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Responsibility in International Law

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Abstract

International legal materials refer to “common but differentiated responsibility”, the “responsibility to protect”, or the “responsibility for the global economy”. These terms are manifestations of a single institution of international responsibility, which undergirds much international law development since the 1990s. Institutions combine an idea and a legal reality. The idea of responsibility is that it establishes a relation between the vectors of moral agent, object, addressee to which the agent is accountable, and criteria of assessment.

In the context of international law, states are the primary agents of responsibility, with international organisations being assigned secondary responsibility. Accountability generally lies to the international community, acting through appropriate bodies which assess whether actors meet their assigned responsibility according to defined standards. This matrix of international responsibility is normatively guaranteed and concretised through an international law-making process that proceeds from the recognition in a non-binding document of responsibility as foundational principle for an area of law to the development of binding treaty law and alternative forms of international law-making. The thus conceptualised institution of international responsibility is then shown to manifest itself in three reference areas of international law: sustainable development, international financial markets, and state-internal peace and stability including the Responsibility to Protect civilians. The article concludes by drawing normative implications for the development and interpretation of international law that falls within the ambit of the institution of international responsibility.

Keywords: Law of the Global Economy; International Responsibility; Institutions of International Law; International Law-making; Responsibility to Protect; Sustainable Development.

I. Introduction

Responsibility has a bewildering array of senses or meanings each of which occupies a distinctive role.¹ Historically, the term responsibility first appears in legal texts of the 15th century where responsibility refers to the justification or defence of an action in court,² and in the 19th century it denotes parliamentary ministerial responsibility to compensate for the theory that the king is not responsible and therefore legally can do no wrong.³ For contemporary society responsibility is a key category of self-reflection which therein seeks reassurance after the loss of metaphysics and the end of utopian expectations of social progress.⁴ Law shares the concept and terminology of responsibility with other disciplines such as philosophy and ethics,⁵ and (international) political theory.⁶ Responsibility plays, of course, an important role in legal philosophy, albeit its account refers mostly to the domestic context. In positive legal theory responsibility is an established concept denoting mainly the consequences of individual action in torts and criminal law.⁷

¹ J. Crawford/ J. Watkins, "International Responsibility", in: J. Tasioulas/ S. Besson (eds), *The Philosophy of International Law*, 2010, 293 et seq. (hereinafter *Philosophy of International Law*); D. Miller, *National Responsibility and Global Justice*, 2007, 82 et seq. (hereinafter *National Responsibility*).

² See W. Korff/ G. Wilhelms, "Verantwortung", in: W. Kasper (ed.), *Lexikon für Theologie und Kirche*, 3rd edition, 2001, 600 et seq.

³ Sir W. Blackstone, *Commentaries*, Book III, Chapter XVII, available at <<http://avalonlaw.yale.edu>>; C. von Rotteck, "Lehrbuch der allgemeinen Staatslehre", in: id., *Lehrbuch des Vernunftrechts und der Staatswissenschaften*, Vol. 2, 2nd edition, 1804, reprinted 1964, 249-251.

⁴ M. Vogt, "Grenzen und Methoden der Verantwortung in der Risikogesellschaft", in: J. Beaufort/ E. Gumpert/ M. Vogt (eds), *Fortschritt und Risiko. Zur Dialektik der Verantwortung in (post-)moderner Gesellschaft*, 2003, 85 et seq.

⁵ See e.g. H. Jonas, *The Imperative of Responsibility*, 1985; F. Kaufmann, *Der Ruf nach Verantwortung. Risiko und Ethik in einer unüberschaubaren Welt*, 1992, 11 et seq.

⁶ *National Responsibility*, see note 1.

⁷ H.L.A. Hart, "Postscript: Responsibility and Retribution", in: *Punishment and Responsibility*, 1968, 210 et seq.; G.P. Fletcher, "Punishment and Responsibility", in: D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 1996, 514; J. Gardner, "The Mark of Responsibility", *Oxford Journal of Legal Studies* 23 (2003), 157 et seq.; C. Kutz, "Responsibility", in: J. Coleman/ S. Shapiro (eds), *The Oxford Handbook of Juris-*

Responsibility has also been used in a political theory underpinning the legal relation between individual rights and their limitations in the public interest which must be traceable to the objectives or public goods enshrined in a Constitution.⁸ Recent accounts of “international responsibility” in the philosophy of international law put emphasis on moral responsibility as a yardstick for the law of state responsibility⁹ or more generally the instrumental value of the state.¹⁰

Contemporary international law also makes a range of uses of the term responsibility. Here responsibility may denote a competence, as is the case for Article 24 UN Charter which provides that the UN Security Council has “primary responsibility for the maintenance of international peace and security.”¹¹ Responsibility may denote primary obligations for states, for instance in the 1982 UN Convention on the Law of the Sea,¹² which is distinguishable from the use of the term responsibility within the customary law of state responsibility concerned with secondary legal consequences attaching to the violation of states’ primary international law obligations.¹³ Responsibility may also denote

prudence and the Philosophy of Law, 2002, 548 et seq.; J. Raz, “Responsibility and the Negligence Standard”, *Oxford Journal of Legal Studies* 30 (2010), 1 et seq.

⁸ R. Dworkin, “Hard cases”, in: *Taking Rights Seriously*, 1975, 88 et seq., see also T. Nagel, “Ruthlessness in Public Life”, in: *Mortal Questions*, 1979, 75 et seq.

⁹ Crawford/ Watkins, see note 1.

¹⁰ L. Murphy, “International Responsibility”, in: *Philosophy of International Law*, see note 1, 299 et seq.

¹¹ See Security Council, Presidential Statement, SCOR 61st Sess., 6389th Mtg, Doc. S/PRST/2010/18 of 23 September 2010: “The Security Council reaffirms its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security. The Council in this regard recalls its resolutions and statements of its President in relation to preventive diplomacy, peacemaking, peacekeeping and peacebuilding.”

¹² “Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area”, Sea-bed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, Advisory Opinion of 1 February 2011 (hereinafter *Responsibilities Opinion*).

¹³ Article 28 ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to A/RES/56/83 of 12 December 2001, in: Report of the ILC, 53rd Sess., Doc. A/56/10 (hereinafter *Articles on State Responsibility*).

individual criminal liability under international law.¹⁴ Concepts such as “the responsibility to protect” or “common but differentiated responsibility” are finding their way into international law instruments. Recent broader debates invoke responsibility in the sense of fundamental obligations of states, be it in respect of international terrorism¹⁵ or for the respect of fundamental human rights in other states.¹⁶ Finally, in the theory of organisation¹⁷ and of global administrative law¹⁸ responsibility is sometimes treated as a term for accountability.

There is thus copious evidence of the importance of responsibility for the theory and practice of international law. But this only leaves the more pressing question as to what responsibility in international law means: is there a concept of responsibility of international law that overarches the terminological senses and debates? The search for a single understanding of responsibility in international law requires one to realise that, seen from the perspective of law, responsibility – like justice – is not a quintessentially legal concept or term. It is rather a regulative principle that occupies a meta-level shared with other disciplines using identical terminology. From that meta-level law observes itself and makes strategic decisions about its relationship with other parts of society. Just as justice remains the ultimate objective of law, responsibility marks the essence of any system of law. It constitutes its largely invis-

¹⁴ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, arts 1, 7 and S/RES/827 (1993) of 25 May 1993.

¹⁵ See T. Reinold, “State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11”, *AJIL* 105 (2011), 244 et seq. (responsibility in the sense of an obligation to prevent a state’s territory to be used by terrorists for launching attacks on another state).

¹⁶ See M. Hakimi, “State Bystander Responsibility”, *EJIL* 21 (2010), 341 et seq. (responsibility to denote the obligation of a state in respect of another state’s human rights observation).

¹⁷ See R.W. Grant/ R.O. Keohane, “Accountability and Abuses of Power in World Politics”, *American Political Science Review* 99 (2005), 35 et seq. (35-37); Y. Papadopoulos, “Problems of Democratic Accountability in Network and Multilevel Governance”, *ELJ* 13 (2007), 477 et seq.

¹⁸ See R. Stewart, “Administrative Law for the 21st century”, *N.Y.U.L. Rev.* 78 (2003), 437 et seq.; A.C. Aman, “The Limits of Globalization and the Future of Administrative Law: From Government to Governance”, *Ind. J. Global Legal Stud.* 8 (2001), 379 et seq.

ble foundational structure which may be rendered visible by means of legal principles.

More precisely, responsibility is an institution. An institution is an idea or a set of ideas with the claim to constitute normative reality.¹⁹ Institutions are not agents for the free production of legal norms. Rather law recognises institutions as necessary conditions for its normative contents. Institutions are law's contact points with social reality. An institution requires convincing power on the level of ideas, it needs social recognition, and it depends on normative guarantees at all levels from principles through rule-making to concrete decisions of cases.²⁰ International law presupposes or reconfirms such institutions, integrating them with the international political system and assigning them functions. The ICJ has recognised this for the institution of the self-determination of peoples.²¹ The understanding of responsibility as an institution of international law will be substantiated subsequently in Part II. There then follow discussions of international responsibility in the reference contexts of sustainable development (Part III.), regulation of the global financial markets (Part IV.), and peace and stability within states (Part V.). Concluding that an institution of responsibility is embedded in contemporary international law, Part VI. will clarify certain normative implications of that finding.

II. Responsibility as an Institution of International Law

Institutions couple an idea with a claim to normative reality. What is the idea of international responsibility and what are the mechanisms of the normative concretisation of this idea?

¹⁹ See U. Di Fabio, "Verantwortung als Verfassungsinstitut", in: W. Kries (ed.), *Staat, Amt, Verantwortung. Festschrift für Karl Fromme*, 2002, 15 et seq. (20).

²⁰ *Ibid.*, 15-40.

²¹ See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, 16 et seq., para. 52 (hereinafter Namibia Opinion); Western Sahara, ICJ Reports 1975, 12 et seq. (31-33); East Timor (Portugal v. Australia), ICJ Reports 1995, 90 et seq. (102, para. 29); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136 et seq. (171, para. 88) (hereinafter Wall Opinion) (from political concept to objective legal principle to subjective right with *erga omnes*-effect).

1. The Idea of International Responsibility

The conceptual analysis of the idea of responsibility may start with the etymological insight that “responsibility” denotes linguistic interaction: answer-ability.²² At the heart of responsibility is indeed the idea of attributing consequences and their control. Responsibility is thus relational. It marks the relation between subject (moral agent), object (action or thing, moral patient), and a designated body (addressee) who disposes of effective sanctioning powers.²³ Modern thinking presupposes that this addressee be legitimate and has criteria of assessment. All matters of responsibility play out within this matrix made up of the three vectors of who is responsible for what to whom.²⁴ Responsibility is in particular the normative core of all public organisation in society, so that the art of organisation in essence becomes the art of the clear delimitation and attribution of responsibilities.²⁵ That has long been accepted for the organisation of the constitutional state.²⁶ But it is true also for the organisation of the international space above the state. The matrix of international responsibility then would consist of the following three vectors: in respect of the question of who can be assigned with international responsibility, responsibility presupposes that there is space for own decision-making by the responsible actor. Only a competent actor can be said to be making decisions for which it and it alone is answerable. Responsibility and sovereignty thus imply each other.²⁷ Sovereignty under international law guarantees each state residual competences for internal matters. For matters not under its jurisdiction, each state is competent to enter into cooperation with other states and to implement the results of that cooperation domestically. The sovereign veil can be pierced and responsibility be attributed to state organs, namely regulators. It is also within the logic of the idea of responsibility that it reaches further down into the state. Thus, individuals running a

²² J.R. Lucas, *Responsibility*, 1993, 5 et seq.

²³ Vogt, see note 4, 89.

²⁴ O. Höffe, *Moral als Preis der Moderne*, 1993, 23.

²⁵ K. Bayertz, *Verantwortung. Prinzip oder Problem?*, 1995, 43.

²⁶ Cf. Di Fabio, see note 19, 20-40; L. Fislér Damrosch, “War and Uncertainty. (On Democratic Ground: New Perspectives on John Hart Ely)”, *Yale L. J.* 114 (2005), 1405 et seq.

²⁷ See F.M. Deng/ S. Kimaro/ T. Lyons/ D. Rothchild/ I.W. Zartman, *Sovereignty as Responsibility: Conflict Management in Africa*, 1996, 1 et seq.

state's government can bear international (criminal) responsibility.²⁸ States are, however, not the exclusive competent actors and therefore subjects of responsibility in the international sphere. That role can also be played by international organisations and their organs if and where competences have been conferred upon them,²⁹ or by other forms of institutionalised cooperation between states to the extent that they exercise formal or informal public authority.³⁰ But to the extent that private conduct is of consequence at the international level it becomes possible to attribute consequences of private action for an international public good. Assigning them with responsibility renders the private parties accountable at the international level to a designated body. At the level of the implementation of this individual or private responsibility, there is then the need to respect the applicable human or other individual rights.

What can international responsibility be assigned for? This denotes the remit of responsibility: the public good for which responsibility is assigned, and the questions of whether conduct or omission are relevant and whether responsibility is to be attributed for the past or the future. Primary and secondary responsibilities among relevant actors have to be clearly identified. The remit of an actor's responsibility is determined on the basis of norms. Such norms are shaped particularly by international law whose structure ensures that the duties of responsible actors can be determined in a practical manner.³¹ This does not exclude that in

²⁸ Rome Statute of the ICC, arts 25, 27, UNTS Vol. 2187 No. 38544. On aggression within the meaning of article 5 (1)(d) Statute of the ICC as a leadership crime see C. Kreß/ L. von Holtendorff, "The Kampala Compromise on the Crime of Aggression", *Journal of International Criminal Justice* 8 (2010), 1179 et seq. (1189). By contrast, the once hotly discussed criminal responsibility of states has been largely dropped, see D. Bodansky/ J.R. Crook, "Symposium: The ILC's State Responsibility Articles", *AJIL* 96 (2002), 772 et seq. (784).

²⁹ The UN Charter uses responsibility in this sense of competence in many of its stipulations on the principal organs, cf. Arts 13 (2), 60 for the General Assembly; Arts 24 (1), 26 for the Security Council; Article 60 for ECOSOC.

³⁰ See A. von Bogdandy et al. (eds), *The Exercise of Public Authority by International Institutions*, 2009.

³¹ See generally P. Weil, "Towards Relative Normativity in International Law?", *AJIL* 77 (1983), 413 et seq. (functions and qualities of international law norms).

certain instances standards may reach into the political sphere.³² International responsibility first presupposes that an international public good which lies in the interest of the international community as a whole can be identified. There is no fixed or predetermined list of such international goods, their identification is the province of the international political and legal systems as is the attribution of responsibility for them. Conceptually, there are two categories of international public goods: there are public goods that require international cooperation and those that are the subject of internal action. Sustainable development and regulation of the global economy are such international goods in need of cooperative action by all or most states, while lawful peace and security are state internal matters.

In respect of such goods, each state will be responsible for reflecting on the objectives as well as the design of the regulation and organisation to achieve these objectives. Since each state owns this responsibility none can cede control either over the process of reflection or over the implementation of the results of the reflections, including any international organisation that may be founded or resorted to in the furtherance of the common objective.³³ If the cooperation extends into the future, in other words if it is a programme rather than a one-off event, then the reflective responsibility extends over time. This will comprise all points of the process of negotiating, entering into and complying with internationally legally binding commitments. Reflective responsibility entails a strong element of discretion in the design of the cooperative mechanisms. But the design of cooperation is subject to certain substantive standards relating to effectiveness, equity, and transparency. The cooperative design would namely have to provide for a clear identi-

³² This concentration on responsibility criteria distinguishes the institution of responsibility from broader accountability theories such as those put forward by M. Bovens, "Analysing and Assessing Public Accountability: A Conceptual Framework", *European Law Review* 13 (2007), 447 et seq. (450); see also M. Bovens/ D. Curtin/ P.T. Hart (eds), *Studying the Real World of EU Accountability: Framework and Design in the Real World of EU Accountability – What Deficit?*, 2010, 35 et seq.

³³ Cf. Joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, Federal Constitutional Court of Germany, BVerfGE 123, 267, see also for a translation under <www.bundesverfassungsgericht.de/entscheidungen> (on the constitutionality of the EU Treaty of Lisbon, discussing reflective "konzeptionelle" responsibility of the European Union Member States and the principle of conferred powers on the European Union) (hereinafter Lisbon judgment).

fication of primary and secondary responsibilities among relevant actors, shaping the demarcation of the obligations of states and the competences of international organisations. But there are also international public goods relating to matters under the jurisdiction of each state. Neither international or supranational organisations nor other states can displace the sovereign in its responsibility for regulating these matters in line with international standards.³⁴ Yet responsibility may come to be recognised to additionally lie with other international actors, as responsibility to guarantee or to act. As a consequence, again the need arises to define the concomitant obligations, rights and competences of all actors.

Responsibility always lies towards another body. Responsibility necessarily implies a hierarchical relationship of the responsible actor with the designated body to which accountability lies. Acting for the international community, an organisation such as the United Nations can fulfil the role of the designated body to which the responsible actor is accountable. A state's international responsibility implies accountability to a designated international body competent to set standards for the conduct of states, assess each state's performance against them and sanction its findings. Accountability in this sense includes that the institution to which accountability lies has effective sanctions at its disposal, in other words powers of compliance control. The consequences of responsibility must be defined. Mere factual results of own action or omission cannot be accounted for as sanction. International responsibility is attributed *in the interest* of the international community.³⁵ International responsibility is not a single issue topic confined to one area of law. Rather this institution sits at a medium level of generality, extending over a range of subject areas of that segment or "layer"³⁶ of interna-

³⁴ Retaining such competence may be demanded in constitutional law as a precondition for effective democratic responsibility, cf. Lisbon judgment. Accordingly Member States have not transferred certain critical competences to the European Union, not even through the Lisbon Treaty.

³⁵ According to arts 42 (b), 48 (1)(b) Articles on Responsibility of States for Internationally Wrongful Acts, see note 13, states have certain obligations to the "international community as a whole", giving legal form to the recognition and safeguarding of collective goods. For the term international community as a whole see Commentaries, article 25, para. 18; J.R. Crawford, "Responsibilities of the International Community as a Whole", *Ind. J. Global Legal Stud.* 8 (2000-01), 303 et seq. (314-315).

³⁶ See J.H.H. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy", *ZaöRV/ HJIL* 64 (2004), 556 et seq.

tional law that advances wider community objectives and harnesses the state.³⁷

It is then clear how international responsibility can be distinguished from state responsibility and other forms of liability in international law.³⁸ Assigning actors with responsibility will often result in the establishment of primary obligations for them. Liability then expresses the idea that a legally defined consequence attaches to the violation of a primary obligation incumbent on the responsible agent. Liability may be institutionalised in different ways,³⁹ and in international law it is expressed as the customary law of state responsibility as well as the often treaty-based liability with or without fault in international law and it will often include the occurrence of damages. Liability may be established for public goods, the safeguard of which lies in the interest of the international community as a whole. States are liable for consequences resulting from their own action, and that may include a lack of supervision of private actors. Responsibility and liability as two different senses of the term responsibility are both in operation in the international legal system but at different stages.⁴⁰

2. Guaranteeing International Responsibility Law

The institution of international responsibility depends on normative guarantees at all levels from principles through rule-making down to concrete decisions. In the decentralised international law context such guarantees cannot be derived from a single constitution – in the sense of a document at the apex of a normative hierarchy. In a world of sover-

³⁷ See E. Hey, “International Public Law”, *International Law Forum* 6 (2004), 149 et seq.

³⁸ Conceptual clarity is particularly in demand in international law which may tend to use responsibility as synonymous for liability, Crawford/Watkins, see note 1, 284.

³⁹ Such as censure in public law, punishment in criminal law, liability in private law.

⁴⁰ Cf. Crawford/Watkins, see note 1, 284 (referring for responsibility to judicial process). In reality, the structure of primary substantive responsibility-related obligations and the corresponding legal interest to invoke them is also relevant at the level of enforcing liability, see Responsibilities Opinion, see note 12, para. 180 (*erga omnes* obligation for states to protect the marine environment of the Area means that all states may claim compensation for damage to that environment).

eigns, what rather matters is the ability of states dynamically to produce authoritative texts on international responsibility along the matrix outlined above. Guaranteeing international responsibility is thus intimately wedded to the contemporary process of international law-making. This process is grounded in foundational political documents, which serve as reference points for subsequent law-making encompassing instruments ranging from treaty law to alternative forms of law-making including administrative-style rule-making. The process has been powerfully elucidated by the Sea-bed Disputes Chamber of the International Tribunal for the Law of the Sea in the recent Advisory Opinion on *Responsibilities and Obligations of States sponsoring Persons and Entities with Respect to Activities in the Area*.⁴¹ The Chamber there discusses the “precautionary principle”, linking it to the Rio Declaration. The politically binding Rio Declaration, so the Chamber finds, is the starting point for a process of concretising this principle into binding law. There could be several forms of legal implementation in the law of the sea, ranging from the treaties to the secondary law of rules adopted by the International Sea-bed Authority.⁴² The cumulative effect of concretising of the principle through treaty or sub-treaty norms could then cause the principle to crystallise in customary international law.⁴³ The Chamber thus identifies a cascading process that allows moving from the first recognition of a broad principle in a politically binding document to the legally binding concretisation of the rationale underlying the principle.

The same concretisation process is available for international responsibility.⁴⁴ The process takes as its starting point a foundational document which for a new area under consideration first adopts the terminology of responsibility and assigns relevant actors with responsibilities. This

⁴¹ See note 12. On the position of the International Tribunal for the Law of the Sea within the Law of the Sea Convention’s dispute settlement system and the broader international regime for the settlement of disputes see B.H. Oxman, “A Tribute to Louis Sohn – Is the Dispute Settlement System under the Law of the Sea Convention Working?”, *Geo. Wash. L. Rev.* 39 (2007), 655 et seq. (656-659).

⁴² Responsibilities Opinion, see note 12, paras 126-35, 161.

⁴³ In the event, the Chamber found that the environmental impact assessment requirement was customary international law, Responsibilities Opinion, see note 12, para. 145, while the precautionary principle was (only) launched on the way to becoming customary international law, para. 135.

⁴⁴ Regardless of the fact that the idea of responsibility is situated at a higher level of abstraction than the more specific environmental principles featuring in the Responsibilities Opinion.

foundational document will be of a non-binding political nature. The document of universal or near universal acceptability is then concretised through binding international law. Such binding law can be treaty law, secondary law adopted by international organisations, or alternative forms of international law-making. The collective self-attribution of responsibility by states is rooted in the consent principle that traditionally underpins the legitimacy of international law. But responsibility may also be attributed by a group of states to third states. The consent principle cannot legitimise responsibility attribution to a non-consenting state. Such external responsibility attribution can, however, derive legitimation from the group of states claiming to be acting in the interest of the international community. This presupposes that these states constitute a representative group of states which includes those most interested in the matter and that there is an objective justification for also attributing responsibility to the non-represented state. The creation of responsibility related norms of international law is thus in essence a deductive process. This differentiates it from the other well-established categories of public-interest norms in international law: *ius cogens* and *erga omnes norms* both develop essentially inductively through converging state practice.

III. Responsibility for Sustainable Development

The article will now turn to examining the law of sustainable development as reference area for the institution of responsibility. Sustainable development is by now an established branch of international law. The 1992 Rio Declaration is its foundational text, grounding it in the idea of responsibility. The Rio Declaration has then been concretised in the international legal regimes on the global commons, namely the climate and the oceans along the matrix of responsibility.

1. Responsibility in the Rio Declaration

The UN Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992 produced as a central outcome the Rio Declaration.⁴⁵ The non-binding Rio Declaration has become the foun-

⁴⁵ Report of the UN Conference on Environment and Development, Rio Declaration, Doc. A/CONF.151/26/Vol.1 of 12 August 1992.

dational document of sustainable development law by setting forth its principles.⁴⁶ In particular, the Rio Declaration bases international efforts at achieving sustainable development on the idea of responsibility in its Principles No. 1, 2 and 7. Rio Principle No. 1 sets out sustainable development as an objective or public good and identifies humanity as a chief beneficiary of international efforts undertaken in pursuit of this objective.⁴⁷ Taken together, Rio Principles No. 2 and 7 break down the objective of sustainable development into the matrix of responsibilities: Principle No. 2 establishes the responsibility of each state for matters under its jurisdiction. The Principle does so by pairing the sovereign right of each state to exploit its own resources pursuant to their own environmental and developmental policies with the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”⁴⁸ Principle No. 7 is then concerned with defining the concomitant responsibility of each state for global ecosystems. The Principle introduces “common but differentiated responsibilities” of states for sustainable development in the following terms:

“States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. *In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.*”(emphasis added)

⁴⁶ On the principles of international environmental law see J. Brunnée, “The Stockholm Declaration and the Structure and Processes of International Environmental Law”, in: A. Chircop/ T. McDorman (eds), *Future of Ocean Regime Building: Essays in Tribute to D.M. Johnston*, 2008, 41 et seq.; P. Birnie/A. Boyle/ C. Redgwell, *International Law and the Environment*, 3rd edition, 2009, 181 et seq. (hereinafter *International Law and the Environment*); P. Sands, *Principles of International Environmental Law*, 1995, 181 et seq.

⁴⁷ Principle No. 1: “Human Beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

⁴⁸ Identical to Principle No. 21 of the Stockholm Declaration of the UN Conference on the Human Environment 1972, but for adding “developmental” policies.

While there is no shortage of voices in the literature discussing the theoretical⁴⁹ and practical⁵⁰ relevance of common but differentiated responsibilities for international sustainable development law, Rio Principle No. 7 is best understood as founding the international protection of the global environment on the idea of responsibility. Principle No. 7 establishes as a public good the protection of global ecosystems as an essential part of sustainable development. Recognition of the causal link between human-induced pressures and current trends in environmental degradation is the ground for assigning states with the responsibility for cooperative action to protect the global environment and achieve sustainable development. This responsibility is common to all states and thus it is attributed to each state. It comprises the responsibility to reflect on the design of a regime for the world's ecosystems and to assume duties under the thus designed regime. In a second step, both higher pressures and higher capacities and financial resources ground attributing special or greater responsibility to developed states within the cooperative design.

There are also standards that any such design has to meet so that it will be effective⁵¹ and reflective of burden-sharing between developed and developing states in line with equity and capacity. Principle No. 7 is concerned with the past, present and future impact and the present and future capacity of states. That implies that the qualification of a state as developed or developing is only a proxy for the actual impact on the environment and the remedial capacity of each state at any given moment in time. The Rio Declaration itself contains further indications of the differentiated treatment accorded to developed and developing states. For instance, by stating that the precautionary approach shall be applied by states "according to their capabilities", the first sentence of Principle No. 15 introduces the possibility of differences in application of the precautionary approach in light of the different capabilities of each state.⁵² The Rio Declaration thus puts the idea of responsibility at

⁴⁹ Cf. C.D. Stone, "Common but Differentiated Responsibilities in International Law", *AJIL* 98 (2004), 276 et seq. (276-81) with E.A. Posner/ C.R. Sunstein, "Climate Change Justice", *Geo. L. J.* 96 (2008), 1565 et seq. (1565-1607).

⁵⁰ International Law and the Environment, see note 46, 132-36.

⁵¹ "conserve, protect and restore the health and integrity of the Earth's ecosystem."

⁵² Principle No. 15: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scien-

the heart of sustainable development governance. The non-binding Declaration drives the process of developing binding international law. What follows is an analysis of the legal regimes concerned with global climate (see below under 2.) and the oceans (see below under 3.), each striving for universal membership, and of the way they concretise common but differentiated responsibilities.⁵³

2. The Climate Change Regime

Spawned at UNCED, the 1992 UN Framework Convention on Climate Change (FCCC) recognises that climate change is indeed a “common concern of humankind” necessitating international cooperative action.⁵⁴ The FCCC, in its arts 3 and 4, incorporates Rio Principle No. 7 into the climate change regime, giving it legal force. Article 3 (1) FCCC essentially restates Principle No. 7 for the climate change context,⁵⁵ and article 4 FCCC further concretises article 3 by creating two categories of obligations, those common to all Parties and those incumbent on developed Parties as defined by Annex I only.⁵⁶ Arts 3, 4 of the FCCC concretise Rio Principle No. 7 along the matrix of responsibility identified above. There is recognition of the causal link between anthropogenic carbon dioxide emissions and current trends in global warming which grounds the need and responsibility for climate protection through binding international law. Humanity is the ultimate beneficiary

tific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

⁵³ Elements of differentiated treatment of developed and developing countries can be found in a number of international environmental law treaties. For a comprehensive account see L. Rajamani, *Differential Treatment in International Environmental Law*, 2006.

⁵⁴ Framework Convention on Climate Change, UNTS Vol. 1771 No. 30822, Preamble (hereinafter FCCC).

⁵⁵ FCCC article 3 (1): “[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” The formula of article 3 FCCC or elements thereof are also incorporated in supplemental climate-change instruments adopted subsequently. The Preamble of the Kyoto Protocol declares the Parties to the Protocol as being guided by article 3 FCCC.

⁵⁶ FCCC article 4 (2)(f) provides that the list of States Parties contained in Annex I is open to amendment by the COP.

of such protection efforts, but accountability of each State Party lies with the States Parties organised within the Conference of the Parties (COP). Each State Party is responsible for cooperative climate protection, both through collectively reflecting on its governance and through the readiness to undertake individual measures. Differentiated emissions, respective capabilities and equity mean that responsibility for protective measures should differentiate between developing and developed States Parties.⁵⁷

Developed States Parties thus have heightened or leadership responsibility to bring about this framework through their continuous readiness to take the necessary measures on the basis of legally binding obligations. The practice of States Parties shows, through the FCCC itself and then through the subsequent supplementing agreements, largely concurring with this matrix, that they have collectively been reflecting on a regime of climate protection (a), which corresponds with the substantive standards inherent in the formula of common but differentiated responsibilities (b).

a. The Common Responsibility of Each State Party: Reflective Responsibility

The responsibility to be engaged in reflecting on climate protection as a cooperative enterprise is common to all Parties, regardless of their status as enshrined under the FCCC or any Protocol to it. Article 2 FCCC establishes how States Parties to the Convention intend to exercise their reflective responsibility. Article 2 provides that the Convention's ultimate objective of stabilising "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" will be achieved through the adoption of "this Convention and any related legal instruments that the Conference of the Parties may adopt." Climate protection, then, is conceived of as a matter of progressively developing instruments that are legally binding or that have at least an equivalent effect.

⁵⁷ See Proceedings of the 96th Annual Mtg of the American Society of International Law, "Common but Differentiated Responsibility", *ASIL Proceedings* 96 (2002), 358 et seq. (358) (remarks of C.C. Joyner) (industrialised countries are responsible for the majority of these emissions, and thus the FCCC excludes developing countries from binding emissions reductions requirements).

The FCCC itself is designed as framework convention. As such, it sets out broad principles for the protection of the global climate but not firm legal commitments. These are to be set out in subsequent Protocols to the Convention (article 17 FCCC). Since it is for the COP to adopt any such supplemental instruments, each state must be involved in the design of the instruments and each state is accountable for that design as well as its readiness to adopt the instrument.

States have adhered to and refined this concept through successive stages of designing instruments. The Parties to the FCCC supplemented it with the Kyoto Protocol.⁵⁸ This treaty sets forth firm, quantified and timetabled emissions reduction commitments for Annex I States Parties. The Kyoto Protocol also contains a conceptual innovation in providing for economically efficient climate change protection through the Protocol's flexibility mechanisms.⁵⁹ There is compliance control through administrative means elaborated by legislative-type decisions of the COP serving as the meeting of the Parties. The Kyoto Protocol's commitments will expire in 2012. States Parties to the FCCC have identified the need for agreeing on a successor regime in the Bali Plan of Action adopted in 2007.⁶⁰ The non-binding Bali Plan of Action sets forth substantive parameters for the future regime, namely in that it provides for mitigation and adaptation measures, the continuation of the flexibility mechanisms and a special fund for the support of climate protection projects in developing countries.⁶¹ It also institutes two open-ended negotiating processes under the FCCC and under the Kyoto Protocol,⁶² with the participation of all states.⁶³ These processes

⁵⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, UNTS Vol. 2303 No. 30822 (hereinafter Kyoto Protocol).

⁵⁹ See I.H. Rowlands, "Atmosphere and Outer Space", in: D. Bodansky/ J. Brunnée/ E. Hey (eds), *Oxford Handbook of International Environmental Law*, 2006, 315 et seq. (330-331) (hereinafter Handbook).

⁶⁰ Conference of the Parties to the United Nations Framework Convention on Climate Change, 13th Sess., Bali, 3-15 December 2007, Decision 1/CP.13, Bali Action Plan, Doc. FCCC/CP/2007/6/Add.1 of 14 March 2008) (hereinafter Bali Action Plan).

⁶¹ For industrialised states, the Bali Action Plan contemplates "[n]ationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, ..." whereas for developing countries it envisages only "[n]ationally appropriate mitigation actions", Bali Action Plan, see note 60, para. 1(b)(i)-(ii).

⁶² The AWG-LCA held its first session in March 2008, United Nations Framework Convention on Climate Change Ad Hoc Working Group on

led first to the political compromise of the so-called Copenhagen Accord that States Parties “took note of”⁶⁴ which was then the basis for the agreement reached at the meeting of the COP in Cancun.⁶⁵ The Cancun COP adopted a decision that sets forth the parameters of the post-Kyoto regime.⁶⁶ There will be mitigation and adaptation and there will be a green fund. Annex I Parties are expected to communicate their intended emissions reduction commitments for the period after 2012 on an individual basis to the COP through its Subsidiary Body on Scientific and Technological Advice (SBSTA). Non-Annex I Parties undertake to communicate their Nationally Appropriate Mitigation Action to the COP. Communications are formally recognised by the COP. These communications to the COP are not legally binding. But something equivalent is being achieved. Because communications are being made to the COP as the representative “supreme” body of the FCCC, each State Party is thereby recognising that the COP can hold it accountable for its targets. This is political accountability in the sense that the instance to which accountability lies can take political sanctions to express its sentiment as to whether negotiating standards of good faith have been fulfilled. The complementary decision adopted by the COP serving as the meeting of the Parties for the Kyoto-Protocol provides this. As a result of the Cancun Accord there is a subtle change in the structure of commitments that now resemble the individually negotiated and agreed schedules of commitments by means of which WTO

Long-Term Cooperative Action under the Convention, First Sess., Bangkok, 1 March - 8 April 2008. For documentation see <<http://unfccc.int/meetings>>

- ⁶³ Views Regarding the Work Programme of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Doc. FCCC/AWGLCA/2008/MISC.1 of 3 March 2008, see under <<http://unfccc.int>>. See J. Brunnée, “From BALI to Copenhagen: Towards a Shared Vision for a Post-2012 Climate Regime?”, *Maryland Journal of International Law* 25 (2010), 86 et seq.
- ⁶⁴ Conference of the Parties to the United Nations Framework Convention on Climate Change, 15th Sess., 7-18 December 2009, Copenhagen, Draft Decision/CP 15; Proposal by the President, Copenhagen Accord (hereinafter Copenhagen Accord), Doc. FCCC/CP/2009/L.7 of 18 December 2009, see under <<http://unfccc.int>>.
- ⁶⁵ See D. Bodansky, “The Copenhagen Climate Change Conference: A Post-mortem”, *AJIL* 104 (2010), 230 et seq.; L. Rajamani, “The Making and Unmaking of the Copenhagen Accord”, *ICLQ* 59 (2010), 824 et seq.
- ⁶⁶ L. Rajamani, “The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves”, *ICLQ* 60 (2011), 499 et seq.

Member States bind their tariffs and other obstacles to trade in goods or services.

Subsequent state practice has thus confirmed the three essential elements of article 2 FCCC: the establishment of a process of negotiating instruments that have legal or equivalent effect, the continuing involvement of each State Party in it, and the role of the COP as accountability addressee of each State Party. Through their practice States Parties have not only confirmed but further elaborated the original conception set out in article 2 FCCC. Evidence of that is the move from state group based greenhouse gas reduction commitments in the Kyoto-Protocol to the individual communications foreseen in the Cancun decisions. Reflective responsibility has thus resulted in states renouncing the hitherto established one-off approach of elaborating a treaty and then applying it. Instead law-making on the climate has become an iterative process passing through characteristic stages. This process has aptly been labelled a “convention-cum-protocol approach.”⁶⁷ The first stage is a multilateral law-making treaty in the form of a framework convention, which sets out broad principles and objectives. Subsequently, States Parties are to be guided by these objectives and principles in defining more specific obligations. States’ law-development responsibility then translates into a responsibility to respect the law agreed at relevant intervals. But the underlying law-development responsibilities remain active and come to the fore again at the end of the period of time covered by the treaty. Discharge of their continuous reflective responsibility then requires states to enter into negotiations with a view to drawing up a successor instrument. All States Parties are responsible for entering into and conducting negotiations through the multilateral process under the FCCC. That does not exclude the raising of climate change matters in other near-fora, but decision-making ought to be left to the inclusive UN process. Negotiations must be conducted in good faith, which, as a minimum, requires that constructive efforts must be undertaken to develop negotiating positions on the issues that each state considers critical.⁶⁸ Reflective responsibility implies that

⁶⁷ P. Sand, “The Evolution of International Environmental Law”, in: Handbook, see note 59, 29, 35 et seq.; D. Bodansky, “The Framework Convention/Protocol Approach”, in: *Framework Convention on Tobacco Control Technical Briefing Services*, 1999.

⁶⁸ The ICJ first devised an obligation to negotiate in good faith in the North Sea Continental Shelf cases, ICJ Reports 1969, 3 et seq. (para. 85). Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federa-

States Parties remain ready to adapt or modify regulatory techniques if need be.

b. Differentiated Responsibilities of States Parties: Standards for Outcomes

As shown above, already Rio Principle No. 7 makes clear that common but differentiated responsibilities also enunciate substantive standards as to effectiveness and burden-sharing that the climate protection regime has to comply with. Article 2 FCCC establishes a negotiating responsibility for all States Parties. The outcome of that negotiated process is only vaguely determined, i.e. the human induced temperature rise must remain manageable. In addition, it must reflect regard for the scientific consensus on the underlying threats to the global commons.⁶⁹ The critical standard is the differentiated responsibilities which must reflect the differentiated capacities for contribution to climate change and for the fight against it. Under article 3 (1) FCCC, differentiation of the burden to be shouldered by states for the protection of the climate needs to take place on the basis of responsibility understood as causation⁷⁰ and capacities or financial resources to take remedial action. To this has been added the explicit consideration of equity, which relates to the allocation of climate protection efforts between developed and de-

tion), Judgment of 1 April 2011, paras 122-184, available at <<http://www.icj-cij.org/docket/files/140/16398.pdf>>, has clarified that good faith requires a state, as a minimum, transparently to raise the issues it considers important. The reasoning of the Court in the case applied to settling disputes under a convention peacefully through negotiations prior to its seisin, but may be taken to reflect the structure of any good faith obligation to negotiate in international law.

⁶⁹ The normative basis is article 1 (2) FCCC which establishes the causal link between anthropogenic emissions and the resulting climate change. This science based analysis of the problem leads to informed solutions based on or at least informed by science. See R.K. Pachauri et al. (eds), *Climate Change, 2007: Synthesis Report*, 66-67, Intergovernmental Panel on Climate Change, 2007, available at <<http://www.ipcc.ch/pdf/assessment-report>>

⁷⁰ See National Responsibility, see note 1, 83-90 (discussing the role of establishing causation for identifying responsibility for a given situation – outcome responsibility – as opposed to assigning responsibility for dealing with it – remedial responsibility).

veloping states.⁷¹ This results in a rough dividing line between developing and developed countries. The attribution of primary (“leadership”) responsibility to developed States Parties yields their accountability not just for internal mitigation and adaptation action as internationally agreed but also for support for emission reduction efforts in developing States Parties. The assumption underlying differential or secondary responsibility of developing countries is that they lack relevant capacity both in respect of emitting greenhouse gases and in respect of mitigating any such emissions. It is for this critical assumption that there are no quantitative emission reduction obligations imposed on them. This would point to a duty for each State Party to evaluate, in good faith, on which side of the dividing line between developing and developed states it falls at the precise moment of negotiations.

Practice of states conforms to this principle. Article 3 (1) FCCC enshrines the common but differentiated responsibilities for climate change, and article 4 FCCC introduces distinct categories of States Parties as Annex I and non-Annex I countries. Higher standards of conduct are explicitly set for Annex I (developed) states, both in the FCCC and the Kyoto Protocol supplementing it. The Kyoto Protocol implements the idea of differentiated responsibility by establishing time-tabled and quantified emission reduction commitments for Annex I States Parties only. States Parties other than Annex I countries have a much diminished but still relevant complimentary responsibility to play in the development and operation of viable climate change. That categorisation as an Annex I or non-Annex I State Party at the time of the adoption of the FCCC is a proxy as the underlying principle of capability only is reflected in that the Annexes are open to amendment by the COP.⁷² More forcefully, the Bali Plan uses the more flexible categories of developed and developing states⁷³ and the Cancun decisions allow

⁷¹ This is neither distributive nor corrective justice. But see Posner/ Sunstein, see note 49, 1583, 1591.

⁷² See Conference of the Parties to the United Nations Framework Convention on Climate Change, Request from a Group of Countries of Central Asia and the Caucasus, Albania and Moldova regarding their Status under the Convention, Decision 35/CP.7, Doc. FCCC/CP/2001/13/Add.4 of 21 January 2002, page 25.

⁷³ Bali Action Plan, see note 60, para. 1 (b)(i)-(ii); see Brunnée, see note 63, 101; C. Spence et al., “Great Expectations: Understanding Bali and the Climate Change Negotiation Process”, *RECIEL* 17 (2008), 142 et seq. (150).

the underlying rationale to play out even more forcefully by providing for individual communications from all developing states as well.⁷⁴

3. The Rio Declaration and the Law of the Sea

Rio Principle No. 7 allows for context-specific implementation as long as the main conceptual planks of the principle are maintained. The implementation of the principle of common but differentiated responsibilities in the Rio-spawned regime on the global climate has been discussed above. This regime relies on multilateral law-making treaties. The global commons of the oceans are also subject to a multilateral law-making treaty in the form of the 1982 UN Convention on the Law of the Sea.⁷⁵ While the LOS Convention predates the Rio Declaration, the International Tribunal for the Law of the Sea has not hesitated to refer to the Rio Declaration as a conceptual starting point for understanding the Convention.⁷⁶ The Convention can therefore be considered as an instantiation of the Rio Declaration principles and common but differentiated responsibilities.⁷⁷ Referred to as a “constitution for the oceans”⁷⁸ in the sense that it comprehensively covers all ocean uses, the Convention instantiates its vision of common but differentiated responsibilities of States Parties in particular in the regulation of the exploration and exploitation of the mineral resources of the sea-bed per Part

⁷⁴ On the evidence of the communications received so far there is a differentiation within the group of Non-Annex I Parties between the more and the less developed states. China, in particular, has communicated a substantial policy commitment. See Subsidiary Body for Scientific and Technological Advice, Compilation of Economy-Wide Emission Reduction Targets to be Implemented by Parties included in Annex I to the Convention, Doc. FCCC/SB/2011/INF.1 of 10 March 2011.

⁷⁵ United Nations Convention on the Law of the Sea, UNTS Vol. 1834 No. 31363 (hereinafter UNCLOS or LOS Convention).

⁷⁶ Responsibilities Opinion, see note 12, para. 125.

⁷⁷ See C.D. Stone, “Common but Differentiated Responsibilities in International Law”, *AJIL* 98 (2004), 276 et seq. (276) speaking of “close cognates” to common but differentiated responsibilities.

⁷⁸ T. Koh, *The Law of the Sea: Official Text of the UN Convention on the Law of the Sea*, 1983, xxxiii.

XI UNLCOS and the 1994 Implementation Agreement relating to Part XI UNCLOS.⁷⁹ ⁸⁰

Such mining activity of potentially high economic interest would by necessity implicate the sensitive marine environment of the deep sea. The LOS Convention contains a fundamental principle of the protection of the marine environment.⁸¹ In order to protect the marine environment of the deep sea-bed the Convention establishes “responsibilities” for states when engaging in mining. Responsibility thus appears as a legal term in several provisions of Part XI UNCLOS. The structure of these provisions has been clarified by the Sea-bed Disputes Chamber of the International Tribunal for the Law of the Sea in its Responsibilities Advisory Opinion.⁸² The Chamber found that these provisions must be seen as enshrining primary obligations for states in the interest of the protection of the marine environment, not secondary obligations within the meaning of the law of state responsibility.⁸³ States are under direct obligations for their own conduct. They also have indirect obligations for the conduct of private parties (undertakings) wishing to explore or exploit the area whereby states need not just to “sponsor” and thus control the private parties but also have the obligation to take appropriate legislative action in the national legal orders to control private action. The obligation involved is substantively a due diligence obligation in the sense that there is no prescribed or finite measure to be taken but that standards depend on the circumstances and are subject to evolution.⁸⁴ It includes everything that is comprised by the direct obligations a state is under, namely the implementation of the precautionary ap-

⁷⁹ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, UNTS Vol. 1836 No. 31364.

⁸⁰ See E. Posner/ A.O. Sykes, “Economic Foundations of the Law of the Sea”, *AJIL* 114 (2010), 569 et seq. (587-588) (summary of the state of the law resulting from Part XI UNCLOS and the 1994 Implementation Agreement).

⁸¹ “... the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment”, Case No. 10, *The Mox Plant Case* (Ireland v. United Kingdom), Provisional Measures, para. 82, ITLOS 3 December 2001; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Provisional Measures, para. 92, ITLOS 8 October 2003.

⁸² Responsibilities Opinion, see note 12.

⁸³ Responsibilities Opinion, *ibid.*, paras 64-71, 107-116.

⁸⁴ Responsibilities Opinion, *ibid.*, paras 117-120.

proach and best environmental practices.⁸⁵ These direct and indirect obligations are incumbent on *all* states – both developed and developing – that choose to engage in sponsoring exploration and exploitation of the mineral resources of the deep sea-bed to the same degree. They are imposed in the interest of mankind.⁸⁶ Differential treatment of developing countries for the protection of the marine environment is indeed only possible to a very limited extent as equality of treatment for all states sponsoring activities in the area is essential to prevent regulatory arbitrage (“sponsor states of convenience”) being harmful to the protection of the environment of the deep sea. But developing states receive special access rights to the mining activities that the International Sea-bed Authority itself will be undertaking for the benefit of mankind.⁸⁷ Also, developed states should support developing states through provision of training.⁸⁸

The regime for the Area enshrined in Part XI UNCLOS and the 1994 Implementation Agreement thus concretises common but differentiated responsibilities of States Parties for the protection of the marine environment of the deep sea-bed. Each state engaging in mining in the Area is assigned with the responsibility to protect the marine environment. In remarkable distinction from the climate change regime, primary environmental protection obligations of states are not differentiated in any significant measure. Rather developed and developing states are under more or less the same stringent obligations, and there is the same accountability of both groups of states to the International Sea-bed Authority. Non-differentiation in respect of the environmental protection objective of sustainable development can, however, be squared with the underlying rationale of common but differentiated responsibilities: Differentiated responsibilities are attributed on the basis of different contributions of developed and developing states to environmental degradation and different capacities of both groups of states to halt environmental degradation in the future. Neither rationale is applicable in the context of the deep sea-bed mining regime. There is no differentiation in the responsibilities of states for the protection of the

⁸⁵ Responsibilities Opinion, *ibid.*, paras 123, 125-137.

⁸⁶ Responsibilities Opinion, *ibid.*, para. 158. Para. 180 clarifies that the beneficiary of the protection of the marine environment is “mankind” as much as it is the beneficiary of the mining activities carried out in the Area (article 140 UNCLOS).

⁸⁷ Responsibilities Opinion, *ibid.*, para. 157.

⁸⁸ Responsibilities Opinion, *ibid.*, para. 163.

environment because deep sea-bed mineral exploitation is in fact an activity that has no differential impact depending on who is undertaking it.

The rationale of different capacities creating differentiated obligations plays out, however, in that developed states have to assist developing states through training and other means to meet their marine environmental protection requirements. Common but differentiated responsibilities also contain the seeds for a strong consideration of equity. In the context of the deep sea-bed mineral exploitation, equity translates into participation in its economic benefits. This is then realised through the international mechanism of the International Sea-bed Authority.

4. Conclusions

Critical parts of the law of sustainable development are built around the institution of responsibility. Principle No. 7 of the Rio Declaration is the foundational text. The foundational document is then implemented in the diverse issue-areas such as climate and the deep sea-bed. Across the variations, the core idea of Principle No. 7 is, however, borne out in both areas:⁸⁹ each state bears reflective responsibility for the best collective protective efforts, and is accountable for its own efforts. Substantive obligations can then vary depending on the status of each State Party as developed or developing, to the extent that this is compatible with the objective of protecting the global environmental good in the interest of humanity.

IV. Responsibility for the Global Economy

Despite the framework of international financial standards developed since the end of the Bretton Woods system, in 2008 and 2009 the world

⁸⁹ J. Brunnée/ S. Toope, *Legitimacy and Legality in International Law*, 2010, 151 et seq. offer an alternative account of how the principle of common but differentiated responsibilities acquires social reality in international law. It is a “norm” to the extent that it is supported by resilient shared understandings of relevant actors and meets specified criteria of legality, generality, promulgation, non-retroactivity, non-contradiction, constancy and predictability.

was engulfed in the worst economic and financial crisis since the 1930s, prompting a complete overhaul of the international financial architecture.⁹⁰ The new architecture has been grounded in responsibility with the Washington Declaration of the Group of Twenty as its foundational text.

1. Responsibility in the G20 Washington Declaration

The process of designing a new international financial architecture has been using the informal intergovernmental forum of the Group of Twenty (G20),⁹¹ which was originally conceived as a loose grouping bringing together the finance ministers and central bank governors of a number of leading industrialised and critical emerging economies which met for the first time in 1999.⁹² Yet in November 2008, the G20 met at the level of Heads of State or Government in Washington (“Leaders’ Summit”), producing the Washington Declaration and Plan of Action.⁹³ While the Washington Declaration does not expressly employ the ter-

⁹⁰ See M. Giovanoli, “The International Financial Architecture”, in: M. Giovanoli/ D. Devos (eds), *International Monetary and Financial Law*, 2010, 1.01.

⁹¹ See A.S. Alexandroff/ J. Kirton, “The ‘Great’ Recession and the Emergence of the G-20 Leaders’ Summit”, in: A.S. Alexandroff/ A.F. Cooper (eds), *Rising States, Rising Institutions: Challenges For Global Governance*, 2010, 193 et seq.; A.F. Cooper, “The G20 as an Improvised Crisis Committee and/or a Contested ‘Steering Committee’ for the World”, *Int’l Aff.* 86 (2010), 741 et seq. (G20 as a “steering committee” or a “crisis committee” for regulatory deliverables).

⁹² Initially the G20 started out as the G22 and was formed for a one-time meeting. It briefly became the G33 and finally upon the recommendation of the G7 finance ministers became the G20. See P.I. Hajnal, “The G8 System and the G20: Evolution, Role and Documentation”, 2007, 151 et seq. Members of the G20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Korea, Turkey, United Kingdom, United States, and the European Union. Spain and the Netherlands have attended as observers, as have ASEAN, the Financial Stability Board, IMF, the New Partnership for Africa’s Development (NEPAD), the United Nations, the IBRD and the WTO.

⁹³ *Declaration of the Summit on Financial Markets and the World Economy*, of 15 November 2008, available at <www.g20.org/Documents> (hereinafter Washington Declaration).

minology of responsibility, it contains an implicit acknowledgement of responsibility by the G20 states. This implicit acknowledgement lies in the Declaration identifying past government actions and omissions as causative of the crisis of the financial markets and in identifying the need to take adequate action to prevent a recurrence of the crisis.⁹⁴ The Declaration thereby puts in place the critical elements for shaping its approach to financial market regulation as a matter of responsibility. The Declaration identifies the public good of a functioning global financial market and more widely of a return to growth for the international economy. Consequences for that public good are attributed to action taken by each participating state.⁹⁵ Accountability of each of the participating states is established. The G20 states claim not to act (only) in their own interest but rather as stewards of the global financial markets and more widely the global economy.⁹⁶ The Washington Declaration thereby expresses that the intended beneficiary of the thus assumed responsibility are not just the G20 states themselves but the international community as a whole. In 2010, the Pittsburgh Leaders' statement then made explicit what the Washington Declaration had implied: the G20 states self-assign themselves with responsibility for the global economy.⁹⁷ The non-binding Washington Declaration thus puts the idea of responsibility at the centre of the cooperative construction of a new global financial architecture. The non-binding Declaration has initiated a concretising law-making process on the regulation of financial markets that combines the production of standards at the international level with their implementation at the national level.

⁹⁴ See Washington Declaration, *ibid.*, paras 3-7.

⁹⁵ See Washington Declaration, *ibid.*, para. 2.

⁹⁶ See Washington Declaration, *ibid.*, para. 1.

⁹⁷ *Leaders' Statement: The Pittsburgh Summit of 24-25 September 2009. The Framework for Strong, Sustainable and Balanced Growth*, Annex I, paras 1-4: "The Framework for Strong, Sustainable and Balanced Growth we launched in Pittsburgh is the means to achieving our shared objectives. G-20 members have a responsibility to the community of nations to assure the overall health of the global economy. We are committed to assess the collective consistency of our policy actions and to strengthen our policy frameworks in order to meet our common objectives. Through our collective policy action, we will ensure growth is sustained, more balanced, shared across all countries and regions of the world, and consistent with our development goals." (emphasis added), (hereinafter Pittsburgh Leaders' Statement) <<http://www.g20.org/Documents>>.

What follows is an analysis of the emerging oversight of a globally integrated financial regime and the way it concretises the idea of responsibility for the G20 states (2) and for other states (3).

2. Designing an Oversight Regime for the Global Financial Markets

The design by the G20 states of a regulatory regime for the global financial markets is based on attribution of specific responsibilities to all relevant actors: the states, national regulators, and private international financial institutions.

The states themselves represented by their leaders assume the responsibility to reflect on the design of the regime for the global financial markets. Through the Washington Declaration, the G20 states had started to sketch the future governance of the financial markets. In line with *continuous reflective* responsibility, states have kept the development of the G20 as the core governance body under close review since the initial meeting in Washington. Since the initial meeting there has been a rapid succession of follow-up meetings of the G20 at the level of Heads of State or Government.⁹⁸ The “summit declaration” or “leaders’ statement” issued by the G20 at the issue of each meeting mark the progress of consensus on the organisation, the principles, the instruments, and the standards that should govern the cooperative enterprise, finally declaring the G20 the premier forum for their international economic cooperation.⁹⁹ Exercise of their reflective responsibility in this way by states has resulted in the design from scratch of a specific forum for cooperation that does not conform to existing templates. There is a horizontal treaty-less mechanism that allows for political coordination

⁹⁸ A second meeting took place in London in the spring of 2009, a third meeting was held in September 2009 in Pittsburgh, a fourth in June 2010 in Toronto, a fifth in Seoul in November 2010, and a sixth in Cannes in November 2011. Annual meetings are envisaged thereafter. More regular meetings still are being held at the level of the G20 finance ministers to implement the agreements reached by the principals and to prepare their next meeting.

⁹⁹ Pittsburgh Leaders’ Statement, see note 97, preambular para. 19. The *Toronto Summit Declaration of 26-27 June 2010*, para. 1, states accordingly: “In Toronto, we held our first Summit of the G-20 in its new capacity as the premier forum for our international economic cooperation”, <<http://www.g20.org/Documents>> (hereinafter Toronto Summit Declaration).

and management but also rule-making.¹⁰⁰ Through it, states are effectively accountable for their domestic financial and economic action and record of compliance with agreed policies to the international community as organised in the G20.¹⁰¹ Action by states through the G20 must conform to standards and can be assessed against it. The Washington Declaration and subsequent summit declarations specify that regulatory action of the G20 will have to accord to the standards of sound regulation, transparency, inclusiveness, and accountability in the sense of enforceability,¹⁰² and similar standards will also govern the reform of the international financial institutions¹⁰³ and the organisation of the forum of the G20 itself. A standard of differentiated responsibilities does not feature. This reflects the assumption that effective regulation of the

¹⁰⁰ As opposed to a vertical approach involving an international organisation such as the IMF to head the process or a Meeting of Parties to an international treaty. See generally on government networks and their norm-generating effects A.M. Slaughter, *A New World Order*, 2004. For the use of Meetings of Parties for international lawmaking in a range of sectors see V. Röben, “Conference (Meetings) of States Parties”, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2012, vol. I, 605.

¹⁰¹ Under the Mutual Assessment Process (MAP) the G20 states can collectively evaluate each member’s record of compliance with previously agreed policies and regulatory standards, Toronto Summit Declaration, see note 99, para. 9; see IMF, *Factsheet: The G-20 Mutual Assessment Process*, 11 November 2010 <<http://www.imf.org/external/np/exr/facts>>. At the London Summit, the G20 asked the WTO along with UNCTAD and the OECD to “monitor and report publicly on G20 adherence to their undertakings on resisting protectionism and promoting global trade and investment”, *Leaders’ Statement, The London Summit April 2009, The Global Plan for Recovery and Reform*, para. 20, <<http://www.g20.org/Documents>> (hereinafter London Leaders’ Statement); Doc. WTO/OECD/UNCTAD, *Report on G20 Trade and Investment Measures September 2009 to February 2010 of 8 March 2010*, <<http://www.unctad.org/en/docs>>, and related Pittsburgh Leaders’ Statement, see note 97, para. 48. International accountability of each state is complemented by its national responsibility, see R.M. Nelson, “The G-20 and International Economic Cooperation: Background and Implications for Congress”, *Congress Research Service* 1 (2010), R40977, <fas.org/sfp/crs/row/R40977.pdf>

¹⁰² Washington Declaration, see note 93, para. 9; Pittsburgh Leaders’ Statement, see note 97, para. 5.

¹⁰³ London Leaders’ Statement, see note 101, para. 20.

global financial markets requires uniformity to avoid regulatory arbitrage.¹⁰⁴

Through the G20, states have contrived to set up machinery to produce policy coordination as well as financial market regulation. Management capacity has been complemented by rule-making capacity.¹⁰⁵ The machinery links political levels of decision-makers with expert-staffed levels of decision-making, trusted with proposing and implementing political decisions. At their summit meetings, leaders task finance ministers to come up with concrete proposals at the follow-up meeting. These are followed up by meetings of senior civil servants/regulators to further implement the political decisions into technical arrangements through standard-setting bodies susceptible of being applied by national authorities. Critically, regulators are addressed as agents having responsibilities of their own for cooperatively reaching certain regulatory outcomes.¹⁰⁶ Their responsibility corresponds to their competence since financial regulation is still fully under the national competence of states with the exception of the European Union. Regulators are accountable to the G20 and receive guidance on that basis. The central forum for this cooperation is the Financial Stability Board (FSB) set up by the G20.¹⁰⁷ The FSB is made up of finance ministries and a regulator,¹⁰⁸ and its task is to implement the decisions taken

¹⁰⁴ However, equity considerations underlie the G20-Declaration on Delivering Resources through the International Financial Institutions, providing for a massive increase of financial resources for the IMF and various multilateral development banks, to meet the needs of emerging and developing countries, London 2 April 2009 <<http://www.g20.org/Documents>>.

¹⁰⁵ For an early account see D. Zaring, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations", *Tex. Int'l L. J.* 33 (1998), 281 et seq.

¹⁰⁶ Washington Declaration, see note 93, para. 8.

¹⁰⁷ Established at the London Leaders' Summit of the G20, see note 101, para. 15. The FSB was preceded by the Financial Stability Forum which was itself preceded by the Joint Forum on Financial Conglomerates, see Slaughter, see note 100, 135. The FSB has adopted a non-binding Charter to enhance its transparency. Cf. FSB Charter, article 1: "The Financial Stability Board (FSB) is established to coordinate at the international level the work of national financial authorities and international standard setting bodies (SSBs) in order to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies ..."

¹⁰⁸ FSB Charter, article 4: "(1) The following bodies are eligible to be a Member: (a) National and regional authorities responsible for maintaining financial stability, namely ministries of finance, central banks, supervisory and

at the political level within its remit. This cyclical process will bring about, at the international level, internationally agreed and backed non-binding standards for regulation. These standards will actually be translated into binding national law. While the FSB is to set new standards, the organisationally powerful IMF would then monitor and enforce compliance with them,¹⁰⁹ even though the FSB seems to increasingly assume this compliance control function itself.¹¹⁰ Standards may be agreed upon within the FSB itself or in various standard-setting bodies which informally report to the FSB. For instance, under the new FSB standards for compensation, supervisors will require that 40 to 60 per cent of all senior bankers' bonuses come in the form of deferred compensation over time.¹¹¹ At the London Summit the G20 decided to reduce reliance on credit rating agencies, and the FSB responded to this G20 goal with Principles for Reducing Reliance on CRA (Credit Rating Agency) Ratings,¹¹² which were endorsed at the Seoul Summit.¹¹³ In addition to the FSB, the Basle Committee on Banking Supervision (BCBS) is an important standard-setting body and venue for regulators'

regulatory authorities; (b) International financial institutions; and (c) International standard setting, regulatory, supervisory and central bank bodies." For the membership of the FSB see under <<http://www.financialstabilityboard.org>>.

¹⁰⁹ Washington Declaration, see note 93.

¹¹⁰ There is a toolbox including peer review under the FSB's Framework for Strengthening Adherence to International Standards of 9 January 2010, <http://www.financialstabilityboard.org/publications/r_100109a.pdf>.

The FSB has completed its first peer review on compensation, *Thematic Review on Compensation, Peer Review Report, March 2010* <http://www.financialstabilityboard.org/publications/r_100330a.pdf>.

The results feed into the regular progress reports on actions taken since the last summit prepared by the rotating G20 chair.

¹¹¹ The FSB Principles for Sound Compensation Practices and their Implementation Standards, 2 April 2009, were endorsed by the Pittsburgh Leaders' Statement, see note 97, para. 17. See L.A. Bebchuk/ J.M. Fried, "Paying For Long-Term Performance", *University of Pennsylvania Law Review* 158 (2010), 1915 et seq. (1919).

¹¹² FSB, Principles for Reducing Reliance on Credit Rating Agency (CRA) Ratings 27 October 2010, <http://www.financialstabilityboard.org/publications/r_101027.pdf>.

¹¹³ Leaders' Declaration, *The G20 Seoul Summit*, 11-12 November 2010, para. 37 (hereinafter Seoul Leaders' Declaration).

cooperation.¹¹⁴ The attribution of own responsibility through the G20 has fed into the process of national banking supervisors agreeing within the BCBS on the critical common standards for the equity reserves that banks need to hold.¹¹⁵ Consensus was first reached by the finance ministers on capital requirements for banks (Basel III), which were then further implemented by the Basle Committee.¹¹⁶ These “Basel standards” are not binding *per se*, but each regulator’s state is in turn responsible for implementing them internally in binding law.¹¹⁷ The G20 also makes use of the International Organization of Securities Commissions (IOSCO), a network of securities’ regulators, which has come up with the May 2010 Principles Regarding Cross-border Supervisory Cooperation.¹¹⁸

While these processes use the channels of regulatory rule-making by public authorities, the Washington Declaration enters uncharted territory by assigning private actors with direct responsibility for the international financial markets.¹¹⁹ The position of these private parties can

¹¹⁴ Supported by the BIS, the BCBS “generates global public goods of information and expertise” in the area of banking supervision. It drafts standards relating to capital adequacy requirements of banks.

¹¹⁵ In September 2010, the BCBS announced the international regulatory framework for banks (Basel III), which established a 7 per cent minimum common equity requirement as well as an additional counter-cyclical buffer including up to 2.5 per cent of risk-weighted assets (Basel III: A Global Regulatory Framework for more resilient Banks and Banking Systems of 16 December 2010, <<http://www.bis.org/publ/bcbs189.pdf>>). The Leaders Statement of the Seoul Summit, 11-12 November 2010, endorsed the Basel III framework.

¹¹⁶ Progress Report on the Actions of the London and Washington G20 Summits, 48, 5 September 2009.

¹¹⁷ Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability, FSB of 15 February 2011, <http://www.financialstabilityboard.org/publications/r_110219.pdf> “All members will now put in place the necessary regulations and/or legislation to implement the Basel III framework on 1 January 2013, such that it can be fully phased in by 1 January 2019.” The Enhancements to the Basel II framework, BCBS of 14 July 2009, <www.bis.org/publ/bcbs157.htm>, were implemented by EU Directive 2009/111/EC, amending the “Basel II” or “CRD” Directive (2006/48/EC), 2009 OJ 17/9.

¹¹⁸ IOSCO, *Principles Regarding Cross-border Supervisory Cooperation*, <<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD322.pdf>>.

¹¹⁹ Washington Declaration, see note 93, para. 3. This entails “enhancing required disclosure on complex financial products and ensuring complete and

be analysed through the responsibility prism. They are thus designated as international moral agents that have to account for their handling of financial risks. They are deemed internationally accountable against standards being set by the G20. In subsequent steps, the G20 states have specified the category of private actors that bear this responsibility. They have created the category of Systemically Important Financial Institutions (SIFIs). SIFIs will be made subject to regulation developed by the FSB,¹²⁰ and globally systemic firms (G-SIFIs) will be made the subject of an individualised process of supervision through international supervisory colleges.¹²¹

3. The G20 and the Responsibility of Third States

The Washington Declaration constitutes an instance of self-attributed responsibilities by the states represented in the G20. But the London Leaders' Statement also innovates by assigning responsibility for global financial markets to third states.¹²² By acting through the G20 rather than a more formal international organisation or a treaty with a meeting of parties, states had established a principle of lightly institutionalised harmonisation of national legislation with adherence to certain substantive standards. Practice of the G20 states conforms and fleshes out this conceptualisation. That is also true for assigning non-traditional actors with international responsibility. While the G20 comprises a large enough portion of the world's economy for laying down rules that will affect much of the global economy and have a significant compliance pull, a significant number of issues require action on the part of non-represented, third states. Off-shore tax havens figure prominently here. Such havens are sometimes under the remit of the G20 states, but there are also third states. These third states are assigned responsibility exter-

accurate disclosure by firms of their financial conditions. Incentives should be aligned to avoid excessive risk-taking.”

¹²⁰ The Seoul Leaders' Declaration, see note 113, paras 30-31, 11-12 November 2010, endorsed the FSB's policy framework for reducing the moral hazard of systemically important financial institutions (SIFIs). See FSB, “Effective Resolution of Systemically Important Financial Institutions”, Consultative Document of 19 July 2011, available under <<http://www.financialstabilityboard.org>>

¹²¹ Seoul Leaders' Declaration, see note 113, para. 31. See already *Declaration on Strengthening the Financial System*, 2 April 2009.

¹²² London Leaders' Summit, see note 101, para. 15.

nally by the G20 states. The legitimating basis for this is the G20 claim to overall responsibility for the global economy, the beneficiary of which, in the last instance, is humanity, backed by the G20 representing a large share of the international economy. Concretisation of such third-state responsibility in binding law will still have to correspond with the applicable rules of the law of treaties, namely the *pacta tertiis* rule.¹²³ States not represented at the G20 therefore have the right to decide whether to enter into any bilateral or multilateral agreement proposed to them. But their responsibility would mean that they are politically accountable for the position taken at the G20. In the event, bilateral treaties on tax issues have been entered into by all of the said third states.¹²⁴

4. Conclusions

Responsibility forms the normative core both of the established field of sustainable development law and of the emerging regulation of the global financial markets and the global economy more broadly. Both areas follow the matrix of responsibility for matters of concern to the international community. An international public good is identified, every state is assigned reflective responsibility, a body is identified to which accountability lies, which has the power of sanctioning, and standards of accountability are determined – effectiveness, transparency, equity, differentiated obligations. Private parties and third states may also be assigned responsibilities.

¹²³ Article 34 Vienna Convention on the Law of Treaties, UNTS Vol. 1155 No. 18232.

¹²⁴ See OECD, Tax-Co-operation 2009 of 31 August 2009 with press release: “OECD-Assessment shows bank secrecy as a shield for tax evaders coming to an end.” Several treaties have been concluded by the G20 members Germany, the United Kingdom and the United States on the basis of the OECD-model Agreement on Exchange of Information on Tax Matters, <<http://www.oecd.org/dataoecd/15/43/2082215.pdf>>, drafted by OECD Member States and non-OECD states through the Global Forum on Transparency and Exchange of Information. See in particular: United Kingdom-Liechtenstein (Tax Information Exchange Agreement, 8 December 2008); United Kingdom-Switzerland (Swiss Federal Department of Finance Press Release, 24 August 2011); Germany-Switzerland (Press Release, 10 August 2011); United States-Switzerland (Press Release, 19 June 2009).

In both areas, the matrix of international responsibility is being concretised through processes of law-making grounded in a foundational political document which first adopts the terminology of responsibility. As is the case with the Rio Declaration for sustainable development, the Washington Declaration of the G20 is a foundational document adopted by a representative body of states for the regulation of the financial markets. Each document then serves as reference point for a law-making process that encompasses a range of instruments of traditional treaty law – as in sustainable development – and alternative law-making forms such as the regulatory processes pioneered in the regulation of the global financial markets.¹²⁵

V. Responsibility for Peace and Stability within States

Sustainable development and regulation of the global economy are international goods in need of cooperative action by all or most states. But international responsibility also structures the governance of areas fully under the jurisdiction of each state, in other words: state-internal matters.

1. Responsibility in the 2005 World Summit Outcome

The 2005 World Summit Outcome¹²⁶ marks the Outcome of the UN World Summit held in 2005, that brought together all Member States represented at the level of Heads of State or Government.¹²⁷ The Outcome is a resolution of the UN General Assembly and thus technically distinguishable from the Rio Declaration adopted by UNCED and the

¹²⁵ On choice of instruments see generally J.H. Jackson, “International Economic Law in Times that are interesting”, *JIEL* 3 (2000), 3 et seq., (8) (“treaties are often an awkward albeit necessary method of designing institutions needed in today’s interdependent world, but they do not solve many problems”); C. Lipson, “Why are some International Agreements informal”, *International Organizations* 45 (1991), 495 et seq., (537-538) (benefits of informal agreements *vis-à-vis* treaties).

¹²⁶ The 2005 World Summit Outcome, A/RES/60/1 of 16 September 2005 (hereinafter 2005 World Summit Outcome). See generally A.M. Slaughter, “Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform”, *AJIL* 99 (2005), 619 et seq.

¹²⁷ A/RES/59/291 of 15 April 2005.

Washington Declaration adopted by the G20. But the Outcome is functionally comparable to both the Rio and the Washington Declarations. Like those, the Outcome represents the political commitment of the participating states undertaken at the level of Heads of State or Government, expressing the intention of the international community to ground its future course of action in critical state-internal matters on the idea of responsibility.¹²⁸ The critical state-internal matters addressed are post-conflict peace-building, basic human security – the Responsibility to Protect –, and development.¹²⁹ In respect of responsibilities for these state-internal matters, the Outcome adopts a uniform approach which distinguishes primary and secondary responsibilities. Primary responsibility for the public goods of development, peace and stability, and basic human security is attributed to each state.¹³⁰ That implies its accountability to the international community. The international community acting through the United Nations has secondary responsibility that comprises a responsibility to guarantee and a responsibility to act preventively and responsively. This responsibilities-matrix of the Outcome has then been concretised mainly by subsequent action of the

¹²⁸ General Assembly resolutions may be evidence of or result in customary international law but do not have legal effect as such, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports 1986, 14 et seq. (paras 187-190); *Wall Opinion*, see note 21, para. 87.

¹²⁹ The 2005 World Summit Outcome, see note 126, also covers a broad range of economic and social areas, including for instance a demand that the governance structure of the Bretton Woods institutions include more representation from developing countries and economies in transition. This demand has been taken up by the G20 with respect to “emerging and developing economies, including the poorest countries.” *Pittsburgh Leaders’ Statement*, see note 97, para. 20, which then led to the Articles of Agreement of the IMF being amended in 2010, not yet in effect.

¹³⁰ 2005 World Summit Outcome, see note 126, para. 22, “We reaffirm that each country must take primary responsibility for its own development and that the role of national policies and development strategies cannot be overemphasized in the achievement of sustainable development. We also recognize that national efforts should be complemented by supportive global programmes, measures and policies aimed at expanding the development opportunities of developing countries, while taking into account national conditions and ensuring respect for national ownership, strategies and sovereignty.” For reasons of space, only post-conflict peace-building and the Responsibility to Protect will be discussed, leaving development to one side.

principal organs of the United Nations. The following discussion of peace-building will in particular focus on the standards of accountability for states (see below under 2.), while the discussion of the Responsibility to Protect will demonstrate the United Nation's own responsibility to act which must in turn not undermine the primary responsibility of each state for its internal affairs (see below under 3.).

2. Post-conflict Peace-Building

The Outcome only sketches the approach to peace-building in post-conflict situations. It explicitly deals with the set up of a Peacebuilding Commission at the UN level,¹³¹ but subsequent pronouncements of the UN Security Council confirm that each state is primarily responsible for its post-conflict peace-building.

a. Primary Responsibility of Each State Emerging from Conflict

The UN Security Council has re-emphasised in general terms that “the primary responsibility for peace-building lies with governments and relevant national actors, including civil society, in countries emerging from conflict.”¹³² Primary responsibility ensures national ownership of any peace-building processes.¹³³ Beyond peace-building after conflict, the Security Council has extended the reach of the principle to all instances in which internal peace and stability of a state is in question.

¹³¹ 2005 World Summit Outcome, see note 126, para. 97, “Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding Commission as an intergovernmental advisory body.” See also Explanatory note on the Peacebuilding Commission, Secretary-General, Doc. A/59/2005/Add. 2.

¹³² SC Presidential Statement, para. 2, Doc. S/PRST/2011/2; SC Presidential Statement, para. 4, Doc. S/PRST/2011/4.

¹³³ 2005 World Summit Outcome, see note 126, para. 5, refers to self-determination, and the reference to self-determination must be understood as constituting both the ground of the primary responsibility of each state and the limit to the possible role of the international community in prescribing standards for the conduct of state internal affairs.

This is demonstrated by the case of Cyprus. In respect of the ongoing division of the country, the Security Council has emphasised that “the responsibility for finding a solution to the internal conflict” lies primarily with the state (of Cyprus).¹³⁴ By the same token, this state is accountable to the international community pursuant to certain standards, concerning, for instance, the conduct of negotiations.¹³⁵ The United Nation’s role is to support these negotiations.¹³⁶

b. The United Nations as Addressee of Accountability of States

By virtue of being the primarily responsible actor, each state is accountable for the consequences of its action for internal peace and stability. That accountability lies towards the United Nations. Within the United Nations, competence for post-conflict peace-building is asserted to lie with the Security Council by virtue of Article 24 UN Charter, with the Security Council interpreting the controlling term “international peace and security” to extend to achieving sustainable peace after a country emerges from conflict.¹³⁷ The vantage point from which the United Nations approach the internal organisation of a state is the impact that this organisation has on the state’s internal stability, and, by ramification, international stability.¹³⁸ Demands are formulated to ensure that a state is stable and internally peaceful rather than become a failed state or a pa-

¹³⁴ S/RES/1986 (2011) of 13 June 2011 preambular para. 3 “Echoing the Secretary-General’s firm belief that the responsibility for finding a solution lies first and foremost with the Cypriots themselves ...”

¹³⁵ *Ibid.*, paras 1-10.

¹³⁶ *Ibid.*, preambular para. 3 “... reaffirming the primary role of the United Nations in assisting the parties to bring the Cyprus conflict and division of the island to a comprehensive and durable settlement.”

¹³⁷ SC Presidential Statement, Doc. S/PRST/2011/4 para. 1 “The Security Council reaffirms its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security and its readiness to strive for sustainable peace in all situations under its consideration.”

¹³⁸ Identified threats to global stability will justify and require concerted efforts of a legislative and administrative nature by both states and the Security Council. Terrorism and proliferation of weapons of mass destruction have been identified as such global stability risks, for the former see S/RES/1373 (2001) of 28 September 2001, for the latter see S/RES/1540 (2004) of 28 April 2004.

riah state.¹³⁹ There is also growing understanding that representative state organs are essential to the successful development of developing states, and as such form the legitimate objective of strategic efforts of the international community.¹⁴⁰ As expressed in a number of recent general statements by the Security Council, achieving state-internal stability requires “representative institutions” that ensure that, as a minimum, rulers have the consent of the governed and that internal and communal conflicts can be successfully and peacefully mediated.¹⁴¹

On that basis, the Security Council concretises the accountability of each state emerging from conflict through criteria for the internal organisation of these states. The said Presidential statements have been followed up by mandatory Security Council action based on UN Charter Chapter VII. A democratic state organisation based on elections marks one end of the organisational spectrum,¹⁴² which starts, at the

¹³⁹ Joint Article on Libya: the pathway to peace, Prime Minister Cameron and President Obama, <<http://www.number10.gov.uk>>.

¹⁴⁰ See World Bank, *World Development Report 2011*. International efforts should be directed towards building government institutions in states which can mediate political and communal conflicts. The report acknowledges that there is not one single form or template for democracy, and that in each case, a culturally acceptable form must be found.

¹⁴¹ SC Presidential Statement, Doc. S/PRST/2011/2, para. 1 “The Security Council restates the previous Statements of its President on post-conflict peacebuilding. The Council stresses the importance of institution building as a critical component of peacebuilding and emphasizes the importance of a more effective and coherent national and international response to it, so that countries emerging from conflict can deliver core government functions, including managing political disputes peacefully, providing security and maintaining stability, protecting their population, ensuring respect for the rule of law, revitalising the economy and providing basic services, which are essential to achieving durable peace. The Council emphasizes the importance of national ownership in this regard”; SC Presidential Statement, para. 3, Doc. S/PRST/2011/4 “The Security Council reiterates that, in order to support a country emerge sustainably from conflict, there is a need for a comprehensive and integrated approach that incorporates and strengthens coherence between political, security, development, human rights and rule of law activities.”

¹⁴² A state’s opting for democracy will receive a positive assessment from the Council, an expression of support, and even the indication of positive measures that the Council and the UN Member States should take in support of national efforts, S/RES/1944 (2010) of 14 October 2010. For previous practice see N. Petersen, *Demokratie als teleologisches Prinzip*, 2009.

other end, with minimum standards for collective decision-making, “institution building” and representation of traditionally under-represented groups such as women and minorities.¹⁴³ Territorial international administration in post-conflict situations by the United Nations has consistently been directed toward establishing democratic governance structures.¹⁴⁴ There is also rich practice of the Security Council operationalising the peaceful exercise of any self-determination claims in the colonial and in the non-colonial contexts through criteria for the domestic structures of the new states typically emerging from conflict.¹⁴⁵ In a non-colonial context, the proper representation of any group bearer of the right to self-determination within a state’s governance institutions will realise that group’s “internal” self-determination, foreclosing the group’s rights to “external” self-determination through secession. If the case so warrants, the Security Council can move from establishing standards for internal peace-building processes to addressing any factors that might stand in the way or hinder their implementation by deploying a variety of instruments including targeted measures (individual sanctions) and forcible measures under Chapter VII of the UN Charter.

For that purpose, a situation internal to a state can be determined to constitute a “threat to the peace, breach of the peace, or act of aggression” within the meaning of Article 39 UN Charter, clearing the threshold for forcible and non-forcible measures under Chapter VII, Arts 41-42. This template is now being established by the Security Council through its recent action e.g. regarding the Ivory Coast. This state has been emerging from a civil conflict; there has been a third-party brokered peace process, which includes presidential and parliamentary elections. S/RES/1962 sets forth the critical considerations that will justify measures of the Council under Chapter VII on the situation in that state.¹⁴⁶ S/RES/1975 protects the outcome of the presidential

¹⁴³ Cf. S/RES/1820 (2008) of 19 June 2008, op. para. 11 (standards to ensure the representation of women as a matter of internal peace).

¹⁴⁴ See R. Wolfrum, “International Administration in Post-Conflict Situations by the United Nations and Other International Actors”, in: A. v. Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 9 (2005), 649 et seq.

¹⁴⁵ See U. Saxer, *Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung*, 2010; M. Benzing, “Midwifing a New State: The United Nations in East Timor”, *Max Planck UNYB*, see note 144, 295 et seq.

¹⁴⁶ S/RES/1962 (2010) of 20 December 2010, preambular paras 2-4 “Congratulating the Ivorian people for the holding of the two rounds of the Presidential election on 31 October 2010 and 28 November 2010 with a massive and

elections, through binding requests addressed to the main players.¹⁴⁷ It urges the defeated incumbent to immediately step aside and condemns him for not accepting the overall political solution proposed by the High-Level Panel put in place by the African Union.¹⁴⁸ Beforehand all Ivorian state institutions, including the armed forces, were urged to yield to the authority vested by the Ivorian people in the newly elected President.¹⁴⁹ S/RES/1980, preambular para. 5, then welcomes the fact that the elected President has taken office in accordance.

The Council also put so-called targeted sanctions in place to support implementation of the peace process and the elections.¹⁵⁰ This sanctions regime is specifically to serve stabilisation throughout the country, the holding of the parliamentary elections and the implementation of the key steps of the peace process.¹⁵¹ The implementation of these measures

peaceful participation. Condemning in the strongest possible terms the attempts to usurp the will of the people and undermine the integrity of the electoral process and any progress in the peace process in Côte d'Ivoire. Expressing grave concern at the risk of escalation of violence, recalling that the Ivorian leaders bear primary responsibility for ensuring peace and protecting the civilian population in Côte d'Ivoire and demanding that all stakeholders and parties to conflict act with maximum restraint to prevent a recurrence of violence and ensure the protection of civilians." The motivation as well as the robustness of the measures taken by the Council here closely resemble those under Responsibility to Protect.

¹⁴⁷ S/RES/1975 (2011) of 30 March 2011.

¹⁴⁸ *Ibid.*, op. para. 3

¹⁴⁹ S/RES/1962 (2010) of 20 December 2010, op. para. 1.

¹⁵⁰ *Ibid.* op. para. 16: "Reaffirms its readiness to impose measures, including targeted sanctions, against persons who, among other things, threaten the peace process and national reconciliation, including by seeking to undermine the outcome of the electoral process, obstruct the work of UNOCI and other international actors and commit serious violations of human rights and international humanitarian law, as set out by Resolution 1946 (2010)." S/RES/1980 (2011) of 28 April 2011, op. para. 1 renews the targeted sanctions under Chapter VII directed against individuals.

¹⁵¹ See in this respect S/RES/1962, see note 149, op. para. 8 "Stresses the importance of UNOCI's continued support to the Ivorian peace process in accordance with its mandate, especially the completion of the unfinished tasks including the legislative elections, ..., the strengthening of rule of law institutions, the reform of the security sector, and the promotion and protection of human rights with particular attention to the situation of children and women."

is backed up by available military means.¹⁵² The Council took forcible measures under UN Charter Chapter VII when the defeated incumbent resorted to force against the newly elected president.¹⁵³ Any measures taken by the Council on that basis remain, however, within the rationale of primary responsibility of the state concerned.¹⁵⁴ The United Nations also recognises that it has a critical own role to play in support of building countries' national institutions.¹⁵⁵ One important instrument is the Peacebuilding Commission established by concurrent General Assembly and Security Council resolutions, which also established a Peacebuilding Fund and a Peacebuilding Support Office.¹⁵⁶ That this involvement is again complementary to the primary responsibility of each state is implied, for instance through the composition of the Peacebuilding Commission.¹⁵⁷

¹⁵² Ibid., op. para. 14 “Recalls its authorization given to UNOCI to use all necessary means to carry out its mandate, within its capabilities and its areas of deployment.”

¹⁵³ S/RES/1975, see note 147, op. para. 6, “Recalls its authorization and stresses its full support given to the UNOCI, while impartially implementing its mandate, to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence, within its capabilities and its areas of deployment, including to prevent the use of heavy weapons against the civilian population and requests the Secretary-General to keep it urgently informed of measures taken and efforts made in this regard.”

¹⁵⁴ S/RES/1980, see note 150, preambular para. 4 “Emphasizing the continued contribution to the stability in Côte d’Ivoire of the measures imposed by resolutions 1572 (2004), 1643 (2005) and 1975 (2011) and stressing that these measures aim at *supporting* the peace process in Côte d’Ivoire.” (emphasis added)

¹⁵⁵ SC Presidential Statement, para. 4, Doc. S/PRST/2011/4 of 11 February 2011.

¹⁵⁶ S/RES/1645 (2005) of 20 December 2005; A/RES/60/180 of 20 December 2005.

¹⁵⁷ 2005 World Summit Outcome, see note 126, paras 97-105. The purpose of the Peacebuilding Commission is to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery (para. 98).

3. The “Responsibility to Protect”

It would not seem to be a controversial statement that international law considers the security of civilian populations to be covered by the sovereignty of each state understood as objective competence and subjective right. Correspondingly, the UN’s main concern had traditionally been with the security of states in their international relations. But the atrocities committed against civilian populations in Rwanda and on the Balkans in the 1990s caused basic human security in each state to arise as a concern for the international community.¹⁵⁸ By developing the “responsibility to protect” the 2005 World Summit Outcome established as an international public good the protection of civilian populations from four crimes and violations: genocide, war crimes, ethnic cleansing, and crimes against humanity.¹⁵⁹ In respect of this objective, the Outcome assigns states and the international community with responsibilities. It is the responsibility of “each individual state” to protect its populations from the four crimes,¹⁶⁰ including their prevention.¹⁶¹ Pro-

¹⁵⁸ See reports in relation to the Rwandan genocide Doc. S/1999/1257 and the fall of Srebrenica Doc. A/54/549.

¹⁵⁹ 2005 World Summit Outcome, see note 126, at paras 138-139. For forerunners, cf. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001; High-level Panel on Threats, Challenges and Change, *A more secure World – Our shared Responsibility*, Doc. A/59/565 of 2 December 2004; Report of the UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Doc. A/59/2005 of 21 March 2005. There is a burgeoning literature, to which is cited throughout this portion of the article.

¹⁶⁰ 2005 World Summit Outcome, see note 126, para. 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.”

¹⁶¹ This language fits into the threefold standard of human rights and humanitarian obligations to “respect, protect and fulfil”, cf. UN Human Rights Committee, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *General Comment No. 31*, Doc. CCPR/C/21/Rev.1/Add. 13 of 26 May 2004; cf. A. Peters, “The Responsibility to Protect: Spelling out the Hard Consequences for the UN Security Council and its Members”, in: U. Fastenrath et al. (eds), *Essays in Honour*

tection from the four crimes is a universal standard, applying to all UN Member States. But in respect of the objective of civilian protection, the Outcome also identifies an own responsibility of the international community to act preventively and responsively through the United Nations.¹⁶² The Outcome is a politically binding instrument adopted by the General Assembly at the level of Heads of State or Government. It has been followed up by normative activity of the UN principal organs under the UN Charter, ranging from the Secretary-General's report to the General Assembly on "Implementing the Responsibility to Protect"¹⁶³ and an extensive General Assembly debate¹⁶⁴ to UN Security Council measures binding under UN Charter Chapter VII.¹⁶⁵ This

of Bruno Simma, 2011, 297 et seq. On the threefold human rights standard see generally W. Kälin/ J. Künzli, *The International Law of Human Rights Protection*, 2010, 96 et seq.

¹⁶² 2005 World Summit Outcome, see note 126, para. 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."

¹⁶³ Report of the Secretary-General, *Implementing the Responsibility to Protect*, Doc. A/63/677 and related A/RES/63/308 of 14 September 2009, para. 1. "Takes note of the report of the Secretary-General and of the timely and productive debate organized by the President of the General Assembly on the responsibility to protect, held on 21, 23, 24 and 28 July 2009, with full participation by Member States; 2. Decides to continue its consideration of the responsibility to protect."

¹⁶⁴ Doc. A/63/PV.99.

¹⁶⁵ The 2005 World Summit Outcome, see note 126, was adopted by the UN General Assembly. As the United Nations is based on coordinated princi-

organisational secondary law-making concretises the Responsibility to Protect along the general matrix of international responsibility. Building on a multi-level governance model, primary responsibilities of each state and secondary responsibilities of the United Nations for the protection of civilians are demarcated, duties and possible sanctions for their non-fulfilment are determined, and lines of accountability are established.

a. Primary Responsibility of Each State to Protect Civilians from Genocide, War Crimes, Ethnic Cleansing and Crimes against Humanity

The Secretary General's report on implementation offers a conceptual clarification of the 2005 World Summit Outcome's Responsibility to Protect concept by distinguishing a three Pillar strategy: Pillar one comprises the protection responsibilities of the state, Pillar two the international assistance and capacity-building, and Pillar three timely and decisive response. The three Pillars mark functions that are assigned to states and the United Nations. Each state is assigned with the Responsibility to Protect its civilian populations from the four crimes, this overall responsibility of each state is primary over the secondary responsibility of the United Nations.¹⁶⁶ This backs up the assertion that Responsibility to Protect is no distraction from but rather presupposes sovereignty.¹⁶⁷ Guaranteeing each state the space for own protective action is indeed a necessary prerequisite for attributing the consequences of its decisions to it. Each state is accountable for its decisions to the international community which will assess them against internationally defined criteria. The 2005 World Summit Outcome already identifies the broad standard to prevent the commission of the four crimes. This universal standard, applying to all UN Member States, is in need of further concretisation.

pal organs (Article 7 UN Charter) this resolution would not *per se* be binding on, in particular, the Security Council to the extent that this body bears "primary responsibility" for international security and world peace. The Council has, however, referred to the concept itself, absorbing it into its own practice, comprising general re-statements of the law and forcible and non-forcible measures pursuant to Chapter VII of the UN Charter. Pertinent Council resolutions will be discussed subsequently.

¹⁶⁶ Report, see note 163, para. 14.

¹⁶⁷ *Ibid.*, para. 10 ("responsible sovereignty").

In a first step, the standard is backed up and fleshed out by relevant international treaty law, which needs to be faithfully embodied in national legislation.¹⁶⁸ The Genocide Convention e.g. establishes the threefold obligation for States Parties to prevent genocide¹⁶⁹ and to punish individuals for its commission¹⁷⁰ (obligation to protect) as well not to actively commit genocide through its own organs or actors it controls (obligation to respect). In respect of war crimes, the Geneva Conventions also impose obligations of respect and protection including prevention.¹⁷¹ Crimes against humanity are punishable individual offences under international criminal law, and respective obligations for states are laid down in the statutes of the International Criminal Tribunals and of the ICC.¹⁷² Further concretisation of the protective standard is the province of the United Nations. The Secretary-General's report specifies the protection responsibilities of the state.¹⁷³ Significantly, UN Security Council resolutions under UN Charter Chapter VII have defined specific standards for states to meet their protective responsibility. The Security Council did so in S/RES/1674 on the protection of civilians in armed conflict¹⁷⁴ and in S/RES/1882 on the topic of children and armed conflict.¹⁷⁵ These resolutions set forth general restatements of the law, but add that states need to comply with them as an expression of their responsibility.

¹⁶⁸ Ibid., para. 17.

¹⁶⁹ Article I; cf. further Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, 43 et seq. (221, para. 430) (due diligence obligation to prevent the extraterritorial commission of genocide) (hereinafter Genocide Convention case).

¹⁷⁰ Article I; and Genocide Convention case, see above, 226, para. 439.

¹⁷¹ Wall Opinion case, see note 21, paras 158-159 (duty for states to ensure respect for common article I of the Geneva Conventions regardless of whether they are parties to a specific dispute including other states).

¹⁷² Cf. A. Cassese/ G. Acquaviva/ M. Fan/ A. Whiting, *International Criminal Law*, 2011 (ethnic cleansing is not a defined crime under international criminal law).

¹⁷³ Report, see note 163, paras 14-22.

¹⁷⁴ S/RES/1674 (2006) of 28 April 2006, op. para. 4 reaffirmed paras 138 and 139 of the 2005 World Summit Outcome Document, see note 126. This reaffirmation was recalled in S/RES/1706 (2006) of 13 August 2006.

¹⁷⁵ S/RES/1882 (2009) of 4 August 2009, preambular para. 3 "Stressing the primary role of national Governments in providing protection and relief to all children affected by armed conflicts."

b. The Responsibility of the United Nations to Guarantee and to Act

The UN's own Responsibility to Protect civilians is secondary to each state's primary responsibility. The United Nations must therefore not substitute itself for the choices of each state. But it must also be able to take action to ensure that the state discharges this responsibility within the standards applicable. The United Nations' responsibility comprises two elements, a responsibility to guarantee and a responsibility to act.

The 2005 World Summit Outcome establishes the United Nations as the body to which each state is accountable for discharge of its protective responsibility. Assuming this role of accountability body is the responsibility of the United Nations. It thus has the responsibility to guarantee that states fulfil their primary responsibility. For that purpose the United Nations may progressively develop standards, assess performance against these standards, and for that purpose it may take observational action through its own organs and other organs. The United Nations may, as a consequence of its assessment, take enforcement action. Sanctionability of assessments is inherent to the idea of accountability. In the case of accountability of a state to an international organisation, the sanctionability of assessments becomes a question of the competences of the organisation. The United Nations can assess the failure of a state to meet its protection responsibility and take action on the basis of Charter Chapter VII with the dual objective of directly protecting civilians and indirectly sanctioning the government for its failure. A government that has been found manifestly to fail the Responsibility to Protect-test may be presumed to have lost the consent of the governed and will eventually have to step aside.

It is a consequence of the forceful statement in the 2005 World Summit Outcome, para. 139, that the United Nations has not only the responsibility *to guarantee* but also has responsibility *to act*. The own responsibility of the United Nations to act extends to assistance and response action, that is Pillar 2 and 3 in the terminology of the Secretary-General's Implementation report. On the basis of UN Charter Chapters VI and VIII, the United Nations will take action through its own organs aimed at preventing crises from arising in the first place including establishing an early warning facility.¹⁷⁶ The international community, acting through the United Nations, must be ready to build capacity to prevent any of the four crimes being committed and to assist in

¹⁷⁶ Report, see note 163, paras 28-39

situations of stress. Pillar 3 is timely and decisive response and it is again the responsibility of the United Nations.¹⁷⁷ Responsive action by means of Security Council measures pursuant to Chapter VII UN Charter may take place in the case of a “manifest failure” on the part of the state to fulfil its responsibility where a crisis could not be prevented.¹⁷⁸ The range of means includes military force.¹⁷⁹ The objective of such preventive and responsive action by the United Nations can, however, only be restitution of the state-internal political process, in other words the primary responsibility of the state.

In particular the Security Council has substantially added to the legal concretisation of the Responsibility to Protect, namely by referring to it in resolutions adopted under Chapter VII, authorising forcible measures concerning the situations in Libya and in the Ivory Coast. In the Libyan situation, the Security Council has invoked the Responsibility to Protect in its resolution S/RES/1973 adopted under Chapter VII, which authorises the deployment of “all necessary measures” by Member States to protect civilians in Libya from the large-scale use of force by the Libyan government.¹⁸⁰ Security Council action further concretises the individual criminal responsibility of the Libyan leadership by referring the situation in Libya to the Prosecutor of the ICC.¹⁸¹ In the Ivorian situation, invocation of a Responsibility to Protect civilians and human rights has motivated the authorisation of a UN force and the French troops supporting it to use “all necessary means” to protect civilians from the use of force by the defeated incumbent president’s forces.¹⁸² The Ivorian intervention thus pushes the boundaries of possible UN Security Council action through the direct authorisation of peacekeepers as a result of a state’s government failure to fulfil its pro-

¹⁷⁷ Ibid., paras 49-67.

¹⁷⁸ The Council may intervene at an early point to prevent a crisis from escalating, cf. Report, see note 163, para. 11 lit. (c) (referring to Council involvement in Kenya after disputed elections pursuant to SC Presidential Statement, SCOR 60th Sess., 5831st Mtg, Doc. S/PRST/2008/4 of 6 February 2008).

¹⁷⁹ 2005 World Summit Outcome, see note 126, para. 139 “should peaceful means be inadequate and national authorities are manifestly failing to protect their populations ...”

¹⁸⁰ S/RES/1973 (2011) of 17 March 2011.

¹⁸¹ S/RES/1970 (2011) of 26 February 2011, op. paras 4-8.

¹⁸² See text at notes 146 et seq.

tective responsibilities.¹⁸³ In these instances, the Security Council has invoked the state's Responsibility to Protect for motivating its measures under Chapter VII. This practice of the Security Council concretises the Responsibility to Protect into secondary (Council) but also primary (Charter) law.

Three functions of the Council's referral to the Responsibility to Protect have to be distinguished. First, there is the level of the Charter itself. Responsibility presupposes competence to act. Do the United Nations and in particular the UN Security Council have the competence to respond to a state failing to protect its populations by taking over the protection task? The UN Charter entrusts the Security Council with the primary responsibility for the maintenance of "international peace and security", and for that purpose the Security Council under Chapter VII UN Charter has powers to take decisions that are legally binding on all members of the organisation.¹⁸⁴ But does this denote the competence of the UN Security Council to take forcible measures in respect of what is essentially a state-internal situation? It first offers a general interpretation of the criterion "any threat to the peace" that Article 39 UN Charter establishes as a threshold for any Security Council action under Chapter VII.¹⁸⁵ In other words the Responsibility to Pro-

¹⁸³ S/RES/1962 (2010) of 20 December 2010 recalls that the Ivorian leaders bear primary responsibility for ensuring peace and protecting the civilian population in Côte d'Ivoire. S/RES/1975 of 30 March 2011 preambular para. 9 contains recognition of the responsibility to protect civilians: "... reaffirming the primary responsibility of each State to protect civilians and reiterating that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians and facilitate the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel ..."

¹⁸⁴ In addition to its power to repel threats to international peace and security, the Security Council has assumed (quasi-)legislative powers in areas as diverse as anti-terrorism and non-proliferation, see G. Abi-Saab, "The Security Council as Legislator and Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy", in: R. Wolfrum/ V. Röben (eds), *Legitimacy in International Law*, 2008, 109 et seq.

¹⁸⁵ The Council had acted essentially in internal situations before, Somalia being a case in point, S/RES/794 (1992) of 3 December 1992, op. para. 10, cf. further C.E. Philipp, "Somalia – A Very Special Case, Cross Cutting Issues", *Max Planck UNYB*, see note 144, 517 et seq. But the Responsibility to Protect provides a general rationale for acting in internal situations. The Council is thus interpreting the threshold criterion of "international peace

protect clarifies that the commission of any of the four crimes in a state *per se* can constitute a “threat to the peace”. Responsibility to Protect here drives the legal development at the level of the treaty. Second, Responsibility to Protect is of relevance in determining the exercise of that power by the Security Council. In other words, Responsibility to Protect serves to guide the exercise of the discretion that the Security Council enjoys under Chapter VII, Arts 41 and 42 (“may”). The moment that the Council recognises that Responsibility to Protect is implicated in a given instance, however, accountability of the Council is established. The Security Council then assumes the burden of argumentation as to whether an intervention to protect civilians is required. Third, Responsibility to Protect is grounded and limited to what the Council can do in individual instances. Its responsive action in pursuit of Responsibility to Protect must not arrogate the primary responsibility of each state to protect its populations through means of its free choosing. Council action must not go further than restoring a state of affairs where the state concerned can again assume its primary responsibility. Interpretation of the Charter and each resolution adopted under Chapter VII must comply with this understanding. Fourth, intervention of the UN Security Council in Member States in pursuit of the Responsibility to Protect requires observance of an inclusive procedure by the Council involving the regional context of the state deemed to be violating its primary protective responsibilities.

The 2005 World Summit Outcome already refers to legitimacy of the Council as depending on procedural inclusiveness,¹⁸⁶ and the Security Council envisages that its procedure will have to involve any regional security system concerned.¹⁸⁷ Chapter VIII UN Charter indeed provides for regional systems of collective security to prevent regional crises, bring them to the Council’s attention, and to carry out measures authorised by the Council.¹⁸⁸ The Security Council has explicitly men-

and security” in a general fashion, akin to an exercise of legislative power. On such legislation on the level of the primary UN Charter see M. Wood, *The UN Security Council and International Law*, 2006; Namibia Opinion, see note 21, para. 22.

¹⁸⁶ 2005 World Summit Outcome, see note 126, para. 154.

¹⁸⁷ See S/RES/1809 (2008) of 16 April 2008.

¹⁸⁸ UN Charter, Arts 52-53, provide that crises shall be dealt with at the regional level to the extent possible. According to Article 52 (2) UN Charter Member States of the UN shall make “every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.” Corre-

tioned the referral of the situation in Libya by the Arab League pursuant to its Charter as one of the grounds justifying Resolution 1973.¹⁸⁹ And in the case of the Ivory Coast, the Council has referred to action of the African Union requesting that state's government to respect its fundamental norms. The Security Council then took these references into account, triggering action by it under Chapter VII.¹⁹⁰

The UN Security Council is responsible for its preventive and responsive action. The 2005 World Summit Outcome recognises the responsibility not just of the international community but implicitly that of the Security Council as well, and this is made explicit in the Secretary-General's Implementation report and has been acknowledged in Security Council practice. Accountability of the Security Council lies with the UN General Assembly as the body representative of UN membership as a whole. This accountability is of a political nature. In other words, the Security Council can be held to account politically by the General Assembly, which may define political criteria. Responsibility to Protect itself would be the most important criterion for the exercise of the Council's powers under Chapter VII, even though further more detailed criteria for consistent action would be needed.¹⁹¹

spondingly, Article 52 (3) UN Charter obliges the Security Council to "encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council". Article 53 UN Charter even envisages that the competent regional organisation may carry out enforcement action upon authorisation by the UN Security Council.

¹⁸⁹ S/RES/1973, see note 180, preambular para. 12.

¹⁹⁰ The controlling terms of these provisions make reference to international situations. However, in parallel to the threshold contained in Article 39 UN Charter, the relevant criteria in Arts 52 and 53 UN Charter are open to being interpreted as encompassing the state-internal situations involving the Responsibility to Protect. Such interpretation of Arts 52 and 53 may be inferred from the Security Council accepting referrals by regional security systems to it of instances of state-internal unrest and use of force against civilians.

¹⁹¹ Report, see note 163, para. 62, and In Larger Freedom, see note 159, para. 126. See J. Brunnée, "International Law and Collective Concerns: Reflections on the Responsibility to Protect", in: T. Malick Ndiaye/ R. Wolfrum (eds), *Liber amicorum Judge Thomas Mensab*, 2007, 35 et seq. (43-48), (discussing negotiating history).

In addition to this role as addressee the General Assembly is a responsible actor itself both under the second and the third Pillar.¹⁹² The General Assembly has indeed become active through the Human Rights Council. Membership of this subsidiary organ of the General Assembly depends on a state's human rights record. And on that basis, the Council has been supporting and supplementing Security Council interventions in Libya¹⁹³ and in Ivory Coast.¹⁹⁴

c. Responsibility of Each State Represented on the Governance of United Nations Organs

The collective responsibility of the international community and of the UN principal organs does not preclude that it be further broken down to individual states represented on the governance of these organs. This first of all concerns the 15 UN Member States represented in the UN Security Council at any one time but particularly the 5 permanent members. Complementing the powers of UN Security Council membership with the duty to exercise these in a certain way would be in tune with the idea of responsibility.¹⁹⁵ But it would need further authoritative recognition. The 2005 World Summit Outcome document only established the responsibility of the international community for responding to a state's failure to meet its primary protective responsibility through the Security Council.¹⁹⁶ But the Secretary-General's report

¹⁹² The General Assembly's peace and security functions are addressed in UN Charter Arts 11, 12, 14, and 15.

¹⁹³ A/HRC/RES/S-15/1 of 25 February 2011, S/RES/1970 (2011) of 26 February 2011 preambular para. 5 "Welcoming the Human Rights Council resolution A/HRC/RES/S-15/1 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible."

¹⁹⁴ A/HRC/16/25 in connection with S/RES/1975 (2011) of 30 March 2011.

¹⁹⁵ And more broadly solidarity, L. Boisson de Chazournes, "Responsibility to Protect: Reflecting Solidarity?", in: R. Wolfrum/ C. Kojima (eds), *Solidarity: A Structural Principle of International Law*, 2010, 93 et seq.

¹⁹⁶ 2005 World Summit Outcome, see note 126, para. 139: "timely and decisive manner ... on a case-by-case basis ...". This preparedness is conditioned on a manifest failure of the state to protect, the inadequacy of peaceful means, respect of the Charter law, and cooperation with relevant regional organizations as appropriate.

suggests that each state represented on the Security Council and in particular that each permanent member has an own responsibility and “should” consider the use of the veto in instances where the Responsibility to Protect is manifestly implicated.¹⁹⁷ While the General Assembly has not yet given authoritative recognition to individual responsibility qua Security Council membership,¹⁹⁸ as permanent members the United States and the United Kingdom have accepted this responsibility incumbent on them qua membership of the Council in a joint statement at the level of Heads of State and Government.¹⁹⁹ It is, furthermore, only consequent that their individual protective responsibility also attaches to membership in the UN General Assembly.²⁰⁰

¹⁹⁷ Report, see note 163, para. 61: “Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the 2005 World Summit Outcome document, and to reach a mutual understanding to that effect.”

¹⁹⁸ A/RES/63/308 of 14 September 2009 “takes note of the report of the Secretary-General.”

¹⁹⁹ Joint Statement of Prime Minister Cameron and President Obama: “We are reluctant to use force but when our interests and values come together we know that we have a responsibility to act. This is why we mobilised the international community to protect the Libyan people from Colonel Gaddafi’s regime”, see note 141. These states assume a responsibility to act for the benefit of the population of the state concerned while a secondary beneficiary may be their own population. On the legal qualification of joint statements see *Aegean Sea Continental Shelf case (Greece v. Turkey)*, ICJ Reports 1978, 3 et seq. (para. 98); *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Reports 1994, 112 et seq. (para. 26); *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, paras 128, 149, < <http://www.icj-cij.org/docket/files/135/15877.pdf>>.

²⁰⁰ Report, see note 163, para. 61: “... All Member States, not just the 15 members of the Security Council, should be acutely aware of both public expectations and shared responsibilities. If the General Assembly is to play a leading role in shaping a United Nations response, then all 192 Member States should share the responsibility to make it an effective instrument for advancing the principles relating to the responsibility to protect expressed so clearly in paragraphs 138 and 139 of the Summit Outcome.”

4. Conclusions

The international responsibility for post-conflict peace-building and the Responsibility to Protect from the crimes of genocide, war crimes, ethnic cleansing and crimes against humanity is grounded in the 2005 World Summit Outcome. In respect of these state-internal matters, starting from a multi-level global governance model comprising states and international organisations, each state, the United Nations, and states represented on the governance structure of the United Nations are conceived of as actors to whom responsibilities ought to be attributed in such a way that the common objective be best achieved. The politically binding 2005 World Summit Outcome has then been concretised through secondary law-making by the UN principal organs namely the UN Security Council. The Security Council has underlined the primary responsibility of each state for internal peace and stability. The United Nations have secondary responsibility only. But Security Council measures also establish that by virtue of its primary responsibility each state is accountable pursuant to criteria set by it. In terms of the criteria that states have to meet, there is a powerful trend requiring states to secure internal peace and stability through representative institutions. A state's responsibility will also involve assessment by the Council of whether the state has effectively complied with the criteria. The UN Security Council assesses the internal situation of states from an early point on when a crisis threatens to develop, formulating viewpoints and issuing decisions as appropriate. As a crisis evolves, there then arises a point when the UN Security Council may take responsive action under Chapter VII UN Charter. Post-conflict peace building and the Responsibility to Protect overlap here as the UN Security Council will invoke the state's Responsibility to Protect in either case to justify resort to forcible measures. But the United Nations is not free in its actions either. Rather it is responsible itself to the international community, in particular as to whether it will itself take collective protective action as consequence of the manifest failure of the primarily responsible territorial state. An own responsibility of states serving on the governance structure of the United Nations is also emerging. That is true particularly for the members of the UN Security Council in the exercise of their special powers.

Responsibility for post-conflict peace-building and the Responsibility to Protect converge. Both concepts involve the definition, imposition of

standards for the institutional set-up of the state,²⁰¹ the assessment of whether standards have been met, and the sanctionability of the assessment.

The idea of responsibility powerfully structures the approach of the international community to state-internal matters relevant for international peace and stability and the protection of civilians but this objective is its ground and its limit. The reach of the institution of responsibility is thus not automatically congruent with community interests protected by *erga omnes* or *ius cogens* norms. United Nations practice on post-conflict peace-building and the Responsibility to Protect demonstrates that responsibility remains a concept that the United Nations has been careful to reserve for the internal matters considered to be most significant for global stability. While international law contains a host of legally binding human rights norms, the international institution of responsibility for them has not yet been extended to them.

Through the appropriate normative processes, there may, however, be constituted international responsibility for human rights protection along the lines of the matrix of responsibility for state-internal matters. That this may come to pass in the future is indicated by certain pronouncements of the United Nations that each state is responsible for the protection of human rights. Also, there is currently no international responsibility for individual states to ensure respect of human rights obligations in another state generally. International law at this juncture does not provide for the requisite comprehensive powers for states to enforce another state's human rights obligations. The 1948 Genocide Convention obligates States Parties to prevent the extraterritorial commission of genocide, but that would not confer a right to intervene in another state.²⁰²

There are also only limited powers for states to act under the customary international law of state responsibility. A state that is not mate-

²⁰¹ The 2005 World Summit Outcome, see note 126, paras 119-145, discusses the Responsibility to Protect together with democracy and the rule of law in its section dealing with human rights.

²⁰² Genocide Convention case, see note 169, para. 430 ("A State does not incur [state] responsibility simply because the desired result is not achieved; [state] responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power ... The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law.").

rially injured by another state violating its multilateral treaty obligations can require cessation. Reparation must be tended to the entire group of states to which the obligations are owed.²⁰³ In the human rights context, reparation can be made only once for the benefit of the individuals concerned. Even to the extent that international human rights norms constitute *ius cogens*, a state is limited to non-recognition and invoking other states' obligation to cooperate to remove the consequences of the breach of the *ius cogens* norm.²⁰⁴ A state may also resort to judicial enforcement, seeking a declaration that another state has violated its obligations under the applicable human rights treaty.²⁰⁵ The powers that accrue to states in respect of the human rights obligations incumbent on other states remain limited,²⁰⁶ there is currently no basis for an attribution of the consequences of ongoing human rights violations in other states. This particularly clearly demonstrates the function of the institution of responsibility to concretise norms into doctrine and to link this doctrine with enforcement machinery.

VI. Responsibility as an Institution of International Law: Concluding Reflections

The institution of international responsibility underlies much of the most dynamic law of the international community. The critical idea is to identify international public goods for which each state and any competent international organisation ought to be assigned responsibilities. Responsible actors would be accountable to designated bodies for

²⁰³ Articles on Responsibility of States for Internationally Wrongful Acts, see note 13, article 48. The law of state responsibility attaches "legal consequences" to the breach by a state of any obligation under international law binding on that state provided there are no circumstances precluding wrongfulness. The resulting secondary obligations for that state comprise cessation of the violation and/or making reparation for it.

²⁰⁴ Articles on Responsibility of States for Internationally Wrongful Acts, see note 13, article 41.

²⁰⁵ Many UN human rights treaties contain a clause conferring jurisdiction on the ICJ, see Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), see note 68.

²⁰⁶ On non-forcible intervention in other states' domestic affairs see L.F. Damrosch, "Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs", *AJIL* 83 (1989), 1 et seq.

controlling consequences of their action for these goods, and accountability would be assessed against standards and can be sanctioned. Safeguarding such international public goods must benefit the international community as a whole. They fall broadly into one of two groups. There are those of a transjurisdictional or global nature requiring cooperation between states. Others are under the jurisdiction of each state. Standards of accountability vary accordingly. This matrix of international responsibility acquires legal reality through a dynamic law-making process that concretises political commitments into binding law leading to enforceable doctrine. The process involves characteristic stages: a foundational document grounds the approach of the international community to a new field or area of responsibility. This foundational document is political in nature but it typically carries the legitimacy of having been adopted by the domestically responsible Heads of State or Government. The foundational reference text is then concretised through an iterative law-making process that involves, as sources of law, classic treaties as well as alternatives to treaty making including the secondary law of international organisations. The institution of international responsibility sits at the centre of some of the most dynamic areas of contemporary international law. Climate change regulation is based on common but differentiated responsibilities for sustainable development, the regulation of the international financial market is based on the G20 responsibility for the global economy, state-internal peace and security is based on the responsibility to secure lawful stability, and the protection of civilians is founded on the responsibility to protect. Seen together, these reference areas reflect the importance, the contours, and the functions of responsibility as an institution of the law of the international community. Critical among these functions is to help concretise broad norms into doctrine and to link this doctrine with an enforcement machinery. Understood as an institution, responsibility can indeed deliver a single concept encompassing the various senses in which the form is used in international law and international law doctrine. It encompasses the senses of competence, obligation and liability.

Identifying international responsibility as an institution of international law allows understanding in what ways international law has been evolving. The emergence of an institution of responsibility is a central marker for the underlying shift in the fundamental function of international law from serving sovereigns pursuing their national interests to serving the pursuit of common objectives and community interests.

The institution will identifiably remain distinct from its implementation. In other words, the implementation at any one time does not ex-

haust the meaning of the institution. There is a residual normative content of which several effects can be identified: first, the institution comprises only a segment of international law differentiating it from other parts, giving it identity and aiding in the interpretation of individual norms. Second, the institution allows us normatively to link disparate developments in the law, to see their interconnectedness, and thus allowing the systemic study of new functionalities in the existing law. Third, it may serve to evaluate legal developments, becoming a catalyst for the development of new law shaped by, reflecting the set of ideas behind the institution, and justifying the rolling out of a regulatory framework to improve on the present state of things. Finally, seen against the background of responsibilities states attribute to themselves or which are attributed to them, the classic consent rationale justifying international law commitment loses importance. The institution of responsibility itself includes a reference to a meta-basis of obligation. This is a basis of obligation not grounded in consent in the sense that there is no free disposition about the obligations to be incurred. This article points to the process of negotiating, entering into and complying with internationally legally binding commitments. Rather states have to become engaged in the process.