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# THE RESPONSIBILITY TO PROTECT DOCTRINE: CUSTOMARY INTERNATIONAL LAW, AN EMERGING LEGAL NORM, OR JUST WISHFUL THINKING?

PETER STOCKBURGER\*

*We are in the early stages of a doctrine that holds enormous promise for the extension of the protective reach of the law. We should not be too timid in our advocacy in support of that doctrine for fear that it will meet insurmountable resistance. Here again, we must have faith that the fundamental justice of the cause will prevail.*

Louise Arbour, 2008

## *Introduction*

Humankind is well versed in the art of atrocity. The law, unfortunately, as an institution created to govern the brutality of human action, is also well versed in the art of inaction. Throughout the twentieth century, international law and the community entrusted with its enforcement failed to provide basic human security for those subjected to the most horrendous of atrocities. This inaction, although legal, was in the broadest sense of the term immoral. Nonetheless, for decades, international institutions and non-governmental organizations alike have remained paralyzed to respond to, and have at times facilitated through inaction, acts of state genocide, ethnic cleansing, and crimes against humanity. Today, in an increasingly globalized and interconnected world, state actors are almost instantly aware of atrocities happening to people in other countries, and even more aware of the amoral incompetency international law permits states and institutions to engage in. This macabre reality illustrates a stark truism within the international legal regime; sovereignty, as traditionally conceptualized under the Treaty of Westphalia, continues to shield perpetrators from punitive measures and prevents the international community from stopping state acts of mass atrocity before they manifest themselves.<sup>1</sup>

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Today, traditional notions of sovereignty are gradually becoming outdated and exaggerated.<sup>2</sup> Many scholars and jurists are beginning to hypothesize, and argue consistently, that absolute territorial state sovereignty, as a paramount concept recognized in international law, no longer serves as the primary paradigm from which the field of international relations should be measured.<sup>3</sup> This changing reality has given rise to new institutions and scholarly work advocating for an increase in human rights awareness, human security, and humanitarian intervention.

The United Nations (UN) is one institution that has become particularly involved in this gradual movement toward a new international conceptual framework. For example, in the decades following the end of the Cold War, the United Nations Security Council (UNSC) passed a number of resolutions authorizing humanitarian interventions in Somalia,<sup>4</sup> Liberia,<sup>5</sup> Rwanda,<sup>6</sup> Haiti,<sup>7</sup> Sierra Leone,<sup>8</sup> and Kosovo.<sup>9</sup> Moreover, the UN has directly contributed to an international movement aimed at redefining international law by having a hand in the creation of a number of

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and has been admitted to the national Order of Barristers. His presentations on international relations and diplomacy have been showcased in conferences that were held in both the United States and abroad.

<sup>1</sup> Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. INT'L STUD. 445, 446 (2008).

<sup>2</sup> LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 3 (4<sup>th</sup> ed. 2001).

<sup>3</sup> See generally Kerry Tetzlaff, *Humanitarian Intervention Post Kosovo: Does a Right to Humanitarian Intervention Exist in Customary International Law After Kosovo? If Not, Is There a Trend Towards the Creation of a Right to Humanitarian Intervention in Customary International Law?*, 4 N.Z. POSTGRADUATE L. E-JOURNAL 1, 1 (2006), [http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%204%20\(2006\)/KerryHIPOSTKOS.pdf](http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%204%20(2006)/KerryHIPOSTKOS.pdf); see generally David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 BYU J. PUB. L. 1 (2003).

<sup>4</sup> S.C. Res. 751, ¶ 7, U.N. Doc. S/RES/751 (Apr. 24, 1992); S.C. Res. 814, ¶ 4, U.N. Doc. S/RES/814 (Mar. 26, 1993).

<sup>5</sup> S.C. Res. 788, ¶ 12, U.N. Doc. S/RES/788 (Nov. 19, 1992).

<sup>6</sup> S.C. Res. 929, ¶ 3, U.N. Doc. S/RES/929 (June 22, 1994).

<sup>7</sup> S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

<sup>8</sup> S.C. Res. 1181, ¶ 6(c), ¶ 8(b) U.N. Doc. S/RES/1181 (July 13, 1998).

<sup>9</sup> S.C. Res. 1244, ¶ 11(h), ¶ 12, U.N. Doc. S/RES/1244 (June 10, 1999).

international tribunals armed with mandates that, by definition, weaken the principle of absolute territorial sovereignty where states have engaged in acts of genocide, ethnic cleansing, or crimes against humanity.<sup>10</sup>

This increase in UN intervention, coupled with the lessons from the 2003 invasion of Iraq and current lack of intervention and support in Sudan, has led many scholars and legal experts to question whether humanitarian intervention, as both a legal concept and moral precept, should be reconsidered by the international community.<sup>11</sup> Notably, this reinvigorated debate, while noble in purpose and scope, still faces the same legal challenges it faced years ago; that is, humanitarian intervention, generally viewed as military intervention by one or more states in the affairs of another state on humanitarian grounds taken in order to prevent, avert, or stop gross violations of human rights, is a *prima facie* violation of international law. In other words, the *right* to violate another's territorial sovereignty inherently contradicts the corollary, and arguably more paramount, international principle of non-intervention as codified in Article 2(4) of the UN Charter (the "Charter").

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<sup>10</sup> S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, UNGA, A/RES/57/228 (May 13, 2003), *available at* <http://www.eccc.gov.kh/english/agreement.list.aspx> (last visited August 30, 2008); *see also* G.A. Res. 57, U.N. Doc. A/RES/57/228 (Feb. 27, 2003); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Freetown, 16 January 2002, *available at* <http://www.sc-sl.org/LinkClick.aspx?Fileticket=mZTstj3eoio%3D&tabid=176> (last visited Aug. 31, 2008); S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999); *see also* Regulation No. 200/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (June 6, 2000); S.C. Res. 1233, U.N. Doc. S/RES/1244 (June 10, 1999); Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>11</sup> *See generally* Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention Under International Law – Part II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998); Vesel, *supra* note 3; Young Sok Kim, *Responsibility to Protect, Humanitarian Intervention and North Korea*, 5 J. INT'L BUS. & L. 74 (2006).

Non-intervention is a general principle of customary international law,<sup>12</sup> including the right of “every sovereign State to conduct its affairs without outside interference. . . .”<sup>13</sup> This general principle, evincing a universal respect for territorial and political integrity,<sup>14</sup> is supported by both *opinio juris* and “established and substantial practice” of states.<sup>15</sup> Thus, in short, the principle of non-intervention has been “presented as a corollary of the principle of the sovereign equality of States” within the rubric of customary international law.<sup>16</sup>

Although the principle of non-intervention generally “forbids all States or groups of states to intervene directly or indirectly in the internal or external affairs of other States,”<sup>17</sup> there are three well-established exceptions: (1) consent, actual or *de facto*, by the intervened upon State; (2) legitimate claims of self-defense, either individual or collective, pursuant to Article 51 of the Charter; and (3) UNSC authorization pursuant to Chapter VII of the Charter. Currently, there is no widely recognized exception to the principle of non-intervention for humanitarian purposes without prior authorization from the UNSC.

It is against this backdrop that it has been argued that “a new norm, the concept of the responsibility to protect [“R2P”], [has] emerged to articulate the rationale and the methodology by which the international community should engage in the protection of those

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<sup>12</sup> U.N. Charter art. 2, para. 4; U.N. Charter art. 2, para. 7; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 1, 53, 56 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 171 (July 9) [hereinafter *Wall Opinion*]; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 126 (June 27) [hereinafter *Nicaragua*]; *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, prmb1., U.N. GAOR, 25th Sess. Supp. No. 28, U.N. Doc. A/8082 (1970).

<sup>13</sup> *Nicaragua*, *supra* note 12, at 106.

<sup>14</sup> *Id.*; *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9) [hereinafter *Corfu Channel*].

<sup>15</sup> *Nicaragua*, *supra* note 12, at 106.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 108.

exposed to atrocities.”<sup>18</sup> This new R2P<sup>19</sup> doctrine, “[r]ooted in human rights and international humanitarian law . . . squarely embraces the victims’ point of view and interests, rather than questionable State-centred [sic] motivations.”<sup>20</sup> In short, the R2P doctrine operates on the following principle: where a state fails to protect its own citizenry from mass atrocity (i.e., genocide, ethnic cleansing, or crimes against humanity), the responsibility to protect that citizenry shifts to the international community. Intervention within this context, thus, is based on a *responsibility* to protect rather than on a *right* to intervene.

The purpose of this article is to examine the scope and purpose of this new R2P doctrine, providing a conceptual framework for determining whether the doctrine has, to any degree, reached the level of customary international law or, conversely, is simply an emerging norm within the international legal community. Near its completion, this paper seeks to examine the current debates over the legitimacy of intervention pursuant to the R2P doctrine, either multilateral or unilateral, and what effect these debates are having on the codification and practical application of the R2P doctrine.

To achieve this above stated purpose, this article will be separated into three parts: Part I will discuss the development and history of the R2P doctrine; Part II will discuss the operational and legal components of the R2P doctrine; and Part III will analyze what dimensions of the R2P doctrine, if any, have risen to the level of customary international law.

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<sup>18</sup> Arbour, *supra* note 1, at 447.

<sup>19</sup> The name “Responsibility to Protect” and its acronym, R2P, are creations of the International Commission on Intervention and State Sovereignty who released its report “The Responsibility to Protect” in 2001 following direction by the UN Secretary-General. The Commission’s findings, and its subsequent debate within the UN, all follow the title of the Responsibility to Protect doctrine.

<sup>20</sup> Arbour, *supra* note 1, at 448.

*I. The Development and History of R2P*

With the possible exception of the prevention of genocide after World War II, no idea has moved faster within the international normative arena than the R2P doctrine.<sup>21</sup> From a conceptual embryo, the R2P doctrine has truly moved into a field of plausible operability. However, to understand this development, it is important to first examine what circumstances and events gave rise to the need and creation of the R2P doctrine.

*A. Rwanda*

Not diminishing or withstanding the atrocities of World War II and the humanitarian fallout from the subsequent Cold War, the contemporary development of the R2P doctrine began with Rwanda in 1994. As most readers are aware, in April 1994, as unspeakable violence was erupting between the Hutus and Tutsis in Rwanda, the international community stood idly by. The UN Secretariat in particular, and even some permanent members of the UNSC, were aware of Rwandan officials connected with the government that were planning to carry out a state policy of genocide.<sup>22</sup> Despite the presence of the UN forces within Rwanda, and while “credible strategies were available to prevent, or at least greatly mitigate, the slaughter which followed,” the UNSC refused to take the necessary action.<sup>23</sup> The fallout from this global inaction was catastrophic for Rwanda, and it destabilized the entire Great Lakes region of Africa. In the aftermath, “many African peoples concluded that, for all the rhetoric about the universality of human rights, some human lives end up mattering a great deal less to the international community than others.”<sup>24</sup> From this failure to act came a reinvigorated debate about the prospect and legitimacy of humanitarian intervention to prevent imminent atrocity.

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<sup>21</sup> Thomas G. Weiss, *Article, R2P After 9/11 And the World Summit*, 24 WIS. INT'L L.J. 741, 741 (2006).

<sup>22</sup> Int'l Comm'n on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Dec. 2001) [hereinafter R2P Report], at 1, ¶ 1.1.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

*B. Kosovo*

In 1999, Kosovo saw the exact opposite of a response from the international community, illustrating the legal complexities involved in any debate over humanitarian intervention. “At the time of the conflict in Kosovo during the 1980s and 1990s, Kosovo was a province within Serbia, a constituent part of the Federal Republic of Yugoslavia.”<sup>25</sup> Kosovo was the centerpiece in a regional conflict between ethnic Albanians and ethnic Serbs.<sup>26</sup> “After the death of Tito in 1981, Albanian Kosovars began to experience oppression from the Serbs,”<sup>27</sup> and “as the State of Yugoslavia began its decline, the oppression against the Albanian Kosovars increased.”<sup>28</sup>

In 1989, Kosovo’s autonomy was revoked and its parliament dissolved in 1990.<sup>29</sup> Shortly thereafter, Albanian Kosovar politicians declared their independence and established their own parliament and institutions.<sup>30</sup> In response, Serbs increased their systematic discrimination against Albanian Kosovars throughout the 1990s.<sup>31</sup> In February and March of 1998, Serb police clashed with Albanian activists, resulting in deaths on both sides.<sup>32</sup> “Police persecution continued to increase, and hundreds of thousands of Albanian Kosovars were forced from their homes.”<sup>33</sup> The Albanian Kosovars reacted with armed resistance, resulting in Serb forces committing atrocities against their population as part of a Serbian government

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<sup>25</sup> Kerry Tetzlaff, *Humanitarian Intervention Post Kosovo: Does a Right to Humanitarian Intervention Exist in Customary International Law After Kosovo? If Not, Is There a Trend Towards the Creation of a Right to Humanitarian Intervention in Customary International Law?*, 4 N.Z. POSTGRADUATE L. E-JOURNAL 1, 1 (2006), [http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%204%20\(2006\)/KerryHIPOSTKOS.pdf](http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%204%20(2006)/KerryHIPOSTKOS.pdf).

<sup>26</sup> Tetzlaff, *supra* note 25, at 4.

<sup>27</sup> *Id.*; Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12 EUR. J. INT’L L. 437, 438 (2001), available at <http://ejil.oxfordjournals.org/cgi/reprint/12/3/437.pdf>.

<sup>28</sup> Tetzlaff, *supra* note 25, at 4; Hilpold, *supra* note 27, at 438.

<sup>29</sup> Tetzlaff, at 4-5; Hilpold, at 438.

<sup>30</sup> SIMON CHESTERMAN, JUST WAR OR JUST PEACE? 207 (2001).

<sup>31</sup> Tetzlaff, *supra* note 25, at 5; Hilpold, *supra* note 27, at 438.

<sup>32</sup> Tetzlaff, at 5; CHESTERMAN, *supra* note 30, at 207.

<sup>33</sup> Tetzlaff, at 5; Hilpold, *supra* note 27, at 438.



sponsored program of “ethnic cleansing.”<sup>34</sup>

In March 1998, the UNSC adopted Resolution 1160 (1998), criticizing the violence by both the Kosovo separatists and the Serb forces.<sup>35</sup> A second resolution was adopted in September 1998, “[a]ffirming that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region.”<sup>36</sup> This resolution, Resolution 1199 (1998), also demanded a ceasefire under Chapter VII of the Charter and for both the Federal Republic of Yugoslavia and Kosovar Albanian leadership to take steps to improve the humanitarian situation and avert a humanitarian catastrophe.<sup>37</sup>

Shortly after Resolution 1160 (1998) was adopted, Serb police forces killed approximately thirty Albanian Kosovars.<sup>38</sup> The North Atlantic Treaty Organization (NATO) decided it was time to intervene and threatened to use force against Serbia, unless Serbia agreed to comply with both UNSC resolutions and allow a NATO air verification mission over Kosovo.<sup>39</sup> During this time, the UNSC adopted a third resolution, Resolution 1203 (1998), welcoming the agreement between NATO and Serbia.<sup>40</sup> The Resolution further noted that the Organization for Security and Cooperation in Europe (OSCE) was “considering arrangements to be implemented in coordination with other organizations” and that “action may be needed to ensure their safety and freedom of movement.”<sup>41</sup> Both Russia and China stated, after passing this resolution, that they did not consider that the Resolution authorized military intervention in Kosovo.<sup>42</sup> The U.S. representative, however, stated that “[t]he NATO allies, in agreeing on October 13 to the use of force, made it clear that they had the authority, the will and the means to resolve

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<sup>34</sup> Tetzlaff, *supra* note 25, at 5; Hilpold, *supra* note 27, at 438-39.

<sup>35</sup> S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

<sup>36</sup> S.C. Res. 1199, pmb., U.N. Doc. S/RES/1199 (Sept. 28, 1998).

<sup>37</sup> *Id.* ¶ 1-2.

<sup>38</sup> Tetzlaff, *supra* note 25, at 5; CHESTERMAN, *supra* note 30, at 208.

<sup>39</sup> Tetzlaff, at 5; CHESTERMAN, at 209.

<sup>40</sup> S.C. Res. 1203, pmb., U.N. Doc. S/RES/1203 (Oct. 28, 1998).

<sup>41</sup> *Id.* ¶ 9.

<sup>42</sup> U.N. SCOR, 53th Sess., 3937th mtg. at 14, U.N. Doc. S/PV.3937 (Oct. 24, 1998).

this issue. We retain that authority.”<sup>43</sup>

“The situation in Kosovo continued to deteriorate with hundreds of thousands of Kosovar Albanians being forced from their homes by Serb forces.”<sup>44</sup> Between March 23 and June 10, 1999, NATO responded by conducting air strikes against the Federal Republic of Yugoslavia in what was called “Operation Allied Force.”<sup>45</sup> This operation was conducted without the UNSC authorization.

The debate over the humanitarian intervention intensified following NATO’s military campaign in Kosovo, which many viewed as a controversial case of intervention made to protect civilians without UNSC endorsement.<sup>46</sup> For example, an independent commission on Kosovo found that NATO’s intervention was illegal under international law, but “legitimate because it was unavoidable.”<sup>47</sup>

### *C. Development of R2P*

In response to the unchecked atrocities in Rwanda, and the confusing legal justifications surrounding NATO’s intervention in Kosovo, Kofi Annan, then former UN Secretary-General, asked the General Assembly in 2000 the following: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights?”

In 2000, in response to this challenge, the Government of Canada, together with a group of major foundations, announced at the General Assembly in September 2000 the establishment of the International Commission on Intervention and State Sovereignty

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<sup>43</sup> *Id.* at 15.

<sup>44</sup> Tetzlaff, *supra* note 25, at 6; Hilpold, *supra* note 27, at 438.

<sup>45</sup> Tetzlaff, at 6; CHESTERMAN, *supra* note 30, at 211.

<sup>46</sup> TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 78 (2007).

<sup>47</sup> Indep. Int’l Commission on Kosovo, *The Kosovo Report: Executive Summary—Main Findings* 289 RELIEF WEB (2000), <http://www.Reliefweb.int/library/documents/thekosovoreport.htm>.

(ICISS).<sup>48</sup> The ICISS was asked to “wrestle with the whole range of questions – legal, moral, operational and political – rolled up in th[e] debate [of humanitarian intervention], to consult with the widest possible range of opinion around the world, and to bring back a report that would help the Secretary-General and everyone else find some new common ground.”<sup>49</sup>

On September 14, 2000, the ICISS was launched with a mandate to “promote a comprehensive debate on the issues [of humanitarian intervention], and to foster global political consensus on how to move from polemics, and often paralysis, towards action within the international system, particularly through the United Nations.”<sup>50</sup> “It was proposed that the commission would complete its work within a year, enabling the Canadian Government to take the opportunity of the 56<sup>th</sup> session of the UN General Assembly to inform the international community of the commission’s findings and recommendations for action.”<sup>51</sup>

Throughout 2000 and 2001, five full meetings of the ICISS were held: Ottawa on November 5-6, 2000; Maputo on March 11-12, 2001; New Delhi on June 11-12, 2001; Wakefield, Canada on August 5-9, 2001; and Brussels on September 30, 2001. “There was also an informal commission meeting in Geneva on February 1, 2001, involving a number of Commissioners in person and others by conference call.”<sup>52</sup>

According to the ICISS’ report, the initial stages of the process were varied:

At their first meeting, Commissioners considered a series of central questions, identified the key issues and decided on a general approach. An early draft outline of the Report was then developed and circulated. This outline was considered at the Geneva meeting in early February, and expanded further at the Maputo meeting in March. A fuller draft was then produced in May, circulated to

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<sup>48</sup> R2P Report, *supra* note 22, at VII.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 81.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 82.

Commissioners for consideration and initial comment, and considered in more detail at the New Delhi meeting in June. Significant changes to the substance and structure of the report were agreed at that meeting. On this basis, a further draft was produced and circulated in early July, with Commissioners making specific written comments.<sup>53</sup>

The remaining stages of the report process involved a meeting in Brussels over several days in July, producing a full-length draft with substantial written input from a number of the Commissioners.<sup>54</sup> A further meeting of the ICISS was held in Brussels at the end of September to consider the implications of the attacks on the World Trade Center and the Pentagon, resulting in a number of adjustments to the final text as published.<sup>55</sup>

The final report produced by the ICISS represented a robust approach to the controversial issue of humanitarian intervention. The ICISS report, entitled “The Responsibility to Protect,” produced a framework for taking a comprehensive approach to humanitarian crises, “framing intervention as a continuum from diplomatic and economic sanctions through to military intervention as a last resort.”<sup>56</sup> In short, the ICISS’ report argued that, each state “has a responsibility to protect its citizens; if a State is unable or unwilling to carry out that function, the State abrogates its sovereignty, at which point both the right and the responsibility to remedy the situation falls to the international community.”<sup>57</sup> This R2P doctrine incorporates, by structure, the “responsibility to prevent” and “responsibility to rebuild” as essential elements on either side of intervention.<sup>58</sup> These legal and operational components of the R2P doctrine will be examined in greater detail in Part II.

The endorsement of the ICISS report came fairly quickly. In

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<sup>53</sup> R2P Report, *supra* note 22, at 82-83.

<sup>54</sup> *Id.* at 83.

<sup>55</sup> *Id.*

<sup>56</sup> Rebecca J. Hamilton, *Recent Development: The Responsibility to Protect: From Document to Doctrine—But What of Implementation?*, 19 HARV. HUM. RTS. J. 289, 290 (2006).

<sup>57</sup> *Id.*

<sup>58</sup> R2P Report, *supra* note 22, ¶ 2.29.

December 2004, the ideas and principles of the ICISS report were officially endorsed by the Secretary-General's High-Level Panel on Threats, Challenges and Change in a 2004 report titled "A More Secure World: Our Shared Responsibility."<sup>59</sup> Paragraph 203 of this report endorsed a collective international responsibility to protect when sovereign governments have proved powerless or unwilling to prevent:

We endorse 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 and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.<sup>60</sup>

The Secretary-General then endorsed this report in his own 2005 report entitled "In Larger Freedom."<sup>61</sup> "In Larger Freedom" was adopted in the Outcome Document of the World Summit by the UN General Assembly in September 2005, including a commitment to the basic principles of the ICISS report:

We are prepared to take collective action . . . through the Security Council, in accordance with the Charter, including Chapter VII . . . should peaceful means be inadequate and national authorities . . . manifestly [fail] to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity . . . each individual State has the responsibility to protect its populations from genocide,

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<sup>59</sup> See generally The Secretary General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 201-302, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

<sup>60</sup> *Id.* ¶ 203.

<sup>61</sup> See The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, 135, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005); see generally Nicholas J. Wheeler, *A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit*, 6 (2005), Presentation at 'The UN at Sixty: Celebration or Wake?' (Oct. 6-7, 2005), <http://www.una-uk.org/humanrights/R2P%5B1%5D.pdf>.

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.<sup>62</sup>

Shortly thereafter, regional organizations such as the African Union adopted similar principles while others argued for a rejection of the emerging principle.<sup>63</sup>

Nearly one year after the 2005 World Summit, in a debate over authorization to send UN peacekeepers to Darfur, Sudan, the Secretary-General remarked: “[I]n September, in a historic first, UN members unanimously accepted the responsibility to protect populations from genocide, ethnic cleansing, war crimes and crimes against humanity, pledging to take action through the Security Council when national authorities fail.”<sup>64</sup> Subsequently, the UNSC passed Resolution 1674 on April 28, 2006, reaffirming “the provisions . . . of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>65</sup>

This widespread endorsement of the R2P doctrine is notable. Rarely has an international principle received such widespread endorsement in such a rapid fashion. In 2008, for example, during an address at an event on sovereignty in Berlin, Germany, current UN Secretary-General Ban Ki-moon clarified his support and

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<sup>62</sup> 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-139, U.N. GAOR, 60th Sess., Supp. No. 60, U.N. Doc. A/Res/60/1 (Oct. 24, 2006) [hereinafter World Summit Document].

<sup>63</sup> African Union, *The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus,”* Ext/EX.CL/2(VII) (Mar. 2005); Steven Groves, *The U.S. Should Reject the U.N. “Responsibility to Protect” Doctrine*, THE HERITAGE FOUNDATION, (May 1, 2008), <http://www.heritage.org/research/InternationalOrganizations/bg2130.cfm>.

<sup>64</sup> Dana Michael Hollywood, *It Takes a Village...or at Least a Region: Rethinking Peace Operations in the Twenty-First Century, The Hope and Promise of African Regional Institutions*, 19 FLA. J. INT’L L. 75, 102 (2007); see Eric Reeves, Darfur: An Abject Abandonment of the “Responsibility to Protect”, (July 4, 2006), <http://www.sudanreeves.org/Sections-article574-p1.html>.

<sup>65</sup> S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

understanding of the R2P doctrine:

RtoP [sic] is not a new code for humanitarian intervention. Rather, it is built on a more positive and affirmative concept of sovereignty as responsibility – a concept developed by my Special Adviser for the Prevention of Genocide, Francis Deng, and his colleagues at the Brookings Institute more than a decade ago. RtoP [sic] should be also distinguished from its conceptual cousin, human security. The latter, which is broader, posits that policy should take into account the security of people, not just of States, across the whole range of possible threats.

The concept of responsibility to protect is more firmly anchored in current international law than the two related concepts. It was adopted by the 2005 World Summit—the largest gathering of Heads of State and Government the world has seen—and was subsequently endorsed by both the General Assembly and Security Council. It rests on three pillars.

First, Governments unanimously affirmed the primary and continuing legal obligations of States to protect their populations—whether citizens or not—from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. They declared—and this is the bedrock of RtoP [sic]—that “we accept that responsibility and will act in accordance with it.”

The second, more innovative pillar speaks to the United Nations institutional strengths and comparative advantages. The Summit underscored the commitment of the international community to assist States in meeting these obligations. Our goal is to help States succeed, not just to react once they have failed to meet their prevention and protection obligations. It would be neither sound morality, nor wise policy, to limit the world’s options to watching the slaughter of innocents or to send in the marines. The magnitude of these four crimes and violations demands early, preventive steps—and these steps should require neither unanimity in the Security

Council nor pictures of unfolding atrocities that shock the conscience of the world.

The third pillar is much discussed, but generally understood too narrowly. It is Member States' acceptance of their responsibility to respond in a timely and decisive manner, in accordance with the United Nations Charter, to help protect populations from the four listed crimes and violations. The response could involve any of the whole range of UN tools, whether pacific measures under Chapter VI of the Charter, coercive ones under Chapter VII, and/or collaboration with regional and sub regional arrangements under Chapter VIII. The key lies in an early and flexible response, tailored to the specific needs of each situation.<sup>66</sup>

This speech was followed up, in January 2009, by a report issued by the Secretary-General entitled "Implementing the responsibility to protect."<sup>67</sup> In this report, the Secretary-General addresses the R2P mandate, its historical, legal and political contexts, and examines the "three pillars" of the R2P doctrine: (1) the protection responsibilities of the State, (2) international assistance and capacity-building, and (3) timely and decisive response.<sup>68</sup> In July 2009, the Secretary-General presented this report to the 63<sup>rd</sup> session of the UN General Assembly.<sup>69</sup> Subsequently, during informal interactive dialogues and debates on the R2P doctrine, scholars and State representatives presented their views on the R2P doctrine to the General Assembly.<sup>70</sup> These views will be examined

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<sup>66</sup> Press Release, Secretary-General, Secretary-General Defends, Clarifies 'Responsibility to Protect' At Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World,' SG/SM/11701, (July 15, 2008), available at <http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>.

<sup>67</sup> See generally The Secretary-General, *Report of the Secretary-General on Implementing the responsibility to protect, delivered to the General Assembly*, U.N. Doc. A/63/677 (Jan. 12, 2009).

<sup>68</sup> *Id.*

<sup>69</sup> Int'l Coalition for the Responsibility to Protect, *General Assembly Debate on the Responsibility to Protect and Informal Interactive Dialogue*, (2009), <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2493-general-assembly-debate-on-the-responsibility-to-protect-and-informal-interactive-dialogue-#presentation> (last modified Sept. 29, 2009).

<sup>70</sup> See *infra* notes 166-172.



further in Part III.

## *II. Legal and Operational Components of R2P*

The R2P doctrine is premised on a number of legal principles. The following is a brief summary of those principles, as drafted and contemplated by the original ICISS report. First, the R2P doctrine implies an evaluation of all the issues surrounding humanitarian intervention from the point of view of those “seeking or needing support, rather than those who may be considering intervention.”<sup>71</sup> Thus, the ICISS, in drafting its report, focused the “international searchlight” on the “duty to protect communities from mass killing, women from systematic rape and children from starvation,” rather than on the legal rights of sovereign States.<sup>72</sup>

Second, the R2P doctrine, as drafted by the ICISS, acknowledges that the primary responsibility to protect these communities “rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.”<sup>73</sup> The ICISS recognizes that, in many cases, the state will “seek to acquit its responsibility in full and active partnership with representatives of the international community.”<sup>74</sup> Thus, the ICISS views the R2P doctrine as “more of a linking concept that bridges the divide between intervention and sovereignty as the language of the ‘right or duty to intervene’ is intrinsically more confrontational.”<sup>75</sup>

Third, the R2P doctrine, as drafted and proposed by the ICISS, implies more than just the “responsibility to react,” but also includes the “responsibility to prevent” and the “responsibility to rebuild.” Thus, the doctrine directs the international community’s “attention to the costs and results of action versus no action, and provides conceptual, normative and operational linkages between

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<sup>71</sup> R2P Report, *supra* note 22, ¶ 2.29.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

assistance, intervention and reconstruction.”<sup>76</sup>

*A. R2P Component: The Responsibility to Prevent*

According to the ICISS, the prevention of deadly conflict is first and foremost the responsibility of the sovereign state concerned. Consequently, what is required is “[a] firm national commitment to ensuring fair treatment and fair opportunities for all citizens [to] provide a solid basis for conflict prevention.”<sup>77</sup> The failure to prevent is significant, according to the ICISS, and can have severe international consequences. Notably, the ICISS envisions an international role in the duty to prevent including efforts to build better early-warning systems and greater involvement by regional actors with intimate local knowledge.<sup>78</sup> Moreover, the ICISS report endorses the Security Council itself, the body charged with the primary responsibility for the maintenance of international peace and security, in playing a significant role in addressing the root causes of conflict and the need to pursue long-term, effective preventative strategies.<sup>79</sup> Although there is no universal agreement as to the precise causes of deadly conflict, the R2P doctrine does recognize it is important to differentiate between “root” causes and “direct” causes of armed conflict.<sup>80</sup>

In the end, according to the ICISS, without a “genuine commitment to conflict prevention at all levels – without new energy and momentum being devoted to the task – the world will continue to witness the needless slaughter of our fellow human beings, and the reckless waste of precious resources of conflict rather than social and economic development.”<sup>81</sup> Consequently, the entire international community must take “practical responsibility to prevent the needless loss of human life, and to be ready to act in the cause of

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<sup>76</sup> *Id.*

<sup>77</sup> R2P Report, *supra* note 22, ¶ 3.2.

<sup>78</sup> *Id.* ¶¶ 3.16, 3.17.

<sup>79</sup> *Id.* ¶ 3.18.

<sup>80</sup> *Id.* ¶ 3.19.

<sup>81</sup> *Id.* ¶ 3.43.

prevention and not just in the aftermath of disaster.”<sup>82</sup>

*B. R2P Component: The Responsibility to React*

Following the failure to prevent, the ICISS endorses, above all else, a “responsibility to react to situations of compelling need for human protection.”<sup>83</sup> Thus, when preventative measures fail to resolve or contain conflict, and where a State is unable or unwilling to redress the humanitarian situation, the R2P doctrine calls for “interventionary measures by other members of the broader community of states . . . .”<sup>84</sup> These types of measures may include political, economic or judicial measures, and in extreme cases – “but only extreme cases – they may also include military action.”<sup>85</sup> Accordingly, there should be tough “threshold conditions . . . before military intervention is contemplated.”<sup>86</sup>

*1. Measures Short of Military Action*

Military action is not always required under the R2P doctrine as conceived by the ICISS. Wherever possible, for example, “coercive measures short of military intervention ought first to be examined, including in particular various types of political, economic, and military sanctions.”<sup>87</sup>

Sanctions are an important factor in any R2P analysis as they may “inhibit the capacity of States to interact with the outside world.”<sup>88</sup> Consequently, such measures may be more persuasive than actual military action. Notably, the ICISS report recognizes that non-military measures can be “blunt and often indiscriminate weapons and must be used with extreme care to avoid doing more harm than good – especially to civilian populations.”<sup>89</sup> For example,

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<sup>82</sup> *Id.*

<sup>83</sup> R2P Report, *supra* note 22, ¶ 4.1.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* ¶ 4.1.

<sup>87</sup> *Id.* ¶ 4.3.

<sup>88</sup> *Id.* ¶ 4.4.

<sup>89</sup> R2P Report, *supra* note 22, ¶ 4.5.

blanket economic sanctions have been “increasingly discredited in recent years as many have noted that the hardships exacted upon the civilian population by such sanctions tend to be greatly disproportionate to the likely impact of the sanctions on the behaviour [sic] of the principal players.”<sup>90</sup> Thus, the implementation of the R2P doctrine must take note of the variety of restrictions and sanctions that may be applicable in the military, economic, political, and diplomatic arenas.

With regard to military sanctions, the ICISS sees arms embargoes and the cessation of military cooperation and training programs as effective tools where conflict arises or is threatened.<sup>91</sup> Such embargoes may include the sale of military equipment.<sup>92</sup> In terms of economics, utilizing methods of financial sanctions, restrictions on income generating activities such as oil and diamonds, and restrictions on access to petroleum products may also be important ways of restricting military operations and reducing the means available to sustain conflict.<sup>93</sup> Politically, according to the ICISS, restrictions on diplomatic representation (including expulsion of staff) and restrictions on travel may also have some “utility when against specific leaders or individuals and their families.”<sup>94</sup> In short, according to the ICISS, all of these non-military efforts to target sanctions “effectively may decrease the impact on innocent civilians and will, in turn, increase the “impact on decision makers . . . .”<sup>95</sup>

## 2. *Military Intervention*

Once non-military options have been exhausted, the ICISS endorses, in only extreme and exceptional cases, military intervention. Accordingly, the R2P doctrine contains five criteria for determining whether military intervention is proper: (1) just cause, (2) right intention, (3) last resort, (4) proportional means, and (5)

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* ¶ 4.7.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* ¶ 4.8.

<sup>94</sup> *Id.* ¶ 4.9.

<sup>95</sup> R2P Report, *supra* note 22, ¶ 4.6.

reasonable prospects.<sup>96</sup>

a. R2P Threshold Criteria #1: Just Cause

According to the ICISS, military intervention, exercised pursuant to the R2P doctrine for human protection purposes, is only justified in two broad sets of circumstances: (1) in order to halt or avert “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 (2) in order to halt or avert “large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”<sup>97</sup> If either, or both, of these conditions are satisfied, the ICISS proposes that the R2P doctrine provides ample justification for military intervention.<sup>98</sup>

According to the ICISS report, these two conditions include the following “conscience-shocking” situations: (1) actions defined by the framework of the 1948 Genocide Convention that involve large scale threatened or actual loss of life; (2) the threat or occurrence of large scale loss of life, whether the product of genocidal intent or not, and whether or not involving state action; (3) different manifestations of “ethnic cleansing,” including: (a) the systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area; (b) the systematic physical removal of members of a particular group from a particular geographical area; (c) acts of terror designed to force people to flee; (d) the systematic rape for political purposes of women of a particular group (either as another form of terrorism, or as a means of changing the ethnic composition of that group) and; (4) those crimes against humanity and violations of the laws of war as defined in the Geneva Conventions and Additional Protocols that involve large scale killing or ethnic cleansing; (5) situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war; and (6) overwhelming natural or environmental catastrophes, where the state concerned is either

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<sup>96</sup> *Id.* ¶ 4.16.

<sup>97</sup> *Id.* ¶ 4.19.

<sup>98</sup> *Id.*

unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.<sup>99</sup>

Notably, with regard to these aforementioned circumstances, the ICISS does not quantify the term “large scale.”<sup>100</sup> Moreover, the principles outlined by the R2P doctrine do not draw a line, or credible distinction, between situations where killing or ethnic cleansing is the result of state action or non-state action.<sup>101</sup> This distinction is important, as many scholars are now recognizing the deficiencies of international law in grappling with violence perpetrated by non-state actors. From “transnational terrorist networks to private security contractors . . . organizations that are not officially part of the apparatus of any state are increasingly engaged in protracted episodes of intense violence, giving rise to questions of accountability under international law.”<sup>102</sup> It is not that the R2P doctrine does not provide any guidance with regard to this distinction. The ICISS simply notes that the threshold “just cause” requirement does not require a “moral difference whether it is state or non-state actors who are putting people at risk.”<sup>103</sup> Intellectually, this statement, in of itself, appears to pose problems in terms of rectifying the doctrinal problem within international law – that is a body of law that regulates the relations of nations, not individuals.

The R2P doctrine also addresses the issue of “evidence” with regard to this threshold requirement of “just cause.” According to the ICISS, ideally there would be a “report as to the gravity of the situation, and the inability or unwillingness of the state in question to manage it satisfactorily, from a universally respected and impartial non-governmental source.”<sup>104</sup> In the absence of such a report, there are other ways “in which credible information and assessments can be obtained, and the evidence allowed to speak for itself.”<sup>105</sup> For

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<sup>99</sup> R2P Report, *supra* note 22, ¶ 4.20.

<sup>100</sup> *Id.* ¶ 4.21.

<sup>101</sup> *Id.* ¶ 4.22.

<sup>102</sup> John Cerone, *Much Ado About Non-State Actors: The Vanishing Relevance of State Affiliation in International Criminal Law*, 10 SAN DIEGO INT’L L.J. 335, 336 (2009).

<sup>103</sup> R2P Report, *supra* note 22, ¶ 4.22.

<sup>104</sup> *Id.* ¶ 4.29.

<sup>105</sup> *Id.* ¶ 4.30.

example, reports prepared in the normal course of their operations by or for UN organs and agencies can be important, as well as “assessments made for their own purposes by other credible international organizations and non-governmental organizations, and on occasion the media.”<sup>106</sup>

b. R2P Threshold Criteria #2: “Right Intention”

The primary purpose of any military intervention, according to the ICISS, must be “to halt or avert human suffering.”<sup>107</sup> Consequently, any use of military action that has at its core the aim, from the outset, the “alteration of borders or the advancement of a particular combatant group’s claim to self-determination, cannot be justified.”<sup>108</sup> Moreover, according to the ICISS, the “[o]verthrow of regimes is not, as such, a legitimate objective, although disabling that regime’s capacity to harm its own people may be essential to discharging the mandate of protection – and what is necessary to achieve that disabling will vary from case to case.”<sup>109</sup> Accordingly, one way to ensure that the “right intention criterion is satisfied is to have military intervention always take place on a collective or multilateral rather than single-country basis.”<sup>110</sup>

c. R2P Threshold Criteria #3: “Last Resort”

According to the ICISS, before military intervention may be undertaken, “every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored.”<sup>111</sup> In other words, military action must be the last resort. Consequently, the responsibility to react – that is military coercion – “can only be justified when the responsibility to prevent has been fully discharged.”<sup>112</sup> Notably, however, it does not necessarily follow from this proposition that every possible option

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* ¶ 4.33.

<sup>108</sup> *Id.*

<sup>109</sup> R2P Report, *supra* note 22, ¶ 4.33

<sup>110</sup> *Id.* ¶ 4.34.

<sup>111</sup> *Id.* ¶ 4.37.

<sup>112</sup> *Id.*

must have been tried and failed. Rather, the principle of “last resort” means “there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded.”<sup>113</sup>

d. R2P Threshold Criteria #4: “Proportional Means”

The ICISS also proposes that the scale, “duration and intensity of any planned military intervention must be the minimum necessary to secure the humanitarian objective in question.”<sup>114</sup> Thus, the means must be “commensurate with the ends, and in line with the magnitude of the original provocation.”<sup>115</sup> Accordingly, the effect on the political system of the targeted country should be limited to what is strictly necessary to accomplish the purpose of the intervention.<sup>116</sup> According to the ICISS, “[i]t should go without saying that all the rules of international humanitarian law should be strictly observed in these situations.”<sup>117</sup>

e. R2P Threshold Criteria #5: “Reasonable Prospects”

According to the ICISS, “[m]ilitary action can only be justified if it stands a reasonable chance of success, that is,” whether the intervention can actually halt or avert the atrocities or suffering that triggered the intervention in the first place.<sup>118</sup> Thus, military action cannot be justified pursuant to the R2P doctrine “if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all.”<sup>119</sup> Moreover, “military action for limited human protection purposes cannot be justified if in the process it triggers a larger conflict” and, consequently, in such circumstances, coercive military action would no longer be justified.<sup>120</sup>

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<sup>113</sup> R2P Report, *supra* note 22, ¶ 4.37.

<sup>114</sup> *Id.* at 37, ¶ 4.39.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* ¶ 4.40.

<sup>118</sup> *Id.* ¶ 4.41.

<sup>119</sup> R2P Report, *supra* note 22, ¶ 4.41.

<sup>120</sup> *Id.*



### *C. R2P Component: The Responsibility to Rebuild*

The third element of the R2P doctrine, as constructed and proposed by the ICISS, involves post-intervention obligations entitled “the responsibility to rebuild.” According to the ICISS, “the responsibility to protect implies not just the responsibility to prevent and react, but “to follow through and rebuild.”<sup>121</sup> Thus, “if military intervention is taken – because of a breakdown or abdication of a state’s own capacity and authority in discharging its ‘responsibility to protect’ – there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development.”<sup>122</sup> This process, according to the ICISS, includes increasing security,<sup>123</sup> providing for justice and reconciliation,<sup>124</sup> ensuring development,<sup>125</sup> protecting sovereignty,<sup>126</sup> and avoiding “dependency and distortion.”<sup>127</sup>

### *III. R2P: Customary International Law Principle or Emerging Norm?*

With these historical and operational elements of the R2P doctrine established, and before examining whether any provision of the R2P doctrine has reached the level of customary international law, it is important to first establish what constitutes customary international law, its parameters, and, more importantly, what is not customary international law.

Historically, for a practice to become customary international law, two elements must be satisfied.<sup>128</sup> First, “the practice must have

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<sup>121</sup> R2P Report, *supra* note 22, ¶ 5.1.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* ¶¶ 5.8 – 5.12.

<sup>124</sup> *Id.* ¶¶ 5.13 – 5.18.

<sup>125</sup> *Id.* ¶¶ 5.19 – 5.21.

<sup>126</sup> R2P Report, *supra* note 22, ¶ 5.26.

<sup>127</sup> *Id.* at pp. 44-45, ¶¶ 5.27 – 5.31.

<sup>128</sup> Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT’L & POL’Y 147, 148 (1996) (quoting IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6-7 (2d ed. 1973) who noted that elements of this part of custom are duration, uniformity and consistency of practice, and generality of the practice).

long-term, widespread compliance by many States” and, second, “states must believe that conformance with the practice is not merely desired, but mandatory and required by international law.”<sup>129</sup> The latter element is a mental state referred to as *opinio juris*. Once a practice meets these two requirements, it is generally considered binding on all states as a rule of customary international law. Supporting state practice can now grow rather fast, though; it does not require “long-term” development any more.<sup>130</sup>

### A. State Practice

Whether a certain practice enjoys very widespread support, including those of the states specially affected by the rule, is a question of fact, not law. State practice must be viewed from two different, but related angles: “what practice contributes to the creation of customary international law (selection of state practice) and whether this practice establishes a rule of customary international law (assessment of state practice).”<sup>131</sup> Both physical and verbal acts of states may constitute practice that contributes to the creation of customary international law.<sup>132</sup> Notably, “resolutions adopted by States in international organizations or at conferences are normally not binding in themselves and therefore the value accorded to any particular resolution in the assessment of the formation of a

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<sup>129</sup> Loschin, *supra* note 128, at 148. The key decision is the *North Sea Continental Shelf Case* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) (requiring party asserting custom to show that very widespread state practice and *opinio juris* exists) [hereinafter *North Sea Continental Shelf*].

<sup>130</sup> *North Sea Continental Shelf*, *supra* note 129, ¶ 74 (stating that “the passage of a short period of time is not necessarily, or of itself, a bar to the formation of customary international law”).

<sup>131</sup> Jean-Marie Henckaerts, *Assessing the Laws and Customs of War: The Publication of Customary International Humanitarian Law*, 13 HUM. RTS. BR. 8, 9 (2006).

<sup>132</sup> *Id.* at 12, ¶ 6 (noting that physical acts “include, for example, battlefield behavior, the use of certain weapons, and the treatment afforded to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations.”).

rule of customary international law depends on its content, degree of acceptance, and the consistency of related practice.”<sup>133</sup>

Additionally, there is no specified time frame in which a rule of customary international law emerges. Rather, “state practice has to be weighed to assess whether it is sufficiently ‘dense’ to create a rule of customary international law, which means that it has to be virtually uniform, extensive, and representative.”<sup>134</sup> In essence, to be virtually uniform, state practice must mean that different states have not engaged in substantially different conduct.<sup>135</sup> Notably, however, the jurisprudence of the International Court of Justice (ICJ) “shows that contrary practice that appears at first sight to undermine the uniformity of the practice concerned does not necessarily prevent the formation of a customary international legal principle as long as this contrary practice is condemned by other states or denied by the government itself.”<sup>136</sup> “Where there is overwhelming evidence of state practice in support of a rule, alongside repeated evidence of violations of that rule, such violations do not challenge the existence of the rule in question.”<sup>137</sup> Thus, “[s]tates wishing to change an existing rule of customary international law must do so through official practice and must claim to be acting as of right.”<sup>138</sup> Additionally, for a rule of general customary international law to come into effect, evidence of state practice must be “both extensive and representative.”<sup>139</sup> It does not, however, need to be universal in the broad sense of the term.<sup>140</sup> In short, “no precise number or

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<sup>133</sup> Henckaerts, *supra* note 131, at 9; *see, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 70-73 (July 8, 1996) [hereinafter Nuclear Weapons Opinion].

<sup>134</sup> Henckaerts, *supra* note 131, at 9 (quoting Sir Humphrey Waldock, *General Course on Public International Law*, in 106 COLLECTED COURSES HAGUE ACAD. INT’L L. 44 (1962)).

<sup>135</sup> Henckaerts, *supra* note 131, at 9.

<sup>136</sup> *Id.*; *see, e.g.*, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 1986).

<sup>137</sup> Henckaerts, *supra* note 131, at 9.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*; Int’l L. Ass’n [ILA], *Statement of Principles Applicable to the Formation of General Customary International Law* (July 25-29, 2000) 734 [hereinafter ILA Report].

percentage is required because it is not simply a question of how many states participate in the practice, but also *which* states participate.”<sup>141</sup>

### B. *Opinio Juris*

The requirement of *opinio juris* in establishing the existence of customary international law refers to the legal conviction that a particular practice is carried out as required by law.<sup>142</sup> It is usually not necessary to demonstrate separately the existence of an *opinio juris* because it is generally contained within a particular dense practice. Where situations are ambiguous, however, *opinio juris* plays an important role in figuring out whether or not state practice counts toward the formation of customary international law. Where a state fails to act or react to a practice, for example, both the ICJ and its predecessor, the Permanent Court of International Justice, have attempted to find the separate existence of an *opinio juris* to determine whether instances of ambiguous practice should count toward the establishment of customary international law.<sup>143</sup>

In determining whether there has been consistent and genuine state practice reflecting the framework and principles of the R2P doctrine, and consequently *opinio juris* formed with regard to its effect and practical application, it is important to look at both pre-Charter and post-Charter state behavior pertaining to intervention. Both periods of time reflect different state practices, and thus different theories behind customary international law and the provisions of a robust humanitarian intervention exception within the general principle of non-intervention.

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<sup>141</sup> Henckaerts, *supra* note 131, at 9; ILA Report, *supra* note 140, at 736-37.

<sup>142</sup> See generally LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 3 (4<sup>th</sup> ed. 2001); Nicaragua, *supra* note 12; Wall Opinion, *supra* note 12; Loschin, *supra* note 128, at 148; see, e.g., North Sea Continental Shelf, *supra* note 129.

<sup>143</sup> See generally Corfu Channel, *supra* note 14; Nicaragua, *supra* note 12; Wall Opinion, *supra* note 12; Nuclear Weapons Opinion, *supra* note 133; North Sea Continental Shelf, *supra* note 129.

*C. Customary International Law: Humanitarian Intervention*

Prior to the development of the Charter, states had a general right to anticipatory self-defense, thereby permitting the use of force to prevent acts of war occurring on their own soil.<sup>144</sup> Since 1945, however, there has been a great deal of debate about the continuing vitality of the concept of anticipatory self-defense, and more importantly, humanitarian intervention.<sup>145</sup> For example, during the Cold War the concept of humanitarian intervention was raised during discussions of several cases, including the interventions in the Palestine conflict in 1948, the Belgian intervention in the Congo in 1964, the United States action in the Dominican Republic in 1965, the Indian action in East Pakistan in 1971, the Indonesian intervention in East Timor in 1975, the South African action in Angola in 1975-1976, the Vietnamese intervention in Cambodia in 1978-1979, the Tanzanian action in Uganda in 1979, the French action in Central Africa in 1979, and the United States mission in Grenada in 1983.<sup>146</sup>

From these cases, it is difficult to ascertain whether, during the Cold War, there was a development of customary international law allowing for humanitarian intervention. For example, in none of the above-noted cases was the “sole motivation of the intervener truly humanitarian.”<sup>147</sup> In fact, in all of these cases, the intervening state “used force to advance a variety of policy goals” and the actions of the intervening states in these above noted examples “rarely involved the explicit citation of the doctrine of humanitarian intervention.”<sup>148</sup> Consequently, as one scholar noted, since 1945, there has been no “true example of a clear reliance on [humanitarian] intervention by any state.”<sup>149</sup>

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<sup>144</sup> Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 USAFA J. LEG. STUD. 27, 34 (2000).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at p. 36. According to Joyner, these cases of humanitarian intervention are explored further in ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 114-127 (1993).

<sup>147</sup> Joyner & Arend, *supra* note 144, at 36.

<sup>148</sup> *Id.*

<sup>149</sup> Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian*

During the post Cold-War period, there have been a number of significant developments that may point to an emerging international willingness to accept the doctrine of humanitarian intervention as a pure purpose in accepting the use of military force.<sup>150</sup> For example, in 1991 the UNSC adopted a resolution mandating that two million Kurds in northern Iraq be protected from Saddam Hussein's forces.<sup>151</sup> This resolution marked the first time the UNSC made the determination, pursuant to its Chapter VII authority, that the flow of refugees posed a threat of such magnitude that international action was warranted.<sup>152</sup> This determination served as the legal basis for "Operation Provide Comfort," providing humanitarian assistance to the Kurds during the 1990s.<sup>153</sup>

Shortly after the Security Council's humanitarian action in Iraq, the UN was faced with an additional crisis in the Balkans. In 1992 and 1993, the United Nations High Commissioner for Refugees was mandated to provide relief to the victims of war and monitor the extent to which disputants were adhering to international norms in dealing with civilians in the Balkan region.<sup>154</sup> "The United Nations Protection Force (UNPROFOR) was given the task of delivering relief to war victims."<sup>155</sup> In the end, in November 1995, the UN handed over the peacekeeping forces to NATO, marking the first time a UN peacekeeping operation was handed over to a regional organization.<sup>156</sup>

The situation in Somalia provides an additional example of the use of humanitarian intervention during the post-Cold War

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*Intervention: An Emerging Legal Norm?*, 10 U.S.A.F. ACAD. J. LEG. STUD. 27, 36 (1999/2000).

<sup>150</sup> Joyner & Arend, *supra* note 144, at 37.

<sup>151</sup> S.C. Res. 688, ¶¶4-5, U.N. Doc. S/RES/688 (Apr. 5, 1991).

<sup>152</sup> Joyner & Arend, *supra* note 144, at 37.

<sup>153</sup> *Id.* at 37; see James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DEN. J. OF INT'L L. & POL'Y 9, 28-29 (1991-1992).

<sup>154</sup> Joyner & Arend, *supra* note 144, at 37.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 38; see S.C. Res. 770, U.N. Doc. S/RES/770 (August 13, 1992); see also S.C. Res. 1031, U.N. Doc. S/RES/1031 (Dec. 15, 1995); see generally DAVID RIEFF, *SLAUGHTERHOUSE: BOSNIA AND THE FAILURE OF THE WEST* (1995).

period. In 1992, the UNSC made the decision, pursuant to Chapter VII of the Charter, to send forces (UNSOM I) to protect relief operations.<sup>157</sup> Unlike Iraq, however, there was no Somali threat to international peace and security. Consequently, there were no refugees spilling over into neighboring countries of strategic importance to major powers.<sup>158</sup> Thus, while U.S. intervention and UN peacekeeping failed, the Somali experience did produce an important precedent in which the UNSC approved a Chapter VII action for purely humanitarian purposes.

In light of these experiences,<sup>159</sup> and in addition to the earlier mentioned intervention attempts in both Rwanda and Kosovo, it is perhaps arguable that state practice recognizing the legitimacy of collective action for humanitarian purposes, with at least UNSC authority, has emerged within the normative arena. However, it should also be noted that many skeptics, especially those in the Third World, have been uneasy with the idea of intervention, whether humanitarian or other types. For example, according to then Algerian President Abdelazi Bouteflika, during remarks made at a UN general debate in 1999:

We do not deny that the United Nations has the right and the duty to help suffering humanity, but we remain extremely sensitive to any undermining of our sovereignty, not only because sovereignty is our last defense against the rules of an unequal world, but because we are not taking

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<sup>157</sup> S.C. Res.794, ¶¶6-7, U.N. Doc. S/RES/794 (Dec. 3, 1992).

<sup>158</sup> Joyner & Arend, *supra* note 144, at 38; see Jeffrey Clark, *Debate in Somalia: Failure of the Collective Response*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 205 (Lori Fisler Damrosch ed., 1993); see generally William J. Durch, *Introduction to Anarchy: Humanitarian Intervention and "State-Building" in Somalia*, in UN PEACEKEEPING, AMERICAN POLITICS AND THE UNCIVIL WARS OF THE 1990S 311 (William J. Durch ed., 1996).

<sup>159</sup> Notably, there are many more examples of intervention used on humanitarian grounds that have occurred in the post-Cold War period. See, e.g., James E. Hickey, Jr., *Challenges to Security Council Monopoly Power Over the Use of Force in Enforcement Actions*, 10 AM. SOC'Y INT'L L. INT'L LEGAL THEORY 69, 89-105 (2004) (discussing the collective use of force in Cuba 1962, Lebanon in 1976, Grenada in 1983, Liberia in 1992, Bosnia in 1992, Kosovo in 1999, and Iraq in 2003).

part in the decision-making process of the Security Council.<sup>160</sup>

These concerns are legitimate, and are reflected by Richard Bilder:

[I]f NATO can decide on its own that Yugoslavia's treatment of its Kosovar Albanians warrants NATO's bombing, occupation, and de facto severance of Kosovo from Yugoslavia, why cannot every powerful nation or regional group, on the "mirror image" principle, do the same? Would the United States and NATO concede the Arab League's legal right to decide for itself that Israel's treatment of its Palestinian minority warranted the league's bombing of Israel? Can China decide that Indonesia's mistreatment of ethnic Chinese allows it to bomb Jakarta? Can Russia bomb Istanbul to make the Turks stop their effort to suppress the Kurdish separatist movement-hard to distinguish, incidentally, from Yugoslavia's efforts to suppress Kosovar Albanian separatism? And so on! Do we really want to say that the Charter and international law permit this kind of world? And if NATO flouts and bypasses the Charter's basic and most significant principles, how can it hope to later invoke those principles against other states? Or, if the United States and NATO do claim those Charter principles still apply, will there be, as cynics claim, one Charter and one international law for the weak and one very different and less demanding one for the strong?<sup>161</sup>

#### *D. Customary International Law: R2P*

These above-noted positions reflect a specific debate pertaining to humanitarian intervention, a controversial legal topic

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<sup>160</sup> Weiss, *supra* note 21, at 748-49; Internal Displacement Unit of the Off. for the Coordination Of Humanitarian Affairs, *No Refuge: The Challenge of Internal Displacement*, at 37, U.N. SALES NO. E.003.III.M.1 (2003).

<sup>161</sup> Richard B. Bilder, *Kosovo and the "New Interventionism": Promise or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153, 162-63 (1999).



still discussed with regard to modern-day atrocities.<sup>162</sup> The semantics of this debate are important to note. First, the discussion regarding humanitarian intervention involves the notion of a right to intervene under international law. This implies a contravention of the traditional norms of sovereignty and non-intervention, principles that have been at the heart of the international legal structure.<sup>163</sup>

The R2P doctrine takes a different approach, thus, theoretically, should engender a different kind of debate. For example, as Gareth Evans, the chair of the ICISS and author of the R2P doctrine, noted in 2006, the R2P doctrine turns the “whole weary debate about the right to intervene on its head and [re-characterizes] it not as an argument about any right at all but rather about a responsibility – one to protect people at grave risk – with the relevant perspective being not that of the prospective interveners but, more appropriately, of those needing support.”<sup>164</sup>

In light of the rapid development of the R2P doctrine, the position of States has been varied.

### *1. European Union*

The European Union (EU) favors the adoption of the R2P doctrine within international law. In a statement made by the EU during the UN General Assembly’s 63<sup>rd</sup> meeting on behalf of the candidate countries to the EU (Croatia, the former Yugoslav Republic of Macedonia, and Turkey), the countries of the Stabilization and Association Process, and potential candidates to the EU (Albania, Bosnia, Herzegovina, Montenegro, Ukraine, the Republic of Moldova, and Armenia), the Ambassador and Permanent Representative of Sweden to the UN voiced the general support by the EU for the basic principle of State sovereignty, but also recognized that the obligations upon states to protect human rights is “an essential element of responsible sovereignty” as an obligation

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<sup>162</sup> See Samuel Vincent Jones, *Darfur, The Authority of Law, and Unilateral Humanitarian Intervention*, 39 U. TOL. L. REV. 97, 99-100 (2007).

<sup>163</sup> See James P. Terry, *Rethinking Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism*, 2004 ARMY LAW. 36 (2004).

<sup>164</sup> Gareth Evans, *From Humanitarian Intervention to The Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 708 (2006).

“firmly embedded in international law – treaty-based and customary law.”<sup>165</sup> Accordingly: “The EU welcomes and supports the steps to implement the responsibility to protect set out in the report, and particularly the Secretary-General’s emphasis on the responsibility of State themselves, the importance of early prevention; and helping States build their capacity to shoulder their own responsibilities.”<sup>166</sup> Consequently, the EU voiced its support for the integration of the R2P doctrine into the international normative framework.<sup>167</sup>

## 2. *Non-Aligned Movement*

The Non-Aligned Movement (NAM) takes a different approach to the R2P doctrine. The NAM is a movement comprising of approximately 118 nations and two-thirds of the UN’s members.<sup>168</sup> In a similar statement made to the 63<sup>rd</sup> Session of the UN General Assembly, the permanent representative from Egypt, on behalf of the NAM, noted there are “concerns about the possible abuse of R2P by expanding its application to situations that fall beyond the four areas defined in the 2005 World Summit Document, misusing it to legitimize unilateral coercive measures or intervention in the internal affairs of States.”<sup>169</sup> Thus, although the NAM pledged participation actively in the deliberations on the R2P doctrine, NAM remained “seized of and active in further deliberations in the UN General Assembly on the responsibility to protect populations from

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<sup>165</sup> Anders Liden, Ambassador and Permanent Representative of Sweden to the United Nations, General Assembly Debate on the Responsibility to Protect, 63<sup>rd</sup> Sess., 97<sup>th</sup> Plenary Meeting, Statement on Behalf of the European Union, (July 23, 2009), *available at* [http://www.responsibilitytoprotect.org/EU\\_Sweden\\_ENG.pdf](http://www.responsibilitytoprotect.org/EU_Sweden_ENG.pdf).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Tigran Aleksanyan, *Will the Non-Aligned Movement (NAM) Succeed in Multipolarisation?*, CENT. & E. EUR. WATCH (Aug. 8, 2008), *available at* [http://www.despiteborders.com/clanok\\_an.php?subaction=showfull&id=1219848380&archive=&start\\_from=&ucat=38,39,41,48](http://www.despiteborders.com/clanok_an.php?subaction=showfull&id=1219848380&archive=&start_from=&ucat=38,39,41,48) ; *see generally* Cedric Grant, *Equity in Third World Relations: A Third World Perspective*, 71 INT’L AFF. 567 (1995).

<sup>169</sup> H.E. Ambassador Maged A. Abdelaziz, U. N. Permanent Rep. for the Coordinating Bureau of the Non-Aligned Movement, Address at the 63<sup>rd</sup> Session of the U.N. Gen. Assembly (July 23, 2009), *available at* [http://www.responsibilitytoprotect.org/NAM\\_Egypt\\_ENG.pdf](http://www.responsibilitytoprotect.org/NAM_Egypt_ENG.pdf).

genocide, war crimes, ethnic cleansing, and crimes against humanity, bearing in mind the principles of the Charter and international law, including respect for the sovereignty and territorial integrity of States, non-interference in their internal affairs, as well as respect for fundamental human rights.”<sup>170</sup> Consequently, the NAM, as a major voting bloc in the UN General Assembly, has not fully endorsed the pragmatic or operational components of the R2P doctrine.<sup>171</sup>

Notably, these differing positions cast doubt on whether the R2P doctrine is a principle of customary international law as there is not yet a consistent state practice. However, according to some human rights scholars, the R2P doctrine is not just wishful thinking or the rehashing of old debates; rather, it is a doctrine “anchored in existing law, in institutions and in lessons learned from practice.”<sup>172</sup>

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<sup>170</sup> *Id.*

<sup>171</sup> See Chair of the Coordinating Bureau of the Non-Aligned Movement, Statement by H.E. Ambassador Maged A. Abdelaziz on behalf of the Non-Aligned Movement on Agenda Item 44 and 107: “Integrated and coordinated implementation of and follow up to the outcomes of the major United Nations conferences and summits in the economic, social, and related fields; Follow up to the outcome of the Millennium Summit: report of the Secretary General,” (July 23, 2009) [http://www.responsibilitytoprotect.org/NAM\\_Egypt\\_ENG.pdf](http://www.responsibilitytoprotect.org/NAM_Egypt_ENG.pdf). For additional statements made on R2P doctrine during the 63<sup>rd</sup> session, see General Assembly debate on the Responsibility to Protect and Informal Interactive Dialogue, <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2493-general-assembly-debate-on-the-responsibility-to-protect-and-informal-interactive-dialogue-> (last visited Sept. 30, 2009). Statements include those made by the United Kingdom, Indonesia, France, The Philippines, Brazil, Guatemala, Bosnia-Herzegovina, USA, Belgium, South Korea, Australia, Liechtenstein, Costa Rica, New Zealand, The Netherlands, Italy, Austria, Pakistan, Switzerland, Algeria, Singapore, Ecuador, Chile, Morocco, Colombia, Israel, South Africa, Uruguay, Ghana, Japan, Czech Republic, China, Mali, Canada, Nigeria, Vietnam, Guinea-Bissau, Ireland, Venezuela, Norway, Germany, Bolivia, Romania, Slovenia, Monaco, Qatar, Solomon Islands, Croatia, Jordan, Luxembourg, Mexico, Rwanda, Turkey, Cuba, Hungary, India, Andorra, San Marino, Sri Lanka, Sierra Leone, Jamaica, Myanmar, The Former Yugoslav Republic of Macedonia, Slovakia, Islamic Republic of Iran, Russian Federation, Nicaragua, Iceland, Armenia, Timor Leste, Panama, Democratic Republic’s Republic of Korea, Botswana, Kazakhstan, Swaziland, Bangladesh, Papua New Guinea, Benin, United Republic of Tanzania, Peru, Kenya, Malaysia, Lesotho, Azerbaijan, Georgia, Argentina, Sudan, Gambia, Serbia, Cameroon, the Holy Sea, and Palestine.

<sup>172</sup> Arbour, *supra* note 1, at 447-48.

Thus, its “vitality flows from its inherent soundness and justice, as well as from the concept’s comparative advantages over formulations of humanitarian intervention.”<sup>173</sup> Consequently, regardless of the positions of voting blocks within the UN structure, such as the EU and the NAM, it may be argued that the R2P doctrine is already part and parcel of customary international law. To illustrate this point, it would be beneficial to examine one of the recognized pillars of the R2P doctrine – the duty to prevent acts of genocide.

Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”) asserts that genocide, “whether committed in time of peace or in time of war, is a crime under international law which [States] undertake to prevent and to punish.”<sup>174</sup> A majority of countries are “part[ies] to this treaty which, by broad agreement, reflects customary international law binding on all States.”<sup>175</sup> The recognition of genocide as a crime under international law deserving of punishment is not only reflected in the Genocide Convention,<sup>176</sup> but it is also included in the statutes of the international criminal tribunals for the former Yugoslavia<sup>177</sup> and Rwanda,<sup>178</sup> and the Rome Statute of the International Criminal Court.<sup>179</sup>

Nearly fifty years ago, the ICJ issued an influential advisory opinion on the application of the Genocide Convention, delivering some of “the most stirring language of any decision ever rendered by the World Court.”<sup>180</sup> In this opinion, the ICJ highlighted the “humanitarian and civilizing purpose” of the Genocide Convention

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<sup>173</sup> *Id.* at 448.

<sup>174</sup> Convention for the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>175</sup> Arbour, *supra* note 1, at 450.

<sup>176</sup> See Genocide Convention, *supra* note 174, at 1951.

<sup>177</sup> See ICTY Statute, *supra* note 10.

<sup>178</sup> See ICTR Statute, *supra* note 10.

<sup>179</sup> See Rome Statute, *supra* note 10.

<sup>180</sup> Mark Toufayan, *The World Court’s Distress When Facing Genocide: A Critical Commentary on the Application of the Genocide Convention Case (Bosnia and Herzegovina) Yugoslavia (Serbia and Montenegro)*, 40 TEX. INT’L L.J. 233, 234 (2005).

to “safeguard the very existence of certain human groups” and to “confirm and endorse the most elementary principles of morality.”<sup>181</sup> Even the dissenting judges of the Court endorsed the humanitarian purpose behind the Genocide Convention, noting, “when a common effort is made to promote a great humanitarian object . . . [i]t is rather the acceptance of common obligations – keeping step with like-minded States – in order to attain a high objective for all humanity that is of paramount importance.”<sup>182</sup>

The Genocide Convention was the first human rights treaty adopted by the UN and “formalized the pledge of the international community to prevent the commission [of genocide].”<sup>183</sup> It defines genocide as certain acts that are done with the “intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.”<sup>184</sup> For the purposes of the Convention, these acts include: killing members of such a group, causing serious mental or bodily harm to the members of such a group; deliberately inflicting on such a group conditions of life calculated to bring about the group’s physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.<sup>185</sup> In addition to these specific acts, the Genocide Convention also places liability on a variety of other acts, including: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity to commit genocide.<sup>186</sup>

Interestingly, the drafters of the Genocide Convention decided on deliberately ambiguous language to define the scope of the obligation to prevent genocide under Article 1 of the Genocide

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<sup>181</sup> See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 23 (May 28, 1951).

<sup>182</sup> *Id.* at 46-47 (dissenting opinion of Judges Guerrero, McNair, Read, and Hsu Mo); see also Bunyan Bryant, *Codification of Customary International Law in the Genocide Convention*, 16 HARV. INT’L L.J. 686 (1975) (noting that the Convention both codifies and creates international law).

<sup>183</sup> Toufayan, *supra* note 180, at 259.

<sup>184</sup> Genocide Convention, *supra* note 174, art. 2.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at arts. 3, 6

Convention.<sup>187</sup> From this definition, it is difficult to “infer any conclusion on the scope and content of the duty to prevent genocide unless one strays deeply into the intricacies of legal construction.”<sup>188</sup> Consequently, there has been international reluctance to identify acts of genocide, and hesitance in the UN to effectively act. Nonetheless, it has become universally accepted that the responsibility to prevent genocide is reflective within customary international law.

A further discussion of the responsibility to prevent occurred in the 1993 ICJ case between Bosnia and Serbia.<sup>189</sup> In this case, the “congenital tension between the concern for human rights and state sovereignty – two pillars of international law,”<sup>190</sup> manifested itself as Bosnia requested that the World Court declare its government “must have the means to prevent the commission of acts of genocide against its own People as required by Article I of the Genocide Convention.”<sup>191</sup> This case was “the first occasion for the ICJ to clarify the scope of the implementation of the duty to prevent genocide and to give effect to the affirmations it formulated some forty years earlier.”<sup>192</sup> In the end, however, this potential for lucidity was squandered under the iron fist of procedural limitations. While this result “demonstrated that the courtroom was not the appropriate forum for the airing of questions relating to genocide,”<sup>193</sup> the case

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<sup>187</sup> Genocide Convention, *supra* note 174, art. 1 (“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”).

<sup>188</sup> *Id.*; Toufayan, *supra* note 180, at 259 (discussing the problems with “no treaty body or monitoring organ charged with ensuring the implementation of obligations arising under the Convention and helping to define their content, and nothing in the debates about Article I provide the slightest clue as to the scope of the obligation to prevent”).

<sup>189</sup> Application of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide, 1993 I.C.J. 325, 408 (Further Request for the Indication of Provisional Measures Order of Sept. 13) [hereinafter Application of the Genocide Convention].

<sup>190</sup> Toufayan, *supra* note 180, at 235.

<sup>191</sup> Application of the Genocide Convention, *supra* note 189, at p. 332 (quoting the request filed by Bosnia and Herzegovina with the Court on July 27, 1993).

<sup>192</sup> Mark Toufayan, *supra* note 180, at 235.

<sup>193</sup> *Id.*; Geoffrey S. DeWeese, *The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention*, 26 DENV. J. INT’L L. &

still provides some guidance as to what the duty to prevent encompasses under international law.

In a separate opinion, ad hoc Judge Lauterpacht interpreted the duty to prevent as one “that rests upon all parties and is ... owed by each party to every other,” thereby clarifying its *erga omnes* character.<sup>194</sup> Lauterpacht then went on to note that the “Security Council’s continuous arms embargo imposed on Bosnia had institutionalized the Serbs’ arms advantage without providing sufficient means for securing the right to life of the Bosnian population, thereby contributing to the genocide of the Muslim population.”<sup>195</sup> Based on the reasoning of the doctrine set forth in the *Lockerbie Case*, Lauterpacht argued that the Security Council was limited by requirements of *jus cogens* and that this resolution “can be seen as having in effect called on Members of the United Nations, unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.”<sup>196</sup> Thus, because the UNSC is mandated to “discharge its duties. . . in accordance with the Purposes and Principles of the United Nations,” including the “promotion. . . and respect for human rights and for fundamental freedoms,” the resolutions under Chapter VII to prevent genocide in Bosnia and Herzegovina were “clearly ineffective and had actually contributed to the commission of the crime by suppressing the inherent right of that state to self-defense,” resulting

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POL’Y 625, 628 (1998).

<sup>194</sup> See Application of the Genocide Convention, *supra* note 189 at 436 (separate opinion of Judge Lauterpacht); see also Geoffrey S. DeWeese, *supra* note 93, at 626-27 (declaration of Judge Oda explaining the *erga omnes* nature of the duty to punish genocide). See generally Oscar Schachter, *International Law in Theory and Practice: General Course of Public International Law*, 178 RECUEIL DES COURS 9, 195-201 (1982), reprinted in OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 208-214 (1991) (exploring the relationship between *erga omnes* obligations and genocide).

<sup>195</sup> Mark Toufayan, *supra* note 180, at 237.

<sup>196</sup> See, e.g., Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114, 140-42 (Provisional Measures Order of April 14) (separate opinion of Judge Shahabuddeen); *id.* at 173-75 (dissenting opinion of Judge Weeramantry); *id.* at 206-07, 211-221 (dissenting opinion of Judge El-Koshi).

in the resolutions ceasing to be “valid and binding.”<sup>197</sup> Despite this *ultra vires* character of the UNSC resolutions, Lauterpacht noted “it would be difficult to say that [Member States] became positively obliged to provide the Applicant with weapons and military equipment” to enable it to defend itself and its population.<sup>198</sup>

This discussion of the responsibility to prevent genocide reflects the universal acceptance of the first pillar of the R2P doctrine – the responsibility to prevent. Thus, it is most likely fair to argue that all States agree on the importance of preventing acts of genocide and crimes against humanity before they happen. Of course, as with any legal debate, how these terms are defined will always be a matter of interpretation.

A more difficult determination lies within the second and third pillars of the R2P doctrine – the responsibility to react and the responsibility to rebuild. With regard to the responsibility to react, the R2P report, as set forth by the ICISS, states that any use of military intervention to employ the principles of the R2P doctrine should be done so pursuant to Security Council authorization.<sup>199</sup> This idea was further endorsed in the 2005 World Summit Outcome Document.<sup>200</sup> The question remains, however, and is subject to considerable debate,<sup>201</sup> whether regional organizations may cite the R2P doctrine in asserting their mandated role, pursuant to Chapter VIII<sup>202</sup> of the Charter, to intervene militarily to ensure human

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<sup>197</sup> Toufayan, *supra* note 180, at 238

<sup>198</sup> Application of the Genocide Convention (Order of Sept. 13), *supra* note 189, at 441 (separate opinion of Judge Lauterpacht).

<sup>199</sup> See R2P Report, *supra* note 22.

<sup>200</sup> See World Summit Document, *supra* note 62.

<sup>201</sup> See generally Dana Michael Hollywood, *It Takes a Village...Or at Least a Region: Rethinking Peace Operations in the Twenty-First Century, The Hope and Promise of African Regional Institutions*, 19 FLA. J. INT'L L. 75 (2007); see also Peter Valek, Note: *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?*, 26 MICH. J. INT'L L. 1223 (2005).

<sup>202</sup> According to Article 52, Charter VIII of the UN Charter, “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.” U.N. Charter art. 52, para.1.



security is maintained and upheld.

Moreover, as evidenced by the recent debate on the implementation and scope of the R2P doctrine during the 63<sup>rd</sup> meeting of the UN General Assembly, it is not yet clear what practical or operational provisions of the R2P have reached, or are emerging within the international community. While it appears that governments have “made a strong show of support for implementing the 2005 consensus commitment to prevent and halt genocide, war crimes, crimes against humanity and ethnic cleansing,”<sup>203</sup> it is not yet clear to what degree.

### *Conclusion*

As with many areas of customary international law, it is difficult to ascertain, within a brief and cursory framework such as this article, whether the R2P doctrine, as created by the ICISS and endorsed by the UN, has reached the level of customary international law. Certainly, one could argue that there is significant dissent within the international community with regard to the operational and pragmatic applications of the R2P doctrine. However, according to William Pace, the Executive Director of WFM-Institute for Global Policy, it is estimated that nearly “75 of the 93 Member States participating in the General Assembly debate [on the R2P doctrine] gave strong statements in support of the Responsibility to Protect and put forward valid and useful questions about its implementation within the United Nations.” In his view, this constitutes a “clear global commitment to continue working to finally bring about an end to the kind of atrocities that led to the founding of the United Nations in 1945[.]”<sup>204</sup>

Notwithstanding this widespread endorsement, many scholars do not believe the R2P doctrine actually represents a new legal

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<sup>203</sup> Press Release, Int’l Coal. for the Responsibility to Protect, *General Assembly Debate on the Responsibility to Protect concludes with calls for implementation of the norm* (July 29, 2009) available at [http://www.responsibilitytoprotect.org/ICRtoP%20release%20General%20Assembly%20Debate%2029\\_July\\_2009\(2\).pdf](http://www.responsibilitytoprotect.org/ICRtoP%20release%20General%20Assembly%20Debate%2029_July_2009(2).pdf).

<sup>204</sup> *Id.*

doctrine, but rather an amalgamation of current and pre-existing principles under international law. According to Edward C. Luck, the Special Adviser to the Secretary-General on The Responsibility to Protect, the R2P doctrine is not a new legal norm, offering new legal concepts, but rather reflects a long-standing commitment by the international community to protect citizens from universally condemned crimes.<sup>205</sup> Of course, conversely, there are those who also believe the R2P doctrine is a possible trojan horse seeking to undermine traditional notions of state sovereignty and non-intervention.

The next step in the implementation and adoption of the R2P doctrine will be delicate. Following the 63<sup>rd</sup> UN General Assembly debate on the doctrine, and its arguable success in gaining support for its implementation, states will invariably be interested in determining its substantive scope and restrictions. What is important to note within this ongoing debate, however, is the distinct differences in semantics between the R2P doctrine and the age-old concept of humanitarian intervention. If the rhetoric of these two sets of norms can be kept separate, there is a strong possibility of further R2P implementation. The R2P doctrine, while not yet a part of customary international law, is most certainly an emerging norm reflecting widespread international support and ongoing interest. However, before it moves any further within the normative arena, concerns over state sovereignty, abuses, military hegemony, and a return to pre-Charter politics must be addressed with both vigor and intellectual honesty.

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<sup>205</sup> Edward C. Luck, Special Adviser to the Secretary-General, Remarks to the General Assembly on the Responsibility to Protect (R2P) (July 23, 2009), *available at* <http://www.un.org/ga/president/63/interactive/protect/luck.pdf>.

