). EU migration and asylum policy is complex, illustrated with ever changing political priorities, public opinion and real world

events, which impact on state responses to migratory and refugee flows. The differing visions on protection and responsibility within the EU can co-exist, complement each other and could reinforce the RtoP principle, provided that the protection imperative stays (HADDAD, 2010:99).

Prevention not only reflects the containment policies that are being devised to halt persons from arriving at the European borders. Even the imperative to rescue persons in peril at high seas can be used as pretext to undertake interception (VANDVIK, 208:32). Prevention can this be used as a negative pretext to preempt. It is unclear whether all states on a trajectory should be held responsible for not hosting the refugee. Importantly, states cannot be forced to uphold humanitarianism.

Cooperation has not always been easy, not even on containment. At a certain point for example African states refused to play their part in European game of remote control migration (LEVY, 2010:102). Also it has been brought to the fore how Italia receives more irregular immigrants from Germany than of the south (LEVY, 2010:104). This may indicate how the public debate on these issues is distorted.

Prevention however also involves lessening the need to leave home in the first place. Root causes of flight or reasons that induce migration are distinct themes and state response to these types of groups are also different. Nevertheless, the refugee and the migrant have features in common and it is not always easy to make an objective distinction between refugees and migrants. States committed themselves openly to protect refugees, the protection of migrant is safeguarded to a lesser extent.

The status of a refugee who has left his place of origin out of fear of persecution becomes an economic migrant with time. (LEVY, 2010:114). This has to be explained as not undermining the person's well founded fear of persecution but makes clear how

insufficient reception conditions in receiving countries will oblige the persons to move on, i.e. undertake a secondary movement.

Regarding the EU policy, it was stated how there is an approach destined at the end of the process instead of considering refugee movement as the result of a complex situation in which Europe itself plays a relevant role.

It has been claimed that while the obscurity of legal reasoning or institutionalized rights language may mask power struggles, national priorities and ideological influences behind the formation of the CEAS, human rights, even without illusions are important to understand the motivations being EU policy making and the unintended outcomes of the politics of the exceptional (LEVY, 2010:119). The author refers to the fact that the so called exceptional measures that were devised by the EC over the first decade after the year 2000 in terms of extra territorial protection would have involved an increased supranational effort and the step forward to achieving something towards the CEAS.

The refugee might not cease to exist, but if conditions that may induce migration are better addressed, and broader legal migration opportunities are created too, arguably mixed migration flows are more easily sorted out. Through addressing root causes of migration, and opening opportunities for legal (temporary) migration, the refugee will claim to be a refugee and the migrant will identify him or herself as a refugee. Conflating irregular immigration with asylum seekers has come to the detriment of overall protection.

A lesser focus on security in European policy making regarding controlling the movement of persons was identified after 2010 and more focus on migration-development and asylum-migration nexus (LEVY, 2010:93). The securiticised debate could return to normal politics. It was a recognition of the realities of global migration (LEVY, 2010:96) Furthermore, it recognized circular migration (LEVY, 2010:112).

Sami Nair argued in this light how the EU is not clearly open nor closed to immigration. The EU issues a strategy and vision and proactive policies concentrated on the causes of migration (NAIR, 2006:46). He emphasizes how stricter frontiers will not end immigration, but have led to more definitive migration, which blocks the logic of the migrant of coming and going. Better entry procedures he regards necessary therefore and visa as well, otherwise people will look for alternatives that are not fully in line with the law (NAIR, 2006:191). The fact that asylum seekers are segregated from labor markets is not helpful either (LEVY, 2010:105).

In a broader light, poverty and a lack of employment prospects can be linked to migration and forced displacement. The EU asylum policy can be situated between the area of legal migration, which remains the domain of national sovereignty, and the area of illegal immigration where joint cooperation is established (HADDAD, 2010: 91). Foremost, the cautionary words are in place that regulating immigration is perfectly lawful under international law and the determination of abusive policies is not an easy matter (HURWITZ, 2009:211).

Nevertheless, with barely any legal migration routes into the EU from third countries, refugees and migrants are being forced into irregular ways of traveling (VANDVIK, 2008:27). Immigration control efforts so far have had effect of diversion of migratory flows towards longer and more dangerous routes. Argue in this light that right to control one's own borders in time of peace should not be realized to the detriment of human lives. Irregular immigration is a security issue and humanitarian one (VANDVIK, 2008:38). The grant of asylum is the last recourse of prevention.

Rather than seeking solutions for the persons that has already become a refugee, or at least is displaced, through either local integration, resettlement or voluntary repatriation, a good way to address this situations is to prevent the flight in the first place. Along these lines

also has been argue to what extent the ‘solution’ that may be for offer, are real solutions has been questioned, based on the argument that moving one refugee movement by reinstalling the individuals in the citizen-state-territory-hierarchy will inevitably lead to the creation of a new refugee movement (HADDAD, 2003:321-322). From this insight however, one must also conclude that the figure of the refugee will continue to exist. This means to say, even if root causes are addressed, there will be refugees.

Cooperation between EU countries and third states could involve different areas such as development, social affairs and employment and justice and home affairs. Cooperation could involve state of origin, first asylum, resettlement and asylum (UCARER, 2006:222).

The victim should be reframed however, not the industrialized states are the victims. Also in the debate the notion of sharing a burden must be reframed again to sharing a collective responsibility towards refugees.

However difficult, Hurwitz explains how states have a duty to cooperate in various spheres of International Relations in order to maintain international peace and security. From this duty of cooperation derive the principles of burden sharing and solidarity. The importance of solidarity is connected to the coming to the fore of newly independent states in the 1960s and a ‘new morality in international law’, which emphasizes that those nations that have the necessary means are expected to assist those that do not (HURWITZ, 2009:138-139).

Levy argued how even if Member states use human rights to achieve the reverse, they are strategically necessary (LEVY, 2010:118). Although it is not specified for whom they are strategically necessarily, from the context one can conclude he refers to the guarantees of rule of law. Levy argues that it is impossible to understand the dynamics behind the Geneva regime in the EU without accepting that even if honoured in the breach, burden sharing, non

refoulement and the sanctity of international law remain shared aspirations (LEVY, 2010: 119).

Porous borders and differentiated citizenship have been advocated by Seyla Benhabib, there is a need for porous borders for immigrants and the right of every human being to have rights, to be recognized before the law without regard to their condition of political membership (BENHABIB, 2005:15). She places this within the context of the superseded capacity of the Westphalian nation state to influence decisions and results, and how the territorially bounded concepts do not keep up with the material functions that have to be fulfilled, but maintain the monopoly over practices. Globalization erodes the power of the state to guarantee outcomes and to act independently (WEISS, 2007:94).

The borders of political communities, and thus the regulations of the condition of membership have to be redefined in different ways of belonging, either for example sub national or supranational. (BENHABIB, 2005:13-16). A right to have rights may not be all-encompassing enough, according to Benhabib the challenge ahead is to develop an international regime that separates the right to have rights from the national condition of the individual (BENHABIB, 2005:58). In a certain way the UN Secretary General tries to include this line of thinking into the way he advocates and envisions RtoP, by emphasising how the reference to populations in the World Summit Outcome document does refer not only to citizens but to all populations within state borders (A/67/399, 2013:2).

Obstacles to the exercising of the freedom of movement are intrinsically linked to inequalities between states and regions, to the maintaining of restrictive interpretation of state sovereignty and citizenship and eventually to forsaking on the universality of fundamental rights. (CERIANI CERNADAS, 2009:203). The right to freedom of movement is crucial for any person to seek (international) protection and the guarantee of the

individual's human rights. In order to provide protection therefore, states first need to take responsibility to advance towards strengthening freedom of movement.

Chapter conclusion

Failed attempts to protect populations from massive human rights violations have almost at every instance been accompanied by refugee flows. The memory of halfhearted attempts by the international community to guarantee people's life and dignity, or the absence of any attempt at all, resulted in the international refugee regime, after the two World Wars, and more recently in the concept of the responsibility to protect after well known cases of massive human rights violations of the 1990's. Furthermore, the Kosovo crisis strengthened momentum in the European Union for the need of revising EU asylum policy. However, the results of these new attempts remains to be seen.

The status in interstate relations of these new attempts and therefore the level of compliance also remains to be seen. State practice is important in the consolidation of and emerging and arguably desired mode of behaviour that may eventually achieve the status of legal duty. Emerging principles such as the responsibility to protect may be characterised as soft law. As such it may influence the interpretation, application and development of other rules of law. In order to advance these emerging principles, norm entrepreneurs are crucial, but not sufficient and different levels of governance need to be included.

The principle of RtoP still needs a lot of fine tuning however, to clearer represents an answer to the initial dilemma that brought it into existence: what to do when states commit massive human rights violations towards its own population, and who does so? Behind this pressing question lie greater questions of how to prevent even having to decide upon the before mentioned situation, of how to prevent outbreaks of violence and how to protect people that may become subjected to this. It is important in this light to constructively

engage with non-western proposals to gain greater legitimacy. The claim of defending western universal values will not take the concept very far, nor a proclaimed impartiality. One has to be partial, namely taking side of the victims.

Intervention remains a matter of choice, this is critical, but not because they may be used for suspicious western interests. Not only do preventive measures have to lessens the tension, or mismanagement of diversity that may lead to human rights violations, also preventive measure should not have the adverse effects of containing the freedom of movement, obliging people to remain in the state or region of origin and thus instead of granting protection through asylum inducing the need for a envisioned intervention.

Prevention may be the best policy once the calculations of states of economic, political and human costs result that such policy is in their own best interest. In that sense there is still a long way to go.

For refugees there still exists a disconnection between rights and responsibilities and the extent to which within the European Union similarities can be discerned between RtoP and refugee policy, they seem not for the better. Measures taken in the light of the Common European Asylum System (CEAS) more so have shifted and shirked responsibilities for protecting than shared them. Assigning another European Union Member state as first state of asylum (and thus responsible for addressing the claim) or any external state of transit as safe third country may clarify responsibility, but does not achieve much in terms of human rights guarantees, nor burden sharing.

It is worrisome if even a regional and quite supranational organization such as the EU does not achieve internal responsibility sharing on receiving and hosting refugees. Even more difficult seem the prospects of cooperation with other states, not on the notion of limiting the movement of persons towards the EU, but rather on promoting it. Only as such the EU can act on its responsibility to protect. Granting refuge to those who need it is the

easiest way to implement the responsibility to protect and therefore migrants must dare to present themselves as such and a right to leave one's country and to seek asylum must be safeguarded as the norm of nonrefoulement respected.

General conclusion

Over the past decades the limits and checks on state sovereignty have increasingly become accepted by the majority of actors in the international community, in favour of human rights of individuals and of communities as a whole. Invoking state sovereignty as legitimising the commission of human rights violations towards a state's own population ceases to be an effective shield from outside scrutiny and interference. Although the prospective duty of the international community to act when faced with the (imminent) commission of mass atrocities is often advocated, timely and effective response to halt such violations is not yet a guarantee nor managed by smooth mechanisms.

In contemporary political history the 1990's provided clear examples of the human suffering resulting when responsibility to provide protection was not effectively taken by the international community. From the aftermath of this decade emerged a proposal to address this, it is what we know now as the responsibility to protect (RtoP), meaning that states have a primary responsibility to protect their populations from mass atrocities, and if they are unwilling or unable, the international community should provide support, either through peaceful means or eventually the use of force.

States to a lesser extent have started to define themselves through the defense of their physical state borders, but rather do so by controlling their populations, its insiders and outsiders, and the movement of persons in a broader sense, a process that becomes detached from the actual territory, and borders of the state.

Physical borders thus become softer through a different emphasis in state control towards controlling populations, and furthermore through more transparency as state have to justify treatment of its inhabitants. Nonetheless, the physical state border remains a crucial element for the figure of the refugee fleeing from persecution.

Today's human rights abuses are tomorrow's refugee movements and therefore, if a state does not effectively fulfill its commitments in safeguarding human rights of its population, the person may seek international protection and in doing so become a concern for the international community. This concern has to be solved by the international refugee protection regime, which is a set of rules, norms and decision making procedures and builds forth on understandings of asylum and burden sharing. The refugee has de facto lost connection to a territory and belonging to a political community alike. The international community approach to this individual is mainly to seek to reestablish the link of the refugee to some territory, either through voluntary repatriation (once time is fit), local integration in the host state, or resettlement to a third state.

The concept of state sovereignty is a social construction, which has been developed through practice. Therefore it can be reconceptualised. For example in the 1990s the imperative to understand (state) sovereignty as responsibility was indicated. RtoP starts from the same premise. However, since the prospect of an application of RtoP was coined, it has been fiercely criticised in international affairs, particularly the advent of external intervention. So far RtoP has been inconsistently applied, if at all. However, RtoP has become a social fact. It does not create new legal duties but envisions stronger commitment to implement existing duties. What makes an idea interesting is the way it relates to the economic and political problems of today, and this may be crucial for the advocacy of RtoP.

RtoP clearly departs from a statal view, it also is to be regarded as a political instrument. It is still questionable to what extent RtoP may strengthen responsibility towards refugees on the territory of other states, which is one of the main weaknesses in the current international refugee regime. There are no existing legal commitment towards protecting refugees on other states territory now, and as RtoP does not create new legal obligations its effect on bridging this gap may be limited. Nevertheless, the strengthening of commitment

of states towards implementing existing legal obligations can also help to bridge such protection gaps.

In this sense there are parallels between the difficulties of refugee protection and the situations for which RtoP in first instance was brought into being, namely the ineffective responses of the international community when faced with mass atrocity. Furthermore, the underlying norms of RtoP and the refugee regime are very similar, in the first place emphasizing responsibilities of a state toward the own population (and here it is important to note a difference between population and citizens) and second place emphasizing the necessity of responsibility sharing between states in fulfilling these obligations towards humans in general.

RtoP according to its narrow definition as deriving from the 2005 World Summit is only applicable when the international community faces one of the four following crimes on a widespread basis: crimes against humanity, ethnic cleansing, genocide and war crimes. Refugee protection in a narrow sense is not directly included in the RtoP framework and there are important distinctions that can be made between a refugee and a person suffering from the before mentioned crimes.

However, in broader terms RtoP builds forth on insights on the vulnerability of forcibly displaced persons, for example who now are commonly known as internally displaced person's (idp's). Furthermore, refugees are the persons most at risk of the four crimes. Therefore, it makes sense to apply a responsibility to protect to the problems of refugees, but maybe not RtoP literally. Either way, providing refugee protection is an easy manner to implement RtoP and for states to live up to their promises. However, there is a need for caution not to weakening the existing international refugee protection regime , which even with weaknesses is well established and does provide protection. Furthermore, RtoP does not in any sense cover all scenarios of refugee flight.

Nevertheless, for pragmatic reasons the international community should focus on addressing a problem that actually exists, focus on the vulnerable populations, on alleviating or preempting the suffering of the victims instead of losing oneself in the reservations of states regarding one or another concept. RtoP can be regarded as a responsibility of states to protect their populations including refugees and in that manner serve as a framework to address state responses to bridge refugee protection gaps.

State commitments towards refugees derive to a large extent from the 1951 Geneva Refugee Convention, its additional 1967 protocol and human right instruments. The emergence of the international refugee regime was characterised as a recognition by the international community of a collective responsibility to protect refugees. Nonetheless such acknowledgement and the according signing of treaty instruments, states are not always that forthcoming in providing refugee protection, nor in sharing responsibilities with other states in doing so.

The Refugee Convention defines to grounds for recognition as a refugee and accords rights to the individual refugee. However, the individual eventually needs a state to guarantee these rights, i.e. to guarantee the right to have rights. Increasingly states develop practices to define individual refugees as part of a group, and also focus in their refugee status determination procedures on state capacity in order to determine if the individual involved could receive protection elsewhere, rather than looking at individual particularities of the case.

The mandate of the refugee agency of the UN, UNHCR grants it the responsibility to find permanent solutions to the problem of refugees. The work of UNHCR is meant to be non-political. Recognition of a collective responsibility for refugees has resulted in limited real commitment in implementation. Since the 1970' s the refugee problem became seen as a permanent problem and a burden. What is interesting about UNHCR's role to strengthen

refugee protection is how international organisations can teach states new behaviour, this accounts for regional organisations as well. In this sense the Un could teach states new behaviour.

The great majority of refugees are hosted in the global south. State practices of containment and limiting the right of peoples of freedom of movement such as for example interception (at sea), visa restrictions and carrier sanctions may breach and demonstrate lack of good faith in implementing treaty obligations guaranteeing human and particular refugee rights. Also geography, poverty and conflict are factors of why refugees have difficulties of escaping their state or region of origin.

Was the year 1999 important for the promotion of RtoP, it also was a potential turning point for a different approach in the EU refugee policies. EU member states to a certain extent are committed to realizing a Common European Asylum Framework (CEAS). Implementation of the CEAS was faced with similar difficulties as the international refugee protection regime. The Dublin regulation and 'safe country' understandings in European politics can be understood as ways to devise a more pragmatic approach to responsibility sharing, emphasising what state should take its responsibility for a refugee case and also institutionalizing a regime to level the number of physically present refugees on respective territories and to divide financial and material costs between different states. This policy has an internal EU aspect and an external EU aspect.

Lack of supranational enforcement however makes effective implementation impossible. Also are the refugees concerned stripped of their agency to decide for themselves upon their country of refuge. Furthermore, by beforehand labeling states as 'safe', the assessment of each individual case is not guaranteed.

Interpretations of safety in more general sense are changing. Temporary protection is an increasingly applied instrument by states to refugee claimants than the grant of full refugee

status. This practice has far reaching consequences for the additional socio-economic rights which are accorded to a refugee in the Geneva Refugee Convention, but cannot be claimed by the person receiving temporary protection. A right to temporary stay is not the same as a right to belong.

Such measures are taken in the light of state concerns about what they consider irregular secondary movements and mixed movements. However, the freedom of movement has to be seen in the broader context of north-south relations.

The mentioned practices may breach the guarantee of non-refoulement, of not returning a person to a state where his or her life or freedom is at severe risk. Furthermore, it may risk violating the right to leave any country including one's own which is limited and de facto therefore also the right to seek and enjoy asylum. Interesting in this context are legal developments that follow a reasoning of tying state responsibility to the notion of control (over a person or population), and the notion of possibly incurring indirect responsibility.

Therefore, even if we have concluded that even if for addressing mass atrocity crimes, an issue is who has to act and in what manner, and the same account for deciding who has to take responsibility to protect refugees, allocating responsibility may have adverse effects. Safe country practices designate a state as responsible for receiving certain refugees, addressing their claims and or hosting them, or to reaccept their nationals, based either on the fact that the country is considered a safe country of origin, a safe country of passage of the state where the persons have entered the EU. The application of these concepts in EU refugee policy has gone hand in hand with containment policies. As these practices were implemented to address state preoccupations rather than to address refugee protection gaps, they have had adverse effect. Notions of control have become detached from physical borders and in that light progressive legal developments of incurring responsibility based on control are interesting and may in the long term strengthen refugee protection.

In the short term it may make states wary to intervene in cases of mass atrocities, because states may be hesitant knowing that they may be held responsible for their actions in the future. However, arguably the same occurs with inaction. Eventually this may lead to the acknowledgement that even the best refugee protection, or most effective humanitarian intervention is no substitute for human rights protection at home and the latter is where resources should be dedicated.

A memory of failed attempts marks the imperative to devise different approaches, which may derive from, or promote new norms in international affairs. We have taken a stance on characterising these norms as being moral, political or legal. Increasingly an interest is taken in the influence of soft law in understanding statal behaviour in International Relations. Soft law can consist of certain types of state behaviour regarded as ‘good’, or nonbinding declarations, which may influence the interpretation, application and development of other rules of law.

Under what conditions a political norm may become a legal one in international law depends on reciprocity and interaction, which has to be undertaken and maintained by actors collectively. The difficulty in interstate relations often concerns eventual compliance with norms. How can inappropriate action be punished, inaction turned into action and ineffective action be transformed? All these questions are relevant for the implementation of the RtoP doctrine.

In allocating and enforcing compliance or responsibility one can think of geographical proximity, special capacities in terms of expertise or strength, or the existence of special ties. In refugee protection, these factors often already play a role in allocating responsibility, particularly the first and the latter element. We have seen however how labeling countries as safe may not be the most effective parameter to allocate responsibility, particularly for individual cases.

If other states have difficulty to hold each other responsible, maybe then the individual citizens can challenge domestic activities of their own states. However one must be conscious of the limits of human rights language, the means are limited, and there must be space for agency of the persons directly involved to consent to what is claimed to be for the good of all. One must be realistic and not claiming to be impartial when it is impossible to be so. Often precisely the individual that needs to claim its rights does not have access to rule of law institutions precisely because of being excluded from basic citizenship rights.

The dilemmas that RtoP seeks to address are not necessarily new, although the balance of priorities tends to bend over in the favor of human rights to the detriment of state sovereignty. States are given some agency in this process, they are most commonly held accountable for the obligations they have committed themselves to by signing documents and declarations. Moreover, states are support to progressively pledge adherence to more commitments. This development may be seen as limiting the critique that RtoP is a Western concept.

Alternatives and adjustments of RtoP have been proposed such as Responsibility while Protecting (RwP). Coining alternatives will not necessarily increase the consensus reached on the 2005 interpretation of RtoP. Nonetheless it may be regarded as a sign of southern involvement in constructively engaging to advance the norms underlying RtoP the imperative to address some of the dilemmas faced in international politics. Southern constructive engagement on refugee responses may therefore be very valid and instructive. To be effective the collective responsibility to protect refugees must be a shared commitment, and here is a lot to gain. The issue of responsible protecting has also been taken up by the UNSG in his 2012 report on RtoP however (A/67/929, 2012).

The non-indifference clause in the constitution of the African Union is interesting in this regard, as are mechanisms devised to address protection issues for internally displaced persons, as set forth in the Kampala Convention, but also present in national laws.

Much of the debate surrounds principles and norms, but intervention for human rights purposes remains a matter of choice and states will place their considerations in the light of economic, political and human costs, so will the UN in its current set-up. Intervention in any regard not the best instrument for human rights protection, nor are human rights ideally enforced by interstate action. Pragmatic solutions for problems that are actually being faced by individuals deserve interest over discussions around morality and norms.

RtoP when applied as a framework of a responsibility to protect can serve as a catalyst for reform and innovation in the refugee protection regime. The two underlying norms have and can so be strengthened, i.e. the norm of asylum which involves the state providing protection to refugees reaching its territory, but also guaranteeing human rights and thus not creating refugees or forced displacement and the second norm which is nowadays called burden sharing, but should be framed back to responsibility sharing to indicate what is really the issue that no state should bear the overwhelming physical, economic and political responsibility for the world's refugees without receiving proportional support.

In terms of responsibility to protect one can even go as far as envisaging a responsibility to prevent, along these lines economic factors can be included. Furthermore, it would involve better management of diversity, which otherwise often results in conflict and in turn the possibility of refugees and RtoP situations. The universal human rights discourse tells us how increasingly there is recognition that differences between humans are morally irrelevant. However this can only be the case when inclusivity, equality, and respect for fundamental rights and civil liberties are guaranteed.

The challenge concerning the viability of asylum is the gap, which is the disconnection between rights and responsibilities. To ensure international protection, rights and responsibilities need to be balanced, to identify to whom protection is owed and to whom not. Such balancing is an ongoing process.

Forced displacement will not be eradicated any time soon. Therefore, consequences must be addressed, i.e. solutions must be found for the individual refugee, respecting the individual agency and assessment of the individual case. As such the responsibility to prevent will also be applied in preventing refugees from falling in between established norms/rights and their implementation. The latter at present regularly happens for prolonged periods, one only has to look at refugee settlements, urban refugees, or refugees in industrialised states without fully recognized citizenships. Broader discussions on responsibilities to protect can redirect funding and raise attention and awareness, although it always remains questionable to what extent actors indeed will come forward with promised funding and to what extent awareness will lead to action.

Global dilemmas also play out in the EU context. Internal EU responsibility sharing on refugee policy is not strongly established, but has rather been defined as shifting and shirking responsibilities for refugees.

EU refugee policy in relation with non member states is sometimes based on consent of the states involved, at least more so than based on the consent of the refugee or asylum claimant involved. However, the cease risks to become meaningless if people are a priori excluded from access to the EU. The ability to control populations increasingly implies responsibility, not only legal and political but also moral. Progressive developments of international law may even point in the direction of future accountability for inaction when faced with human rights violations, particularly when a state had sufficient information regarding the situation in question. Court rulings regarding genocide and indirect

refoulement are to be mentioned here, this may also extend to the RtoP doctrine. Future developments could work towards a responsibility for staying disengaged when faced with mass atrocities.

RtoP understood broadly does not have to reemplace existing refugee protection, but both regimes can coexist and reinforce each other to the better protection of the victims. The difference between both regimes is that the refugee regime is built on a restraining norm (non-refoulement) and the RtoP regime (not fully but to a large extent) deals with proscribing norms (provision of assistance and support). The first is more easily dealt with.

If one decides to take a broad stance, and include before mentioned economic factors, refugee movement and many of the EU concerns can be seen as a result of a complex situation in which Europe itself plays a relevant role. As stricter border control will not end immigration nor the existence of (potential) refugees, they may just choose to identify themselves differently to fool authorities. Migrants will claim to be refugees, and refugees will be idp's instead as they will be made impossible for them to leave their countries or origin. States may have a habit to control their borders but in times of peace should not come to the detriment of human lives. Acknowledge need to address root causes of conflict and migration and create better entrance procedures opportunities for legal migration.

Furthermore, the state has to recognize that it can no longer can guarantee outcomes. There is increased need for cooperation and mutual consent and an understanding of how borders of political communities are being redefined. Even if working towards porous border and different ways of belonging, belonging is important. The practice to lock people in , indirectly creates the more likely necessity of intervention and the tendency of creating safe havens of providing temporary protection while brokering political solutions to conflict. In order therefore to provide stronger protection to refugees, Protection must not be narrowed down to the minimum, but be inclusive in all its aspects.

At a certain point of this thesis was quoted how the manner in which states collectively respond to refugees serves as a barometer of wider change in the state system. The wider change in the state system is how human rights gain prevalence over state sovereignty. However, as we have seen, particularly in the EU context, the before said does not mean that states forsake on their control, they restate their sovereign power by controlling populations rather than physical state borders, which has important implication for the main guarantees that the international refugee regime provides to refugees, especially the freedom of movement, measures that keep people trapped in their states, regions of origin or other state designated as safe.

RtoP is understood as a broader framework of the existence of a state responsibility to protect that builds forth on the notion that states have a primary responsibility to protect their populations, including refugees, and in second instance, if states are unwilling or unable to do so, seek or receive support from other states in fulfilling these commitments. The same understandings are reflected in the international refugee protection regime as asylum and burden sharing.

Imperative is however how these commitments have to be understood as commitments towards the victims, towards the refugees. Therefore, if a state forsakes on providing sufficient protection, either a proper citizen or a passenger, the solution is not to place political claims on the state to better its practices and meanwhile keeping persons from fleeing that state, or sending them back to where they came from, in order to point out to a state that these persons are his responsibility. Vulnerable populations are not a burden to be shared but a responsibility.

RtoP can be used as a political instrument, to emphasise the collective responsibility to protect refugees that states have already committed themselves to through ratifying the Geneva Refugee Convention, the additional protocol or the norm of non-refoulement which

can be regarded as international customary law. However there is also a need for awareness of the fact that minimum understandings of safety in the longer run will not be effective, just as RtoP needs to redirect more focus on the pillar of prevention and as regards refugee policy states need to adjust their understandings to more realistic interpretations of the interconnectedness of people's imperatives to leave their home.

Both regimes have in common that states need to constructively step up the sharing of responsibilities to find solutions which in a timely manner restore the victim's belonging to a community and his or her agency.

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