THE RESPONSIBILITY TO PROTECT:
LEGAL RIGHTS AND OBLIGATIONS TO SAVE HUMANS FROM
MASS MURDER AND ETHNIC CLEANSING

by

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ABSTRACT

The context for this work is set by the proliferation of intrastate conflicts and the international legal debate of humanitarian intervention. The thesis specifically addresses the concept of the "Responsibility to Protect" (R2P) as formulated by the International Commission on Intervention and State Sovereignty (ICISS). The objective is to assess the present quality of R2P as a concept of international law.

Five components of the R2P framework are discussed: the primary responsibility of every state to protect its population from large-scale killings and large-scale ethnic cleansing; the right of other states to collective humanitarian intervention through the United Nations; a right of unilateral humanitarian intervention without prior Security Council authorization; the responsibility of the international community to take military action; and the criteria for external military involvement.

Methodologically, the analysis is grounded in the dominant theory of legal positivism and its doctrine of sources, which requires notably an analysis of treaties and customary international law. An ethical theory is devised and applied, however, to remedy inadequacies of a strictly positivist method that sets out to determine international law solely on the basis of hard facts. These ethical considerations serve as a background theory to provide guidance in difficult cases of treaty or customary law analysis, and they fill gaps in positive international law as legally binding "principles of ethical law".

In conclusion, the individual components of R2P differ in terms of their legal status and the degree to which it can be explained by the traditional positivist approach to international law. The primary responsibility of every state has become accepted as a hard norm of international customary law; the right of collective humanitarian intervention is provided for in Chapter VII of the UN Charter; a right of unilateral humanitarian intervention has become part of the international legal system as a "principle of ethical law"; the residual responsibility of the international community is a principle of "legal soft law"; finally, positive international law defines no criteria delineating the permissible and required use of force for the protection of foreign populations.
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CHAPTER 1: HUMANITARIAN INTERVENTION AND THE CONCEPT OF A RESPONSIBILITY TO PROTECT IN THE AGE OF “NEW WARS”

Over the course of the last two decades, the world has witnessed horrendous human suffering in armed conflicts around the globe. As such, the perpetration of atrocities by human beings against their peers has surely neither been a new phenomenon nor a specific characteristic of this epoch. What is new, however, and an increasing challenge for the international legal system, is the form of these conflicts and the nature and extent of their impact on the civilian population.

The history of the twentieth century in general has been marked by the immense bloodshed inflicted by humans upon humans as an effect of international and domestic warfare. For the most part of it, the bloodiest wars had been those fought between states in the pursuit of territory, wealth, and influence. Yet, since the end of World War II, changes can be observed in the nature of conflicts. To label what has absorbed the international community, most noticeably in these past two decades, the term “new wars” has been designed.

“New wars” exhibit several characteristics that distinguish them from the bulk of earlier armed conflicts. One central feature is that state borders no longer define the locus of a conflict. Increasingly, wars are fought within, rather than between, states. By now, such internal wars account for the vast majority of all armed conflicts. In the long decade between 1989 and 2001, 118 civil wars broke out, compared with only 8 interstate wars. And in 2004, all conflict-related emergencies of “pressing” concern were civil wars.

Another trend, which has accompanied the proliferation of civil wars, is the increased vulnerability of civilians. Civilians, not soldiers, have become the main victims of these

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3 See Weiss, Ideas, supra note 1 at 63-64 and generally at 59-67.
4 Ibid. at 63-64.
5 Ibid. at 61.
6 See Joyner, supra note 2 at 704.
8 See Weiss, Ideas, supra note 1 at 62; Hoffman & Weiss, Sword & Salve, supra note 1 at 60.
conflicts. The prevalence of civilian casualties is the result of a variety of ways in which the use of military force affects civilian populations, including often, at the most extreme, their intentional targeting. Assaults committed with genocidal intent ultimately aim at destroying whole populations. Even where a conflict party does not pursue the physical extermination of a people, it may employ a number of different strategies against its members, such as their forcible displacement, or the use of systematic rape as a means of terror or to change the ethnic composition of that population. These kinds of assaults on civilians have come to be grouped under the euphemistic but nonetheless commonly used term of "ethnic cleansing".

Intentional assaults on civilians have recently been reported, for instance, out of the west-Sudanese region of Darfur, where "military, paramilitary, and police have employed a wide range of tactics against the civilian population [including] aerial bombings [...], heavy shelling by tanks and other artillery, ground attacks [...], the bulldozing and burning of villages, arrests and extrajudicial execution, kidnapping, torture, and rape." Such abstract reports may provide an insight into the means of contemporary warfare. Yet, psychologically, they are often inadequate to confer the actual meaning of these strategies for the targeted population, and the gravity of the suffering that is inflicted upon the victims.

In an attempt to illustrate the fate of civilian victims in internal wars, I may therefore quote an excerpt from an account that has been published in more shocking detail by Cherif Bassiouni. The story had been told to Professor Bassiouni by a Canadian prosecutor who investigated massive rape cases in the Balkans, and describes the cruelties committed against a Catholic Croat research centre.

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10 See Joyner, supra note 2 at 704; see also Weiss, Ideas, supra note 1 at 68; Hoffman & Weiss, Sword & Salve, supra note 1 at 73
11 See ICISS, Responsibility to Protect, supra note 9 at 4; Weiss, Ideas, supra note 1 at 68; Hoffman & Weiss, Sword & Salve, supra note 1 at 72.
12 See Weiss, Ideas supra note 1 at 68; Hoffman & Weiss, Sword & Salve, supra note 1 at 72.
13 See Weiss, ibid. at 68; Hoffman & Weiss, Sword & Salve, supra note 1 at 72; ICISS, Responsibility to Protect, supra note 9 at 4.
14 See ICISS, ibid. at 4.
15 Cf. ibid. at 33.
16 See Human Rights First, Stand In For Darfur: About the Crisis, online: Human Rights First <http://www.humanrightsfirst.org/international_justice/darfur/about/background.asp>; Max W. Matthews, "Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur" (2008) 31 B.C. Int'l & Comp. L. Rev. 137 (HeinOnline) at 144.
17 See Joyner, supra note 2 at 694-695.
man, his Serb wife and two teenaged stepdaughters in Sarajevo.  The offenders are characterized as “half a dozen young thugs who were soccer fans” and initially tied the man to the floor and berated him for having won a championship for a Croatian soccer team against a Serb team:

They then proceeded to take their rifle butts and break both of his legs so that he would never play soccer again. While he was laying there on the floor with two broken legs, the thugs went and got his wife and two daughters. They told the wife in the presence of her husband and her two daughters that unless she did everything they wanted, they would rape the two girls. The mother, in order to protect her daughters, complied and submitted to degrading and humiliating sexual acts. Totally unexpectedly, she was turned to face her husband and daughters, and one of the men slit her throat. While she was writhing on the floor dying, they raped the two girls in the presence of their stepfather. Then, when they were finished, they slit the throats of the two girls.

After they had abused and killed his wife and stepdaughters, the thugs dumped the man on the street “as a living example of what could happen to others like himself and his family”. He committed suicide the night after he had told the story to the prosecutor.

The quantitative dimension of human suffering like this can only be indicated through numbers and statistics that demonstrate both the long history of the problem and its more recent aggravation. Already during the Cold War, civil wars or tyrannical regimes in Nigeria, Indonesia, Uganda or Cambodia claimed millions of victims. By the end of the 1980s, it is estimated that more than 150 million people had been killed, since the beginning of the twentieth century, through genocide and government mass murder. In the last decade of that century, violence within national borders has further proliferated, and, today, at least one commentator sees “intrastate conflict, civil war, and internal violence perpetrated on a massive scale” as a “quintessential problem” of the international system. The examples of such conflicts are indeed numerous, and the statistics on the victims that they leave behind deeply shocking: in Somalia in 1993, scorched-earth tactics caused a famine that claimed the lives of between 200,000 and

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19 See Bassiouni, supra note 18 at 201-202; see also: Joyner, supra note 2 at 694-695.
20 See Bassiouni, ibid. at 202; see also Joyner, supra note 2 at 695.
21 See Bassiouni, ibid.; see also Joyner, supra note 2 at 695.
22 For a brief overview of these instances see Joyner, supra note 2 at 696.
23 See Rudolph J. Rummel, Death by Government (New Brunswick, N.J.: Transaction, 1994) at 1-3 (referring to the fifteen most murderous regimes only).
24 See e.g. Weiss, Ideas, supra note 1 at 61; ICISS, Responsibility to Protect, supra note 9 at 4.
350,000 people;\textsuperscript{26} during the Rwandan genocide in 1994, about 800,000 people, or a tenth of the country’s population, were butchered within a few weeks, with 250,000-500,000 women being raped, and half of the population being forcibly displaced;\textsuperscript{27} in July 1995, 7,000 to 8,000 Muslim men and boys were murdered in the town of Srebrenica in Bosnia-Herzegovina;\textsuperscript{28} overall about 250,000 people died in Bosnia, and 20,000-50,000 rapes were committed;\textsuperscript{29} in Kosovo, the ethnic cleansing of Kosovar Albanians led to the deaths of thousands and the displacement of about 700,000 persons;\textsuperscript{30} in the Democratic Republic of Congo (DRC), “the deadliest [conflict] on the planet since the Second World War”,\textsuperscript{31} conflict-related disease and malnutrition have caused an estimated 4 million deaths, “or the numerical equivalent of as many as five Rwandas”,\textsuperscript{32} and keep claiming the lives of some 30,000-40,000 people every month;\textsuperscript{33} in Darfur, “[a]t least 200,000, but as many as 400,000 black Africans may have died; countless women left behind have been raped; and as many as 3 million people have been forcibly displaced.”\textsuperscript{34}

The scale and gravity of human suffering in ongoing intrastate conflicts is a challenge for the international community, its political decision-makers and legal framework. Then United Nations (UN) Secretary-General Kofi Annan directly confronted the UN General Assembly with this issue in early 2000, asking: “[...] how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”\textsuperscript{35}

From the standpoint of international law, this query raises difficult issues. Traditionally, the most prominent question has been whether other states may decide to intervene in an internal conflict

\textsuperscript{26} See Weiss, Ideas, supra note 1 at 62.

\textsuperscript{27} Ibid. at 62; see also Joyner, supra note 2 at 698.

\textsuperscript{28} See Joyner, ibid. at 699.

\textsuperscript{29} See Weiss, Ideas, supra note 1 at 62; see also Joyner, supra note 2 at 695.

\textsuperscript{30} See Joyner, ibid. at 698.

\textsuperscript{31} See Weiss, Ideas, supra note 1 at 52.

\textsuperscript{32} Ibid. at 52-53.

\textsuperscript{33} Ibid. at 52.

\textsuperscript{34} Ibid. at 54.

to protect the imperiled population, that is, if they have a “right of humanitarian intervention”. The concept of humanitarian intervention is difficult to define in general but usable terms. Adam Roberts has set out to formulate a definition that he considers consistent with the circumscriptions chosen by a number of different sources. In his words, humanitarian intervention is “coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and with the purpose of preventing widespread suffering or death among its inhabitants.”

While Roberts’ definition may provide both a good summary of earlier understandings and a useful general approximation to the issue still, further refinements may be needed with a view to the purpose of this thesis. Since December 2001, the debate of humanitarian intervention has been shaped by the framework and the language that the International Commission on Intervention and State Sovereignty (ICISS) established in its report on “The Responsibility to Protect”. As it is precisely this framework that will be the object of my analysis, due regard shall be had to its scope in devising the working definition that will be at the basis of the following chapters. Moreover, I chose to focus on particular aspects that appear to be especially relevant and controversial in the legal discourse. Thus, for instance, a broad variety of acts could constitute an intervention, defined as “the exercise of authority by one state within the jurisdiction of another state […] without its permission”. In line with this definition, the ICISS notably discusses a broad range of measures to be taken by foreign governments. Yet, I intend to restrict myself to a discussion of military action, as this form of intervention raises specific legal issues and has been a long-standing matter of international legal debate. Similarly, a very narrow understanding will be applied as to when interventionist action qualifies as “humanitarian”. In a broader sense, “humanitarian” may denote any conduct that is undertaken “for the stated purpose of protecting or assisting people at risk”. While the ICISS refers to this notion at the outset, its analysis later on suggests that military intervention may be justified in extreme cases only,

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36 See Thomas M. Franck & Nigel S. Rodley, “After Bangladesh: The Law of Humanitarian Intervention by Military Force” (1973) 67:2 A.J.I.L. 275 at 305 (JSTOR); see also Joyner, supra note 2 at 697, n. 10; see also Welsh, “Responsibility to Protect”, supra note 9 at 365, n. 5 (“The task of defining humanitarian intervention is notoriously difficult.”)
38 Ibid. at 5.
39 See ICISS, Responsibility to Protect, supra note 9; see also Hamilton, supra note 35 at 289-290, 293.
41 See ICISS, Responsibility to Protect, supra note 9 at para. 1.39.
notably in order to prevent or stop large-scale loss of life or large-scale ethnic cleansing.\footnote{Ibid. at para. 4.19.} Even more specifically, I will focus on atrocities that are inflicted actively by humans on their peers, leaving for discussion in more specialized works situations of a large-scale loss of life that is the consequence of state neglect in, for example, the event of natural disasters. For the purposes of this work, an intervention will therefore be understood as humanitarian only if it serves the stated purpose of halting or averting large-scale killings or large-scale ethnic cleansing.

In the light of these considerations, the terms “humanitarian intervention” or “intervention for human protection purposes” in this thesis will refer to military action that is taken by one or more states in another state, without the consent of its authorities, and with the stated purpose of halting or averting the commission of large-scale killings or large-scale ethnic cleansing against its population. In the specific case where such action is undertaken without prior approval from the Security Council, it will be qualified as “unilateral” humanitarian intervention.\footnote{See UN Secretary-General, Millennium Report, supra note 35 at para. 219.}

When alluding to the concept of humanitarian intervention, Secretary-General Annan did not fail to indicate that this was “a sensitive issue, fraught with political difficulty and not susceptible to easy answers.”\footnote{See Nicholas J. Wheeler & Justin Morris, “Justifying the Iraq War as a Humanitarian Intervention: The Cure is Worse than the Disease” in Ramesh Thakur & Waheguru Pal Singh Sidhu, eds., The Iraq crisis and world order: Structural, institutional and normative challenges (Tokyo: United Nations University Press, 2006) 444 at 447; see also Weiss, Ideas, supra note 1 at 97, 128; note that the number of countries involved in such an intervention is without relevance for the definition as “unilateral”, see Weiss, Ideas, supra note 1 at 97.} Indeed, the use of military force for humanitarian protection purposes raises legal, political, moral and ethical questions and has accordingly been treated as a contentious matter both of law and philosophy.\footnote{See Fernando R. Tesón, Humanitarian Intervention: An Inquiry Into Law and Morality, 2nd ed. (Irvington-on-Hudson, NY: Transnational, 1997) at 6 [Tesón, Humanitarian Intervention] (the 3d ed. of this work was not available to the author at the time of writing this thesis); Joyner, supra note 2 at 699-700.} While humanitarian intervention has sparked controversies for centuries, it has resurfaced in the legal discussion in the 1970s and since become a “centerpiece of international debate”.\footnote{See Evans, “Responsibility to Protect”, supra note 25 at 703; see also Joyner, supra note 2 at 704.}

From the viewpoint of international law, military intervention for human protection exhibits a conflict of principles.\footnote{See Tesón, Humanitarian Intervention, supra note 45 at 8.} On the one hand, the international system of states has since the conclusion of the Treaties of Westphalia in 1648 been based on the principle of the sovereign equality of all states. To protect the sovereignty of states, the corollary principle of non-
intervention in each other’s affairs was established, which traditionally provided that “governments can attempt to influence each other’s behaviour only through established diplomatic channels”. The control of its internal affairs, which were initially understood to include questions of human rights protection, lay with the sovereign state.

When, by the end of the Second World War, the United Nations system was established, state sovereignty was one of its core principles – alongside, however, the seemingly incompatible notion of human rights. Several provisions suggest that states should enjoy a status of sovereign equality that guarantees them the exclusive jurisdiction over their territory as well as freedom from interference by external actors. Humanitarian intervention appears to be contradictory to this framework, which notably comprises the reference to the sovereign equality of the member states in Article 2(1) of the Charter of the United Nations, the prohibition of the use of force in Article 2(4), and the principle of non-intervention in Article 2(7). On the other hand, the Preamble and Article 1(3) of the UN Charter refer to the fundamental human rights and freedoms of the individual.

From the outset, the text of the UN Charter had thus created a system of principles and purposes that apparently clashed on the issue of humanitarian intervention. Subsequent developments, however, have profoundly affected the way in which these provisions of the UN Charter and their underlying concepts are understood. While the United Nations were initially seen as an organization that was aimed at protecting the territorial integrity, political independence and national sovereignty of states, its Secretary-General, more than fifty years later, asserted that it was ultimately aimed at the protection of individual human beings. What the second half of the twentieth century has witnessed is the expansion of the concept of security, to go beyond narrow

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48 See Weiss, Ideas, supra note 1 at 14-18; see also Kwa Chong Guan, “Intervention and Non-Intervention: A Singapore Comment” in David Dickons & Guy Wilson-Roberts, eds., Non-Intervention and State Sovereignty in the Asia-Pacific (Wellington, NZ: Centre for Strategic Studies, 2000) 50 at 50.


51 See Welsh, “Responsibility to Protect”, supra note 9 at 364; see e.g. Weiss, Ideas, supra note 1 at 18.

52 See Welsh, ibid.

53 See Weiss, Ideas, supra note 1 at 22; Welsh, “Responsibility to Protect”, supra note 9 at 364.

54 See also Welsh, ibid.

55 See Joyner, supra note 2 at 703-704.

56 See Kofi Annan, “Two Concepts of Sovereignty” The Economist (18 September 1999) 49 (Lexis) [Annan, “Two Concepts of Sovereignty”]; see also Weiss, Ideas, supra note 1 at 97.
understandings of “state security” and to include the emerging idea of “human security.” The UN member states themselves have adopted declarations and conventions which indicate that human rights are no longer constrained by national borders and narrow understandings of state sovereignty. For the former Canadian Minister of Foreign Affairs, Lloyd Axworthy, human security has even become “a central organizing principle of international relations.”

In accordance with this shift in the international security paradigm, the interpretation of central norms in the UN Charter has undergone major changes. Especially those provisions on the use of force that determine the legality of military action under the Charter may be understood differently today than at the time of their adoption. For example, Article 39 of the UN Charter, which provides the trigger for Chapter VII measures, including the authorized use of military force, had originally been interpreted to strictly require crises with transboundary implications, but was gradually expanded to apply to mere intrastate conflicts as well. Similarly, the general prohibition on the use of force in Article 2(4) of the UN Charter has occasionally been softened, potentially against the intentions of its framers, to allow for military intervention that is aimed at upholding essential human rights. Into this evolving international environment fell the reconceptualization of humanitarian intervention as a “responsibility to protect” by the ICISS, which suggested a new solution for legally reconciling state sovereignty and human rights concerns.

The ICISS sought to facilitate consensus on the theoretical issues surrounding the concept, and to foster the delivery of effective protection to people at risk in practice. My objective in writing this thesis is to clarify the extent to which the framework of a responsibility to protect, as formulated by the ICISS, has by now become entrenched in international law. Specifically, I will address the status of five individual components of this framework: the responsibility of every state and its authorities to protect its population against large-scale killings and large-scale ethnic cleansing; the right of other states to employ military force collectively through the United

58 See Welsh, “Responsibility to Protect”, supra note 9 at 364.
60 See Weiss, Ideas, supra note 1 at 47-48; see also Hamilton, supra note 35 at 289.
61 See Tesoń, Humanitarian Intervention, supra note 45 at 133-140, 146-174; see generally Stahn, supra note 35 at 113; see also Alicia L. Bannon, “The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism” (2006) 115 Yale L.J. 1157 at 1161 and n. 17 (Lexis); Welsh, “Responsibility to Protect”, supra note 9 at 368-369.
62 See Joyner, supra note 2 at 696.
Nations to stop these atrocities where the host government fails to do so; the right of other states in these cases to intervene unilaterally, that is, without prior authorization by the Security Council; the responsibility of the international community to take military action for the protection of the imperiled people; and, finally, the criteria for external military involvement in these crises.

The relevance of such an inquiry into the legal normative framework is obvious at least from the standpoint of a constructivist theory, according to which rules, and legal norms in particular, have a practical influence on state behavior, as their violation attracts political costs. The likelihood of humanitarian intervention in practice may therefore be contingent upon the rules that international law stipulates.

The distinctive characteristic of my approach to this issue, as compared to the wealth of scholarly analyses that have already been undertaken on humanitarian intervention and the responsibility to protect in international law, is a combination of recent developments both in methodological terms and on the field of international politics. It will, firstly, take into account recent endorsements of the concept of a “responsibility to protect” in the declarations and practice of states and international organisations, for instance at the 2005 UN World Summit and in the peacekeeping practice of the Security Council in current conflicts, such as in Darfur or the DRC. The evaluation of these political developments will then be effected on the basis of a legal methodology that acknowledges weaknesses of the dominant positivist doctrine and draws upon the extensive work by contemporary legal scholars who have proposed distinctive approaches to the law of humanitarian intervention.

The analysis of the current status of the ICISS framework in terms of international law will take five major steps: for an introduction to the subject-matter of this thesis, Chapter 2 will start with an overview of the concept of the responsibility to protect. In particular, I will outline the background for the establishment of the ICISS, the relevant components of its concluding report, the major conceptual contributions to the international debate, and the response that it has caused in international legal scholarship and the community of states.

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64 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 145.
In Chapter 3, I will devise a methodology for determining the existence and contents of international legal norms on humanitarian intervention and responsibilities to protect. This methodological groundwork will require a discussion of different doctrinal understandings of international law, its relationship with the concepts of ethics and morality, and the conditions under which legal norms on particular issues can be identified.

An essential outcome of this elaboration will be the conclusion that moral and ethical considerations may play a pivotal role in assessing the contents of international law. In Chapter 4, therefore, I will develop an ethical theory on the rights and obligations of individual states and the international community for the protection of populations at risk. As this theory will only serve a subsidiary function within a primarily legal discussion, I will not engage in a debate of the various conceptions of ethics or moral philosophy. Rather, for the purposes of this thesis, I will use the notions of ethics and morality interchangeably to mean a system of informal principles that define right and wrong, aim at lessening evil and harm, and set out rules to govern the relations between persons accordingly.

Having identified the method for determining the relevant legal rules, as well as the normative ethical theory that will provide guidance in this endeavor, I will then, in Chapter 5, apply these important background considerations to the empirical data that shapes the international law on human protection. This part will mainly analyze the UN Charter and the dealings of the states in order to answer the central question of what legal status the different elements of the ICISS report enjoy. Finally, in Chapter 6, I will summarize my legal conclusions and indicate their political ramifications as well as the need for further normative development on humanitarian intervention and the responsibility to protect.

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CHAPTER 2: ICISS AND R2P – FROM A “RIGHT OF HUMANITARIAN INTERVENTION” TO A “RESPONSIBILITY TO PROTECT”

In December 2001, the ICISS published its report entitled “The Responsibility to Protect”.\(^\text{67}\) This report contains a comprehensive statement of the concept that is today generally referred to under the acronymic abbreviation “R2P”.\(^\text{68}\) In this chapter, I am going to highlight the political background that led to the establishment of the commission, and the conceptual precursors on which it was able to draw; explain the ICISS’s major contributions to the scholarly discussion of humanitarian intervention, as well as its strategic concept for making an impact on the actual practice of human protection; outline the response that the report has caused both in academic and political circles; and finally indicate the current state of mind in academic commentary as to its status in international law.

2.1 Political Background and Conceptual History of R2P

The stage for the conceptual evolution of R2P was set by the humanitarian crises in Rwanda in 1994 and in Kosovo in 1999, and the UN Security Council’s inadequate reaction to these conflicts.\(^\text{69}\) The two cases illustrated a lack of consensus on the legitimacy of humanitarian intervention.\(^\text{70}\) While the failure of the international community to take early and effective action against the genocide in Rwanda was heavily criticized, so was NATO’s military campaign for the protection of the Kosovar Albanians from ethnic cleansing five years later.\(^\text{71}\) What ultimately links these two different cases was the Security Council’s failure to timely authorize the use of robust military force for the protection of either civilian population.\(^\text{72}\)

In the aftermath of these crises, the perception surfaced that a framework needed to be established to provide guidance for international responses to imminent or ongoing cases of genocide or ethnic cleansing.\(^\text{73}\) Secretary-General Kofi Annan repeatedly called upon the member states of the UN to “find common ground in upholding the principles of the Charter, and

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\(^\text{67}\) See ICISS, *Responsibility to Protect*, supra note 9; see also Hamilton, *supra* note 35 at 289-290, 293.

\(^\text{68}\) See Evans, “Responsibility to Protect”, *supra* note 25 at 713; Stahn, *supra* note 35 at 102.


\(^\text{70}\) See Welsh, “Responsibility to Protect”, *supra* note 9 at 364.

\(^\text{71}\) *Ibid*.

\(^\text{72}\) See Weiss, “R2P After 9/11”, *supra* note 59 at 756; Weiss, *Ideas, supra* note 1 at 88.

\(^\text{73}\) See Matthews, *supra* note 16 at 139.
acting in defence of our common humanity”.74 Annan’s objective was to overcome the stalemate over the legitimacy of humanitarian intervention and to prevent future “Rwandas” and “Kosovos”.75

Rwanda and Kosovo by now have become symbols for the challenges that the international community needs to confront when intrastate conflicts create large-scale threats to the civilian population. “No more Rwandas” demands that the world order be made a more secure place not just for states, but also for individuals.76 It appeals to humanitarian intervention in a prescriptive sense, demanding that those who possess the needed capacities to protect populations at risk in foreign states take the required action.77 The experience from Kosovo, by contrast, seems to have demonstrated a duality of simultaneous challenges: while, on the one hand, “genuine” intervention should be enabled by discouraging anti-interventionists from blocking collective action, humanitarian interventions must, on the other hand, be limited to these genuine cases, and an abuse of the concept outside this scope be prevented.78 The need to lay out the conditions under which the international community should tolerate an intervention by willing states alludes to the permissive dimension of norms on humanitarian intervention.79

Annan himself proposed to address these issues in the light of “two concepts of sovereignty”: state sovereignty and individual sovereignty. He observed that, while the first, traditional concept of state sovereignty is increasingly understood as serving the people, rather than the state as a legal entity, the “fundamental freedom of each individual […] has been enhanced by a renewed and spreading consciousness of individual rights.”80 Critics complain that Annan’s remarks on the “two concepts of sovereignty” ultimately constitute little more than a mere restatement of the dilemma of humanitarian intervention.81

74 See UN Secretary-General, Press Release, SG/SM/7136, “Secretary-General Presents His Annual Report to General Assembly” (20 September 1999) [UN Secretary-General, “Annual Report 1999”]; cf. UN Secretary-General, Millennium Report, supra note 35 at para. 217; see also ICISS, Responsibility to Protect, supra note 9 at 2; Matthews, supra note 16 at 140.
75 See Welsh, “Responsibility to Protect”, supra note 9 at 365; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 143; Nicholas J. Wheeler, “A Victory for Common Humanity? The responsibility to protect after the 2005 World Summit” (Paper presented to the conference on “The UN at Sixty: Celebration of Wake?”, Faculty of Law, University of Toronto, 7 October 2005), United Nations Association – UK <http://www.una-uk.org/humanrights/R2P%5B1%5D.pdf> at 3-4.
76 See Welsh, “Responsibility to Protect”, supra note 9 at 365.
77 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 145.
78 Ibid. at 168.
80 See Annan, “Two Concepts of Sovereignty”, supra note 56; see also Evans, “Responsibility to Protect”, supra note 25 at 707.
81 See Evans, ibid. at 707.
Annan’s challenge, however, also prompted the response from the Canadian government which announced at the Millennium Summit in September 2000 to the General Assembly the establishment of the International Commission on Intervention and State Sovereignty. The mandate of this independent commission was to address the whole range of legal, moral, operational and political questions involved in the debate of a right of humanitarian intervention, to foster “a broader understanding of the problem of reconciling intervention for humanitarian protection purposes and sovereignty”; and to facilitate a “global political consensus on how to move from polemics – and often paralysis – towards action within the international system, particularly through the United Nations”. Essentially, it was thus entrusted with developing new common ground for humanitarian intervention.

To facilitate such a global consensus on humanitarian intervention, the ICISS was comprised of twelve independent experts, who were selected with the intention to fairly represent a wide range of viewpoints, from both developed and developing countries and a broad variety of geographical backgrounds. Moreover, it held eleven regional roundtables and national consultations around the globe to expose the views of government officials, civil society and academics worldwide.

The central theme of the ICISS report is “the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.” This theme is specified with a view to the principle of non-intervention in the basic principles set out in the synopsis of the report:

A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.

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82 See ICISS, Responsibility to Protect, supra note 9 at vii; Welsh, “Responsibility to Protect”, supra note 9 at 365; see also Evans, “Responsibility to Protect”, supra note 25 at 707.
83 See ICISS, ibid. at vii
84 Ibid. at para. 1.7; see generally on the ICISS’s goals: Welsh, “Responsibility to Protect”, supra note 9 at 365.
85 See Weiss, Ideas, supra note 1 at 98.
86 See ICISS, Responsibility to Protect, supra note 9, App. A for the names and short biographies of the Commissioners; see also Jutta Brunnee & Stephen J. Toope, “Norms, Institutions and UN Reform: The Responsibility to Protect” (2006) 63:3 Behind the Headlines 1 at 11 (proquest); Weiss, Ideas, supra note 1 at 99.
87 Ibid. at para. 1.7; see also MacFarlane, Thielking & Weiss, supra note 35 at 981.
88 Ibid. at 83; see also Weiss, Ideas, supra note 1 at 99.
89 See ICISS, ibid. at viii.
B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.\(^{90}\)

Although the work of the ICISS has been considered “path-breaking”,\(^{91}\) the R2P concept has not been without antecedents.\(^{92}\) Rather, the way for its evolution had been prepared by the normative work of Francis M. Deng and Roberta Cohen, and the efforts of Secretary-General Kofi Annan.\(^{93}\) While the first provided the intellectual stimulus for R2P, the latter facilitated its development politically. Addressing the issue of internally displaced persons, Deng and Cohen had broken new ground by formulating “sovereignty as responsibility”.\(^{94}\) This new approach heavily influenced the ICISS’s work, and can thus be seen as a direct precursor to the R2P concept and the idea that the enforcement of human rights standards in a state may be an international responsibility.\(^{95}\) Kofi Annan then further challenged the traditional concept of state sovereignty in several speeches and his opinion piece on the “two concepts of sovereignty” in *The Economist* in September 1999.\(^{96}\) Emphasizing “the fundamental freedom of each individual”, Annan questioned the role of states as the sole source of legitimacy and authority in international relations, and supported the idea that sovereignty imposes responsibilities on states.\(^{97}\) He subsequently reinforced this case for a shift of balance between state rights and human rights in his opening address to the General Assembly, that same week,\(^{98}\) and at the Millennium Summit, the following year.\(^{99}\) Rather than conceptual, the groundbreaking aspect of this proposal may have been the mere fact that the Secretary-General as “the world’s top international civil servant” launched an intergovernmental debate on humanitarian intervention.\(^{100}\)

While the ICISS was able to draw upon these precursors, its work can be considered as “pivotal” in that it essentially developed and comprehensively stated the idea of a “responsibility to

\(^{90}\) Ibid. at ix.

\(^{91}\) See Weiss, *Ideas*, supra note 1 at 88.

\(^{92}\) Ibid. at 88-98.

\(^{93}\) Ibid. at 88-89.


\(^{95}\) See Evans, “Responsibility to Protect”, supra note 25 at 708; Weiss, *Ideas*, supra note 1 at 93, 95.

\(^{96}\) See Annan, “Two Concepts of Sovereignty”, supra note 56; see also Weiss, *Ideas*, supra note 1 at 96.

\(^{97}\) Annan, *ibid.*; see also Weiss, *Ideas*, supra note 1 at 96.

\(^{98}\) See UN Secretary-General, “Annual Report 1999”, supra note 74; see also Weiss, *Ideas*, supra note 1 at 97.


\(^{100}\) See Weiss, *Ideas*, supra note 1 at 96-98; cf. also Evans, “Responsibility to Protect”, supra note 25 at 707.
The main contributions of the R2P report to the debate of humanitarian intervention were later summarized by Gareth Evans, one of the commission’s co-chairs, in four points: firstly and secondly, the ICISS insisted on new ways of talking about humanitarian intervention and sovereignty, understanding humanitarian intervention as a responsibility rather than a right, and sovereignty as a responsibility rather than control; thirdly, it suggested a "continuum of obligations", ranging from the prevention of man-made crises, over various forms of reaction, to the reconstruction of conflict-torn societies after the crisis; and, fourthly and finally, the report spelled out guidelines for appropriate military action as one form of reaction.

2.2 Main Intellectual Contributions of the R2P Report

These main ideas of the R2P report aimed at influencing the international debate about humanitarian intervention in different ways.

Firstly, by framing the issue of humanitarian intervention as an argument about a responsibility to protect people at risk rather than about a right to intervene, the commission “sought to turn the whole weary debate […] on its head”, and to recast it from the perspective of those in need of support rather than that of the prospective interveners. Skeptics regard this re-formulation of the debate as “a rhetorical trick” or as “old wine in new bottles”. The commission, by contrast, hoped that changing the relevant perspective would help to break new ground for a more constructive debate. Supporters of this re-characterization of humanitarian intervention moreover credit it for focussing international attention where it should fall, that is, on the rights of those individuals who are in dire need of protection, while the prospective interveners are depicted as having responsibilities rather than rights. Thomas G. Weiss therefore praises the ICISS report for “[prioritizing] the rights of those suffering […] rather than looking for a legalistic trigger to authorize states to intervene […]”

The second and possibly most important concept spelled out in the report, the idea that sovereignty encompasses a responsibility to protect, is based on Deng’s conceptualization of

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101 See Breau, “Peacekeeping”, supra note 9 at 431; Stahn, supra note 35 at 102.
102 See Evans, “Responsibility to Protect”, supra note 25 at 707-710; see generally also Stahn, supra note 35 at 103-104 (emphasizing the first three aspects); Weiss, “R2P After 9/11”, supra note 59 at 743-744 (focussing on the first two contributions); Welsh, “Responsibility to Protect”, supra note 9 at 365-372.
103 See Evans, “Responsibility to Protect”, supra note 25 at 708.
104 See Stahn, supra note 35 at 102.
105 Ibid. at 102, 111-115.
106 See Evans, “Responsibility to Protect”, supra note 25 at 708.
107 See Weiss, “R2P After 9/11”, supra note 59 at 744; Joyner, supra note 2 at 708.
state sovereignty as responsibility, and has significant ramifications for the principle of non-intervention, as indicated in the afore-mentioned "Basic Principles" of the R2P report. By asserting that sovereignty implies a responsibility of the state to protect its people, the ICISS initially upholds the role of the respective government as the central actor. At the same time, however, it treats the sovereignty of a state not as an absolute value, but as one that needs to be reconciled with the need to protect the human life of its citizens. It therefore makes the right to sovereignty contingent upon the state’s effective guaranteeing of basic human rights. Where this minimum standard is not upheld, the state is considered as forfeiting any entitlement to claim sovereignty as a barrier for other states’ involvement to remedy the situation. State sovereignty is thus trumped by the human rights of its population. The broader community of states not only becomes empowered to intervene, but it even bears a responsibility to act. The right of the state to freedom from outside intervention yields to the international community’s responsibility to protect people within this state. In the conceptualization suggested by the ICISS, the ideas of sovereignty and intervention are therefore not contradictory; rather they are complementary in that a state’s sovereignty is dependent on compliance with its primary responsibility to protect its population, and gives way to the residual responsibility borne by the broader international community where it fails to fulfill this responsibility.

The third contribution of the ICISS was to frame the international community’s residual responsibility to protect as a continuum of obligations: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. It thus took a “holistic approach across time” that covers the three different temporal phrases before, during and after the crisis. Their specific contents are summarized by the ICISS:

A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.

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109 See Evans, “Responsibility to Protect”, supra note 25 at 708.
110 See ICISS, Responsibility to Protect, supra note 9 at xi.
111 See Joyner, supra note 2 at 708.
112 See Weiss, Ideas, supra note 1 at 98; Joyner, supra note 2 at 708.
113 See MacFarlane, Thielking & Weiss, supra note 35 at 978.
114 See Joyner, supra note 2 at 720; Hamilton, supra note 35 at 290.
115 See Weiss, “R2P After 9/11”, supra note 59 at 743.
116 See Joyner, supra note 2 at 720.
117 See Welsh, “Responsibility to Protect”, supra note 9 at 366.
118 See ICISS, Responsibility to Protect, supra note 9 at xi; see also Bannon, supra note 61 at 1161.
119 See MacFarlane, Thielking & Weiss, supra note 35 at 978.
120 See ICISS, Responsibility to Protect, supra note 9 at xi; see also Evans, “Responsibility to Protect”, supra note 25 at 709.
121 See Weiss, Ideas, supra note 1 at 101-102.
B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.

C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.122

The value of this approach lies in making clear that military intervention, and intervention in general, are not the only means of protecting populations at risk, but merely one aspect of a multidimensional spectrum of potential action.123 In fact, the ICISS stresses, “the single most important dimension of the responsibility to protect” is prevention.124 Yet, the most critical aspect of the responsibility to protect remains the responsibility to react.125

In the context of the responsibility to react, the ICISS demands that “less intrusive and coercive measures [be] considered before more coercive and intrusive ones are applied.”126 Noncoercive measures thus need to be fairly examined, though not necessarily attempted before recourse is had to intervention.127 Within the category of coercive measures, there is then, again, a whole spectrum of escalating measures available.128 Military intervention should only be considered as a last resort.129

Finally, military intervention as the “ultimative coercive measure” at the international community’s disposition in discharging its responsibility to react is subject to a set of specific principles.130 The elaboration of these guidelines is seen as the fourth major contribution of the ICISS to the humanitarian intervention debate.131 The commission formulated six criteria that military intervention needs to satisfy in order to be warranted: just cause, right intention, last resort, proportional means, reasonable prospects and right authority.132

122 See ICISS, Responsibility to Protect, supra note 9 at xi [emphasis omitted]
123 See Evans, “Responsibility to Protect”, supra note 25 at 709; Joyner, supra note 2 at 708-709.
124 See ICISS, Responsibility to Protect, supra note 9 at xi; see also Joyner, supra note 2 at 709; Weiss, Ideas, supra note 1 at 103.
125 See Joyner, supra note 2 at 711; see also Weiss, Ideas, supra note 1 at 102.
126 See ICISS, Responsibility to Protect, supra note 9 at xi; see also Weiss, Ideas, supra note 1 at 103 (who criticizes that “[t]hese priorities are highly situational”); Matthews, supra note 16 at 141.
127 See Bannon, supra note 61 at 1164.
128 See ICISS, Responsibility to Protect, supra note 9 at paras. 4.3-4.9; see also Matthews, supra note 16 at 141; Bannon, supra note 61 at 1165.
129 ICISS, ibid. at xii.
130 Ibid. at paras. 4.10-4.43; see also Matthews, supra note 16 at 141; see also the detailed overview by Joyner, supra note 2 at 710-716.
131 See Evans, “Responsibility to Protect”, supra note 25 at 710.
132 See ICISS, Responsibility to Protect, supra note 9 at xii-xiii, at para. 4.16 and, generally, at paras. 4.15-4.43.
The just cause requirement defines two broad categories of internal situations in which military intervention for humanitarian purposes can be justified:

To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or

B. large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.133

It is noteworthy that this threshold has been set deliberately high, permitting military intervention only in certain extreme cases of human rights abuses.134 Not every threat to the right to life can satisfy the just cause threshold; the loss of life or ethnic cleansing must rather be of a conscience-shocking magnitude.135 Moreover, many other forms of human rights deprivations that supporters of humanitarian intervention might have considered as legitimate cases for military action, such as political oppression, systematic racial discrimination or the overthrow of a democratically elected government, are excluded from the list.136 On the other hand, the qualifier "actual or apprehended" allows for intervention in anticipation of the two agreed just causes, large-scale killings and large-scale ethnic cleansing, enabling the international community to take action before the atrocities have actually begun.137

When a situation crosses the just cause threshold, four other precautionary principles further delineate the legitimate use of military force:

A. Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.

B. Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.

133 Ibid. at para. 4.19
134 See Evans, "Responsibility to Protect", supra note 25 at 710; see also Joyner, supra note 2 at 711.
135 See Weiss, Ideas, supra note 1 at 104.
136 See Joyner, supra note 2 at 711; see also Evans, "Responsibility to Protect", supra note 25 at 710; Weiss, Ideas, supra note 1 at 105.
137 See Joyner, ibid.; also see Weiss, Ideas, supra note 1 at 105 (arguing that the insertion of these words "opens the door fairly wide" so that "justifiable causes could include overthrow of a democracy or violations of human rights or, perhaps, even an environmental catastrophe like the one in Chernobyl if a state reacts slowly [...]").
C. Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.

D. Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.  

These principles establish a framework that can be seen in the tradition of the Christian “just war” theory, and resembles the criteria that have been developed through other intellectual efforts. In conjunction, the five principles of just cause, right intention, last resort, proportional means, and reasonable prospects were intended to enable the Security Council and the world at large to determine the legitimacy of military intervention for human protection purposes.

It remains the critical question of right authority, that is, who has the power to authorize military intervention under these circumstances. The ICISS’s approach to this problem was to state a clear preference for intervention that is authorized by the Security Council under Chapter VII.

A. There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. [ … ]

B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out.

The ICISS was well aware of the objections to relying on the Security Council as the right authority, such as its unrepresentative membership, its lack of political will to authorize intervention in the past, and the obstructive effect that the permanent members’ right to veto may have. After all, the failure of the Security Council to react to the crises in Rwanda and Kosovo had been the trigger for the establishment of the commission in the first place. Nevertheless, the ICISS considered the task being “not to find alternatives to the Security Council as a source

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138 See ICISS, Responsibility to Protect, supra note 9 at xii [emphasis omitted]; see generally ibid. at paras. 4.32-4.43.
139 See Evans, “Responsibility to Protect”, supra note 25 at 710; see also Weiss, Ideas, supra note 1 at 106, 111; Welsh, “Responsibility to Protect”, supra note 9 at 370.
140 See Weiss, Ideas, supra note 1 at 107 (with reference to works by a subcommittee of the International Law Association’s commission on human rights; the Swedish, Dutch, and Danish governments; the US administration’s Lawyers’ Committee for Human Rights; the International Council on Human Rights Policy for NGOs; and several independent scholars)
141 See Evans, “Responsibility to Protect”, supra note 25 at 710.
142 See ICISS, Responsibility to Protect, supra note 9 at para. 4.17
143 See Welsh, “Responsibility to Protect”, supra note 9 at 371.
144 See ICISS, Responsibility to Protect, supra note 9 at xii.
145 Ibid. at paras. 1.1, 6.13, 6.20; see also Welsh, “Responsibility to Protect”, supra note 9 at 371.
146 Ibid. at paras. 1.6, 1.7.
of authority, but to make the Security Council work better than it has”.\textsuperscript{147} It thus sent the political message to the Security Council members that their failure to act could have “enduringly serious consequences for the stature and credibility of the UN itself”, if military intervention was successfully undertaken by interested states without its authorization.\textsuperscript{148} Moreover, it suggested that the five permanent members agree to a “‘code of conduct’ for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis”, in which they undertake that “in matters where [their] vital national interests were not involved, [they] would not use [their] veto to obstruct what would otherwise be a majority resolution”.\textsuperscript{149}

Despite this preference for Security Council authorization, the ICISS did not explicitly rule out that intervention could take place if the Security Council failed to take action, and indicated alternative procedures for these cases.\textsuperscript{150}

If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

I. consideration of the matter by the General Assembly in Emergency Special Session under the ‘Uniting for Peace’ procedure; and

II. action within area and jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.\textsuperscript{151}

Ultimately, the ICISS thus avoided a clear pronouncement on whether or not unauthorized interventions can be legitimate or even legal.\textsuperscript{152} While affirming the central role of the Security Council, it left open the possibility of the General Assembly, regional organizations or coalitions of states stepping in to assume the international community’s responsibility to protect.\textsuperscript{153}

\subsection*{2.3 Strategies for an Impact on International Politics}

By discussing military intervention as a legitimate means of discharging a responsibility to react to humanitarian crises, while setting out, at the same time, the conditions that such operations

\textsuperscript{147} Ibid. at para. 6.14.
\textsuperscript{148} Ibid. at para. 6.40; see also Evans, “Responsibility to Protect”, supra note 25 at 712.
\textsuperscript{149} Ibid. at para. 6.21 (“constructive abstention”).
\textsuperscript{150} See Welsh, “Responsibility to Protect”, supra note 9 at 371.
\textsuperscript{151} See ICISS, Responsibility to Protect, supra note 9 at xiii; see generally ICISS, Responsibility to Protect, supra note 9 at para. 6.28-6.35.
\textsuperscript{152} See Stahn, supra note 35 at 104.
\textsuperscript{153} Ibid.; Evans later placed a different emphasis, see Evans, “Responsibility to Protect”, supra note 25 at 711-712 (portraying the Security Council as the sole source of authority for legal intervention under the UN Charter, and stressing that the ICISS opted not to establish alternative legal bases).
have to meet, the ICISS addressed both the permissive and the prescriptive dimension of a norm of humanitarian intervention. The commissioners thus endeavored to define the scope for humanitarian arguments as a justification for the use of force, and to encourage, within these limits, military intervention in practice.\(^{154}\)

Academic commentators, such as namely Alex J. Bellamy and Jennifer M. Welsh, have inquired into the mechanisms through which the ICISS intended to ensure the practical impact of their normative framework. As these scholars have concluded, the central tool envisaged by the ICISS is the use of language.\(^ {155}\) On the one hand, the just cause thresholds and other precautionary principles are designed as a framework for prospective interveners to justify their decision, and for others to critically appraise these arguments.\(^ {156}\) The criteria for military intervention should thus, firstly, avert the abuse of humanitarian propositions for ulterior purposes.\(^ {157}\) At the same time, formulating the framework for military action in terms of a responsibility to react, rather than a right to intervene, the ICISS designed the just cause threshold as a measure for other UN members or the public to call for Security Council action in particular forms of humanitarian crises.\(^ {158}\) The Security Council members, in turn, would be compelled to justify their resistance, especially in the form of a veto, on the grounds of this framework.\(^ {159}\) They should consequently find it more difficult to avoid or even block action through the Security Council, which increases the likelihood of genuine collective intervention and reduces the risk of divisive unilateral intervention.\(^ {160}\) Welsh summarizes this strategy by the ICISS as the establishment of a “culture of justification”.\(^ {161}\)

While it has been acknowledged that this “use of the enabling and constraining functions of argument […] was an innovative attempt to move humanitarian intervention beyond the divisive and irresolvable struggle between defenders of human rights and advocates of sovereign inviolability”,\(^ {162}\) analysts have also identified inherent problems with this strategy.\(^ {163}\) First, the criteria formulated by the ICISS are no molding tool in which the facts of real-life situations

\(^{154}\) Cf. Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 146-148
\(^{155}\) Ibid.; Welsh, “Responsibility to Protect”, supra note 9 at 371-372.
\(^{156}\) See Bellamy, ibid. at 147.
\(^{157}\) Ibid.
\(^{158}\) Ibid. at 146.
\(^{159}\) Ibid. at 146-147.
\(^{160}\) Ibid. at 147-148.
\(^{162}\) See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 148.
\(^{163}\) Ibid. at 148-151; Welsh, “Responsibility to Protect”, supra note 9 at 372.
could mechanically be fit. Rather, the specific conditions that the particular case must meet are indeterminate and require an evaluation of the factual evidence, a process that is always affected by political influences.164 Moreover, the R2P framework is designed to serve two purposes that stand in an inherent tension: the promotion of intervention in “just” cases and the prevention of intervention where the requirements of a just “case” are not satisfied.165 The indeterminacy of the criteria makes it possible for states to employ the R2P language in either direction when applying it to a specific case, that is, to argue, for instance, that a certain emergency meets the just cause requirement and thus demands intervention, or, on the contrary, to uphold that the threshold is not met and intervention would therefore be abusive.166 In addition, to approach the need for humanitarian protection by requiring an explicit justification for inaction rests on the unproven presupposition that the force of domestic or international opinion will be sufficiently strong to persuade governments to take action.167 In fact, intervention politics since the early 1990s have not provided much support for this assumption.168

With a view to facilitating an actual impact of the report in practice, the ICISS suggested several follow-up processes within the framework of the UN:169 the affirmation of the basic principles of R2P by the General Assembly in a draft declaratory resolution;170 an agreement by the Security Council members on the principles concerning military humanitarian intervention;171 an agreement by the permanent five Security Council members “not to apply their veto, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support”;172 and, finally, consideration by the Secretary-General of how to advance the key elements of the report through his own action as well as that of the General Assembly and the Security Council.173 As the later analysis of the legal status of the R2P framework will show, these requests have been acted upon to different degrees only.174

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164 See Bellamy, ibid. at 148-149.
165 Ibid. at 148.
166 Ibid. at 148-149 (with reference to Security Council debates on Sudan).
167 See Welsh, “Responsibility to Protect”, supra note 9 at 372; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 150.
168 See Bellamy, ibid. at 150; see also Welsh, “Responsibility to Protect”, supra note 9 at 372.
169 See ICISS, Responsibility to Protect, supra note 9 at paras. 8.28-8.30; see also Welsh, “Responsibility to Protect”, supra note 9 at 373.
170 See ICISS, Responsibility to Protect, supra note 9 at para. 8.28.
171 Ibid. at para. 8.29.
172 Ibid.
173 Ibid. at para. 8.30.
174 See also Welsh, “Responsibility to Protect”, supra note 9 at 373 (suggesting that only the Secretary-General has shown a significant degree of activity).
2.4 Academic Reactions to the R2P Report

Amongst scholars, the ICISS report has caused an audible yet mixed response.\textsuperscript{175} While many commentators have been sympathetic to the concept of a responsibility to protect,\textsuperscript{176} others have reacted with indifference or even rejected it as either too revolutionary or too conservative.\textsuperscript{177}

On the positive end of the range of opinions, R2P has been praised for being a vital intellectual contribution to the contemporary debate of humanitarian intervention,\textsuperscript{178} and for describing the “international state of mind”.\textsuperscript{179} Moreover, R2P has been credited with the capacity to reduce, to a certain extent, the polemics of the debate,\textsuperscript{180} and bridge the divide struggle between defenders of state sovereignty and human rights,\textsuperscript{181} thus promoting the stalled debate about humanitarian intervention without abandoning the principle of state sovereignty.\textsuperscript{182} Accordingly, supporters of the concept have heralded it as a “path-breaking work”\textsuperscript{183} with the potential to significantly change this “notoriously difficult area of international law and politics”.\textsuperscript{184} For the most fervent enthusiasts, prominently represented by Secretary-General Kofi Annan, the R2P framework took away the last excuses for inaction and provides clearer guidance for action in cases where lives

\begin{footnotes}
\footnote{175}{See Hamilton, \textit{supra} note 35 at 291; Matthews, \textit{supra} note 16 at 146.}
\footnote{176}{See Weiss, “R2P After 9/11”, \textit{supra} note 59 at 743.}
\footnote{177}{See Hamilton, \textit{supra} note 35 at 291; see also the distinction between opponents, skeptics and optimists by MacFarlane, Thielking & Weiss, \textit{supra} note 35 at 979-981.}
\footnote{178}{See David M. Malone, edited by Richard B. Bilder, \textit{Book Review of Humanitarian Intervention: Ethical, Legal, and Political Dilemmas} by J.L. Holzgreve and Robert O. Keohane, eds., (2003) 97 A.J.L. 999 at 1001 (Lexis) (“By far the most influential intellectual contribution to contemporary debate over humanitarian intervention has been the incisive, highly substantive ICISS report [...]”); Joelle Tanguy, “Redefining Sovereignty and Intervention” (2003) 17:1 Ethics & International Affairs 141 at 141-142 (EBSCOhost) (“Steering clear of the paths that had paralyzed the debate on humanitarian intervention in the 1990s, the commission reframed its terms in an ingenious way”); cf. also generally Hamilton, \textit{supra} note 35 at 292; Matthews, \textit{supra} note 16 at 146 (both treating these statements as support for a position according to which R2P is “the most comprehensive approach to humanitarian intervention ever” proposed).}
\footnote{179}{See Anthony Lewis, “The challenge of global justice now” (2003) 132:1 Daedalus 5 at 8; see also generally Weiss, “R2P After 9/11”, \textit{supra} note 59 at 743, MacFarlane, Thielking & Weiss, \textit{supra} note 35 at 981.}
\footnote{181}{See Evans, “Responsibility to Protect”, \textit{supra} note 25 at 712-713 (citing UN Secretary-General Kofi Annan); but see also Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 148-151 (calling the use of argument an “innovative attempt” to move humanitarian intervention beyond this divide, but pointing to “at least three inherent problems with this approach”, \textit{ibid.} at 148).}
\footnote{182}{See Matthews, \textit{supra} note 16 at 140.}
\footnote{183}{See Weiss, \textit{Ideas}, \textit{supra} note 1 at 88; for Evans, who had co-chaired the ICISS, “[t]he evolution away from the discourse of humanitarian intervention, which had been so divisive, and toward the embrace of the new concept of the responsibility to protect has been a fascinating piece of intellectual history in its own right”, see “Responsibility to Protect”, \textit{supra} note 25 at 704.}
\footnote{184}{See Brunnée & Toope, \textit{supra} note 86 at 3.}
\end{footnotes}
can be saved. From the other end of the spectrum, even one of the harshest opponents of R2P, Mohammed Ayoob, admits that the concept has “considerable moral force”.

Even some of the commentators who exhibit basic support for the concept, however, also indicate potential inadequacies of R2P. On a conceptual level, Welsh, for instance, identifies both philosophical and legal challenges to the attempt to shift the terms of the debate from rights to responsibilities. More pragmatically, Jutta Brunnée and Stephen J. Toope contend that “at this stage it is not at all clear that the concept will fulfill its promise. It may be a mere rhetorical flourish.”

This assumption ultimately lies at the heart of many critiques that treat R2P with a mixture of indifference and skepticism. Their authors criticize the ICISS report for a lack of innovation and meaningful contribution to solving the fundamental problems of humanitarian intervention. For one commentator, R2P mainly revives criteria that had been formulated as early as in the fifth century as a part of Saint Augustine’s “just war” doctrine. Others affirm that the existing difficulties with the concept of humanitarian intervention will not be solved by simply changing the terminology to “responsibility to protect”. In particular, it is recognized that the political dynamics underlying decision-making in practice are still the same. Decisions will remain to be driven by considerations of realpolitik, and largely depend on factors such as

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185 See UN Secretary-General, Press Release SG/SM8125, “Secretary-General Addresses Peace Academy Seminar on the Responsibility to Protect” (15 February 2002); see also generally MacFarlane, Thielking & Weiss, supra note 35 at 981.
187 See Welsh, “Responsibility to Protect”, supra note 9 at 363 and more generally 367-369, 372.
188 See Brunnée & Toope, supra note 86 at 8.
189 For this categorization see e.g. MacFarlane, Thielking & Weiss, supra note 35 at 980; see also Hamilton, supra note 35 at 291-292.
190 See for a general overview MacFarlane, Thielking & Weiss, supra note 35 at 980-981; Hamilton, supra note 35 at 292.
191 See Walter Dorn, at Pugwash workshop, see Erika Simpson, Report on meeting, online: Address (Canadian Pugwash Group Workshop, 23 March 2002), in Erika Simpson, The Responsibility to Protect: A Seminar on the Report of the International Commission on Intervention and State Sovereignty, online: University of Western Ontario <http://publish.uwo.ca/~simpson/documents/Simpson.2002-The%20responsibility%20to%20protect.pdf> at 4; see generally MacFarlane, Thielking & Weiss, supra note 35 at 980; Hamilton, supra note 35 at 292; Evans concedes that the ICISS’s criteria for humanitarian intervention “have an explicit pedigree in Christian just war theory”, while emphasizing that “their themes resonate equally with other major world religions and intellectual traditions”, see “Responsibility to Protect”, supra note 25 at 710.
192 See Jennifer Welsh, Caroline Thielking & S. Neil MacFarlane, “The Responsibility to Protect: Assessing the report of the International Commission on Intervention and State Sovereignty” (2002) 57 Int’l J. 489 at 500 (HeinOnline); see also Newland, supra note 986 at 45; see generally MacFarlane, Thielking & Weiss, supra note 35 at 980; Hamilton, supra note 35 at 292; Matthews, supra note 16 at 146.
193 Weiss concedes this point against the backdrop of the aftermath of the terrorist attacks on September 11, 2001, and the 2005 World Summit, see Weiss, “R2P After 9/11”, supra note 59 at 758.
194 See generally Hamilton, supra note 35 at 291; Matthews, supra note 16 at 146.
political will and operational capacity.\textsuperscript{195} Especially the ICISS’s preference for Security Council authorized action has been criticized as disappointing and lagging behind more recent trends in the international legal system.\textsuperscript{196}

Finally, another group of commentators has criticized the ICISS report from a different angle, focussing not on a perceived lack of innovation but, right to the contrary, on the dangers associated with innovative aspects of the concept.\textsuperscript{197} In their eyes, the report is “dangerously disrespectful of current international law”.\textsuperscript{198} These fears are not even alleviated by the ICISS’s explicit affirmation that contemporary customary international law does not legalize unilateral humanitarian intervention.\textsuperscript{199} Rather, one scholar insists that, implicitly, “their pro-intervention analysis is based on the assumption that such a law does exist.”\textsuperscript{200} Others attack the ICISS for reaching conclusions that are biased in favor of the powerful, and particularly the Western, states, or at least present a potential for abuse.\textsuperscript{201} For David Chandler, for instance, the commission ultimately abets to “an elite group of Western powers sitting in judgment over their own actions.”\textsuperscript{202} This line of criticism has culminated in the increasingly prominent concern that the concept might be used as a justification for neo-imperialist interventions.\textsuperscript{203} For others, finally, the ICISS has by and large endorsed a liberal internationalist framework that is not reflective of a universal consensus, and may therefore not be capable of significantly influencing the international political practice on a global level.\textsuperscript{204}

\textsuperscript{195} See generally MacFarlane, Thielking & Weiss, supra note 35 at 980; Hamilton, supra note 35 at 292.
\textsuperscript{197} See generally Hamilton, supra note 35 at 292; Matthews, supra note 16 at 146.
\textsuperscript{200} See Vesel, supra note 199 18-19; see generally Hamilton, supra note 35 at 292.
\textsuperscript{201} See generally Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 147.
\textsuperscript{202} See David Chandler, From Kosovo to Kabul and Beyond: Human Rights and International Intervention, new ed. (London: Pluto, 2006) at 135; see generally Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 147.
\textsuperscript{204} See David Ryan, Book Review of The Responsibility to Protect by International Commission on Intervention and State Sovereignty, (2002) 78:4 International Affairs 890 at 891 (Wiley InterScience); see generally MacFarlane, Thielking & Weiss, supra note 35 at 981.
2.5 The International Political Discourse on R2P

In the community of states, the R2P report has, indeed, excited anything but a uniformly positive reaction.205 While some states, notably Canada, Germany and the UK, at least initially welcomed the initiative,206 other states were more equivocal, or utterly rejected the concept.207

The divide of opinions has become apparent both in the international community at large and within the Security Council.208 The permanent members of the Council reacted predominantly with skepticism.209 China had voiced its rejection of the concept of humanitarian intervention already during the consultation process of the ICISS, when the commission held its roundtable consultation in Beijing in June 2001,210 and consistently appeared to disapprove of the outcome document as well.211 Given this opposition at the outset, it has been regarded as a “significant breakthrough for the growing acceptance of the norm” when China later endorsed the responsibility to protect in an official paper on UN reforms.212 Similarly, the US had, from the inception, opposed the idea of criteria proposed by the ICISS, out of fear that it would be compelled to engage military forces in situations where its national interests were not at stake, while, conversely, being constrained to intervene in situations that it deemed appropriate cases for action.213 The US government’s initial reactions thus gave little reason to believe that it would subscribe to the substance of the report or even support its further development.214 Nevertheless, R2P has subsequently been acknowledged by a task force that had been

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205 Cf. e.g. the overview by Bellamy, “Whither the Responsibility to Protect”, supra note 63 at, 151-152; MacFarlane, Thielking & Weiss, supra note 35 at 981-983.
206 See Bellamy, ibid. at 151 (with a list of other advocates: Argentina, Australia, Colombia, Croatia, Ireland, South Korea, New Zealand, Norway, Peru, Rwanda, Sweden, and Tanzania).
208 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 151-152.
209 Ibid. at 151 (“with the partial exception of the U.K.”).
211 See MacFarlane, Thielking & Weiss, supra note 35 at 982; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 151; also note that the ICISS comprised no Chinese member that could have promoted a view from China in the drafting process; see MacFarlane, Thielking & Weiss, supra note 35 at 982.
212 See Weiss, Ideas, supra note 1 at 116.
213 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 151.
214 See MacFarlane, Thielking & Weiss, supra note 35 at 983; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 151.
commissioned by the US Congress in December 2004. The Russian response to the ICISS report, for comparison, has been described as “lukewarm”. Indifferent or hostile reactions emanating from the country have been ascribed to “the feeling that Moscow will not be in a position to influence significantly the humanitarian intervention agenda anyway”, or the concern that a pro-interventionist rule could be used to justify action over the humanitarian situation in Chechnya. At least the rhetoric of the report has, however, found the support of the Russian government, coupled with a reiteration of the Security Council as the only legitimate body for authorizing intervention. The most favorable, while not unqualified, responses to R2P in the Security Council came from France and the UK, who were still concerned, however, that the establishment of criteria for humanitarian intervention would not necessarily produce the required political will.

Outside the Security Council, the Non-Aligned Movement (NAM), consisting of currently 118 members and thus arguably constituting the most representative group aside from the UN, has noted “similarities between the new expression ‘responsibility to protect’ and ‘humanitarian intervention’”, a right which it explicitly rejects. More equivocally, the Group of 77, when jointly commenting on the Secretary-General’s report “In Larger Freedom”, did not address the issue of a responsibility to protect. Still, a continued preoccupation with the principles of state sovereignty and non-interference is visible particularly in East Asia. Finally, the majority of

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216 See MacFarlane, Thielking & Weiss, supra note 35 at 982.
217 Ibid.
220 See Non-Aligned Movement, Secretariat, NAM Background and General Information: Members of NAM, online: Non-Aligned Movement <http://espana.cubanoal.cu/ingles/index.html>; Weiss, Ideas, supra note 1 at 121.
221 See NAM, Statement on the draft outcome document, supra note 207; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 152.
222 See Group of 77 and China, Statement on the Report of the Secretary-General entitled “In Larger Freedom: Towards Development, Security and Human Rights For All” (A/59/2005), delivered by H.E. Ambassador Stafford Neil, Permanent Representative of Jamaica to the United Nations and Chairman of the Group of 77 (6 April 2005), online: Group of 77 <http://www.g77.org/Speeches/040605.htm>; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 152 (suggesting that the G77 nevertheless called for a revision of the report with a view to a stronger emphasis on the principles of territorial integrity and sovereignty).
223 See MacFarlane, Thielking & Weiss, supra note 35 at 982-983.
African states refrained from making any individual comments on the responsibility to protect at the 2005 World Summit.\textsuperscript{224}

A favorable response to the R2P came, by contrast, from the Americas.\textsuperscript{225} Ultimately, it was mainly states from Latin-America, the Western hemisphere, and sub-Saharan Africa on whose support the proponents of R2P could count at the UN World Summit in 2005.\textsuperscript{226}

2.6 Academic Commentary on the Status of R2P in Contemporary International Law

As mixed as the reactions to the ICISS report may have been, this has not kept its language and framework from becoming firmly entrenched in the international discourse on humanitarian intervention.\textsuperscript{227} Whether the responsibility to protect has also been endorsed by the international legal system has, however, been controversial among academic commentators.

The ICISS itself explicitly denied in its report the existence of a sufficiently strong basis for a customary international norm on the responsibility to protect.\textsuperscript{228} The commissioners found that “it would be quite premature to make any claim about the existence now of such a rule”.\textsuperscript{229} At the same time, they suggested that the practice of states, regional organizations and the Security Council supported an “emerging guiding principle” of the responsibility to protect that may, if further precedents are set, eventually crystallize into a norm of customary international law.\textsuperscript{230} This assessment of R2P as being an emerging international norm has later been called “rather heroic” by the commission’s co-chair, Gareth Evans.\textsuperscript{231}

\textsuperscript{224} See Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 162 (noting that only South Africa and Tanzania publicly endorsed the ICISS proposal, whereas Algeria and Egypt directly opposed it).

\textsuperscript{225} See Fund For Peace, \textit{Regional Responses to Internal War: Perspectives from the Americas on Military Intervention}, vol. 3 (June 2002), online: Fund For Peace <http://www.fundforpeace.org/publications/reports/ffpr-americas_conference.pdf> at 4-5 [Fund For Peace, \textit{Americas}]; MacFarlane, Thielking & Weiss, \textit{supra} note 35 at 982.

\textsuperscript{226} See Evans, “Responsibility to Protect”, \textit{supra} note 25 at 715; cf. also MacFarlane, Thielking & Weiss, \textit{supra} note 35 at 981-982 (noting that, while “[g]eneral statements regarding the responses of individual regions are problematic […] Western, and many sub-Saharan African and Latin American countries have largely welcomed the report”).

\textsuperscript{227} See Hamilton, \textit{supra} note 35 at 293; Matthews, \textit{supra} note 16 at 146-147; see also Philip Cunliffe, “Sovereignty and the politics of responsibility” in Christopher Bickerton, Philip Cunliffe & Alexander Gourevitch, eds., \textit{Politics Without Sovereignty: A Critique of Contemporary International Relations} (Abingdon: University College London Press, 2007) 39 at 41 (opposing the R2P concept as such but admitting: “[The ICISS Report] has gained quick acceptance as a promising solution to the bitter ‘clash of rights’ of the 1990s. This clash pitted the rights of sovereign states against those claiming a ‘right to intervention’ to defend the human rights of individuals within states. The dust has settled on this battle, and the doctrine of sovereignty [as] responsibility securely holds the terrain.”)

\textsuperscript{228} See ICISS, \textit{Responsibility to Protect}, \textit{supra} note 9 at para. 2.24; see also Matthews, \textit{supra} note 16 at 147.

\textsuperscript{229} See ICISS, \textit{ibid.} at para. 6.17; see also Matthews, \textit{supra} note 16 at 147.

\textsuperscript{230} See ICISS, \textit{ibid.} at paras. 2.24, 6.17; see also Matthews, \textit{supra} note 16 at 147.

\textsuperscript{231} See Evans, “Responsibility to Protect”, \textit{supra} note 25 at 713.
Since then, the concept has received varying degrees of affirmation from different actors, including the General Assembly and the Security Council. Under the dominant positivist doctrine of international law, such precedents can support the emergence of a norm as customary international law. Accordingly, the number of academics who have commented favorably on the status of R2P in international law has been growing, many of them subscribing now to the ICISS’s qualification of the principle as an emerging norm of international law. This category, however, still comprises many shades of gray, and both more optimistic and pessimistic views have been articulated.

The one extreme position has been defended by David Aronofsky, who advocates the existence of a “legal duty and responsibility on all nations, as well as the Security Council, to protect [the victims of genocide, war crimes and crimes against humanity] and prevent such atrocities.” To support this claim, Aronofsky points to several international conventions on human rights and humanitarian law setting out rights that would “[w]ithout effective military intervention […] become meaningless”, as well as to General Assembly and Security Council resolutions. In his opinion, state sovereignty is no obstacle to humanitarian intervention, collective or unilateral, as “states effectively waive their national sovereignty when they commit, facilitate the commission of, or fail to protect their populations against atrocities.”

A number of other commentators do not go as far as to claim that international law currently imposes a legal responsibility to protect, or grants a right of unilateral humanitarian intervention, but rather characterize R2P as a concept in the process of emerging as a rule of customary

232 See UN General Assembly, 2005 World Summit Outcome, UN GAOR, 60th Sess., 8th Plen. Mtg., UN Doc. A/Res/60/1 (16 September 2005) at paras. 138-139 [UN General Assembly, World Summit Outcome]; UN Security Council, Resolution 1674 (2006), UN SCOR, 61st Year, 5430th Mtg., UN Doc. S/Res/1674 (28 April 2006); see also MacFarlane, Thielking & Weiss, supra note 35 at 989; Matthews, supra note 16 at 146-147.

233 See Part 3.5.2, above; see e.g. Matthews, supra note 16 at 147: “the General Assembly and Security Council resolutions have undoubtedly enhanced the force of R2P, moving the principle further along the continuum toward binding law.”

234 See Evans, “Responsibility to Protect”, supra note 25 at 713.

235 Ibid. (“[a number of academic commentators and international lawyers] were prepared to accept, to a greater or lesser extent, the [...] assessment of the responsibility to protect as an emerging international norm that might, in due course, become accepted as customary international law” [emphasis added]).


237 Ibid. at 317-318; but see Wheeler & Morris, supra note 43 at 446 (arguing against the recourse to force for the enforcement of humanitarian values protected by the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide: “it was clearly understood that [these human rights instruments] did not provide a basis for states to use force to uphold these standards in the event that particular governments failed to live up to them.”)

238 See Aronofsky, ibid.
international law. At a closer reading of their assessments, these authors exhibit more or less positive or negative standpoints on the concept and its previous or future development. Weiss and Evans, for instance, point to the speed of the development of the idea since its publication, and underline the force that the responsibility to protect already has, even though it may legally still only be a norm in emergence: Weiss asserts that “R2P [...] has broken speed records in the international normative arena", moving faster than any other idea, except possibly the prevention of genocide after the Second World War. He sees us at the “dawn of a new normative era” and qualifies humanitarian intervention at least as a “serious policy option”. Similarly, Evans points to “the extraordinary progress [that] has been made [...] within a remarkably short period of time [...]”, and considers R2P as “a broadly accepted international norm”. With regard to the prospects for the future crystallization of the concept as a legal norm, Rebecca J. Hamilton and Max W. Matthews paint a rather bright picture, suggesting that R2P has received “increasingly broad support [...] that bodes well for the future emergence of an international norm”, and that it might achieve the status of binding international law “in the foreseeable future”.

More skeptical prognoses may be exemplified by the assessment by Brunnée and Toope, who contend that still “[m]uch work remains to be done before [the responsibility to protect] can plausibly be considered a binding norm of international law.” Their argument rests on the recognition that none of the documents in which the R2P concept has been included so far was of binding normative force, and that international practice contains “worrisome” examples, notably in Darfur, of states “evad[ing] effective action to stop what is at least ethnic cleansing and may

239 See e.g. Maya Brehm, “The Arms Trade and States’ Duty to Ensure Respect for Humanitarian and Human Rights Law” (2008) 12:3 J. Confl. & Sec. L. 359 at 387 (Oxford University Press); Joyner, supra note 2 at 704, 716; Hamilton, supra note 35 at 297; Weiss, “R2P After 9/11”, supra note 59 at 743; Evans, “Responsibility to Protect”, supra note 25 at 704; Brunnée & Toope, supra note 86 at 713; Breau, “Peacekeeping”, supra note 9 at 445-446; Matthews, supra note 16 at 147-148; Wheeler & Morris, supra note 43 at 458.

240 See Weiss, Ideas, supra note 1 at 116.

241 Ibid. at 5; Weiss, “R2P After 9/11”, supra note 59 at 741

242 See Weiss, “R2P After 9/11”, ibid. at 743

243 See Weiss, Ideas, supra note 1 at 52, 118 (note, however, that Weiss deplores the repeated failure to intervene in practice, the “dusk of the bullish days of humanitarian intervention”, see “R2P After 9/11”, supra note 59 at 743, which “mocks the value of the emerging R2P norm”, ibid. at 759.

244 See Evans, “Responsibility to Protect”, supra note 25 at 722.

245 Ibid. at 715.

246 See Hamilton, supra note 35 at 297.

247 See Matthews, supra note 16 at 137.

248 See Brunnée & Toope, supra note 86 at 13.
amount to genocide".249 For Nicholas J. Wheeler and Justin Morris, even intervention authorized
by the Security Council is only an “embryonic norm” yet.250

Such skepticism about the future of R2P has been growing in the aftermath of the US-led
invasion in Iraq in 2003. Several commentators have observed that this war has had a negative
impact on the normative development of the concept.251 Notably proponents of R2P, like Evans,
are concerned that the misuse of humanitarian arguments in Iraq has been a significant set-back
for the principle, as it lost the momentum that it had been gaining in the international debate and
was “once again struggling for its acceptance”.252 Weiss notes that “humanitarian intervention is
an even harder sell these days”,253 with opposition to R2P coming not only from “the usual
suspects”, but also from states that earlier would have been sympathetic to the concept.254 At the
same time, he argues, “the sloppy and disingenuous use of the ‘h word’ has played into the hands
of those Third World countries that wish to slow or reverse normative progress”.255 Indeed, some
authors see a risk that, rather than the R2P concept moving further towards recognition as
international law, the status that it has reached by now may erode.256 According to this skeptical
point of view, the war in Iraq has “grievously threatened” R2P.257

At the far end of this range of academic opinions are those who either reject even the
classification of R2P, or parts of it, as emerging customary law,258 or simply ignore the
concept.259 A very differentiated analysis is proposed by Carsten Stahn, who takes a closer look
at the alleged emergence of R2P from a positivist perspective, and argues that the concept in fact
“encompasses a spectrum of different normative propositions that vary considerably in their

249 See Brunnée & Toope, supra note 86 at 13.
250 See Wheeler & Morris, supra note 43 at 458.
251 See e.g. Wheeler & Morris, supra note 43 at 459-460
252 See Gareth Evans, “When is it Right to Fight?” (2004) 46:3 Survival 59 at 70-71 (Informaworld Journals); see
also Wheeler & Morris, supra note 43 at 457; Welsh, “Responsibility to Protect”, supra note 9 at 374.
253 See Weiss, “R2P After 9/11”, supra note 59 at 753.
254 Ibid at 751.
255 Ibid. at 758.
256 See Alex J. Bellamy, “Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian
Intervention after Iraq” (2005) 19:2 Ethics & International Affairs 31 at 32-33 (EBSCOhost) [Bellamy, “Trojan
257 See MacFarlane, Thielking & Weiss, supra note 35 at 978.
258 See Stahn, supra note 35, especially at 110
259 See Tarcisio Gazzini, The changing rules on the use of force in international law (Manchester: Manchester
University Press, 2005) at 174-177 (it should be noted that this work was published before the outcome document of
the UN World Summit was released; while Gazzini uses at least one reference that, in turn, discusses R2P, he fails
to mention this concept, but unambiguously states that “[t]he actual evidence […] that [a humanitarian intervention
exception to the ban on the use of force] has emerged or is emerging is clearly insufficient”, ibid. at 175, and, in the
context of suggestions by the British government, that “setting criteria for the exercise of such a right [to
humanitarian intervention] may be a futile exercise from a strictly normative point of view”, ibid. at 178).
status and degree of legal support".26° The characterization as an “emerging norm” is, in his view, both overoptimistic and overpessimistic, since “some of the features of the concept are actually well embedded in contemporary international law, while others are so innovative that it may be premature to speak of a crystallizing practice.”261 The basis for this contention is his analysis that “[m]any of the elements of the concept of responsibility to protect are [...] rooted in a broader ideological or legal tradition”, while others are “so innovative [...] that it is difficult to ascribe them to the existing acquis of international law.”262 In conclusion, for Stahn, the term “responsibility to protect” is “a political catchword rather than a legal norm”, comprising a variety of propositions, the normative status of which remains uncertain.263

2.7 Outlook

In the rest of this thesis, I will endeavor to assess the current legal status of the different elements of the R2P concept. Unlike Stahn’s, however, my analysis will not be based on a positivist understanding of international law from the outset. Rather, the next chapter will be a detailed discussion of different legal theories and their relevance for the law of humanitarian intervention. The conclusions of that chapter will provide the methodological foundation for the subsequent legal analysis.

260 See Stahn, supra note 35 at 100, 102.
261 Ibid. at 110.
262 Ibid. at 115.
263 Ibid. at 120.
Before the substantive question will be answered of what legal status the different components of the R2P framework enjoy at present, it is appropriate, at first, to elaborate on the method that will be used for this inquiry.264 As Oppenheim explained, nothing less than a century ago, it is often difficult to expose the norms that are recognized by the international legal system as existing rules of law, and it is for this reason that "an inquiry into [...] the method of the science of international law is necessary."265 Many scholarly publications, including a large number of commentaries on humanitarian intervention and the responsibility to protect, rely on certain presuppositions and conceptions that directly influence the outcome of their analyses, but fail to explicitly state these foundations.266

In this chapter, I undertake to define the procedure through which I will determine the legal status of the different R2P elements in current international law. Importantly, as the rest of the chapter will show, this methodological decision is anything but a mere formality. On the one hand, with a view to the conclusions reached through the application of a certain method, it has already been noted that this outcome may largely be a function of the respective methodology. On the other hand, the methodology itself may be evidence of a broader concept of the nature of international law. Steven R. Ratner and Anne-Marie Slaughter point out that legal methods are often conceptually linked to theories of international law: broadly, a "legal method" can be understood as the way in which an abstract "conceptual apparatus or framework – a theory of international law – [is applied to] concrete problems faced in the international community".267 For this reason, I will subsequently discuss conflicting legal theories, as they have an impact on the required legal method and can lead to diverging conclusions on the law of humanitarian intervention and the responsibility to protect.

Today, the dominant theory of international law in general is legal positivism, and it appears that most scholars discussing R2P have subscribed to the assumptions of this concept, analyzing evidence of the positivist sources of treaties and custom, and avoiding explicit references to

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266 Cf. Ratner & Slaughter, supra note 264 at 2.
267 Ibid. at 3-4 (noting, however, that not every legal theory necessarily has a methodological counterpart and that, conversely, an author may choose to apply different legal theories in one legal method).
moral considerations. I will therefore begin with an outline of the basic suppositions of a positivist theory of international law and an indication of some of its flaws. Conscious of the shortcomings of legal positivism, I will then turn to the early-modern concept of international law as natural law and indicate some of the central reasons for its decline. Finally, I will consider two recent approaches, that are based on a positivist doctrine of international law but respond to its shortcomings by having recourse to concepts of ethics and morality.

On the basis of this survey, I will then define the method through which I will subsequently assess the legal status of R2P. It will be argued that a strictly positivist approach in its traditional sense is inadequate to answer this question. To the necessary extent, I will therefore suggest and apply modifications to the positivist methodology. These amendments are closely informed by the works by Fernando R. Tesón and Brian D. Lepard, and require the elaboration of an ethical theory of humanitarian intervention and a responsibility for human protection, which will be the subject of the next chapter.

3.1 The Dominant Theory: Legal Positivism and the Law of Humanitarian Intervention

Legal positivism emerged in the arena of international legal discourse during the eighteenth and nineteenth centuries. By the nineteenth and early twentieth century, it had replaced natural law theory as the leading doctrine in international legal scholarship. Today, legal positivism is the dominant theory of international law, and "the lingua franca of most international lawyers, especially in continental Europe". As Tesón critically ascertains, "[p]ositivism reigns in international law in a way in which it does not in other legal disciplines."

Given this dominance of a positivist understanding of international law, I will begin my elaboration of a theoretical and methodological framework for the legal analysis of R2P with an outline of this legal theory and its doctrine on the sources of international law. I will moreover indicate conceptual and operational difficulties that a strictly positivist approach to international law faces. This discussion will provide the background for the subsequent inquiry into

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268 See Terry Nardin, "The Moral Basis of Humanitarian Intervention" (2002) 16:1 Ethics & International Affairs 57 at 63 (EBSCOhost) [Nardin, "Humanitarian Intervention"].
270 See Tesón, Humanitarian Intervention, supra note 45 at 314.
271 See Ratner & Slaughter, supra note 264 at 15.
272 See Tesón, Humanitarian Intervention, supra note 45 at 314.
alternative approaches to international law in general and to the law of humanitarian intervention in particular.

3.1.1 Conceptual Basics of Legal Positivism

Legal positivists understand international law as a “positive science” that is based on “hard facts”. According to this understanding, legal propositions ought to be proven inductively on the basis of objective standards and verifiable indicators. While legal positivism appears in different versions, its “purer forms” can be characterized by the “core supposition” that law is created only through the ‘laying down’ of legal rules by a sovereign entity, at a discrete point in history, and that these rules are effective, even if they are “unjust when measured against some other, moral (or natural law) standard.”

More specifically, three fundamental principles can be derived from this supposition: firstly, as a strictly positivist view accords the required sovereignty to lay down binding rules on the international level only to states, they are the sole source from which international law can emanate. International law is thus, in principle, created voluntarily by the states themselves and based on their consent or agreement; no source other than the will of states can create international legal norms. In this sense, the agreement between states becomes the international law equivalent to legislation on the domestic level. This doctrine, according to which law is dependent on the consent of states, can be referred to as “voluntarism” or “consensualism”. Voluntarism may be seen as following directly from the conception of state sovereignty, and receives support from academic scholars and governments. Moreover, it has found explicit approval in international jurisprudence, namely in the Lotus decision of the Permanent Court of International Justice (PCIJ). As state consent was established to be the

276 See See Louis Henkin, “International Law: Politics, Values and Functions: General Course on Public International Law” (1990) 216 Rec. des Cours 9 at 45, 46 (also noting that for certain instances of international law-creation, particularly for customary law, “assent” or “non-dissent” would be more accurate terms than “consent”, ibid.); see also Currie, Forcete & Oosterveld, supra note 269 at 12.
277 See Nardin, “Humanitarian Intervention”, supra note 268 at 64.
278 See Schachter, “International Law”, supra note 273 at 32.
279 Ibid. at 32-33.
only formal source from which positive international law could emerge, positivism was practically reduced to mere state voluntarism.\(^281\) The principle that international law is entirely dependent upon the voluntary adherence of states to certain rules\(^282\) entails consequences for the practice of determining its content. Based on their underlying theoretical foundation, positivists would have to thoroughly analyze the actual behavior of states rather than to engage in "speculative inquiries into the nature of justice or teleology."\(^283\)

The second principle derived from the core concept of a pure form of positivism is that ethical considerations play no role in determining the content of international law.\(^284\) Moreover, according to the so-called separability thesis, law, or "law as it is", is independent from morality, or "law as it ought to be", in that legal norms do not have to coincide with moral norms or to be "just or morally good".\(^285\) The legitimacy of international legal norms that have been identified through an analysis of the behavior of states therefore cannot be challenged on the basis of non-positivist conceptions of justice.\(^286\)

Finally, unless states voluntarily agree to international legal norms, they remain at liberty to conduct themselves in whatever way they please.\(^287\) As the PCIJ stated in *Lotus*, "[r]estrictions upon the independence of states cannot [...] be presumed."\(^288\)

### 3.1.2 The Positivist Doctrine of Sources

The concept that international law is dependent on the consent of the states applies both to the international legal system as such and to its individual norms.\(^289\) Pursuant to the positivist principles outlined above, specific norms obtain their binding force as international law not because of their content, but due to their enactment through the accepted procedure of state

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\(^{281}\) See Ago, *supra* note 275 at 1073.

\(^{282}\) See Currie, Forcese & Oosterveld, *supra* note 269 at 12.


\(^{286}\) Cf Currie, Forcese & Oosterveld, *supra* note 269 at 15.

\(^{287}\) See Ratner & Slaughter, *supra* note 264 at 5.

\(^{288}\) See *Lotus*, *supra* note 280 at 18.

The central requirement is that the will of the states has been manifested in observable "positive" facts. 291

According to a widely accepted moderate form of positivism, such consent need not be declared expressly in treaties. 292 Rather, the positivist doctrine of sources recognizes different processes that reflect, though to varying degrees, the consent of the states to a particular norm and can thus contribute to the creation of international law. 293 Article 38(1) of the Statute of the International Court of Justice, while phrased in terms of the function of the Court, 294 is commonly regarded as an authoritative statement of these sources of international law: 295

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This statement, however, should not be treated as a straightforward enumeration of the "sources" of international law. 296 Rather, the individual sources require further elaboration, which can be approached from a more conceptual and a more practical viewpoint.

On a conceptual level, a distinction may be made between "formal" and "material" sources of international law. 297 Formal sources are the "legal procedures and methods for the creation of rules of general application which are legally binding on the addressees". 298 Material sources, by contrast, "provide evidence of the existence of rules which, when proved, have the status of

290 Cf. Holzgrefe, supra note 284 at 35-36.
291 See Schachter, "International Law", supra note 273 at 60.
292 See Currie, Forcete & Oosterveld, supra note 269 at 12.
293 See Henkin, supra note 276 at 47-51, 61-62 (elaborating on the differing degrees to which treaties, customary law and general principles are rooted in state consent); see also Schachter, "International Law", supra note 273 at 60.
295 See Restatement (Third), supra note 289, § 102, reporter's note 1; see also Brownlie, Principles, supra note 294 at 5.
296 See Brownlie, ibid.
297 Ibid. (but see also for doubts about the viability of this distinction in the context of international relations, ibid. at 3).
298 Ibid. at 3.
legally binding rules of general application.” In other terms, within the elements enumerated in Article 38(1) of the Statute of the Court, the actual sources, as the ways in which rules or principles become law, need to be distinguished from mere evidence or opinion-evidence as the means of proving that a rule has achieved the status of international law in one of these ways.

In an attempt to identify formal sources on the international level, the positivist principle that rules of general application are dependent on the general consent of states can be regarded as an equivalent or at least as a substitute for the “constitutional machinery of law-making” that exists on the domestic level of states. Formal sources of international law are then notably international custom, Article 38(1)(b), and general principles of law, Article 38(1)(c). International conventions, or treaties, Article 38(1)(a), also constitute a practically important source that, however, primarily creates mutual obligations of the parties rather than rules of general application. Article 38(1)(d), by referring to “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”, by contrast, mentions two material sources.

In a practical sense, treaties and custom are the two principal ways for the creation of international law. General principles, by contrast, play only the role of a secondary source of international law. This disparity in their practical relevance is consistent with the hierarchical relation between the different sources: while treaty law and customary international law enjoy the same authority as sources of international law, general principles are recognized as a secondary source only. They may merely serve as “supplementary rules of international law” in special circumstances, namely to temporarily fill gaps in the international legal system “that

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299 Ibid.
300 See Restatement (Third), supra note 289, § 102 reporters’ note 1, § 103 comment a; see also Henkin, supra note 276 at 46.
301 See Brownlie, Principles, supra note 294 at 3 (in the realm of international law, Brownlie criticizes the use of the term “formal source” as “awkward and misleading”, since it puts the reader “in mind of the constitutional machinery of law-making which exists within states” but not on the international level; consequently, he argues that “in a sense ‘formal sources’ do not exist in international law”, ibid.).
302 Ibid. at 5.
303 Ibid.
304 [emphasis added]
305 See Brownlie, Principles, supra note 294 at 5.
306 See Henkin, supra note 276 at 47; Restatement (Third), supra note 289 at 18; Antonio Cassese, International Law, 2nd ed. (Oxford: Oxford University Press, 2005) at 153 [Cassese, International Law].
307 See Henkin, supra note 276 at 61.
308 Ibid. at 47; Restatement (Third), supra note 289, § 102 comment j; Cassese, International Law, supra note 306 at 154.
309 See Restatement (Third), ibid., § 102 comment l, reporters’ note 7; see also Henkin, supra note 276 at 61.
310 Ibid., § 102 comment l, § 102(4).
would, if not filled, greatly impede the utility of international law as a sensible dispute-resolution system." 311

The central element of the study of international law or an area thereof becomes, as Brownlie puts it, "the variety of material sources, the all-important evidences of the existence of consensus among states concerning particular rules or practices." 312 Moral and ethical considerations, by contrast and in compliance with the positivist separability thesis, have to play no role in the determination of international law. 313

3.1.3 Conceptual and Operational Difficulties in the Doctrine of Sources

The positivist doctrine of legal sources confronts, however, various challenges. In part, these difficulties are of an operational nature and arise in the application of the doctrine to particular issues for international law, while other, conceptual-jurisprudential questions concern the coherence of the positivist theory as such. 314 The number and gravity of concerns, moreover, varies from source to source.

3.1.3.1 Treaties

Conventional law, i.e. law created in treaties, 315 can arise from any binding international agreement regardless of its form. 316 The agreement itself serves, in principle, as the required verifiable indicator of state consent. 317 Rules on the creation, application and termination of international agreements have been codified in the 1969 Vienna Convention on the Law of Treaties, which is itself an international treaty. 318

Treaty law generally raises only few jurisprudential problems. 319 Yet two difficulties with the doctrine of conventional law should be noted at this point. Firstly, the determination of precise international rules in treaty law raises problems that may ultimately have the potential to undermine important foundations of legal positivism, namely the understanding of international
law as a positive science that rests on the observation of verifiable “hard facts”, and the rejection of ethical or moral considerations as relevant factors in this analysis. The theory of treaty interpretation is put forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which can be considered as codifying the customary rules of treaty interpretation. In keeping with these provisions and the positivist approach to international law, evidence for specific norms of conventional law is in practice sought in the text of the agreement and possibly supplementary means of interpretation. The Vienna Convention demands that this approach be textual, that is, primarily concerned with the terms of the agreement itself. Accordingly, it admits, for instance, the records of the treaty negotiations, the travaux préparatoires, only as a supplementary means. As a part of this textual approach, however, the purpose of an agreement shall be taken into account. Yet, such interpretations may be difficult and make the determination of the content of international treaty law less straightforward in practice than the doctrine may suggest. The traditional positivist method with its rejection of ethical considerations can be inadequate for a purposive interpretation. In this sense, Tesón points out that “substantive moral assumptions” are required for the determination of the relevant purpose of any legal instrument, and particularly of the UN Charter with its several potentially conflicting purposes set out in Article 1.

Moreover, a dilemma for the fundamental positivist principle of state consent is revealed by an inquiry into the underlying rationale for the binding nature of treaties. The binding force of treaties, including the Vienna Convention on the Law of Treaties, can ultimately only be explained by recourse to the customary principle that agreements must be observed (pacta sunt servanda). To avoid circularity, this principle has, however, in turn been said to be rooted not in the consent of states, but in natural law, that is, the very concept in opposition to which

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321 See Tesón, Humanitarian Intervention, supra note 45 at 149.
322 See Restatement (Third), supra note 289, § 103 comment a.
323 See Brian D. Lepard, Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions (University Park, PA: Pennsylvania State University, 2002) at 113-114.
324 See Art. 32 Vienna Convention; see also Lepard, supra note 323 at 113-114.
325 See Article 31(1) Vienna Convention.
327 See Tesón, Humanitarian Intervention, supra note 45 at 315.
328 See ibid. at 151, 167.
329 See Henkin, supra note 276 at 47; Restatement (Third), supra note 289 at 18.
330 See Henkin, ibid.
legal positivism emerged, and which specifically did not ground international law in a consensual basis.

3.1.3.2 Customary International Law

No universally agreed definition exists for the concept of customary law. The definition in Article 38(1)(b) of the Statute of the Court, which speaks of “international custom, as evidence of a general practice accepted as law”, is considered as most authoritative but not uncontroversial. In more detail, the Restatement of the Law, Third, Foreign Relations Law of the United States, which is published by the American Law Institute and recognized as an influential statement on international law, provides that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” Importantly, therefore, the legal term “custom” requires that a usage be regarded as an obligatory one by those who follow it. It must be expected that, in the case of a departure from this usage, “some form of sanction will probably, or at any rate ought to, fall on the transgressor.” From these endeavors of a definition, two requirements for the existence of customary international law can be deduced: a “widespread and uniform state practice” and an “accompanying opinio juris, or a belief on the part of the states that their practice is mandatory as a matter of law”. Methodologically, and in keeping with the understanding of international law as a positive science, it requires in theory the proof of legal propositions through a detailed examination of the practice of states and their related legal convictions. Yet, in Louis Henkin’s words, the notion of customary international law is even “more complex, more mysterious, more troublesome” than treaty law. The concept is fraught both with conceptual-jurisprudential and operational problems.

331 See Restatement (Third), supra note 289, § 102 reporters’ note 2.
332 See Cassese, International Law, supra note 306 at 156.
333 See Currie, Forcсе & Oosterveld, supra note 269 at 133.
334 See Restatement (Third), supra note 289, §102(2) (while the reporters admit that no definition of customary law is universally agreed, they consider the essence of this definition as widely accepted, ibid., § 102 reporters’ note 2).
336 See Brierly, supra note 335 at 59; see also Currie, Forcсе & Oosterveld, supra note 269 at 120.
337 See Currie, Forcсе & Oosterveld, ibid. at 121.
339 See Henkin, supra note 276 at 47.
340 Ibid.
3.1.3.2.1 Conceptual-Jurisprudential Problems

While customary international law, like treaty law, is assumed to be rooted in state consent, its relationship with the underlying principle that international law is dependent on the will of states is more complicated.\textsuperscript{341} Particular problems are created in the context of the so-called “persistent objector” rule, which is basically designed to safeguard the state consent principle.\textsuperscript{342} While customary international law is, in principle, universally binding,\textsuperscript{343} this rule states that a customary norm has no binding effect on “a state that has actively and consistently denied the existence or applicability to it of [that rule] prior to and since [its] crystallization [...]”.\textsuperscript{344} Accordingly, a state can “contract out of a custom” by providing clear evidence of its objection during the process of the formation of that custom.\textsuperscript{345} Yet, limits on the states’ freedoms have recently been established by the emergence of the concept of peremptory norms or \textit{jus cogens}, which enshrine fundamental values and do not permit derogation through customary or treaty norms of a lesser rank.\textsuperscript{346} Importantly, rules that qualify as \textit{jus cogens} also exclude the possibility of contracting out through persistent objection.\textsuperscript{347} By limiting the applicability of the persistent objector rule, the notion of \textit{jus cogens} thus creates tensions with the consent principle.\textsuperscript{348}

Further serious conceptional questions are raised by the second element of international custom, the \textit{opinio juris} requirement. Firstly, and fundamentally, some scholars contend that the formation of customary law is not dependent on the existence of a psychological element, or at least make it redundant in practice by inferring the existence of an \textit{opinio juris} from the observation of a general state practice.\textsuperscript{349} Yet this general and consistent practice may be followed simply as a matter of courtesy or grace,\textsuperscript{350} or out of considerations of fairness or

\textsuperscript{341} Ibid. at 47, 50.
\textsuperscript{342} Cf. ibid. at 50.
\textsuperscript{343} See Restatement (Third), \textit{supra} note 289, § 102 comment d.
\textsuperscript{344} See Currie, Forcse & Oosterveld, \textit{supra} note 269 at 141; see also Henkin, \textit{supra} note 276 at 50; Restatement (Third), \textit{supra} note 289, § 102 comment d.
\textsuperscript{345} See Brownlie, \textit{Principles}, \textit{supra} note 294 at 11.
\textsuperscript{346} See Cassese, \textit{International Law}, \textit{supra} note 306 at 155; see also Henkin, \textit{supra} note 276 at 47; Restatement (Third), \textit{supra} note 289, § 102 comment j.
\textsuperscript{347} See Henkin, \textit{supra} note 276 at 50.
\textsuperscript{348} Ibid.
\textsuperscript{350} See Henkin, \textit{supra} note 276 at 49; Currie, Forcse & Oosterveld, \textit{supra} note 269 at 121.
The mere fact that a certain course of conduct is generally observed by the states therefore need not imply that international law exists that requires or permits this form of behavior. Rather, this conduct must be motivated by a perception of a corresponding legal obligation. Consequently, the psychological element of opinio juris is a necessary ingredient of customary international law. The same rationale, that a consistent behavioral pattern as such does not create law, also supports the requirement that opinio juris must be proven by independent evidence going beyond the mere existence of a general state practice.

Furthermore, while scholars and courts often simply speak of the opinio juris requirement as "a sense of legal obligation", it seems questionable how this conceptualization can explain the creation of rules of customary law in the beginning. Notably, the abstract formulation does not explain where the sense of a legal obligation required for the emergence of a certain practice as law originally comes from. Lepard calls "the very notion of customary law created by consistent practice and by a belief among states that the custom is already law [...] a paradox, 'for it proposes that a customary norm can come into existence (i.e. become authoritative) only by virtue of the necessarily erroneous belief that it is already in existence (i.e. authoritative).'

The proposition that a previously voluntary practice becomes legally required because the states feel that it is legally required seems circular. Jack L. Goldsmith and Eric A. Posner have concluded that the idea of an opinio juris is unsuitable to convincingly explain the transformation of a usage into customary law, since it is nothing else than a conclusion about the current legal quality of that practice. Similarly, the Restatement suggests that the definition of customary international law may in fact be concerned with "a later stage in the history of international law when governments found practice and sense of obligation already in evidence, and accepted them without inquiring as to the original basis of that sense of obligation."

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351 See Brownlie, Principles, supra note 294 at 8.
353 See Brownlie, Principles, supra note 294 at 8.
354 See Goldsmith & Posner, supra note 349 at 1118; see also Currie, Forsece & Oosterveld, supra note 269 at 135.
355 See Henkin, supra note 276 at 50.
356 See Lepard, supra note 323 at 101.
357 See Restatement (Third), supra note 289, § 102 reporters' note 2 ("Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured?"); Goldsmith and Posner regard the idea that "the legal obligation is created by a nation's belief in the existence of the legal obligation" as "mysterious", supra note 349 at 1118; see also Currie, Forsece & Oosterveld, supra note 269 at 135.
358 See Goldsmith & Posner, ibid.; see also Currie, Forsece & Oosterveld, supra note 269 at 135.
359 See Restatement (Third), supra note 289, § 102 reporters' note 2.
reporters propose that the sense of a legal obligation may originally have been based on the concepts of natural law or common morality. In conclusion on this conceptual flaw of the customary law doctrine, it seems justified to agree with Currie that "the oft-repeated doctrinal position — that customary international law depends on state practice coupled with opinio juris — oversimplifies the manner in which such law actually emerges." Nevertheless, the essence of the concept and its definition are universally accepted both in doctrine and by states.

3.1.3.2.2 Operational Problems

The application of the concept of international custom in practice also confronts operational problems that shed some doubt on the utility of the positivist doctrine of sources. It may often be difficult to decide whether the requirements of a sufficient state practice and opinio juris are fulfilled.

With regard to the first factor, doctrine demands that the existence of a widespread and uniform state practice is empirically measured. What would be required is to "[tabulate] states [...] according to whether they engage or acquiesce in a given practice or not." Topics of debate remain, however, both the quality and the quantity of the empirical evidence required to prove a sufficiently general state practice. Little agreement has been reached on the types of national actions that can be counted as state practice. Moreover, difficulties arise in evaluating different forms of state practice where a state is inconsistent in its acts or statements, or where verbal pronouncements are not supported by the factual behavior of the state. In practice, the use of the different sources by courts, academics and politicians may thus be criticized for being selective. More generally, it may be charged that the doctrine often fails to reflect the empirical reality.

360 Ibid.
361 See Currie, Forcense & Oosterveld, supra note 269 at 135-136.
362 See Henkin, supra note 276 at 50; Restatement (Third), supra note 289, § 102 reporters’ note 2.
363 See Currie, Forcense & Oosterveld, supra note 269 at 135.
365 See Currie, Forcense & Oosterveld, supra note 269 at 132.
366 Ibid.
367 See generally ibid. at 132-134.
368 See Goldsmith & Posner, supra note 349 at 1117; see also Currie, Forcense & Oosterveld, supra note 269 at 134.
369 See Currie, Forcense & Oosterveld, ibid. at 133.
370 See Goldsmith & Posner, supra note 349 at 1117; see also Currie, Forcense & Oosterveld, supra note 269 at 134.
371 See Currie, Forcense & Oosterveld, ibid. at 134.
In terms of the quantity of evidence needed to prove the emergence of a general practice of the states, no precise formula for the required extent of state practice exists.\(^\text{372}\) The International Court of Justice (ICJ) demands that the practice be “extensive” and “virtually uniform.”\(^\text{373}\) This formulation does not require absolute uniformity,\(^\text{374}\) rather “substantial uniformity” is necessary and sufficient.\(^\text{375}\) Still, the precise meaning of terms like “general” or “uniform” remains unclear.\(^\text{376}\) In the practical application, the existence of substantial uniformity, for instance, is a matter of appreciation and often leaves the decision-maker considerable freedom in assessing the specific case at hand.\(^\text{377}\)

Moreover, it may be doubted that the doctrine adequately accounts for today’s geopolitical realities. Since “the heyday of customary international law”, within the space of a hundred years, the membership of the world community has grown dramatically from about 40 to around 200 states.\(^\text{378}\) Sometimes it may even be impossible to obtain the “huge body of evidence required”.\(^\text{379}\) Ascertaining and tabulating the actual practice of all these states, as the doctrine may suggest, is at least an “arduous task”.\(^\text{380}\) In practice, this task is rarely undertaken.\(^\text{381}\) Instead, propositions of customary international norms are normally based on a highly selective survey of only a few states, such as the major powers and specially interested nations.\(^\text{382}\)

Similar operational difficulties are raised by the second element of the law-making process through custom, the opinio juris requirement.\(^\text{383}\) As Judge Tanaka, dissenting in the North Sea Continental Shelf cases, pointed out, the psychological nature of opinio juris as an internal motivation makes it particularly difficult to find the required evidence.\(^\text{384}\) In practice, the ICJ has

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\(^\text{372}\) See Restatement (Third), supra note 289, § 102 comment b.
\(^\text{373}\) See e.g. North Sea Continental Shelf, supra note 352 at para. 74.
\(^\text{375}\) See Brownlie, ibid.
\(^\text{376}\) See Currie, Forcense & Oosterveld, supra note 269 at 134.
\(^\text{377}\) See Brownlie, Principles, supra note 294 at 7.
\(^\text{378}\) See Cassese, International Law, supra note 306 at 165.
\(^\text{379}\) Ibid.
\(^\text{380}\) See Currie, Forcense & Oosterveld, supra note 269 at 134.
\(^\text{381}\) Ibid.
\(^\text{382}\) See Goldsmith & Posner, supra note 349 at 1117.
\(^\text{383}\) See Henkin, supra note 276 at 49; see also Brownlie, Principles, supra note 294 at 8.
\(^\text{384}\) See North Sea Continental Shelf; Tanaka J., dissenting, supra note 364 at 176 (Judge Tanaka, in his dissenting opinion, concludes from this observation that “[t]here is no other way than to ascertain the existence of opinio juris from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of state practice, which is something which is impossible of achievement [...]”, ibid.); see also Currie, Forcense & Oosterveld, supra note 269 at 132.
applied two different methods to approach this problem.\textsuperscript{385} In many cases, the Court assumed the existence of an \textit{opinio juris} when it had found sufficient evidence of a general practice, or when there appeared to be a consensus in literature or precedents for this presumption in previous decisions of the Court or other international tribunals.\textsuperscript{386} To infer the existence of \textit{opinio juris} simply from the observation of a general practice, however, makes the \textit{opinio juris} requirement redundant.\textsuperscript{387} Yet, as noted above, \textit{opinio juris} is a necessary requirement for the establishment of customary international law.\textsuperscript{388} More compatible with this proposition is the second, more exacting approach adopted by the Court in a significant minority of cases, in which it demanded more positive evidence for a recognition by the states that this practice was required by a legally binding rule.\textsuperscript{389} Which approach the Court chooses appears to be a discretionary matter and dependent upon how contentious the alleged rule of customary law is.\textsuperscript{390}

As a result of these operational problems, a general definition of when a certain rule or principle becomes a norm of customary international law cannot be given.\textsuperscript{391} In practice, proponents of certain customary norms often refer to the recognition that this norm has found by scholars and international tribunals, instead of engaging in an actual empirical survey of the existence of the required state practice and \textit{opinio juris}.\textsuperscript{392} In this way, the emergence of international custom is shaped to a significant degree by scholarly and judicial pronouncements.\textsuperscript{393}

Ultimately, the openness of the doctrine of international custom for selective propositions of law undermines the claim of legal positivism as a science that is based exclusively on a descriptive, value-free survey of hard facts. Rather, the proposition of a certain rule of customary law reflects and requires the selection and interpretation of precedents by the analyst.\textsuperscript{394} In conclusion, therefore, a positivist analysis of customary law cannot escape value choices.\textsuperscript{395}

\textsuperscript{385} See Brownlie, \textit{Principles}, \textit{supra} note 294 at 8.
\textsuperscript{386} Ibid.
\textsuperscript{387} See Goldsmith & Posner, \textit{supra} note 349 at 1117-1118; see also Currie, Forcés & Oosterveld, \textit{supra} note 269 at 135.
\textsuperscript{388} See Goldsmith & Posner, \textit{ibid.} at 1118; see also Currie, Forcés & Oosterveld, \textit{supra} note 269 at 135.
\textsuperscript{389} See e.g. \textit{North Sea Continental Shelf}, \textit{supra} note 352 at para. 77; see generally Brownlie, \textit{Principles}, \textit{supra} note 294 at 8, 10.
\textsuperscript{390} See Brownlie, \textit{ibid.} at 8-9.
\textsuperscript{391} See e.g. Henkin, \textit{supra} note 276 at 49.
\textsuperscript{392} See Currie, Forcés & Oosterveld, \textit{supra} note 269 at 135.
\textsuperscript{393} \textit{Ibid.} at 136.
\textsuperscript{394} See Tesón, \textit{Humanitarian Intervention}, \textit{supra} note 45 at 12, 14-15, 313.
\textsuperscript{395} \textit{Ibid.} at 313; 11.
3.1.3.3 *General Principles of Law*

The third accepted manifestation of international law, finally, are, in the language of Article 38(1)(c) of the Statute of the Court, “the general principles of law recognized by civilized nations”. The precise meaning and scope of this concept has been controversial ever since the drafting of the Statute. 396 According to the widely accepted contemporary understanding, “general principles of law” are derived from domestic law. 397 They are “principles common to the domestic law of developed legal systems”. 398 To the extent that these rules apply to the relations of states, they are used by way of analogy on the international level. 399 Norms of international law are identified by selecting elements of the better developed domestic legal systems, borrowing their legal reasoning and adapting it to the international level. 400 Examples of norms that have been adapted from the domestic to the international level include especially procedural-jurisprudential rules like the *res judicata* principle, 401 but also the principle of equity, 402 and arguably the prohibition against torture. 403

Unlike the subject-matters of the aforementioned norms, humanitarian intervention and an international responsibility to protect are *per definitionem* issues that concern relations between states. It is therefore highly implausible that domestic legal systems are better developed and contain widespread evidence of norms on these issues. For this reason, the following legal analysis of the R2P framework will focus on the primary sources of treaties and international custom. Nevertheless, difficulties with the concept of “general principles of law” may briefly be indicated to highlight further inconsistencies in the positivist doctrine of sources.

In theory, the elaboration of international norms through an analysis of domestic legal systems is compatible with the general positivist principle that international law flows from the will of the states. 404 Yet, in practice, the concept requires a methodology to demonstrate that alleged principles find the required support in domestic law. Two approaches to this problem can be distinguished in academic literature and in jurisprudence, “categoricism” and

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396 See Brownlie, *Principles*, supra note 294 at 16.
399 See Brownlie, *Principles*, supra note 294 at 16.
400 Ibid.
402 See Brownlie, *Principles*, supra note 294 at 16.
403 See Restatement (Third), *supra* note 289, §102 reporters’ note 7.
“comparativism”.\textsuperscript{405} The “categorist” school finds “general principles of law” in those principles of domestic law that seem “inherently good and necessary ingredients of any functioning legal system.”\textsuperscript{406} It confronts, however, the criticism that it leaves the determination of the principles that demonstrate these qualities to decision-makers who may be biased by their background and inclined to import significant parts of their own domestic legal systems.\textsuperscript{407} A comparative approach, by contrast, would basically demand that as many domestic legal systems as possible be analyzed for their endorsement of the principle in question.\textsuperscript{408} Since such a survey would constitute a very cumbersome undertaking, an “intermediate comparativist approach” has been developed that builds upon the assembly of a “representative sample of the world’s legal systems”.\textsuperscript{409} This approach, however, raises questions, for example, about the proper configuration of the systems constituting the world community, the selection of their representatives and the weight that should be attributed to systems comprising different numbers of states and people.\textsuperscript{410} In practice, the comparative doctrine may thus equally be applied in a selective manner,\textsuperscript{411} and, indeed, tribunals have been found to show a considerable discretion in developing and refining general principles of law.\textsuperscript{412}

In conclusion, the analysis of domestic legal systems may sometimes yield uncertain results and leave room for ideological assumptions.\textsuperscript{413} In its practical application, the concept of “general principles of law” may therefore be less consistent with the state consent principle, and have a less solid foundation in hard facts, than the doctrine suggests.

\subsection*{3.2 The Traditional Antipole: Natural Law Theory}

Considering these weaknesses of the positivist doctrine of sources, both in terms of its conceptual foundation and its application to specific issues in practice, it is worthwhile inquiring into other theoretical approaches to international law and issues of human protection.

\textsuperscript{405} See Currie, Forcense & Oosterveld, supra note 269 at 149-150.
\textsuperscript{406} Ibid. at 150.
\textsuperscript{407} Ibid. at 150; see also Christopher A. Ford, “Judicial Discretion in International Jurisprudence: Article 38(1)(c) and ‘General Principles of Law’” (1994) 5 Duke J. Comp. & Int’l L. 35 at 74 (Lexis).
\textsuperscript{408} See Currie, Forcense & Oosterveld, supra note 269 at 149.
\textsuperscript{409} Ibid.; see also Ford, supra note 407 at 68-69.
\textsuperscript{410} See Currie, Forcense & Oosterveld, \textit{ibid}.
\textsuperscript{412} See Brownlie, \textit{Principles, supra} note 294 at 16.
\textsuperscript{413} Ibid.
Traditionally, the alternative to positivist thinking can be found in natural law doctrine, as a reaction to which legal positivism has emerged, and to which it stands in many respects in an antithetical position. Until its decline in the 18th and 19th centuries, the concept of a “law of nature” also constituted the framework for arguments that were made in favor of and against a right or duty of humanitarian intervention.

In the following, I will endeavor to briefly define the main characteristics of this concept. In addition, I will outline some of the major criticisms that have been raised against the notion of a law of nature, some of which will become relevant in the later appraisal of modern proposals to incorporate ethical considerations as part of a legal methodology.

3.2.1 History and Main Characteristics of Natural Law Thinking

In early modern jurisprudence, the law of humanitarian intervention and international law in general were treated as part of natural law, which can broadly be described as “a higher law binding states and their rulers”. The concept of “natural law” rests on the belief that the legal systems of all peoples are grounded in “certain fundamental, and shared, moral values”. The history of this school of thought can be traced back to ancient Greek and Roman philosophers. Natural law doctrine has been influential in both medieval and early modern Europe, and remained the dominant theory of international law at least down to the end of the eighteenth century.

During this time, the concept of natural law took different forms. Natural law theory was heavily influenced by religious doctrine well into the eighteenth century. Before the Reformation, the law of nature was understood as God’s universal law, and equated with the “divine law administered by the church”. As such, it had primacy over the laws made by human beings. The fracture of Christianity into “then-mutually antagonistic denominations” during the

414 See Currie, Forcense & Oosterveld, supra note 269 at 11.
416 See generally ibid.
417 See Currie, Forcense & Oosterveld, supra note 269 at 6.
418 Ibid.
420 See Currie, Forcense & Oosterveld, ibid.
421 Ibid. at 6-7.
422 Ibid. at 6.
424 See Currie, Forcense & Oosterveld, ibid.
Reformation, and the influence of Enlightenment philosophy weakened the religious foundations of natural law and re-connected it to its ancient bases of human reason and rationality.\textsuperscript{425}

In its modern form, the term “natural law” is circumscribed as “[t]he only law given to men by nature”.\textsuperscript{426} The law of nature is said to be inherent in the world in that it is “founded on the nature of things, and particularly on the nature of man.”\textsuperscript{427} It is immutable, that is, it cannot be altered or derogated from,\textsuperscript{428} and its content has to be identified through reason.\textsuperscript{429} The law of nature can thus broadly be defined as “universally applicable rules derived by right reason.”\textsuperscript{430}

Under a natural law concept, the task in determining norms of international law would therefore be to elaborate, through a process of reasoning, those principles of justice that can be held to be binding in a “state of nature”, that is, in a model society without any “positive” law created by human institutions.\textsuperscript{431} As a result, international obligations under a natural law theory are essentially based on conceptions of justice or morality.\textsuperscript{432}

3.2.2 Conceptual Problems and Decline

One of the major disadvantages of this conception of international law is its lack of clarity.\textsuperscript{433} It has recently been argued that “natural law leaves much to be desired as a theoretical basis for international law [as] it may be founded on a false premise: the presumption that human beings are rational and reasonable, and that the expression of this rationality will necessarily produce a common understanding of natural law’s content.”\textsuperscript{434}

The criticism that the law of nature may be incapable of establishing clear rules on controversial issues finds support notably in the treatment that humanitarian intervention has received from natural law theorists. Military intervention for human protection purposes has been discussed as

\textsuperscript{425} Ibid.
\textsuperscript{427} See Emer de Vattel, \textit{The law of nations, or, principles of the law of nature, applied to the conduct and affairs of nations and sovereigns: From the French of Monsieur de Vattel: A new edition, revised, corrected and enriched with many valuable notes} (London: printed for G.G. and J. Robinson, Paternoster, 1797) (Eighteenth Century Collections Online) at lviii; see also Holzgrefe, \textit{supra} note 284 at 19.
\textsuperscript{428} See de Vattel, \textit{supra} note 427 at lviii; see also Wolff, \textit{supra} note 426 at para 5; Holzgrefe, \textit{supra} note 284 at 19.
\textsuperscript{429} See generally Anglie, \textit{supra} note 283 at 11-12; Holzgrefe, \textit{supra} note 284 at 19; Nardin, “Humanitarian Intervention”, \textit{supra} note 268 at 58.
\textsuperscript{430} See Arthur Nussbaum, \textit{supra} note 419 at 20; see also Currie, Forcense & Oosterveld, \textit{supra} note 269 at 6.
\textsuperscript{431} See Anglie, \textit{supra} note 283 at 11-12.
\textsuperscript{432} See Currie, Forcense & Oosterveld, \textit{supra} note 269 at 7.
\textsuperscript{433} Cf. \textit{ibid.} at 17.
\textsuperscript{434} \textit{Ibid.} at 9.
an issue of natural law since the Middle Ages, and the conclusions that natural law theorists reached have covered the entire range from a perfect duty of non-intervention to an imperfect duty of humanitarian intervention. The Dutch jurist Hugo Grotius, for instance, found, at the beginning of the seventeenth century, a just cause for war in the "Right of Human Society", in cases where Princes "exercise such Tyrannies over Subjects as no good Man living can approve of". In the view of Grotius, humanitarian intervention was a discretionary right only and not a duty of the potential intervener. Samuel Pufendorf, by contrast, even considered the existence of an obligation to intervene on behalf of others. During the eighteenth and nineteenth centuries, then, the view that intervention for humanitarian purposes could be justified as a matter of natural law gradually eroded. Emmerich de Vattel, for instance, generally regarded the relations between a government and its citizens as an internal matter for which no accountability towards foreign powers exists, but allowed humanitarian intervention at least in the form of assistance to a people that has already taken up arms to revolt against the oppressor. John Stuart Mill took this idea that the victims of oppression must be willing to fight for their freedom even one step farther and argued that humanitarian intervention should not be permitted, as only a people that has prevailed in the "arduous struggle" against the domestic oppressor and gained its freedom by its own efforts has proven fit for free institutions. Finally, the Enlightenment philosopher Christian von Wolff submitted that, by nature, no nation or its ruler had a right to interfere in the government of another state, and therefore rejected the proposition that force may be used by foreign states to protect a people

435 See the comprehensive overview by Nardin, "Humanitarian Intervention", supra note 268 at 58 ff.
436 See Holzgrefe, supra note 284 at 25-28 (an "imperfect" duty of humanitarian intervention is one that it is not coupled with a corresponding "right of humanitarian rescue" that the victims of oppression could claim against foreign states, but that leaves these states with discretion in its discharge and does not impose any obligation to undertake specific action, see Holzgrefe, supra note 284 at 26-27; Holzgrefe further notes that even a perfect duty of intervention, although in fact not advocated by any natural law theorist, would in principle be "wholly compatible with the precepts of natural law", ibid. at 27).
438 See Grotius, supra note 437 at 633 ("I may make War upon a Man [...] if he disturbs and molests his own Country" [emphasis added]); see generally Grotius, supra note 437, book II, c. XXV, sect. VII; see also Holzgrefe, supra note 284 at 26.
440 See Nardin, "Humanitarian Intervention", supra note 268 at 63.
441 See de Vattel, supra note 427 at 155.
442 See John Stuart Mill, Dissertations and Discussions: Political, Philosophical, and Historical, vol. 3 (London: Longmans, Green, Reader and Dyer, 1867) at 173-175.
from oppression by their own ruler. This opinion is representative of the current of natural law thinking that dismisses a right, let alone a duty, of humanitarian intervention.

The failure of natural law theories to produce clear results on the content of international law raises, however, questions about its suitability as a foundation for an effective international legal order. In domestic societies that are built on a "vertical" system of governance with central law-makers, natural law thinking may serve an important function in informing the legal system and legitimating the state itself. Constitutional documents of liberal democracies reflect the notion of a "higher law" when they speak of "natural", "inalienable" and "self-evident" "rights of man". These principles inform jurisprudence and statute law and are, in turn, authoritatively declared and put into operation by legislatures and courts. Through this process of codification, natural law principles obtain "positive legal force" and legitimacy.

The international society, by contrast, is characterized by a "horizontal" legal system which lacks a central law-maker. There is no hierarchical structure that could authoritatively establish the existence of given "higher principles" and define them in a way that they would constitute a working legal order specific enough to effectively regulate issues of everyday relations. As the Mexico-United States General Claims Commission phrased it, "[t]he law of nature may have been helpful, some three centuries ago, to build up a new law of nations, [...] but [the conception of inalienable rights of men and nature] have failed as durable foundations of [...] international law and [cannot] be used in the present day as substitutes for [...] positive international law, as recognized by nations and governments through their acts and statements [...]"

On the same account, the legitimacy of international norms based on notions of natural law can be questioned. Since, historically, natural law principles have not been endorsed by sources with law-making authority, the body of international law would comprise merely "the scribbles of non-appointed, and unrepresentative, international jurists supposedly tapping into some higher

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443 See Wolff, supra note 426 at paras. 257-258.
444 See Nardin, "Humanitarian Intervention", supra note 268 at 63.
446 Ibid. at 9-11.
447 Ibid. at 9-10 (with reference to the United States Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789)).
448 Ibid. at 10.
449 Ibid.
450 Ibid. at 11.
451 Ibid. at 9, 11.
453 See Currie, Forcense & Oosterveld, supra note 269 at 17.
form of human reason”.454 These jurists may not only give conflicting accounts of the law of nature,455 but have also been criticized for their “tendency to dogmatism, their emphasis on self-evident principles which admitted no critical challenge.”456 Moreover, the practical conclusions that have been drawn from natural law arguments, may sometimes raise questions about the impartiality of the motives of the respective theorist.457

Partly as a result of these main disadvantages, the influence of natural law thinking in the international legal discourse abated by the nineteenth century,458 as the view emerged that international law is “positive law” and properly based on the will of states.459 Within this framework, natural law could only contribute to the creation of international law by phrasing norms that states recognize or accept as rules of law.460

While the expression “natural law” may no longer be “fashionable”,461 the concept itself did not entirely disappear.462 The idea of a higher body of principle, while “banished from the realm of positive law” and “stripped of its [...] legal connotations” continued to exist in the form of a “common morality”.463 Common morality provides a non-legal standard by which everybody should live, and comprises principles that are “required by a conception of the person and what is owed to persons”.464 These principles can be discovered through reason and a “critical reflection on laws and customs”, and their validity does not depend on their recognition in different communities of tradition.465

454 Ibid.
455 Ibid.
456 See Tesón, Humanitarian Intervention, supra note 45 at 9.
457 Nardin states, for instance, that Hugo Grotius’s conclusion that “the Dutch East India Company might justly wage war on the Portuguese for seeking to prevent the Sultan of Johore from trading with the Dutch [...] may cause us to raise an eyebrow with respect to Grotius’s motives”; at the same time, he denies that the force of Grotius’s argument as such was weakened by this observation, see Nardin, “Humanitarian Intervention”, supra note 268 at 61.
458 See Currie, Forcexe & Oosterveld, supra note 269 at 17.
459 See Nardin, “Humanitarian Intervention”, supra note 268 at 63.
460 See Henkin, supra note 276 at 46.
461 See Currie, Forcexe & Oosterveld, supra note 269 at 9.
462 See Nardin, “Humanitarian Intervention”, supra note 268 at 64; see also Currie, Forcexe & Oosterveld, supra note 269 at 9.
463 See Nardin, ibid.
464 Ibid.
465 Ibid.
3.3 Modern Alternatives: Approaches that Apply the Positivist Legal Sources and Ethical Considerations

Whereas natural law-thinking under the banner of common morality had initially taken place outside the realm of international law,\textsuperscript{466} it has resurfaced in the legal discourse during the twentieth century.\textsuperscript{467} This has become most apparent in the emerging human rights law which recognized the inalienability of certain fundamental rights also on an international level.\textsuperscript{468} Moreover, at least one recent approach, specifically to the issue of humanitarian intervention, draws upon moral analysis and modern “rights” philosophy as a necessary part of a legal methodology.\textsuperscript{469} Such approaches that take moral or ethical considerations into account as part of the legal discourse may be another potential alternative to a traditional positivist understanding and methodology of international law.

Specifically with a view to the area of humanitarian intervention, two scholars have recently elaborated legal methodologies that deviate from the positivist separability thesis by taking into account moral and ethical considerations: Fernando R. Tesón has proposed a legal methodology that “incorporate[s] political philosophy as an integral part”,\textsuperscript{470} and devised a human-rights based theory of international law that suggests the legality of humanitarian intervention in certain cases,\textsuperscript{471} and, building upon this work, Brian D. Lepard, has formulated a “fresh legal approach [to humanitarian intervention] based on fundamental ethical principles in international law and world religions”.\textsuperscript{472}

By having recourse to ethical principles as a part of their legal methodologies, these academics respond to some of the shortcomings of the traditional positivist approach.\textsuperscript{473} Both scholars suggest that strict legal positivism cannot satisfactorily answer the question of the status of humanitarian intervention in international law.\textsuperscript{474} Specifically, it is recalled that the identification of norms both in conventional and in customary law requires an interpretation of legal materials.\textsuperscript{475} Moreover, it is submitted that legal questions are “inextricably interwoven with important ethical problems”, as conflicts between established legal norms often reflect conflicts.

\textsuperscript{466} Cf. \textit{Ibid.}
\textsuperscript{467} See Currie, Forcense & Oosterveld, \textit{supra} note 269 at 17.
\textsuperscript{468} \textit{Ibid.}
\textsuperscript{469} See Tesón, \textit{Humanitarian Intervention, supra} note 45 at 6-7, 9-10.
\textsuperscript{470} \textit{Ibid.} at 6.
\textsuperscript{471} See e.g. Tesón, \textit{Humanitarian Intervention, supra} note 45 at 16, 79, 129, 313, and generally c.3, c. 6.
\textsuperscript{472} See Lepard, \textit{supra} note 323.
\textsuperscript{473} See Tesón, \textit{Humanitarian Intervention, supra} note 45 at 6-15; Lepard, \textit{supra} note 323 at 29-30.
\textsuperscript{474} See Lepard, \textit{ibid.} at 101-102; Tesón, \textit{Humanitarian Intervention, supra} note 45 at 15.
\textsuperscript{475} See Tesón, \textit{Humanitarian Intervention, supra} note 45 at 15.
between underlying ethical principles, and can therefore only be reconciled with a view to these ethical principles.\textsuperscript{476} An ethical theory of international law shall therefore provide the necessary guidance in difficult cases of interpreting the law,\textsuperscript{477} and help to solve conflicts between competing norms.\textsuperscript{478}

Rather than advocating a pure form of natural law theory, both Tesón and Lepard recognize the positivist doctrine of sources.\textsuperscript{479} Within this framework, however, they grant ethical or moral considerations different roles that may be inconsistent with fundamental positivist principles, such as the separability thesis and the principle of state consent. In the following sections, I will discuss the two central propositions that, firstly, ethical considerations may provide guidance as a “background theory” in difficult cases of treaty and customary law analysis, and, secondly, that some ethical principles possess immediate legal force as “general principles of moral law”. As the subsequent discussion will show, these concepts pose challenges of different degrees to the traditional positivist approach to international law.

3.3 1 Background Theory Guiding Treaty Interpretation and Customary Law Analysis

The first potential function for moral or ethical considerations in an international legal methodology is that of a “background theory” which provides guidance in cases of treaty interpretation and customary law analysis that do not yield unequivocal results.\textsuperscript{480} Jurisprudentially, this proposition is based on the recognition that the content of international law cannot be determined without value choices being made.\textsuperscript{481} For Tesón, this need for value judgments establishes the link between international law and moral philosophy.\textsuperscript{482} In his view, “the best philosophical position [...] is also the best interpretation of international legal materials”.\textsuperscript{483} As a result, moral philosophy, or an ethical theory of international relations,

\textsuperscript{476} See Lepard, supra note 323 at 29.
\textsuperscript{477} See Tesón, Humanitarian Intervention, supra note 45 at 117; Lepard, supra note 323 at 98.
\textsuperscript{478} See Lepard, ibid. at 98.
\textsuperscript{479} See Tesón, Humanitarian Intervention, supra note 45 at 146-174 (for an analysis of humanitarian intervention under the U.N. Charter), c.8, c.9 (for an analysis of unilateral and collective state practice); moreover, Tesón dedicates one chapter to the views of the ICJ expressed in Nicaragua, ibid. c. 10; Lepard, supra note 323 at 99-102, 105-111.
\textsuperscript{480} See Teson, ibid. at 117, 167 (aside from informing the interpretation of the international law, a second task that Tesón's ethical theory of international law shall perform is “to explain in a consistent manner those norms of international law that are well settled”, ibid. at 117).
\textsuperscript{481} See Tesón, Humanitarian Intervention, supra note 45 at 11, 313.
\textsuperscript{482} Ibid. at 313.
\textsuperscript{483} Ibid. at 15.
complements positive facts, such as treaty texts and diplomatic dealings, as the basis for international legal propositions. In the context of treaty interpretation, this “background theory” can notably inform the judgments that need to be made in identifying the relevant purposes of the agreement. A more general background role for an ethical theory is advocated by Lepard, who elaborates a detailed method of treaty interpretation that is shaped in various ways by fundamental ethical principles. Itself a product of ethical considerations, this methodology pays initially respect to the existing norms of treaty interpretation, as established under customary law and codified in the Vienna Convention on the Law of Treaties, but contains some modifications as it accords particular weight to the shared understandings of the parties both at the time of the adoption of the treaty (original understandings) and at present (contemporary understandings), and to the presumed duty of individuals and governments “continually to strive toward progressive realization of fundamental ethical principles”.

The proposed methodology consists of up to four steps with different roles for ethical considerations: The first step consists in an ascertainment of the ordinary meaning of the provision in light of the object and purposes of the treaty, as mandated by the traditional rules of treaty interpretation set out in Article 31 of the Vienna Convention. Subsequently, supplementary means of interpretation, including but not limited to the records of the negotiations of the treaty, the travaux préparatoires, shall be used “to ascertain the parties’ true shared understandings of their obligations” at the time of the adoption of the treaty. Regardless of whether or not the travaux préparatoires are ambiguous, it should be determined, in a third step, whether there are any new generally accepted understandings of the terms of the treaty that deviate from the ordinary meaning of the provision or from the original shared understandings. Specifically with regard to the UN Charter, the criterion to be met for “new generally accepted understandings” is that they are “genuinely shared by all U.N. member states or at least a very large majority of member states.” As Lepard explains, “[s]uch new understandings ought to ‘trump’ either an apparent ordinary meaning or original understandings...
to the extent the new understandings are equally or more consistent with fundamental ethical principles."492 This element of Lepard’s methodology allows for a special dynamism in the interpretation of the UN Charter: while it would allow for changes in the meaning of the terms of the Charter as ascertained with a view to the ordinary meaning or the original understanding of the parties to the extent that the new genuinely shared understandings are more or at least equally supportive towards fundamental ethical principles, it would not recognize any political dynamic away from these principles.493 In Lepard’s own words, the approach strengthens the stability of Charter interpretation and prevents “moral backsliding”.494 Finally, if the aforementioned steps fail to produce a clear result, the Charter should be interpreted in a way that best helps to implement fundamental ethical principles.495 Where ambiguities persist, Lepard visualizes these ethical principles “as a ‘magnet’ exerting a constant normative ‘pull’ on interpretations of the obligations of states under the Charter, but never forcing them to recognize and fulfill legal obligations that they have clearly rejected for themselves.”496 In conclusion, Lepard notably suggests that treaties should be interpreted in a way as to promote ethical principles where no conflicting understandings of the parties can be ascertained, and not to allow the parties to detach themselves from earlier, ethically preferable understandings of the treaty text.497

The proposition that the best interpretation of international legal materials is the one demanded by moral-political philosophy justifies a similar background role for ethical and moral considerations in making the necessary value choices in customary law analysis.498 Moreover, fundamental ethical principles can be resorted to if the analysis of all available material sources produces no clear result as to whether a particular norm has achieved the status as customary law or is, so far, no more than a legal rule in emergence. In this case, “the consistency of a norm with fundamental ethical principles should be regarded as an important factor that can ‘tip the balance’ in favor of recognition.”499

492 Ibid. [emphasis in the original].
493 Ibid.
494 Ibid. at 116, 118.
495 Ibid. at 116.
496 Ibid.
497 Ibid.
498 See Tesón, Humanitarian Intervention, supra note 45 at 15.
499 See Lepard, supra note 323 at 103.
3.3.2 General Principles of Moral Law

A particularly noteworthy role for ethics as a part of a legal methodology can be found in Lepard’s proposition of “general principles of moral law”. This notion is defined as encompassing fundamental ethical principles that obtain the status of legally binding norms independently, irrespective of any explicit prior recognition in treaty law, customary law, or national or international law. Lepard considers “general principles of moral law” as falling within the category of “general principles” in the meaning of Article 38(1)(c) of the Statute of the Court.

Importantly, Lepard emphasizes that the “critical distinction between law and morality” ought to be upheld, and therefore rejects the idea that all fundamental ethical principles constituted legally binding general principles of moral law. Rather, he limits this category to principles that fulfill certain criteria. General principles of moral law have to be not only fundamental, but even “essential” or at least “compelling”, and “the legal duties flowing from such principles ought to be narrowly tailored and circumscribed, appropriately specified, and made subject to certain prescribed conditions”.

Lepard distinguishes the three categories of “fundamental”, “compelling”, and “essential” ethical principles as a function of the degree to which these are logically and directly related to what he regards as the preeminent ethical principle of “unity in diversity”, that is, the principle that all human beings ought to be considered as “members of one human family”, who are entitled to basic respect and dignity, and the diversity among whom is to be valued. Fundamental ethical principles, in Lepard’s terminology, are “compelling” if they are “deserving of especially high weight in relation to other ethical principles because of their direct and immediate logical relationship to the preeminent principle of unity in diversity” and “essential” if they are “so closely related to the preeminent principle of unity in diversity that they deserve the highest weight and therefore cannot normally be overridden by other ethical principles.”

As for the further question, how the distinction between “fundamental”, “compelling”, and “essential” principles is to be effectuated in practice, Lepard explicitly refrains from proposing a
systematic methodology, but limits himself to suggesting that certain principles are sufficiently compelling to qualify as general principles of moral law.\textsuperscript{505} He suggests that support for the recognition of a certain fundamental ethical principle as a general principle of moral law can be found both in the weight that is apparently accorded to it by contemporary international law, and by reference to revered moral texts.\textsuperscript{506}

The particular significance of general principles of moral law lies in their characteristic that, while being rooted in ethics, they directly establish rules of international law. Within the humanitarian intervention context, examples of general principles of moral law comprise, for instance, "a principle prohibiting deliberate violations by governments, international organizations, or other actors of essential human rights; [...] a principle requiring that some legal avenue for the use of military force to prevent or put an end to widespread and severe violations of essential human rights be available in the international system; and [...] a principle imposing an obligation on governments, international organizations, and other actors to take some reasonable measures, either individually or collectively, within their abilities to prevent or stop such violations."\textsuperscript{507}

3.4 General Recognition of the Positivist Framework and Central Methodological Problems Confronted in the Analysis of R2P

After having identified some weaknesses, conceptual and operational, of the dominant positivist theory of international law and its methodology, it has been shown that the antithetical natural law doctrine itself confronts challenges that have caused its decline. The afore-described approaches by Tesón and Lepard provide an interesting alternative, recognizing, on the one hand, the positivist framework of international law, while deviating from its foundational principles and allowing a role for ethical and moral considerations where they deem it an appropriate remedy for the shortcomings of positivism.

Indeed, despite all justified skepticism of the positivist doctrine in its strict traditional form, there is at least one compelling reason to use the framework that it has established as a basis for the legal analysis of R2P: the international system rests on the recognition of a need for cooperation between the states. To broadly disregard the rules that have been created and accepted by the states under this system, which is permeated by and based on a positivist understanding of the

\textsuperscript{505} Ibid. at 109.
\textsuperscript{506} Ibid. at 108-109; for Lepard's use of revered moral texts see also text accompanying notes 647-648.
\textsuperscript{507} Ibid. at 106.
law, could be detrimental to the international community as such. An individualistic stipulation of an alternative set of rules could undermine the trust that the current system has gained and thus endanger the progress that has been made in terms of social cooperation on the international level so far. These considerations may themselves claim an ethical force. Hence, Lepard elaborates that “respect for the existing structure of international law” is itself a “fundamental ethical principle pervading contemporary international law”.

I will therefore adopt Lepard’s view that the positivist sources of treaties, international custom, and general principles, as they are acknowledged by the existing international law, should provisionally be recognized. At the same time, ethical principles shall be pursued to the extent that this structure permits, and may, where they would be gravely violated by obedience to the existing structure, allow for “measured disobedience” as a last resort.

Choosing a basically positivist approach for the analysis of the R2P framework in international law means, however, that answers need to be formulated for some of the difficulties with legal positivism that have been identified before. With regard to the specific issues at hand, the following challenges will need to be confronted: in the context of treaty interpretation, the suggested ambiguities of a purposive interpretation of the UN Charter may arise; moreover, a methodology will need to be devised that takes due account of the way in which shared understandings of the UN Charter may have changed since its creation, over six decades ago. As a matter of customary law analysis, the circularity in the opinio juris definition needs to be resolved as best as possible. In addition, it will be found that few instances of actual state action with a view to humanitarian intervention exist, while a host of state declarations and UN activities in this area may be observed. It is thus necessary to determine the material sources that may prove the existence of the required state practice and opinio juris. Furthermore, as this material evidence will need to be interpreted, and there is no mathematical formula to define when the existence of a norm of customary law has been proven, a convincing and consistent basis shall be devised to guide this interpretation and avoid the charge of selectivity. Finally, it is possible that no clear rule either in conventional or in customary law will be found in the traditional positivist sources; the question then arises, whether ethical principles, for instance in the form of general principles of moral law, may fill such gaps in the legal system. Solutions to

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508 Ibid. at 102; cf. also 75-82.
509 Ibid. at 102.
510 Ibid.
these questions may require, however, adjustments to the positivist approach that part with some of its underlying principles.

3.5 Discussion: Proper Approach to the Law of Humanitarian Intervention and R2P

The works by Tesón and Lepard provide valuable suggestions for a methodology that meets these challenges. In the following, I will discuss several components of an approach that employs moral and ethical considerations as a part of a legal theory. Notably, I will argue that the definition of the *opinio juris* requirement should be modified in order to avoid a paradox; that verbal statements by state representatives, individually or through organisations of states, such as the United Nations, may provide evidence of state practice and *opinio juris*; that recourse to ethical principles as a background theory is an appropriate way of solving the aforementioned ambiguities in treaty interpretation and customary law analysis; and, finally, that an ethical theory may provide principles that should complement the international legal system where the latter fails to provide rules on a relevant question. Particularly the last two suggestions may conflict with certain elementary norms of legal positivism, such as the principle of state consent and the separability thesis, and will therefore be defended with a view to these concepts. While it is not my intention and beyond the scope of this work to undermine the doctrine of legal positivism as such, this argumentation will entail an inquiry into the merits of the named positivist principles, as well as into some of the criticisms that had been brought against natural law theory.

3.5.1 Redefinition of the Opinio Juris Requirement

The first clarification to the traditional positivist doctrine of sources concerns the requirement of *opinio juris*, and addresses the circularity that is inherent in its common definition simply as “a sense of legal obligation”.

It may be useful, at first, to return to the complete Latin denomination of the psychological element of international custom, which reads “*opinio juris sive necessitatis*”. The recognition that a sense of a legal obligation is only one alternative, next to the sense of a necessity, provides an initial solution to the paradox that customary law is said to be created through a practice which states engage in because of a somehow pre-existing feeling that they are legally obligated to do so. As Antonio Cassese explains, a relevant practice need not be regarded as required by

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511 See text accompanying notes 355-363.
512 See e.g. *North Sea Continental Shelf*, supra note 352 at para. 77; *North Sea Continental Shelf*, Tanaka J., dissenting, supra note 364 at 175; e.g. *Restatement (Third)*, supra note 289, § 102 comment c.
law from the outset. Rather, at an initial stage, state practice may be based on an *opinio necessitatis*, that is, on a feeling that it is necessary, for instance, for social, economic, or political reasons. Typically, indeed, a certain behavioral pattern will begin to evolve as a reaction not to perceived legal, but to actual economic, political, or military demands.

This initial stage in the development of a norm of customary international law may, moreover, provide an avenue not only for economic or military, but also for ethical considerations. Thus, it appears justified to subscribe to Lepard’s broad redefinition of the *opinio juris* requirement, according to which it may be sufficient that states engage in a certain conduct because they “generally believe that it is or would be desirable now or in the near future to have an authoritative legal principle or norm prescribing, permitting, or prohibiting the conduct in question.”

Customary law then gradually evolves in a continuous process. Once a practice has, based on the perception of a respective necessity, found sufficiently widespread acceptance, it may then be considered as required by law. Only at this later stage, the practice needs to be followed *opinio juris*, that is, with a sense of a legal obligation. At this point in time, the existence of a rule of customary law can be ascertained. This understanding of the *opinio juris sive necessitatis* requirement avoids the critical circularity. Yet, it is not able, as of itself, to determine at what point in time the continuous process of law creation has been concluded and a norm of customary law evolved. There remain ambiguities and a need for interpretation, that will have to be met through the elaboration of a guiding “background theory”.

516 See Lepard, *supra* note 323 at 103 [emphasis modified from the original].
517 *See Cassese, International Law*, supra note 306 at 157-158.
520 *Ibid.*; see also *Restatement (Third)*, *supra* note 289, § 102 comment b.
521 *See Cassese, International Law*, supra note 306 at 157-158.; see also *Restatement (Third)*, *supra* note 289, § 102 comment b.
3.5.2 Evidence for Opinio Juris and State Practice

Taking into account this modification, the requirement for a rule of customary international law will be a general practice of states that is accompanied by a corresponding *opinio juris sive necessitatis*. Aside from the quantitative problem of determining the required extent for a sufficiently widespread and uniform conduct by the states, both requirements, state practice as well as *opinio juris*, raise the question of what material evidence can be used to prove their existence.

With regard to the first requirement, it has been accepted that the practice of states can take numerous forms, and scholars have compiled entire lists of what constitutes proper evidence of such state practice. Still, little agreement seems to have been reached on the relevant types of state conduct. Ordinarily, reference is made to indications of governmental action. Most widely accepted as instances of state practice are presumably policy statements, national legislation, and diplomatic correspondence. In addition, but more controversially, treaties, the writings of jurists, and nonbinding statements and resolutions by multilateral bodies, such as the UN General Assembly, are sometimes used to prove the existence of a general state practice.

When the proof of a sufficiently widespread and uniform state practice is successful, it may be equally difficult to demonstrate that it has been accompanied by an *opinio juris*. As noted earlier, the International Court of Justice, at least in theory, requires that the *opinio juris* is demonstrated on the basis of evidence beyond the mere fact that a certain behavioral pattern

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522 See *Restatement (Third)*, supra note 289, § 102 reporters' note 2.
523 *Ibid.*, § 102 comment b mentions as examples “diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states, for example in organizations such as the Organization for Economic Cooperation and Development (OECD). Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights”; Brownlie, *Principles*, supra note 294 at 6, generally mentions as “material sources of custom […] diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.”
524 See Goldsmith & Posner, *supra* note 349 at 1117; see also Currie, Forcse & Oosterveld, *supra* note 269 at 134.
525 See *Restatement (Third)*, *supra* note 289, § 103 comment a.
526 See *ibid.; see also Currie, Forcse & Oosterveld, supra note 269 at 134.
527 See *ibid.; see also Currie, Forcse & Oosterveld, supra note 269 at 134. (with a critique of these sources; Brownlie equally concludes his list of material sources of custom on the note that “[o]bviously the value of these sources varies and much depends on the circumstances”, see *Principles*, *supra* note 294 at 6); in terms of statements by the United Nations General Assembly, the actual sources of state practice are the statements and votes of the governments, see *Restatement (Third)*, *supra* note 289, § 102 reporters' note 2.
528 See Brownlie, *Principles*, *supra* note 294 at 8.
enjoys widespread support.\textsuperscript{529} Such independent evidence for the sense of a legal obligation or of a necessity may be most readily available where states explicitly comment on their motivation for acting in a certain way and on their sense of what international law demands.\textsuperscript{530} Statements and votes of governments on General Assembly resolutions may express the states’ attitude towards what is legally permissible or required.\textsuperscript{531} In addition, expressions of \textit{opinio juris} may also be found in some of the other material sources that served as evidence of state practice.\textsuperscript{532} Based on his definition of \textit{opinio juris}, which will be adopted in this thesis, Lepard for instance grants an important evidentiary status to multilateral treaties and declarations, to the extent that their language and other circumstances evidence the “states’ views on the desirability of immediately recognizing certain universal legal obligations.”\textsuperscript{533}

As the later analysis of legal materials will show, the protection of humans, if necessary with armed force, has been more often the subject of diplomatic correspondence, national policy statements, and the resolutions of UN bodies than of actual state action. Moreover, some multilateral treaties have been concluded that deal with this matter or at least touch upon it. Any of these sources may provide material evidence both of state practice and of \textit{opinio juris}.

The confirmation of a sufficiently uniform state practice may, however, be problematic where states fail to comply in their actual dealings with a purported rule.\textsuperscript{534} The relevance of this problem for the R2P framework is apparent if one takes account of the magnitude of suffering worldwide that is stopped neither by the respective host government nor by the world community, namely in the Sudanese Darfur region. Generally, however, a \textit{prima facie} deviation from a candidate norm need not automatically count as “negative state practice” that undermines the claim of this rule to customary legal status. Instead, such cases can even confirm an international custom, if the concerned states in fact demonstrate their commitment by explaining their deviation from the rule on the basis of the terms of this norm, for instance as a recognized exception to the general rule.\textsuperscript{535}

\begin{footnotesize}
\begin{itemize}
  \item See e.g. \textit{North Sea Continental Shelf}, supra note 352 at paras. 74, 77.
  \item See Currie, Forcse & Oosterveld, supra note 269 at 130.
  \item See Restatement (Third), supra note 289, § 102 reporters’ note 2; see also Nicaragua, supra note 374 at para. 188; see also Currie, Forcse & Oosterveld, supra note 269 at 130.
  \item See Currie, Forcse & Oosterveld, \textit{ibid.} at 133.
  \item See Lepard, supra note 323 at 103-104.
  \item See Currie, Forcse & Oosterveld, supra note 269 at 130.
  \item See Nicaragua, supra note 374 at para. 186; see also Cassese, \textit{International Law}, supra note 306 at 157.
\end{itemize}
\end{footnotesize}
In terms of the quantity of evidence needed to prove the existence of a general state practice of the states, no precise formula exists.\textsuperscript{536} The International Court of Justice demands that the practice be “extensive”.\textsuperscript{537} In ascertaining a sufficiently extensive state practice, the practice of “states whose interests are specially affected” may weigh more heavily than that of others.\textsuperscript{538} Along these lines, Henkin defines general state practice as “practice by a significant number of representative States concerned with the subject.”\textsuperscript{539}

Ultimately, however, no uniform, mathematical measure for the required number and repetition of acts of state practice can be devised.\textsuperscript{540} In addition, at the particular time of evaluation, the practice under consideration may be passing through a “gray area” in which it is uncertain whether it has already achieved the status of a legal norm.\textsuperscript{541} Uncertainties like these reiterate the need for the recognition of an ethical background theory.

\textbf{3.5.3 Ethical Background Theory for Treaty and Customary Law Analysis}

The analytical and argumentative work by Tesón and Lepard has indicated a number of ways in which moral and ethical considerations can provide an important background for both treaty interpretation and customary law analysis: by informing the identification of the relevant purposes of an agreement; by shaping the general approach to treaties, to the relevant understandings of their parties, and to possibly changed meanings of the terms of the agreement; by guiding the selection and appraisal of instances of state practice; by “tipping the balance” in favor of a particular decision in ambiguous cases of treaty or customary law analysis; and by reconciling conflicting principles.

Recourse to ethical principles in this role of a background theory that provides guidance in difficult cases of the interpretation of treaties or international custom might conflict with the positivist principles of state consent and the separation of law and morality, and also raises concerns of subjective assertions of legal norms by the analyst. Yet, it will be argued that these concerns are not compelling, in particular since moral considerations, functioning as a

\textsuperscript{536} See Restatement (Third), supra note 289, § 102 comment b.
\textsuperscript{537} See North Sea Continental Shelf, supra note 352 at para. 74.
\textsuperscript{538} Currie, Forcense & Oosterveld draw this conclusion from the language used by the ICJ in North Sea Continental Shelf, supra note 269 at 126.
\textsuperscript{539} See Henkin at 50; see also Restatement (Third), supra note 289, § 102 comment b (“[the practice] should reflect wide acceptance among the states particularly involved in the relevant activity.”)
\textsuperscript{540} See North Sea Continental Shelf, Tanaka J., dissenting, supra note 364 at 175; see also Currie, Forcense & Oosterveld, supra note 269 at 132.
\textsuperscript{541} See Henkin, supra note 276 at 49.
background theory, will only play a limited, though significant, role well entrenched within the framework of a positivist doctrine of sources.

3.5.3.1 Appraisal in the Light of the Consent Principle

In suggesting that ethical considerations can serve a viable function as a background theory for the resolution of ambiguities that arise in interpreting treaty law, customary international law, and general principles of law, Tesón and Lepard address issues that arise from the application of the recognized sources of international law under legal positivism. Hence, their suggestion of a background role for ethics may be seen as a mere specification to the traditional doctrine of sources, which is built upon, and complies with, the state consent principle.

Unlike proponents of traditional natural law concepts, Tesón and Lepard, do not exclusively or even primarily rely on logical reasoning as the means for identifying international law, by way of deduction from some higher system of universal morality. Rather, both authors emphasize the unfettered importance of the existing principles on the emergence of international law. Tesón thus explicitly points out that value choices must not be “exercised from nowhere, in a vacuum”.542 Rather, the actual practice of states remains a “central touchstone of international legal reasoning” about customary international norms, and moral-political reasoning only provides guidance in selecting and interpreting the relevant precedents.543 Hence, his ethical theory is merely one component in the process of arriving at legal propositions, and only works in conjunction with recourse to “institutional history”, that is, state practice and treaty texts.544 Similarly, Lepard presents respect for the existing legal structure as a basic tenet of his legal methodology,545 and initially recognizes the accepted sources of international law, that is, treaties, international custom, and general principles.546

Nevertheless, it must be acknowledged that, in difficult cases of legal analysis, the ethical background theory becomes decisive in that it informs the specific interpretation of treaty norms or instances of state practice, or even “tips the balance” towards the recognition of a certain rule as customary law or a general principle of law. This, however, means that the final decision on the content of international law rests on assumptions that are not directly derived from

543 Ibid. at 12, 15, 174.
544 Ibid. at 15.
545 See Lepard, *supra* note 323, at 102, 115.
546 Ibid. at 102.
expressions of the consent of states, and, in any event, not dependent on the consent of a particular state.

Yet, this ultimately decisive role for ethical considerations is limited to cases of ambiguities, that is, to cases in which the traditional methods simply fail to reveal the existence, or absence, of the necessary state consent. The ethical background theory serves to "begin to provide at least some general answers" to questions that the traditional approaches precisely left unresolved. Accordingly, it can be argued that the proposition of an ethical background theory providing guidance in difficult cases of identifying and interpreting the international law does not really conflict with the positivist consent principle, but only supplements it where it is unfit to produce clear outcomes concerning the status of a rule in international law.

3.5.3.2 Appraisal in the Light of the Separability Thesis

Yet, even in this limited role within the framework of the traditional doctrine of sources, recourse to ethical theories conflicts with strict legal positivist thinking in that it blurs the clear separation between the realms of law and morality required by the separability thesis. Unlike in the case of the consent principle, this conflict is not just an apparent one. According to the separability thesis, moral considerations should play no role, not even as a supplementary means, in determining the content of the international law.548

The following discussion will therefore focus on the question if the separability thesis can claim absolute validity in international legal theory, or if it can legitimately be deviated from. I will argue that a clear separation of legal and moral reasoning should not be required in theory, since it cannot be upheld in practice. Taking into account the methods through which international law is ascertained in practice, I will even suggest that a coherent ethical theory can serve a valuable function in the international legal discourse.

In theory, international law, under a positivist approach, is determined inductively as a function of hard facts. Accordingly, the separability thesis states that there is no room for moral considerations in this process. What is required by doctrine is empirical research, notably into agreements, as well as into the practice and the domestic laws of states. The positivist

547 Ibid. at 102.
548 See Raz, supra note 284 at 214; see generally Holzgrefe, supra note 284 at 35; Ratner & Slaughter, supra note 264 at 5.
549 See Schachter, "International Law", supra note 273 at 61.
550 See Raz, supra note 284 at 214; see generally Holzgrefe, supra note 284 at 35; Ratner & Slaughter, supra note 264 at 5.
551 Cf. Anghie, supra note 283 at 13.
approach to the ascertainment of international law thus supposedly functions in a value-free manner.\textsuperscript{552}

In practice, the analytical works of international lawyers have, at least at first glance, by and large adhered to this doctrinal position and largely focused on the analysis of texts, official statements and the actual intent and behavior of governments.\textsuperscript{553} Moral-philosophical considerations, by contrast, have been rejected as irrelevant, and even controversial issues such as humanitarian intervention have been discussed as a conflict between principles of positive international law without reference to “the moral underpinnings of the international legal order and their bearing on the problem [...]”.\textsuperscript{554}

Yet, the proponents of legal methodologies that take into account ethical considerations suggest that this methodological theory and its apparent application in practice do not properly reflect the reality of international legal analysis. Notably, Tesón argues that legal positivism, contrary to its theoretical assumptions outlined above, cannot escape value choices in practice, since both treaty texts and state practice need to be interpreted.\textsuperscript{555} This need for interpretation, Tesón states, is particularly transparent in the context of international custom.\textsuperscript{556} He argues that the assertion of a norm of customary law, at least in the areas of use of force and human rights, cannot be purely descriptive and value-free, since the claim that certain precedents shape a customary rule is based on a process of selecting and interpreting instances of state practice that reflects and requires a value choice.\textsuperscript{557} As well, treaty interpretation according to the rules of the Vienna Convention may face the problem that several relevant purposes of the treaty in question need to be ranked, for which process a guiding precept is equally necessary.\textsuperscript{558}

Then again, if the content of customary law and international law in general can only be determined by way of an interpretation, a value-free approach does not provide the means to solve international legal problems, such as the controversy about a right of humanitarian intervention.\textsuperscript{559} Therefore, Tesón suggests that the articulation of legal propositions necessarily requires a moral-political philosophy that serves as a “background [...] theory” and provides

\textsuperscript{552} See Tesón, \textit{Humanitarian Intervention, supra} note 45 at 15.
\textsuperscript{553} \textit{Ibid.} at 8.
\textsuperscript{554} \textit{Ibid.} at 8, 313.
\textsuperscript{555} \textit{Ibid.} at 313, 15.
\textsuperscript{556} \textit{Ibid.} at 313.
\textsuperscript{557} \textit{Ibid.} at 12, 14-15, 313.
\textsuperscript{558} \textit{Ibid.} at 151.
\textsuperscript{559} \textit{Ibid.} at 15.
guidance in making the necessary value choices.\textsuperscript{560} Furthermore, it is submitted by Lepard that the application of the existing sources in practice is problematic not only in that their content may be ambiguous, but also because different legal norms may collide. Where these sources themselves reflect ethical principles, these principles may serve both to give more specific content to the legal norms and to reconcile conflicts.\textsuperscript{561}

The accounts of other academics indeed provide evidence that the analytical practice of international lawyers fails to live up to the standards that the underlying positivist doctrine of sources establishes. It has already been seen that especially the sources of international custom and general principles of law raise essential operational difficulties in practice. Consequently, assertions of legal norms, while on the face based on the inductive analysis required by legal positivism, ultimately exhibit a selective approach by the decision-maker.\textsuperscript{562} As has been noted for customary law analysis, "the oft-repeated doctrinal position – that customary law depends on state practice coupled with \textit{opinio juris} – oversimplifies the manner in which such law actually emerges".\textsuperscript{563}

To sum up, the argument that the traditional, strictly positivist theory is inadequate to explain how international norms are identified, can be substantiated by evidence of the practice of legal analysis. If, however, a determination of the specific content of international law cannot be undertaken, as purported by positivists, in a value-free process based exclusively on hard facts and positive evidence of state consent, the question arises what rules or guidelines govern the necessary interpretation of the relevant legal materials. It appears that a normative theory based on ethical principles can provide a coherent and transparent standard according to which such interpretation can occur. While this proposition is in explicit contrast to the positivist separability thesis, it may constitute a more accountable basis for decisions about the status of international law which hitherto were made on the face of it pursuant to the separability thesis, but in fact reflected selections made by the analyst without explicit justification.

\textsuperscript{560} \textit{Ibid.} at 6-7, 12, 15.
\textsuperscript{561} See Lepard, \textit{supra} note 323 at 29, 102.
\textsuperscript{562} See Goldsmith & Posner, \textit{supra} note 349 at 1117; see also the critique by Currie, Forcense and Oosterveld of Judge McNairs approach to the identification of general principles of law in his separate advisory opinion on the \textit{International Status of South-West-Africa}, \textit{supra} note 269 at 145.
\textsuperscript{563} See Currie, Forcense & Oosterveld, \textit{supra} note 269 at 135-136.
3.5.3.3 The Risk of Subjectivism

While the need to complement the positivist analysis of the existing legal sources with a theory that is apt to provide guidance for the necessary interpretation establishes a strong case for taking ethical considerations into account as part of a legal methodology, recourse to an ethical theory raises concerns similar to those confronted by natural law concepts. Especially, it may be argued that legal propositions that are based on ethical considerations may reflect subjective assumptions about what is ethical and what is unethical. At worst, statements of the law may reflect the analyst's ideological assumptions.\(^{564}\) Tesón himself criticizes the classical natural law theory, with which he shares the emphasis on a necessary link between international law and moral philosophy, for "their tendency to dogmatism, their emphasis on self-evident principles which admitted no critical challenge".\(^{565}\)

There are, however, several arguments that can weaken this objection against the recourse to an ethical normative system as a background theory in difficult cases of international legal analysis. First of all, it has to be reiterated that in this role, ethical considerations would have a limited function only and not shape the international law "in a vacuum".\(^{566}\) Rather, they would only complement hard facts such as state practice and treaty texts.\(^{567}\) The traditional elements of international legal reasoning would thus maintain their function as a "central touchstone",\(^{568}\) and limit the space for subjective assumptions.

Moreover, moral reasoning is not necessarily subjective or ideologically charged.\(^{569}\) Much depends on how the underlying ethical theory is devised. The methodology for identifying ethical principles can itself contain safeguards against subjectivism and ideologism. For instance, it may be possible to identify certain ethical values, notably values of humanity, that are already endorsed by positive legal principles and can, by means of analogy, support related considerations.\(^{570}\) Along these lines, Lepard argues for recourse, *inter alia*, to ethical principles that find at least implicit support in the Charter itself.\(^{571}\) Another element that may provide useful guidance in deriving more specific rules from general principles are pronouncements by

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\(^{566}\) *Ibid*. at 15.

\(^{567}\) *Ibid*.


\(^{569}\) See Buchanan, *supra* note 564 at 154-155.

\(^{570}\) See Brownlie, *Principles*, *supra* note 294 at 26.

\(^{571}\) See Lepard, *supra* note 323 at 117.
international institutions, which have gained increasing prominence and influence in international relations.\textsuperscript{572}

An alternative, more theoretical, approach to the elaboration of an ethical theory that is as objective as possible could lie in the methodology adopted by Tesón in the tradition of modern "rights" philosophers.\textsuperscript{573} A basic foundation of this approach is the commitment to aim at finding "moral principles to which all rational agents would give allegiance", and to revise principles that, contrary to the initial intuition, later on turn out to be incorrect.\textsuperscript{574}

Finally, it should also be recognized that, in reality, scholarly pronouncements of international legal experts have already exercised a profound influence on the development specifically of customary international law as it is today.\textsuperscript{575} Against this backdrop, to allow for coherently elaborated ethical theories to become part of the debate about the law as it is does not seem to increase the risk of subjectivism to an unjustifiably significant extent.

3.5.3.4 Conclusion

In conclusion, where the application of the existing sources as required by the traditional positivist doctrine fails to produce unambiguous results, ethical theories can be useful as a "background" tool for a transparent and consistent resolution of such ambiguities. Within these limits, it is thus justified to apply moral and ethical considerations as part of a legal methodology. The positivist principles of consent and the separation of law and morality provide no compelling reasons against the recognition of a background role for ethical theories. At the same time, the underlying ethical theory must be as objective as possible. The elaboration of the ethical background theory, in the next chapter, will thus pay particular attention to providing safeguards against subjectivism and ideologism.

3.5.4 Ethical Principles Closing Gaps in the Legal System

Another question is whether ethical principles can have the quality not just to contribute to the identification of legal norms through the accepted procedures, but even where a thorough analysis of the sources has clearly established that positive international law does not contain a

\textsuperscript{572} See Currie, Forcese & Oosterveld, supra note 269 at 17-18.
\textsuperscript{573} See Tesón, Humanitarian Intervention, supra note 45 at 9.
\textsuperscript{574} Ibid. at 9-10.
\textsuperscript{575} See Currie, Forcese & Oosterveld, supra note 269 at 136.
rule on the issue at hand. A purely positivist approach to such a constellation of a “non liquet” or a “legal void” would suggest that the states retain the unfettered liberty to orient their conduct along national interests. Yet, as Vice-President Schwebel pointed out in his dissenting advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the holding of a “non liquet” had been considered by the drafters of the ICJ Statute as a “blind alley” that should be avoided. Another solution could then possibly lie in referring to ethical principles that obtain the force of binding international law and provide guidelines for the behavior of states with the same authority as conventional or customary law.

The idea that certain ethical principles may independently be considered as binding international law, although they have not explicitly been recognized in treaties, international custom, or general principles of national or international law corresponds to Lepard’s concept of general principles of moral law. Yet I suggest that the notion of general principles of moral law has been used by Lepard to describe a specific concept that may create further issues, the solution of which would side-track from the actual objective of this thesis. The characterization of general principles of moral law as general principles within the meaning of Article 38(1)(c) of the Statute of the Court, for instance, is incompatible with the prevailing understanding of the wording of that provision and raises the question if it is possible and meritorious to entrench the concept within the framework of legal positivism.

In the following, I will focus exclusively on the basic idea that legal principles may directly be inferred from a system of ethics or morality. While it is not my intention to produce new terminologies, I will label this form of legal principles as “principles of ethical law”, simply to indicate their origin and quality, while distinguishing them from the more specific concept of general principles of moral law advocated by Lepard.

The recognition of principles of ethical law constitutes a departure from the traditional doctrine of sources. Notably, it conflicts to an even higher degree than the idea of an ethical background

576 See Hugh Thirlway, “The Sources of International Law” in Malcolm D. Evans, ed., International Law (Oxford: Oxford University Press, 2006) at 128 (defining non liquet as “a finding that there was no law on point”); see also Cassese, International Law, supra note 306 at 189, n. 3.
577 Cf. Bannon, supra note 61 at 1162-1163.
578 See Ratner & Slaughter, supra note 264 at 5; see also Cassese, International Law, supra note 306 at 189, n. 3.
580 See Lepard, supra note 323 at 106.
581 Ibid. at 107.
theory with central propositions of legal positivism. Moreover, the notion of principles of ethical law may face challenges that were also levelled against natural law theories.

With a view to the difficulties that the concept raises in light of the separability thesis and the charge of subjectivism, reference may yet be made to the prior discussion in the context of ethical considerations serving as a background theory. As demonstrated above, neither finds the separability thesis general application in practice, nor are deviations necessarily detrimental to the legal system. The danger of subjectivism equally fails to constitute a convincing argument against recourse to ethical imperatives. Rather, it merely, though importantly, demands that the underlying ethical theory be devised with a view to utmost objectivity. Yet, principles of ethical law challenge the consent principle and will therefore be appraised in more detail in the light of this basic tenet of legal positivism in international law.

3.5.4.1 Appraisal in the Light of the Consent Principle

Principles of ethical law originate as ethical principles. Different approaches may be developed to the identification of the relevant ethical principles. Such an approach might, as in the case of Lepard's theory on general principles of moral law, *inter alia* take into account the general weight that a certain proposition is given by contemporary international law. The specific legal rule of ethical law, however, cannot necessarily be traced back to acts of the will of states, and is notably not dependent on the consent of individual states. Rather, the concept advocated by Lepard exemplifies the variety of sources external to the will of states that analysts may use to ascertain specific legal obligations under ethical law: Lepard's methodology, on the one hand centres upon what he defines as the preeminent ethical principle of unity in diversity, and, moreover, takes into account not just legal but also religious and philosophical moral texts. It is thus the analyst through a theoretical concept and not the states through expressions of their will who ultimately decide on the content of international law. The notion of principles of ethical law therefore conflicts with the fundamental principle of legal positivism that all international law is derived from the will of states.

582 See Part 3.5.3.2, above.
583 See Part 3.5.3.3 above.
584 Cf. Lepard, *supra* note 323 at 106.
585 See Part 4.1, above.
586 See Lepard, *supra* note 323 at 108 [emphasis added].
In the following, I will endeavor to appraise the concept of principles of ethical law in light of the consent principle, and to discuss its validity with regard to those considerations that have been said to require the consent principle as a necessary foundational rule of the international legal system. Specifically, the consent principle has been defended as the basis for the legitimacy and effectiveness of international law, and as a tool to reduce the risk of predation of weaker states by stronger ones, or of subjectivism and a lack of clarity in the determination of international law.\textsuperscript{588} I will argue that none of these concerns presents an insuperable obstacle for the recognition of principles of ethical law, and that, moreover, the consent principle cannot claim absolute respect anymore already in the contemporary international legal system.

\textbf{3.5.4.2 The Legitimating Force of State Consent}

Proponents of the state consent principle uphold that it is the only mechanism in international relations that can provide international law with legitimacy, and as such can justify the enforcement of international norms.\textsuperscript{589} This proposition can be challenged on two different accounts: first, on the basis of a comparison with domestic legal systems, and, second, by more fundamentally questioning the normative force of consent given by state leaders.

In domestic societies, certain notions of a “higher law”, in the form of “rights of man” that are “natural” and “unalienable”, are not only accepted as legitimate, but even form core constitutional principles.\textsuperscript{590} The proposition that legitimacy on the international level, by contrast, can only flow from state consent, rather than any body of “higher law”, is based on the assumption that the world community consists of states that lack any shared substantive ends or a shared conception of justice from which legal norms could otherwise derive legitimacy.\textsuperscript{591}

Yet, the international legal system is not as different from domestic societies as this argument suggests. Firstly, the members of liberal societies are often equally deeply divided over questions of justice, but they still coexist within legal systems that can be regarded as legitimate although not every single norm is derived from the consent of the members of that society.\textsuperscript{592} Also, the international human rights doctrine exemplifies that certain shared values have emerged on the

\textsuperscript{588} See generally Buchanan, supra note 564 at 148-158.
\textsuperscript{589} See generally \textit{ibid}. at 149-152.
\textsuperscript{590} See Currie, Forcese & Oosterveld, supra note 269 at 9-10.
\textsuperscript{592} See Buchanan, \textit{ibid}. 

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international level as well. This may be seen as a resurrection of natural thinking similar to that reflected in liberal domestic constitutions. It is therefore conceivable that international legal norms might derive their legitimacy from concepts other than the consent of the states, similar to some fundamental norms in domestic legal systems.

Moreover, it appears doubtful that state consent can possess the normative, legitimating force that proponents of a strict legal positivism suggest. "State consent", after all, is in practice nothing else than the consent of the leaders of these states. Many state leaders, however, derive their power from undemocratic systems in which massive human rights violations occur, and can thus hardly be considered as agents who represent their peoples’ will. Yet, if they do not represent their people, but possibly rather oppress it, the consent of these individuals can hardly be considered as the decisive criterion that confers legitimacy upon international norms.

Altogether, the state consent principle can, therefore, not be seen as the sole source of legitimacy for international law. It is conceivable that ethical principles might qualify as an alternative source from which at least equally legitimate legal norms can emanate.

### 3.5.4.3 Lack of Effectiveness

Another alleged justification for the foundational role of the consent principle, that states will only comply with norms to which they have given their consent, and therefore only law made by the states can effectively regulate their relations, has equally been rebutted by Buchanan through a comparison with domestic legal systems. Buchanan argues that domestic legal systems do not descend into chaos although they do not require consent to every norm, and that the international legal order is not decisively different from domestic orders in this regard.

In support of this argument, the historical experience of the decolonization process may in fact be interpreted as an example illustrating that the effectiveness of legal rules, also on the international level, can be ensured although, or precisely because, these rules have not been consented to by their addressees. When the former colonies became independent, the

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593 Ibid. at 151; see also Currie, Forcész & Oosterveld, supra note 269 at 17.
595 Ibid. at 151, 152.
596 Ibid. at 152.
597 Ibid.
598 Ibid.
599 Ibid.
600 Ibid. at 148-149.
international legal system was, to a large extent, imposed upon them by assuming that newly independent states were bound by the existing customary law.601

In addition, assuming arguendo that rules to which states have given their consent will work at least more effectively than rules that are independent of the consent of the governed, it seems doubtful that these rules would exercise any regulating effect. If international law consisted only of those rules to which the states had accorded legal status through their statements and actions, this legal system would only describe and legitimate the actual state conduct as it has been happening, it would not really prescribe the way in which states should conduct their affairs, thus constraining them in the exercise of their power.602 Positivism has therefore been criticized as a "deeply conservative doctrine" and "a tool of power rather than a means to challenge or constrain the arbitrary exercise of that power".603

In conclusion, the proposition that the consent principle must necessarily be at the basis of the international legal system to ensure its effectiveness is highly questionable. It can, on the contrary, be argued that, if international law is to have any constraining effect on the states' exercise of power, it must provide an avenue for non-positivist conceptions of justice, on the basis of which the legitimacy of the law that has been created by the states can be challenged.604 The concern for the effectiveness of the international legal system thus does not provide a compelling argument against the recognition of principles of ethical law either.

3.5.4.4 Risk of Subjectivism

While principles derived from a system of ethics may thus be equally legitimate and effective as norms created by the consent of states, deviation from the rules that have been made though this recognized process may confront the challenge of subjectivism.605 This risk may indeed be more significant in the context of principles of ethical law than in cases where ethical considerations serve as a background theory only. Whereas in this latter case, ethical principles function in conjunction with the "touchstone" of institutional history, that is, treaty texts or instances of state practice,606 they may, in the case under consideration here, obtain independent legal force based on their identification through moral reasoning.

602 Ibid. at 15.
603 Ibid.
604 Cf. Currie, Forcense & Oosterveld, supra note 269 at 15.
605 See generally Buchanan, supra note 564 at 154-155.
606 Cf. Tesón, Humanitarian Intervention, supra note 45 at 15.
In response to this challenge, particular attention should be paid to ensuring that proposed principles of ethical law do not simply reflect subjective or ideological positions. As has been argued above, moral reasoning does not need to be entirely subjective. Rather, it can find support, for example, in international legal materials and the pronouncements of international institutions. The contemporary proliferation of international bodies has created an institutional framework in which an increasing amount of such pronouncements is produced. As more concrete statements emanate from institutions that at least “simulate domestic legislative bodies and courts”, ethical principles may be asserted with more precision and authority, and thus partially avoid the challenges that had been mounted against natural law theories.\(^{607}\)

The perceived danger of subjectivism thus, again, does not essentially undermine the argument for the recognition of principles of ethical law. It demands, however, that the underlying ethical framework is defined with a view to securing the highest possible degree of objectivity. Equally, the underlying concept should produce sufficiently clear results. In this context, the establishment of abstract categories such as “fundamental”, “compelling”, and “essential” ethical principles, as suggested by Lepard, seems to provide very little guidance in determining the relevant ethical principles, unless it is complemented by a systematic methodology. The philosophical theory and methodology for the identification of the relevant ethical principles shall be addressed in the following Chapter 4.

3.5.4.5 Risk of Predation

Finally, strict adherence to the state consent requirement could be defended as an instrument to protect weaker states against predation by stronger ones. The basis of this thesis is that the state consent principle acknowledges the political equality of all states, and that, if this principle were deviated from, material inequalities that exist between the states would ultimately result in some states taking advantage of their power and preying upon their weaker peers.\(^{608}\)

Assuming for the moment that this empirical prediction is correct, and that strict adherence to the state consent requirement is a safeguard for the states’ right of self-determination and individuals’ human rights against violations by more powerful states,\(^{609}\) its value insofar is purely instrumental, that is, it can explain the need to adhere to the consent principle only to the

\(^{607}\) Cf. Currie, Forcense & Oosterveld, supra note 269 at 17.

\(^{608}\) See generally Buchanan, supra note 564 at 153.

\(^{609}\) See generally ibid.
extent that otherwise predatory behaviour would occur.\textsuperscript{610} It could thus be contended that the state consent requirement should be adhered to, in principle, but that it has no claim to absolute validity in cases where no predation would occur.\textsuperscript{611}

With regard to the law of humanitarian intervention in particular, the risk of predation by stronger states on weaker ones may arguably be a real concern.\textsuperscript{612} In this case, however, the question arises to what extent the rights of weaker states as such are worthy of protection, or whether the human rights of their individual citizens must be the focus of our prediction about the risks of deviating from the state consent requirement.\textsuperscript{613}

In conclusion, it is submitted here that the state consent principle, by acknowledging the formal equality of all states, may possibly have an instrumental value in reducing the risk of stronger states preying on weaker states. Yet, as will be elaborated as part of an underlying ethical theory, and in keeping with Tesón’s normative theory, state rights should be conceived as subordinate to the rights of individuals.\textsuperscript{614} Therefore, the utmost concern should be one for human rights, and, consequently, the risk of predation by stronger states against weaker ones cannot serve to dismiss the case for a recognition of principles of ethical law where these would on aggregate be beneficial for human rights protection.

\textit{3.5.4.6 Inconsistencies and Exceptions to the State Consent Principle}

Having suggested that the chief arguments for a strict adherence to the positivist state consent requirement are no compelling obstacles to the recognition of principles of ethical law, it should also be noted, that this concept is not as revolutionary as it might, at first glance and against the backdrop of the dominant role of legal positivism in contemporary international law, seem. Rather, some support for the recognition of certain ethical values as legally binding may be found both in jurisprudence and academic literature. The International Court of Justice, for instance, justified the binding force of the prohibition against genocide under reference to the concept of “moral law”.\textsuperscript{615} In the \textit{Corfu Channel} case, the Court based legal obligations on

\begin{footnotesize}
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\item \textsuperscript{610} \textit{Cf. ibid} at 153.
\item \textsuperscript{611} \textit{Ibid}
\item \textsuperscript{612} See e.g. Oscar Schachter, \textit{“The Legality of Pro-Democratic Invasion” (1984) 78 A.J.I.L. 645, at 649-650 (Lexis) [Schachter, \textit{“Pro-Democratic Invasion”}].}
\item \textsuperscript{613} On the issue of the moral standing of states and their citizens see generally Tesón, \textit{Humanitarian Intervention, supra} note 45 c. 3.
\item \textsuperscript{614} \textit{Ibid.} at 79.
\end{itemize}
\end{footnotesize}
“certain general and well-recognized principles,” which included “elementary considerations of humanity.” 616 Equally, Brownlie states that certain criteria of public policy related to considerations of humanity may be relied upon without the need for particular justification.617 Furthermore, in international humanitarian law, the so-called Martens Clause with its reference to “the laws of humanity and the requirements of public conscience” has been relied upon in conventions and judicial proceedings as a supplementary means to fill gaps in treaty and customary law.618

In addition to these precedents for the recognition of certain principles that had not been justified by a reference to the will of states, the state consent principle itself reveals inconsistencies and has already been subject to several exceptions in theory and practice.

Most fundamentally, the positivist principle that states create legal obligations by expressing their consent to certain rules only obtains meaning if it implies the principle that agreements must be honored (pacta sunt servanda).619 This principle itself cannot without circularity be based on the consent of states.620 Rather, it may be seen as an emanation of natural law.621 Consequently, the positivist doctrine as such is built upon naturalist arguments, recourse to which is otherwise forbidden by the separability thesis.622

More specifically, the “axiom that law is made only by consent” is difficult to reconcile with several elements of the doctrine of customary international law.623 International custom is one of the two formal sources that give rise to international norms of general application.624 Yet, quite apart from the operational difficulties of this concept and its often selective application in practice, it does not even in theory require the expressed consent of every single state.

Firstly, the consent of those states that actively participate in a certain behavioral pattern is said to be implied in this practice.625 Yet, not every single state even needs to participate in the required “general practice” for the creation of a new norm of customary law.626 Rather, it is

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617 See Brownlie, Principles, supra note 294 at 26.
619 See Henkin, supra note 276 at 47 (for treaty law).
620 See Brierly, supra note 335 at 53.
621 See Henkin, supra note 276 at 47.
622 See Holzgrefe, supra note 284 at 36.
623 See Henkin, supra note 276 at 50, see also Currie, Forcense & Oosterveld, supra note 269 at 17.
624 See Brownlie, Principles, supra note 294 at 3, 5.
625 See Currie, Forcense & Oosterveld, supra note 269 at 16.
626 See Cassese, International Law, supra note 306 at 162.
sufficient if "a significant number of representative States concerned with the subject" engage in a particular practice. 627

Even for those states that actively participate in the practice under consideration, it has been argued that the implication of consent is "not a philosophically sound explanation of customary law". 628 Rather, it is an attempt to justify the application of rules to which states can hardly be said to have consented. 629 In particular, the proposition that even newly independent states shall be bound by all existing international customs, including those predating their independence, provokes the criticism of being "no more than a fiction resorted to in order to conceal the objectively binding force of international law as independent of the will of the particular State." 630

Secondly, in practice, no court has ever undertaken an analysis of the views of every single state. 631 As a result of the enormous increase in the number of states to nearly 200, from about 40 "in the heyday of international customary law", it has indeed become an extremely arduous and sometimes impossible task to gather the enormous amount of evidence required. 632 Against this backdrop, Brierly's demand that in determining the nature of international law, rather than "forc[ing] the facts into a preconceived theory", we should find a theory that can explain the actual facts, 633 may serve as the starting point for an approach to international law that does not strictly adhere to the consent principle.

Finally, another recent trend which brings into question the general assertion that international norms are binding upon states because they have received their consent is the concept of jus cogens and its impact on the persistent objector rule. 634 As indicated above, no contracting out is possible from a rule that qualifies as jus cogens, that is as a peremptory principle that admits no derogation. 635 Cassese even goes farther and generally denies the possibility that dissenting states

627 See Henkin, supra note 276 at 50; see also Restatement (Third), supra note 289, § 102 comment b ("[the practice] should reflect wide acceptance among the states particularly involved in the relevant activity.").
628 See Brierly, supra note 335 at 51-52; see also Currie, Forcese & Oosterveld, supra note 269 at 17.
629 See Brierly, ibid. at 52, see also Currie, Forcese & Oosterveld, supra note 269 at 17.
630 See Hersch Lauterpacht, Private Law Sources and Analogies of International Law: with Special Reference to International Arbitration (N.p.: Archon Books, 1970) at 53; see also Currie, Forcese & Oosterveld, supra note 269 at 17; see Henkin, supra note 276 at 50.
631 See Cassese, International Law, supra note 306 at 162.
632 Ibid. at 165.
633 See Brierly, supra note 335 at 52; see also Currie, Forcese & Oosterveld, supra note 269 at 17.
634 See Henkin, supra note 276 at 50; see also Cassese, International Law, supra note 306 at 155 (for jus cogens), 162-163 (for the persistent objector rule).
635 See Henkin, supra note 276 at 50.
may be exempt from any customary norm. In his view, international relations today are a lot more social values-oriented than they used to be, and the concept of customary law can therefore be considered as having lost its initial consensual character.

Regardless of whether Cassese’s complete denial of the persistent objector rule is shared, it is apparent that even the positivist doctrine of customary international law makes exceptions from the general rule that states are bound by international customs because they have consented to them. Consequently, it is difficult to maintain that consent is an indispensable requirement for every binding international law.

3.5.4.7 Conclusion

The foregoing analysis has shown that none of the fundamental considerations on which strict adherence to the state consent requirement is proposed compellingly undermines the submission that, in deviation from this strictly positivist principle, certain ethical principles can independently be regarded as possessing binding legal force. On the contrary, it has been argued that a strict limitation of international law to norms that have voluntarily been made by the states lacks constraining force on the exercise of the states’ power, and that principles of ethical law may therefore be a legitimate addition to the international legal system as based on the traditional doctrine of sources. This proposition appears to be in conformity with some dicta by the International Court of Justice and academics, as well as with the resurfacing idea that certain fundamental rights and obligations must be respected and cannot be abrogated even by sovereign states.

3.6 Conclusions and Outlook

The inquiry into different theoretical approaches to the law governing the use of force for humanitarian protection has led to the conclusion that, despite several conceptual and operational flaws of the doctrine, it is best to adhere to legal positivism as the general basis for an analysis of the legal status of the R2P framework. Accordingly, the positivist sources of conventional and customary law will provide the primary tools for the following legal analysis. Yet, in deviation from the positivist separability thesis, moral and ethical considerations will be granted important functions as a background theory, informing the interpretation of treaties and the analysis of

636 See Cassese, International Law, supra note 306 at 165.
637 Ibid. at 164-165.
638 Cf. Currie, Forcete & Oosterveld, supra note 269 at 19.
international custom, as well as in the form of principles of ethical law, that is, ethical principles that obtain binding legal force independently of their recognition in any of the positivist legal sources.

Methodologically, the inquiry into the international law on the different elements of R2P will therefore start out, where appropriate, with an interpretation of the relevant treaties. This interpretation will follow the steps set out by Lepard, that is: firstly, ascertain the ordinary meaning of the relevant provision in light of the object and purposes of the treaty; secondly, determine the parties’ original shared understandings at the time of the adoption of the treaty; thirdly, inquire as to whether there are any new generally accepted understandings of the terms that can trump the ordinary meaning and original understandings since they are equally or more consistent with moral and ethical considerations; and, finally, resort to ethical principles for guidance if the aforementioned steps fail to produce an unequivocal result.

Also, I will address any relevant customary norms. Important material evidence for both elements of customary international law, the general state practice and the *opinio juris sive necessitatis*, will be provided notably by national policy statements and declarations by UN bodies. Moreover, potential examples of a “negative state practice” will critically be appraised. The need to interpret these material sources of customary law will be approached on the basis of an ethical background theory, which will moreover serve to resolve, if necessary, ambiguities and conflicts in both conventional and customary law.

Finally, where this method fails to expose rules of international law, ethical considerations will be resorted to in order to fill this legal void. As “principles of ethical law”, they will provide rules of binding legal force that complement the existing conventional and customary norms, independently of any specific proof of the consent of states.

A potential backlash of the recourse to ethical considerations has been identified in the risk of subjective and ideological propositions. To avoid this danger, a coherent ethical theory will need to be devised, that rests on a philosophical and methodological basis which provides the necessary safeguards against subjectivism and ideologism. The elaboration of such a normative theory of the ethics of R2P will be undertaken in the next chapter.
CHAPTER 4: THE ETHICS OF R2P

As a result of the decision for a method that, while being rooted in legal positivism, grants a central role to ethical and moral considerations, a framework must be set out that exposes the relevant ethical and moral principles. To avoid the risk of selectivity, such a framework should provide for a consistent ethical theory on the issues of humanitarian intervention and a responsibility to protect. In this chapter, I will therefore endeavor to outline the ethics of R2P, that is, ethical principles and imperatives that govern the different components of the R2P framework, from the responsibility of a state for the protection of its own people to the rights and duties of foreign entities.

Bearing in mind the legacy of natural law theory, an ethical theory of R2P that may influence the contents of international law, first and foremost, needs to confront the challenges of subjectivism and ideologism. To this end, before engaging in a substantive discussion of the individual aspects of R2P, I will set out the parameters that I deem a suitable basis for an ethical theory that is, to the best degree, objective and free of ideological presumptions. For this part, I will specifically draw on the achievements by Tesón and Lepard, who devoted significant parts of their works to the definition of a moral-philosophical theory or the exposition of ethical principles of humanitarian intervention.639

The analysis will proceed in several steps: firstly, it will be suggested that different ways exist for devising a normative ethical theory, including a more empirical and a more theoretical-philosophical method. Taking the position that a primarily empirical analysis is inadequate for identifying the most meritorious ethical principles, secondly, a model will need to be devised to guide the determination of ethical principles through a process of theoretical-philosophical reasoning, taking into account, again, the risk of subjective or even ideological presuppositions. I will suggest that the social contract theory outlined by Rawls in “A Theory of Justice”, adapted to the level of international relations, provides a suitable thought-model for determining the ethics of R2P. On this basis, finally, I will discuss substantive ethical imperatives and argue that not only has the host state a responsibility to protect its population, but also have foreign states moral rights and even duties to take military action for the protection of imperiled populations.640 These imperatives will then provide the necessary guidance, in the next chapter, in analysing the positivist sources of international law and complementing them where they fail to provide rules.

639 See Tesón, Humanitarian Intervention, supra note 45, c. 2-6; Lepard, supra note 323, c. 2.
640 Parts of this chapter have previously been submitted as a paper in the seminar “International Law Problems” under the supervision of Professor Maurice Copithorne.
4.1 Theory of Ethics: The Preferability of a Moral Philosophy over Empiricism

As the legal method adopted in this thesis, and particularly the decision to have recourse to moral and ethical considerations, has directly been informed by the approaches of Tesón and Lepard, the works of these scholars also provide a good framework for the elaboration of the required ethical theory. Both of these scholars confront the challenge to devise, as a preliminary part of their analyses of the law of humanitarian intervention, a comprehensive theory of the relevant moral or ethical norms. Importantly, however, they ground their respective normative theories in significantly diverging conceptual foundations: while Tesón elaborates a moral theory that draws upon the philosophy of social contractarianism, Lepard explicitly renounces any recourse to a particular philosophical approach. Instead, he aims at identifying ethical principles that find support in international legal materials, philosophical and religious texts.

In the following paragraphs, I will outline these two concepts in some more details, and use them to exemplify the merits of a philosophical as compared to an essentially empirical approach. I will suggest that, despite the benefits of an empirical survey of the different attitudes towards an issue like R2P, it is necessary for a compelling ethical theory to be grounded in a convincing philosophical fundament.

A largely empirical approach to ethics may be exemplified by Lepard’s methodology for ascertaining the relevant principles for his discussion of humanitarian intervention. Lepard notably analyzes several primary and supplementary materials for their endorsement of the proposed rules, and discusses the link of these rules with what he considers the “pivotal and preeminent ethical principle” of “unity in diversity”. In Lepard’s concept, ethical principles to be taken into account in identifying and interpreting international legal norms must satisfy two criteria: firstly, they “can be understood as endorsed by contemporary international law, including the U.N. Charter and emerging international human rights and humanitarian law”; and, secondly, they are logically connected with the preeminent principle of “unity in diversity”.

The notion “unity in diversity” embodies the notion that all human beings are united “as equally

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642 See especially Tesón, *ibid.* at 61-74, 79.
643 See Lepard, *supra* note 323 at 34.
dignified members of one human family, who in turn can, within a framework of unity, develop and take pride in individual, national, ethnic, or religious identities". 646

To adduce further credibility to the principles thus identified, Lepard refers to the foundational texts of seven world religions and philosophies and points to passages in these revered moral texts that may be interpreted as being consistent with or even supportive of the respective principles. 647 This analysis of passages from religious and philosophical texts, however, serves a supplementary function only. The support that particular ethical principles may potentially find in “many of the major religious and philosophical systems of the world” only further strengthens the case for their ethical and consequently legal relevance. 648

Ultimately, Lepard’s approach to humanitarian intervention is thus essentially “grounded in the tradition of international law”. 649 While he incorporates fundamental ethical principles in his legal methodology, he refers back to international law for guidance in identifying the relevant ethical principles. 650 The legal authority of fundamental ethical principles is derived from their, explicit or implicit, incorporation in legal texts. 651

The central weight that Lepard accords to legal materials, and his supplementary inquiry into revered moral texts, distinguish his approach profoundly from Tesón’s method in defining his ethical theory, a “substantive moral philosophy of international relations”. 652 Tesón engages thoroughly with different philosophical concepts that have provided the ground for opposition against humanitarian intervention. 653 He arrives at his proposition that there is a moral right of humanitarian intervention in cases of serious human rights violations through a critique of the prevailing non-interventionist model, which, in his conclusion, suffers from “philosophical inadequacies”. 654

Whereas Lepard refuses to “seek guidance on the relevant ethical principles in a particular philosophy”, 655 Tesón explicitly draws upon the concepts developed by modern political

646 Ibid. at 33-34 (this “preeminent, ethical principle” of unity in diversity is itself based on an analysis of contemporary international materials and additional support from revered moral texts, ibid. at 45-50).
647 Ibid. at 34 (these seven religions and philosophies have been selected as a function of the widest global dispersion of their membership and include Christianity, the Bahá’í Faith, Islam, Judaism, Buddhism, Hinduism, and Confucianism and Chinese “folk religions”, ibid. at 42).
648 Ibid. at 42.
649 Ibid. at 34.
650 Ibid.
651 Ibid. at 42.
652 See Tesón, Humanitarian Intervention, supra note 45 at 313.
653 Ibid., c. 5.
654 Ibid. at 15, 23-24, 314.
655 See Lepard, supra note 323 at 34.
philosophers like Rawls and Dworkin.\textsuperscript{656} Social contractarianism, in his view, provides a
"defensible" philosophical foundation for international law.\textsuperscript{657} Specifically Rawls's theory of
international law is praised as "a step in the right direction", although Tesón modifies it in at
least one aspect, and draws different conclusions on the specific principles of international
justice.\textsuperscript{658} In contrast to Lepard's methodology, which is concerned with finding principles that
have in fact been endorsed by legal materials as well as possibly a broad range of philosophical
and religious texts, Tesón undertakes to identify principles to which, hypothetically, "all rational
agents would give alliance".\textsuperscript{659}

It is apparent that Lepard, while building upon Tesón's work in his recognition of a role for
ethics in his legal methodology, has deviated from the antetype set by Tesón in defining his
ethical methodology. With a view to the pivotal concern of ruling out subjectivism and
ideologism, Lepard's more empirical approach may be promising in that it sets out to identify
ethical principles on which there is an international consensus. Lepard himself sees one of the
merits of his approach in the potential that its foundation in legal and different religious and
philosophical texts may, on a practical level, foster acceptance among governments and people
from different national, cultural and religious backgrounds.\textsuperscript{660} Tesón's more philosophical
approach to the ethics of humanitarian intervention, by contrast, may be more suspect of
allowing for subjective and ideologically charged propositions. Indeed, Tesón has attracted harsh
criticism when he defended the US-led invasion in Iraq in 2003 as a justified humanitarian
intervention.\textsuperscript{661} His evaluation rested, inter alia, on the propositions that the interveners, despite
shifting justifications and potentially additional motives, had the intention to end a tyranny that
was severe enough to meet the just cause threshold for humanitarian intervention.\textsuperscript{662} Also, at the
time of this evaluation in 2005, he assumed that "the war in Iraq [fared] reasonably well".\textsuperscript{663} This

\textsuperscript{656} See Tesón, \textit{Humanitarian Intervention, supra} note 45 at 9-10, 61-74, 79, 313.
\textsuperscript{657} \textit{Ibid.} at 79.
\textsuperscript{658} \textit{Ibid.} at 61-74, 79.
\textsuperscript{659} \textit{Ibid.} at 9-10.
\textsuperscript{660} See Lepard, \textit{supra} note 323 at 33.
\textsuperscript{661} See Fernando R. Tesón, "Ending Tyranny in Iraq" (2005) 19:2 Ethics & International Affairs 1 at 2
(EBSCOhost) [Tesón, "Ending Tyranny"]; Weiss, \textit{Ideas, supra} note 1 at 124 ("Fernando Tesón’s judgments about
the use of force for humanitarian purposes are usually apt, but his efforts to rationalize the end of Saddam Hussein’s
tyranny in such terms are inlausible and erroneous."); Weiss, "R2P After 9/11", \textit{supra} note 59 at 750; see also
Terry Nardin, "Humanitarian Imperialism" (2005) 19:2 Ethics and International Affairs 21 at 21 (EBSCOhost)
[Nardin, "Imperialism"].
\textsuperscript{662} See Tesón, “Ending Tyranny”, \textit{ibid.} at 2-15.
\textsuperscript{663} \textit{Ibid.} at 13.
defence has notably been criticized for its focus on the character of the regime rather than its specific human rights abuses.664

Despite the controversy around the specific case of Iraq, the suggested philosophical approach to the ethics of humanitarian intervention may still be preferable over more empirical concepts. It is doubtful that an approach that identifies ethical principles primarily on the basis of an empirical survey of legal and moral texts, but lacks a compelling philosophical basis, can authoritatively state the ethics governing a controversial issue like that of human protection within and across the borders of a state. Given that it is my intention to use ethical considerations not only as such, but more significantly even as an element of international law, the selected ethical principles should be the most meritorious ones. Lepard himself admits, however, that these are not necessarily the principles that his approach exposes.665 His reliance on legal materials and emerging legal norms means, as we recall the positivist foundation of contemporary international law, that recourse is had to principles that are essentially based on the will of state representatives and may have been designed without regard to any moral and ethical considerations.666 The revered moral texts of major world religions and philosophies, which are supposed to enhance the credibility of the proposed principles, are ambivalent on the issue notably of military force for humanitarian purposes, as they may contain propositions that are antithetical to the passages selected by Lepard.667 A comprehensive treatment of these texts would indeed require a survey of the host of specialized commentaries that exist on the various religions and philosophies - an undertaking that Lepard explicitly renounces.668

For these reasons, it appears preferable to undertake the inquiry into the ethics of humanitarian intervention and the responsibility to protect on the basis of a moral philosophy of international relations, such as the one suggested by Tesón. Yet, as his own extensive discussion of interventionist and non-interventionist positions demonstrates, there is a variety of philosophical concepts that dispute the authority to establish ethical imperatives. The thorough discussion and appraisal of all of these philosophies would exceed the scope of this thesis. Instead, the subsequent analysis will rest on the assumption that social contract theory provides an adequate

664 See Nardin, "Imperialism", supra note 661 at 21.
665 Lepard concedes this point, supra note 323 at 34.
666 See Holzgrefe, supra note 284 at 35-36; Ratner & Slaughter, supra note 264 at 5.
667 See Lepard, supra note 323 at 41.
668 Ibid. at 42.
philosophical foundation for the ethics of international relations. As the following section will show, social contractarianism, specifically in the form given to it by Rawls, can be equipped with mechanisms that provide a certain protection against subjective propositions.

4.2 Model for Ethical Arguments: Rawls's Social Contract in the Original Position

Having suggested that a philosophical approach to the ethics of R2P is preferable, and that social contractarianism generally is an appropriate philosophical basis, the methodological question remains of how to apply this philosophy to identify specific ethical principles. It is necessary to devise a criterion or procedure that enables the analyst to expose the ethical imperatives that arise out of the concept of the social contract. This criterion or procedure, moreover, will allow for a valuation of ethical arguments that have been made in the existing literature and that are often consistent in themselves but nevertheless incompatible with one another as they may derive from different underlying philosophical concepts.

A useful tool in this regard is the “thought-experiment" of a hypothetical contract between “original contractors”, advocated by John Rawls in his modern version of social contractarianism. According to this thought-model, societies are based on “principles of justice”, that is, those rules that individuals would choose as the foundation of their society when they begin to engage in social cooperation. To define what is just, Rawls reflects as to what principles rational persons would agree on to further their own interests if their bargain was fair. An agreement is “fair” if the contractors are equally free and not advantaged or disadvantaged by natural or social circumstances. To identify principles that are fair in this sense, Rawls imagines an “original position” in which these circumstances are covered by a “veil of ignorance”, that is, the original contractors ignore both their place in society and their natural disposition. As a consequence of this uncertainty, the veiled egoists will follow a “maximin” strategy: they will adopt those rules that will, in the worst case, still create the most tolerable outcome. Thus, while being egoists, the original contractors will “agree on certain principles as if they were not

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669 Cf. Tesón, Humanitarian Intervention, supra note 45 at 79, 118; Joyner, supra note 2 at 719; MacFarlane & Khong, supra note 57 at 58.
672 Ibid. at 11.
673 Ibid. at 132-133 and n. 19.
egoists". They will establish principles that favor the least advantaged in society, since they have to acknowledge the possibility of being in that position themselves.

While Rawls's social contract theory is initially formulated for issues of domestic affairs, it can also be applied to international relations. The principles governing international relations are defined on a second stage of the hypothetical contract. Again, the contractors are thought of as being under a veil of ignorance, which not only conceals the power and strength of their nation as compared with other nations, but also their own place as an individual within their respective society. The original contractors are thus deprived of any information that would allow "the more fortunate among them to take advantage of their special situation." Tesón therefore deems it preferable not to label the hypothetical contractors as "state representatives", since they ultimately speak for themselves and not for the nation in which they will live. With a view to human protection, these individuals will acknowledge the existence of societies that are grossly unjust and will apply a maximin strategy to "make what is intolerable as tolerable as possible".

The Rawlsian-Tesonian model of a hypothetical social contract is a suitable tool to approach the relevant ethical principles concerning rights and duties of humanitarian protection. The metaphor of a "veil of ignorance" that prevents the original contractors from knowing their own society and place in that society can serve as a constant reminder of the diversity of viewpoints, requiring us to reflect on the positions and beliefs of people from different cultural and social backgrounds. This awareness of diversity may help to reduce the risk of subjective or ideological assumptions in the formulation of ethical principles.

Eventually, however, the analyst will need to make a judgment as to what the choices of the hypothetical original contractors would be, and the conclusions reached may still vary.

674 See Laberge, supra note 570 at 19.
675 ibid.
676 See Rawls, supra note 671 at 331; see also Tesón, Humanitarian Intervention, supra note 45 at 61.
677 See Rawls, ibid.; cf. Laberge, supra note 570 at 18-19.
678 See Rawls, ibid. at 331-332.
679 ibid. at 332.
680 See Tesón, Humanitarian Intervention, supra note 45 at 65 (going even farther by submitting that the original contractors may not even have to perceive the world as being divided into separate entities); but see Rawls, supra note 671 at 332 (explicitly using the term "representatives").
681 See Laberge, supra note 570 at 21; see also Tesón, Humanitarian Intervention, supra note 45 at 66.
682 See Laberge, ibid.
683 While Tesón explicitly suggests that the original contractors would choose a "principle of limited intervention on behalf of human rights", Humanitarian Intervention, supra note 45 at 66, Rawls proposes a principle of freedom from foreign intervention, and mentions the possibility of military intervention for the protection of liberties of other societies only in a subordinate clause, supra note 671 at 332, 334.
Again, the risk of subjectivism and ideologism looms. To further minimize this risk, I suggest that it is appropriate, at this point, to resort to a combination of logical reasoning and comparative empirical analysis, not unlike the approach suggested by Lepard. There may be some essential ethical values that are not seriously disputed or even disputable. For these values, which may be rare, it may not necessitate the imagination of a “veil of ignorance”, but even “non-veiled egoists”, including the most powerful individuals such as influential state representatives, will recognize them. Importantly, one such value should be the notion of human dignity. This suggestion may be supported by the finding of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its judgment in Furundžija that “[t]he general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.”\(^{684}\) Starting from such generally accepted values, certain conclusions and more specific principles may be deduced through compelling logical reasoning.\(^{685}\)

This method, however, will only suffice to identify a small number of very basic principles. For any ethical question outside this core of generally held ethical convictions, I will need to develop my argument in a way that demonstrates an objective and logically compelling application of the Rawlsian-Tesonian contract model, and convincingly submit that the proposed principle would hypothetically be included in a contract made by individuals who work under a veil of ignorance that conceals their actual position in society. While the force and integrity of such a proposition ultimately depends on the strength of the argument, empirical observations that show a certain degree of support for a candidate principle can help to repel charges of subjectivism. Such support may come from a variety of sources, including the rhetoric of state representatives, UN declarations, judicial or scholarly pronouncements, religious or philosophical texts, declarations by NGO’s, or surveys on the positions of civil society. Notably, it has for instance been observed that the criteria on the use of military force set out by the ICISS are consistent not only with Christian “just war” theory, but also “with other major world religions and intellectual traditions”.\(^{686}\)

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\(^{685}\) Cf. Aronofsky, supra note 236 at 317-318 (but note that Aronofsky’s suggestions concerning “reasonable inference” of certain duties and responsibilities directly apply to the identification of legal norms, and do not provide evidence of a methodology that would preclude subjective judgments).

\(^{686}\) See Evans, “Responsibility to Protect”, supra note 25 at 710.
On the basis of this philosophical foundation and methodological approach, I will address, in the following sections of this chapter, the ethics of a primary responsibility to protect of the host state, of a right of collective and unilateral humanitarian intervention, and of a responsibility of the international community to protect. While these discussions are predicated on the model established in the works of Rawls and Tesón, their outcomes need not necessarily be consistent with the conclusions drawn by these authors.

4.3 The Responsibility of States for the Protection of their Populations

The first question that the R2P framework raises is whether a state has a responsibility to protect its population, as suggested by the ICISS.\textsuperscript{687} From an ethical point of view, this question can most directly be addressed on the basis of the contractarian philosophy that has been chosen as the underlying conceptual framework for the definition of ethical principles.

The basic idea of social contractarianism is that individuals conclude an agreement putting forth the fundamental principles governing their association when they enter into social cooperation.\textsuperscript{688} They negotiate not only the rights and duties of the individual members of this society towards one another, but also conclude an agreement that defines the relationship between the citizens and the authorities which they establish to govern their political community and to ensure its civil order.\textsuperscript{689} In forming a state, the individual contractors accept limitations on their personal rights and freedoms in order to receive certain services, which include notably protection through the state.\textsuperscript{690} Accordingly, the government owes its position to a contract in which it undertakes to protect its citizens.\textsuperscript{691} As Tesón formulates, governments are, "[f]rom an ethical standpoint [...] mere agents of the people."\textsuperscript{692} On the basis of social contractarianism, the government of every state is thus under a responsibility to protect its citizens, including from mass killings and other massive human rights violations.\textsuperscript{693}

Empirical research also provides evidence for a widespread acceptance of the proposition that the responsibility of the host state to protect its population is an ethical imperative. Lepard's analysis of legal materials as well as of religious and philosophical texts, for instance, leads him

\textsuperscript{687} Cf. ICISS, Responsibility to Protect, supra note 9 at xi.

\textsuperscript{688} See Rawls, supra note 671 at 10-11.

\textsuperscript{689} Cf. Joyner, supra note 2 at 719.

\textsuperscript{690} See MacFarlane & Khong, supra note 57 at 58; Tesón, Humanitarian Intervention, supra note 45 at 118.

\textsuperscript{691} See MacFarlane & Khong, ibid. at 59.

\textsuperscript{692} See Tesón, Humanitarian Intervention, supra note 45 at 117.

\textsuperscript{693} See Joyner, supra note 2 at 720.
to formulate a “trust theory of government”, according to which the institutions or individuals exercising governmental authority have “ethical duties to act as trustees for the benefit of the community members [...] and to respect and protect their human rights.”694 In support of this trust theory of government, Lepard cites Article 56 of the UN Charter, the Universal Declaration of Human Rights, as well as the Hebrew Scriptures, Buddhist, Confucianist and Bahá’í writings, the New Testament and the Quran.695 Moreover, as the legal analysis of state practice on the primary responsibility to protect will show, this idea has also found broad support in the statements by representatives of individual states and in the discussions of UN bodies.696 Finally, even one of the harshest opponents of R2P in scholarly literature, Mohammed Ayoob, has admitted that the approach of understanding sovereignty as responsibility has “considerable moral force”.697 It may thus confidently be concluded that the ethical proposition of states and their governments being responsible for the protection of their citizens cannot be undermined by claims of subjectivism or ideologism.

In conclusion, states and their public authorities are under an ethical obligation to protect their citizens from massive human rights violations like large-scale killings and ethnic cleansing.

4.4 The Case for a Right of Humanitarian Intervention

The ensuing question is whether, in cases where a state fails to fulfill this obligation to protect its population from large-scale killings or ethnic cleansing, other states are ethically justified in intervening with military force to stop these atrocities. A distinction will need to be drawn between intervention undertaken collectively through the United Nations and unilateral humanitarian intervention, as the latter raises particular ethical problems. I will therefore attempt to determine the ethics of humanitarian intervention in three steps: in this section, I am going to make an argument for military intervention as a means to avert massive human rights violations; at the end of these explanations, a prima facie case for humanitarian intervention will have been established. The subsequent two sections will then, in turn, address and critically appraise potential counter-arguments to humanitarian intervention in general and unilateral operations in particular. In these parts, I will submit that no argument is sufficiently strong to undermine the case for either collective or unilateral humanitarian intervention.

694 See Lepard, supra note 323 at 59.
695 Ibid. at 59-62.
696 See Part 5.2.3, above.
697 See Ayoob, supra note 186 at 84.
4.4.1 Human Dignity and Human Rights

The essential basis for the claim that humanitarian intervention can be legitimate is an ethical theory that places utmost importance on human rights. The central proposition is that every human being possesses an inherent dignity and certain human rights that all other individuals have to respect. Every person has a moral worth qua person, and is, as a member of the human family, “entitled to a basic respect and dignity”. In particular, all individuals have a right to life and to physical security, since these “minimal protections of their physical existence” are necessary conditions for their free “physical, intellectual, and ethical endeavours”.

Yet, it may be doubtful whether this recognition of the dignity and rights of human beings suffices to justify military intervention. This conclusion would first be challenged by advocates of moral relativism. Moral relativists suggest that rights possess meaning only within specific social settings and change as soon as this setting changes. A consequence of this theory is that human rights are relevant only in domestic societies and cannot justify criticism of social practices in other societies, let alone military intervention.

The claim that there are no transboundary ethical values can, however, not be upheld. It appears that there is a hard core of truly universal human rights, and that no culture would defend practices like large-scale killings or ethnic cleansing as ethically justified. Also, it seems to be a necessary consequence of the philosophical concept adopted in this essay that human dignity and basic human rights are guaranteed. Recognizing that different cultures may have different values and needs, the original contractors, who do not know what society they belong to, may be reluctant to agree on rights that some cultures do not accept. Nevertheless, as part of their maximin strategy, they will uphold human dignity and the right to life of every individual.

On the other hand, even if human dignity and human rights are acknowledged as universal ethical principles, this does not automatically mean that military intervention is ethically

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698 See Lepard, supra note 323 at 53, 55, 89.
699 Tesón uses this proposition against cultural relativism, Humanitarian Intervention, supra note 45 at 42-43.
700 See Lepard, supra note 323 at 45.
701 Ibid. at 62.
703 See Tesón, Humanitarian Intervention, supra note 45 at 34.
705 Rawls, supra note 671 at 53, goes farther for the domestic level: “each person is to have a right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.”
justified. This challenge is supported by statements of state representatives at the Vienna World Conference on Human Rights, who denounced some of the most egregious human rights violations, but at the same time emphasized that these situations must be dealt with by cooperative rather than confrontational means.\(^{706}\)

It must be recalled, however, that the objections raised by state representatives may only indicate potential challenges to international intervention. In the end, the hypothetical perspective of the original contractors is decisive in determining the ethics of intervention. For them, humanitarian intervention may be the only "source of salvation" when their human dignity and rights are threatened.\(^{707}\) As a result, they would, in principle, agree that humanitarian intervention should be condoned.\(^{708}\) This finding can empirically be supported by the interviews, commissioned by the International Committee of the Red Cross, with civilians in conflict-torn societies, a majority of whom has welcomed the presence of foreign peacekeepers and called for more rather than less external intervention.\(^{709}\)

In conclusion, the values of human dignity and human rights strongly favor a right of humanitarian intervention. They establish at least a _prima facie_ case that humanitarian intervention is ethically legitimate. A different conclusion may only need to be drawn eventually if humanitarian intervention would cause other difficulties that ultimately outweighed its benefits.

### 4.4.2 Specific Concepts Explaining the Legitimacy of Humanitarian Intervention

This general argument for the legitimacy of humanitarian intervention has been supported on the terms of particular philosophical concepts and theories. In a Kantian tradition, for instance, it has been phrased as a consequence of the "Golden Rule" combined with a principle that good deeds take precedence over good words. Other proponents have drawn analogies between the


\(^{707}\) See Laberge, _supra_ note 570 at 20.

\(^{708}\) _Ibid._

controversial forms of humanitarian intervention and cases in which outside intervention for the protection of human beings is accepted.

The Kantian Golden Rule and the idea of the importance of good deeds are closely connected with the recognition that all individuals are entitled to basic respect.\textsuperscript{710} According to the Golden Rule, "one should treat others as one would want to be treated".\textsuperscript{711} Moreover, in implementing ethical ideals, concrete action is demanded, that is, deeds take ethical precedence over mere good words.\textsuperscript{712} These principles can also be based on a maximin strategy of the original contractors. In conjunction, they mandate that one offers the same assistance to people in need that one would want to receive in a comparable situation and can thus call for humanitarian intervention.

Further support for the idea of ethically justified humanitarian intervention has been adduced on the basis of an analogy to the right of self-defence. As Article 51 UN Charter shows, a war in self-defence is not just morally accepted, but even explicitly recognized in international law. Unless one accepts the notion that states possess autonomous rights,\textsuperscript{713} the justification of self-defence can only be found in the rights of their citizens. A war in self-defence is justified because the government defends the rights of its people.\textsuperscript{714} Then again, where basic human rights are concerned, "there is no substantial moral difference between the rights of citizens and those of foreigners".\textsuperscript{715} Consequently, intervention for the protection of foreigners from large-scale killings or ethnic cleansing can claim a similar ethical status.

Another analogy has been drawn between the responsibilities of a government for its citizens and those of parents for their children. While this analogy was originally aimed at describing the special relationship between a state and its citizens in order to deny a right of foreign intervention, proponents of humanitarian intervention have turned it around to support the contrary position.\textsuperscript{716} Gerard Elfwstrom had formulated that the relationship between the government and its citizens was similar to the "guardian-type relationship" between parents and their children in a domestic society.\textsuperscript{717} The government represents the interests of its citizenry, and it is the citizens' primary responsibility to take action if the government obviously

\textsuperscript{710} See Lepard, supra note 323 at 45, 50-52.
\textsuperscript{711} Ibid. at 50.
\textsuperscript{712} Ibid. at 52.
\textsuperscript{713} This notion will be discussed in detail and rejected below, see Part 4.5.1.1
\textsuperscript{714} See Tesón, Humanitarian Intervention, supra note 45 at 120.
\textsuperscript{715} Ibid.
\textsuperscript{716} See Gerard Elfwstrom, "On Dilemmas of Intervention" (1983) 93:4 Ethics 709 at 718 (JSTOR).
\textsuperscript{717} See Elfwstrom, supra note 716 at 714.
misinterprets their interests.\textsuperscript{718} In many cases, Elfstrom argues, foreign intervention constitutes a violation of the citizens' autonomy.\textsuperscript{719} While this analogy may be properly chosen, it has been shown not to support the conclusion that humanitarian intervention should generally be considered as illegitimate.\textsuperscript{720} With regard to the parent-child relationship, society is, in fact, widely held to have a right and even a duty of intervention to protect children against parental mistreatment.\textsuperscript{721} In extreme cases, a parent may even be "overthrown" [...] as a guardian of the abused child.\textsuperscript{722} Thus, the parent-child analogy argues in favor of rather than against the justification of humanitarian intervention in certain cases.

\textbf{4.4.3 Preliminary Conclusions on the Scope of Justifiable Intervention}

The foregoing considerations have established a \textit{prima facie} argument in favor of humanitarian intervention, which can only be undermined by major conflicting concerns, which will be dealt with in the following sections. At the same time, due regard must be had to the fact that this case for humanitarian intervention is entirely grounded in the rights of those individuals whose protection it shall serve. It should therefore be qualified by a condition set out by Tesón, namely that the victims must welcome the intervention.\textsuperscript{723} This condition takes into account that in certain cases victims of oppression may prefer a certain degree of tyrannical government over risky attempts to overthrow that regime.\textsuperscript{724} A difficulty with this proposition is that it will not always be easy to determine the interests of the victims, particularly were they lack a chosen representative. Tesón suggests that it can be presumed that an oppressed people wishes to be liberated, but still every effort must be made to determine their true will.\textsuperscript{725}

As doubtful as the suggested presumption of a people's wish to be liberated may be in cases of other, lesser forms of oppression, the quality of the threatened human rights violations in cases of large-scale killings or ethnic cleansing certainly justifies this assumption. In these cases, therefore, a \textit{prima facie} argument for the ethical justification of humanitarian intervention has been established.

\textsuperscript{718} \textit{Ibid.} at 715-716.
\textsuperscript{719} \textit{Ibid.} at 716-717.
\textsuperscript{720} See Tesón, \textit{Humanitarian Intervention}, supra note 45 at 88.
\textsuperscript{722} See Tesón, \textit{ibid.} at 88.
\textsuperscript{723} \textit{Ibid.} at 126-129.
\textsuperscript{724} See Laberge, \textit{supra} note 570 at 28.
\textsuperscript{725} See Tesón, \textit{Humanitarian Intervention}, \textit{supra} note 45 at 128.
4.5 General Challenges to the Legitimacy of Humanitarian Intervention

Objections against humanitarian intervention in general may be grounded in two different foundations: in a notion of rights that are violated by the intervention, and in calculations regarding the undesirable consequences of intervention. I will start by appraising different versions of rights theories that oppose humanitarian intervention as a matter of principle, and then discuss potential adverse consequences of granting a moral right of humanitarian intervention.

4.5.1 Humanitarian Intervention and Rights Theory

A central classic argument against humanitarian intervention is that it violates rights of the target state. This argument is made in two different versions: on the basis of the assumption that states possess autonomous rights independently from individuals, and on the basis of rights that the states derive from their citizens. Moreover, military intervention for the protection of human beings confronts different forms of criticism that are based on rights of other individuals than those who are effectively rescued.

4.5.1.1 Rights of the Target Community - Autonomous Rights of the State and Rights Derived from Individuals

In a state-oriented tradition of international legal discourse, states are considered as moral persons that are capable of forming their proper will, and possess certain rights qua states. These rights are logically independent from the rights of their citizens. Just as individuals are entitled to freedom within a domestic society, states are regarded as holding a right of autonomy on the international level. The concept of an autonomous moral standing of nation-states has served as a basis to deny other states a right of humanitarian intervention.

The difficulties with this concept begin with the very notion of a “state’s rights”. This notion raises the basic question who the actual bearer of the state’s right to freedom is, the government or the people. In practice, the notion of the state’s right of autonomy will be claimed by those

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726 Ibid. at 24-25.
727 See de Vattel, supra note 427 at iv.
728 See Tesón, Humanitarian Intervention, supra note 45 at 55.
729 See de Vattel, supra note 427 at iv.
730 See Wolff, supra note 426 at paras. 256-258; other proponents of an independent right of autonomy vested in the nation-state place moral limits on the exercise of its sovereignty and permit humanitarian intervention in extreme cases of oppression, see e.g. Grotius, supra note 437, book II, c. 25 sec. 8 at. para. 4.
731 See Tesón, Humanitarian Intervention, supra note 45 at 76-77.
in power in order to defend their methods of government over the population. This is in accordance with the view expressed by Wolff that no government has a right to interfere with other governments in their dealings with their own subjects, even if these are treated "too harshly".

Ultimately, the notions of the "freedom", "independence", or "sovereignty" of states are used by tyrants to justify the exercise of arbitrary power over their people. The recognition of the state's freedom may entail the denial of individual freedom. Consequently, the theory of an autonomous moral standing of states is incompatible with human rights. Equally, it fails the test of ethical principles under the contractarian scheme outlined above. As part of their maximin strategy, the original contractors will agree to an extensive scheme of individual liberties.

In conclusion, under this version of social contract theory, "state sovereignty is [...] subordinated to the recognition of fundamental human rights." Foreign states are not obligated to respect it in cases where human rights are egregiously violated. The rulers are only agents of the people rather than holders of independent rights of autonomy. Accordingly, states do not possess a right of autonomy qua states that could automatically trump other claims, such as human rights.

There may however be an alternative and possibly more convincing basis for rights of the state that prohibit foreign intervention. According to Walzer, states have a right to territorial integrity and political sovereignty. These rights are derived from the rights of their members. This view places a high value on the community and the shared history of individuals. The state is seen as the result of the individuals exercising their right to political association. The recognition of sovereign states aims at establishing an "arena" for the individuals within which they can fight for and (sometimes) win their individual freedom.
This theory permits foreign intervention in very narrow circumstances only. It rests on the assumption that the people itself needs to earn its freedom by means of an “arduous struggle of self-help”.\textsuperscript{745} Unjustified intervention is a crime of aggression because it “forces men and women to risk their lives for the sake of their rights”.\textsuperscript{746} Normally, “boundary crossings” are therefore only permitted to support a political community within a state that has already taken up arms to fight for national liberation, or as counter-intervention after another foreign army has intervened.\textsuperscript{747} Yet, Walzer also accepts intervention, as proper humanitarian intervention, in cases of enslavement or massacres, since he considers it “cynical” in these cases to allude to the idea of a community.\textsuperscript{748} In other words, people cannot be required to struggle for their freedom within a state if they are even denied the right to live there.\textsuperscript{749}

It follows from this that Walzer’s conception of community rights and rights of the states that are derived from individuals would not oppose humanitarian intervention in the situations under consideration here, large-scale killings and ethnic cleansing. To advocate an even stricter non-interventionist principle based on the idea of an “arduous struggle of self-help”, as suggested by John Stuart Mill, would not be compatible with the concern of the original contractors for the protection of the least advantaged.\textsuperscript{750}

\textsuperscript{745} Ibid. at 87, 93; see generally Smith, supra note 738 at 72-73.
\textsuperscript{746} See Laberge, supra note 570 at 24.
\textsuperscript{747} See Walzer, Just Wars, supra note 741 at 90.
\textsuperscript{748} Ibid.
\textsuperscript{749} See Laberge, supra note 570 at 25-26.
\textsuperscript{750} Cf. also the critique of Mill by Smith, supra note 738 at 74.
4.5.1.2 Rights of Individual Citizens

When neither autonomous rights of the states nor rights of the community as a whole can de-legitimize humanitarian intervention, it may still conflict with rights of individual citizens.

Firstly, the rights of those individuals who support the government shall be taken into view. Even a government that violates the rights of a number of citizens may still enjoy the support of another part, maybe even the majority of the population. Foreign intervention, it has been argued, would violate these citizens’ right of autonomy.

To admit this argument against humanitarian intervention would, however, mean that the victims of oppression would have to sacrifice their rights. Moreover, those who support the government make themselves to a certain extent accomplices in the human rights violations. Weighed against the victim’s rights, their right of autonomy is therefore not worth protection against foreign intervention. In terms of the maximin strategy, to uphold the rights of the “accomplices” to the detriment of the rights of the victims could arguably produce a worse outcome for the original contractors than a right of intervention. Consequently, a precedence for the offenders’ rights is not ethically justified on this basis.

While rejecting the idea that humanitarian intervention restricts in a relevant form the freedom of the individual offenders, it must not be concealed that harm may be done to people as well who are not involved in committing human rights abuses. A major difficulty with military action is that it will almost certainly result in suffering and deaths of innocents. This is particularly problematic since the ethical justification for humanitarian intervention is a concern for human dignity and human rights.

There are two possible ways of confronting this challenge to the legitimacy of humanitarian intervention. Tesón suggests that humanitarian intervention can still be just because different forms of human rights infringements must be distinguished: the broader category of infringements and the subclass of violations. Infringements of human rights are characterized

751 See Tesón, Humanitarian Intervention, supra note 45 at 89-90.
752 See Elfstrom, supra note 716 at 716-717.
753 Ibid. at 717.
754 See Tesón, Humanitarian Intervention, supra note 45 at 91.
755 Cf. ibid.
756 Ibid. at 103.
757 See Part 4.4, above.
758 See generally Tesón, Humanitarian Intervention, supra note 45 at 102-108.
simply by “a frustration of the interest of the victim”. They are thus defined by reference not only to the harm suffered by the victim, but also to the motive of the offender for causing it. Intervention that is directed at stopping willful violations of human rights is undertaken with a right motive and does not entail disrespect for the individuals that get harmed. Humanitarian intervention thus infringes upon the human rights of innocents, but does not violate them. It can therefore be justified, in rare cases even if it causes more human rights infringements than it prevents.

I suggest that Tesón’s argument for humanitarian intervention even in cases where it causes more suffering and deaths of innocents than it prevents is inconsistent with the maximin strategy. The original contractors are concerned with the outcome of the principles that they adopt, not with “considered judgments about the justification of [...] violence”. They will aim at preventing infringements of their rights, whether these are committed in a respectful or disrespectful manner. There is no room for a distinction between infringements and violations of rights.

Alternatively, humanitarian intervention could be just notwithstanding the harm that it causes to innocents if, comparing the violations that it intends to rectify with those that it causes, it maximizes human rights enjoyment. This justification thus rests on calculations of utilities and will be referred to as “utilitarianism of rights”.

Utilitarianism has been criticised on different accounts. Firstly, it has been suggested that a classic utilitarian position is indifferent to distribution, that is, it may justify human rights deprivations of peoples in some areas of the world in the name of global prosperity. Secondly, Rawls considers the equal liberties of all members of a society as settled moral thresholds, the violation of which cannot be justified by reference to advantages enjoyed by others. This

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759 Ibid. at 104.
760 Ibid. at 105 [emphasis omitted].
761 Ibid. at 105.
762 Ibid. at 106.
763 Cf. ibid. at 105-106.
764 Ibid. at 106.
765 Cf. Tesón in his critique of utilitarianism of rights, Humanitarian Intervention, supra note 45 at 107.
767 Cf. ibid. at 176; Tesón, Humanitarian Intervention, supra note 45 at 103.
768 See Mervyn Frost, Towards a normative theory of international relations (Cambridge: Cambridge University Press, 1986) at 139-140; see generally his critique of utilitarian theory at 137-144; Tesón, Humanitarian Intervention, supra note 45 at 101.
769 See Rawls, supra note 671 at 3-4; Tesón, Humanitarian Intervention, supra note 45 at 101.
second argument, however, begs the question: to proclaim human rights as moral thresholds that we must not violate with our actions leaves the ethical dilemma unresolved that we confront when our inaction permits others to commit human rights violations. If utilitarian calculations are applied under a “veil of ignorance”, they also appear to be less affected by the first criticism: since this model is from the outset primarily concerned with protecting the least advantaged, it will not condone the “exploitation” of certain peoples for a supposedly bigger common interest. In this function, it may be seen as emerging from the accepted doctrine of proportionality.\footnote{Cf. Luban, \textit{supra} note 766 at 176.}

In conclusion, utilitarianism of rights can provide a defence for humanitarian intervention even where innocents are harmed. At the same time, it limits the justification to interventions that do not cause more harm than they intend to prevent. In practice, this limitation raises a difficult problem, since the balance between utility and disutility can often only be determined after the fact. A solution to this problem may be to demand that a just intervention must have reasonable prospects of success and also be proportionate in its implementation.\footnote{Cf. Tesón, \textit{Humanitarian Intervention}, \textit{supra} note 45 at 122; these requirements are also part of the framework suggested by the ICISS, \textit{Responsibility to Protect}, \textit{supra} note 9 at xii, 37.} On the same account, force should only be used as a last resort.\footnote{Cf. Lepard, \textit{supra} note 323 at 82, 83.}

\textbf{4.5.2 Humanitarian Intervention and Adverse Consequences in Practice}

While it has made necessary the formulation of limits for legitimate humanitarian intervention, the discussion of rights theory has not provided a sufficient basis for an ethical principle of strict non-intervention. In the following sections, different adverse consequences will be discussed that may supposedly prove humanitarian intervention to be unethical.

\textit{4.5.2.1. Risk of Abuse}

A very popular argument is that, if humanitarian intervention is basically accepted, this concept can easily be abused.\footnote{Cf. Schachter, “Pro-Democratic Invasion”, \textit{supra} note 612 at 649-650; see also Ian Brownlie, “Humanitarian Intervention” in John Norton Moore, ed., \textit{Law and Civil War in the Modern World} (Baltimore: John Hopkins University Press, 1974) 217 at 226.} It introduces a normative basis for recourse to war that can lead to “new wars or invasions of the weak by the strong”.\footnote{\textit{Ibid.}} The dangerous consequences of legitimizing
armed attacks in the long run can possibly outweigh the benefits of individual interventions that are undertaken for a good cause, and demand that interventions be generally prohibited.\textsuperscript{775}

Several counter-arguments have been made against this proposition. They concern the actual degree of the risk of abuse, its significance in relation to compensating benefits, and the appropriateness of the conclusion that any intervention should be prohibited.

The first objection is that in practice the risk of abuse may be of limited significance. Tesón argues that less powerful states have “a powerful incentive not to abuse the humanitarian intervention exception”, since they know that they may become the targets for similar actions themselves.\textsuperscript{776} Yet, this proposition does not alleviate the concern of an abuse by powerful states.\textsuperscript{777} The danger of abuse can thus not lightly be dismissed on factual grounds. How often a right of intervention is abused is ultimately an empirical matter.\textsuperscript{778}

The harm caused by an abuse of an interventionist rule could, however, be outweighed by other aspects. Tesón suggests that the parties in the original position will weigh the dangers of abuse against those of underuse.\textsuperscript{779} He argues that the cases of abuse will be balanced out in the long run by “egregious cases of oppression and genocide” in which governments refrain from intervening although they could have done so.\textsuperscript{780} While Tesón’s factual assumption may be correct, his implications for the status of humanitarian intervention under the social contract are not convincing. The original contractors, who are concerned with creating rules that are most beneficial for the least advantaged, will be even less inclined to allow for humanitarian intervention if this right is underused where it should protect people and abused where it can only cause more harm.

The dangers of abuse may, however, be balanced out by the benefits that legitimate humanitarian intervention brings for the rescued persons.\textsuperscript{781} When the danger of abuse of an intervention rule is highlighted, it must conversely not be forgotten that the principles of non-intervention, sovereignty or self-determination can equally be abused.\textsuperscript{782} Governments could use these concepts as a shield against foreign intervention behind which they can commit gross human

\textsuperscript{775} Ibid. (specifically for a right of pro-democratic intervention).
\textsuperscript{776} See Tesón, \textit{Humanitarian Intervention, supra} note 45 at 71.
\textsuperscript{777} According to Schachter, it is in “the nature of things [that a right of intervention] would be reserved for the most powerful States” anyway., \textit{Pro-Democratic Invasion}, supra note 612 at 650.
\textsuperscript{778} Tesón concedes this point, \textit{Humanitarian Intervention, supra} note 45 at 112.
\textsuperscript{779} Ibid. at 70-71, 109.
\textsuperscript{780} Ibid. at 70-71.
\textsuperscript{781} Cf Schachter, “Pro-Democratic Invasion”, supra note 612 at 649 (concluding however for the right of pro-democratic intervention that the benefits in single cases are outweighed by the long-term dangers).
\textsuperscript{782} See Smith, supra note 738 at 72 for self-determination.
rights violations. The adverse consequences of abusive interventions should therefore be
weighed in a way analogous to the considerations of short-term human rights utility and
disutility as suggested above with a view to the harm caused to innocents. While calculations
of this sort would require in-depth empirical research that is beyond the scope of this thesis, there
are indications that the benefits of intervention may outweigh the dangers. The large numbers of
victims in Cambodia under Pol Pot and during the Rwandan genocide may illustrate the scope
of human rights violations committed in a state before foreign intervention occurred. At the same
time, it has recently been argued that lifting the prohibition of unilateral humanitarian
intervention would not necessarily lead to more wars being fought for ulterior purposes, but, on
the contrary, could restrain some aggressive wars and might even lower the overall number of
wars. This argument draws on sociological studies which indicate that “encouraging
aggressive states to justify using force as an exercise of humanitarian intervention can facilitate
conditions for peace between those states and their prospective targets.” It is submitted, for
instance, that the type of issue that is in dispute has a direct impact on the potential for
escalation, with humanitarianism having far less escalatory effects than more symbolically
charged issues such as territorial claims; that leaders who resort to humanitarian justifications for
military intervention may be constrained in their military agenda, since their political opponents
could turn this argument against them if the intervention produces adverse humanitarian
outcomes (“blowback effect”); and that the potential of humanitarianism to serve as a pretext for
aggressive wars is limited, as it will fail to enlist the desired support if it is not credible.

Finally, even if the danger of abuse was so significant that it ultimately outweighed the benefits
of intervention, and humanitarian intervention should therefore in principle be prohibited, an
argument could still be made that in particular situations intervention should be condoned. These
would be cases in which the human rights violations committed are so serious that the benefits of

783 Cf. Myanmar, U Ohn Gyaw, supra note 706 at 223.
784 See Part 4.5.1.2, above.
785 The Khmer Rouge dictatorship that was ended by Vietnam’s intervention in 1978 had cost the lives of
approximately a quarter of the Cambodian population, see Weiss, Ideas, supra note 1 at 38.
distinguishing the “strong position” that legalizing unilateral humanitarian intervention “should, on balance,
discourage aggressive wars by states that use the pretext of humanitarianism”, and the “modest position” that “some
aggressive wars that would be fought in the current legal regime would not be fought in a regime that permits
[unilateral humanitarian intervention]” while other aggressive wars might indeed be encouraged and increase their
prevalence beyond the status quo, ibid. at 110; Goodman admits that it is impossible to ascertain which of these
scenarios would come true, ibid. at 139).
787 Ibid. at 110.
788 Ibid. at 118-136.
an intervention outweigh the detriments, including those that are indirectly caused as a result of the erosion of the non-intervention principle.\textsuperscript{789}

In conclusion, it has not been proven that the potential for abuse of such a concept outweighs the benefits of intervention in a way that could undermine the legitimacy of humanitarian intervention in general. Even if this were the case, an individual act of humanitarian intervention might, in particularly egregious cases of human rights violations, be ethically justified.

\textbf{4.5.2.2 Self-Interestedness of the Interveners}

A related objection to ethically justified humanitarian intervention is that this idea is a “chimera” since states always act for their own interest, even if they allegedly pursue humanitarian motives.\textsuperscript{790} It is argued that, in international affairs, states are rarely ever impartial and treat the victims whom they purport to save only as means for their own ends.\textsuperscript{791}

If states were never motivated by humanitarian purposes, there could indeed not be any humanitarian intervention in the sense defined above.\textsuperscript{792} Yet, it is an empirical matter whether a particular state in a particular situation aims at stopping human rights violations, and it is a mere assumption that states could never be impartial in international affairs.\textsuperscript{793}

Alternatively, if it is acknowledged that states may at least partly be motivated by humanitarian reasons, it can still be argued that any intervention that is not exclusively undertaken for humanitarian purposes is abusive. Military intervention would then be illegitimate if it was at least partly motivated by self-interested purposes of the intervening state.\textsuperscript{794} Yet, a certain self-interest of the intervener need not impair the legitimacy of the intervention, even if this self-interest is not purely concerned with upholding humanity.\textsuperscript{795} As Wesley points out, humanitarian intervention seeks a lasting transformation of the society in crisis into a functioning and peaceful state that guarantees certain fundamental human rights.\textsuperscript{796} Such a lasting transformation can often be achieved only through continued peacekeeping and peacebuilding missions that demand a lot

\textsuperscript{789} See Tesón, \textit{Humanitarian Intervention}, supra note 45 at 110.
\textsuperscript{790} See the overview of this realist argument in Smith, supra note 738 at 70.
\textsuperscript{792} Cf. text accompanying notes 36-43.
\textsuperscript{793} See Tesón, \textit{Humanitarian Intervention}, supra note 45 at 112.
\textsuperscript{794} See the discussion of this argument in Tesón, \textit{ibid.} at 112-113.
\textsuperscript{795} Smith points out that great powers may in some cases have a national interest in upholding humanity to strengthen their leadership and credibility, \textit{supra} note 738 at 71.
\textsuperscript{796} See Michael Wesley, “Toward a Realist Ethics of Intervention” (2005) 19:2 Ethics & International Affairs 55 at 58, 66 (Synergy Blackwell Journals).
of commitment and come with significant costs.\textsuperscript{797} The lack of a compelling self-interest of the intervening state will often result in a commitment shortfall.\textsuperscript{798} The absence of any self-interested motivation may then mean that interventions in states that are in genuine need of outside help will either not occur or be half-hearted, which culminates in failures such as in Rwanda or Somalia.\textsuperscript{799}

In conclusion, the fact that an intervening state pursues not only humanitarian motives but also national self-interests does not undermine the legitimacy of the intervention.\textsuperscript{800}

\textbf{4.5.2.3 Lack of Consistency}

Taking into account the role of national interests and power politics, humanitarian intervention will, in practice, probably never be undertaken in a consistent manner. The different treatment of Tibet on the one hand and Haiti and East Timor on the other hand may be regarded as evidence of this inconsistency.\textsuperscript{801} This factual observation, however, does not entail the ethical conclusion that it is not ethically justified to intervene in certain genuine cases, because there will be no intervention in others either.\textsuperscript{802} This would be incompatible with the concern for human rights outlined above, or, in Smith’s words, “the fact that one cannot do everything everywhere does not mean that one should not try to do anything anywhere.”\textsuperscript{803}

\textbf{4.5.2.4 Addresses Only the Symptoms and Not the Underlying Causes}

A related criticism of humanitarian intervention is that it addresses only the symptoms and not the underlying causes of conflicts. With regard to the UN peacekeeping mission in Bosnia, David Rieff criticizes that the great powers had failed to do anything about the predictable collapse of Yugoslavia, and then, “feeling considerable pressure to do something, came up with the idea of mitigating the effects of the crisis rather than trying to resolve it with either a serious political or military effort.”\textsuperscript{804}

\begin{itemize}
  \item \textsuperscript{797} \textit{Ibid.} at 66.
  \item \textsuperscript{798} \textit{Ibid.} at 70.
  \item \textsuperscript{799} \textit{Ibid.} at 58, 70.
  \item \textsuperscript{800} See Tesón, \textit{Humanitarian Intervention}, supra note 45 at 113; Wesley, \textit{supra note 796} at 56-58, would even require a national interest in the intervention as part of a realist system of ethics.
  \item \textsuperscript{801} See Smith, \textit{supra note 738} at 78.
  \item \textsuperscript{802} \textit{Ibid.}
  \item \textsuperscript{803} \textit{Ibid.}
\end{itemize}
The proposition that states should rather deal with the underlying causes of conflicts, such as poverty or misgovernment, instead of simply easing their conscience through half-hearted military intervention, is a valuable warning, but it does not end the discussion about humanitarian intervention. Where a crisis results in large-scale killings or ethnic cleansing, our concern for human dignity and human rights justifies “curing” these “symptoms” at least. As Michael J. Smith puts it, “throwing up one’s hands at the horror of it all or raining down curses on all the world does not help us to address [the extraordinary and excruciating dilemmas that are raised by some of the situations we observe across the world].”

4.5.2.5 Uncertainties in Terms of Evidence

Even if the interveners’ motives are legitimate, the recognition of a right of humanitarian intervention may be problematic because it requires an often difficult judgment about whether the factual circumstances justify intervention. Specifically, it has been argued that foreigners necessarily lack the knowledge about a society to make this decision.

Whether or not foreigners are able to appraise the need for intervention in a society in crisis is, however, a contingent matter. Particularly in cases of large-scale killings or ethnic cleansing, which cannot be justified by different cultural understandings or the state of development in a country, there may well be situations in which foreigners have sufficient evidence for the need to intervene. Apart from this, uncertainties in terms of evidence are not a specific difficulty with humanitarian intervention. For UN-authorized measures under Chapter VII, for instance, the existence of a “threat of peace” may need to be assessed. Humanitarian intervention ought therefore not to be considered generally illegitimate simply because of the difficulties in determining the existence of a just cause.

4.5.3 Conclusion: Ethical Legitimacy of Collective Humanitarian Intervention

None of the aforementioned counter-arguments to humanitarian intervention in general has been able to undermine the prima facie case established above. Accordingly, at least collective action

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805 See Smith, supra note 738 at 69.
806 Ibid.
807 Ibid. at 78.
809 See Tézón, Humanitarian Intervention, supra note 45 at 114.
810 See Article 39 UN Charter.
through the United Nations may be ethically justified as a reaction or in order to prevent large-scale killings or ethnic cleansing.

Yet, in addition to the requirement that the targeted victims welcome the intervention, which may be presumed to be satisfied in these cases, the foregoing analysis has raised or clarified further limits on legitimate humanitarian intervention. Firstly, the expected benefits of an act of intervention must exceed the harm and suffering that it will presumably cause. Humanitarian intervention can therefore only be ethically justified if it has reasonable prospects of success and is implemented with proportionate means. Moreover, force should only be used as a last resort.

In addition, further clarity has been brought about with a view to the interveners’ motivation. By definition, humanitarian intervention demands that the intervener has humanitarian motives. As has been shown, the legitimacy of intervention that is undertaken for humanitarian purposes is, however, not undermined if national self-interests are pursued as well.

4.6 The Right of Foreign States to Unilateral Humanitarian Intervention

The legitimacy of collective humanitarian intervention within certain limits does, however, not automatically require a similar conclusion on unilateral action. Some of the difficulties thus far mentioned gain a particular urgency when intervention is undertaken without Security Council authorization, and, at the same time, additional concerns emerge. These specific difficulties might still warrant the conclusion that unilateral humanitarian intervention can never be ethical.

4.6.1 The Question of Right Authority

With a view to several of the aforementioned difficulties with humanitarian intervention in general, it could be argued that the UN Security Council is the only proper authority for such operations. The particular position of the Security Council in the international order is derived from the nature and provisions of the UN Charter. Comprising 192 states, the UN is today an organization of almost universal membership.\(^{811}\) It constitutes the forum within which these states mediate their power relationships, and adopts decisions that possess the authority and legitimacy of a representative international body.\(^{812}\) Admittedly, the Security Council itself


\(^{812}\) See ICISS, *Responsibility to Protect*, supra note 9 at paras. 6.8-6.9.
faces, *inter alia*, the criticism of being unrepresentative in its limited membership. Still, it remains the body upon which the UN members have conferred the "primary responsibility for the maintenance of international peace and security" and the authority to act on their behalf in discharging this responsibility. This explicit authorization to represent almost the entire community of states distinguishes the UN Security Council from other multilateral organizations and coalitions and may justify a particular role in legitimizing humanitarian intervention.

A collective decision-making process through the UN system could attenuate some of the concerns raised by the need to evaluate whether there is enough evidence of a just cause. Also, a collective process can serve "as a check on an individual state's tendency to intervene for self-interested purposes." It may prevent interventions in cases where humanitarian motives are only used to cloak selfish interests of the intervener. To require humanitarian intervention to take place within the United Nations framework is thus a suitable way to "raise barriers to illegitimate intervention". For these reasons, it may be argued that unilateral intervention should presumptively be illegitimate.

Yet, the case of the Rwandan genocide suggests that there may be instances that warrant or even require foreign intervention, but in which there is no sufficient willingness for multilateral approval of or participation in humanitarian intervention. It can be argued that in this case the states capable of launching a successful intervention campaign were waiting for one another to take the first step. Even when the Security Council had approved the deployment of troops for humanitarian purposes, only two countries, France and Senegal, were willing to contribute forces. Aside from this specific case, the Cold War experience teaches us that the Security Council may be paralyzed due to political reasons, in which case humanitarian intervention can only be undertaken unilaterally. To delegitimize intervention simply because it was not collectively approved could mean that, because of a lack of commitment by Security Council

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813 Ibid. at paras. 6.13.
814 See Art. 24(1) UN Charter.
815 Cf. ICISS, *Responsibility to Protect*, supra note 9 at paras. 6.13-6.14 (noting that "the Commission is in absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes.")
816 See Smith, *supra* note 738 at 78.
817 Ibid. at 77.
818 Ibid. at 78.
819 Ibid. at 77; cf. also Lepard, *supra* note 323 at 82.
820 Ibid.
821 Ibid.
822 See Smith, *supra* note 738 at 77.
823 See Lepard, *supra* note 323 at 15.
824 Cf. Laberge, *supra* note 570 at 17.
members, nothing would be done.\textsuperscript{825} This result is not supported by the hypothetical contract model and its concern for human dignity and human rights. Consequently, the presumption for the illegitimacy of unilateral intervention can be overridden.\textsuperscript{826} This conclusion, however, can only apply to the extent that all other conditions of legitimate intervention are fulfilled, and no additional specific arguments undermine the legitimacy of unilateral intervention as such.

\textbf{4.6.2 Threat to International Peace and Security}

An argument has been made that if the use of force is permitted in the form of humanitarian intervention, this may result in a spread of wars and threaten international peace and security.\textsuperscript{827} Moreover, especially unilateral humanitarian intervention can lead to a conflict between the interveners and states opposing it.\textsuperscript{828}

It is doubtful, however, if the threat that humanitarian intervention may pose to a peaceful international order justifies a general prohibition of unilateral humanitarian intervention. To argue this would mean that international peace in a sense of war-free interstate relations is valued so highly that it overrides concerns for the human rights of victims in intrastate conflicts. Yet, a peaceful order can be characterized not only by the absence of war, but also by respect for human rights.\textsuperscript{829} Egregious violations of human rights, particularly in the form of a genocide, pose "a common threat to humanity", regardless of whether they occur across borders or within a state.\textsuperscript{830}

Similarly, it may be argued that the original contractors will attempt to protect themselves not only against international wars, but also against intrastate violence. Consequently, the potential threat to international peace should not weigh more heavily than the dangers that large-scale killings and ethnic cleansing on the one hand and military intervention on the other hand pose to innocents within a country. In accordance with the argument that has been made with regard to these aspects,\textsuperscript{831} it must be asked whether the benefits for the rescued victims will presumably

\textsuperscript{825} Cf. Smith, supra note 738 at 77.
\textsuperscript{826} Cf. ibid.
\textsuperscript{827} Cf. ibid. at 73; cf. Schachter, "Pro-Democratic Invasion", supra note 612 at 650; see also the discussion of Howard Adelman's position by Laberge, supra note 570 at 34; but see Goodman, supra note 786 at 141, who argues that lifting the prohibition of humanitarian intervention may even reduce the number of aggressive wars.
\textsuperscript{828} The fear of such a conflict between the superpowers was one of the reasons why the concept of humanitarian intervention enjoyed less attention during the Cold War, cf. Ramesh Thakur, "Humanitarian Intervention" in Thomas G. Weiss & Sam Daws, eds., The Oxford Handbook on the United Nations (Oxford: Oxford University Press, 2007) 387 at 391; Weiss, supra note 785 at 18.
\textsuperscript{829} See Lepard, supra note 323 at 79.
\textsuperscript{830} See Smith, supra note 738 at 77.
\textsuperscript{831} See Part 4.5.1.2, above.
outweigh the detriments for others by disrupting the international order. So far, it has not been demonstrated that the risk of a spread of wars is empirically so high that it justifies a general prohibition of unilateral humanitarian intervention.832

4.6.3 Threat to the Role of the UN System

According to Article 24(1) of the UN Charter, the “members confer on the Security Council primary responsibility for the maintenance of international peace and security”. Not only is there a legal and ethical duty for all parties to a treaty to honor their agreements (pacta sunt servanda).833 Also, the system established by the UN Charter is supposed to be the “linchpin” that preserves order and stability and ultimately the “society of states”.834 This system risks to be marginalized if states unilaterally intervene for humanitarian purposes.835

These considerations argue in favor of requiring a collective basis for legitimate humanitarian intervention.836 The intervener should seek to obtain Security Council approval.837 If this attempt fails, the issue should be brought to the UN General Assembly’s attention.838

The fact that the UN members confer a primary responsibility on the Security Council does not mean that they are relieved of their own obligations.839 Conversely, it may also be argued that the position of the Security Council does not impede that action without its approval may be legitimate. Awareness that states may be inclined to intervene unilaterally if the Security Council fails to take action in “conscience-shocking situations” may also provide an incentive for the Council members to address the issue themselves and thus uphold the credibility of the United Nations.840 In conclusion, concern for the stature of the UN system seems no sufficient grounds to declare unilateral intervention ethically illegitimate.

832 See Goodman, supra note 786 at 141.
833 See Lepard, supra note 323 at 80; see also Article 26 Vienna Convention.
834 See ICISS, Responsibility to Protect, supra note 9 at 48.
835 Cf. ibid. at 1.
836 Cf. Lepard, supra note 323 at 78, 82.
837 See ICISS, Responsibility to Protect, supra note 9 at xii.
838 The ICISS proposes that the matter can be considered by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure, ibid. at xiii.
840 Cf. the recommendation by the ICISS, Responsibility to Protect, supra note 9 at xiii.
4.6.4 Conclusions and Further Limitations on Humanitarian Intervention

In conclusion, unilateral humanitarian intervention should only be a fallback option. Normally, military action for the protection of populations at risk ought to be undertaken on a collective basis in the framework of the UN system. A state considering humanitarian intervention should first attempt to obtain Security Council approval and, if the Security Council does not meet this request, move for a General Assembly resolution. If these attempts fail, however, unilateral humanitarian intervention can still be ethically justified.

4.7 The International Responsibility to Protect: An Ethical Duty to Intervene

In the preceding two sections, international protection for populations at risk has been discussed with a view to a “right of humanitarian intervention”, that is, whether foreign states can be ethically justified if they decide to use military force to prevent or stop large-scale killings or ethnic cleansing within another state. Having suggested that both collective and unilateral humanitarian intervention may, under certain conditions, be permissible, the ethical analysis of the R2P framework must lastly turn to one of the major intellectual contributions of the ICISS: the shift in perspective from that of potential interveners to the one of the people in need of support, and the reformulation of humanitarian intervention as a responsibility rather than a right. The question thus is whether ethical principles in certain cases not only allow, but even require external actors, such as foreign states or the international community at large, to take military action for the protection of populations from massive human rights violations.

At a closer look, the idea of an ethical duty of humanitarian intervention finds immediate support in the thread of the foregoing argumentation, notwithstanding the fact that the discussion so far has been phrased in terms of a right rather than an obligation. Far from suggesting a conclusive statement as to the scope of an ethical norm of humanitarian intervention, the discussion of a “right” to intervene has mainly accounted for two considerations: firstly, humanitarian intervention has usually been debated as an incident of warfare and an infringement upon the sovereignty of states that necessitates a specific justification to be permissible, while the idea that it might even be morally required is of a more recent nature.\footnote{See Carla Bagnoli, “Humanitarian Intervention as a Perfect Duty: A Kantian Argument” in Terry Nardin & Melissa S. Williams, eds., \textit{Humanitarian Intervention} (New York: New York University Press, 2006) 117 at 117-118.} It is this framework, in which many of the arguments dealt with had been raised, and which thus provides the most appropriate forum to engage with the wealth of the existing standpoints. Secondly, and more importantly, it
is a necessary precondition for the existence of an ethical duty to intervene for humanitarian purposes that such intervention is permissible, at first.\footnote{See Kok-Chor Tan, “The Duty to Protect” in Terry Nardin & Melissa S. Williams, eds., Humanitarian Intervention (New York: New York University Press, 2006) 84 at 86-89.} Accordingly, the scope of a right of humanitarian intervention defines at least the widest limits for a possible duty to protect through military means.\footnote{Cf. Tan, supra note 842 at 84-96.}

Substantively, however, the arguments made in the foregoing sections need not be exhausted in establishing a right of humanitarian intervention as a discretionary entitlement of foreign states. By contrast, the thrust of that analysis has been to deny rather than to affirm the idea of rights borne by the states as legal entities. It has been argued that states and their governments are not holders of any autonomous rights, but are only entitled to those rights that they derive from their citizens.\footnote{See Part 4.5.1.1; see also Tesón, Humanitarian Intervention, supra note 45 at 177-121.} At the same time, I have elaborated that states carry ethical responsibilities towards their populations.\footnote{See Part 4.3, above.} In light of this decision against an autonomous moral standing of states, it would in fact appear contradictory to formulate humanitarian intervention as a mere right, devoid of any concomitant responsibility.

Indeed, the foundations on which the ethical right of humanitarian intervention has been developed also support the idea of a responsibility of foreign entities.\footnote{Cf Tan, supra note 842 at 88-96; Bagnoli, supra note 841 at 121; Tesón, Humanitarian Intervention, supra note 45 at 123, n. 15.} The case for humanitarian intervention has essentially been made on the basis of the concept of human rights and human dignity, and different variations of this argument.\footnote{See Part 4.4, above.} Recalling the Rawlsian-Tesonian philosophy of a social contract concluded under a veil of ignorance, it has been suggested that the hypothetical original contractors would agree to a right of humanitarian intervention, as this may be their only “source of salvation” if they find themselves in danger of massive human rights violations.\footnote{Cf. Tan, supra note 842 at 88-96.} Taking again the perspective of the original contractors, they will realize, however, that they may not benefit from the legitimacy of humanitarian intervention alone, if there is no sense of an obligation on the part of the potential interveners. It is therefore suggested that the original contractors would also agree to a principle that, in certain egregious cases of human rights violations, foreign military intervention is required. Unless specific counter-
arguments demand a narrower delineation of these cases, they can be considered as congruent with the scope of all those situations for which intervention is found to be permissible.\textsuperscript{849}

The proposition of an ethical duty to intervene may be circumstantiated by different surveys that have inquired into the actual attitudes of people both in a potential intervener state and those geographical areas that might be targets of intervention. Two studies in the United States, for instance, have demonstrated that a majority of US citizens see their own nation and other Western powers under a moral obligation to use military force in order to prevent a genocide, whether in Africa or in Europe.\textsuperscript{850} On the other hand, the aforementioned survey by the International Committee of the Red Cross in twelve different war-torn societies revealed that two thirds of the interviewed civilians under siege in these regions indeed called upon the international community for more intervention.\textsuperscript{851} Confirmed by this empirical data, the thought-experiment of a social contract between veiled egoists establishes a \textit{prima facie} case for an ethical duty of humanitarian intervention, which is ultimately grounded in the concern for human dignity and basic human rights.\textsuperscript{852}

This \textit{prima facie} ethical case for an international responsibility to protect could, however, be undermined by different arguments that have been or could be made against this component of the R2P framework. Firstly, both state representatives and scientific commentators have criticized the idea of a responsibility to protect for opening new avenues for the use of military force, as well as for its potential for abuse.\textsuperscript{853} In the state community, the Venezuelan President Hugo Chávez, for instance, considered the responsibility to protect as a “very dangerous” concept that would foster imperialism and interventionism.\textsuperscript{854} These criticisms, however, ultimately concern the permissive dimension of the R2P framework, and have no further weight going beyond the risk of abuse argument that has already been discussed with a view to a right of humanitarian intervention. Within the limits in which intervention is ethically permitted, these objections thus do not affect the case for a duty to intervene.

No more compelling is, within the scope of this discussion, the second concern, which relates to the potential for an abusive interpretation of the concept of an international responsibility to

\footnotesize{\textsuperscript{849} See Tan, \textit{supra} note 842 at 94.  
\textsuperscript{851} See Greenberg Research, \textit{supra} note 709 at xvi; see also Weiss, “R2P After 9/11”, \textit{supra} note 59 at 756-757.  
\textsuperscript{852} Cf. Joyner, \textit{supra} note 2 at 720, 723; Tan, \textit{supra} note 842 at 88-96; Bagnoli, \textit{supra} note 841 at 121.  
\textsuperscript{853} See generally Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 147.  
\textsuperscript{854} See Venezuela, President Hugo Chávez, \textit{supra} note 203.}
protect in the converse direction. This line of reasoning, which has been defended particularly by Western governments, suggests that any terminological shift from rights to responsibilities of international actors in the human rights context may serve as a means for the governments of concerned states to divert attention from their own responsibilities towards those of others.855 Yet, focussing exclusively on the responsibility to react through military intervention, it is necessary to bear in mind the fierce opposition of most states to any encroachment on their territorial sovereignty, and the definitional limitation of humanitarian intervention to action taken without the consent of the government of the target state. In practice, the government of the concerned state would most likely itself be the target of the military operation.856 It is therefore inconceivable that it would try to circumvent a debate on its own failure to protect its population by pointing towards a duty of humanitarian intervention borne and violated by external actors. Whatever force this second counter-argument may have with regard to other aspects of the continuum of obligations that the R2P framework sets out, it definitely fails to weaken the case for an ethical responsibility of the international community to protect by means of military intervention.

The third, and more compelling argument against the understanding of humanitarian intervention as an ethical duty of foreign states is that such an operation in another country may entail challenges and risks, logistically and militarily.857 It may be objected that a government that intervenes with military force in a crisis within another state’s borders incurs costs and may even have to sacrifice the lives of its own soldiers.858 In this case, its international commitment could be seen as conflicting with the responsibility that it has towards its own citizens, or even as a “breach of democratic trust between leaders and the people that have elected them to represent and protect their interests.”859

To properly appraise this suggestion, it is useful to have recourse to the philosophical model, that has been chosen as the basis for the identification of ethical principles. According to the Rawlsian-Tesonian model, which applies the concept of a hypothetical contract between veiled

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856 See Tan, supra note 842 at 89.
857 Cf. Wheeler & Morris, supra note 43 at 458; Tan, supra note 842 at 106-111.
858 See e.g. Samuel P. Huntington, “New Contingencies, Old Roles” (1993) 2 Joint Force Quarterly 38 at 42, online: Joint Electronic Library <http://www.dtic.mil/doctrine/jel/jfq%5Fpubs/jfq0702.pdf> (calling it “morally unjustifiable [...] that members of the Armed Forces should be killed to prevent Somalis from killing one another.”)
859 See generally Tan, supra note 842 at 109.
egoists to the international community, the contractors who agree on the relevant ethical principles are neither representatives of states, nor do they even know which state they will turn out to be living in.\textsuperscript{860} Unlike the actual citizenries of potential intervener states, portions of which may focus on national interests and the well-being of their own people,\textsuperscript{861} the original contractors will thus take a global view and agree on ethical principles that acknowledge human needs across borders.\textsuperscript{862} They must take into account the possibility that they find themselves at either end of the dilemma: as the potential victims of an intrastate conflict that threatens their basic human rights, or as the citizens of a state that could intervene to avert such massive human rights violations, loading however burdens on its own citizens. I suggest that, as a part of their maximin strategy, the original contractors would negotiate a principle that overall promises to be most beneficial to them. This will mean that, on the one hand, they would not stipulate a duty to intervene at any costs, in case they will be citizens or even soldiers of the intervening state, while, on the other hand, they would not want to totally exclude any prescriptive rule of humanitarian intervention.

Despite negative examples for opinions that are exclusively preoccupied with national interests, some empirical support for both aspects of this proposition of a limited ethical duty to intervene may be found in the above-cited surveys on the public opinion in affected states. The interviews with US citizens have, for instance, specifically demonstrated not only that there is a majority acceptance of a moral responsibility to prevent genocide in general, but also that a duty to intervene in Europe has come to enjoy broader support than intervention in Africa.\textsuperscript{863} This discrepancy has emerged only between 1999 and 2003, as support for intervention in Europe has increased significantly, while opinions on Africa have remained virtually unchanged.\textsuperscript{864} The explanation for this phenomenon has been found in the greater satisfaction of the US public with the outcomes of recent military operations in Europe, notably in Bosnia and Kosovo, whereas no high-profile success in peacekeeping on African soil could be noted during the same time.\textsuperscript{865} This observation then, in turn, supports the idea that an adequate ratio between the costs and the benefits of an intervention is a factor in establishing a moral obligation to come to the rescue of others.

\textsuperscript{860} See text accompanying notes 676-681.  
\textsuperscript{861} Huntington's position on the US involvement in Somalia may exemplify this attitude, cf. supra note 858 at 42.  
\textsuperscript{862} For the relevance of such a global point of view see also Tan, supra note 842 at 110.  
\textsuperscript{863} See World Public Opinion, supra note 850; see also MacFarlane, Thielking & Weiss, supra note 35 at 986.  
\textsuperscript{864} See World Public Opinion, \textit{ibid.}  
\textsuperscript{865} \textit{Ibid.;} see also MacFarlane, Thielking & Weiss, supra note 35 at 986.
The conclusion can then be that humanitarian intervention can be established as an ethical duty if this obligation is limited to sufficiently narrow cases, in which especially the gravity of the existing crisis and the risks incurred are proportionate. The existence of a just cause and the requirement of proportionality and reasonable prospects, however, are conditions not just for military intervention to be required, but already for its being permitted.\textsuperscript{866} Similarly, the ICISS has constrained both the right of intervention and the international responsibility to protect through detailed precautionary principles.\textsuperscript{867} In view of the narrow scope for permissible humanitarian intervention, and in light of its basis in human rights, any legitimate intervention may also be conceived as ethically required.\textsuperscript{868}

A fourth and final difficulty with obligatory humanitarian intervention is the "agency problem", that is, the question of who is the actual bearer of this duty, the international community or certain individual states.\textsuperscript{869} As several commentators have pointed out, the need for clarification on its discharge does not deprive the responsibility to protect of its character as an ethical duty.\textsuperscript{870} Broadly speaking, it appears recommendable to establish institutional procedures for the fulfillment of the duty to intervene.\textsuperscript{871} Given, however, that the ICISS itself failed to specify the bearer of the international responsibility to protect, suffice it for the purposes of this thesis to conclude that humanitarian intervention is not just a right, but even an ethical obligation of the international community.

To sum up, the philosophical basis of a social contract between veiled egoists, and the argument for a right of humanitarian intervention based on the values of human dignity and fundamental human rights, support the proposition that the international community not only has a right, but even a duty to use military force in order to protect people in other states from large-scale killings or ethnic cleansing. This duty of humanitarian intervention is as limited in its scope as the right of humanitarian intervention and must, in particular, be a proportionate reaction to the scale of the crisis that it purports to mitigate.

\textsuperscript{866} See Part 4.5.3, above.
\textsuperscript{867} Cf. ICISS, Responsibility to Protect, supra note 9 at xii.
\textsuperscript{868} Cf. Tan, supra note 842 at 111.
\textsuperscript{869} Cf. ibid.; Bagnoli, supra note 841 at 124-126.
\textsuperscript{870} See Tan, ibid. at 94-95; Bagnoli, supra note 841 at 124-125.
\textsuperscript{871} See Tan, ibid. at 102-106, Bagnoli, supra note 841 at 124-125.
4.8 Conclusion

The ethical discussion of the different elements of R2P in this chapter has produced a coherent normative theory of humanitarian intervention and a responsibility to protect. Firstly, it has been outlined that every state and its government have an ethical responsibility to protect their population from massive human rights violations, including notably large-scale killings and ethnic cleansing. In the case that a government fails to fulfill this responsibility, foreign states are entitled, under certain conditions and limits, to intervene with military force to prevent or halt such atrocities. The ethical values of human dignity and human rights establish, in principle, a case for legitimate humanitarian intervention in instances of large-scale killings and ethnic cleansing, and none of the counter-arguments can justify a strict non-interventionist principle. To be justified, humanitarian intervention must satisfy certain conditions, notably it has to be a last resort and proportionate, and it must have reasonable prospects of success. While Security Council approval should be sought, interventions outside the UN system may equally be justified. Finally, and importantly, to the extent that humanitarian intervention is legitimate, it is not only a right, but even an ethical duty of the international community to intervene in order to prevent or halt large-scale killings or ethnic cleansing.

This normative theory of the ethics of R2P will provide the background for the following legal analysis. According to the legal methodology elaborated in Chapter 3, it will provide guidance in both treaty interpretation and customary law analysis, as well as serve to fill in gaps within the legal regulations.
On the basis of the foregoing methodological and ethical considerations, this chapter will analyze the quality that the R2P framework has achieved in the terms of international legal theory. As the foregoing discussion has indicated, it is impossible to appraise “the responsibility to protect” as a monolithic concept. Stahn has compellingly demonstrated in his analysis that the notion “responsibility to protect” not only describes “a multifaceted concept with various elements”, but has also been used to describe “partly different paradigms” in the documents that have incorporated it since its formulation by the ICISS. Moreover, the approach to the individual parts of the concept may vary within a single document, casting it in moral, political, or legal terms. As a consequence, the distinct propositions that are embraced by the notion of the responsibility to protect may have achieved a different status in international law.

In the following, five different elements of a “responsibility to protect” framework will be discussed: the primary responsibility of the host state to protect its own population; a right of the international community to exercise humanitarian intervention collectively through the Security Council; a right of other states to unilaterally intervene for humanitarian purposes; a residual responsibility to protect lying with the broader community of states; and, finally, a set of criteria for legitimate military intervention for human protection.

5.1 Elements of the Analysis – From Treaty Interpretation to Negative State Practice

For each of these elements, the analysis will follow the methodology developed in Chapter 4. At the outset, I will therefore address the legal status of the relevant idea on the basis of the traditional positivist doctrine of sources, through an interpretation of the relevant treaties, that is, specifically the UN Charter and the Genocide Convention, and an analysis of customary

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872 See Stahn, supra note 35 at 118.
873 Ibid. at 101, 118.
874 Ibid. at 108 (suggesting that the paragraphs on the responsibility to protect in the World Summit Outcome Document, while resisting the attempts of the US to reduce R2P to a purely moral concept, “represent a curious mixture of political and legal considerations, which reflects the continuing division and confusion about the meaning of the concept.”)
875 See Stahn, supra note 35 at 102; see also ibid. at 110; Weiss makes reference in this context to Karl Popper’s plea for “piecemeal engineering”, see Weiss, “R2P After 9/11”, supra note 59 at 745.
international law.\(^{877}\) In this part of the analysis, ethical considerations will only be employed as a background theory to provide guidance, where necessary, in interpreting the relevant treaty provisions or material sources of international custom, or to resolve conflicting legal propositions. Where this first stage of the analysis fails to detect legal rules, ethical considerations may, moreover, serve to fill in these gaps in the legal system through the independent recognition of legally binding principles of ethical law.

The customary law analysis will evaluate a variety of material sources, including notably policy statements and declarations, by individual states or collectively through international institutions. The focus of this analysis will be on developments following the publication of the ICISS report in 2001. With a view to prior events, a rich literature with, however, often diverging assessments exists already. These earlier developments may be taken into account where components of the R2P are less novel than is sometimes suggested, but rather have a longer conceptual history that may be relevant for their current legal status.\(^{878}\)

Broadly, the analysis of state practice will have three different foci: general statements on the concept, by representatives of individual states and groups of states; the Outcome Document of the 2005 World Summit; and actual state conduct, including evidence of negative state practice that may undermine the claim of an idea to a legally binding status.

5.1.1 General State Declarations in the Light of “9/11” and the Iraq War

The first element of the analysis will be a survey of the general verbal reactions by representatives of states or organizations of states after the publication of the ICISS proposals. In this context, two important influences should be mentioned that had a significant impact on the debate: the terrorist attacks in the US on September 11, 2001 (“9/11”), and the war in Iraq since 2003.

The effect of 9/11, in the direct aftermath of which the ICISS report was published, was to draw the international attention to the problem of international terrorism rather than to humanitarian

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\(^{877}\) It will be assumed that the third formal source of international law, the general principles of law understood in the traditional sense, will be unhelpful for this analysis, due to a lack of principles on humanitarian intervention in the domestic legal systems, see Part 3.1.3.3, above.

\(^{878}\) Cf. Stahn, supra note 35 at 102, 111, 115.
crises, thus almost “suffocat[ing] at birth” the central theme of the report.\(^{879}\) R2P, however, overcame this challenge and stayed on the international agenda.\(^{880}\)

A bigger threat to the further evolution of the concept has been posed by the war in Iraq in the wake of 9/11.\(^{881}\) The Iraq war has heavily influenced the debate of humanitarian intervention, making it more divisive and less receptive for consensus on the principle of a responsibility to protect.\(^{882}\) For commentators, the invasion of Iraq had the potential of bringing the concept of “humanitarian intervention into disrepute”,\(^{883}\) and, indeed, many governments have perceived the use of humanitarian arguments by the US and the UK as a cover for underlying national interests.\(^{884}\) The Iraq war has been claimed as a point in case by those who, like China and Russia, suspect that major Western powers would use humanitarianism as a pretext for military intervention,\(^{885}\) which has made it harder for proponents of a doctrine on humanitarian intervention to find the necessary support.\(^{886}\) Significantly, however, the Iraq war has not only increased the hostility from states that had been suspicious of the R2P concept from the outset.\(^{887}\)

On the contrary, even states that earlier would have been sympathetic to the R2P concept have now stated opposition.\(^{888}\) It thus seems that the forecast by Roberts and later Weiss that states would become “even more circumspect than before about accepting any doctrine, including on

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\(^{879}\) See Evans, “Responsibility to Protect”, supra note 25 at 712; see also MacFarlane, Thielking & Weiss, supra note 35 at 980 (noting, with reference to the academic debate on humanitarian intervention, that “the mainstream (realist) American security studies community is clearly disengaged” since September 2001).

\(^{880}\) See MacFarlane, Thielking & Weiss, supra note 35 at 978.

\(^{881}\) See MacFarlane, Thielking & Weiss, supra note 35 at 978; see also Wheeler & Morris, supra note 43 at 459-460 (pointing to the “deleterious impact of the Iraq war on the developing norm of humanitarian intervention”).

\(^{882}\) See Wheeler & Morris, supra note 43 at 459 (noting that “[t]he war against Iraq has produced a major fissure in the liberal international consensus forged in the 1990s concerning the justifiability of military intervention for humanitarian protection”); see also MacFarlane, Thielking & Weiss, supra note 35 at 977; Evans, “Responsibility to Protect”, supra note 25 at 717 (for whom “the misuse of [R2P] in the context of the war on Iraq” has in fact been “[t]he biggest inhibitor of all to [its] ready acceptance […] as an operating principle”); Brunnée & Toope, supra note 86 at 4.

\(^{883}\) See Ian Williams, In These Times, online at: “Intervene With Caution” (2003) 27:18 In These Times 23 (Lexis), online: In These Times <http://www.inthesetimes.com/article/601/>; see also Hamilton, supra note 35 at 293; Bellamy, “Trojan Horse”, supra note 256 at 38; Welsh, “Responsibility to Protect”, supra note 9 at 374.

\(^{884}\) See generally Wheeler & Morris, supra note 43 at 449.

\(^{885}\) Ibid. at 456-457; see also Hamilton, supra note 35 at 293.

\(^{886}\) See Hamilton, supra note 35 at 293; see also Weiss, “R2P After 9/11”, supra note 59 at 750, 753.

\(^{887}\) See Weiss, ibid. at 752.

\(^{888}\) Ibid. at 751-752; MacFarlane, Thielking & Weiss, supra note 35 at 984 (both sources mention as an example the strong objection by Argentina, Chile and Germany to including the basic principles of the R2P in the final communiqué of the Progressive Governance Summit of left-or-center government leaders, on July 13-14, 2003); Welsh, “Responsibility to Protect”, supra note 9 at 374 (with similar reference to the Progressive Governance Summit and the German reservations); Fund For Peace, Regional Responses to Internal War: Perspectives from Europe on Military Intervention, vol. 5 (June 2003), online: Fund For Peace <http://www.fundforpeace.org/publications/reports/fipr-europe_conference.pdf> [Fund For Peace, Europe]; see also Hamilton, supra note 35 at 293 (pointing to the particular reluctance of European states to endorse R2P “for fear of legitimating the Iraq war”).
humanitarian intervention or on the responsibility to protect, that could be seen as opening the
door to a general pattern of interventionism” has come true.\textsuperscript{889} Moreover, in the political
practice, there seems to be an increased reluctance in the international community to authorize
intervention, particularly in an Islamic state like Sudan.\textsuperscript{890}

In the light of these developments, the Iraq war may have the potential not only to prevent or
slow down the further normative evolution of a doctrine of humanitarian intervention.\textsuperscript{891} It could,
moreover, even have reversed the trend and eroded earlier progress on this field.\textsuperscript{892}

\subsection*{5.1.2 The 2005 UN World Summit – Success or Set-Back?}

The second focus of the customary law analysis will rest on the treatment of the R2P concept at
the United Nations 2005 World Summit. This high-level plenary meeting of the General
Assembly provided a global forum for intergovernmental negotiations,\textsuperscript{893} and ended with the
conclusion of an official outcome document, in which the R2P concept was explicitly endorsed
in two paragraphs under the headline “Responsibility to protect populations from genocide, war
crimes, ethnic cleansing and crimes against humanity”:

\begin{quote}
138. Each individual State has the responsibility to protect its populations from genocide, war crimes,
ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such
crimes, including their incitement, through appropriate and necessary means. We accept that
responsibility and will act in accordance with it. The international community should, as appropriate,
encourage and help States to exercise this responsibility and support the United Nations in
establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use
appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and
VIII of the Charter, to help 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,
\end{quote}

After 9/11”, supra note 59 at 750.
\textsuperscript{890} See Wheeler & Morris, supra note 43 at 458.
\textsuperscript{891} \textit{Ibid.}; Bellamy, “Trojan Horse”, supra note 256 at 32-33; Weiss, “R2P After 9/11”, supra note 59 at 751.
\textsuperscript{892} See Wheeler & Morris, \textit{ibid.} at 445; Bellamy, “Trojan Horse”, supra note 256 at 32-33; Weiss, “R2P After 9/11”,
supra note 59 at 751; on a more practical level, the preoccupation of the US with Iraq, and the ongoing operational
commitments due to the engagement of military forces in the country, have been identified as obstacles to
interventions elsewhere, see e.g. Weiss, “R2P After 9/11”, supra note 59 at 757; Wheeler & Morris, supra note 43 at
458.
\textsuperscript{893} See United Nations, Press Kit, Backgrounder, “United Nations General Assembly Opens on 13 September
Evans, “Responsibility to Protect”, supra note 25 at 715; see also Brunnée & Toope, supra note 86 at 12.
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.894

This endorsement possesses a particular weight as a material source of international custom, as it evidences a unanimous recognition of the broader framework by almost the whole international community.895 When it comes to a more detailed evaluation of the World Summit’s outcome, however, academic opinion is divided.896

Many commentators have lauded the consensus on the responsibility to protect as a remarkable achievement,897 especially given the history of the debate and its divisive nature after the Iraq war.898 The optimistic assessment of this consensus is that it testifies a shift in the balance between state sovereignty and human rights in international law,899 and contains at least a declaratory commitment that will make it harder for states to stand by in humanitarian crises,900 thus “strengthen[ing] the development of a new international norm regarding humanitarian protection.”901 Accordingly, for some, the endorsement of R2P has been one, if not the only, positive result of an otherwise disappointing meeting.902

894 See UN General Assembly, World Summit Outcome, supra note 232 at paras. 138-139
895 See also Evans, “Responsibility to Protect”, supra note 25 at 715; Bannon, supra note 61 at 1158.
896 See generally Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 144.
897 Ibid. at 153; Evans, “Responsibility to Protect”, supra note 25 at 714; Brunnée & Toope, supra note 86 at 7; Stahn, supra note 35 at 100.
898 See Bellamy, ibid. at 153; see also Brunnée & Toope, supra note 86 at 7.
899 See Stahn, supra note 35 at 100 (note, however, his differentiated evaluation of the language of the outcome document at 108-110); for Tod Lindberg, it represents even a “revolution in consciousness in international affairs”, see “Protect the people: United Nations takes bold stance” The Washington Times (27 September 2005) A19 (Lexis); see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 144.
900 See Wheeler & Morris, supra note 43 at 460 (“reason for some limited optimism”).
901 See Bannon, supra note 61 at 1158; see also Hamilton, supra note 35 at 295.
902 See Breau, “Peacekeeping”, supra note 9 at 429; Brunnée & Toope, supra note 86 at 3 (“the only fundamental normative innovation agreed upon”); note, however, that Brunnée’s and Toope’s overall assessment of the outcome document is rather ambivalent, see Brunnée & Toope, supra note 86 at 12-13); for the former Guatemalan ambassador and UN Economic and Social Council President Gert Rosenthal, the World Summit’s endorsement of R2P was “the only unequivocal success in September 2005” (quoted in Weiss, “R2P After 9/11”, supra note 59 at 745); see also Stahn, supra note 35 at 100.
Skeptics, by contrast, suggest that the consensus in the Outcome Document has ultimately "done little to increase the likelihood of preventing future Rwandas and Kosovos." They argue that the World Summit has neither overcome the challenges posed by a lack of political will and operational capacity in practice, nor addressed the fundamental problem of situations in which the Security Council is deadlocked. What is even more "worrying" to supporters of R2P is the interpretation that, in the process of negotiating the consensus, key elements of the ICISS report have been "bargain[ed] away". This "watering down" of the concept is perceived as a set-back not only for humanitarian protection in practice, but also for future conceptual progress. It is feared that in the worst case, the narrow scope for collective intervention agreed upon in Article 139 of the Outcome Document may even lead to Security Council action being more limited in the future than it used to be in the past.

The possible interpretations of the World Summit Outcome Document's pronouncement on the responsibility ultimately range from "the culmination of successful norm entrepreneurship" to "the result of a trade-off". Whichever interpretation of the Outcome Document turns out to be more compelling, the effort made by the states in negotiating the final formulation of the concept demonstrates their awareness of the importance of this statement for the establishment of an international framework.

The ambiguities in academic commentary on the ramifications of the World Summit agreement for the R2P concept have implications for the following analysis. First and foremost, they reinforce the need to evaluate the different elements of the concept individually and in detail. Furthermore, some of the references made above also indicate the importance of a consideration

903 See Bellamy, "Whither the Responsibility to Protect", supra note 63 at 145-146, 167.
904 See Weiss, "R2P After 9/11", supra note 59 at 757
905 See Wheeler & Morris, supra note 43 at 460.
906 See Bellamy, "Whither the Responsibility to Protect", supra note 63 at 145-146, 167, 169; see also Weiss, Ideas, supra note 1 at 57-58, 122; Welsh, "Responsibility to Protect", supra note 9 at 363, 380 ("the articulation of R2P in Articles 138-139 of the Summit Outcome document [...] represents a weakening of the original notion and circumscribes the international community's obligation to protect individuals from massive human rights violations", ibid. at 363, noting, however, that the states committed themselves "to act in ways not explicitly provided for in the UN Charter", ibid. at 380); note, by contrast, Evans's observation that "[t]he language of the outcome document was quite strong", "Responsibility to Protect", supra note 25 at 715.
907 See Michael Byers, "High ground lost on UN's responsibility to protect" Winnipeg Free Press (18 September 2005) B3 (Factiva).
908 See Bellamy, "Whither the Responsibility to Protect", supra note 63 at 144-146.
909 See Brunnée & Toope, supra note 86 at 10; see also Michael Byers, supra note 907.
910 See Brunnée & Toope, ibid. at 12 (taking themselves the position that it is "too early to tell whether or not the inclusion of the concept actually establishes a base for the future maturation of the norm", at 12, and that the R2P concept, "although diminished in the process of negotiation, remains strong enough to allow for future development", ibid. at 13)
911 Cf. Brunnée & Toope, supra note 86 at 12-13 ("it is difficult to dismiss the Summit Outcome as mere 'cheap talk.'").
of the Outcome Document in light of the evolution of R2P prior to and during the negotiations. Two broader threads will be examined as setting the background for the concluding agreement at the World Summit: the previous scheme of state opinion, especially during the negotiation process, and the adjustments that had already been made to R2P by different actors prior to the World Summit. In this context, two reports will be of particular interest: “A More Secure World: Our Shared Responsibility” by the High-Level Panel on Threats, Challenges and Change, 912 and Secretary-General Kofi Annan’s “In Larger Freedom: Towards Development, Security and Human Rights for All” of March 2005. 913

The High-Level Panel (HLP) was, as the ICISS had been, a “panel of eminent persons”, 914 and comprised sixteen former senior politicians and government officials, 915 one of which was significantly the ICISS’s co-chair Gareth Evans. 916 The HLP was commissioned by Secretary-General Annan in September 2003, and “tasked with examining the major threats and challenges the world faces in the broad field of peace and security [...] and making recommendations for the elements of a collective response”. 917 Specifically, it was asked to: “(a) [e]xamine today’s global threats and provide an analysis of future challenges to international peace and security [...] ; (b) [i]dentify clearly the contribution that collective action can make in addressing these challenges; (c) [r]ecommend the changes necessary to ensure effective collective action, including but not limited to a review of the principal organs of the United Nations.” 918

Responding to this task, the panel submitted a report with a list of recommendations to the Secretary-General in December 2004, 919 in which it drew extensively on the R2P report. 920 The

912 High-Level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 [High-Level Panel].
913 UN Secretary-General, In larger freedom: towards development, security and human rights for all, UN GAOR, 59th Sess., UN Doc. A/59/2005 (21 March 2005) [UN Secretary-General, In larger freedom].
914 See Brunnée & Toope, supra note 86 at 11; see also UN Secretary-General, Note, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 1 [UN Secretary-General, Note on High-Level Panel report].
915 See Weiss, “R2P After 9/11”, supra note 59 at 746; see UN Secretary-General, Note on High-Level Panel report, supra note 915 at para. 2 (for the names of the members).
916 See Weiss, Ideas, supra note 1 at 116; see also UN Secretary-General, Note on High-Level Panel report, supra note 915 at para. 2.
918 See UN Secretary-General, Press Release on High-Level Panel, supra note 917; see also Brunnée & Toope, supra note 86 at 4-5; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 155-156; Weiss, “R2P After 9/11”, supra note 59 at 746.
919 See High-Level Panel on Threats, Challenges and Change, Chair, Transmittal Letter to the Secretary-General (1 December 2004), UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 6; see also Brunnée & Toope, supra note 86 at 5; Weiss, “R2P After 9/11”, supra note 59 at 746; Evans, “Responsibility to Protect”, supra note 25 at 713.

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panel explicitly endorsed “the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide or other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”921 Moreover, it set out “five basic criteria of legitimacy” that should guide the Security Council in deciding upon the use of force, and that corresponded, with minor adjustments, with the just cause thresholds and other precautionary principles elaborated by the ICISS.922 The HLP’s propositions with regard to the R2P and the use of force were, in turn, endorsed by Kofi Annan in his report “In Larger Freedom”.923 which contained the Secretary-General’s own proposals for reform and served as a basic working document for the World Summit.924

While neither of these two documents possesses binding normative force,925 they, along with the ICISS report itself, may be referred to as a standard of comparison when analyzing the treatment of R2P by the states at the World Summit. In this context, attention will, again, need to be paid to the specific formulation of the individual components of the concept.

5.1.3 International Reactions to Ongoing Humanitarian Crises

The third focus of the analysis will rest on how any verbal endorsement of R2P is supported by the actual conduct of international relations. Recent humanitarian crises, such as in Darfur, the DRC, Burundi, Côte d’Ivoire, or Uganda, will be scrutinized for action that may serve as evidence of a positive practice, and for inaction that may constitute negative state practice impeding the emergence of a norm of humanitarian intervention or a responsibility of the international community to protect. Other instances that may qualify as forms of state practice will complement the analysis of the concept’s status in customary international law where appropriate.

920 See Brunnée & Toope, supra note 86 at 5; Weiss even speaks of “enthusiastic support for R2P”, see “R2P After 9/11”, supra note 59 at 746; in Evans’s own assessment, the High-Level Panel “squarely adopted the whole concept”, see “Responsibility to Protect”, supra note 25 at 713.
921 See High-Level Panel, supra note 912 at para. 203; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 156; Brunnée & Toope, supra note 86 at 5.
922 See High-Level Panel, ibid. at paras. 203, 207; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 156; Brunnée & Toope, supra note 86 at 5; Evans, “Responsibility to Protect”, supra note 25 at 713.
923 See UN Secretary-General, In larger freedom, supra note 913 at para 4; see also Weiss, “R2P After 9/11”, supra note 59 at 746.
924 See Evans, “Responsibility to Protect”, supra note 25 at 714.
925 See Brunnée & Toope, supra note 86 at 13.
5.2 Primary Responsibility to Protect of the Host State

The first element of the R2P concept is the primary responsibility of the host state to protect its population. In the “Basic Principles” of its report, the ICISS suggested:

State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.926

I will conclude that, as a result of longer legal traditions, more recent developments after the end of the Second World War, and broad support in state practice, every state has a legal responsibility to protect the people within its borders. Yet, I will argue that, in a positivist system of international law, this responsibility cannot be qualified as a further element of state sovereignty, but only as an obligation under international custom.

5.2.1 Sovereignty as Responsibility under the UN Charter

The UN Charter contains a variety of provisions that are relevant to the discussion of a responsibility of sovereign states to protect their populations, notably those that refer to the sovereign status of its member states and to the need to protect human rights of individuals. The concept of state sovereignty is framed in several of the principles of the United Nations that are set out in Article 2 UN Charter.927

Article 2 (1): The Organization is based on the principle of the sovereign equality of all its Members.

Article 2 (4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2 (7): 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 or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

At the same time, several passages of the UN Charter also make reference to the notion of human rights:928

926 See ICISS, Responsibility to Protect, supra note 9 at xi.
927 See Welsh, “Responsibility to Protect”, supra note 9 at 364; reference to Articles 2(1) and 2(7) only is made by Brunée and Toope, supra note 86 at 7.
928 See Stahn, supra note 35 at 112 (also mentioning the last sentence of Article 2(7)); see also Joyner, supra note 2 at 707 n 55 (for Article 1(3)).
Preamble: We the Peoples of the United Nations determined [...] 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 [...] 

Article 1(3): [The Purposes of the United Nations are:] To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; [...] 

Article 55: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [...] 

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. 

Article 56: All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. 

The formulation of R2P by the ICISS raises the question whether these provisions in the UN Charter justify the proposition that the responsibility to protect their populations is an element of the sovereignty of its member states. According to the conceptualization of “sovereignty as responsibility”, respect for human rights is a condition for the existence of a legitimate state that enjoys sovereign equality.929 Consequently, every state that was unwilling or unable to protect these rights would forfeit its sovereign authority and could be subject to external intervention.930 None of the provisions in the UN Charter explicitly stipulates a responsibility of the member states to protect all peoples within their borders, let alone as an element of state sovereignty. The concept of state sovereignty, while circumscribed in several of the principles of the UN, in fact lacks a precise definition in the Charter. As inconclusive as their plain terms is a purposive interpretation of the named provisions: on the one hand, the solution of humanitarian problems is one of the stated purposes of the United Nations.931 The pursuit of this purpose, however, is again made contingent on the principles of the sovereign equality of its members, the prohibition of the use of force, and non-intervention into the internal affairs of a state.932 According to the methodological considerations set out in Chapter 3, these ambiguities in a purposive interpretation of the UN Charter may be solved through an analysis of the original as well as 

930 See ICISS, Responsibility to Protect, supra note 9 at xi; Cunliffe, supra note 227 at 39. 
931 See Art. 1(3) UN Charter. 
932 See Art. 2(1), 2(4), 2(7) UN Charter.
subsequent shared understandings of the UN members, with ethical principles providing a background and guidance.

5.2.2 Traditional Understandings of State Sovereignty and Human Rights

With a view to the original shared understandings of the parties, two different traditions had influenced the founders of the UN in framing the provisions of its Charter: the Westphalian understanding of sovereignty as granting states exclusive jurisdiction over their territories, and the growing concern for the protection of people within sovereign states from arbitrary exercise of that power.

The traditional concept of sovereignty understood the states as the bearers of exclusive and absolute jurisdiction within their territory. This privilege is safeguarded by a corresponding duty of foreign states and other actors to refrain from interfering with the state’s internal affairs.933 The basis for this concept of state sovereignty lies in the agreements that were concluded between the European states as parts of the Treaties of Westphalia in 1648, and the purpose of which was the preservation of international peace and order through the establishment of a system of states that coexisted in mutual independence and equality.934 Since then, the territorial sovereignty of states has been the preeminent principle of interstate relations,935 and “a key constitutional safeguard of international order”.936 The underlying question of what entities constitute states that enjoy this sovereign status has been fleshed out in the Montevideo Convention on Rights and Duties of States of 1933, which stipulates four core elements: “a) a permanent population; b) a defined territory; c) government; and d) the ability to enter into relations with other states”.937

This Westphalian concept of sovereignty heavily influenced the understandings of the UN founders in formulating the Charter.938 In creating a new world organization, they intended to preserve international peace and security and protect the territorial integrity, political

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933 See Brownlie, Principles, supra note 294 at 287; Joyner, supra note 2 at 703; see also Weiss, Ideas, supra note 1 at 12.
934 See Weiss, Ideas, supra note 1 at 14; Brunnée and Toope qualify this international system with the terms “sovereignty under conditions of international anarchy”, Brunnée & Toope, supra note 86 at 7.
935 See Brunnée & Toope, ibid. at 7; Joyner, supra note 2 at 703; Weiss, Ideas, supra note 1 at 12.
936 See Weiss, Ideas, supra note 1 at 15; see also Brunnée & Toope, supra note 86 at 7; Joyner, supra note 2 at 703.
937 See Article 1 Montevideo Convention; see also Weiss, Ideas, supra note 1 at 14, 89.
938 See Weiss, ibid. at 12, 97; see also Brunnée & Toope, supra note 86 at 7.
independence and national sovereignty of its members.\textsuperscript{939} The Charter was thus centered on the principle of state sovereignty.\textsuperscript{940}

On the other hand, the sovereignty, understood in the sense of an authority of states, has never enjoyed absolute protection. As one commentator puts it, state sovereignty has never been "as sacrosanct as its most die-hard defenders claim."\textsuperscript{941} Both doctrine and practice have for long accepted limits to the formal notion that a state disposes of an unfettered discretion in ruling its territory.\textsuperscript{942} Moreover, it has also been recognized that state sovereignty involves certain duties on the international level, at least where its acts could have an impact on other states.\textsuperscript{943}

Equally, states have never been intended to be protected simply for their own good.\textsuperscript{944} Rather, since Grotius and Locke in the seventeenth century, theorists have identified the protection of human beings as the essential purpose of sovereignty.\textsuperscript{945} Accordingly, there have been attempts in the international legal system ever since to increase the protection of individuals and groups from their own government, for instance through treaties that provided for the protection of religious groups or minorities.\textsuperscript{946}

This tradition has equally permeated the thinking of the UN founders in framing the Charter. While they attached a significant weight to the sovereignty of states, this principle was never meant to legitimize the unfettered exercise of power by state authorities to the detriment of their citizens.\textsuperscript{947} Provisions like the Preamble, Article 1(3) and Article 55 indicate the ambition of constraining governments with a view to the need of protecting individual human beings.\textsuperscript{948}

Altogether, the UN Charter has thus, since its creation, reflected both strands of thought: the importance of upholding the sovereignty of states as equal members of the international community, and the need to limit state authority for the protection of individuals. In the light of these important influences, it may be concluded that the UN Charter never endorsed a concept of state sovereignty that provides governments with an unlimited, absolute jurisdiction over their territory, even at the expense of human rights. Yet, it remains doubtful if the importance of

\textsuperscript{939} See Joyner, supra note 2 at 703-704.
\textsuperscript{940} See Stahn, supra note 35 at 112.
\textsuperscript{941} See Weiss, Ideas, supra note 1 at 94-95.
\textsuperscript{942} Ibid. at 12, see also Joyner, supra note 2 at 717.
\textsuperscript{943} See Stahn, supra note 35 at 112.
\textsuperscript{944} Ibid. at 111.
\textsuperscript{945} See generally ibid. at 111.
\textsuperscript{946} Ibid.
\textsuperscript{947} Ibid. at 112; Joyner, supra note 2 at 707.
\textsuperscript{948} See Stahn, ibid. at 112; see also Joyner, supra note 2 at 707, n. 55 (for Article 1(3)); Brunnée & Toope, supra note 86 at 7.
individual rights was acknowledged to the degree that states were seen under a legal obligation to actively protect their populations, possibly even as a direct element of their sovereignty. It is more likely that such an interpretation, if it is currently justified, may have evolved as a function of the subsequent understandings and practice of the UN members.

5.2.3 Subsequent Understandings and Practice of the UN Members

As Secretary-General Annan pointed out in 1999, the consciousness has risen since the inception of the UN that the Charter's aim is "to protect individual human beings, not to protect those who abuse them".949 There has been a further evolution in the states' commitment to the protection of the rights of individuals, which has become evident in the adoption of human rights instruments and in state declarations. This development, which had gradually taken place since the second half of the 1940s and has also found notable support in the wake of the ICISS recommendations, may subsequently be appraised with a view to the conclusions that it allows as to the contemporary understanding of the relevant UN Charter provisions.

5.2.3.1 Pre-ICISS Developments

In the decades following the end of the Second World War, the concern for human rights has been growing as governments have, in practice, failed to demonstrate the respect for individuals that the UN founders had expected. Increasingly, conflicts have taken place within state borders and affected civilians, thus creating new challenges and expectations towards the international community. As a result, the concept of state sovereignty has come under additional strain.950

To face the challenge of human rights protection, a number of international instruments has been adopted since the adoption of the UN Charter, including the Universal Declaration of Human Rights (1948),951 the four Geneva Conventions on the Law of War (1949),952 the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and

949 See Annan, "Two Concepts of Sovereignty", supra note 56; see also Weiss, Ideas, supra note 1 at 97.
950 See Joyner, supra note 2 at 707, 704, 717; see also Brunnée & Toope, supra note 86 at 7.
Cultural Rights (1966), special conventions for specific rights or groups of persons, as well as regional conventions. In these instruments, obligations of the states to protect and promote the rights of individuals have been codified.

The Universal Declaration of Human Rights and the several human rights conventions can be seen as having strengthened, through their adoption and subsequent interpretation and application, the understanding of sovereignty as implying responsibilities of the government towards individuals. This trend has further been consolidated over the course of the last two decades, as the security paradigm has shifted to account for the security of individuals, and to conceive governments as bearers not just of rights but also of responsibilities.

5.2.3.2 Post-ICISS State Practice

In the years since 2001, there has been ample evidence in state declarations that supports the understanding of states being under a responsibility to protect their populations. The idea has been adopted both at the World Summit and in other statements by state representatives. Its implementation in practice, however, is more questionable.

Verbally, the World Summit has produced a clear and express commitment of the assembled heads of state and government to the "responsibility [of each individual state] to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity." The primary responsibility of the host state had been advocated as a "basic principle" by the ICISS, and was subsequently endorsed in an equal form both by the High-Level Panel and the

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954 See also Joyner, supra note 2 at 717-718 and n. 86 (with references to special conventions); Stahn, supra note 35 at 118.

955 See Joyner, ibid. at 706; see also Stahn, supra note 35 at 118.

956 See Joyner, ibid.

957 Ibid. at 706-707.

958 See UN General Assembly, World Summit Outcome, supra note 232 at para. 138; see also e.g. Stahn, supra note 35 at 118; Bellamy, "Whither the Responsibility to Protect", supra note 63 at 164.

959 See e.g. UK, Permanent Representative to the UN Sir Emry Jones Parry, Statement following the vote on Security Council Resolution 1556 (2004), UN SCOR, 59th Year, 5015th Mtg., UN Doc. S/PV.5015 (30 July 2004) 5; Philippines, Representative on the UN Security Council Mr. Baja, Statement following the vote on Security Council Resolution 1556 (2004), UN SCOR, 59th Year, 5015th Mtg., UN Doc. S/PV.5015 (30 July 2004) 10; see also Stahn, supra note 35 at 118.

960 See UN General Assembly, World Summit Outcome, supra note 232 at para. 138; see also Stahn, supra note 35 at 108.

961 See ICISS, Responsibility to Protect, supra note 9 at xi.
Secretary-General. The Outcome Document of the World Summit followed these documents in recognizing the responsibility of each state for its own population. Moreover, it even further strengthened the concept, placing a particularly strong emphasis on the primary responsibility of the host state rather than the residual responsibility of the broader community of states. The acknowledgement of the primary responsibility to protect reflects the international state of mind during the negotiations, which had shown an acceptance of this component of R2P even by states that opposed the farther-reaching idea of a shared responsibility to protect of the international community. Overall, the World Summit Outcome Document thus facilitates the gradual recognition of duties borne by states for the protection of their citizens and most strongly supports the first element of the ICISS recommendations.

Also outside the World Summit negotiations, states have increasingly referred to the principle of governmental responsibility to protect the inhabitants of its territory from atrocities. Several examples can be found in the debates of the Security Council: in its Resolution 1545 (2004) on Burundi, the Council adopted a robust Chapter VII mandate, emphasizing at the same time “the responsibility of the transitional Government of Burundi, to protect civilians under imminent threat of physical violence”; after the adoption of Resolution 1556 (2004), the representatives of the UK and the Philippines made reference to the concept; and in the debate on the conflict in Darfur, the Ghanaian representative stressed that “the Government [of Sudan] bore the responsibility to protect the victims of war”.

962 See High-Level Panel, supra note 912 at para. 29; UN Secretary-General, In larger freedom, supra note 913 at para. 135; see also Stahn, supra note 35 at 105, 107, 118.
963 See UN General Assembly, World Summit Outcome, supra note 232 at para. 138; see also Stahn, supra note 35 at 118.
964 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 165 and n 79; Brunnée & Toope, supra note 86 at 6.
965 See Stahn, supra note 35 at 108 (with reference to statements by Algeria, Cuba, Egypt, Iran, Pakistan, Russia, and Venezuela in note 65).
966 Ibid. at 108, 114.
967 Ibid. at 108; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 164-165 (“backbone of the outcome document’s statement on the responsibility to protect”); Brunnée & Toope, supra note 86 at 6.
968 See Stahn, ibid. at 118; see also Joyner, supra note 2 at 706.
970 UK, Permanent Representative to the UN Sir Emyr Jones Parry, Statement following the vote on Security Council Resolution 1556 (2004), UN SCOR, 59th Year, 5015th Mtg., UN Doc. S/PV.5015 (30 July 2004) 5; Philippines, Representative on the UN Security Council Mr. Baja, Statement following the vote on Security Council Resolution 1556 (2004), UN SCOR, 59th Year, 5015th Mtg., UN Doc. S/PV.5015 (30 July 2004) 10; see also Stahn, supra note 35 at 118 n. 123.
A shared understanding that each sovereign state has a responsibility to protect its population may be questioned, however, with a view to the continued occurrence of conflicts such as in Darfur, in which the government of a state not only fails to protect its people, but is even actively involved in attacks on civilians.\textsuperscript{972} Yet, a negative practice as such need not necessarily contradict the aforementioned positive examples of a rising commitment to the governments’ responsibilities for their populations. The conflict in Darfur may provide a case in point, as the Sudanese government has not denied the existence of a responsibility to protect its people. Right to the contrary, it has used the concept of the primary responsibility of the host state in its defence against outside inference in this crisis.\textsuperscript{973} In addition, it has, cynically enough, even suggested that it could improve the situation without foreign intervention by reinforcing its own armed forces in the region.\textsuperscript{974}

The failure of the Sudanese government to protect the people of Darfur in practice thus does not exhibit an understanding that runs counter to the recognition of a governmental duty to protect its citizens. Right to the contrary, even the Darfur conflict has created evidence that supports the development of a norm on state responsibilities for their inhabitants.

\textbf{5.2.3.3 Appraisal: Responsibility to Protect as an Element of Sovereignty}

The general development of international human rights law since the adoption of the UN Charter and the specific treatment of the R2P framework over the last few years provide broad support for the idea that governments are responsible for the protection of their people.\textsuperscript{975} This conception, moreover, corresponds with the ethical theory developed above,\textsuperscript{976} and could therefore well qualify as a new shared understanding of the UN Charter, according to which the protection of its population is an element of a sovereign state.

\textsuperscript{972}See Human Rights First, supra note 16; see also Matthews, supra note 16 at 144.\textsuperscript{973} See e.g. Sudan, State Minister for Foreign Affairs Abdelwahad Najeb, Interview (16 August 2004) on Voice of America, Nairobi, cited in Eric Reeves, “The Deployment of New African Union Forces to Darfur: What it does and doesn’t mean” Sudan Tribune (26 October 2004), online: Sudan Tribune <http://www.sudantribune.com/article.php3?id_article=6168> (insisting on the limited mandate of the AU force in the country: “The mission for those forces is very clear: protection for the monitors. As far as the civilians, this is the responsibility of the government of Sudan.”); see also Bellamy, “Trojan Horse”, supra note 256 at 43-44.\textsuperscript{974} See Weiss, Ideas, supra note 1 at 56; Sudan Tribune, “UN should reject Sudan’s Darfur Plan – HRW” Sudan Tribune (19 August 2006), online: Sudan Tribune <http://www.sudantribune.com/spip.php?article17145>; for Weiss, this offer was “[p]erhaps the most outlandish proposal regarding human protection – which amounted to putting the fox in charge of the hen coop”, Weiss, Ideas, supra note 1 at 56.\textsuperscript{975} See Joyner, supra note 2 at 706; Stahn, supra note 35 at 118.\textsuperscript{976} See Part 4.3, above.
Nevertheless, this evaluation should not lightly be inferred. Due regard must be had to the far-reaching consequences of an understanding of “sovereignty as responsibility”, including the denial of sovereign authority as a defence against external intervention.\textsuperscript{977} For different reasons, the aforementioned developments prove insufficient to carry this understanding.

To begin with, the responsibility to protect as conceptualized by the ICISS is fundamentally different from the obligations undertaken by the states in human rights conventions. While these obligations may conceptually reflect a more general “traditional obligation of the state to safeguard the well-being and security of persons under its jurisdiction”,\textsuperscript{978} their legal force is derived from the voluntary adherence of states to the respective agreements.\textsuperscript{979} As such, they have been created by the states in exercise of their sovereign rights, and exist “on account of sovereignty, not in spite of it.”\textsuperscript{980} The ICISS proposal, by contrast, is novel in that it does not discuss obligations that have been established under specialized regimes, but rather sets out the states’ responsibility to protect as a part of the definition of sovereignty itself.\textsuperscript{981} The recognition of a primary responsibility to protect in this sense would thus constitute a “fundamental […] shift” in the concept of state sovereignty itself.\textsuperscript{982} Accordingly, such an understanding cannot simply be grounded in the general evolution of international human rights law.\textsuperscript{983}

Moreover, while the states have expressed broad support for the idea that they bear a responsibility to protect their own citizens, it must not be underestimated to what extent they still adhere to the concept of sovereignty as a protection against external coercion. State sovereignty continues to be a paramount principle of the international legal system,\textsuperscript{984} and is emphatically championed especially by developing states that have suffered from colonial rule.\textsuperscript{985} Even the “narrowest and most absolute interpretation of traditional sovereignty” still finds support, as may be illustrated by the response from Algerian president Abdelaziz Bouteflika to Annan’s proposal of his concept of two sovereignties, stating that “[…] we remain extremely sensitive to any undermining of our sovereignty, [inter alia] because sovereignty is our last defence against the

\textsuperscript{977} See Cunliffe, supra note 227 at 39.
\textsuperscript{978} See Stahn, supra note 35 at 118.
\textsuperscript{979} See Joyner, supra note 2 at 718.
\textsuperscript{980} Ibid. at 718-719.
\textsuperscript{981} See Brunnée & Toope, supra note 86 at 8 (“We confront not simply a carving out of specialized regimes through treaty commitments, but what Anne-Marie Slaughter has called a “tectonic shift” in the very definition of sovereignty.”)
\textsuperscript{982} See Brunnée & Toope, ibid. (“[… the responsibility to protect may well be of a different order.”)
\textsuperscript{983} Ibid.; but see e.g Stahn, supra note 35 at 114-115-118.
\textsuperscript{984} See Joyner, supra note 2 at 717.
\textsuperscript{985} See Weiss, Ideas, supra note 1 at 26, 97.
Finally, the subsequent analysis of international custom on unilateral intervention will show that there is still strong opposition in the international community to the perception that, by violating the human rights of their citizens, states forfeit their right to non-intervention against other states.987

In the light of all these circumstances, the growing commitment to human rights protection and the verbal endorsement of a responsibility to protect its population does not support an understanding of the primary responsibility to protect as formulated by the ICISS. Despite the “pull” that ethical considerations may exercise in this direction, the clear refusal by states to understand their sovereign right to non-intervention as contingent on a minimum of human rights protection makes it impossible to interpret the concept of state sovereignty in the UN Charter as a responsibility to protect.

5.2.4. The Responsibility to Protect as an International Customary Duty

While the evolution of international human rights law and the endorsement of the R2P framework have not yet culminated in the proposed reconceptualization of sovereignty as a responsibility, they may still have contributed to the emergence of a general governmental duty for the protection of its population. As mentioned before, international treaties and the statements or votes of governments, notably in the UN bodies, can both constitute state practice and evidence a corresponding opinio juris sive necessitatis, as required for the creation of customary international law.988 A primary responsibility to protect could thus have crystallized as a customary rule.

The foregoing analysis has already shown that the broader community of states has not only strengthened human rights of individuals in specialized treaty regimes, but also unanimously and consistently subscribed to the idea of a general responsibility of a government to protect its people from massive human rights violations. When this responsibility is understood not as a necessary element of state sovereignty, but as a discrete duty, the violation of which does not automatically entail the forfeiture of sovereign rights, it is not the “fundamental conceptual shift”
anymore that has faced the stated objections. Rather, it simply constitutes another, although much broader duty, complementing the “expanding network of obligations in the field of human rights” that has been established since the adoption of the UN Charter and placed constraints upon the exercise of sovereign authority. The strong case for such a customary obligation that can be made on the basis of the above-mentioned evidence is further supported by the ethical concept of a responsibility borne by the governing towards the governed.

5.2.5 Conclusion: The Primary Responsibility to Protect as a Customary Obligation

Based on the expanding system of human rights conventions since the end of the Second World War, and the frequent reference to a more general responsibility to protect in the practice of the UN bodies over the last years, an obligation of each state to save its inhabitants from large-scale killings and large-scale ethnic cleansing has emerged as a binding norm of customary international law. Ethically, compliance with this obligation may even be considered as a necessary prerequisite for a legitimate government. In the legal realm, however, the concept of “sovereignty as responsibility” in the form suggested by the ICISS has not received the necessary state consent required by the positivist doctrine of sources. The consequences that a violation of the primary responsibility to protect entails remain therefore uncertain; the forfeiture of state sovereignty as a defence against foreign intervention, however, cannot be assumed.

5.3 The Right of Collective Humanitarian Intervention

While a state that fails to fulfill its primary responsibility to protect does not forfeit every right of non-intervention, this does not necessarily suggest that there is no right of humanitarian intervention, either collectively or unilaterally. Such a right, however, would have to be justified as a discrete element of the international legal system, it cannot simply be inferred from the absence of any legitimate defence of the target state against foreign interference. Whether international law provides for a right of collective humanitarian intervention, undertaken by willing states with the prior authorization by the UN Security Council, will therefore need to be assessed independently, namely through an interpretation of the relevant UN Charter provisions.

989 Cf. Ideas, supra note 1 at 16.
990 See Part 4.3, above.
5.3.1 Collective Humanitarian Intervention in the Provisions of the UN Charter

Collective humanitarian intervention raises the issue of the legality of military action within the UN system. The central provision on this is Article 2(4) of the UN Charter, which contains a broad prohibition of the use or even threat of force:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. 991

In exception to this general rule, the Charter explicitly mentions two avenues for a legal use of force: the right of individual or collective self-defence, which is recognized by Article 51, and the authority of the Security Council to employ armed forces under Chapter VII. 992 According to Article 39, which provides the trigger for action under Chapter VII, the power of the Security Council to mandate the use of military force is conditional upon the existence of a “threat to the peace, breach of the peace, or act of aggression”, in which case the Council may decide to take measures “to maintain or restore international peace and security”. For international crises, the Charter thus provides explicit rules on the employment of external force under the authority of the Security Council. 993 With regard to intrastate conflicts, by contrast, it remains “conspicuously silent”. 994

Within this framework, collective humanitarian intervention in an intrastate conflict can only be justified on the explicit terms of the Charter if the situation constitutes a “threat to the peace” within the meaning of Article 39. 995 The interpretation of this term ultimately determines the permissibility of warfare for the stated purpose of protecting human rights and is accordingly controversial. A purposive interpretation of the agreement again fails to solve the dilemma, as both the preservation of peace and the protection of human rights are central purposes of the UN Charter, creating, however, tensions within the system. 996 The interpretation must thus turn to other aspects, namely the understandings of the parties.

991 See also Joyner, supra note 2 at 701.
992 See especially Articles 39 and 42 of the UN Charter; see also Evans, “Responsibility to Protect”, supra note 25 at 704.
993 See Evans, “Responsibility to Protect”, supra note 25 at 704.
994 See Joyner, supra note 2 at 700.
995 The right of self-defence as recognized by Article 51 UN Charter cannot be invoked as it requires that “an armed attack occurs against a Member of the United Nations”, which can be excluded where a humanitarian crisis remains confined to the national borders of one state, see Joyner, supra note 2 at 702.
996 Cf. ibid. at 701; see text accompanying notes 931-932.
Originally, a “threat to the peace” had been understood to strictly require transboundary implications of the crisis.\footnote{997} Under the recent impression of two world wars, preventing interstate warfare was the central preoccupation of the UN founders, and the reason to outlaw the use of force in a prohibition of unprecedented breadth.\footnote{998} In this system, international peace represented the central value, which was to be preserved even in the face of human rights violations and other forms of injustice.\footnote{999} The pursuit of justice was supposed to employ the peaceful means set out in Chapter VI.\footnote{1000} In the light of these intentions of its drafters, an expansion of the notion of a “threat to the peace” to include situations of human rights violations within a state has been rejected as a “considerable stretch” of the provision.\footnote{1001}

Yet, the proposed methodology of treaty interpretation does not stop at this point. Rather, it allows for an inquiry into subsequent understandings of the parties, that may trump the original understandings if they prove to be more consistent with the relevant ethical principles.\footnote{1002} With a view to the question at hand, the ethical framework of humanitarian intervention suggests that the Security Council should be allowed to authorize intervention for the protection of human rights.\footnote{1003} If sufficient evidence for an according understanding of the Charter can be adduced, Article 39 could thus be interpreted as triggering Chapter VII action also in cases of massive human rights violations without transboundary effects.

\textbf{5.3.2 New Shared Understandings of Chapter VII of the UN Charter}

Evidence for a shift in the commonly held understandings of Article 39 can, indeed, be found both in its actual application by the Security Council and in statements by UN members. In particular, the Security Council appears to have broadened its Chapter VII practice to include collective humanitarian intervention since the 1990s, and the General Assembly has explicitly endorsed this practice at the UN World Summit in 2005. Account should also be taken, however, of the details of the Security Council practice, and the possibility that its failure to stop ongoing internal conflicts with disastrous humanitarian consequences may contradict the proposition that a “threat to the peace” is understood to include intrastate crises.

\footnote{997} See Weiss, Ideas, supra note 1 at 48.
\footnote{998} See Evans, “Responsibility to Protect”, supra note 25 at 704.
\footnote{999} See Joyner, supra note 2 at 701.
\footnote{1000} Ibid. at 701 and n 26.
\footnote{1001} See Weiss, Ideas, supra note 1 at 26,48; nevertheless, Weiss ultimately recognizes that certain internal crises qualify as “threats to international peace and security”, see Ideas, supra note 1 at 49.
\footnote{1002} See Parts 3.3.1 and 3.5.3, above.
\footnote{1003} See Parts 4.4-4.6, above.
Initially, little support was established for a broadened understanding of Article 39, as, until the end of the Cold War, the concept of humanitarian intervention received scant attention from the member states in interpreting and applying the UN Charter. During the two decades following the adoption of the Charter, the humanitarian aspects of conflicts did not find a single mention in a Security Council resolution.\textsuperscript{1004} Although humanitarian considerations emerged during the 1970s and 1980s,\textsuperscript{1005} they were not met with a corresponding increase in Security Council action.\textsuperscript{1006} In total, only 13 peacekeeping missions were authorized between 1948 and 1988, while on 212 occasions, the Council was deadlocked by the invocation of a veto.\textsuperscript{1007} One reason for the absence of any collective humanitarian intervention during that time may thus be found in the lack of cooperation between the five permanent Security Council members.\textsuperscript{1008} At the same time, however, the international order was also based on a strong perception that state sovereignty was inviolable.\textsuperscript{1009} Where the Security Council deployed peacekeeping forces, their mandates were therefore limited with a view to upholding the principles of state sovereignty and non-intervention.\textsuperscript{1010} Equally, three unilateral invasions that had significant humanitarian benefits and are today often counted as examples of humanitarian intervention, those by India in East Pakistan (1971), by Vietnam in Kampuchea (1978), and by Tanzania in Uganda (1979), were neither defended on humanitarian grounds, nor did they receive the approval of the Security Council.\textsuperscript{1011} On the contrary, Vietnam’s intervention was even explicitly condemned, although it had ended the Khmer Rouge regime under whose government about a quarter of the Cambodian population had lost their lives.\textsuperscript{1012} Similarly, in the case of East Pakistan, the members of the Security Council held that they were not empowered to intervene, as the mass killings committed inside its borders were considered as an internal matter of Pakistan.\textsuperscript{1013} These cases and statistics support the analysis that “the notion of humanitarian intervention was [...] far from the

\begin{footnotesize}
\textsuperscript{1004} See Weiss, Ideas, supra note 1 at 111.
\textsuperscript{1005} Ibid.
\textsuperscript{1006} Ibid.
\textsuperscript{1007} Ibid. at 38-39.
\textsuperscript{1008} Cf. Ibid. at 38.
\textsuperscript{1009} Ibid.
\textsuperscript{1010} Ibid. at 39.
\textsuperscript{1011} Ibid. at 37-38.
\textsuperscript{1012} Ibid. at 38; it should be noted, however, that the hostile reactions to Vietnam’s intervention were at least partly grounded in considerations of power politics rather than an appraisal of its humanitarian effects, as the US and its allies treated it as just another “move in the game of cold-war power politics”, and that, conversely, a condemnation through the Security Council was vetoed by the Soviet Union, see Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society (Oxford: Oxford University Press, 2000) at 89, 96.
\textsuperscript{1013} See Wheeler & Morris, supra note 43 at 446.
\end{footnotesize}
mainstream of acceptable international relations”, ¹⁰¹⁴ and the Security Council therefore continued to interpret its powers narrowly during the Cold War period. ¹⁰¹⁵

The normative practice of the Security Council has, however, fundamentally changed after the end of the Cold War. ¹⁰¹⁶ Quantitatively, the number of peacekeeping operations undertaken by the UN has increased significantly. ¹⁰¹⁷ Even more important, however, is the new qualitative dimension that UN missions have obtained during the 1990s, as the members of the Security Council have shown an unprecedented willingness to apply Chapter VII to humanitarian crises inside a state’s borders. ¹⁰¹⁸ Security Council interventions have become extended to matters that had previously been considered as internal affairs of the respective states. ¹⁰¹⁹ The humanitarian situation within a country has explicitly been recognized as a legitimate concern for international action, ¹⁰²⁰ and at least in the cases of large scale killings or ethnic cleansing, state sovereignty has not been accepted as a defence against armed intervention anymore. ¹⁰²¹ Most recently, notably in the five years following the publication of the R2P report, the application of Chapter VII for the protection of human rights has, as one commentator suggests, even become “routine”. ¹⁰²²

While the increase in operations that supposedly qualify as collective humanitarian interventions may bode well for a broadened understanding of Article 39 of the UN Charter, the precedential value of these operations may, in some cases, be debatable, and could, moreover, have been antagonized by an unwillingness of the Security Council to authorize nonconsensual action in other cases. It has, for instance, been suggested that many operations that are alleged to exemplify the use of Chapter VII as a basis for humanitarian intervention were either undertaken with the consent of the target state or justified on the grounds of regional security rather than a humanitarian need. ¹⁰²³ One example may be the UN mission in the Persian Gulf following the First Gulf War, which Weiss describes as a precedent for humanitarian intervention. ¹⁰²⁴ At the same time, however, he admits that the relevant Resolution 688 (1991) found the threat to international peace and security in the “international repercussions of Saddam Hussein’s

¹⁰¹⁴ See Weiss, Ideas, supra note 1 at 37-38.
¹⁰¹⁵ See Wheeler & Morris, supra note 43 at 446.
¹⁰¹⁶ Ibid. at 447.
¹⁰¹⁷ See Weiss, Ideas, supra note 1 at 31, 39.
¹⁰¹⁸ See Wheeler & Morris, supra note 43 at 447; Weiss, Ideas, supra note 1 at 31, 40.
¹⁰¹⁹ See Weiss, ibid. at 47.
¹⁰²⁰ Ibid. at 44.
¹⁰²¹ See Wheeler & Morris, supra note 43 at 446.
¹⁰²² See Breau, “Peacekeeping”, supra note 9 at 445 (mentioning the case of Darfur as a “notable exception”)
¹⁰²³ See Bannon, supra note 61 at 1159.
¹⁰²⁴ See Weiss, Ideas, supra note 1 at 41.
repression of Kurdish and Shiite populations”, and that this transboundary effect was a significant reason for the non-Western members of the Security Council to support this resolution. Moreover, he acknowledges that Resolution 688 made no specific reference to Chapter VII. Similarly, the situation in the DRC, in which the Security Council eventually provided a robust mandate for the protection of civilians, has been recognized as involving “elements of international armed conflict”. While the value of these cases as precedents for humanitarian intervention may thus be doubtful, the current conflict in Darfur has, even more critically, demonstrated a reluctance of the Security Council to deploy troops without the consent of the state government.

Detailed analyses suggest, however, that the DRC may well support the proposition that a collective right of humanitarian intervention under Chapter VII is commonly accepted by the UN member states, and that the slow response of the Security Council to the conflict in Darfur does not necessarily undermine this assertion. The Council’s dealing with the crisis in the DRC, for instance, comprised a number of resolutions, the later of which, while making reference to the “grave violations of human rights”, did not explicitly mention any transboundary effects of the conflict. As far as its reaction to the atrocities in Darfur are concerned, the Security Council’s attempts to secure the Sudanese government’s consent before deploying troops was arguably in conformity with a framework of collective humanitarian intervention, such as namely the one proposed by the ICISS. It has been suggested that these attempts at a consensual solution were not only justified, but even required by the precautionary principles of reasonable prospects and proportionality. That the Security Council did not resort to military intervention without the consent of Sudan thus does not support the conclusion that its members considered themselves as lacking the authority to do so once other, preferable or at least preferred, means failed. The Darfur conflict therefore fails to undermine the case for a collective right of humanitarian intervention under Chapter VII, unless, in the future course of

1025 Ibid.
1026 Ibid.
1027 See Breau, “Peacekeeping”, supra note 9 at 446-449
1028 See Matthews, supra note 16 at 148, 150.
1029 Cf Breau, “Peacekeeping”, supra note 9 at 446-448.
1030 Cf Matthews, supra note 16 at 150-152.
1032 See Matthews, supra note 16 at 151.
1033 Cf. ibid. at 150-151.
events, Sudan withdrew its consent and the Security Council for this reason definitely renounced military action.\footnote{Cf. ibid. at 152.}

In the end, even if some of the cases that are heralded as precedents for collective humanitarian intervention did not provide compelling examples of a new shared understanding that internal humanitarian crises may justify Chapter VII action, other Security Council resolutions affirm such an understanding. An explicit recognition may be found, for example, in Resolution 1296 (1999), which explicitly “notes that […] the committing of systematic, flagrant and widespread violations of international […] human rights law in situations of armed conflict may constitute a threat to international peace and security”.\footnote{See UN Security Council, Resolution 1296 (2000), UN SCOR, 55th Year, 4130th Mtg., UN Doc. S/Res/1296 (19 April 2000) at para. 5; cf. also UN Security Council, Resolution 1265 (1999), UN SCOR, 54th Year, 4046th Mtg., UN Doc. S/Res/1265 (17 September 1999) (indicating that the Security Council would be willing “to respond to situations of armed conflict where civilians are being targeted […], including through the consideration of appropriate measures at the Council’s disposal in accordance with the Charter of the United Nations”, at para. 10).}

Against this backdrop, the conclusion may be justified that, already during the 1990s, an interpretation of Article 39 UN Charter has gradually become accepted according to which internal conflicts can constitute threats to international peace and security.\footnote{See Weiss, Ideas, supra note 1 at 47-48; see also Hamilton, supra note 35 at 289.} This analysis is supported, for instance, by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), which stated already in October 1995 that there was a “settled practice of the Security Council” and “a common understanding, manifested by the ‘subsequent practice’ of the membership of the United Nations at large, that the ‘threat to the peace’ of Article 39 may include, as one of its species, internal armed conflicts.”\footnote{See Prosecutor v. Dusko Tadić a/k/a “DULE”, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 2005) at para. 30 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: International Criminal Tribunal for the Former Yugoslavia <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>; see also Weiss, Ideas, supra note 1 at 48.} Later the High-Level Panel affirmed that “step by step, the [Security] Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a ‘threat to international peace and security’, not especially difficult if breaches of international law are involved.”\footnote{See High-Level Panel, supra note 912 at para. 202; see also Stahn, supra note 35 at 106.} According to this interpretation of the Charter, humanitarian intervention could
legally be authorized by the Security Council if it determines the occurrence of human rights violations to be of such a scale that they constitute a threat to international peace.\textsuperscript{1039}

For those who deem this precedential support for a collective right of humanitarian intervention insufficient, the World Summit Outcome Document may provide additional evidence that Article 39 of the UN Charter has become understood in a broader sense.\textsuperscript{1040} In paragraph 139 of the document, the member states affirmed:

[...:] 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.

As one skeptic concerning the previous recognition of collective humanitarian intervention under the UN Charter argues, this agreement accepts the violation of international human rights norms as a legitimate trigger for Security Council involvement under Chapter VII, regardless of whether or not the violence crosses borders.\textsuperscript{1041} Yet, this evaluation of paragraph 139 of the World Summit Outcome Document is, again, not uncontroversial. For one commentator, the fact that the international responsibility to protect has been discussed in the rubric of human rights rather than that of collective security and Chapter VII indicates “an aversion on the part of the member states to consider intervention for human protection purposes as part of the UN’s ‘standard’ practice of collective security.”\textsuperscript{1042} This observation may well support the prognosis that the Security Council will continue to seek the consent of the target state before taking action for humanitarian purposes, and will authorize armed intervention only in exceptional circumstances.\textsuperscript{1043} It does, however, not undermine the suggested understanding of the notion of a “threat to the peace” as such. Even if the bar for collective humanitarian intervention has been set high,\textsuperscript{1044} the essential aspect for the present analysis remains that, at least within narrow

\textsuperscript{1039} See Joyner, \textit{supra} note 2 at 702.
\textsuperscript{1040} See e.g. Bannon, \textit{supra} note 61 at 1159.
\textsuperscript{1041} \textit{Ibid}.
\textsuperscript{1042} See Welsh, “Responsibility to Protect”, \textit{supra} note 9 at 377; see also Brunnée and Toope at 10 (suggesting that the Security Council may even have been under a broader duty to intervene under Chapter VII in conjunction with \textit{erga omnes} human rights obligations, and that the scope of this duty may have been narrowed down through the parameters for collective intervention set out in the World Summit Outcome Document); see also Stahn, \textit{supra} note 35 at 117 (arguing that “the argument of states’ primary responsibility may be used to constrain, rather than enable, Council involvement”).
\textsuperscript{1043} See Wheeler & Morris, \textit{supra} note 43 at 447.
\textsuperscript{1044} \textit{Ibid}.
limits, the consensual agreement at the World Summit indicates a common understanding of the member states that Chapter VII provides a basis for humanitarian action.

Finally, this modified understanding is further supported by individual state declarations. The Chinese government, for instance, has recognized that a "massive humanitarian crisis" is a "legitimate concern of the international community".\textsuperscript{1045} Russia and India even more clearly shared the position that the United Nations was already sufficiently empowered to deal with humanitarian emergencies through the Security Council.\textsuperscript{1046} Moreover, in Latin America, the concept of humanitarian intervention as such has gained increasingly broad recognition.\textsuperscript{1047}

Lastly, however, a more recent potential challenge to a right of collective humanitarian intervention through the UN deserves mentioning. This challenge is mounted by the provisions in the Constitutive Act of the African Union (AU) which imply that the AU rather than the Security Council should deal with humanitarian emergencies on the continent.\textsuperscript{1048} Yet, subsequent specifications on the relationship between the AU and the UN, as well as the general practice of African States rebut the proposition that the Constitutive Act denies a right of the member states to intervene collectively through the Security Council: in a protocol defining the terms of reference of its own Peace and Security Council, the AU formally affirms that the "primary role" in maintaining international peace and security devolves on the UN Security Council.\textsuperscript{1049} In addition, African states have by and large been supportive of humanitarian intervention,\textsuperscript{1050} and traditionally demanded that it be authorized by the Security Council.\textsuperscript{1051}

Against this backdrop, the AU’s Constitutive Act should not be interpreted to the effect that

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\textsuperscript{1046} See Bellamy, "Whither the Responsibility to Protect", supra note 63 at 151-152; cf. Primakov, supra note 218 (for Russia); Bellamy notes that India had considered past failures to act as a matter of political will, not of the normative framework for Security Council action, and had suggested a constructive abstention of Security Council members from using their veto against resolutions falling within the R2P framework, see 151-152 and n 39; see also Anita Inder Singh, “UN at 60: New strategies a must for effectiveness” The Tribune (30 September 2005), online: The Tribune India [http://www.tribuneindia.com/2005/20050930/edit.htm#4].

\textsuperscript{1048} See especially Constitutive Act of the African Union, 11 July 2000, 2158 U.N.T.S 33 (entered into force 26 May 2001) Article 4(h) [AU Constitutive Act]; Bellamy, "Whither the Responsibility to Protect", supra note 63 at 157-160; for further discussion of the AU Constitutive Act see also Part 5.4.2.3, below.


\textsuperscript{1050} See Weiss, "R2P After 9/11", supra note 59 at 745

\textsuperscript{1051} See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 158.
African states disagree with the understanding that the UN Security Council has a right to authorize humanitarian intervention under Chapter VII.

5.3.3 Conclusion: Legality of Collective Humanitarian Intervention under the UN Charter

Sufficient evidence can be found for the proposition that the member states of the UN have come to the commonly shared understanding that the Security Council is empowered to react to massive humanitarian crises within a state with the means foreseen in Chapter VII, including the use of armed force. According to this understanding, massive human rights violations within a state, such as large-scale killings or large-scale ethnic cleansing, can constitute a “threat to the peace” as required by Article 39 of the UN Charter. As this new understanding is more reflective of the ethical background than the original interpretation of the UN Charter at the time of its adoption. The notion of a “threat to the peace” in Article 39 UN Charter has thus effectively been expanded to encompass at least certain forms of humanitarian crises, such as mass murder and ethnic cleansing. Humanitarian intervention authorized by the Security Council is therefore in these cases not just a “policy option”, but a legal course of action under Chapter VII of the UN Charter. The UN Charter thus provides for a right of collective humanitarian intervention.

5.4 The Right of Unilateral Humanitarian Intervention

Not just ethically and politically, but also legally even more problematic than collective humanitarian intervention is military intervention without UN Security Council authorization. The doctrine of unilateral humanitarian intervention has met with strong reservations both from governments and from international lawyers, who fear that the concept would be open to abuse by the powerful. In contemporary legal scholarship, the legality of humanitarian intervention

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1052 Cf. e.g. Stahn, supra note 35 at 117 (“Some agreement seems to have taken hold on the idea that inaction by the host state can be remedied through collective action.”)
1053 Cf. Weiss, Ideas, supra note 1 at 49; MacFarlane, Thielking & Weiss, supra note 35 at 987; this assessment seems also to be supported by Gazzini, supra note 259 at 174-175 (“The lawfulness of individual or joint military interventions duly authorised by the Security Council in the context of humanitarian crisis threatening international peace and security is today generally accepted.”)
1054 Cf. Weiss, ibid. at 46; see also MacFarlane, Thielking & Weiss, supra note 35 at 987.
1056 Cf. e.g. MacFarlane, Thielking & Weiss, supra note 35 at 987.
1057 See Joyner, supra note 2 at 700; Wheeler & Morris, supra note 43 at 447 (observing that especially “many Southern states [are] worried that such a right [to unilateral action] would become a weapon that the strong would use against the weak.”)
is highly controversial,\textsuperscript{1058} both with a view to the provisions of the UN Charter\textsuperscript{1059} and the norms of customary international law.\textsuperscript{1060} Due to the controversies in the international community, I will argue that the positivist sources of international law fail to provide a rule on either the permissibility or the prohibition of unilateral humanitarian intervention. The resulting legal void needs to be filled by principles of ethical law.

5.4.1. Unilateral Intervention under the UN Charter

For more than half a century, the UN Charter has provided the conventional framework for the continuing debate about the legality of unilateral humanitarian intervention, without, however, establishing a clear rule on the issue.\textsuperscript{1061} Again, the Charter interpretation will therefore center on its general principles on the use of force. As noted before, the central provision in the UN Charter on military action is the basic proscription in Article 2(4) of any "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The only explicit exceptions to this principle in the Charter, the right of self-defence in Article 51 and the power of the Security Council to authorize the use of force under Chapter VII, can, as a matter of definition, not apply to unilateral intervention for the protection of foreign populations. The legality of unilateral humanitarian intervention under the UN Charter must therefore be determined on the terms of the general rule in Article 2(4). The decisive question becomes whether the proscription of the use of force in Article 2(4) covers this form of military action at all, or if its scope is narrower and has therefore no prohibiting effect on humanitarian intervention outside the UN system.

Academic literature is divided on how Article 2(4) should be interpreted with a view to unilateral humanitarian intervention.\textsuperscript{1062} On the one hand, it is submitted that military intervention in intrastate conflicts violates the general prohibition of the use of force, unless it is approved by

\textsuperscript{1058} See e.g. Gazzini, supra note 259 at 175 (arguing that unilateral humanitarian intervention has not been permitted since the UN Charter entered into force); but see e.g. Bannon, supra note 61 at, 1162-1163.

\textsuperscript{1059} See e.g. Gazzini, supra note 259 at 175 ("unilateral use of force on humanitarian grounds [...] is radically incompatible with the text of the Charter"); but see e.g. Bannon, supra note 61 at 1161 ("State practice, academic commentary, and a close reading of the Charter itself suggest that unilateral (or regional) intervention in the absence of U.N. action may be acceptable under some circumstances").

\textsuperscript{1060} See e.g. Wheeler 447 ("It is evident from the position taken by the vast majority of states in debates in the General Assembly that there is no support for a legal right of unilateral humanitarian intervention [...]"); Gazzini, supra note 259 at 175 ("The actual evidence, in terms both of practice and opinio juris, that such an exception [allowing States to intervene militarily to tackle humanitarian emergencies] has emerged or is emerging is clearly insufficient."); but see e.g. Bannon, supra note 61 at 1161.

\textsuperscript{1061} See Weiss, Ideas, supra note 1 at 34-35.

\textsuperscript{1062} See generally Joyner, supra note 2 at 703.
the Security Council. The contrary view, according to which unilateral humanitarian intervention may be compatible with Article 2(4) of the Charter, points to the qualifiers of the prohibited forms of force at the end of the clause. These commentators argue that intervention for humanitarian protection purposes may not be directed against the territorial integrity or political independence of the target state, and can thus be compatible with Article 2(4) as long as it is otherwise consistent with the principles of the Charter.

For the proponents of this narrower interpretation of the prohibition in Article 2(4), the difficulty then lies in demonstrating that military intervention for the protection of human rights is indeed consistent with the principles of the Charter. They may find support for this argument in the humanitarian principle that is expressed in Article 1(3) of the Charter, according to which the promotion of human rights is a fundamental purpose of the UN, Articles 55 and 56, and the Preamble. The problem, however, ultimately comes down again to the question of how to reconcile this concern for human rights with the principle of state sovereignty. At this point, proponents may resort to the understanding of sovereignty as responsibility, arguing that state sovereignty is ultimately granted to serve the citizens and not the state as a legal entity or its government. The latter therefore cannot claim sovereign rights where it fails to prevent or stop massive human rights deprivations against its citizens, or is itself the perpetrator of these violations. Accordingly, a teleological interpretation is said to reveal that neither the principle of non-intervention nor the prohibition of the use of force contradicts a humanitarian intervention.

As this argument shows, the terms of the relevant provisions in the UN Charter are, once again, ambiguous and require further interpretation. The starting point of this analysis must be the recognition that the plain language of Article 2(4), with its explicit qualifier of “the threat or use of force against the territorial integrity or political independence of any state, or in any other

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1063 See Gazzini, supra note 259 at 174; see also Joyner, supra note 2 at 702.
1064 See Tesón, Humanitarian Intervention, supra note 45 at 151; Joyner, supra note 2 at 714; Bannon, supra note 61 at 1161 and n. 17.
1065 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 167; see also Joyner, supra note 2 at 702-703; Bannon, supra note 61 at 1161 and n. 17.
1066 See Joyner, supra note 2 at 703.
1068 Cf. Reisman, ibid. at 869-872; Joyner, supra note 2 at 714; Tesón, Humanitarian Intervention, supra note 45 at 173-174; see generally Stahn, supra note 35 at 113.
1069 See Tesón, ibid. at 133-140, 146-174; see generally Stahn, supra note 35 at 113; see also Bannon, supra note 61 at 1161 and n. 17.
manner inconsistent with the Purposes of the United Nations\textsuperscript{1070} does not support a flat prohibition of every use of force in international relations.\textsuperscript{1071} This idea is affirmed by the Preamble, which should be taken into account as a part of the purposive interpretation pursuant to Article 31(2) of the Vienna Convention. The Preamble stipulates that “armed force shall not be used, save in the common interest”. The repeated emphasis of the UN Charter on the humanitarian principle, however, suggests that the protection of human rights is a common interest.\textsuperscript{1072} Read in conjunction with the Preamble, it thus supports an interpretation of Article 2(4) UN Charter according to which the use of force for humanitarian purposes remains lawful.\textsuperscript{1073} According to the proposed methodology, this interpretation would need to be rebutted with reference to the original or subsequent shared understandings of the UN members, or on the basis of ethical and moral considerations.

Critics of this interpretation most heavily rely on the proposition that it is incompatible with the original shared understandings of the parties. Indeed, it has already been noted that the prevention of interstate warfare was a primary objective in establishing the UN system.\textsuperscript{1074} Opponents of unilateral humanitarian intervention conclude that the Charter’s framers had intended to prohibit any use of force outside the right of self-defence and collective action through the Security Council.\textsuperscript{1075} An “expansionary approach” in which Article 2(4) of the UN Charter was “stretched’ to accommodate […] human rights” would be incompatible with this original intent.\textsuperscript{1076}

This conclusion on the original understandings, according to which every form of military action outside the two explicit exceptions in the Charter would be prohibited, conflicts, however, not only with the text of Article 2(4), but also with the travaux préparatoires and the historical context of the UN Charter. Instead of plainly prohibiting any military action that is not explicitly exempted from this rule, the Charter’s framers further circumscribed the illegal forms of the use of force as those directed “against the territorial integrity or political independence of any state,
or in any other manner inconsistent with the Purposes of the United Nations".1077 This qualifying clause would effectively be read out of the Charter, were the suggested interpretation of Article 2(4) as a general prohibition of any use of force adopted.1078 Yet, the travaux préparatoires indicate that the effective deletion of the qualifying terms would be inconsistent with the intentions of the UN’s founders, as the proposal to omit this final clause had in fact been tabled but not accepted at the United Nations Conference on International Organization in San Francisco.1079 Moreover, the historical context of the UN’s inception suggests that its founders were not solely concerned with preventing aggressive wars, but also with defending human rights. The Second World War had, after all, not only served the defence against an aggressor, but also important humanitarian purposes.1080 Similarly, the ensuing Nuremberg trials not only condemned aggressive wars, but also crimes against humanity committed by governments against their own subjects.1081 As Tesón argues, “[b]ecause World War II was itself a humanitarian effort, it is hard to see how the Nuremberg Tribunal would have condemned a war in defense of human rights as an aggressive war.”1082 Against this backdrop, the claim that Article 2(4) UN Charter was originally understood to outlaw unilateral humanitarian intervention is debatable, at least. Both the prevention of wars and the protection of fundamental human rights were significant motives in drafting the UN Charter.1083 Ultimately, an inquiry into the original understandings of the parties therefore fails to produce an unequivocal result on the proper interpretation of Article 2(4) UN Charter.1084

A compelling interpretation based on the understandings of the parties that unilateral humanitarian intervention was prohibited under Article 2(4) UN Charter could then only be established if there was clear evidence that this position had subsequently become generally accepted. Yet, again, mixed signals have been sent by the UN members. On the one hand, a clear reluctance to positively recognize this form of military force was apparent during the early years after the adoption of the UN Charter, when the international order was still shaped by a more traditional understanding of state sovereignty, and the major evolution of the human rights doctrine lay yet ahead. In 1948, for instance, a majority of states undertook to prevent genocide

1077 See Reisman, “Humanitarian Intervention”, supra note 1073 at 177; Tesón, Humanitarian Intervention, supra note 45 at 150-151.
1078 See Tesón, ibid. at 150.
1079 Ibid.
1080 Ibid. at 155-156.
1081 Ibid.
1082 Ibid. at 156 [emphasis in the original].
1083 Ibid.
1084 Ibid.
and signed the Genocide Convention.\textsuperscript{1085} Even this treaty did not support the legality of unilateral humanitarian intervention, as it explicitly only legitimates action to prevent and suppress acts of genocide that is taken multilaterally through the competent organs of the United Nations.\textsuperscript{1086} Over the course of the last two decades, however, there have been indications that the international community may be willing to leave some leeway for unilateral humanitarian intervention. In the cases of Liberia and Kosovo, for instance, the Security Council refrained from condemning the respective interventions by the Economic Community of West African States (ECOWAS) and the North Atlantic Treaty Organization (NATO).\textsuperscript{1087} For academic commentators, this reaction exemplified a certain flexibility in the application of Article 2(4) that accounted for the moral values that are integral to the Charter.\textsuperscript{1088} The UN Secretary-General Kofi Annan, moreover, has publicly supported a modern understanding of the Charter, asserting in 1999 that “we are [today] more than ever conscious that [the Charter’s] aim is to protect individual human beings, not to protect those who abuse them”.\textsuperscript{1089} Then again, the following discussion of international custom will provide ample evidence of ongoing opposition in the community of states to the idea of humanitarian intervention without Security Council authorization.\textsuperscript{1090} This conflicting state practice makes it impossible to speak of a new commonly shared understanding that the Charter allows for unilateral humanitarian intervention. Rather, the aforementioned ambiguities in interpreting its provisions, and specifically Article 2(4), continue.

Ultimately, the explicit qualifiers of the prohibited use of force in Article 2(4) UN Charter and the Preamble, as well as the ambiguities in the \textit{travaux préparatoires} and in the subsequent state practice impede any unequivocal conclusion on the scope of the prohibition of the use of force. Recourse must therefore lastly be had to the ethical framework elaborated above. The discussion of ethical considerations has suggested that unilateral humanitarian intervention may, in certain circumstances, be legitimate. In light of this background theory, the best interpretation of Article 2(4) UN Charter is one that does not generally prohibit the use of military force without Security Council approval where it is aimed at the protection of imperiled populations. Unilateral humanitarian intervention can therefore be lawful under the UN Charter. Unlike the right of self-defence and Security Council authorized military action under Chapter VII, it is not expressly sanctioned by the UN Charter.

\textsuperscript{1085} See Article 1, Genocide Convention
\textsuperscript{1086} See Article 8, Genocide Convention; see also Welsh, “Responsibility to Protect”, supra note 9 at 373, note 34.
\textsuperscript{1087} See Wheeler & Morris, supra note 43 at 447.
\textsuperscript{1088} Ibid.
\textsuperscript{1089} See Annan, “Two Concepts of Sovereignty”, supra note 56; see also Weiss, Ideas, supra note 1 at 97.
\textsuperscript{1090} See Part 5.4.2, below.
5.4.2 Customary International Law on Unilateral Humanitarian Intervention

More conclusive than the provisions of the UN Charter might be the customary law on this issue. International relations have provided for a variety of incidents that may have shaped a customary norm on unilateral humanitarian intervention, both prior to and following the publication of “The Responsibility to Protect”. While the post-ICISS period has mainly produced verbal statements and, with the notable but highly controversial exception of the US-led invasion of Iraq in 2003, cases that seem to indicate a reluctance to intervene, previous eras have seen actual interventions, the precedential value of which has been a matter of discussion for international lawyers.

The focus of this thesis will be on more recent developments, notably those that have followed the release of the R2P report. Previous epochs shall, however, be dealt with in a cursory fashion to indicate the broader framework of the debate. I will suggest that unilateral humanitarian intervention was controversial, before the ICISS took on the issue, and continues to be surrounded by ambiguities to such a degree as to impede the crystallization of any international custom on the issue.

5.4.2.1 Interventionist Practice pre-ICISS

Early humanitarian interventions that were noted in the international legal literature date back to the nineteenth century.1091 Many of these interventions were undertaken by European powers for the protection of Christian populations in the Ottoman Empire.1092 By the end of the century, the existence of a customary legal doctrine of humanitarian intervention was a highly controversial topic, with considerable academic support being found for both sides of the argument.1093

Over the course of the twentieth century, the international system has evolved in ways that had a significant impact on the development of the interventionist doctrine. Notably, treaties have been concluded that have placed far-reaching restrictions on the use of force, such as the Kellog-Briand Pact in 1928 and later the UN Charter. Moreover, critics submit that the practice of humanitarian intervention in the twentieth century was marked by inconsistencies.1094

1091 See Weiss, Ideas, supra note 1 at 32.
1092 Ibid.
1093 Ibid. at 33.
1094 See generally Weiss, Ideas, supra note 1 at 33-34.
In the decades following the creation of the UN system, there was indeed little evidence of a consistent scheme of interventionist practice that would have been supported by a corresponding *opinio juris*. During the Cold War era, few precedents were set for interventions that could have established a practice of military intervention for human protection purposes.\(^{1095}\) Furthermore, even in these cases the interveners chose not to rely on the doctrine of humanitarian intervention as a justification for their decisions.\(^{1096}\) This reluctance to justify their action on humanitarian grounds makes it difficult to confirm the required conviction on the part of the interveners that their conduct was legally permissible or necessary. Where, by contrast, humanitarianism was voiced more clearly, the Research Directorate of the ICISS found the actual humanitarian motive behind the intervention to be comparatively weak.\(^{1097}\) Generally, the overwhelming majority of states appears to have rejected the idea of humanitarian intervention.\(^{1098}\) Even cases that had significant humanitarian payoffs, such as Vietnam’s invasion of Kampuchea, were condemned by the international community.\(^{1099}\) This rejection of unilateral humanitarian intervention was further confirmed in several resolutions of the General Assembly.\(^{1100}\) Unilateral humanitarian intervention was at that time, in the words of Weiss, “far from the mainstream of acceptable international relations.”\(^{1101}\) In the same sense, the ICJ held in the *Nicaragua* case that “the use of force could not be the appropriate method to […] ensure […] respect [for human rights]”.\(^{1102}\)

In the decade following the end of the Cold War, several military operations took place that have been invoked as supporting a new customary rule of humanitarian intervention. Notable examples are the unilateral interventions by the ECOWAS in Liberia in 1992 and by the NATO in Kosovo in 1999.\(^{1103}\) In both cases, the Security Council refrained from condemning the respective regional organization for its unauthorized intervention in an intrastate conflict.\(^{1104}\)

\(^{1095}\) See Gazzini, *supra* note 259 at 176; see also Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht: Martinus Nijhoff, 1985) at 92.  
\(^{1096}\) See Gazzini, *supra* note 259 at 176 (noting, however, that occasionally reference was made to the existence of humanitarian emergencies); Ronzitti, *supra* note 1095 at 92, 108; Weiss, *Ideas, supra* note 1 at 37-38 (both with specific references to the cases of East Pakistan in 1971, Kampuchea in 1978, and Uganda in 1979).  
\(^{1097}\) See Weiss, *Ideas, supra* note 1 at 37.  
\(^{1098}\) See Gazzini, *supra* note 259 at 176.  
\(^{1099}\) See Weiss, *Ideas, supra* note 1 at 38; see also Evans, “Responsibility to Protect”, *supra* note 25 at 705.  
\(^{1101}\) See Weiss, *Ideas, supra* note 1 at 38.  
\(^{1102}\) See *Nicaragua, supra* note 374 at paras. 267-268; Weiss, *Ideas, supra* note 1 at 35; see also Gazzini, *supra* note 259 at 176.  
\(^{1103}\) See Welsh, “Responsibility to Protect”, *supra* note 9 at 368; see also Wheeler & Morris, *supra* note 43 at 447.  
\(^{1104}\) See text accompanying note 1087; see also Wheeler & Morris, *supra* note 43 at 447.
Moreover, the conduct of the interveners themselves and their public justification with reference to humanitarian arguments may provide evidence of the required state practice and *opinio juris*.\(^{1105}\) Yet, critics have challenged the evidentiary value of the Kosovo campaign, pointing out that NATO's position on the humanitarian justification was inconsistent, with some members explicitly stressing that no precedent should be set by this intervention.\(^{1106}\) In addition, the humanitarian claim of the interveners has also met with the explicit opposition from major international players like China, Russia and India.\(^{1107}\) Since these non-Western positions need to be equally taken into account,\(^{1108}\) NATO's reaction to the Kosovo conflict is of limited support only for the claim to a norm of unilateral humanitarian intervention.\(^{1109}\) Altogether, state practice with regard to humanitarian intervention in the 1990s has been qualified as "scarce and incoherent".\(^{1110}\)

### 5.4.2.2 Post-ICISS Practice

Given the ambiguities around unilateral humanitarian intervention in state practice at the beginning of the twenty-first century, the ICISS report may have had the potential to play a crucial role in the formation of customary international law on this issue. Specifically, it could have contributed to the emergence of a new norm by setting out clear rules and fostering the acceptance of this framework by the international community. Yet, neither have the conceptual elaborations by the ICISS and, subsequently, by the High-Level Panel and the Secretary-General, added significant clarifications on the issue of unilateral humanitarian intervention, nor has the endorsement by the states before and at the UN World Summit exhibited the required support and consistency for the emergence of a new international custom. Ultimately, the strongest indicator for some development in this direction may be the provisions on humanitarian intervention in the Constitutive Act of the African Union.

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\(^{1105}\) See Cassese, "*Ex injuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 E.J.I.L. 23 (Oxford Journals) 28-29 (on the NATO campaign as interventionist state practice); see generally Welsh, "Responsibility to Protect", *supra* note 9 at 368.

\(^{1106}\) See e.g. Belgium, H.E. Vice-Prime Minister and Minister for Foreign Affairs Louis Michel, Statement in the general debate of the General Assembly, UN GAOR, 54th Sess., 14th Plen. Mtg., UN Doc. A/54/PV.14 (25 September 1999) 15 at 17; see also Gazzini, *supra* note 259 at 176.

\(^{1107}\) See Welsh, "Responsibility to Protect", *supra* note 9 at 369; see e.g. Russian Federation, Permanent Representative to the UN Sergey Lavrov, Statement in the Security Council, UN SCOR, 54th Year, 3988th Mtg., UN Doc. S/PV.3988 (24 March 1999) 2 at 2-3; see also Gazzini, *supra* note 259 at 176.

\(^{1108}\) See Welsh, "Responsibility to Protect", *supra* note 9 at 369.

\(^{1109}\) See Gazzini, *supra* note 259 at 176.

\(^{1110}\) *Ibid.*
5.4.2.2.1 Intellectual Stimuli for the Development of a New Customary Norm

Instead of providing an effective stimulus to the international discussion, the ICISS refrained from taking a final stance on the legality of unilateral humanitarian intervention. On the one hand, it stated a preference for intervention that is authorized by the Security Council, and demanded that such authorization “should in all cases be sought prior to any military intervention action”. On the other hand, the commissioners at least suggested alternative options for cases in which the Security Council refuses to take action or fails to consider a proposal within a reasonable time: “consideration of the matter by the General Assembly in Emergency Special Session under the ‘Uniting for Peace’ procedure; and [...] action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.” At the same time, however, the ICISS specified that it did not consider it the task “to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has”. Instead, it confined itself to warning the Security Council’s members that if they fail to “discharge [the Council’s] responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means that meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.”

In these situations, the commissioners reasoned, less harm might be done to the international order by states bypassing the Security Council than by the slaughtering of human beings because of the Council’s inaction. Overall, the ICISS thus neither actively endorsed unilateral humanitarian intervention, nor did it rule out this possibility.

An equally diverse picture is drawn by the subsequent endorsement of R2P by the High-Level Panel. On the one hand, the Panel explicitly stated that the “collective international responsibility to protect [was] exercisable by the Security Council.” It repeated the statement of the ICISS that “the task is not to find alternatives to the Security Council as a source of authority but to

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1111 See Stahn, supra note 35 at 104.
1112 See ICISS, Responsibility to Protect, supra note 9 at xii-xiii.
1113 Ibid.
1114 Ibid. at xii.
1115 Ibid. at xiii.
1116 Ibid. at para. 6.37.
1117 See Hamilton, supra note 35 at 291; Weiss, Ideas, supra note 1 at 117.
1118 See High-Level Panel, supra note 912 at para. 203; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 156; Stahn, supra note 35 at 120.
make the Council work better than it has”.\textsuperscript{1119} The High-Level Panel specifically avoided the dilemma of how to react in cases in which the Security Council is deadlocked.\textsuperscript{1120} Unlike the ICISS, it did not even consider alternative sources of authority for these cases, but rather stressed the need for an effective “global collective security system” and the role of the Security Council as the “primary body” in this system.\textsuperscript{1121}

The omission by the High-Level Panel of even the sparse indication of alternatives in the ICISS report has been seen as a deliberate “effort to channel international intervention through the Security Council”, in an attempt to strengthen the UN system after the invasion of Iraq.\textsuperscript{1122} Then again, this relatively clear picture is clouded by the reference to “a growing recognition that the issue is not the ‘right to intervene’ of any State, but the ‘responsibility to protect’ of every State when it comes to people suffering from avoidable catastrophe”,\textsuperscript{1123} and the request that all individual member states “whether or not they are members of the Security Council” subscribe to the principles that the Panel sets out for the legitimate use of force.\textsuperscript{1124} These formulations indicate that the criteria might be applied more broadly, including outside the Security Council’s decision-making process.\textsuperscript{1125} The ambiguities between different passages in its report inhibit the High-Level Panel’s work from producing more clarity on the scope of the R2P concept.\textsuperscript{1126}

Finally, Secretary-General Kofi Annan equally avoided a clear stance on the legality of unilateral humanitarian intervention in his report “In Larger Freedom”: on the one hand, he did not expressly rule out this option;\textsuperscript{1127} on the other hand, his report is reflective of the existing reservations regarding unauthorized intervention that have already been pointed out.\textsuperscript{1128} Annan accepts the High-Level Panel’s position that the responsibility to protect should be identified with the Security Council,\textsuperscript{1129} and equally subscribes to the assertion that, with a view to the use of armed force, “[t]he task is not to find alternatives to the Security Council as a source of authority but to make it work better”.\textsuperscript{1130} Notably, Annan shifts the thematic focus of the

\textsuperscript{1119} See High-Level Panel, \textit{ibid.} at para. 198; see also Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 156.
\textsuperscript{1120} See Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 156.
\textsuperscript{1121} See High-Level Panel, \textit{supra} note 912 at paras. 204-205; see also Stahn, \textit{supra} note 35 at 106.
\textsuperscript{1122} See Stahn, \textit{supra} note 35 at 106.
\textsuperscript{1123} See High-Level Panel, \textit{supra} note 912 at para. 201 [emphasis in the original].
\textsuperscript{1124} \textit{Ibid.} at para. 209.
\textsuperscript{1125} See Stahn, \textit{supra} note 35 at 107.
\textsuperscript{1126} \textit{Cf. ibid.} at 105.
\textsuperscript{1127} \textit{Ibid.} at 107.
\textsuperscript{1128} See Stahn, \textit{supra} note 35 at 120-121.
\textsuperscript{1129} See Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 157.
\textsuperscript{1130} See UN Secretary-General, \textit{In larger freedom}, \textit{supra} note 913 at para. 125.
responsibility to protect, placing a stronger emphasis on the use of peaceful means.\textsuperscript{1131} In particular, he moved the discussion of the R2P concept into the chapter on the “freedom to live in dignity”, instead of dealing with it as a question of the use of force in the chapter on “freedom from fear”,\textsuperscript{1132} “so as to detach the idea of responsibility from an automatic equation to armed force.”\textsuperscript{1133} Where the use of force is employed as a last resort, it should be authorized by the Security Council.\textsuperscript{1134} Overall, “In Larger Freedom” has been considered as “more deferential to state sovereignty” than either the ICISS or the High-Level Panel report.\textsuperscript{1135} It thus appeared unsuitable to incite any substantive normative change of the law of humanitarian intervention.\textsuperscript{1136}

5.4.2.2 State Reactions to the ICISS Report

In light of these ambiguities in the different reports, and the increasing deference paid to state sovereignty and the Security Council, it may have been unlikely from the outset that the R2P concept would facilitate any solution to the question of unilateral humanitarian intervention in state practice. Indeed, the initial reactions by states and associations of states to the ICISS report have indicated the continued existence of a diverse, but predominantly skeptical pattern of international opinion regarding a right of unilateral intervention.

Explicit support for the idea of such a right can notably be found in the position of the US. One central reason for its original rejection of the R2P concept was that it refused to submit to any criteria that might restrict its perceived liberty to intervene when and where it deemed appropriate.\textsuperscript{1137} This aversion to the concept was eased only on the terms of a high-profile task-force that had been commissioned by the US Congress in 2004 to set out the American interests in a reform of the UN.\textsuperscript{1138} This task-force, which was co-chaired by Newt Gingrich, a former speaker of the House of Representatives, and George Mitchell, a former majority leader of the Senate, disputed that a consensus had emerged on the requirement of Security Council approval

\begin{itemize}
  \item \textsuperscript{1131} See Stahn, \textit{supra} note 35 at 107.
  \item \textsuperscript{1132} See UN Secretary-General, \textit{In larger freedom}, \textit{supra} note 913, c. III, IV.
  \item \textsuperscript{1133} See Stahn, \textit{supra} note 35 at 107.
  \item \textsuperscript{1134} See UN Secretary-General, \textit{In larger freedom}, \textit{supra} note 913 at para. 135; see also Stahn, \textit{supra} note 35 at 107.
  \item \textsuperscript{1135} See Brunée & Toope, \textit{supra} note 86 at 12.
  \item \textsuperscript{1136} See Stahn, \textit{supra} note 35 at 107.
  \item \textsuperscript{1137} See Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 151; Welsh, “Conclusion”, \textit{supra} note 219 at 180.
\end{itemize}
for any humanitarian intervention. While building upon the ICISS report, the Gingrich/Mitchell task-force specifically recommended that the US uphold the right of individual states to react to massive human rights violations, if the Security Council fails to act in a timely manner. This report provided the basis for a renewed engagement of US with R2P, and especially the proposition that the recognition of an international responsibility to protect “should not preclude the possibility of action absent authorization by the Security Council” was explicitly endorsed by the US ambassador to the UN, John Bolton. This position was furthermore shared by the UK and France, who equally refused to rule out unauthorized intervention in all circumstances.

For the majority of states, by contrast, the Security Council remains the only legitimate authority for armed intervention. Its permanent members China and Russia, in particular, uphold that no force must be used without being approved by the Security Council. Similarly, important developing countries like Brazil have continued to reiterate concerns about the UN system being bypassed. The Non-Aligned Movement has repeatedly publicly rejected a right of humanitarian intervention. The Malaysian representative reiterated the perception of the group that international law provided no basis for a concept of humanitarian intervention that could possibly be invoked as a part of the R2P. Also, non-intervention broadly remains a central principle in Latin American and East Asian states. In these areas, however, there are signs for some evolution, as military action by outside forces has been recognized as an option in

\[\text{1}139\text{ See Gingrich/Mitchell Report, supra note 1139 at 29, 144; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 162-163.}\n\[\text{1}140\text{ See Gingrich/Mitchell Report, ibid. at 32; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 163.}\n\[\text{1}141\text{ See US, Representative to the United Nations John R. Bolton, Letter to the representatives of the UN member states (30 August 2005), online: Responsibility to Protect – Engaging Civil Society <http://www.responsibilitytoprotect.org/index.php/government_statements> at 2; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 163-164.}\n\[\text{1}142\text{ See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 152.}\n\[\text{1}143\text{ Ibid. at 168.}\n\[\text{1}144\text{ See PRC, Position Paper at Section II.7 (for the official Chinese position); Primakov, supra note 218 (on Russia’s position); see generally Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 151-152.}\n\[\text{1}145\text{ See Welsh, “Responsibility to Protect”, supra note 9 at 374.}\n\[\text{1}146\text{ See Weiss, Ideas, supra note 1 at 121; see e.g. NAM, Statement on the draft outcome document, supra note 207 at para. 4(g) (“The Ministers […] reiterated the rejection by the Movement of the so-called ‘right’ of humanitarian intervention, which has no basis either in the Charter or in international law […]”).}\n\[\text{1}147\text{ See NAM, Statement on the draft outcome document, supra note 207 at para. 4(g).}\n\[\text{1}148\text{ See Fund For Peace, Regional Responses to Internal War: Perspectives from Asia on Military Intervention, vol. 4 (September 2002), online: Fund For Peace <http://www.fundforpeace.org/publications/reports/asia_conference.pdf> at 18 [Fund For Peace, Asia]; Fund For Peace, Europe, supra note 888 at 15; MacFarlane, Thielking & Weiss, supra note 35 at 982.}\n
extreme cases of humanitarian crises. Nevertheless, unilateral intervention is still regarded with skepticism.

Other developments indicate that humanitarian intervention is even more controversial today than it was a few years ago. Namely the US-led invasion and the “war on terrorism” have had a profoundly adverse impact on any normative evolution. As a result of the war in Iraq, developing countries have felt their suspicions confirmed that humanitarian intervention would be a tool for the powerful Western states to pursue their own interests. Moreover, Weiss observes that “[the] reluctance among countries that earlier might have been counted among R2P’s friends seems to be growing in UN corridors.” Significantly, the attempts by the US and the UK to justify their invasion of Iraq on humanitarian grounds had created an increased skepticism about the potential of the R2P concept to be used for political ends. As a consequence, the Canadian government, which had commissioned the ICISS and been its main sponsor, felt unable to push for the recognition of a right of unilateral intervention. In an attempt to secure consensus on the broader R2P framework, the Canadian government dropped the contentious issue of unilateral intervention, and emphasized instead that Security Council authorization was needed and the responsibility to protect “not a license for intervention [but] an international guarantor of political accountability.” This shift in focus had surfaced as early as during the consultations of the High-Level Panel, when a Canadian “nonpaper” stating the government’s policies avoided addressing the issue of unilateral humanitarian intervention.

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1149 See Fund For Peace, Asia, supra note 1148 at 18; Fund For Peace, Americas, supra note 225 at 14; MacFarlane, Thielking & Weiss, supra note 35 at 982-983.
1150 See Fund For Peace, Asia, supra note 1148 at 18-19; Fund For Peace, Americas, supra note 225 at 14; MacFarlane, Thielking & Weiss, supra note 35 at 983.
1151 See Weiss, “R2P After 9/11”, supra note 59 at 749-753.
1152 Ibid. at 748-756.
1153 Ibid. at 752.
1154 Ibid.
1155 Ibid.
1156 Ibid. at 154, 168 (the same constraints caused commissioners like Ramesh Thakur to water the original concept down over the course of the debate).
In light of these developments, a right of unilateral humanitarian intervention can be said to have become even more controversial between the publication of the ICISS report and the World Summit.

5.4.2.3 AU Charter and Ezulwini Consensus

During the same period, some limited support for the crystallization of a customary right of unilateral intervention may have come from the African continent. Traditionally, African states have been critical of the use of force without Security Council authorization, including initiatives taken by regional organizations. Yet, Article 4(h) of the 2002 Constitutive Act of the African Union (AU) provides for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.” Through this provision, the African leaders have established the right of a regional organization to intervene for human protection purposes and thus institutionalized one of the alternatives to Security Council-authorized intervention that had been considered by the ICISS. As this regional intervention through the AU was not made conditional upon approval by the Security Council, it qualifies as a form of unilateral humanitarian intervention within the definition set out at the beginning. The Constitutive Act thus appears to recognize the legitimacy of unilateral intervention at least within the framework and through the organs of the AU.

As Bellamy points out in his analysis of the AU’s Constitutive Act, the clear recognition of the right of humanitarian intervention in Article 4(h) is to a certain degree blurred by a seemingly contradictory affirmation of the right to non-interference in Article 4(g), as well as by provisions in the “Protocol Relating to the Establishment of the Peace and Security Council of

1159 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 158 (mentioning specifically the public opposition from Namibia, South Africa and Nigeria to the NATO campaign on Kosovo); see also Welsh, “Responsibility to Protect”, supra note 9 at 378 and n. 49.
1160 See Art. 4(h) AU Constitutive Act; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 157; see also Welsh, “Responsibility to Protect”, supra note 9 at 378-379; MacFarlane, Thielking & Weiss, supra note 35 at 982.
1161 See ICISS, Responsibility to Protect, supra note 9 at paras. 6.31-6.35; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 157-158; 161-162.
1162 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 158-159; Welsh, “Responsibility to Protect”, supra note 9 at 378-379.
1163 See text accompanying note 43.
1164 See Welsh, “Responsibility to Protect”, supra note 9 at 378-379; see also Stahn, supra note 35 at 114 (considering the express recognition of a right of intervention in the Constitutive Act as a recent codification of the “departure from classic principles of nonintervention”).
1165 See Article 4(g) AU Constitutive Act: “[The Union shall function in accordance with the following principles: ...] non-interference by any Member State in the internal affairs of another.”
This protocol not only demands that “[i]n the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the United Nations Security Council”, but also explicitly recognizes that the latter has the “primary responsibility for the maintenance of international peace and security”. Nevertheless, the tenor of the AU Constitutive Act remains that the AU has a right of humanitarian intervention in a member state without its consent, and that such intervention can be undertaken without authorization by the Security Council. Article 4(g) of the Constitutive Act only rejects unilateral intervention undertaken outside the AU system. Within this framework of a regional organization, however, the leaders of African states accepted the possibility of unilateral humanitarian intervention.

A second challenge to the acceptance of the AU’s right of unilateral intervention, was mounted when the AU Executive Council met in Addis Ababa in March 2005 to formulate a common position on possible UN reforms. While some states adhered to the view that the AU’s right to intervene in African crises was independent from UN authorization, they ultimately had to abandon this position. Instead, the so-called Ezulwini consensus stipulated that the AU’s interventions should be authorized by the Security Council. At the same time, it was agreed

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1166 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 157-159.
1167 See Article 17(1) AU Protocol on Peace and Security Council; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 159.
1168 See Welsh, “Responsibility to Protect”, supra note 9 at 378.
1169 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 157-159.
1170 Ibid. at 157; the perception that “the International Community has not always accorded due attention to conflict management in Africa” had been a primary concern in establishing the AU, cf. Organization of African Unity (OAU), Assembly of Heads of State or Government, online at 36th Ordinary Session, Lome Declaration, AHG/Decl. 2 (XXXVI) (2000), online: African Human Security Initiative <http://www.africanreview.org/docs/arms/loone.pdf>; the sole purpose of Article 4(h) thus was, as a senior legal advisor to the AU has pointed out, “[to enable] the African Union to resolve conflicts more effectively on the continent”, see Ben Kioko, “The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention” (2003) 852 Int’l Rev. Red Cross 807, online: International Committee of the Red Cross <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5WNJDL/$File/IRRC_852_Kioko.pdf> at 817; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 158.
1171 But cf. Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 158-160 (for possible incompatibilities of the AU concept of humanitarian intervention with the ICISS proposal, and problems concerning collective action through the UN Security Council.)
1172 Ibid. at 160-161 and n 69.
1173 Ibid. at 168.
that, in certain “circumstances requiring urgent action”, it would suffice if the Security Council approved the intervention ex post facto.1175

In conclusion, the member states of the African Union, while strictly rejecting any unilateral humanitarian intervention outside of this framework,1176 have expressed their willingness to intervene, if necessary, without prior Security Council authorization. To this extent, the Constitutive Act of the AU and the subsequently formulated common position on UN reforms in the Ezulwini consensus support a limited avenue for unilateral humanitarian intervention.

5.4.2.4 The World Summit Agreement

The disagreements about unilateral humanitarian intervention lasted throughout the negotiations at the 2005 World Summit.1177 While some states, including the US, the UK and France, continued to uphold a right of unauthorized intervention, they met with persistent opposition, amongst others, from Russia, India, China, and African states.1178 Indeed, the majority of states pushed to reaffirm an absolute primacy on the part of the Security Council as a means to limit Western interventionism.1179

In the Outcome Document concluding the negotiations, no mention is made of unauthorized intervention.1180 The failure to mention this question may not be surprising, seeing that the agreement contains a commitment of the UN member states to respond to humanitarian crises through the Security Council, thus suggesting that the UN will provide a suitable avenue for intervention in appropriate cases.1181 Yet, the structural difficulties that impede effective UN action have remained after the Summit, and so has therefore the question of unilateralism.1182

The absence of any explicit agreement in the Outcome Document has created leeway for diverging interpretations on whether unauthorized intervention has come to be accepted in the international community. On the one hand, proponents of unilateral humanitarian intervention can point to the fact that the states did not categorically preclude this option.1183 The Outcome

1175 See AU, Ezulwini Consensus, ibid. at 6; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 161, 168.
1176 See AU, Ezulwini Consensus, ibid.; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 161.
1177 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 164.
1178 Ibid. at 166; see also Stahn, supra note 35 at 109.
1179 See Bellamy, ibid. at 164.
1180 See Bannon, supra note 61 at 1157-1159.
1181 Ibid. at 1159.
1182 Ibid.
1183 See Stahn, supra note 35 at 120; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 166.
Document contains no explicit rejection of the claim to the legitimacy of unilateral action that had been advanced during the negotiations, for instance by the United States.\textsuperscript{1184} Neither in the paragraphs on the responsibility to protect,\textsuperscript{1185} nor in those on the use of force,\textsuperscript{1186} unilateral humanitarian intervention is clearly ruled out.\textsuperscript{1187} Rather, the paragraphs on the use of force only restate the prohibition of the use of force that is "in any manner inconsistent with the Charter".\textsuperscript{1188} This wording does not undercut the submission that unauthorized humanitarian intervention may be possible if it is aimed at upholding the UN’s commitment to human rights protection in Article 1 and thus consistent with the Charter.\textsuperscript{1189}

On the other hand, paragraph 139 of the Outcome Document clearly indicates that the Security Council is the forum through which the states commit themselves to protect populations at risk.\textsuperscript{1190} The insertion of this explicit reference can be seen as an achievement by those countries that had opposed a broader avenue for humanitarian intervention.\textsuperscript{1191} Compared to the original R2P framework of the ICISS, the exclusive focus on the Security Council represents a set-back for pro-interventionists, as the ICISS had at least mentioned alternative authorities.\textsuperscript{1192} At the World Summit, the international community failed to demonstrate a similar willingness to consider other options for cases in which the Security Council members cannot agree on collective action.\textsuperscript{1193} Moreover, the Outcome Document even explicitly recognizes that the Security Council may exercise a certain discretion in identifying cases for intervention, demanding action “on a case-by-case” basis only.\textsuperscript{1194} For Welsh, paragraph 139 therefore continues what she calls “[s]ubmissive deference to the Security Council” and its authority in deciding on military intervention.\textsuperscript{1195}

\textsuperscript{1184} See Stahn, \textit{ibid.} at 109.
\textsuperscript{1185} See UN General Assembly, \textit{World Summit Outcome, supra} note 232 at paras. 138-139.
\textsuperscript{1186} \textit{Ibid.} at paras. 77-80.
\textsuperscript{1187} See Bellamy, "Whither the Responsibility to Protect", \textit{supra} note 63 at 168.
\textsuperscript{1188} See UN General Assembly, \textit{World Summit Outcome, supra} note 232 at para. 78.
\textsuperscript{1189} See Bellamy, "Whither the Responsibility to Protect", \textit{supra} note 63 at 166-167; see also text accompanying notes 1064-1069.
\textsuperscript{1190} See UN General Assembly, \textit{World Summit Outcome, supra} note 232 at para. 138.
\textsuperscript{1191} See Bellamy, "Whither the Responsibility to Protect", \textit{supra} note 63 at 166.
\textsuperscript{1192} See Weiss, Ideas, \textit{supra} note 1 at 117.
\textsuperscript{1193} See Welsh, "Responsibility to Protect", \textit{supra} note 9 at 378 (employing the concept of “submissive deference” formulated by Dyzenhaus, \textit{supra} note 161, especially at 131; see also Welsh, "Responsibility to Protect", \textit{supra} note 9 at 372 and n. 31).
\textsuperscript{1194} See UN General Assembly, \textit{World Summit Outcome, supra} note 232 at para. 139; see Welsh, "Responsibility to Protect", \textit{supra} note 9 at 380 (noting that “the Article appears to resist any temptation to enshrine a blanket right of humanitarian intervention”).
\textsuperscript{1195} See Welsh, "Responsibility to Protect", \textit{supra} note 9 at 378.
Despite the failure of the Outcome Document to mention the possibility of unilateral intervention, and its explicit focus on the authority of the Security Council, advocates have argued that it has strengthened the legal justification for a limited recourse to unilateral intervention in a different way: by acknowledging that sovereign states have a responsibility to protect their populations from atrocities, and that the international community is entitled to take action if the state fails to fulfill this responsibility, the agreement has undercut the objection that humanitarian intervention violates the sovereignty of the target state.\textsuperscript{1196} It has recognized that "nations have no sovereign right to commit or passively permit atrocities against their populations" and thus affirmed the trend towards perceiving human rights protection as a limitation on sovereignty.\textsuperscript{1197} If, however, a state that tolerates massive human rights violations against its population cannot justify this as being a matter of its sovereign authority, the argument goes, sovereignty cannot provide a defence against external intervention for the prevention of these crimes.\textsuperscript{1198} Alicia L. Bannon argues that this conclusion must be drawn equally for unilateral intervention, although the World Summit Outcome Document explicitly applies it to collective intervention only.\textsuperscript{1199} Pursuant to this line of argument, the heads of state and government, while not affirming a right of unilateral intervention, have supported a conceptualization of sovereignty that weakens their defence against any humanitarian intervention.\textsuperscript{1200}

This argument, however, rests on the assumption that, in concluding the World Summit agreement, the states have accepted a responsibility, the violation of which would entail the forfeiture of their sovereign rights. Taking into account the broad opposition to unilateral intervention, it can hardly be argued that the World Summit agreement was aimed at an obligation of human rights protection that could be enforced through military intervention. In fact, the states have only submitted to action by the international community that finds an explicit basis in Chapters VI through VIII of the Charter.\textsuperscript{1201} Moreover, paragraph 139 of the Outcome Document has emphasized "the need for the General Assembly to continue consideration of the responsibility to protect [...] and its implications, bearing in mind the principles of the Charter and international law".\textsuperscript{1202} This sentence, firstly, exhibits the perception

\textsuperscript{1196} See Bannon, supra note 61 at 1161-1162.
\textsuperscript{1197} Ibid.; see also Stahn, supra note 35 at 101-102.
\textsuperscript{1198} See Bannon, ibid. at 1162.
\textsuperscript{1199} Ibid.
\textsuperscript{1200} Ibid. at 1158, 1162 (but see also ibid. at 1163-1165 for "limitations on unilateral action").
\textsuperscript{1201} See UN General Assembly, World Summit Outcome, supra note 232 at para. 138.
\textsuperscript{1202} Ibid. at para. 139.
that the concept of a responsibility to protect requires further clarification before it can be implemented in practice,\textsuperscript{1203} and, more importantly, has even been understood as referring back to the Charter principles of state sovereignty and non-intervention”.\textsuperscript{1204} Out of these considerations, the host state’s responsibility to protect its population has already been qualified as an ordinary customary duty only, rather than as an obligation which needs to be fulfilled for a state to be entitled to the sovereign right of non-intervention.\textsuperscript{1205} Accordingly, the submission that the World Summit agreement has undercut a central defence against unilateral humanitarian intervention must be rejected.

In conclusion, the World Summit has contributed little to clarifying the question of unilateral humanitarian intervention in either direction, that is, neither have the states recognized a right of unilateral intervention or removed legal hurdles for such a right, nor have they expressly precluded it.\textsuperscript{1206} Against the backdrop of the existing ambiguities on international practice and convictions, this means, however, that the World Summit has failed to foster the crystallization of any customary norm, may it permit or prohibit unilateral humanitarian intervention.

\textit{5.4.3 Conclusion}

As a result, neither conventional law nor international custom provide for a positive right of unilateral humanitarian intervention. At the same time, the interpretation of the UN Charter has suggested the understanding that the basic prohibition of the use of force in Article 2(4) of the Charter does not cover humanitarian intervention, even if it is undertaken outside the UN system and Chapter VII. Accordingly, the UN Charter neither prohibits unilateral humanitarian intervention. Finally, the illegality of this form of military action is not established by customary international law either, as the irreconcilable divide in state opinion, with major powers and significant numbers of states on either side of the argument, does not allow for the crystallization of any customary rule on the unilateral recourse to force for humanitarian purposes.

\textsuperscript{1203} See e.g. Russian Federation, Representative on the Security Council Mr. Rogachev, Statement in the Security Council, UN SCOR, 60th Year, 5319th Mtg., UN Doc. S/PV.5319 (9 December 2005) 18 at 19; Stahn, \textit{supra} note 35 at 110.

\textsuperscript{1204} See Brunée & Toope, \textit{supra} note 86 at 7; cf. also Stahn, \textit{supra} note 35 at 110 (“[This express reference] almost seems to suggest that the drafters of the Outcome Document had some doubts whether their own proposal was consistent with international law and the Charter.”)

\textsuperscript{1205} See Part 5.2.3.3, above.

\textsuperscript{1206} See Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 168.
Accordingly, where the UN fails to react collectively to cases of large-scale killings or large-scale ethnic cleansing, the individual states act in a legal void.\textsuperscript{1207} Pursuant to the basic positivist understanding of international law as being confined to those rules that the states have voluntarily accepted, the consequence would be that the members of the international community remain at liberty to conduct their international affairs at their discretion.\textsuperscript{1208} The legal theory devised in Chapter 3 of this thesis instead demands that ethical principles are resorted to as legally binding rules.\textsuperscript{1209} According to the ethical theory that has been elaborated in Chapter 4, unilateral humanitarian intervention can, under certain circumstances, be legitimate. As long as these requirements are met, unilateral humanitarian intervention is then not only ethically justified, but legalized under principles of ethical law.

\textbf{5.5 Residual Responsibility to Protect Borne by the International Community}

Once it has been concluded that military intervention for the purpose of protecting foreign populations is legal, both with and without prior Security Council authorization, the question arises of whether the international community is not just entitled, but even obligated to take military action. The intellectual groundwork for such an obligation has been established by the ICISS in reconceptualizing humanitarian intervention as a responsibility, rather than a right of the interveners.

I will indicate that the notion of a collective international responsibility to protect is an innovative idea that goes beyond the traditional scope of positive duties in international law. While the states were initially cautious about this concept, the World Summit agreement and other instances of recent state practice exhibit a certain endorsement of the idea, yet with the need for substantial clarifications. On the other hand, the idea is not undermined, as has been suggested in literature, by the failure of the international community to effectively terminate ongoing crises, notably in Darfur. On the basis of these observations, I will conclude that the international responsibility to protect has crystallized as a “soft” principle of international law, as a programme of action that demands the protection of people at risk in a general form, without, however, stating specific obligations.

\textsuperscript{1207} Cf. Bannon, supra note 61 at 1162-1163 (arguing that the UN is “institutionally broken, at least with respect to the case at hand”, if it fails to react to incidents of genocide or other atrocities, and that, therefore, individual states that act to uphold the World Summit’s purpose of preventing another genocide, as well as the UN Charter’s commitment to human rights protection, do not act illegally).
\textsuperscript{1208} See Ratner & Slaughter, supra note 264 at 5.
\textsuperscript{1209} See Part 3.5.4, above.
5.5.1 Positive Duties in International Law prior to R2P

Unlike the primary responsibility of the host state to protect its population, the idea of a collective international responsibility to protect people at risk is novel and cannot be grounded in a broader legal tradition. Rather, positive duties are generally a rare element in international law.

Few precedents can be identified for legal obligations to act, and the scope of these is limited. One example is the Genocide Convention, which has been ratified by most states, and affirms an undertaking on the part of its signatories to prevent genocide. During the Cold War, however, this verbal commitment has never been matched by actual state practice, and in the light of the present genocide in Darfur, Weiss has even concluded that “[t]he 1948 Convention on the Prevention and Punishment of the Crime of Genocide literally appears to be not worth the paper on which it is reproduced.”

Limited support for the idea of a collective responsibility to protect populations from large-scale killings and ethnic cleansing can be found in two UN reports on the massacres in Srebrenica and the genocide in Rwanda. In his report on Srebrenica, Secretary-General Annan observed in November 1999 that “[w]hen the international community makes a solemn promise to safeguard and protect innocent civilians from massacre, then it must be willing to back its promise with the necessary means.” This passage indicates that, at least once external actors have decided to intervene on humanitarian grounds, they have responsibilities to effectively protect the

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1210 See Stahn, supra note 35 at 115.
1211 Ibid.
1212 See Article 1 Genocide Convention; for a definition, see Article 2 of the Convention: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”; see also Welsh, “Responsibility to Protect”, supra note 9 at 373 and n. 34.
1213 See Evans, “Responsibility to Protect”, supra note 25 at 705 (pointing to Vietnam’s invasion of Kampuchea as a case in which, rather than being praised for giving practical effect to the terms of the Convention, the interveners faced more international criticism than the genocidaires).
1214 See Weiss, “R2P After 9/11”, supra note 59 at 758.
1216 See UN Secretary-General, Fall of Srebrenica, ibid. at para. 504.
population that relies on this protection. More generally, Annan suggests that the international community was partly responsible for the “tragic course of events”, due to “its prolonged refusal to use force in the early stages of the war”, and that, in the future, “a deliberate and systematic attempt to terrorize, expel or murder an entire people must be met decisively with all necessary means.”

These findings of the Secretary-General in the context of the massacres in Srebrenica were recalled, just one month later, by the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda. The language employed in this report was, however, even stronger, as the Inquiry noted that “[f]aced in Rwanda with the risk of genocide, and later the systematic implementation of a genocide, the United Nations had an obligation to act which transcended traditional principles of peacekeeping.”

Finally, the International Law Commission (ILC) suggested in its Draft Articles on State Responsibility that certain violations of international law may trigger a positive duty of other states to cooperate in order to end this breach of law. Yet the ILC proposed this duty of cooperation only in the face of a “serious breach” of “a peremptory norm of general international law”, and explicitly acknowledged that such a duty, even within this limited scope, may reflect a progressive development rather than a currently existing rule of international law. In this light, the broader collective responsibility to protect as proposed by the ICISS appears even more progressive.

5.5.2 The International Responsibility to Protect as A Positive Obligation?

The ICISS proposal of a broader international responsibility to protect goes beyond the scope of all these earlier concepts. As the ICISS elaborates, its residual responsibility “requires that in some circumstances action must be taken by the broader community of states to support

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1217 See Wills, supra note 1215 at 418; Breau, "Peacekeeping", supra note 9 at 464.
1218 See UN Secretary-General, Fall of Srebrenica, supra note 1215 at para. 501.
1219 Ibid. at para. 502.
1220 See UN, Independent Inquiry into Rwanda, supra note 1215 at 50-51.
1221 Ibid. at 50.
1223 See ILC, Draft Articles on State Responsibility, Art. 40(1), 41(1).
1224 See ILC, Draft Articles on State Responsibility Article 41, commentary, at para. 3; see also Stahn, supra note 35 at 113-114.
1225 See Stahn, ibid. at 116.
1226 cf. ibid. (specifically comparing the R2P framework in the 2005 World Summit Outcome document with the ILC Articles on State Responsibility)
populations that are in jeopardy or under serious threat.”\textsuperscript{1227} This responsibility essentially demands that the international community provide “life-supporting protection and assistance to populations at risk”,\textsuperscript{1228} and “is activated when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or where people living outside a particular state are directly threatened by actions taking place there.”\textsuperscript{1229}

Given the innovative character of the international responsibility to protect in the legal discourse, its crystallization as a positive legal obligation to intervene appears doubtful.\textsuperscript{1230} The High-Level Panel pronounced very favorably on the development of such a norm, stating that “there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from [avoidable catastrophes – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease], when they are unable or unwilling to do so that responsibility should be taken up by the wider international community [...]”.\textsuperscript{1231} Both the High-Level Panel and Secretary-General Annan expressly endorsed “the emerging norm that there is a collective international responsibility to protect”.\textsuperscript{1232}

The treatment of the concept both in declarations by states and in actual state conduct, by contrast, sheds doubt on whether the concept has yet been endorsed in a way that supports the existence of a legal obligation under international custom, or bodes well for the emergence of such a norm in the near future.\textsuperscript{1233} In fact, skepticism has been voiced as to whether the ICISS itself had ever intended the international responsibility to protect to become a norm of binding international law.\textsuperscript{1234} In particular, it has been pointed out that the R2P report fails to identify any legal consequences of a violation of the proposed international responsibility to protect.\textsuperscript{1235} As Stahn suggests, this is a strong indicator that the ICISS may have intended to formulate this responsibility as a form of “soft law” or a mere political principle only, rather than as an

\textsuperscript{1227} See ICISS, Responsibility to Protect, supra note 9 at para. 2.31.  
\textsuperscript{1228} Ibid. at para. 2.32.  
\textsuperscript{1229} Ibid. at para. 2.31.  
\textsuperscript{1230} See Stahn, supra note 35 at 115, 120.  
\textsuperscript{1231} See High-Level Panel, supra note 912 at para 201; see also Stahn, supra note 35 at 99-100.  
\textsuperscript{1232} See High-Level Panel, ibid.; UN Secretary-General, In larger freedom, supra note 913 at para. 135; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 156; Breau, “Peacekeeping”, supra note 9 at 436 (pointing to the strong formulation of the HLP’s support for the concept); but see also Stahn, supra note 35 at 105 (noting that “[t]he purported scope of the responsibility to protect remained unclear in the panel’s report.”).  
\textsuperscript{1233} See Parts 5.5.3-5.5.7, below.  
\textsuperscript{1234} See Stahn, supra note 35 at 117-118.  
\textsuperscript{1235} Ibid.; Weiss simply suggests that a failure by foreign governments to intervene in appropriate cases should essentially be a reason of embarrassment to them, Weiss, Ideas, supra note 1 at 111.
"emerging hard norm of international law". This interpretation is further supported by the fact that the ICISS does not name a specific addressee of the residual international responsibility to protect, but only makes reference to the unspecific notion of "the broader community of states". Finally, the Commission also avoided the term "duty" and the proposition of a corresponding right of people at risk to claim international protection.

The incidents of state practice that will be scrutinized in the following sections indicate a similar reluctance on the part of state representatives to adopt an obligatory framework for humanitarian intervention. In addition to the vagueness of public statements on the international responsibility, the renunciation of military intervention in recent conflicts may pose a serious challenge to the claim that a sense of legal obligation or necessity has emerged. Nevertheless, I will argue that a close analysis of both verbal statements and the treatment of recent humanitarian disasters supports the proposition that a collective international responsibility to protect has been endorsed by international law, though only as an abstract principle that requires further specification to establish specific legal obligations.

5.5.3 State Reactions to the ICISS before and at the World Summit

Initially, the ICISS proposal of an international collective responsibility to protect found little favor in the community of states. The Canadian government upheld the prescriptive component of the R2P framework at least in principle. Yet, the main sponsor of the ICISS refrained from specifying the nature of the responsibility to protect, as is indicated by Prime Minister Paul Martin’s failure to address the potential consequences of its violation by the Security Council. Even less conducive to the emergence of a new norm on an international responsibility to protect were the reactions by other members of the international community. The vast majority of governments refused to commit themselves in any way to take military action in predefined situations. The United States was especially adamant about preserving its liberty to engage its military forces only where its national interests were affected, while keeping them out of other

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1236 See Stahn, supra note 35 at 117-118.
1237 Ibid. at 120.
1238 See Welsh, “Responsibility to Protect”, supra note 9 at 367, 368.
1239 Cf. Canada, Paul Martin, supra note 1157; see Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 154.
1240 See MacFarlane, Thielking & Weiss, supra note 35 at 982.
conflicts. It was already seen as a “significant breakthrough” when the Congress-commissioned Gingrich/Mitchell report accepted in principle in 2005 that, in some cases, “the collective responsibility of nations to take action cannot be denied”. This acknowledgement of an international responsibility in the abstract was coupled, however, with a reinforcement of the primary responsibility of the host state, and detached from the specific criteria for military intervention. Ultimately, therefore, the report provides little support for a rule that would prescribe all necessary action, including military intervention, in a predefined set of cases.

The US opposition to a legal duty of intervention became even more apparent again during the drafting process of the World Summit Outcome Document, as the US ambassador to the UN, John Bolton, stressed that “the responsibility of the other countries in the international community is not of the same character as the responsibility of the host, and we thus want to avoid formulations that suggest that the other countries are inheriting the same responsibility that the host state has”. This submission runs counter to the sense of a legal obligation of humanitarian intervention for the United Nations, the Security Council or individual states. Rather, Bolton claimed that the international community’s responsibility to protect was of a moral nature only. From this viewpoint, the Security Council would legally retain the discretion to decide cases on a one-by-one basis.

Compared with the rather clear opposition that has come from the only remaining superpower, the signs emanating from the African continent are, at least in theory, more supportive of a new normative development of a responsibility to protect. On the one hand, the right of the African Union to humanitarian intervention in its member states, as envisaged by Article 4(h) of the Constitutive Act, establishes an institutional mechanism that would allow for more international, namely regional, involvement in humanitarian crises on the continent. In practice, this arrangement could however also have a drawback for the idea of an international duty to protect,

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1241 See Welsh, “Conclusion”, supra note 219 at 180; Welsh, “Responsibility to Protect”, supra note 9 at 376; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 151; cf. also MacFarlane, Thielking & Weiss, supra note 35 at 745.
1242 See Weiss, Ideas, supra note 1 at 116.
1243 See Gingrich/Mitchell Report, supra note 1139 at 29; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 162.
1244 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 163.
1245 Ibid.
1246 US, Bolton, supra note 1141 at 2; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 163-164.
1247 US, Bolton, ibid.; see also Stahn, supra note 35 at 108; Welsh, “Responsibility to Protect”, supra note 9 at 376.
1248 See US, Bolton, ibid. at 3; see also Stahn, supra note 35 at 108.
1249 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 164.
1250 Ibid. at 157-158.
as the broader international community, and the Security Council members in particular, could use it as an excuse to refer these crises to the AU instead of taking responsibility themselves through collective action in the UN system.\textsuperscript{1251} Awareness of this risk led to a more explicit endorsement of a collective responsibility to protect, as the African leaders emphasized in the Ezulwini consensus that the responsibility of the international community to protect should not be undermined.\textsuperscript{1252} The incorporation of this passage was notably forced by South Africa in a conscious attempt to promote the prescriptive component of the R2P framework and to secure the attention and involvement of the great powers with Africa’s problems.\textsuperscript{1253}

Despite this verbal commitment to an international responsibility to protect, the Ezulwini consensus is not unequivocally supportive of the concept. Notably, the African states reiterated the importance of the principles of “sovereignty, independence, and territorial integrity of states”,\textsuperscript{1254} and limited the legal use of force to self-defence under Article 51 of the UN Charter or humanitarian intervention under Article 4(h) of the AU Constitutive Act.\textsuperscript{1255} This, however, suggests that the AU claims the discretion to decide on the proper response to incidents of humanitarian crises on the African continent, while the role of the international community, acting through the Security Council, is limited to an approval of and support for AU action.\textsuperscript{1256} With a view to the world organization and its executive body, the Ezulwini consensus thus effectively impedes rather than facilitates the discharge of a collective responsibility to protect by the broader international community.\textsuperscript{1257} Despite all verbal affirmations to this effect, the African commitment to the collective responsibility to protect should therefore not be counted as unconditional.

Overall, the state reactions to the conceptualization of an international responsibility to protect prior to the World Summit can thus be described as lukewarm at best. On the negative side, the opposition of the US to the creation of a legal obligation weighs heavily.

\textsuperscript{1251} Ibid. at 159.
\textsuperscript{1252} See AU, \textit{Ezulwini Consensus, supra} note 1174 at 6; see also Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 160-161.
\textsuperscript{1253} See Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 160-162.
\textsuperscript{1254} See AU, \textit{Ezulwini Consensus, supra} note 1174 at 6; see also Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 161.
\textsuperscript{1255} See AU, \textit{Ezulwini Consensus, ibid.;} see also Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 161.
\textsuperscript{1256} See Bellamy, “Whither the Responsibility to Protect”, \textit{supra} note 63 at 161-162.
\textsuperscript{1257} Ibid.
5.5.4 The Collective Responsibility to Protect at the World Summit

Given the previously ambiguous and overall rather cautious approach by the community of states to the idea of an international responsibility to protect, an endorsement at the World Summit could have proved pivotal to the normative evolution of the concept. Yet, during the negotiations on the final agreement, several states openly rejected a collective international responsibility to protect, questioning its compatibility with the principles of the UN Charter. Accordingly, they opposed the insertion of a reference to the concept in the Outcome Document.

The fact that paragraph 139 eventually alluded to the idea of a collective international responsibility to protect may therefore be regarded as a positive step in its normative development. The most enthusiastic commentators have even interpreted the Outcome Document as a clear and unambiguous acceptance of the concept by the community of states. In Bannon’s opinion, the “failure by the international community to respond [to incidents of genocide and other atrocities] is no longer simply morally blameworthy.” Indeed, the assembled heads of state or government resisted the urge from the US to reduce the concept to a purely moral rather than legal framework.

To appraise the specific normative meaning of the World Summit Outcome Document, a close look at the precise phrasing of paragraph 139 is needed, which reads:

> 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 manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

This statement of the role of the international community in humanitarian emergencies is confined to very basic terms that reveal, moreover, continuing ambiguities with regard to the precise normative meaning of a collective international responsibility to protect. Firstly, the formulation that the states undertake to act through the Security Council leaves open the question of who is the actual bearer of the international responsibility to protect. As Welsh points out,
the broad reference to Chapter VII action by the Security Council points towards an understanding of the collective responsibility as being a sole "UN responsibility to protect", rather than the responsibility of any specific state.\textsuperscript{1266} Moreover, like the reports by the ICISS, the High-Level Panel and the Secretary General, the World Summit did not define the consequences of a failure by the Security Council members to discharge this responsibility through collective action.\textsuperscript{1267} The absence of any reference to the consequences of its violation, however, argues against the proposition that the international responsibility to protect was meant to be a firm legal duty.\textsuperscript{1268}

These doubts about the states' intention to contribute to the establishment of a legal obligation are further reinforced by the cautious wording of their commitment to employ, if necessary, military means under Chapter VII.\textsuperscript{1269} To begin with, the subtle formulation of the states being "prepared to take collective action" falls short of a clear commitment to an existing or emerging duty and seems to imply a sense of voluntariness rather than of obligation.\textsuperscript{1270} In preparing the World Summit, Secretary-General Annan had still raised the question of "an obligation [...] to use [military force] protectively to rescue the citizens of other States from genocide or comparable crimes".\textsuperscript{1271} In the process of drafting the final agreement, this formulation was from the outset replaced with the notion of a "responsibility",\textsuperscript{1272} which already had a weaker normative force than that of an "obligation" or a "duty".\textsuperscript{1273} The original text of the Outcome Document was then further watered down from a clear statement by the states that "we recognize our shared responsibility", to a mere "preparedness" to take collective action.\textsuperscript{1274} The final wording of the World Summit agreement is thus noticeably weaker than previous proposals, an adjustment that can be attributed to those states that had opposed the idea of a strict legal obligation.\textsuperscript{1275} In addition, the state leaders only expressed their preparedness to take action "on a case-by-case basis".\textsuperscript{1276} This qualifier equally runs counter to the idea of a systematic duty.\textsuperscript{1277}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1266} Ibid at 378.
\item \textsuperscript{1267} See Stahn, supra note 35 at 120.
\item \textsuperscript{1268} Ibid at 117-118.
\item \textsuperscript{1269} Ibid at 109, 120 (noting that the World Summit's stance on action under Chapter VII is more reserved than the plain and unconditional acceptance of a responsibility of the international community to use peaceful means, at 109).
\item \textsuperscript{1270} Ibid. at 109; cf. also Bellamy, "Whither the Responsibility to Protect", supra note 63 at 166.
\item \textsuperscript{1271} See UN Secretary-General, \textit{In larger freedom}, supra note 913 at para. 122 [emphasis added].
\item \textsuperscript{1272} See Bellamy, "Whither the Responsibility to Protect", supra note 63 at 165-166.
\item \textsuperscript{1273} See Weiss, \textit{Ideas}, supra note 1 at 103.
\item \textsuperscript{1274} See Bellamy, "Whither the Responsibility to Protect", supra note 63 at 166.
\item \textsuperscript{1275} Ibid. at 167; Stahn, supra note 35 at 109, 120.
\item \textsuperscript{1276} See UN General Assembly, \textit{World Summit Outcome}, supra note 232 at para. 139; see also Stahn, supra note 35 at 109.
\end{enumerate}
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The Outcome Document also fails to set out criteria that would more specifically frame the international responsibility to protect.\(^{1278}\) Paragraph 139 only stipulates that national authorities must “manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity” for the responsibility to protect to transfer from the host state to the international community.\(^{1279}\) It is noteworthy that this threshold is significantly higher than the criteria envisaged by the ICISS as well as the High-Level Panel, which suggested that the fallback responsibility of the international community was activated if a state was “unable or unwilling” to protect its population.\(^{1280}\) By raising the threshold for international action, the UN members further weakened their commitment to collectively protect people at risk.\(^{1281}\)

Another aspect that may define the nature of the international community’s sense of commitment is the treatment of the ICISS’s recommendation that the permanent Security Council members agree to abstain from the use of their veto in order to enable the authorization of military intervention for humanitarian purposes. For Bellamy, this recommendation was “[a]rguably the most important component of the prescriptive element” of the R2P framework.\(^{1282}\) Indeed, an unfettered veto right of the five permanent members would constitute a significant obstacle for the international community in discharging a responsibility to protect through the Security Council. In the case of Darfur, for instance, it has been reported that China blocked coercive measures against the Sudanese government by threatening to veto such a decision in the Security Council, and thus obstructed collective action to end the conflict in the province.\(^{1283}\) The idea that the international community is required to react collectively to humanitarian emergencies could thus have been strengthened, had the permanent Security Council members for these cases agreed to a self-constraint on their discretion in using the veto.

Right to the contrary, however, an agreement as recommended by the ICISS has subsequently found little support in the international community. The High-Level Panel, while removing this recommendation from the specific section on the responsibility to protect, had still more

\(^{1277}\) See Stahn, supra note 35 at 109.

\(^{1278}\) Ibid.

\(^{1279}\) See UN General Assembly, World Summit Outcome, supra note 232 at para. 139; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 165; Welsh, “Responsibility to Protect”, supra note 9 at 378.

\(^{1280}\) See ICISS, Responsibility to Protect, supra note 9 at para. 2.31; High-Level Panel, supra note 912 at para 201; see also Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 165.

\(^{1281}\) See Welsh, “Responsibility to Protect”, supra note 9 at 378.

\(^{1282}\) See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 167.

\(^{1283}\) See Bannon, supra note 61 at 1160.
generally proposed reforms of the voting system in the Security Council. It restated the
ICISS’s plea for self-discipline and called upon the permanent members “to pledge themselves to
refrain from the use of the veto in cases of genocide and large-scale human rights abuses.”
Yet, neither the proposals of the High-Level Panel on Security Council reform, nor the ICISS
proposal on a constructive abstention from the use of the veto, received much support in the
community of states. As for the proponents of R2P, Canada quietly dropped the issue of possible
constraints on the use of the veto, not even mentioning it in the nonpaper that it submitted to the
High-Level Panel. India took up the recommendation of a voluntary agreement by the
permanent Security Council members not to veto R2P resolutions, but was unable to convince
the “permant five” of this proposal. At the World Summit, the draft provision calling upon
the permanent members “to refrain from using the veto in cases of genocide, war crimes, ethnic
cleansing and crimes against humanity” was removed largely due to the opposition of the US.
In the end, there was broad consensus in the community of states against such a voluntary
commitment by the veto powers. The World Summit Outcome Document thus completely
avoided a central element of the prescriptive R2P concept.

What remains of the World Summit is thus the undertaking of the states to individually consider
each case in which “peaceful means [are] inadequate and national authorities manifestly fail to
protect their populations from genocide, war crimes, ethnic cleansing and crimes against
humanity” for action under Chapter VII. This agreement is nothing more than a compromise
solution between supporters and opponents of a legal responsibility to protect, and has been
made even more unclear by the reference to a need for further consideration of the concept in the
General Assembly. Especially the cautious wording of their commitment to collective human
protection, as well as their unwillingness to define a specific set of criteria for intervention or to
push for a self-constraint by the permanent Security Council members in their veto practice
contradicts the proposition that the Outcome Document could serve as evidence for an emerging

1284 See High-Level Panel, supra note 912 at para. 257; see also Bellamy, “Whither the Responsibility to Protect”,
supra note 63 at 156.
1285 See High-Level Panel, ibid. at paras. 256; see also Stahn, supra note 35 at 106; Brunnée & Toope, supra note 86
at 5.
1286 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 167.
1287 Ibid. at 155-156.
1288 Ibid. at 152 n 39.
1289 See Bannon, supra note 61 at 1160.
1290 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 164.
1291 See UN General Assembly, World Summit Outcome, supra note 232 at para. 139.
1292 See Stahn, supra note 35 at 108, 110.
sense of a legal obligation or necessity. Ultimately, the World Summit thus produced little support for the emergence of an international responsibility to protect as a hard legal norm.\footnote{Ibid. at 120.}

5.5.5 The Collective Responsibility to Protect in state and UN practice

While individual policy statements and the UN World Summit have only demonstrated an abstract verbal commitment of the states to an international responsibility for imperiled populations, their reactions to humanitarian crises, through the United Nations and other avenues, may add further normative weight to the concept. In this section, I will make the argument that the verbal endorsement of the collective responsibility to protect has, in recent years, increasingly been matched by the actual practice of states.

At first glance, past and present failures to end massive humanitarian crises seem to contradict the emergence of a customary norm that would require the international community to act. Prior to the publication of the ICISS report, during the Cold War era and into the 1990s, even conscience-shocking situations of large-scale human rights violations had only infrequently prompted external actors to intervene with military force, and even where action had been taken, it had often failed to demonstrate the required determination to produce the desired results.\footnote{See Evans, “Responsibility to Protect”, supra note 25 at 705-706.} Similarly, the Security Council’s “prolonged inaction” in the face of humanitarian crises continues to be a concern for international lawyers still at the beginning of the twenty-first century.\footnote{See Brunée & Toope, supra note 86 at 16.} Weiss specifically points to the conflicts in Darfur, the DRC and northern Uganda as evidence of “in-humanitarian nonintervention” and “[a]ppallingly sparse responsibility to protect those suffering from atrocities that shock the human conscience[...].”\footnote{See Weiss, “R2P After 9/11”, supra note 59 at 746-747.}

The failure by the international community to effectively address conscience-shocking humanitarian crises may have the potential to undermine the proposition that the protection of individuals has become accepted as a responsibility of the broader community of states.\footnote{See Weiss, Ideas, supra note 1 at 31; see also ibid. at 58 and Weiss, “R2P After 9/11”, supra note 59 at 759-760 (“The repeated failure to come to the rescue mocks the value of the emerging R2P norm [...]”); see also Wheeler & Morris, supra note 43 at 447-448.} Ongoing massive human rights violations, such as in Darfur, could suggest that there is not yet a sufficiently strong sense of obligation in the international community that would prompt the powerful states to intervene.\footnote{See Wheeler & Morris, ibid. at 447-448 (with reference to Rwanda, Sudan and the DRC).} Humanitarian intervention still seems to be undertaken on the
basis of a highly selective decision-making process, rather than as an immediate reaction to humanitarian need.\(^{1299}\)

Yet, the treatment of humanitarian crises by the international community, and especially the Security Council practice since the release of the ICISS report exhibit aspects that can support the emergence of an international responsibility to protect. A notable positive form of state practice can, for instance, be found in the Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region, which was agreed on 30 November 2006 at the International Conference on the Great Lakes Region peace process.\(^{1300}\) This protocol contains an express provision in which the states declare their commitment to exercising a collective responsibility to protect populations at risk:

> Member States agree that the provisions of this Article and Article 5 of the Protocol shall not impair
> the exercise of their responsibility to protect populations from genocide, war crimes, ethnic cleansing,
> crimes against humanity, and gross violations of human rights committed by, or within, a State. The
> decision of the Member States to exercise their responsibility to protect populations in this provision
> shall be taken collectively, with due procedural notice to the Peace and Security Council of the
> African Union and the Security Council of the United Nations.\(^{1301}\)

The Great Lakes process unites eleven African states.\(^{1302}\) Their recognition of the international responsibility to protect can be seen as a significant contribution to the development of the principle in the international legal system.\(^{1303}\)

Other positive signals have emanated from the Security Council, both in terms of an abstract verbal endorsement of the concept and, more notably, in its application in practice. Since the turn of the millennium, the Council had demonstrated an increasing interest in developing a doctrine on the protection of civilians, requesting at two occasions that the Secretary-General assemble reports on this issue.\(^{1304}\) In Resolution 1674 (2006), dealing with the protection of civilians in armed conflict, the Security Council members then officially endorsed the concept of a

\(^{1299}\) Ibid at 448.


\(^{1301}\) See Non-Aggression and Mutual Defence in the Great Lakes Region, quoted in: Breau, “Constitutionalization”, supra note 1300 at 559.


responsibility to protect. Initially, this verbal commitment to R2P may have been of limited normative value, as it merely reaffirms “the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”, and thus suffers from the same lack of specificity as the declaration by the state leaders at the World Summit.

Over the last years, however, the treatment by the Security Council of various conflicts has exposed a practical impact of the concept, in spite of its vagueness. Susan C. Breau’s analysis of a number of Security Council resolutions specifically addresses the effects that the concept has had on the nature of peacekeeping missions that have been deployed to different trouble-spots, notably in Africa. Breau suggests that, were the international community’s responsibility to protect as envisaged by the ICISS effectively endorsed, the UN’s peacekeeping practice would need to be transformed into more robust peace enforcement missions. The specific nature of the peacekeeping mandates issued by the Security Council can thus provide important evidence as to the relevance that the collective responsibility to protect has already gained.

As Breau’s analysis shows, the practice of the UN in responding to human rights abuses has changed significantly since the end of 2001. To address humanitarian catastrophes, the Security Council has routinely applied Chapter VII and provided increasingly robust peacemaking mandates that call for the protection of civilians within the field of operations. Breau interprets this as evidence, on the one hand, of a determination on the part of the Security Council to prevent future Rwandas or Srebrenicas, and, on the other hand, of the impact that, amongst others, the ICISS report and especially the conceptualization of a responsibility to react may already have had on recent peacekeeping operations. Indeed, as she suggests, some of these missions heavily support the transformation of the international legal system towards embracing the international responsibility to protect as a legal obligation. Examples for this

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1305 See UN Security Council, Resolution 1674 (2006), UN SCOR, 61st Year, 5430th Mtg., UN Doc. S/Res/1674 (28 April 2006) at para. 4; Matthews, supra note 16 at 143 (for whom the “[o]fficial endorsement of R2P culminated” in this resolution); Breau, “Constitutionalization”, supra note 1300 at 559; see also Stahn, supra note 35 at 100.
1306 See UN Security Council, Resolution 1674 (2006), UN SCOR, 61st Year, 5430th Mtg., UN Doc. S/Res/1674 (28 April 2006) at para. 4 at para. 4; see also Matthews, supra note 16 at 143.
1307 See Breau, “Peacekeeping”, supra note 9.
1308 Ibid. at 432, 444.
1309 Ibid. at 445-453.
1310 Ibid. at 445, 453.
1311 Ibid. at 429, 445.
1312 Ibid. at 431, 438-439, 464.
1313 Ibid. at 464 (noting, however, that such an obligation has not yet crystallized as customary international law and “may be some time off”, Ibid. at 445-446, 464).
development have notably been found in the context of the conflicts in the DRC, Côte d’Ivoire and Burundi

The conflict in the DRC is a case in point in which the Security Council specifically authorized the use of force under Chapter VII for the protection of civilians.\textsuperscript{1314} Warfare and the resultant famine and spread of disease have already claimed an estimated four million human lives, making the conflict in the DRC the deadliest worldwide since the Second World War.\textsuperscript{1315} The UN Security Council originally mandated a peacekeeping mission to observe the implementation of a ceasefire agreement, the United Nations Organization Mission in the Democratic Republic of Congo (MONUC), in 1999.\textsuperscript{1316} Three months later, however, this mandate was expanded to include an authorization to use force under Chapter VII for the protection of civilians,\textsuperscript{1317} and in 2004, it was further strengthened to enable MONUC “to use all necessary means”, \textit{inter alia}, “to ensure the protection of civilians […] under imminent threat of physical violence”.\textsuperscript{1318} On the one hand, the relevance of the original Chapter VII mandate for a discussion of an international duty of humanitarian intervention is limited in that the conflict in the DRC directly involves nine countries,\textsuperscript{1319} and thus qualifies as an international armed conflict that could traditionally trigger Chapter VII action for the maintenance of international peace and security.\textsuperscript{1320} On the other hand, the later Security Council resolutions made no explicit reference to any transboundary effects of the conflict, but rather focussed on human rights violations within the territory of the DRC.\textsuperscript{1321} Similarly, in 2003, the Security Council responded to the upsurge of ethnic violence in the Ituri province and hundreds of deaths in the capital Bunia by mandating an Interim Emergency Multinational Force and authorizing it under Chapter VII “to take all necessary measures to fulfill its mandate”, which encompassed “if the situation requires it, to contribute to

\textsuperscript{1314} See generally \textit{ibid.} at 446-449.
\textsuperscript{1315} See Weiss, \textit{Ideas}, supra note 1 at 52-53; Weiss, “R2P After 9/11”, \textit{supra} note 59 at 747.
\textsuperscript{1316} See UN Security Council, Resolution 1279 (1999), UN SCOR, 55th Year, 4076th Mtg., UN Doc. S/Res/1279 (30 November 1999) at paras. 4-5; see also Breau, “Peacekeeping”, \textit{supra} note 9 at 446.
\textsuperscript{1317} See UN Security Council, Resolution 1291 (2000), UN SCOR, 55th Year, 4104th Mtg., UN Doc. S/Res/1291 (24 February 2000) at para. 8; see also Breau, “Peacekeeping”, \textit{supra} note 9 at 446-447.
\textsuperscript{1318} See UN Security Council, Resolution 1565 (2004), UN SCOR, 59th Year, 5048th Mtg., UN Doc. S/Res/1565 (1 October 2004) at paras. 4(b), 6; see also Breau, “Peacekeeping”, \textit{supra} note 9 at 448.
\textsuperscript{1319} See Weiss, \textit{Ideas}, supra note 1 at 52.
\textsuperscript{1320} See Breau, “Peacekeeping”, \textit{supra} note 9 at 449.
\textsuperscript{1321} \textit{Ibid.}
the safety of the civilian population." 1322 This Interim Emergency Multinational Force effectively prevented an aggravation of the crisis. 1323

The case of Côte d'Ivoire can be quoted as another example of the UN equipping intervention forces with a robust mandate to protect civilians. 1324 In Resolution 1528 (2004), the Security Council not only mandated the troops with tasks of traditional peacekeepers, but also to use armed force for the protection of civilians, but "without prejudice to the responsibility of the Government of National Reconciliation" in this area. 1325 In the opinion of Breau, this robust mandate has probably prevented the deaths of thousands. 1326

As a final point, recent international reactions to the ongoing conflict in Burundi have established not only another precedent for the authorization of armed force for humanitarian purposes, but also examples for the use of R2P language in this context. 1327 Since 1993, the country had been the scene of the first genocide on African ground in modern times, preceding and facilitating the humanitarian catastrophe in Rwanda. 1328 The international community largely ignored this conflict for a decade, until the Security Council finally authorized intervention in 2004. 1329 Again, it must be noted that other nations were directly affected by the conflict in Burundi. 1330 Nonetheless, the Security Council also showed a willingness to authorize the use of force to protect civilians within the country. 1331 At the same time, and in line with the ICISS proposal and the World Summit Outcome Document, the relevant Resolution 1545 (2004) also reiterates the primary responsibility of the transitional government of Burundi for the protection of its people. 1332 Breau moreover points out that some statements made during the Security Council debate of the operation in Burundi "included some tentatively language with respect to the sense of a responsibility to protect". 1333 The UK representative, for instance, expressed the

1322 See UN Security Council, Resolution 1484 (2003), UN SCOR, 58th Year, 4764th Mtg., UN Doc. S/Res/1484 (30 May 2003) at paras. 1, 4; see also Breau, "Peacekeeping", supra note 9 at 447-448; Weiss, "R2P After 9/11", supra note 59 at 755.
1323 See Weiss, "R2P After 9/11", supra note 59 at 755.
1324 See Breau, "Peacekeeping", supra note 9 at 449.
1325 See UN Security Council, Resolution 1528 (2004), UN SCOR, 59th Year, 4918th Mtg., UN Doc. S/Res/1528 (27 February 2004) at paras. 6(i), 8; see also Breau, "Peacekeeping", supra note 9 at 449.
1326 See Breau, "Peacekeeping", supra note 9 at 449.
1327 Ibid. at 450-452.
1328 Ibid. at 450.
1329 Ibid.
1330 Ibid.
1333 See Breau, "Peacekeeping", supra note 9 at 450.
view that “we are obliged to give [...] support [to solutions produced by the Africans]”, and the representative of the US stated that “we must help our friends when they step up to the challenge as they are doing here.”

Given the general attitude, notably of the US, towards a legal responsibility to protect, these imperative formulations must certainly not be overstated as supporting the emergence of a legal duty to intervene, and Breau accordingly concludes that a sense of a legal obligation cannot yet be observed. Nevertheless, the aforementioned cases demonstrate the increasing preparedness of the Security Council to authorize military force for the protection of civilians in order to prevent or halt humanitarian disasters. This willingness could bode well for the emergence of a legal responsibility to protect, if it was consistently shown in the face of actual or apprehended humanitarian catastrophes.

In this regard, however, the international response to the conflict in Darfur has been considered as detrimental: Breau, for instance, specifically points to this case as an exception to the routine use of Chapter VII mandates for human protection in the last five years, and as evidence that there is no uniform international practice on intervention yet. In her opinion, the Security Council’s failure to adopt a robust mandate for the people of Darfur proves that there is no rule yet that the international community is responsible to protect populations at risk.

5.5.6 Negative State Practice in Darfur

Indeed, Darfur has repeatedly been cited as a key test case for the international community’s responsibility to protect, and for many, the international community has failed this test. A

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1335 See text accompanying notes 1240-1249.
1336 See Breau, “Peacekeeping”, supra note 9 at 464.
1337 Cf. ibid. 446, 464.
1338 Ibid. at 429, 445, 453, 464.
1339 Ibid. at 452-453.
1341 See Hamilton, supra note 35 at 293; Georgette Gagnon, Address (Conference on Reforming the United Nations: The Use of Force to Safeguard International Security and Human Rights, Northwestern University School of Law, 25 January 2005), (2005) 4:1 Northwestern Journal of International Human Rights 118 (HeinOnline) at 120; Breau, “Peacekeeping”, supra note 9 at 453, 464 (“Darfur is the key example of where the international community is failing in its responsibility”, Breau, “Peacekeeping”, supra note 9 at 464); see generally Matthews, supra note 16 at 150.
close analysis of the international treatment of this conflict may however also justify other conclusions.

At the root of the current conflict in Darfur are long-term disputes between farmers and herders over the use of the region’s resources. In February 2003, two rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), revolted against the central Sudanese government. In response, the government armed the so-called “Janjaweed” militia to support the regular armed forces, fighting off the rebellion by attacking civilian populations thought of to be supporting the rebels. The conflict results as one between different ethnic groups, as the Janjaweed militia is largely made up of Arab fighters, whereas the rebel groups are primarily supported by the African tribes of the Fur, Zaghawa and Massalit. Janjaweed and government forces have specifically targeted civilians through a variety of tactics, including the burning of villages, torture and rape. Several hundred thousand people have died, more than two million have been displaced, and every month more than 5,000 die as a direct result of violence, conflict-related disease and malnutrition. The attacks on the civilian population have internationally been recognized as qualifying as a genocide, and on July 14, 2008, the prosecutor at the International Criminal Court (ICC), Luis Moreno-Ocampo, formally requested an arrest warrant against the Sudanese president, Omar Hassan al-Bashir, accusing him of genocide and crimes against humanity. Al-Bashir was charged with being the mastermind of a plan to destroy the ethnic groups of the Fur, Massalit and Zaghawa, and is the

1342 See Human Rights First, supra note 16; Matthews, supra note 16 at 144.
1343 See Breau, “Peacekeeping”, supra note 9 at 452.
1344 ibid.; Human Rights First, supra note 16; Matthews, supra note 16 at 144.
1345 See Breau, “Peacekeeping”, supra note 9 at 452; Human Rights First, supra note 16; Matthews, supra note 16 at 144.
1346 See Human Rights First, ibid.; Matthews, supra note 16 at 144.
1347 See Breau, “Responsibility to Protect”, supra note 25 at 703 (“at least two hundred thousand people”); Human Rights First, supra note 16; Matthews, supra note 16 at 144; Weiss, “R2P After 9/11”, supra note 59 at 747.
1348 See Breau, “Responsibility to Protect”, supra note 25 at 703; Human Rights First, supra note 16; Matthews, supra note 16 at 144; Weiss, “R2P After 9/11”, supra note 59 at 747 (calculating “as many as three million forcibly displaced”).
1349 See Evans, “Responsibility to Protect”, ibid. at 703.
first sitting head of state against whom charges are brought by the ICC.\textsuperscript{1352} Accordingly, Darfur may serve as a "textbook example" of a state that is, in the words of the ICISS, "clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities".\textsuperscript{1353}

At the same time, the international community, and particularly the UN, is also being blamed for failing to protect the people of Darfur.\textsuperscript{1354} The UN has been involved in Sudan for several years.\textsuperscript{1355} In June 2004, the Security Council set up the UN Advance Mission in Sudan (UNAMIS) to prepare for the deployment of a full-fledge peace support mission following the signing of a peace agreement between the government and the SLA.\textsuperscript{1356} In March 2005, UNAMIS was transformed into the United Nations Mission in Sudan (UNMIS) with the mandate of supporting the implementation of a Comprehensive Peace Agreement (CPA).\textsuperscript{1357} In the meantime, the AU Peace and Security Council had established the African Union Mission in Sudan (AMIS) to monitor compliance with a ceasefire agreement.\textsuperscript{1358} This AU force, however, presented itself as largely ineffective.\textsuperscript{1359}

UNMIS was initially mandated to liaise and coordinate with AMIS,\textsuperscript{1360} and on May 16, 2006, the Security Council expressed its intention that UNMIS take over the military operations in Darfur from AMIS.\textsuperscript{1361} Sudan, however, while agreeing to an extension of AMIS until December 2006, continuously voiced its rejection of a UN force.\textsuperscript{1362} In April 2007, the mandate of UNMIS was

\textsuperscript{1352} Ibid.
\textsuperscript{1353} See ICISS, \textit{Responsibility to Protect}, supra note 9 at para. 2.31; see Hamilton, supra note 35 at 293; see also Gagnon, supra note 1341 at 120; see generally Matthews, supra note 16 at 150.
\textsuperscript{1354} See Hamilton, supra note 35 at 293; Gagnon, supra note 1341 at 120; see generally Matthews, supra note 16 at 150.
\textsuperscript{1355} See generally UN Mission in Sudan (UNMIS), \textit{Mission's Mandate}, online: UNMIS <http://www.unmiss.org/english/mandate.htm>; Matthews, supra note 16 at 149.
\textsuperscript{1356} See UN Security Council, Resolution 1547 (2004), UN SCOR, 59th Year, 4988th Mtg., UN Doc. S/Res/1547 (11 June 2004); see also UN Mission in Sudan (UNMIS), \textit{Mission Background}, online: UNMIS <http://www.unmiss.org/english/background.htm>.
\textsuperscript{1358} See African Union Mission in Sudan (AMIS), \textit{History}, online: AMIS <http://www.amis-sudan.org/history.html>; see also UN Mission in Sudan (UNMIS), \textit{UNMIS and African Union Mission in Sudan}, online: UNMIS <http://www.unmiss.org/english/au.htm> (last visited on 13 July 2008; page appears to have been removed in the meantime); Matthews, supra note 16 at 145.
\textsuperscript{1359} See Weiss, "R2P After 9/11", supra note 59 at 759; Matthews, supra note 16 at 145.
\textsuperscript{1360} See UN Security Council, Resolution 1590 (2005), UN SCOR, 60th Year, 5151st Mtg., UN Doc. S/Res/1590 (24 March 2005) at paras. 1, 4(a) at para 2; see also UNMIS, \textit{UNMIS and African Union Mission in Sudan}, supra note 1358.
\textsuperscript{1361} See UN Security Council, Resolution 1679 (2006), UN SCOR, 61st Year, 5439th Mtg., UN Doc. S/Res/1679 (16 May 2006); see also Matthews, supra note 16 at 149.
\textsuperscript{1362} See Weiss, \textit{Ideas}, supra note 1 at 57.
expanded, and on July 31, 2007, having eventually obtained the Sudanese government’s consent, the Security Council finally authorized an “AU/UN Hybrid operation in Darfur (UNAMID)”.

The United Nations has for long been criticized for failing to take determined action for the protection of civilians. This criticism has targeted different aspects of the Security Council’s treatment of the crisis: firstly, it has been deplored that the Security Council’s initial response to the established crimes against humanity had been “staggeringly slow”, and that the Council had been unwilling to provide any robust mandate whatsoever for the protection of civilians. Subsequently, when the Security Council considered to authorize a strong UN force to take over peacekeeping tasks from AMIS, it attracted criticism for trying to secure the Sudanese government’s consent for such a mission, attempts that ultimately resulted in the negotiation of the hybrid UNAMID force. In Weiss’s view, this diplomatic strategy amounted to “ignor[ing] that the essential element of R2P is the international responsibility to act, with or without the approval of the host country”. Finally, even after the Security Council had formally endorsed UNAMID, and in the face of further escalating violence, the deployment of international troops continued to be delayed. For Weiss, this “painful dithering” of the Security Council demonstrates, at the very least, that international practice in reality has not yet caught up with the endorsement of the responsibility to protect in multilateral rhetoric, and could be even more disastrous for international law than the slow response to the genocide in Rwanda.

Yet, the slow international response to the crisis in Darfur over the last years need not necessarily contradict the emergence of an international legal norm of a collective responsibility to protect. Firstly, the actual conduct of states is not as of itself determinative of the development of customary international law, but only to the extent that it is accompanied by a corresponding opinio juris sive necessitatis. It thus needs to be examined whether the fact that the

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1363 See UN Security Council, Resolution 1769 (2007), UN SCOR, 62nd Year, 5727th Mtg., UN Doc. S/Res/1769 (31 July 2007); see also Matthews, supra note 16 at 145, 149.
1364 See Breau, “Peacekeeping”, supra note 9 at 452; see also Weiss, “R2P After 9/11”, supra note 59 at 759 (“The chasm between the magnitude of the suffering and the international response could hardly have been greater.”)
1365 See Breau, “Peacekeeping”, ibid. at 452; see also Weiss, “R2P After 9/11”, supra note 59 at 742.
1366 See Weiss, Ideas, supra note 1 at 56-57.
1367 See Matthews, supra note 16 at 145.
1368 See Weiss, Ideas, supra note 1 at 56; but see Matthews, supra note 16 at 150-152; see also text accompanying notes 1387-1392.
1369 See Matthews, supra note 16 at 150.
1370 See Weiss, “R2P After 9/11”, supra note 59 at 742.
1371 Ibid. at 757; Weiss, Ideas, supra note 1 at 54.
1372 See text accompanying notes 349-354.
international community did not react in a faster or more determined fashion proves that the foreign states did not consider themselves responsible for intervening in Darfur. Moreover, an in-depth analysis of the Security Council’s response to the crisis exposes some evidence that its decisions may even have been guided by a sense of legal responsibility, rather than contradicting it.

As for the first aspect, the existence or absence of the international community’s sense of a legal obligation or at least of a necessity to protect the inhabitants of the Darfur province, Weiss observes several alternative reasons for the current lack of decided international intervention here and in other case.\(^{1373}\) Firstly, the political will to engage in military intervention for humanitarian protection has decreased after 9/11, as major states are more preoccupied with the war on terror and also, since the US-led invasion of Iraq, more easily face charges of imperialism from developing countries when they refer to humanitarianism as a reason for intervention.\(^{1374}\) Secondly, even the more powerful states appear to lack the operational capacities for these missions, as their military forces are either generally not sufficiently equipped, or, as in the case of the US, tied down in other conflicts, namely in Afghanistan and Iraq.\(^{1375}\) Accordingly, the failure of the international community to react sooner and with a more robust mandate may, at least partly, be explained by an absence of the required operational capacities and political will, rather than a lack of normative conviction.\(^{1376}\) It therefore does not automatically undermine the claim to the emergence of a customary norm of an international responsibility to protect.

Right to the contrary, the international discussions and reactions regarding the genocide in Darfur may even feature aspects that support the normative development of the collective responsibility to protect in the arena of international law.\(^{1377}\) On the one hand, even some of those states on the Security Council that opposed coercive measures against Sudan alluded to the R2P concept, suggesting that the threshold where the Sudanese government had manifestly failed

\(^{1373}\) Ibid. at 747-748.

\(^{1374}\) Ibid. at 747.

\(^{1375}\) Ibid. at 747-748, 753-756.

\(^{1376}\) Cf. Weiss, “R2P After 9/11”, supra note 59 at 742-743 (noting more generally that “[n]ormative developments and political reality are rarely in synch”, and that specifically the consensus about R2P has been growing steadily since the early 1990s, Weiss, “R2P After 9/11”, supra note 59 at 742; despite this lack of political will, he still observes “an acceptance by most governments of the collective responsibility to protect”, Weiss, “R2P After 9/11”, supra note 59 at 745; for Weiss, accordingly, “the 2005 World Summit marked the zenith of international normative consensus about R2P, [while] the blow-back from 9/11 and the war in Iraq along with the absence of any military capacity besides the American one, which is tied down, explains the current nadir in actual humanitarian intervention”, Weiss, “R2P After 9/11”, supra note 59 at 742; in his words, “[w]e are at the dawn of a new normative era, but in the dusk of the bullish days of humanitarian intervention”, Weiss, “R2P After 9/11”, supra note 59 at 743.

\(^{1377}\) See e.g. Matthews, supra note 16 at 152.
to fulfill its primary responsibility had not yet been met.\textsuperscript{1378} Instead of denying an international responsibility to protect, these states relied on the argument that this responsibility is complementary to the primary responsibility of the host state, and had not yet been activated in the case of Sudan.\textsuperscript{1379} In light of this reasoning, as debatable as it may in the present case be, the initially slow response by the Security Council does not provide clear evidence that its member states have not accepted in practice the international community’s collective responsibility to protect.

Moreover, as Matthews sets out in some detail, different aspects of subsequent Security Council resolutions indicate that the Council, despite its present failure to effectively end the crisis, has endeavored to implement the R2P framework.\textsuperscript{1380} Matthews recalls the complexity of the R2P framework, which allows for, or even demands, diverse reactive measures.\textsuperscript{1381} Some of these measures were taken by the Security Council under explicit invocation of a responsibility to protect or, at least, in immediate proximity to the recognition of this concept.\textsuperscript{1382} For instance, in Resolution 1672 (2006), the Security Council subjected individual Sudanese officials to sanctions, which is one of the measures explicitly discussed by the ICISS.\textsuperscript{1383} Subsequent Security Council resolutions, moreover, combine the endorsement of such practical steps with an indirect invocation of a responsibility to protect. Resolution 1679 (2006), for instance, declared the UN’s intention to take over military operations in Darfur from the AU, and explicitly recalled Resolution 1674 (2006), which had asserted the Security Council’s responsibility for the protection of civilians from crimes against humanity.\textsuperscript{1384} Resolution 1679 (2006) was thus the first of a number of resolutions, culminating in Resolution 1769 (2007) with its authorization of UNAMID, that exhibits a simultaneous endorsement of a collective responsibility to protect in

\textsuperscript{1378} Cf. e.g. Algeria, Representative on the UN Security Council Mr. Baali, Statement on behalf of Algeria, Angola and Benin following the vote on Security Council Resolution 1556 (2004), UN SCOR, 59th Year, 5015th Mtg., UN Doc. S/PV.5015 (30 July 2004) 5; see Stahn, supra note 35 at 117.
\textsuperscript{1379} See Stahn, supra note 35 at 117.
\textsuperscript{1380} See Matthews, supra note 16 at 148-150, 152.
\textsuperscript{1381} See IC ISS, Responsibility to Protect, supra note 9 at paras. 4.1-4.9; Matthews, supra note 16 at 148, 150.
\textsuperscript{1382} See Matthews, supra note 16 at 148-150.
\textsuperscript{1383} See IC ISS, Responsibility to Protect, supra note 9 at para. 4.9; UN Security Council, Resolution 1591 (2005), UN SCOR, 60th Year, 5153rd Mtg., UN Doc. S/Res/1591 (29 March 2005) at para. 3(d), (e); UN Security Council, Resolution 1672 (2006), UN SCOR, 61st Year, 5423rd Mtg., UN Doc. S/Res/1672 (25 April 2006) at para. 1; see also Matthews, supra note 16 at 148.
\textsuperscript{1384} See UN Security Council, Resolution 1679 (2006), UN SCOR, 61st Year, 5439th Mtg., UN Doc. S/Res/1679 (16 May 2006), preamble, at para. 3; UN Security Council, Resolution 1674 (2006), UN SCOR, 61st Year, 5430th Mtg., UN Doc. S/Res/1674 (28 April 2006) at para. 4; see also Matthews, supra note 16 at 149 (noting the change of attitude within the Security Council, which had previously for several years refrained from calling for intervention by an international military force).
Security Council rhetoric and practice. Matthews concludes that "the references to R2P [in these resolutions] suggest that the Security Council may be taking its responsibility to protect seriously and will continue to act accordingly", and that R2P is, even and specifically in the case of Darfur, "showing [...] immediate signs of implementation."

The criticism remains to be addressed, however, that the Security Council’s attempt to obtain Sudan’s consent to the deployment of UN forces signifies a refusal to fully subscribe to the concept of a collective responsibility to protect. Countering this objection, Matthews makes a strong claim that the Council’s ambition to secure Sudan’s support before authorizing an intervention force was consistent with the R2P framework, arguably even more so than immediate intervention. He argues that the international community is expected to cooperate as much as possible with the host government, which is the bearer of the primary responsibility to protect. Moreover, such cooperation can help the external forces to more effectively fulfill their mandate, thus enhancing the reasonable prospects of success of the intervention and securing its proportionality, which are required by two of the ICISS’s precautionary principles. While no definite appraisal of the Security Council’s proceedings in the Darfur conflict in light of R2P is intended here, the foregoing observations indicate that its pursuit of an agreement with the Sudanese government is not incompatible with the recognition of an international responsibility to protect.

In conclusion, far from constituting a clear example of negative state practice, the Security Council’s approach to the genocide in Darfur can, to a certain extent, even serve as a positive example of the international community’s endeavor to fulfill its responsibility to protect in

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1386 See Matthews, supra note 16 at 150.

1387 Cf. Elvir Camdzic & John Weiss, “Darfur: Where is the will?” San Francisco Chronicle (20 September 2006) B9, online: SFGate <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/09/20/EDG6PKDTM51.DTL>; see also Weiss, Ideas, supra note 1 at 56; see generally Matthews, supra note 16 at 150-152.

1388 See Matthews, ibid. at 150-151.

1389 Ibid. at 151.

1390 See ICISS, Responsibility to Protect, supra note 9 at paras. 4.39-4.43; Matthews, supra note 16 at 151; see also Evans, “Responsibility to Protect”, supra note 25 at 719 (stating that Darfur, at the time of writing the article, was “not a case where I would argue that external forces should fight their way in whatever resistance of the national government: if nothing else [the reasonable prospects criterion] would argue against that.”)

1391 Cf. e.g. Weiss’s judgment that “it is appalling that after three and a half years the Security Council [was] still dickering over the consent of a government that is responsible for the deaths of hundreds of thousands of people and the flight of millions from their homes”, Ideas, supra note 1 at 57.

1392 See Matthews, supra note 16 at 150-151.
accordance with the R2P framework.\textsuperscript{1393} It thus contributes to the emergence of a collective responsibility under customary international law.\textsuperscript{1394} This development has, so far, not been compromised by the Security Council’s making the UN mission contingent upon Sudan’s consent, as this course of action generally falls within the range of options that, for instance, the ICISS had envisaged for discharging the collective responsibility to protect.\textsuperscript{1395} Only if the Security Council consistently eschewed intervening without the host government’s agreement, this could impair the crystallization of a collective responsibility to protect as an international legal norm.\textsuperscript{1396}

5.5.7 Conclusion: International Responsibility to Protect as “Legal Soft Law”

The international responsibility to protect is today, and has since its articulation by the ICISS been, fraught with ambiguities that raise the question if it has ever been meant to become a hard norm of international law. Notably, both the ICISS report and subsequent endorsements of the notion of an international responsibility to protect lack a clear definition of the bearer of that responsibility, and fail to address the consequences of its violation. Moreover, its proponents have avoided using the legal terms of a “duty” or “obligation”, or to formulate a right of the targeted victims of massive human rights violations to foreign intervention.\textsuperscript{1397}

This reluctance to establish a specific framework for a legal obligation of humanitarian intervention is particularly manifest in state declarations, including at the World Summit. The World Summit Outcome Document provides nothing more than a compromise on the issue, accommodating to a large extent the concerns of those states that opposed an international responsibility to protect.\textsuperscript{1398} At the same time, while the World Summit’s declaration of a “preparedness” to take collective action through the Security Council can hardly be considered as evidence that a hard norm of international law is emerging, the proponents of a collective responsibility to protect still resisted the pressure, namely from the US, to squarely place the concept in the category of morality. The endorsement of R2P in paragraph 139 of the Outcome Document therefore at least allows for the further development of an international responsibility to protect in the legal arena, although it has not significantly promoted this process itself.\textsuperscript{1399}

\begin{itemize}
\item \textsuperscript{1393} Ibid. at 148-150, 152.
\item \textsuperscript{1394} Ibid. at 152.
\item \textsuperscript{1395} Ibid. at 150-152.
\item \textsuperscript{1396} Cf. Ibid. at 152 (mentioning specifically the hypothesis that the Sudanese government retracts its consent).
\item \textsuperscript{1397} See text accompanying notes 1233-1238 and 1269-1277.
\item \textsuperscript{1398} See Part 5.5.4, above.
\item \textsuperscript{1399} See Parts 5.5.3-5.5.4, above.
\end{itemize}
More conducive to the concept's consolidation than the World Summit agreement has been its subsequent endorsement by the Security Council. Initially, the verbal embrace of the "provisions [...] of the 2005 World Summit Outcome Document regarding the responsibility to protect" in Resolution 1674 (2006) had produced little more than a reaffirmation of the status quo after the summit. The actual practice of the Security Council in the past few years, however, has demonstrated an increased willingness to authorize military intervention for the protection of individuals, which has recently been coupled with explicit references to a responsibility to protect. There appears to be a clear and growing commitment of the Security Council members to observe a responsibility for populations at risk, if necessary by means of armed force. Importantly, the slow response to the genocide in Darfur and the attempts to cooperate with the government, whose leader has in the meantime officially been accused of this and other crimes in the region, does not contradict this commitment. On the contrary, it can even be understood as a further endeavor of discharging an international responsibility to protect.

In sum, the past years have produced a significant amount of positive evidence that the members of the international community recognize a certain, not just moral, responsibility to protect people in any country where they are at risk from genocide of massive ethnic cleansing, and that they are willing to discharge this responsibility through the Security Council. This development is moreover consistent with the ethical theory outlined before, according to which humanitarian intervention is not just a right but also a duty. On these grounds, it seems justified to consider the international responsibility to protect as having crystallized as a principle of the contemporary international legal system.

At the same time, the aforementioned ambiguities remain, and it must be recalled that many, if not most, states reject the notion of a specific legal obligation to come to the rescue of foreigners in other states. There is consequently no sufficiently widespread combination of state practice and opinio juris to establish a customary legal duty of humanitarian intervention borne by either the United Nations, the Security Council or individual states under a positivist approach. Also, the resistance to such a duty is sufficiently broad and clear as to leave no margins of interpretation within which ethical principles could influence the final conclusion on the content

1400 See text accompanying notes 1307-1337.
1401 See Part 5.5.6, above.
1402 But see Weiss, Ideas, supra note 1 at 122 ("there still is appallingly sparse responsibility to protect those suffering from atrocities that shock the human conscience -- unhumanitarian nonintervention.")
1403 See Part 4.7, above.
1404 See Part 5.5.3, above; but see Weiss, "R2P After 9/11", supra note 59 at 745 ("In short, there is an acceptance by most governments of the collective responsibility to protect.")
of the law. As a result, the existence of an international responsibility to protect as a specific obligation under hard international law must be denied.\textsuperscript{1405}

On the basis of this analysis, the proper assessment of the international responsibility to protect under current international law seems to be that of "legal soft law" as defined by Chinkin.\textsuperscript{1406} This notion of "legal soft law" encompasses norms that take the form of hard law, as opposed to resolutions of international organisations, codes of conducts and other non-legal instruments, but lack the specificity to qualify as hard law themselves.\textsuperscript{1407} Pursuant to this distinction, obligations are "hard" only if they have been set out in a sufficiently precise form.\textsuperscript{1408} Soft law, by contrast, is often a compromise between proponents and opponents of regulating a particular issue, and combines a degree of constraint with a certain flexibility and freedom to manoeuvre.\textsuperscript{1409} Legal soft law can notably emerge from treaties to the extent that they stipulate "general goals and programmed action", rather than specific rights or obligations, and insofar lack the precise wording required for hard law.\textsuperscript{1410} The international responsibility to protect meets this definition, as the international commitment to protect people at risk has been delineated through the hard law process of international custom but lacks the specificity of a hard obligation. It should therefore be qualified as legal soft law.\textsuperscript{1411}

In the practical application, the existence of a legal soft law norm requiring the necessary measures for the protection of individuals raises the need to fill this programme of action with contents. Unless guidelines can be found in positive law, which will be denied in the following

\textsuperscript{1405} See Stahn, \textit{supra} note 35 at 120 (finding "hardly any evidence that states understand the [...] responsibility to protect in the sense of a positive duty to act under international law", and suggesting that "[u]nder current international law, their obligations encompass at best the duties identified by the ILC Article 41 of the 2001 Articles on State Responsibility," that is, a positive duty "to cooperate to bring to an end through lawful means any serious breach [...]", and a negative obligation "not to recognize as lawful a situation created by a serious breach [...]", nor render aid or assistance in maintaining that situation"; Article 41(1) and (2) ILC Draft Articles on State Responsibility; Stahn, \textit{ibid.} at 115, 120; Wheeler & Morris, \textit{supra} note 43 at 458, 460 (stating that "the norm that emerged during the 1990s – codified in the 2005 World Summit Outcome document – is permissive rather than obligatory"); Breau, "Peacekeeping", \textit{supra} note 9 at 453, 464 (concluding from her analysis of the Darfur case that "the responsibility to protect has not been adopted as a rule in best practice", at 453, and that "the notion of a legal obligation [is lacking and] may be some time off, but there is a clear movement in that direction in the practice of the United Nations in peace enforcement", at 464; see also Breau, "Constitutionalization", \textit{supra} note 1300 at 559, 560).


\textsuperscript{1407} \textit{Ibid.} at 851 and n. 2; see also Welsh, "Responsibility to Protect", \textit{supra} note 9 at 380-381, n 55.

\textsuperscript{1408} See Chinkin, \textit{ibid.} at 851.

\textsuperscript{1409} Cf. \textit{ibid.} at 853, 861.

\textsuperscript{1410} \textit{Ibid.} at 851.

\textsuperscript{1411} Cf. Stahn, \textit{supra} note 35 at 117-118 (suggesting that the notion of a responsibility to protect may indeed have been intended by its proponents as "soft law" rather than an emerging norm of hard law); cf. also Welsh, "Responsibility to Protect", \textit{supra} note 9 at 380, n. 55.
paragraph, it seems preferable to refer to principles of ethical law for guidance in discharging this responsibility.

5.6 Criteria for Humanitarian Intervention

Having concluded that humanitarian intervention to prevent or halt large-scale killings or large-scale ethnic cleansing is legal under contemporary international law, and may even be demanded by a principle of legal soft law, a need arises to define more precisely the conditions under which such intervention can or ought to be undertaken. As Wheeler and Morris note, “the question of when to intervene [is] one of degree”.

The establishment of criteria to determine whether or not force should be employed is therefore a crucial issue.

In recognition of this significance, both the ICISS and subsequently the High-Level Panel and the Secretary-General had included as an integral part of their reports criteria on when to use force. The ICISS had proposed, in addition to the just cause threshold, the complementary precautionary principles of right intention, last resort, proportional means and reasonable prospects. These principles are not entirely novel, but rather have a longer ideological tradition, particularly in Christian “just war” theory, but also in other major world religions and philosophies. Ultimately, the ICISS mainly affirmed criteria that had already been spelled out in the preceding decades, in works by international commissions and independent scholars. The ICISS’s precautionary principles were then, in turn, endorsed with only minor revisions by the High-Level Panel. Secretary-General Annan, finally, embraced the calls for guidelines on the use of force in his own report “In Larger Freedom”. Notably, however, he decoupled these criteria from the R2P framework, which he discussed as a matter of human rights protection, and moved them into the section on force. Moreover, unlike the High-Level Panel, which had suggested an adoption of guidelines on the use of force in resolutions of both the

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1412 See Wheeler & Morris, supra note 43 at 456.
1413 Ibid.
1414 See Evans, “Responsibility to Protect”, supra note 25 at 716.
1415 See ICISS, Responsibility to Protect, supra note 9 at xii; see also Evans, “Responsibility to Protect”, supra note 25 at 710-711.
1416 See Evans, ibid. at 710; see also Stahn, supra note 35 at 114 (at least for the just cause threshold and the further principles of right intention, last resort, and proportional means).
1417 See Weiss, Ideas, supra note 1 at 107.
1418 See High-Level Panel, supra note 912 at para. 207; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 156; see also Weiss, Ideas, supra note 1 at 116; Breau, “Peacekeeping”, supra note 9 at 436.
1419 See UN Secretary-General, In larger freedom, supra note 913 at para. 126; see also Brunée & Toope, supra note 86 at 6.
1420 See UN Secretary-General, In larger freedom, supra note 913, III.E, IV.A; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 157 (speaking of “a seemingly minor amendment that had important consequences”).
General Assembly and the Security Council, Annan regarded the further consideration of such criteria as a matter for the Security Council only.\textsuperscript{1421} Despite the long and broad tradition of the proposed precautionary principles, as well as their consistent endorsement in subsequent reports, the response that they caused in the community of states was overwhelmingly negative. Almost nobody was willing to subscribe to or even further promote these criteria.\textsuperscript{1422} The permanent members of the Security Council, for instance, were concerned that such guidelines would have detrimental effects as they constrained their "freedom for maneuver" in addressing threats to the international order.\textsuperscript{1423} The United States in particular refused to subscribe to any criteria that it supposed would, on the one hand, limit its discretion in deciding on when and where to intervene with armed force, while, on the other hand, demanding that it engage its forces to discharge the international responsibility to protect, although it may not have a national interest in the case at hand.\textsuperscript{1424} Only after the Gingrich/Mitchell report, like Annan's "In Larger Freedom", had decoupled the guidelines on the use of force from the concept of a collective responsibility to protect human rights, the US re-engaged in the discussion of R2P.\textsuperscript{1425} Finally, the UK and France were primarily concerned that the establishment of criteria might not be fit to produce the required political will for effective responses to humanitarian crises.\textsuperscript{1426}

At the other end of the spectrum of opposition, many developing countries, especially from Asia and Africa, feared that a set of criteria would be abused by the more powerful states to justify armed interventionism against the weak,\textsuperscript{1427} and could therefore contribute to a proliferation rather than a limitation of the use of force.\textsuperscript{1428} This argument also had strong supporters within the Security Council, with Russia and China being equally worried about the potential for abuse.\textsuperscript{1429} The US-led invasion of Iraq in 2003 only further augmented these concerns,\textsuperscript{1430} and

\textsuperscript{1421} See Brunnée & Toope, \textit{supra} note 86 at 14.
\textsuperscript{1422} See Evans, "Responsibility to Protect", \textit{supra} note 25 at 716.
\textsuperscript{1423} See Bellamy, "Whither the Responsibility to Protect", \textit{supra} note 63 at 153.
\textsuperscript{1424} See Welsh, "Conclusion", \textit{supra} note 219 at 180; Welsh, "Responsibility to Protect", \textit{supra} note 9 at 376; Bellamy, "Whither the Responsibility to Protect", \textit{supra} note 63 at 151; see also Evans, "Responsibility to Protect", \textit{supra} note 25 at 716-717 (noting "the hostility of the United States [to adopting any guidelines] that could limit in any way the Security Council's – and by extension, its own – complete freedom to make judgments on a case-by-case basis [...]"
\textsuperscript{1425} See Bellamy, \textit{ibid.} at 162-163.
\textsuperscript{1426} See Welsh, "Conclusion", \textit{supra} note 219 at 204, n.4; Bellamy, "Whither the Responsibility to Protect", \textit{supra} note 63 at 152.
\textsuperscript{1427} See Bellamy, \textit{ibid.} at 153.
\textsuperscript{1428} See Evans, "Responsibility to Protect", \textit{supra} note 25 at 716-717 (criticizing this argument for being more passionate than intelligible).
\textsuperscript{1429} See Bellamy, "Whither the Responsibility to Protect", \textit{supra} note 63 at 166.
had thus its share in contributing to a stalemate in the General Assembly discussion on criteria for humanitarian intervention.1431

At the World Summit, any mention of criteria for the use of force was omitted.1432 As the first draft of the outcome document was prepared, the commitment to a set of criteria, like the one previously recommended by the ICISS, the High-Level Panel and the Secretary-General, was already watered down to a commitment to continue its discussion.1433 In the final Outcome Document, even this phrase was removed.1434 While paragraph 139 calls upon the General Assembly to further consider the responsibility to protect, no reference is made to a need to develop guidelines.1435 With a view to the development of criteria, Weiss laments, any further discussion in the General Assembly was bound to stall,1436 and can currently be considered as having been postponed sine die.1437 This observation is a major reason for him to consider the World Summit agreement as having approved “R2P-lite” only.1438

As the community of states was unable to agree on any language regarding specific criteria for humanitarian intervention and the responsibility to protect, actual state behaviour is equally inconclusive. Breau observes on this that “the criteria proposed of the responsibility to react [...] are nowhere near to being uniformly implemented [...]”.1439

In conclusion, the traditional sources of international law provide no criteria that would guide the use of force for humanitarian protection, or frame the international community’s responsibility to protect. At the same time, recalling the earlier analysis of the ethics of humanitarian intervention, seeing the broad basis of the ICISS recommendations in religious and philosophical traditions, in legal scholarship and previous commissions, and taking into account, finally, their consistent embrace by the High-Level Panel and the Secretary-General, a strong claim can be made that these criteria are consistent with ethical principles. Again, it seems that these principles, and by extension, the precautionary principles of the ICISS, have to fill the gaps in the legal system, and therefore ought to be referred to for guidance by the relevant actors.

1430 Ibid. at 153.
1431 See Weiss, “R2P After 9/11”, supra note 59 at 750.
1432 See Breau, “Peacekeeping”, supra note 9 at 438.
1433 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 166.
1434 Ibid.
1435 See Brunnée & Toope, supra note 86 at 11.
1436 See Weiss, Ideas, supra note 1 at 117.
1438 Ibid. at 750.
1439 See Breau, “Peacekeeping”, supra note 9 at 453.
CHAPTER 6: HALF-HEARTED ADOPTION OF R2P INTO INTERNATIONAL LAW, 
POLITICAL RAMIFICATIONS AND FURTHER CHALLENGES

The scope of the preceding analysis had, from the outset, been limited in terms of both its subject-matter and its temporal point of reference. Its objective had solely been to determine whether international law currently recognizes responsibilities and rights to protect populations at risk from large-scale killings and large-scale ethnic cleansing. Accordingly, the conclusions that have been drawn from this evaluation are initially nothing else than a snap-shot of a particular area of international law as it has been shaped by previous developments, and which may be subject to further changes in the future. To this extent, the value of the entire analysis is of a temporary nature. Yet some of its findings may have ramifications for political leaders and establish further tasks for norm entrepreneurs and legal analysts.

Broadly, I have argued that, at this point in time, the international legal system has adopted some of the general notions of the R2P framework as it had been formulated by the ICISS, notably the primary responsibility to protect of the host state, a right of collective humanitarian intervention, and a collective international responsibility to protect. Beyond the explicit recommendations made in the ICISS report, it has also been found that foreign states have a right of unilateral humanitarian intervention outside the UN system. These conclusions may be surprising, as they partially contradict earlier, more cautious analyses and prognoses that had found significant support in international legal scholarship. Over the last few years, however, international politics have produced important material evidence that supports the aforementioned propositions, notably at the 2005 World Summit and in the recent Security Council practice. Significantl, major powers that had initially been strongly opposed to central aspects of the R2P framework have now, at least in principle, acknowledged some of its basic ideas. These recent developments have been an essential aspect of this thesis and partly explain its results.

At the same time, the R2P framework has so far only half-heartedly been endorsed by the international community. None of the major conceptual contributions to the discussion has been fully transformed into hard law: the primary responsibility to protect, rather than reconceptualizing the notion of state sovereignty, has been recognized as a simple customary obligation only; the collective international responsibility has the mere quality of "legal soft

1440 See text accompanying notes 248-263.
1441 See text accompanying notes 208-215 (for the US and China).
law”; and the precautionary principles for military intervention are far from securing the necessary support to become positive international law.

Still, what has already been achieved in the legal arena so far is of significance on a variety of levels. Namely, the general recognition of an international collective responsibility and of rights of intervention undermines the assumptions that the use of force for human protection purposes is strictly prohibited outside the UN system, and that the R2P concept was, at best, of rhetorical value. It thus overcomes central obstacles to the future evolution of international law and politics of humanitarian intervention and breaks ground for a further elaboration of the concept.

Firstly, from a primarily political point of view, the recognition of rights of humanitarian intervention enables leaders to more confidently assert humanitarian rationales for their decisions. The relevance of this political dimension has become apparent in the context of the latest Iraq war. Wheeler and Morris have analyzed Tony Blair’s position in this conflict and aptly illustrate the dilemma in which proponents of humanitarian intervention may find themselves as long as this concept is denied the status of international law. They point out that the British Prime Minister was, contrary to the claim that he abused the concept of humanitarian intervention for ulterior purposes, strongly motivated by humanitarian instincts and the desire to protect the Iraqi people against the tyranny of Saddam Hussein’s regime. Wheeler and Morris argue that, while humanitarian grounds were invoked more strongly when the interveners had failed to find weapons of mass destruction, they had been present from the outset. Nevertheless, Blair had refrained from presenting these motivations more clearly as a reason for the invasion, as

[... ] the advice being tendered to the Prime Minister by his legal advisers was that there was no legal basis for removing a regime on account of its brutal character. Reliance on this justification might have triggered more embarrassing resignations among the government’s legal advisers, including perhaps the Attorney General himself, Lord Goldsmith, whose private legal opinion to Blair provided no support for the view that Iraq’s regime could be overthrown on humanitarian grounds.

It should be noted that the intervention in Iraq, in fact, for various reasons did not satisfy the criteria for military intervention set out by the ICISS. Nonetheless, Wheeler’s and Morris’s account suggests that, as long as it is not recognized in political and legal circles that unilateral

1442 See Wheeler & Morris, supra note 43 at 452-454.
1443 Ibid. at 445, 452-454.
1444 Ibid. at 448.
1445 Ibid. at 454.
humanitarian intervention can be lawful, decision-makers could feel equally compelled, for political reasons, to justify a genuine humanitarian intervention on other grounds than humanitarianism - grounds that may ultimately turn out to be even less credible.

On a second level, the recognition of an international responsibility to protect and of rights of humanitarian intervention as parts of international law establishes the basis on which norm entrepreneurs can promote the further clarification of the legal concept. In particular, positive international law currently defines no criteria delineating the permissible and required use of force for the protection of people in a foreign state. To foster consensus on a set of criteria for the use of military force for human protection purposes had been the primary objective of the ICISS and is considered as crucial by many of its supporters. The current lack of clarity on the notion of an international responsibility raises serious concerns, as, in Bellamy’s words, there is “a real danger that states of all stripes will co-opt the language of the responsibility to protect to legitimate inaction and irresponsibility.” Once international law has embraced a collective responsibility to protect and a right of collective and unilateral humanitarian intervention in principle, the task for norm entrepreneurs now becomes to flesh these principles out with more specific rules. It is this task that can and should be taken on now by proponents of R2P in politics and academia. Currently, the prospects for any development on this issue in positive law seem to be rather bleak, as a vast majority of states can be seen united in stark opposition to the proposed set of criteria, albeit for seemingly contradictory reasons. Further advocacy from the supporters of R2P will be needed to convince the state leaders that it can be to their advantage to adopt the precautionary principles of the ICISS or similar guidelines, for instance in a resolution of the General Assembly or the Security Council. Indeed, I submit that both sides, proponents and skeptics of humanitarian intervention could ultimately benefit to some degree from such an endorsement of specific criteria.

Most apparent are the potential gains of establishing criteria for the anti-interventionists, despite the fact that the removal of any language on guidelines in the World Summit document

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1447 See ICISS, Responsibility to Protect, supra note 9 at vii, viii, 82; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 168; Evans, “Responsibility to Protect”, supra note 25 at 716; Matthews, supra note 16 at 139.

1448 See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 169.

1449 See text accompanying notes 1422-1431.

1450 Cf. Evans, “Responsibility to Protect”, supra note 25 at 716-717 (ascribing “more passion than intelligibility” to the argument that “to have a set of principles purporting to limit the use of force to exceptional, highly defensible cases was somehow to encourage it”).
had specifically been considered a “major diplomatic victory” for them.\textsuperscript{1451} The codification of criteria would create a common framework, on the terms of which potential interveners would have to justify their decisions, and which could thus at least reduce the risk of abusive interventions.\textsuperscript{1452} With a view to the present state of international law, the rejection of most of the precautionary principles by state leaders has led to a half-hearted absorption of the R2P concept that may now indeed have produced what Cunliffe had imputed to the ICISS itself from the outset: a shift of the “presumption in favour of military intervention”.\textsuperscript{1453} Cunliffe had suggested that “under the cover of elevating the victim, the ICISS report effectively shifts the onus of justification away from the intervening state to the state being intervened in.”\textsuperscript{1454} This argument appears more than debatable in its original reference to the R2P report itself, given that the “culture of justification” that the ICISS aimed to establish could have had constraining aspects on the use of force.\textsuperscript{1455} This “culture of justification”, however, has been deprived of an essential foundation as no terms have been defined that could serve as the yardstick for justified intervention. At the same time, international law currently permits unilateral humanitarian intervention, and the past years have seen the crystallization of an international responsibility to protect as “legal soft law”. Overall, the practical result may then indeed be a strengthened case for military intervention that is not matched by a constraining framework. To fix this situation, it should be in the interest of those states fearing abuse of the concept to establish the suggested precautionary principles.\textsuperscript{1456}

Proponents of humanitarian intervention, in turn, could equally benefit from the further clarification of the concept. Not only could it facilitate consensus on humanitarian intervention in the Security Council, thus reducing the number of instances of a perceived need for some states to go it alone.\textsuperscript{1457} Also, as has been indicated by the aforementioned reference to Tony Blair’s attempts to justify the Iraq war, specific criteria would provide a firm ground on which state representatives who intend to take military action for humanitarian purposes could justify

\textsuperscript{1451} See Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 166.

\textsuperscript{1452} See Welsh, “Responsibility to Protect”, supra note 9 at 374; cf. also MacFarlane, Thielking & Weiss, supra note 35 at 988 (taking a slightly different perspective in arguing that the codification of R2P might “help reduce selectivity”).

\textsuperscript{1453} See Cunliffe, supra note 227 at 48-49.

\textsuperscript{1454} Ibid. at 48.

\textsuperscript{1455} See Part 2.3, above; see Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 147; Welsh, “Responsibility to Protect”, supra note 9 at 371.

\textsuperscript{1456} Cf. Breau, “Peacekeeping”, supra note 9 at 464.

\textsuperscript{1457} Cf. Welsh, “Responsibility to Protect”, supra note 9 at 374; ICISS, Responsibility to Protect, supra note 9 at paras. 4.14, 6.39; High-Level Panel, supra note 912 at para. 206; Brunnée & Toope, supra note 86 at 5; Evans, “Responsibility to Protect”, supra note 25 at 711.
this intervention for what it is. This argument may not appear compelling to those states that consider the ICISS criteria as too constraining and aim at preserving an even broader freedom to intervene. In the direction of these states it may be said that the extensive discussion of the Iraq case has demonstrated that under the status quo they will not be immune from criticism on the basis of the ICISS criteria either. Furthermore, it has already been indicated that the ICISS recommendations, to the extent that they reflect ethical principles, could be applied to fill the current gaps in the legal system anyway. The endorsement of a clearly defined set of guidelines in positive international law could at least clarify the terms of the inevitable political discussion.

Finally, the emergence of a collective international responsibility to protect suggests that even the sole remaining superpower, the United States, could have a certain interest in establishing precautionary principles for humanitarian intervention. As the joint letter by Amnesty International, Human Rights Watch and the International Crisis Group of May 25, 2006 showed, as these three organizations called upon the Security Council to effectively discharge its responsibility to protect civilians in Darfur, it should be expected that this principle of “legal soft law” will be invoked regularly to request action from the major powers in the future. A specific set of criteria could form the basis on which these powers could respond to such claims and assert limits on the scope and need for action. Admittedly, the force of this argument is ultimately dependent on the role that language and the appearance of justified conduct play in international practice.

In the light of the political constellation created by 9/11 and the war in Iraq, it appears, however, unlikely if not impossible that clear guidelines on humanitarian intervention will be spelled out soon. Proponents of the R2P framework will have to continue their advocacy for establishing a more specific framework, but they will have to be careful that their attempts do not come at too high a price. The Canadian government as well as ICISS commissioner Ramesh Thakur, for example, resorted to advocating criteria that have been criticized for even falling behind the

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1458 Cf. in particular the US position, e.g. in Welsh, “Conclusion”, supra note 219 at 180; Welsh, “Responsibility to Protect”, supra note 9 at 376; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 162; see also text accompanying notes 1423-1424.
1459 See Part 5.6, above.
1460 But see Brunnée & Toope, supra note 86 at 11 (arguing that the displacement of definitional debates to the next level of specificity will produce the need for a legal assessment that is “likely to generate a heated and protracted debate that could actually delay response”, and that the “recognition that a crime exists will not necessarily lead to action, as the Rwanda case so sadly demonstrated.”)
1461 See Khan, Roth & Evans, supra note 1340.
1462 See text accompanying notes 162-168.
1463 See MacFarlane, Thielking & Weiss, supra note 35 at 983.
Security Council’s actual practice in the 1990s, therefore being “effectively a backward step.”

Other commentators have cautioned that the establishment of firm guidelines could, at least at present, aggravate the disagreements in political practice.

On a third level, finally, the half-hearted adoption of the R2P framework in positive international law creates further issues for legal analysts. In light of the preceding suggestions for ongoing norm entrepreneurship, one task for scholars will consist in the continued and thorough analysis of those material sources that could contribute to the creation or identification of specific norms of international law in the future. In particular, the discussions and resolutions of the General Assembly and the UN Security Council should be observed for the emergence of pronouncements or patterns of behavior that establish clear criteria on the use of force.

Already at present, however, new legal issues have been created by the endorsement of the innovative idea of a collective international responsibility to protect as a principle of legal soft law. One general question that still needs to be answered is, for instance, that of who is the bearer of this international responsibility. Neither the ICISS, nor subsequent reports or the World Summit agreement have clarified this fundamental aspect of the concept. Potential bearers of the international responsibility may be, on the one hand, the UN Security Council or the UN more generally, including the possibility of action through the General Assembly, but also individual states, especially those represented on the Security Council. Specifically with a view to the latter, it may be asked whether the permanent members are, despite their unwillingness to agree to the proposed self-constraint, under any obligations not to use their veto power to obstruct the authorization of Chapter VII missions for the protection of human rights. Predominantly, it is assumed that there is no legal concept of an “abuse of the veto right.”

Yet, the argument had been made, as early as in 1948, that the Security Council members are not unrestrained in their discretion, and that a vote in favor or against a particular resolution may be abusive. This proposition may deserve renewed attention in the light of the ICISS report and the gradual evolution of the concept of human security.

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1464 See Byers, supra note 909; Bellamy, “Whither the Responsibility to Protect”, supra note 63 at 155.
1465 See MacFarlane, Thielking & Weiss, supra note 35 at 983; see more generally Brunnée & Toope, supra note 86 at 11; Welsh, “Responsibility to Protect”, supra note 9 at 375.
1466 See text accompanying notes 1237 and 1265-1266.
The collective international responsibility to protect, moreover, has other dimensions that have only been touched upon in this thesis. Firstly, I have only addressed the most controversial aspect, that of a responsibility to react with military means, leaving aside the other aspects of the continuum of obligations, namely the responsibilities to prevent and to rebuild. Furthermore, even within the narrower scope of military action, the responsibility to protect can have a broader temporal dimension. It has been indicated that a major obstacle to effective collective intervention consists in the lack of operational capacities of the potential interveners at the time of a crisis. Possibly, the collective international responsibility to protect could begin before this stage has been reached, and demand the anticipatory creation and allocation of the required resources for interventions that may become necessary in the future. Finally, also with a view to the situations that may justify intervention, R2P had been conceptualized in a much broader sense by the ICISS than has been covered in this thesis. In particular, the commission considered military intervention as potentially legitimate not only to prevent or stop active killings or ethnic cleansing, but also in cases of “overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened”. It is therefore perceivable that the international community has a legal right or responsibility to intervene without the consent of the respective government where a state fails to effectively protect its population from natural disasters or the consequences thereof.

Apart from the many open questions surrounding the new concept of a collective international responsibility to protect, another area for further scholarly debate has been indicated in the methodological discussion underlying my analysis of R2P. It has been suggested that legal positivism as the dominant theory of international law suffers, in its traditional form, from several flaws that compromise its ability to govern controversial issues such as humanitarian intervention. In particular, I have argued that a positivist analysis, despite its purported reliance on verifiable facts, cannot avoid value judgments, has difficulties in reconciling conflicting principles, and is inconsistent in its adherence to the underlying principle of state consent. This critique of positivist legal theory has, to a significant degree, built upon the methodological considerations by Tesón and Lepard in their approach to the law of humanitarian intervention, but it has implications going beyond this area of law. Hence, the issue of military intervention for human protection purposes, which centers upon reconciling the positions of

1469 See ICISS, Responsibility to Protect, supra note 9 at para 4.20.
1470 See Parts 3.1.3 and 3.5, above.
states and individuals in the international system, could be a suitable field to question Henkin's positivist assertion that "[t]he principle that law is binding on a State only by its consent remains an axiom of the political system, an implication of State autonomy."  

Leaving aside all scientific endeavors to better conceptualize international law in general or the law of humanitarian intervention in particular, actual human protection will always remain contingent on the commitment of the powerful in practice. At the time of writing this thesis, massive violations of fundamental human rights continue to be committed without being effectively halted or prevented by the international community. Several conflicts have been mentioned, including those in Darfur and the DRC, that must still offend, in the words of the former Secretary-General Kofi Annan, "every precept of our common humanity". R2P, heralded as a new approach to "delivering practical protection" for the millions of people who "remain at the mercy of civil wars, insurgencies, state repression and state collapse", has not yet changed the reality that thousands, if not millions of people lose their lives in intrastate conflicts while the international community hesitates to employ military force for their protection.

Partly, the at best limited degree of practical impact of R2P may be due to the fact that the concept, as it moved into the legal arena, has been stripped of some of its central components, notably the criteria on the use of military force that were supposed to enable the effective use of language as a means to foster genuine humanitarian intervention. To a certain extent, further norm entrepreneurship may thus improve the quality of R2P as a working concept of international relations. Still, whatever progress the normative development of R2P as a concept of international law will make, its legal imperatives will only be one aspect in the more complex framework of international politics. India's reservation to the R2P report comes to mind, arguing that the Security Council's failure to act in the past had not been an issue of a lack of authority, but rather one of a political unwillingness to take the required steps. The crucial issue in practice will therefore be to foster the political will of the relevant decision-makers and to create the operational capacities for effective steps to protect populations at risk from massive human rights violations. Only if the international community shows the necessary political will, it will be able to live up to Kofi Annan's challenge, prevent future Rwandas, Srebrenicas and Kosovos,

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1471 See Henkin, supra note 276 at 46.
1472 Cf. UN Secretary-General, Millennium Report, supra note 35 at para. 217 [emphasis omitted]).
1473 See ICISS, Responsibility to Protect, supra note 9 at para. 2.1.
1474 See text accompanying 158-161.
1475 See Bellamy, "Whither the Responsibility to Protect", supra note 63 at 152.
and effectively respond to “gross and systematic violations of human rights that offend every precept of our common humanity”.$^{1476}$

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BIBLIOGRAPHY

INTERNATIONAL TREATIES


Convention on Rights and Duties of States, 26 December 1933, 165 L.N.T.S. 20 (adopted by the Seventh International Conference of American States) [Montevideo Convention].


SECONDARY MATERIAL: MONOGRAPHS

Audi, Robert


Benn, S.I. & Peters, R.S.

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>de Vattel, Emer</td>
<td><em>The law of nations, or, principles of the law of nature, applied to the conduct and affairs of nations and sovereigns: From the French of Monsieur de Vattel: A new edition, revised, corrected and enriched with many valuable notes</em> (London: printed for G.G. and J. Robinson, Paternoster, 1797) (Eighteenth Century Collections Online).</td>
</tr>
<tr>
<td>Gazzini, Tarcisio</td>
<td><em>The changing rules on the use of force in international law</em> (Manchester: Manchester University Press, 2005).</td>
</tr>
<tr>
<td>Author(s)</td>
<td>Title</td>
</tr>
<tr>
<td>----------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Lauterpacht, Hersch</td>
<td><em>Private Law Sources and Analogies of International Law: with Special Reference to... (N.p.: Archon Books, 1970)</em></td>
</tr>
<tr>
<td>Lepard, Brian D.</td>
<td><em>Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical... (University Park, PA: Pennsylvania State University, 2002)</em></td>
</tr>
<tr>
<td>Mill, John Stuart</td>
<td><em>Dissertations and Discussions: Political, Philosophical, and Historical, vol. 3</em> (London: Longmans, Green, Reader and Dyer, 1867).</td>
</tr>
</tbody>
</table>


SECONDARY MATERIAL: ARTICLES


Annan, Kofi “Two Concepts of Sovereignty” *The Economist* (18 September 1999) 49 (Lexis).


Bellamy, Alex J. “Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq” (2005) 19:2 Ethics & International Affairs 31 (EBSCOhost).
<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Byers, Michael</td>
<td>“High ground lost on UN’s responsibility to protect”</td>
<td>Winnipeg Free Press (18 September 2005) B3 (Factiva).</td>
</tr>
<tr>
<td>Camdzic, Elvir &amp; Weiss, John</td>
<td>“Darfur: Where is the will?”</td>
<td>San Francisco Chronicle (20 September 2006) B9, online: SFGate DTMS1.DTL&gt;</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Author</th>
<th>Citation and Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Author(s)</td>
<td>Title/Description</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Matthews, Max W.</td>
<td>“Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur” (2008) 31 B.C. Int’l &amp; Comp. L. Rev. 137 (HeinOnline).</td>
</tr>
<tr>
<td>Author</td>
<td>Title/Description</td>
</tr>
<tr>
<td>--------</td>
<td>------------------</td>
</tr>
<tr>
<td>Rummel, R.J.</td>
<td>“War Isn’t This Century’s Biggest Killer” <em>Wall Street Journal</em> (7 July 1986) 12 (ProQuest Historical Newspapers).</td>
</tr>
</tbody>
</table>
Simons, Marlise, Polgreen, Lydia & Gettleman, Jeffrey


Singh, Anita Inder


Smith, Michael J.


Spiropoulos, J.


Stahn, Carsten


Steiger, Heinhard


Tan, Kok-Chor


Tanguy, Joelle

“Redefining Sovereignty and Intervention” (2003) 17:1 Ethics & International Affairs 141 (EBSCOhost).

Tesón, Fernando R.


Thakur, Ramesh


Thirlway, Hugh


Tushnet, Mark


Vesel, David


Walzer, Michael

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>&quot;To Intervene or Not To Intervene? A Contemporary Snapshot&quot; (2002)</td>
<td>9:2 Canadian Foreign Policy 141.</td>
</tr>
<tr>
<td>Caroline &amp; MacFarlane, S. Neil</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wesley, Michael</td>
<td>&quot;Toward a Realist Ethics of Intervention&quot; (2005) 19:2 Ethics &amp; International Affairs 55 (Synergy Blackwell Journals).</td>
<td></td>
</tr>
<tr>
<td>Wheeler, Nicholas J.</td>
<td>&quot;A Victory for Common Humanity? The responsibility to protect after the 2005 World Summit&quot; (Paper presented to the conference on “The UN at Sixty: Celebration of Wake?”, Faculty of Law, University of Toronto, 7 October 2005), United Nations Association – UK <a href="http://www.una-uk.org/humanrights/R2P%5B1%5D.pdf">http://www.una-uk.org/humanrights/R2P%5B1%5D.pdf</a>.</td>
<td></td>
</tr>
<tr>
<td>Williams, Ian</td>
<td>&quot;Intervene With Caution&quot; (2003) 27:18 In These Times 23 (Lexis), online: In These Times <a href="http://www.inthesetimes.com/article/601/">http://www.inthesetimes.com/article/601/</a>.</td>
<td></td>
</tr>
<tr>
<td>Source</td>
<td>Reference</td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Algeria, Representative on the UN Security Council Mr. Baali</td>
<td>Statement on behalf of Algeria, Angola and Benin following the vote on Security Council Resolution 1556 (2004), UN SCOR, 59th Year, 5015th Mtg., UN Doc. S/PV.5015 (30 July 2004) 5.</td>
<td></td>
</tr>
</tbody>
</table>
Dorn, Walter

Fund For Peace

Fund For Peace

Fund For Peace

Gagnon, Georgette

Greenberg Research

Group of 77 and China

High-Level Panel on Threats, Challenges and Change
High-Level Panel on Threats, Challenges and Change, Chair

Human Rights First

Stand In For Darfur: About the Crisis, online: Human Rights First <http://www.humanrightsfirst.org/international_justice/darfur/about/background.asp>.

International Commission on Intervention and State Sovereignty


International Court of Justice


International Court of Justice  

International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber  

International Criminal Tribunal for the Former Yugoslavia, Trial Chamber  

International Law Commission  

Khan, Irene, Roth, Kenneth & Evans, Gareth  

Mexico/U.S.A. (General Claims Commission)  

Myanmar, Minister for Foreign Affairs U Ohn Gyaw  

Non-Aligned Movement, Chairman of the Coordinating Bureau  

Non-Aligned Movement, Secretariat  
|---|---|
Thailand, Minister of Foreign Affairs Prasong Soonsiri


UK, Permanent Representative to the UN Sir Emyr Jones Parry


UK, Permanent Representative to the UN Sir Emyr Jones Parry


UN General Assembly


UN Mission in Sudan (UNMIS)


UNMIS and African Union Mission in Sudan, online: UNMIS <http://www.unmis.org/english/au.htm> (last visited on 13 July 2008; page may have been removed in the meantime).

UN Office for the Coordination of Humanitarian Affairs


UN Secretary-General

UN Secretary-General


Report of the Secretary-General pursuant to General Assembly resolution 53/35: The fall of Srebrenica, UN GAOR, 54th Sess., UN Doc. A/54/549 (1999).


UN Security Council


Resolution 1265 (1999), UN SCOR, 54th Year, 4046th Mtg., UN Doc. S/Res/1265 (17 September 1999).


United Nations  

USA  

US  

US, Representative on the UN Security Council Mr. Cunningham  

US, Representative to the United Nations John R. Bolton  

Venezuela, President Hugo Chávez  

World Public Opinion  