Marina de Luengo Zarzoso
PhD in Law.
Professor in the Spanish Armed Forces School of Law.

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THE LEGAL CHALLENGES POSED BY THE RESPONSIBILITY TO PROTECT IN THE NEW SECURITY AND DEFENCE LANDSCAPE

The responsibility to protect emerged as a concept, an idea-force of contemporary society in response to the proliferation of new conflicts and threats that transcend borders and are characterised by massive human rights violations. A fundamental way to achieve this protection is for states to introduce national laws against war crimes, genocide and crimes against humanity in order to prevent judicial or criminal impunity, given that the court cannot punish the culprits unless such legislation exists.Security, cities, urban militarisation, threats, risks, Spanish Security Strategy, National Security Strategy

Responsibility to protect, Chapter VII, Crimes against the international community

THE LEGAL CHALLENGES POSED BY THE RESPONSIBILITY TO PROTECT IN THE NEW SECURITY AND DEFENCE LANDSCAPE

I. EMERGENCE OF THE RESPONSIBILITY TO PROTECT

1.1. Debate on the right to humanitarian intervention

Many years have passed since the Peace of Münster of 1648 and the UN Charter of 1945 were signed. Since then, the world has experienced major changes, especially following the Cold War. Wars between states have given way to inter-state conflict characterised by massive attacks on the civilian population, with no clear borders or respect for international law; and we are seeing the proliferation of war crimes and new threats that transcend our borders and affect the international community, such as transnational terrorism, biological weapons, climate change, food crises and cyber attacks[1].

The new international reality and the tragic events in Somalia, Rwanda, Bosnia and Kosovo, among others, have reignited the debate on the principles of sovereignty and non-interference enshrined in the UN Charter, and have suggested limiting these to allow intervention in situations where genocide and other international crimes are blatantly obvious, in light of the measures envisaged in Chapters VI and VII of the aforementioned Charter, which has given rise to major controversy between states.

The protection of human rights is a matter that affects the entire international community, and the violation of rights can compromise our safety. It is for this reason that mechanisms have been put in place to intervene in cases of massive human rights violations so as not to "turn a blind eye" to torture, genocide, forced displacements, etc. [2]

1 We can therefore speak of an "intermestic" threat, as Colonel Sánchez de Rojas calls it, it being international and domestic at the same time. *Vid.* SANCHEZ DE ROJAS DIAZ, E., "*El terrorismo y la responsabilidad de proteger*…cit., pag. 76.

2 Vid. GARRIGUES, J.: *"The responsibility to protect: from an ethical principle to an effective policy"*, in KREISLER, I., GARRIGUES, J., ARIAS, M., JURADO, I., PEREZ GONZALEZ, J., AND

Meanwhile, the UN Charter, signed on 26 July 1945 in San Francisco, begins as follows: "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". Consequently, its purpose, as stated in Article 1, is for: "Nations to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace".

To achieve its purposes, Article 2 of the Charter provides that UN members shall settle their international disputes by peaceful means and refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.

However, the same article recognises the principle of sovereign equality of all its members and the principle of non-intervention: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state"; however, it goes on to add that: "that principle shall not prejudice the application of enforcement measures under Chapter VII".

We can see that, a priori, the use of force is prohibited by international legislation, although this prohibition is not absolute; there are exceptions[3]:

- Self-defence, that is to say, states may use force to defend themselves against an attack. Self-defence is a natural right of every state, and this became a written norm with the Pact of Paris of 1928, also known as the Kellogg–Briand Pact. It is thus provided in Article 51 of the UN Charter[4].
- By Resolution of the Security Council of the UN, in case of a threat to the peace, breaches of the peace or acts of aggression, acting under Chapter VII of the Charter, provided that all measures not involving the use of force have failed prior to authorisation.

LOPEZ, M.D.: *"La realidad de la ayuda 2007-2008: una evaluación independiente de la Ayuda al Desarrollo española e internacional"*, Intermón Oxfam Ediciones, 2007, pag. 159, available at http://www.fride.org/publication/298/the-responsibility-to-protect:-from-an-ethical-principle-to-an-effective-policy.

3 *Vid.* SANCHEZ DE ROJAS DIAZ, E., Coronel de Artillería DEM: "*El terrorismo y la* responsabilidad *de proteger"*, in CONDE PÉREZ, E. (Dir.): "*Terrorismo y legalidad internacional*", Dykinson, Madrid, 2012, pags. 76 et seq.

4 Article 51: *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security".*

On the other hand, Chapter VI of the UN Charter deals with peaceful settlement of disputes, vesting the Security Council with functions relating to peacekeeping and international security, authorising it to investigate situations likely to give rise to disputes and put forward recommendations in order to reach a peaceful settlement.

Chapter VII outlines the specific actions that may be taken in the event of threats to the peace, breaches of the peace and acts of aggression; allowing the Council to take enforcement measures in the event of danger, which may range from economic blockades to the use of force.

During the Cold War, states were very strict when interpreting the principle of non-intervention[5]. Following the war[6], however, the doctrine of humanitarian intervention began to emerge, promoted and championed by the founder of *Médecins Sans Frontières* and former French Minister of Foreign Affairs, Bernard Kouchner[7].

As we have just pointed out, considerable changes have taken place in international society since the adoption of the UN Charter, particularly after the Cold War. These can basically be summarised as a proliferation of armed conflicts within states and the emergence of new cross-border threats. We are seeing "new wars" characterised by "destatisation and privatisation, as well as by economisation, depoliticization and brutalisation"[8].

These new conflicts are currently regarded as a greater threat to international security than conflict between states. And because they are based on rivalries, and ethnic and religious differences they are immensely complex.

The situation caused huge controversy in the international community. On the one hand, there were those who supported the use of military force as a means of intervening in humanitarian crises and, on the other, those who believed this constituted a breach of the principle of sovereignty and posed a neo-colonial threat to poorer countries. Organisations such as the Red Cross were against mixing the two ideas - humanitarian aid and military intervention. This debate was further heightened by the intervention of NATO in Kosovo without the prior authorisation of the Security Council, which was vetoed by Russia and China, and which has been described by

5 This principle was reaffirmed by successive Resolutions of the United Nations' General Assembly.

6 Following the Cold War, the conventional war between states gave way to a number of intra-state conflicts characterised by constant attacks on non-combatant civilians, without respect for international law and depriving individuals of their human rights.

7 *Vid.* http://www.haraldedelstam.cl/2012/05/el-concepto-de-la-responsabilidad-de-proteger-seminario-internacional-en-homenaje-a-embajador-harald-edelstam-estocolmo-17-de-abril-de-2012-roberto-garreton/.

8 Vid. AÑAÑOS MEZA, M.C.: *"The 'Responsibility to Protect' in United Nations and the Doctrine of the 'Responsibility to Protect'"*, in UNISCI Discussion Papers, no. 21 (October 2009), pag. 184.

scholars of international law as legitimate but illegal[9].

A year after the aforementioned intervention in Kosovo, Kofi Annan, the Secretary-General of the UN at the time, opened the debate on what we now call "the responsibility to protect", with this famous phrase: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?"

1.2. From humanitarian intervention to the responsibility to protect

It was therefore Kofi Annan who championed the legal concept we now know as "the responsibility to protect", by challenging the members of the General Assembly in his speeches of 1999 and 2000 to resolve the contradiction between the principles of non-intervention and state sovereignty, and the responsibility of the international community to address the massive violation of human rights.

In his Report to the Millennium Assembly, he stated that: "Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle - not even sovereignty - can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community (…). Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished."[10]

According to the report, in the new millennium, the peoples of the world are more interconnected than ever, given that in the new world, groups and individuals interact directly with increasing frequency across borders, without the intervention of the state. This poses a number of risks: organised crime, drugs, terrorism, weapons, refugees moving in all directions and faster than in the past… in this new globalised world, we feel threatened by events happening far away and, at the same time, we are better informed about the acts of injustice committed in other countries.

9 Vid. GARRIGUES, J.: *"The responsibility to protect: from an ethical principle to an effective policy*- cit., pag. 160; GARRETON, R.: "The responsibility to protect concept", at the international seminar in honour of Ambassador Harald Edelstam, Stockholm, 17 April 2012, available (in Spanish) at http://www.haraldedelstam.cl/2012/05/el-concepto-de-la-responsabilidad-de-proteger-seminario-internacional-en-homenaje-a-embajador-harald-edelstam-estocolmo-17-de-abril-de-2012-roberto-garreton/.

10 Vid. *"Millennium Report of the Secretary-General: We the Peoples - the Role of the United Nations in the 21st century"*, A/54/2000, (27 March 2000), paragraph 219, available at http://www.un.org/en/events/pastevents/we_the_peoples.shtml.

As a result of this statement, the Canadian Government set up the International Commission on Intervention and State Sovereignty (ICISS) for the purpose of finding a solution to this issue, publishing a final report in 2001 entitled "The responsibility to protect"[11]. The report, together with the conclusions of the High-level Panel on Threats, Challenges and Change, which was set up at the request of the Secretary-General, demonstrated the need to recognise the responsibility to protect that every state has towards its people or, failing this, the responsibility will lie with the international community.

It was also pointed out that while wars between states have become less frequent, internal wars have claimed more than five million lives and given rise to a huge number of refugees. It goes on to add that the UN can help address these challenges if its members take a new approach to the mission they have to complete and restructure the organisation to help improve the lives of people in the new century.

The Commission indicates that a new guiding principle, which could be called "the responsibility to protect", is emerging, according to which intervention for the purpose of humanitarian protection, including military intervention as a last resort, is admissible when the civilian population is suffering or in imminent danger of serious physical injury and the state in question is unwilling or unable to halt or avert it; or when the state is responsible for the situation.

It is established that sovereignty not only entitles a state to control its own matters, but, moreover, implies the primary responsibility for the protection of its people within its borders. It is proposed that the international community take responsibility for protection when a state fails to do so. From this viewpoint, sovereignty is not absolute, it has limits. And it also entails a responsibility that ultimately falls on the international community if the state neglects its responsibility in this respect.

Furthermore, the Commission believes that the Charter's strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds.

The responsibility to protect embraces three specific responsibilities:

- Prevent: this is the most important dimension and should be given absolute priority. It includes a number of aspects, such as addressing the causes of insecurities, i.e., poverty, illiteracy, discrimination and forced displacements. The relevant authorities are urged to create early warning mechanisms at the national, regional and international levels.
- React: this emerges when prevention fails and it is the most controversial of the

11 *Vid.* ICISS: *"The Responsibility to protect"*, 2001: http://responsibility to protect.org/ICISS%20Report.pdf.

dimensions. It includes diplomatic, political, economic and judicial measures. Only in extreme cases, and when all else fails, does it include military action.

- Rebuild: this should also be one of the goals of the responsibility to protect, given that half the countries emerging from a war situation relapse into violence within five years. We should bear in mind that, very often, internal wars are caused by the persistence of poverty, discrimination and abuse. Therefore, the peace process should not conclude with the end of war if the deep root causes of the conflict are ignored. Other specific measures should be taken in areas such as security, justice, reconciliation and development. It has also been said that another key factor for a healthy reconstruction is an end to the impunity of the perpetrators of serious violations of human rights[12]; this includes judicial, criminal, political, moral and historical impunity. The subject of impunity will be addressed in more detail later on.

It should be pointed out that the members of the High-level Panel all agree that "we live in a world of new and evolving threats, threats that could not have been anticipated when the UN was founded in 1945; each state requires international cooperation to make it secure"[13]. There are six clusters of threats[14] with which the world must be concerned:

- War between states
- Violence within states, including civil war, large-scale human rights abuses and genocide
- Poverty, infectious disease and environmental degradation
- Nuclear, radiological, chemical and biological weapons
- Terrorism
- Transnational organised crime

Accordingly, at the UN World Summit held in September 2005, the member states officially accepted the principle of the responsibility to protect. The resolution was adopted by consensus[15] and is one of the greatest achievements of the international

12 *Vid.* http://www.haraldedelstam.cl/2012/05/el-concepto-de-la-responsabilidad-de-proteger-seminario-internacional-en-homenaje-a-embajador-harald-edelstam-estocolmo-17-de-abril-de-2012-roberto-garreton/.

13 Vid. SANCHEZ DE ROJAS DIAZ, E., *"El terrorismo y la responsabilidad de proteger*…cit., pag. 76.

14 Vid. SANCHEZ DE ROJAS DIAZ, E., *"El terrorismo y la responsabilidad de proteger*…cit., pag. 76.

15 The unanimous approval by the General Assembly was achieved, albeit with initial opposition

community.

Specifically, the responsibility to protect is defined in two paragraphs of the Outcome Document[16]. This followed the line taken by the ICISS, whereby each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity; the international community should encourage and help states to exercise this responsibility. If the situation persists, the international community – with the authorisation of the UN – should intervene to protect the population.

Emphasis is placed on three different areas (as stated in previous reports)[17]: prevent, react and rebuild:

- Responsibility to prevent: in accordance with Article 138, states assume the responsibility to prevent genocide, war crimes, ethnic cleansing and crimes against humanity, with assistance from the UN. The aim therefore is to prevent the civilian population from experiencing violations of human rights as a result of a conflict.

Prevention requires that responsibilities be assigned to the states concerned as well as the international community, and that cooperation be promoted.

Prevention should be at the heart of the responsibility to protect[18].

- Responsibility to react: this is enshrined in Article 139 and entails the adoption of collective action by the international community when a state fails to protect its population. These measures are set out in Chapters VI and VII of the Charter and may be of a political, economic or judicial nature. Military intervention may be used as a last resort when other measures fail and when it is clear that peaceful means are inadequate and national authorities are manifestly failing to protect their

from Russia and a small group of states; most of them members of the Non-aligned Movement (Cuba, Venezuela, Pakistan and Zimbabwe). These compared the responsibility to protect with imperialist intervention. The words of Zimbabwe's president, Robert Mugabe, represent the arguments these states presented to justify their position: "The vision that we must present for a future United Nations should not be one filled with vague concepts that provide an opportunity for those states that seek to interfere in the internal affairs of other states. Concepts such as 'humanitarian intervention' and 'the responsibility to protect' need careful scrutiny in order to test the motives of their proponents".

16 *Vid. "Resolution adopted by the General Assembly: Final Document of the World Summit 2005"* (24 October 2005), available (in Spanish) at http://www2.ohchr.org/spanish/bodies/hrcouncil/docs/gaA.RES.60.1_Sp.pdf.

17 Vid. SANCHEZ DE ROJAS DIAZ, E., *"El terrorismo y la responsabilidad de proteger*…cit., pag. 86.

18 Vid. AÑAÑOS MEZA, M.C.: *"The 'Responsibility to Protect' in United Nations and the Doctrine of the 'Responsibility to Protect'"*…cit., pags. 169 and 191.

populations[19].

If the responsibility to prevent lies with the state, the responsibility to react rests with the international community and is only required when prevention fails[20].

- Responsibility to rebuild: while this is not expressly referred to in the Outcome Document, according to the reports we analysed, it entails peacebuilding and the reconstruction of the state, which *are* referred to in paragraphs 97 *et seq* of the Outcome Document and should therefore be considered included[21].

Kofi Annan's work was continued, with greater impetus even, by his successor Ban Ki-moon. In 2008, the latter appointed Edward Luck as Special Adviser on the Responsibility to Protect[22]. His role was to continue developing and refining the concept and furthering political dialogue with the member states and other stakeholders with regard to new measures that can be implemented. His term of office ended in June 2012 and his successor has not yet been appointed.

The Secretary-General's report of 2009, entitled "Implementing the responsibility to protect"[23], outlined a strategy that revolved around three pillars.

Barely one year later, the Secretary-General's report on "Early warning, assessment and the responsibility to protect" (2010)[24] analysed the shortcomings and proposed ways to enhance the capacity of the UN in using the warning signs more effectively (fact-finding missions) and provide a better, more timely, flexible and balanced way to address the risks of genocide, war crimes, ethnic cleansing and crimes against humanity.

On 12 July 2011, the General Assembly held an interactive dialogue on the role of regional and sub-regional agreements. The Secretary-General's report on "The Role

19 Vid. SANCHEZ DE ROJAS DIAZ, E., *"El terrorismo y la responsabilidad de proteger*…cit., pag. 97.

20 *Vid.* AÑAÑOS MEZA, M.C.: *op.* cit., pag. 170.

21 Ibid.

22 There is a common office for the prevention of genocide and the responsibility to protect which is charged with maintaining and strengthening existing agreements, even in relation to capacity-building and the collection and analysis of information from outside, while adding value to new agreements for the promotion of defence, intersectoral evaluation, common policy and the accumulation of knowledge on how to anticipate and prevent crises and respond appropriately to them from the point of view of the responsibility to protect. Currently, the Special Adviser for the Prevention of Genocide is Adama Dieng.

23 *Vid.* http://responsibilitytoprotect.org/Report%20of%20the%20SG%20Implementing%20the%20RtoP%20ESPANOL.pdf.

24 *Vid.* http://www.un.org/es/comun/docs/?symbol=A/64/864.

of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect" (2011)[25] stressed that promoting more effective world-regional collaboration was key to implementing the responsibility to protect.

The latest report on the subject was presented on 5 September 2012. Entitled, "Timely and Decisive Response" (2012)[26], it examines the range of tools available to the international community in this respect[27], the partners available to assume the responsibility to protect and the close link between prevention and response[28]. Furthermore, the Secretary-General points out that "the responsibility to protect is a concept based on fundamental principles of international law as set out, in particular, in international humanitarian, refugee and human rights law". He goes on to state that the responsibility to protect is an ally of sovereignty and that the International Criminal Court has had a positive influence in developing the responsibility to protect[29]. On 5 September 2012, the General Assembly held an interactive dialogue on this report. The most notable contribution was that the use of force should be a measure of last resort; that human rights are the starting point of this concept; it was recognised that some countries are concerned about safeguarding sovereignty; and that the private interests of some states has prevented them from responding appropriately to some situations.

We can see that progress has been made on the concept of the responsibility to protect and that this is an evolving process; however, much has yet to be achieved and there are many outstanding issues that need to be addressed.

25 *Vid.* http://www.un.org/es/comun/docs/?symbol=A/65/877.

26 *Vid.* http://www.un.org/es/comun/docs/?symbol=A/66/874.

27 It stresses the importance of using every available tool pursuant to Chapters VI, VII and VIII of the UN Charter. Chapter VI provides for important non-coercive responses such as mediation, negotiation, enquiry, conciliation, arbitration, the use of regional organisations and agreements and public disclosure, etc. If these actions fail, the Security Council may take collective action under Articles 41 and 42 of the Charter, such as sanctions. Pursuant to Article 42, the Council may only authorise the use of force as a last resort.

28 To quote the Secretary-General: "Some may consider that prevention and response are at opposite ends of the spectrum. In practice, however, the two often merge. Preventive diplomacy, for instance, is generally a response to a specific pattern of events or set of concerns, while international responses to the early stages of atrocities seek to prevent their escalation, as well as to accelerate their termination".

29 He stated that "The threat of referrals to ICC can undoubtedly serve a preventive purpose and the engagement of ICC in response to the alleged perpetration of crimes can contribute to the overall response".

2. CONTROVERSIAL ISSUES RELATING TO THE RESPONSIBILITY TO PROTECT

As pointed out previously, it is clear that the state, first and foremost, has the responsibility to protect but that, failing this, the responsibility ultimately lies with the international community. However, "the content and scope of the responsibility to protect is not so clear because the text does not clarify how the terms "responsibility" and "protect" are to be interpreted, and there are obvious problems of interpretation, particularly with regard to the scope of consensus, which become obvious when establishing the lines of implementation "[30]. While substantial progress has been made in defining the concept, there is much uncertainty in relation to the content and scope of the international legal order [31]. Mainly, in what specific cases it should be used, the institutions that should support it and the limits and conditions for its implementation. We will attempt to resolve the issues that raise doubts when putting the principle into practice.

The commitment undertaken by the states that approved the 2005 Summit Outcome Document is a political one[32]. It is therefore not a binding principle for states, but a *soft law* agreement; that said, these *agreements* constitute a moral obligation for states and may become a customary rule of international law with time[33]. For this to

30 Vid. AÑAÑOS MEZA, M.C.: *"The "Responsibility to Protect" in United Nations and the Doctrine of the "Responsibility to Protect"*…cit., pag. 168.

31 Vid. DIAZ BARRADO, C.M.: *"La responsabilidad de proteger en el derecho internacional contemporáneo*…cit., pag. 11.

32 Vid. AÑAÑOS MEZA, M.C.: *op.* cit., pag. 171. Sánchez Patrón has stated that "the existence of these international obligations has rendered the debate on the legal nature of state commitment irrelevant. While the declarative text announcing the responsibility to protect is not binding in itself, and many member states question the binding scope of what they consider a new institution, the reality is that the outcome sought is compulsory per se. It is for this reason that we believe the real debate should not focus on the legality of this institution, but on its effective implementation", Vid. SÁNCHEZ PATRÓN, J.M.: *"La responsabilidad de proteger: reflexiones críticas en torno a cuestiones clave"*, Estudios Internacionales, no. 167, 2010, pag.83.http://www.revistaei.uchile.cl/index.php/REI/article/viewPDFInterstitial/12669/12960.

33 Vid. DIAZ BARRADO, C.M.: *"La responsabilidad de proteger en el derecho internacional contemporáneo*…cit., pag. 3; GARRETON, R.: *"La responsabilidad de proteger: un nuevo papel para Naciones Unidas en la gestión de la seguridad internacional"*, Revista Electrónica de Estudios Internacionales, no. 11, junio 2006, pag. 1, http://www.reei.org/index.php/revista/num11/articulos/responsabilidad-proteger-nuevo-papel-para-naciones-unidas-gestion-seguridad-internacional. In this regard, Añaños Meza has commented as follows: "indeed, the responsibility to protect may take the form of an international rule enshrined in a convention, international custom or general principle of law recognised by civilised nations, pursuant to Article 38 of the Statute of the International Court of Justice. However, it is highly unlikely that states would be willing to accept a responsibility

happen, it would have to be developed through international practice and be accepted by states. We are therefore looking at a principle, a duty, which may become an international rule of law over time.

According to Professor Díaz Barrado, it is "an idea-force of contemporary international society" and "a necessary component in the implementation of essential rules of international law"[34].

Many authors see it as an emerging rule of international law that is still in the making[35].

On this point, we share the view of Professor Gutiérrez Espada when he says that the concept of the responsibility to protect *"has not been widely accepted as a new exception to the prohibition to use force in international relations".*

As stated previously, one of the most controversial aspects is the principle of sovereign equality and the principle of non-interference. The responsibility to protect does not constitute a breach of the principle of sovereign equality; to the contrary, it affirms and strengthens it[36]. As a result of the changes and evolution of international society, new principles have emerged in the international legal order, and some of the existing ones are being interpreted and implemented differently, they are evolving; therefore, the concept of sovereignty has changed as new challenges have arisen[37]. The principles of international law are not static, but dynamic.

According to the modern definition, sovereignty entails responsibilities and

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to protect in an international convention (…) and it is even less likely to emerge as a general principle of law; it has only one viable way to become a rule of international law: as an international custom". Vid. AÑAÑOS MEZA, M.C.: *"The 'Responsibility to Protect' in United Nations"* op. *op.* cit., pag. 182.

34 Vid. DIAZ BARRADO, C.M.: *"La responsabilidad de proteger en el derecho internacional contemporáneo*…cit., pag. 3.

35 *Vid.* AÑAÑOS MEZA, M.C.: *op.* cit., pag. 181; EVANS, GARETH: *"The responsibility to protect"*, 2001: *ending mass atrocity crimes once and for all*", Brookings Institution Press, 2008, pag. 31.

36 Díaz Barrado quotes the UN Secretary-General when he said that the "responsibility to protect is an ally of sovereignty not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian intervention. By helping States to meet their core protection responsibilities, the responsibility to protect seeks to strengthen sovereignty, not weaken it". Vid. DIAZ BARRADO, C.M.: *op.* cit., pag. 21. The Secretary-General, in his 2012 report, entitled "The responsibility to protect: Timely and Decisive Response" stressed this again when he said that "the responsibility to protect is an ally of sovereignty" given that when a state fully assumes its sovereign responsibility to protect, the international community does not need to take collective action to protect its populations".

37 Vid. DIAZ BARRADO, C.M.: *"La responsabilidad de proteger en el derecho internacional contemporáneo*…cit., pag. 19 and 21; AÑAÑOS MEZA, M.C.: *"The 'Responsibility to Protect' in United Nations"* op. *op.* cit., pag. 178.

obligations. States are obliged to protect their populations against serious crimes, mainly on account of the new nature of international law. And particularly in the areas of human rights, international humanitarian law and the new reality of international disputes, which are typified by large-scale violence against civilians. Sovereignty is no longer absolute, it is relative[38] and it not only carries rights, but also responsibilities[39].

In contemporary international society, we encounter the following problem: the state, which should be the primary guarantor of the people living in its territory, often puts the lives and integrity of its citizens at risk. In such cases, sovereignty cannot be used by states as an instrument to commit atrocious crimes.

In the 21st century, sovereignty carries with it the responsibility of the state to protect the population and it therefore embodies both a right and an obligation. And, in our opinion, this does not diminish state sovereignty in any way.

Furthermore, it is reinforced by another idea: that use of force should always be a measure of last resort. We stress that prevention is the primary dimension of the responsibility to protect and this implies that force should only be used when all other measures have failed. The use of force cannot be equated with the responsibility to protect, and there is no special justification for the use of force[40]. A great number of instruments can be used before resorting to the use of force[41]. This was reaffirmed by

38 Garrigues says that "Sovereignty becomes a conditional right. If a state does not fulfil its obligation of guaranteeing the security of its citizens, especially if it does so consciously, it looses its right to invoke sovereignty as the basis for preventing an international intervention which intends to exercise this responsibility". Vid. GARRIGUES, J.: *"The responsibility to protect: from an ethical principle to an effective policy*…cit., pag. 156.

39 López Jacoíste says that sovereignty "not only implies freedom to exercise its jurisdiction and protection against foreign interference, there are also restrictions on the exercise of this freedom, which is the principle of protection and the principle of active and passive responsibility. It therefore entails a dual responsibility: the external duty to respect the sovereignty of other states and the national duty to respect the dignity and fundamental rights of the population of a state". Vid. López Jacoíste Díaz, E.: *"La responsabilidad de proteger: reflexiones sobre su fundamento y articulación"*, Anuario Español de Derecho Internacional, no. 22, 2006, pag. 289.

40 Professor Díaz Barrado has clarified that "the responsibility to protect in no way constitutes a new case in which the use of force is lawful, nor does it call for changes to the legal framework for the lawful use of armed force". Vid. DIAZ BARRADO, C.M.: *"La responsabilidad de proteger en el derecho internacional contemporáneo*…cit., pag. 27. In the same vein, Añaños points out that: "no new legal alternative to the use of force has been established outside the parameters of the Charter and current international legislation. The Security Council has a monopoly on the legitimate use of force according to the provisions of the Charter, and any coercive action under the guise of the responsibility to protect that has not been authorised by the Council is illegal". Vid. AÑAÑOS MEZA, M.C.: 181.

41 Professor López Jacoiste states that the responsibility to protect "is more of a linking concept that bridges the divide between intervention and sovereignty; the language of the "right or duty to intervene" is intrinsically more confrontational (…). However, it should be pointed out that the

the UN Secretary-General in his report entitled "The responsibility to protect: Timely and Decisive Response": *Enforcement action under Chapter VII of the Charter is to be contemplated when other measures are judged unlikely to succeed or when they have already failed. The use of force should be a measure of last resort.*

Therefore, three requirements must be met: the state must have failed in its duty to protect; the settlement of disputes by peaceful means must have proved futile and the use of force must be applied in accordance with Chapter VII, by resolution of the Security Council.

This raises another very important question, one which it has been said calls into question the responsibility to protect: who has the authority to decide whether a state has failed in its duty, and what action should be taken by the international community? According to the UN Charter, the decision lies with the Security Council during the prevention, reaction and rebuilding stages, acting in accordance with Chapters VI and VII. The viability of the Council has been called into question[42], however, bearing in mind that the right of veto of the permanent members [43] prevented the implementation of the responsibility to protect in situations of gross violation of human rights, such as the cases of Syria and Burma. *The case of Syria is addressed by Professor Gutiérrez Espada in an article in which he points out that there is an internal dispute in this country which poses "a threat to international peace and security", and that the UN Security Council should have passed a resolution authorising an armed intervention in order to stop confrontation and protect the population, but it did not do so because the resolution was vetoed by Russia and China.*

As indicated by Blanca Palacián, it is assumed that the international community will take collective responsibility to protect the population if the state fails to do so, thus putting an end to the impunity enjoyed by perpetrators of human rights violations under the guise of the principles of sovereignty and non-interference. This principle can be abused, however, and there is, moreover, the obstacle of the right of veto[44].

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difference is more than mere semantics; it carries the obligation to establish specific categories and positive obligations. The responsibility to protect means not just the "responsibility to react", but the "responsibility to prevent" and the "responsibility to rebuild" as well. Vid. López Jacoíste Díaz, E.: *"La responsabilidad de proteger: reflexiones sobre su fundamento y articulación",* Anuario Español de Derecho Internacional, no. 22, 2006, pag. 290-291.

42 *Vid.* AÑAÑOS MEZA, M.C.: *op.* cit., pag. 177; LOPEZ JACOISTE DIAZ, E.:op. cit., pag. 311; PALACIAN DE INZA, B., "*La responsabilidad de proteger y el derecho de veto",* Documento de Análisis del Instituto Español de Estudios Estratégicos, 9/2012, 15 febrero 2012, http://www.ieee.es/Galerias/fichero/docs_analisis/2012/DIEEEA09-

43 The main responsibility of the Security Council of the UN is peacekeeping and security. It is comprised of 15 members; 10 temporary and 5 permanent members. Permanent members with the right of veto are China, France, Russia, the United Kingdom and the United States.

44 In 2009, the Secretary-General urged the permanent members of the Council to abstain from

It is for this reason that it was decided to get the General Assembly to intervene in those cases where the right of veto prevents the adoption of a resolution in the event of serious war crimes, such as what happened in Syria[45] after Russia and China vetoed the resolution. In this regard, Ban Ki-moon has stated: "I deeply regret that the Security Council has been unable to speak with one clear voice to end the bloodshed. It is disastrous for the people of Syria. It has encouraged the Syrian government to step up its war on its own people". Strategic, military and commercial interests have been cited as the reasons for the two powers exercising their right of veto[46] in the case of Syria, thus calling into question the responsibility to protect.

If the Council ignores the international community's obligation to protect the population from terrible crimes, and the right of veto prevents it from doing so, we are setting a very poor precedent.

While the UN Charter clearly states that the Council is the competent body for the adoption of such decisions[47]; it has been demonstrated in practice that the system in place has serious flaws that can jeopardise concepts like the responsibility to protect and, even more seriously, the UN's action system, and international security and stability. We agree with Gutiérrez Espada when he states in his article that "the deadlock of the Council caused by the exercise of the right of veto renders ineffective rules which it is generally believed protect the essential interests of the international community as a whole, such as the prevention of genocide, war crimes, crimes against humanity and massive human rights violations". Accordingly, the need for reform has become apparent so that the Assembly can decide to take collective action should the Council fail to do so[48]. A more active role on the part of regional organisations has also been suggested[49]. Perhaps the responsibility to protect will give rise to an adequate review of these aspects.

Furthermore, if legal certainty is to exist, a neutral control mechanism must be created. It is important to set up a body that has the power to monitor the legality of the UN's actions and particularly those of the Security Council. Up until now, the

exercising or threatening to exercise their right of veto when it was manifestly obvious that a state was failing in its responsibility to protect; however, this recommendation was never implemented. *Vid.* LLANOS MARDONES, H.I.: "*La responsabilidad de proteger: el rol de la comunidad internacional…* cit., pag. 138.

45 Vid. PALACIAN DE INZA, B., *"La responsabilidad de proteger y el derecho de veto*…cit., pag. 3.

46 Ibid.

47 LLANOS MARDONES, H.I.: *op.* cit., pag. 137.

48 Vid. AÑAÑOS MEZA, M.C.: *"The 'Responsibility to Protect' in United Nations"* op. 178.

49 Professor Gutiérrez Espada points to this possibility in his article: *"la intervención armada de humanidad a cargo de una Organización regional, que pediría a posteriori el aval del Consejo de Seguridad".*

Council has not been subjected to any form of judicial review in relation to the legality of the measures it establishes in its resolutions[50]. To the contrary, it is very difficult to disprove critics who question the resolutions adopted by the UN and, particularly, those relating to the responsibility to protect.

There is a strong link between the responsibility to protect and human rights, given that the concept involves protecting the civilian population when their rights are being seriously violated. International practice has demonstrated that "the responsibility to protect only arises when human rights are violated"[51].

Such is the importance of human rights that a state's obligations in this area prevail over all other obligations derived from its domestic law. The commitments entered into under international human rights law apply at all times, during times of peace and war[52].

We could even go so far as to say that the responsibility to protect was created to prevent the violation of these rights and, therefore, to protect and defend them. At the same time, however, the consolidation of international norms recognising and protecting human rights (and the new nature of conflict) justify a legal change which would lead to acceptance of the responsibility to protect. The two aspects are inextricably linked.

In this regard, Kofi Annan, in his report "In Larger Freedom: development, security and human rights for all", states that "We must also move towards embracing and acting on the "responsibility to protect" potential or actual victims of massive atrocities. The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service. We must move from an era of legislation to an era of implementation. Our declared principles and our common interests demand no less".

It should be pointed out, however, that the responsibility to protect does not apply to all violations of human rights; it is only required when violations constitute genocide, ethnic cleansing, war crimes and crimes against humanity.

50 Vid. JIMENEZ GARCIA, F.: *"Tutela judicial efectiva, pilares intergubernamentales de la Unión Europea y Naciones Unidas o viceversa"*, in CUERDA RIEZU, A. and JIMENEZ GARCIA, F. (Dir.*): "Nuevos desafíos del derecho penal internacional: terrorismo, crímenes internacionales y derechos fundamentales"*, Tecnos, Madrid, 2009, pag. 419.

51 Vid. DIAZ BARRADO, C.M.: *"La responsabilidad de proteger en el derecho internacional contemporáneo*…cit., pag. 33. The author also states that "the responsibility to protect can only be understood when it is recognised that the international defence and protection of human rights is part of the foundational principles of international law".

52 *Vid.* SANCHEZ DE ROJAS DIAZ, E., Coronel de Artillería DEM: "*El terrorismo y la responsabilidad de proteger*…cit., pag. 90.

3. THE RESPONSIBILITY TO PROTECT AND CRIMES AGAINST THE INTERNATIONAL COMMUNITY

The doctrine of the responsibility to protect may only be used in the cases provided for in the 2005 Summit Outcome Document, which are just four and concern international crimes committed in the context of an armed conflict: genocide, war crimes, ethnic cleansing and crimes against humanity.

All of the foregoing are prohibited by international law, which lays down the obligation for states to prevent and punish such crimes in their conventional legislation, that said, however, there are other international crimes that are not included in the 2005 Summit Outcome Document. This means that the responsibility to protect cannot be invoked to prevent international crimes that do not fall into one of the four categories provided for in the Outcome Document. In our opinion, this places a restriction on the cases in which the right can be enforced and excludes a whole range of circumstances and problems that are likely to emerge in contemporary international society. It would have been better to have a "numerus apertus" or open list and not restrict the crimes.

Furthermore, the crimes referred to in the Outcome Document are criminal offences and therefore belong to criminal law. Only a competent authority, according to law, is empowered to determine the existence of an offence. The first problem we encounter is the risk of manipulating these crimes. It should not be necessary for a competent legal *body* to intervene before implementing the responsibility to protect[53].

As pointed out earlier, the responsibility to protect is inextricably linked to international criminal law in that the latter must be invoked if effective protection is to be provided. If no domestic legislation exists to condemn the international crimes that this new concept is aiming to prevent, then the perpetrators will go unpunished and it will not be fully effective. First of all, the responsibility to protect serves an essential function in criminal law – it acts as a deterrent because potential perpetrators know that the crime is likely to have serious legal consequences. Secondly, it is important to be able to take criminal measures against offenders during the reaction stage, and also during the rebuilding stage, given that if robust criminal legislation on war crimes is drawn up when rebuilding a country's basic structures, then such atrocities are less likely to be repeated.

When we speak of international crimes, we are referring to those that appeal to the responsibility of the individual, not the state. That is to say, acts committed by an individual that threaten the interests of the international community. These may be

53 *Vid.* AÑAÑOS MEZA, M.C.: *op.* cit., pag. 190

provided for in domestic or International legislation.

Until relatively recently, states have been sceptical about providing for these types of offences in their domestic criminal legislation. In recent years, however, it can be said that there is a "universal" conscience which regards impunity for the serious violations of human rights that occurred in the last century as unjust and therefore believe it should be eradicated[54]; this idea has served as a basis for establishing international criminal law[55]. Accordingly, a number of norms setting out the criminal responsibility of the individual have arisen.

And, moreover, according to the new international social reality in which we find ourselves, the state can extend its jurisdiction beyond the borders if these fundamental rights and freedoms are deemed to have been violated.

From the point of view of criminal policy, this issue is clear, but legislation has to provide for this possibility out of respect for the principle of legality, one of the fundamental pillars of the Rule of Law. The first requirement is that such crimes be punishable under the Criminal Code, and the Spanish courts must be given jurisdiction to hear such cases.

In Spain, the principle of universal jurisdiction is enshrined in the Organic Law on the Judiciary (LOPJ)[56].

54 Vid. ROPERO CARRASCO, J.: *"La relación entre la teoría de los derechos universales del hombre y el derecho penal más allá de los crímenes internacionales",* en CUERDA RIEZU, A. and JIMENEZ GARCIA, F. (Dir.*): "Nuevos desafíos del derecho penal internacional: terrorismo, crímenes internacionales y derechos fundamentales",* Tecnos, Madrid, 2009, pag. 261. The authors have pointed out that "Under this ideology, classification of international crimes – including conventional crimes like individual rights, crimes against persons or property protected in the event of armed conflict, and the relatively new crime of genocide and crimes against humanity, both in domestic and international legal systems - are, together with International Tribunals, the key elements in establishing International Criminal Law as the defender of a minimum set of universal ethics".

55 The preamble to the Statute of the International Criminal Court states the following: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation (…). Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

56 Article 23.4 of the LOPJ provides that: "The courts of Spain are competent to judge offences committed abroad by Spanish nationals or foreigners when the offence constitutes one of the following crimes: a) genocide and crimes against humanity; b) terrorism; c) piracy and unlawful seizure of aircraft; d) prostitution and exploitation of children and disabled persons; e) trafficking in narcotic and psychotropic drugs; f) trafficking of human beings and clandestine immigration, irrespective of whether or not these are workers; g) genital mutilation of women, provided the perpetrators are in Spain; h) any other offence that Spain is obliged to prosecute under international treaties and conventions and, in particular, those dealing with international humanitarian law and the protection of human rights.

3.1. Crimes against the international community in the Spanish Criminal Code

War crimes are provided for in the Spanish Criminal Code of 1995[57] under the category "Crimes against persons or property protected in the event of armed conflict" (Articles 608 to 614); indeed, the regulation has been commended by other countries and has served as a model for regulating war crimes[58]. The regulation was recently amended pursuant to Organic Law 5/2010 to accommodate changes in international society and international legislation and to cater for new requirements and concepts, such as the responsibility to protect.

The most important aspects of the regulation following these amendments are the following:

The provision of non-applicability of statutory limitations to offences against persons or property protected in the event of armed conflict. Article 131.4 was amended to state that "statutes of limitations shall not apply under any circumstances to crimes against humanity, genocide, and crimes against persons or property protected in the event of armed conflict, except those punished under Article 614[59]". In the same vein, Article 133.2, regulating the limitation period for crimes, was amended,

Without prejudice to the provisions of international treaties and conventions signed by Spain, if the Spanish courts are to judge the foregoing offences, it shall first have to be proven that the alleged perpetrators are in Spain or that there are Spanish victims, that Spain is linked in some way with the case or, in any event, that no other competent country or international court has commenced proceedings with a view to investigating and prosecuting the offences."

57 Spain therefore fulfilled the obligation it undertook when it ratified the four Geneva Conventions of 1949 and the Additional Protocols of 1977. The Conventions set out measures to protect people and property in the event of an armed conflict and prohibit a series of conducts in order to ensure this protection, highlighting war crimes as being the most serious and establishing the obligation that "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention" (Article 49 GcI, Article 50 GCII, Article 130 GCIII, Article 146 GCIV, Article 86.1 API). *Vid.* Pignatelli y Meca, F., General Consejero Togado: *"Los crímenes de guerra en la Ley Orgánica 5/2010, de 22 de junio, de modificación del Código Penal"*, http://www.c ruzroja.es/dih/pdfs/temas/3_1/3_1.pdf.

58 This regulation is regarded as a trailblazer and was worded according to the guidelines provided by the International Committee of the Red Cross on humanitarian law. *Vid.* RODRÍGUEZ-VILLASANTE Y PRIETO, J.L., *"La modificación del Código Penal Español por Ley Orgánica 5/2010, en materia de crímenes de guerra. Un paradigma en la protección penal de las víctimas de guerra"*, Revista Española de Derecho Militar, no. 95-96, enero-diciembre de 2010, pag. 151.

59 Article 614 deals with violations of International Humanitarian Law which are not defined as war crimes. Bear in mind that the Geneva Conventions only classify the more serious violations of humanitarian law as war crimes, and therefore not all violations.

with the new wording being as follows: "The penalties imposed for crimes against humanity, genocide, and crimes against persons or property protected in the event of armed conflict, except those punished under Article 614, shall not expire under any circumstances".

Groups comprised of disabled persons have been included in the genocide and crimes against humanity categories in order to cater for situations that would not otherwise be classified as genocide.

Genocide has always been condemned by the international community, and it is considered that its prohibition should be a customary rule of international law and even a peremptory or norm[60].

The Spanish definition of genocide is broader in scope[61] than that of the Convention of 1948; therefore, as pointed out by Professor Feijoo Sánchez, the Spanish courts may pass judgment on situations which are not within the remit of an international court[62].

Two elements must be present in order to allege the existence of this crime: firstly, one of the crimes listed in paragraph one must have been committed: death, the injuries listed in Articles 149 and 150, sexual assault, subjection to living conditions that endanger their lives or seriously damage their health, forced displacements, the implementation of measures that endanger their way of life or reproduction, wrongful transfer from one group to another or any other type of injury.

Furthermore, as pointed out earlier, a subjective element of injustice must exist, i.e., the intention to destroy a group. In such cases, the perpetrator's conduct is motivated by a desire to annihilate the group[63]. However, it is not necessary that the intent be

60 According to the Vienna Convention on the Law of Treaties, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

61 The most significant differences are the following: "Sexual assault" is explicitly criminalised, which is not the case with the Convention. The forced displacement of a group or its members is punished, while the Convention only punishes the wrongful removal of children. Any measure aimed at impeding their way of life is classified as a crime (the Convention only punishes the prevention of reproduction). Any type of injury is punished, whereas the Convention requires that the injury be serious.

62 *Vid.* FEIJOO SANCHEZ, B.: "*Reflexiones sobre los delitos de genocidio (artículo 67 del Código Penal)",* in La Ley, Sección Doctrina, 1998, available at laleydigital.es.

63 Vid. C VIVES ANTON, T., ORTS BERENGUER, E., ARBONELL MATEU, J.C., GONZALEZ CUSSAC, J.L.: *"Derecho Penal. Parte Especial*…cit.; FEIJOO SANCHEZ, B.: *"La reforma de los delitos de genocidio y lesa humanidad en relación a la protección de personas discapacitadas*… cit.; CERVELL HORTAL, M.J.: *"Genocidio, responsabilidad internacional e inmunidad de los Jefes de Estado*…cit., pag. 33; MATEUS RUGELES, A.: *"Genocidio y Responsabilidad Penal Militar. Precisiones en torno al artículo 28 del Estatuto de Roma*…cit., pags. 33 et seq.

to destroy it completely and make it disappear; it suffices to want to remove it from a specific territory[64].

To allege the existence of a crime against humanity, at least two elements must exist: that the aforementioned crimes or criminal offences are committed and, moreover, they must have been committed within a context, as part of a general attack on the civilian population or a part of it[65], and, in any event, when these crimse are committed because the victim belongs to a group that is persecuted for political, racial, national, ethnic, cultural, religious, gender or disability reasons or any other reasons universally recognised as unacceptable under international law, or when committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. It is precisely the second element that characterises and distinguishes crimes against humanity[66]. The basic difference between genocide and crimes against humanity is that the desire to destroy a group is not the motive behind the latter.

A number of crimes have been added to the Spanish Criminal Code so as to be able to penalise offences against persons or property protected in the event of armed conflict (Chapter III, Articles 608 to 614 bis). This is the real war crime law[67].

These are the criminal offences enshrined in the Military Criminal Code[68], and regulated in the ordinary Criminal Code as a result of the commitments undertaken

64 "The subjective element of injustice aimed at harming the legal interest indicates that the latter is an ethnic, racial or religious group, but not necessarily the entire group in the sense that all human beings belong to the group that inhabits the earth, and not even those who live in the territory of a state; it suffices for it to be a sub-group confined to specific geographical or social areas". Vid. GIL GIL, A.: *"El genocidio y otros crímenes internacionales",* Valencia, 1999, pag. 194.

65 Vid. FEIJOO SANCHEZ, B.: *"Los crímenes de lesa humanidad: una nueva modalidad delictiva en el Código Penal de 1995",* in CUERDA RIAZU, A. (Dir.): *"La respuesta del derecho penal ante los nuevos retos. IX Jornadas de profesores y estudiantes de derecho penal de las Universidades de Madrid"*… cit., pag. 41.

66 Ibid., pag. 48.

67 *Vid.* C VIVES ANTON, T., ORTS BERENGUER, E., ARBONELL MATEU, J.C., GONZALEZ CUSSAC, J.L.: *"Derecho Penal. Parte Especial",* Tirant lo Blanch, Valencia, 2012. Consulted the electronic version.

68 War crimes are set out in Articles 69 to 78 of the Military Criminal Code. Professor Gil Gil has pointed out that "as was the case with most countries, Spain's first positive and permanent step towards the criminalisation of unlawful conduct during war was military criminal legislation." In Spanish law, war crimes initially came within the sole jurisdiction of military law; recently, however, they have been incorporated into the ordinary Criminal Code. Their inclusion in ordinary criminal legislation was deemed necessary, considering that combatants that are not necessarily militaries can commit crimes and that the Military Criminal Code would not apply in such cases. Vid. GIL GIL. A: *"Bases para la persecución penal de crímenes internacionales en España*…cit., pags. 27 and 28.

by Spain when it ratified several international treaties on the matter[69].

While the amendments made to legislation in 2010 were important, even more so were the new items introduced into legislation, such as the contravention of judicial safeguards, attacks on sexual freedom, recruitment of children for participation in hostilities, the violation of armistices, looting and attacks on cultural property[70].

The offence of maritime piracy was reintroduced into the Spanish Criminal Code in the reform of 2010, given the resurgence in this type of crime and the need to criminalise it[71]. Its importance was further evidenced by Spain's participation in Operation Atalanta, the European Union's counter-piracy operation, in an endeavour to prevent a crime that is a growing concern for the international community.

It is provided for in Article 616, as follows: "Anyone who through violence, intimidation or fraud, seizes, damages or destroys an aircraft, ship or other type of vessel or sea platform, or threatens persons, cargo or goods aboard such vessels, shall be convicted of piracy and liable to a term of imprisonment of 10 to 15 years. In all cases, the penalty provided in this article shall be imposed without prejudice to those [penalties] imposed for any [other] offences committed".

This article is complemented with 616 quarter:

"1. *Anyone who resists or disobeys a war ship, or military aircraft or any other ship or aircraft that is seeking to prevent or prosecute the acts set forth in the previous article and is authorised to do so, and which bears clear signs of and is identifiable as a ship or aircraft of the Spanish State, shall be liable to a term of imprisonment of one to three years.*

2. *If, in the course of the act described above, force or violence is used, a penalty of imprisonment for a term of 10 to 15 years shall be imposed.*

3. *In all cases, the penalties described in this article shall be imposed without prejudice to those [penalties] imposed for any [other] offences committed.*"

3.2. Crimes against the international community in the Spanish Criminal Code

69 The most important treaties ratified by Spain for the protection of persons and victims in the event of armed conflict are the Geneva Conventions of 1949 and the Additional Protocols of 1977, and the 1954 Hague Convention on the protection of cultural property in the event of armed conflict.

70 *Vid.* C VIVES ANTON, T., ORTS BERENGUER, E., ARBONELL MATEU, J.C., GONZALEZ CUSSAC, J.L.: *"Derecho Penal. Parte Especial…* cit.

71 The Statement of Reasons of Organic Law 5/2010 sets out: "the need to address the issue of unlawful acts against maritime and aviation safety".

The first law regulating war crimes in the Spanish legal system was the Military Criminal Code[72].

Title Two (Articles 69 to 78) of the current Military Criminal Code of 1985 sets out the crimes against "laws and customs of war" in order to bring it into line with international law[73], in particular, the Geneva Conventions, which lay down the obligation to specify the crimes defined as war crimes in domestic legislation.

The perpetrator of such crimes has to be a military officer[74]; therefore, it is for this reason that such crimes had to be provided for in the ordinary Criminal Code as they would otherwise go unpunished if committed by a civilian.<0}

Furthermore, as Fernández Flores has rightly pointed out, nothing prevents Spain from also hearing cases that involve foreign military officers, given that the Code does not provide otherwise, nor can we find any argument against this[75].

It can therefore be said that military criminal law in Spain provides for a mixed classification of war crimes in that it punishes specific crimes, although Article 78 of the Military Code punishes any action that is contrary to "the requirements of the international conventions ratified by Spain"[76].

While it is true that Spain's Military Criminal Code was the first to punish war crimes, it can also be said that it is not in keeping with the new reality, given that it has never been amended to accommodate changing times, despite doctrine calling for the appropriate amendments to be made. However, we are hopeful to see changes in this respect in the future, following the recent announcement that the Military Criminal Code is to be revised.

4. CONCLUSIONS

72 *Vid.* BLECUA FRAGA, R., RODRIGUEZ-VILLASANTE Y PRIETO, J.L.: "*Comentarios al Código Penal Militar",* Civitas, Madrid, 1988. 814 et seq.

73 Ibid.

74 Article 8 of the Military Criminal Code states that: "for the purposes of the Code, military officer is construed as any individual who holds the position pursuant to the legislation governing the acquisition and loss of said status".

75 *Vid.* BLECUA FRAGA, R., RODRIGUEZ-VILLASANTE Y PRIETO, J.L.: "*Comentarios Al Código Penal Militar",* Civitas, Madrid, 1988. 818 et seq.

76 Op cit. pag. 823.

The responsibility to protect is a new concept, and has only been in existence for seven years. Implementation of the concept has often been inadequate due to a lack of political consensus.

Starting in 2001, it became the focus of UN discussions until it was finally approved at the UN World Summit of 2005. It is more a moral principle than a legal obligation.

Approval of the responsibility to protect principle has been the most significant development since the debate on humanitarian intervention began[77]. The legal system has a new tool with which to address the protection of human rights: the responsibility to protect, which aims to become a firmly established rule of international law. We agree with Professor Gutiérrez Espada when he says that it is an indispensable tool in contemporary international relations, with all of its elements: the responsibilities to prevent, react and rebuild.

Nevertheless, we believe it is necessary to clarify certain aspects that arise when it comes to its practical application. In addition, it is essential to overcome the tension that exists between state interests and the needs of vulnerable communities[78], which becomes even more evident in light of the right of veto held by the permanent members of the Security Council. Abuse of the principle has sparked a flurry of criticism, suggesting that countries are using it to implement strategies aimed at protecting their own interests. As Gutiérrez Espada has pointed out "if the responsibility to protect concept, in its current structure, is to fulfil its purpose, the parameters governing the right of veto of permanent members of the Council need to be changed".

The responsibility to protect has three dimensions, of which prevention is the most important and plays a central role. Measures aimed at promoting prevention should therefore be implemented, such as the creation of early warning mechanisms, diplomatic efforts to avoid conflict and support for NGOs.

Force should only be used as a measure of last resort, and is only justified when all other measures have failed.

The United Nations should continue working to define the exact nature and content of the responsibility to protect, establish a procedure for its implementation and

77 Vid. GARRIGUES, J.: *"The responsibility to protect: from an ethical principle to an effective policy*…cit., pag. 178.

78 In his farewell speech, Kofi Annan stated that: "When I look at the murder, rape and starvation to which the people of Darfur are being subjected, I fear that we have not got far beyond "lip service". The lesson here is that high-sounding doctrines like the "responsibility to protect" will remain pure rhetoric unless and until those with the power to intervene effectively – by exerting political, economic or, in the last resort, military muscle – are prepared to take the lead". Vid. GARRIGUES, J.: *"The responsibility to protect: from an ethical principle to an effective policy*…cit., pag. 157.

control mechanisms.

One of the measures that has been put forward for implementing the responsibility to protect is that states pass domestic laws against genocide, war crimes and crimes against humanity, bearing in mind that if such laws do not exist, the national courts cannot apply international rules to punish the perpetrators of genocide and other war crimes committed in the country. The decisive action of national courts far away from the places where atrocities are committed may be one way of dealing with these crimes, should the International Criminal Court fail to take action. While the regulation of war crimes in our domestic criminal legislation is not perfect, it *is* thorough and attached major importance; as Kofi Annan has pointed out in this respect: "If states bent on criminal behaviour know that frontiers are not an absolute defence—that the council will take action to halt the gravest crimes against humanity—then they will not embark on such a course assuming they can get away with it".

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www.es.amnesty.org	Amnesty International
www.cicr.org	International Committee of the Red Cross
www.fride.org	Foundation for International Relations and Foreign Dialogue
www.iecah.org	Institute for Studies on Conflicts and Humanitarian Action
www.reei.org	Revista electrónica de Estudios Internacionales
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