The Responsibility to Protect: Watershed or Old Wine in a New Bottle?

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This article argues that the responsibility to protect (R2P) is not a radical departure on the role of international community regarding mass atrocities, but a codification of pre-existing concepts of just war and humanitarian intervention, and a call to ensure their consistent application. The authors highlight R2P's holistic approach of preventing, reacting to, and rebuilding after grave crimes are committed, treating impunity and its remedial as a process rather than stand alone events. This article concludes with political hurdles for R2P to be realised in action and suggest creative ways to overcome them.

INTRODUCTION

On his visit in June 2009 to the Nazi concentration camp at Buchenwald, US President Barack Obama said that it “teaches us that we must be ever vigilant about the spread of evil in our own time, that we must reject the false comfort that others' suffering is not our problem and commit ourselves to resisting those who would subjugate others to serve their own interests.”1 Responding to him, Nobel laureate Eli Weisel told the President,

But the world hasn’t learned ... [M]any of us were convinced that at least one lesson will have been learned—that never again will there be war; that hatred is not an option, that racism is stupid; and the will to conquer other people’s minds or territories or aspirations ... is meaningless ... Had the world learned, there would have been no Cambodia and no Rwanda and no Darfur and no Bosnia. Will the world ever learn?2

"Never again" continues to be a powerful commitment, repeated across countries and continents, races and religions, throughout the width and breadth of the globe, not only for the survivors of Nazi Germany,3 but also for those of the

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2. Id.


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killing fields of Cambodia, military dictatorships in Latin America, the Yugoslav Wars, and the Rwandan Genocide. These words have come to symbolize the promise that their suffering will not be forgotten, and that the international community will not allow the injustices perpetrated upon them to be repeated.

The expression is not exclusively post-World War II, having been used, for example, in a passionate call upon Europeans in 1916 to never again embark on the madness of a conflict like the First World War. Referring to the three nations primarily involved in the war, Edward Carpenter cried, “it is intolerable to think they should thus mutilate and destroy each other. All we can say is: ‘Never again must this thing happen!’” He even called attention to “the awful sufferings of the six or seven million Jews,” alluding to the plight of Jews in Russia.

In more recent times, responses of the global community to the atrocities of genocide, war crimes, ethnic cleansing, and crimes against humanity have developed in two directions that constitute the background to the current debate over the responsibility to protect. These two trends emerged in the efforts to draw lessons from thirty years of failure to protect civilians from genocide in Cambodia and Rwanda, military dictatorship in Latin America and the Caribbean, and armed conflict in Somalia, the Balkans, the Great Lakes region, and in West Africa. They relate to efforts to combat impunity through protection of rights of victims and criminal responsibility of perpetrators, on the one hand, and developing an alternative to the tainted concept of humanitarian intervention in order to prevent and halt such atrocities, on the other.

I. TWO INTERNATIONAL RESPONSES TO ATROCITIES

The first trend was the combating of impunity through the concept of victims’ rights and perpetrators' responsibility. Regarding the former, human rights groups launched “amnesty campaigns” in the 1970s in defense of political prisoners and prisoners of conscience under dictatorial regimes, such as in Brazil and Uruguay, while the dictators declared ‘self-amnesty’ law in an effort to establish impunity


4. Among the vast literature on the Cambodian genocide, the expression “never again” was used, for example, in Alan Berlow, NEVER AGAIN? CAMBODIA: STILL HAUNTED BY THE KHMER ROUGE, HARPER’S MAGAZINE (October 1989) 62-68.

5. See, e.g., NUNCA MAS: A REPORT BY ARGENTINA’S NATIONAL COMMISSION ON DISAPPEARED PEOPLE (1986).


7. An organization called “Never Again Rwanda,” according to its web site, “has risen to meet the challenges faced by Rwanda and the world in the wake of the atrocities. We the youth stand firmly united under the commitment “never again.” See http://www.neveragainrwanda.org/index.php. It is part of an international youth network called “Never Again International,” which was founded in 2001 in The Hague, Netherlands. See http://www.neveragaininternational.org/about/.

8. Id. at 17.

for themselves and their regimes.

Conceptually separating amnesty and impunity, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a French judge and human rights activist, Louis Joinet, in 1996 to develop a “set of Principles for the Protection and Promotion of Human Rights Intended to Strengthen Action to Combat Impunity.”10 Earlier, in 1989, the Sub Commission had requested a study from human rights expert Theo van Boven on compensation for victims of violations of human rights and international humanitarian law,11 which was further pursued by legal scholar M. Cherif Bassiouuni in 1998. The “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law”12 were adopted by the Commission on Human Rights on April 19, 2005, and the General Assembly on December 16, 2005, covering physical or mental harm; lost opportunities, including employment, education, and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.13

As for the criminal responsibility of those responsible, the Security Council created two ad hoc UN criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in 1991 and the International Criminal Tribunal for Rwanda (“ICTR”) in 1994. In 1998, governments adopted the Rome Statute creating the International Criminal Court (“ICC”), which came into force in 2002, establishing a permanent tribunal with jurisdiction to investigate and bring to justice individuals who commit the most serious crimes of international concern, specifically genocide, war crimes, and crimes against humanity.14

The second trend relates to efforts to prevent, respond, and ensure rebuilding in the wake of these egregious affronts. In the immediate aftermath of the end of the Cold War, hope arose that the collective security system would begin to function as envisaged in the UN Charter. Thus the Security Council authorized forces under United States command to restore Kuwaiti sovereignty following

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14. Article 15 of the ICC Statute adds the crime of aggression subject to later agreement on the definition and conditions for exercise by the court of its jurisdiction over this crime. The first three crimes are defined in Articles 6-8 of the Statute.
Iraq's invasion in 1990 and restore democratically elected President Aristide in Haiti following his overthrow by a junta in 1994. In the non-governmental field, Médecins sans frontières (MSF) was born out of doctors' unwillingness to keep silent in the face of atrocities in the Biafran secession war (1967-70) and developed a concept of a right and duty to intervene when lives are at stake and notwithstanding state sovereignty. MSF co-founder Dr. Bernard Kouchner joined forces with a professor of international law to articulate a concept of *droit et devoir d'ingérence* (the right and duty to intervene). Kouchner eventually became minister of state in the French government and convinced President Mitterrand to push the idea in several UN resolutions, although the French government did not succeed in obtaining full-fledged endorsement of the concept. These hopes were short-lived and the international community failed to act effectively to prevent large-scale suffering in Rwanda, Somalia, the Balkans and other conflicts. The post-Cold War prospects for collective intervention to halt aggression and large-scale loss of life were put to test in the Balkans. There again, measures under Chapter VII, such as Security Council Resolution 770 (1992) of 13 August 1992 on humanitarian assistance to Bosnia and Herzegovina, or Security Council Resolution 824 (1993) of 6 May 1993 on "safe areas", were inadequate to prevent atrocities.

The failure of the UN Security Council to approve the use of force to protect the Kosovar Albanians against Serbian atrocities precipitated the 1999 NATO military intervention in Kosovo, without Security Council authorization. The dilemma stemmed from the prevailing view, expressed among others by the Secretary-General and the Independent International Commission on Kosovo, that the NATO military intervention was illegal but legitimate. A wide range of positions have been taken on the extent to which the operation could be justified in law or morality. However, most view the dilemma of the gap between legality and legitimacy as a major challenge to the twin principles of sovereignty and human rights in international relations. This dilemma was also a primary motivation for the creation of the International Commission on Intervention and State Sovereignty (ICISS) in 2000. The Commission observed quite forthrightly that "NATO's intervention in Kosovo in 1999 brought the controversy..."
external military intervention for human protection purposes] to its most intense head." While the NATO operation in Kosovo was ongoing, Kofi Annan opined that it had

...cast in stark relief the dilemma of so-called "humanitarian intervention". On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? The inability of the international community to reconcile these two compelling interests in the case of Kosovo can be viewed only as a tragedy.21

II. THE BIRTH OF R2P

By the time of the 2005 UN World Summit meeting, which brought together heads of state and government to take stock five years after the United Nations Millennium Declaration, the moment seemed ripe for the international community to reflect on past failures, and draw on the conclusion of the ICISS to map a path that would ensure that the promise of "never again" becomes a promise fulfilled. Echoing the Secretary-General’s report, In Larger Freedom,24 the governments “acknowledge[d] that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being [and recognized] that development, peace and security and human rights are interlinked and mutually reinforcing.”25 The Summit Outcome document articulated the shared commitment of states to address “the multifaceted and interconnected challenges and threats confronting our world”26 and to build consensus on major threats and challenges, which must be translated “into concrete action, including addressing the root causes of those threats and challenges with resolve and determination.”27

Such commitments imply that sovereignty is predicated not only on states’ rights, but also on the concept of “shared responsibility.”28 The symbiosis of rights and responsibilities forms the bedrock of the international system, conferring

26. Id. at ¶6.
27. Id. at ¶8.
28. Id. at ¶4 and 15.
freedoms and obligations upon the state in both its external and internal relations. Foremost among the responsibilities of states is to guarantee the human rights of their citizens, including the right to live in security and dignity. The Secretary-General has referred approvingly to the position of the Representative of the Secretary-General on Internally Displaced Persons that 'sovereignty entailed enduring obligations towards one's people, as well as certain international privileges.'

Nowhere is this obligation more apparent in the outcome document than in states' commitment to the responsibility to protect ("R2P"), by which they seek to ensure that their populations are shielded from genocide, war crimes, crimes against humanity, and ethnic cleansing. The starting point for the official definition of R2P is the language of the Summit Outcome, establishing in two key paragraphs the responsibilities of states and the international community with respect to populations subject to these atrocities:

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

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect

their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those that are under stress before crises and conflicts break out.\textsuperscript{30}

Paragraphs 138 and 139 shift the focus from the armed foreign intervention of the older doctrine of humanitarian intervention to a delineation of the state's responsibility to prevent and respond to genocide, war crimes, ethnic cleansing, and crimes against humanity, graduating up to peaceful action by the United Nations and finally, if peaceful means prove inadequate and — here is the critical wording — “national authorities are manifestly failing to protect their populations,” coercive action under Chapter VII. The Secretary-General is careful to warn that “there is no room for a rigidly sequenced strategy or for tightly defined 'triggers' for action.”\textsuperscript{31}

These paragraphs should be read with paragraph 97 on the responsibility of states and the United Nations to assist in recovery and rebuilding:

97. Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peace building and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding Commission as an intergovernmental advisory body.\textsuperscript{32}

In its simplest form, the responsibility to protect affirms to every individual that “sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”\textsuperscript{33} With this commitment, the international community, both collectively through the United Nations and individually as a matter of national security policy, sought to guarantee that the grossest affronts to human security and dignity, namely, genocide, war crimes, ethnic cleansing, and crimes against humanity, would never again occur.

While agreement on the broad framework outlined in the document suggests a breakthrough in international relations protecting human rights, there are three distinct and interrelated problems with that assumption: (1) Does R2P's three-fold agenda of the responsibility to prevent, respond, and rebuild conceptually advance human and collective security, or is it merely the codification of pre-


\textsuperscript{31} ICISS Report, supra note 22, at § 50.

\textsuperscript{32} 2005 \textit{World Summit Outcome}, supra note 25, at § 97.

\textsuperscript{33} ICISS Report, supra note 22, at viii.
existing norms and actions? (2) Has R2P been meaningfully embraced by the international community in ways that alter behaviour and institutional arrangements? (3) Has R2P been applied in ways that narrow the gap between words and deeds and generate outcomes that otherwise would not have occurred?

Answering these questions is necessary to determine whether the adoption of R2P by heads of state and government at the 2005 World Summit was indeed a watershed, or whether it is more accurately viewed as a case of “old wine in new bottles”34 in the sense that it is an updated version of older doctrines (humanitarian intervention and the related just war doctrine). Unless it is significantly different from humanitarian intervention and meaningfully implemented, the promise of R2P may be too easily used as a fig leaf, adopting a new rhetoric to cover old processes, which lead to the same outcome. Unless and until this or another new doctrine provides an effective response to acts that shock the conscience of humanity, the international community will be forced to utter the words “never again” following the next mass atrocity.

III. R2P AS A DOCTRINAL WATERSHED

The increased interest in the R2P concept following the ICISS Report, the 2005 Summit Outcome, and the Secretary-General’s report on implementation, as well as focused attention by academic centres and NGOs, suggests that it is a watershed in defining the basis for appropriate responses to the challenge of “never again.”35 In order to examine the proposition that a new doctrine is emerging, it is necessary to put it in the context of the evolving understanding of sovereignty and legitimacy, the purported novelty of the continuum of situations, and the significance of the supporting processes. If R2P redefines sovereignty in useful ways, provides a new understanding of the types of emergency situations to be addressed, and enlists new processes that enhance the prospects of success, then the case would be strong for transforming the principle of R2P into a new legal norm.

A. State Sovereignty and Legitimacy

Sovereignty is a fundamental principle of modern international law and relations, although contemporary approaches to world order see it increasingly as limited by reciprocal responsibilities between the state and its citizens. In other words, legitimacy of a sovereign state is conditioned by the state fulfilling its obligations to its citizens.36 Sovereignty in this regard cannot be viewed as a

34. Moller, supra note 21.
license to control, but an obligation to create an enabling environment for its citizens to live in freedom with their rights protected.\textsuperscript{37}

A limitation on sovereignty based on reciprocal responsibility is not a new concept, nor is the idea that sovereignty is not an end in and of itself but a means to an end. For John Locke, sovereign legitimacy derives from the social contract, whereby an individual relinquishes a degree of freedom to a greater community in exchange for the “legislative or supreme power of any common wealth... to be directed to no other end but the peace, safety, and public good of the people.”\textsuperscript{38} This environment of security permits individuals to experience greater freedoms and opportunity, allowing them agency to live their life as they see fit, within the bounds of their responsibilities to their community. As with all contracts, there are necessarily at least two parties. While the individual has relinquished a degree of freedom by agreeing to live by the rules governing the community, the larger community has assumed the responsibility to guarantee the rights of its members, most notably personal security.\textsuperscript{39}

It is by fulfilling the social contract of protecting the rights of its members that the state acquires legitimacy. However, when members of society fail to live by the rules governing the community, they have broken the social contract, and relinquish some rights (such as freedom of movement when they are sentenced to prison). What has typically been overlooked is the reverse situation in which the community neglects its responsibilities to its citizens. In exchange for guaranteeing the rights of its members, the state acquires sovereign legitimacy. The unavoidable conclusion, then, is that when the state manifestly fails to fulfill its responsibilities to its citizens, it loses legitimacy derived from the fulfillment of the social contract.\textsuperscript{40} Built into this contractarian theory is the concept of a responsibility of the state to protect the rights of its citizens. In human rights theory, the consequence of the failure of the state to fulfill its responsibility is the right to rebellion against tyranny.\textsuperscript{41} R2P offers a middle ground between impunity for oppression and violent overthrow by strongly supporting the state to find its own way to end the oppression, backed up by outside pressure short of regime change.

The emerging doctrine of R2P identifies four crimes (genocide, war crimes, ethnic cleansing, and crimes against humanity), which, if attributable to a state,
cause that state to lose legitimacy and its sovereign rights over its citizens. To the international community, the identification of these crimes as triggering R2P lies in their systematic and recurrent nature and the magnitude of collective suffering resulting from the state’s failure to adequately ensure the protection of its populations. For these crimes to occur, the state — as party to the social contract — has manifestly failed to guarantee the fundamental rights of its citizens and loses its sovereign legitimacy. In such cases, paragraphs 138 and 139 of the World Summit Outcome offer two options. Either the underlying cause of the state’s failure to guarantee the rights of its citizens is that it is unable to do so, in which case it is the responsibility of the international community to assist the state in guaranteeing its citizens’ rights, or the state is unwilling to guarantee the rights of its citizens, and has by deliberate action constructively relinquished its sovereign legitimacy.

In both cases, the responsibility for guaranteeing the rights of its people falls to the broader community of states. In his report, In Larger Freedom: Towards Development, Security and Human Rights for All, then UN Secretary-General Kofi Annan asserted this principle in stating that “no legal principle — not even sovereignty — should ever be allowed to shield genocide, crimes against humanity and mass human suffering.”

B. Shifting the Terms of the Debate to the R2P Continuum

The ICISS Report is commonly used as the guiding document on the responsibility to protect. It rightfully situated this relationship between the state and its citizens at the forefront of the debate. In articulating the responsibility to protect, the Commission — acutely aware of the unacceptability of the traditional concept of humanitarian intervention to many states — drew exception to the traditional false dichotomy between sovereignty and intervention. Perceiving the two in opposition is not only incorrect and unhelpful, but shifts the focus of discussion away from its intended beneficiaries: victimized populations.

The R2P debate shifts the focus from the conventional “right to intervene” in three respects. First, it shifts attention from the claims of the intervening states to the people whom those states are acting to protect. Second, it brings in the role of prevention and rebuilding, rather than limiting the action to the act of intervention. Third, it does not “load the dice in favour of intervention” or “label and delegitimize dissent as anti-humanitarian.” In contrast, the responsibility to protect prioritizes the needs of those seeking or needing support, acknowledges the primary role of states in guaranteeing the protection of the rights of its population,

42. 2005 World Summit Outcome, supra note 25, at ¶ 138.
43. ICISS Report, supra note 22, at ¶ 7; R2P Primer, supra note 36, at 3.
44. In Larger Freedom supra, note 24 at ¶ 129.
45. ICISS Report, supra note 22, at 27, 69; Hum. Int. and Just War, supra note 36, at 306.
46. ICISS Report, supra note 22, at 16.
and includes the fundamental components of the responsibility to prevent and to rebuild.\textsuperscript{47} When confronted with the potential or actual perpetration of genocide, war crimes, ethnic cleansing, or crimes against humanity, states applying R2P recognize that no one pillar is more important than the other: the responsibility of the state, the obligation of the international community, and the timeliness and decisiveness of the response.\textsuperscript{48} The responsibility to protect provides a novel approach to a traditional debate, by shifting the focus of the intervention debate back to populations at risk.

The re-conceptualization of civilian protection from genocide, war crimes, ethnic cleansing, and crimes against humanity highlighted an overarching failure of the pre-existing framework to ensure that the world would “never again” witness these crimes. Recasting the reality of a population in need as the result of an emerging or actualized threat appropriately contextualizes the protection of their rights as part of a continuum, from prevention, to intervention, to post-conflict rebuilding.\textsuperscript{49} Mitigation efforts by the international community to stem abuses in Rwanda, Cambodia, Somalia, and other countries have been undertaken only once the atrocities had taken place, leaving countless numbers dead before action was taken.

UN Secretary-General Kofi Annan noted with disappointment that “if only two peace agreements had been successfully implemented in the early 1990s — the Bicesse Accords in Angola and the Arusha Accords in Rwanda — we could have prevented the deaths of almost three million people.”\textsuperscript{50} This is hardly a fulfilment of the promise of the responsibility to protect. R2P, as agreed in the Summit Outcome, recognizes this failure of past efforts. In stating that R2P “entails the prevention of such crimes, including their incitement, through appropriate and necessary means” and pledging that the international community will assist states “which are under stress before crises and conflicts break out,”\textsuperscript{51} the primacy of prevention in averting potential genocide, war crimes, ethnic cleansing, and crimes against humanity is recognized as the cornerstone of effective implementation of R2P. In this, as in so many cases, prevention is better than cure.

The role of preventive measures also underscores that the options open to the international community are not limited to passive commentary, on the one hand, and full-fledged military intervention, on the other. A wide range of opportunities exists for the international community to avert and alleviate human suffering while only resorting to military intervention as a last resort. Similarly, effective post-conflict rebuilding demands the inclusion of preventive measures to ensure

\textsuperscript{47} Id.

\textsuperscript{48} IMPEMENTING R2P, supra note 29.

\textsuperscript{49} WORLD FEDERALIST MOVEMENT, INSTITUTE FOR GLOBAL POLICY, R2P Civil Society Project, Responsibility to Protect, Engaging Civil Society: Frequently Asked Questions 1 (2009) [Hereinafter R2P CS FAQ].

\textsuperscript{50} IN LARGER FREEDOM, supra note 24, at ¶ 86.

\textsuperscript{51} 2005 WORLD SUMMIT OUTCOME, supra note 25, at ¶ 138.
that states do not revert to conflict.\textsuperscript{52} Situating the responsibility to react between prevention and rebuilding embeds an understanding that intervention of any sort – whether diplomatic, economic, military or otherwise – is part of a process and cannot be viewed in isolation.\textsuperscript{53} To be effective, interventions must be designed with an understanding of what came before, and what is yet to come. A brief review of the three types of responsibility may clarify this sequencing.

1. Responsibility to Prevent

The emerging doctrine of the responsibility to protect focuses the efforts of the international community to ensure that genocide, war crimes, ethnic cleansing, and crimes against humanity are prevented before they are committed. Through the reforms following the acceptance of the World Summit Outcome, states committed themselves to strengthening United Nations measures, with cooperation from states, to encourage faster and more effective mechanisms for recognizing the warning signs of abuses and for acting accordingly.\textsuperscript{54} Peacekeeping, involving civilian and military components, is preventive in so far as it assists states in meeting their responsibility to protect by reducing the risk of armed conflict or the reopening of hostilities.\textsuperscript{55} Beyond holding potential warring factions at bay, a major measure to reduce the risk of genocide, war crimes, ethnic cleansing, and crimes against humanity, is to alleviate their root causes. In this sense, the responsibility to prevent is as much about development as it is about peace enforcement.\textsuperscript{56} Strengthening national capacity for combating poverty and promoting sustainable development through to the advancement of democracy, the rule of law, and a state’s capacity to manage conflict, are central to the international community’s commitment to prevent injustices.

The Secretary-General considered these functions as key elements of the United Nations’s comparative advantage.\textsuperscript{57} Failure to promote development places the international community in an untenable position of forever reacting to the symptoms of conflict, rather than addressing root causes, when promoting development would have been simpler, cheaper, and averted mass human suffering before it occurred.\textsuperscript{58}

As the embodiment of the organized international community, the United Nations, generally, and the Security Council, specifically, are primarily responsible for assisting the state in meeting its prevention responsibilities. However, as noted in the ICISS Report and the Secretary-General’s \textit{Implementing the Responsibility to Protect} report, the increasing array of domestic and transnational civil society

\textsuperscript{52} IN LARGER FREEDOM, supra note 24, at § 115.
\textsuperscript{53} ICISS Report, supra note 22, at 58-60.
\textsuperscript{54} IMPLEMENTING R2P, supra note 29, at § 138; ICISS Report, supra note 22, at 17.
\textsuperscript{55} IN LARGER FREEDOM, supra note 24.
\textsuperscript{56} ICISS Report, supra note 22, at 111.
\textsuperscript{57} IN LARGER FREEDOM, supra note 24, at § 106.
\textsuperscript{58} Id.
and private sector actors plays an ever-increasing role in the prevention of mass human suffering.\textsuperscript{59} Advocacy, early warning, monitoring, research, training, and education are all key components to the prevention and alleviation of conflict and mass human suffering, and are the strengths of civil society and the private sector, as the international community readily acknowledges. Harnessing and utilizing these strengths are imperative to protecting the rights of citizens everywhere, and complement the actions of states and the international community in fulfilling the responsibility to protect.

A pervasive theme of the responsibility to protect is its focus on assisting states to succeed, rather than punishing them when they fail.\textsuperscript{60} As the primary duty-bearer of the responsibility to protect is the state, it follows that for the social contract to be fulfilled, the state must have the capacity to meet its obligations. Enshrined in the World Summit Outcome was the commitment of the international community to assist states to develop their capacity to prevent mass human suffering. It is in this way that sovereignty and intervention are not opposed. When a state is willing to prevent abuses, R2P aims to strengthen the state’s capacity to meet its responsibilities, and thereby enhances the state’s sovereign legitimacy. As such, a strong state is the best line of defense against genocide, war crimes, ethnic cleansing and crimes against humanity.

\textit{Implementing the Responsibility to Protect} enumerates four forms of assistance measures to help states to meet their responsibilities, drawing on paragraphs 139 and 139 of the Summit Outcome, namely, a) encouraging States to meet their responsibilities through “confidential or public persuasion”;\textsuperscript{61} b) helping them do so through education, training and/or assistance such as those provided by the OHCHR and UNHCR;\textsuperscript{62} c) helping with capacity-building, including of “the civilian capacities of regional and sub-regional organizations to prevent crimes and violations,” citing the example of the African Union-United Nations ten year capacity-building programme;\textsuperscript{63} and d) assisting states “under stress before crises and conflicts break out,”\textsuperscript{64} referring to preventive deployment and capacity building measures such as conflict-sensitive development analysis, indigenous mediation capacity, consensus and dialogue, local dispute resolution capacity, and capacity to replicate capacity.\textsuperscript{65}

The formation of the International Commission on Intervention and State Sovereignty was catalyzed by what many regard as the failures of the United Nations and NATO during intervention in Kosovo in 1999. The scale and ferocity of ethnically-based conflict leading to and including the Kosovo crisis

\textsuperscript{59} ICISS Report, supra note 22, at 3; Implementing R2P, supra note 29, at $5$ 59; In Larger Freedom, supra note 24, at $5$ 20.

\textsuperscript{60} ICISS Report, supra note 22, at 69.

\textsuperscript{61} Implementing R2P, supra note 29, at $5$ 30.

\textsuperscript{62} Id. at $5$ 35.

\textsuperscript{63} Id. at $5$ 38.

\textsuperscript{64} Id. at $5$ 28.

\textsuperscript{65} Id. at $5$ 45.
raised the question of how the international community could have responded more effectively to avert the destruction that ensued. The event highlighted the failure of the United Nations system to receive and heed the warning signs of ethnic cleansing — messages that would have either enabled the international community to respond more effectively than it did, or to successfully prevent the crisis before it ensued.

Similarly, the NATO military intervention was severely criticized on many accounts, two of which were addressed by ICISS recommendations and subsequent UN reports. Firstly, the intervention lacked the "right authority" (the UN Security Council had not authorized the campaign, and the NATO Charter restricts the use of force to the defence of its member states, of which none were directly threatened). Secondly, it lacked proportional means (targets for NATO air strikes included "dual-use" targets such as bridges, factories, power stations, and telecommunications infrastructure, and used depleted uranium and cluster munitions). The failure of the international community to act in time to avert the tragedy highlighted the failure of the United Nations to receive and adequately analyze warning signs, assess the risk to the population, as well as respond in a timely and decisive manner. Atrocities of this magnitude do not just occur. They are the result of a purposeful, planned series of events that can be identified and mitigated. Such actions were not taken, or not taken soon enough, in the case of Kosovo. For all its faults, the Kosovar conflict was, above all, a failure of the international community to accurately assess the threat facing the people of Yugoslavia, Serbian and Albanian alike, and to effectively prevent the perpetration of ethnic cleansing before it occurred.

The failure of the international system to adequately respond in Kosovo has greatly contributed to both the conceptualization of the responsibility to protect, generally, and the awareness of the primacy of prevention. Since Kosovo, the United Nations has attempted to strengthen its early warning capacity, focusing its energies on the collection and analysis of early warnings, and using this information to reinforce prevention efforts. In the Summit Outcome document, states committed to "support the United Nations in establishing an early warning capability," and bolstering the UN's ability to fulfil its obligations under the responsibility to protect by strengthening the "good offices" of the Secretary-General to promote the rule of law and the peaceful settlement of disputes through technical assistance and capacity-building.

Similarly, the Secretary-General has called for the expansion and adoption of the preventative mechanisms of some regional and sub-regional bodies in seeking early resolution of conflict, such as the Organization for Security and Cooperation...
in Europe.\textsuperscript{69} Such an approach actualizes the commitment of states at the World Summit to cooperate with regional bodies in ensuring the protection of civilians from genocide, war crimes, ethnic cleansing and crimes against humanity.

2. Responsibility to React

The responsibility to protect has the potential to emerge as a focal point for the global response to gross human rights violations, drawing together the provisions of a wide range of international treaties, conventions, and declarations, and spanning the mandates of a breadth of international bodies and actors. One of the stated goals of the responsibility to protect was to "forge a common strategy" for responding to actual or threatened abuses, "rather than on proposing costly new programs or radically new approaches" to the protection of human rights.\textsuperscript{70} Drawing together the legal principles and obligations under human rights and protection declarations, statutes, covenants, and treaties, R2P is the embodiment of a framework for the cohesive and coherent conceptualization of national and international responsibilities. Foremost among these standards are the Universal Declaration of Human Rights, the four Geneva Conventions, the Rome Statute of the International Criminal Court, the Genocide Convention, the Convention Against Torture, and the Conventions on Civil, Political, Social, Economic, and Cultural Rights.\textsuperscript{71}

Since the agreement of the World Summit Outcome, the responsibility to protect has been invoked in a number of cases, including for the first time in UN Security Council resolution 1674 on the Protection of Civilians in Armed Conflict.\textsuperscript{72} The R2P’s utility in structuring the human rights and civilian protection discourse characterizes its potential impact as a focal point for the international community’s response to human rights abuses.

Shifting the language of civilian protection away from a "right to intervene" to a "responsibility to protect" acknowledges the range of responses available to the international community. While the traditional debate focused on the intervener’s right of action, with the essential conclusion of a violation of sovereignty, R2P recognizes the range of tools available to the international community for ensuring that human rights are protected.\textsuperscript{73} We have discussed the ways in which this broadened conception has impacted the responsibility to prevent, but the same holds true when it becomes clear that national authorities are manifestly failing in their responsibilities. The World Summit Outcome suggests a number of possible courses of action, ranging from peaceful means, including diplomatic and humanitarian measures, to coercive collective action. The ICISS Report

\textsuperscript{69} IMPLEMENTING R2P, supra note 29, at § 37.
\textsuperscript{70} Id. at § 68.
\textsuperscript{71} R2P CS FAQ, supra note 49, at 1.
\textsuperscript{73} ICISS Report, supra note 22, at 29.
succinctly summarizes this graduated approach:

When preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required. These coercive measures may include political, economic or judicial measures, and in extreme cases — but only extreme cases — they may also include military action. As a matter of first principles, in the case of reaction just as with prevention, less intrusive and coercive measures should always be considered before more coercive and intrusive ones are applied.\(^74\)

The Report presents two foundational principles, viz. that interventionary measures include a range of tools at the international community's disposal for civilian protection, and that these measures should be applied, when appropriate, in a graduated sequence, culminating in military action only if less intrusive measures have failed or are likely to fail. In his report of 2005, Secretary-General Kofi Annan asserted these principles, characterizing sanctions as a "necessary middle ground between war and words."\(^75\) The World Summit Outcome codified this understanding, recognizing that "sanctions remain an important tool under the Charter in our efforts to maintain international security without recourse to the use of force."\(^76\) The responsibility to protect has enabled the re-contextualization of the process of civilian protection, such that the “right to intervene” has been recast as a responsibility to use graduated levels of interventionary measures, including political, economic, judicial measures and, in extreme cases only, the use of force, i.e. in cases where the state primarily responsible for the protection of its citizens is manifestly failing to fulfill this obligation.

The provisions agreed to by world leaders also contained two principles regarding the authority to intervene. Principally, paragraph 139 bears testimony to the importance of regional bodies, such as the African Union, in responding to genocide, war crimes, ethnic cleansing, and crimes against humanity. While the UN Security Council is the principal world body charged with the maintenance of international peace and security, paragraph 139 stipulates that collective action be undertaken “in cooperation with regional bodies, as appropriate.”\(^77\)

A pertinent example is the cooperation between the United Nations and the African Union in their response to the crisis in Darfur. Drawing on the R2P in Resolution 1706, the Security Council calls for close coordination between the offices of the UN Secretary-General and the African Union in their joint actions and transition of responsibilities in response to ongoing violence.\(^78\) Collective

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74. Id.
75. In Larger Freedom, supra note 24, at §109-110.
76. 2005 World Summit Outcome, supra note 25, at § 106.
77. Id., at § 138
action through the Security Council, where different geostrategic interests can exercise a veto, presumably ensures that intervention is undertaken with the right intention and avoids potential charges of self-interest.\textsuperscript{79}

The Secretary-General’s analysis draws upon regional and sub-regional early warning and early response mechanisms, such as those of Organization for Security and Cooperation in Europe and the Economic Community of West African States in light of “the importance of adaptation to local conditions and cultures.”\textsuperscript{80}

3. Responsibility to Rebuild

Equally important as the protection of human rights through intervention to halt or avoid atrocities is the guarantee that such acts will not be perpetrated again. In 2005, Secretary-General Kofi Annan voiced the disappointment of the global community that “roughly half of all countries that emerge from wars lapse back into violence within five years.”\textsuperscript{81} This rate of regression underscores the relationship between the responsibility to rebuild post-conflict, and the responsibility to prevent future atrocities. The responsibility to rebuild is nowhere more important than when military intervention is contemplated. As noted in the ICISS Report, the objective of intervention should not simply be to end current hostilities, but also sow the seeds of durable peace, “to ensure that the conditions that prompted the military intervention do not repeat themselves or simply resurface.”\textsuperscript{82} Such a strategy involves a genuine commitment to good governance and sustainable development, as well as a commitment to address the root causes of conflict.\textsuperscript{83}

Effective rebuilding requires a broad range of considerations. While traditional focuses on disarmament, demobilization, and reintegration of combatants are necessary factors, they are by no means sufficient. Ensuring justice, the rule of law, security, economic opportunity, good governance, as well as a host of other factors must be incorporated into strategies for post-conflict rebuilding.\textsuperscript{84} As presented above, R2P necessitates cooperation and coordination between UN and regional bodies.\textsuperscript{85} Additionally, the peacekeeping capacity of the United Nations must be

\textsuperscript{79} Id. Such was the case in the second gulf war. The action taken by the “coalition of the willing” was publicly justified both in terms of security, but also in terms of human rights. Rightly or wrongly, opponents charged that the United States and its allies were acting in their own self-interest. It is not certain that the same charges would have been laid, or laid with such ferocity, had the intervention been authorized by the security council, with the precautionary principles detailed in the ICISS report, as called for by the responsibility to protect.

\textsuperscript{80} Implementing R2P, supra note 29, at § 37; See also ICISS Report, supra note 22, at § 36.

\textsuperscript{81} In Larger Freedom, supra note 24, at § 114.

\textsuperscript{82} ICISS Report, supra note 22, at 39.


\textsuperscript{84} Id. at 41.

\textsuperscript{85} In Larger Freedom, supra note 24, at § 112.
enhanced. Similarly, the commitments of states must match their expectations of the United Nations and assist the body in its peacekeeping reform process, a commitment made at the 2005 World Summit.

In an acknowledgement of the importance of peace building strategies to the responsibility to protect, and in a demonstration of their commitment to R2P's meaningful implementation, global leaders at the World Summit endorsed the Secretary-General's proposal for the creation of a United Nations Peacebuilding Commission and a peacebuilding support office as a focal point for "reconstruction and institution-building efforts necessary for recovery from conflict and support[ing] the development of integrated strategies in order to lay the foundation for sustainable development."86 The Peacebuilding Commission can be seen as an operationalizable mechanism for the responsibility to rebuild, and represents a commitment by the international community to fulfil its responsibility to protect. Its formation indicates recognition by the international community of a fundamental failure of previous civilian protection efforts; failures that the Peacebuilding Commission's creation seeks to significantly address, fostering the development and implementation of a holistic responsibility to protect.

C. Treating and Tackling Impunity as a Process

R2P articulates a new conceptualization of the obligations of states and the international system to prevent, respond to and help rebuild from the gross violations of human rights of genocide, war crimes, ethnic cleansing and crimes against humanity. Taking the beneficiary, not states, as the primary unit of analysis necessitates the acknowledgement that threats to human rights do not just happen, but are the result of a process. This process affords the international community the opportunity and obligation to act, whether through states or collectively, and to avert or respond to the threat of mass human suffering.

The development and acceptance of the responsibility to protect framework by the international community advances a standard to which states, both individually and collectively, can and should be held accountable.87 R2P as a focal point for the protection of human rights has the potential to emerge as a framework to which the citizen can hold up and claim what is theirs by right. This claim does not stop with the state. One of the fundamental overarching principles of the responsibility to protect is that its jurisdiction is universal.88 If a state is unwilling or unable to fulfil its responsibility to its citizens, then it is the obligation of the international community to ensure protection of those at risk. By promoting the rule of law both within and between states, R2P seeks

86. 2005 WORLD SUMMIT OUTCOME, supra note 25, at § 98.
88. IMPLEMENTING R2P, supra note 29, at § 19.
to end impunity for the perpetration of genocide, war crimes, ethnic cleansing, and crimes against humanity. Focusing on the vulnerable rather than the state enshrines the individual responsibility of those committing crimes that shock the conscience of humanity, with the intended consequence of lowering the likelihood of abuses. As such, the framework does not hold only states accountable, but also individuals and the international community, through the United Nations as the embodiment of shared ideals.

The ICISI Report in 2001 called for the reshaping of the international system to better protect the rights of citizens, regardless of their nationality. Since the Report’s release, the international community, through the United Nations, has sought to better define and respond to the expectations entailed in the responsibility to protect. Internally, the United Nations has undergone notable change. The 2009 Report of the UN Secretary-General on the implementation of the responsibility to protect has called on member states to

assist the Human Rights Council in sharpening its focus as a forum for considering ways to encourage States to meet their obligations relating to the responsibility to protect and to monitor, on a universal and apolitical basis, their performance in this regard.

Similarly, the Security Council has drawn on the World Summit Outcome a number of times in informing its deliberations. R2P is also permanently represented within the Secretariat, by both the Special Advisor to the Secretary-General with a focus on the responsibility to protect, and the Special Advisor on the Prevention of Genocide. However, possibly the greatest structural reform of the United Nations as a result of the responsibility to protect has been the establishment of the Peacebuilding Commission and peacebuilding support office. In creating these bodies, the heads of state and governments present at the 2005 World Summit acknowledged the fundamental role of the responsibility to rebuild in ensuring that the responsibility to protect is fulfilled holistically, rather than being confounded with Chapter VII operations.

Thus, in adopting R2P, the United Nations strengthened areas of traditional weakness, such as early warning and peace building capacity, by linking them to prevention of genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility to prevent is the cornerstone of the responsibility to protect since its success would make humanitarian intervention unnecessary. Similarly, the establishment of the Peacebuilding Commission institutionalised the closely related responsibility to rebuild. Drawing together the technical capacity for post-conflict reconstruction and community building, the Peacekeeping Commission

89. In Larger Freedom, supra note 24, at § 134.
90. Implementing R2P, supra note 29, at § 27.
91. Id. at § 16; R2PCS Principle to Practice, supra note 126, at 6.
fills the traditional gap in civilian protection operations. The aim of both the responsibility to prevent and the responsibility to rebuild was to draw from and codify United Nations best practices and enhance its operational capacity to assist countries in avoiding the abuses targeted by the R2P.

Specifically, the Secretary-General identified the following five capacities of development assistance for this purpose: (a) conflict-sensitive development analysis, (b) indigenous mediation capacity, (c) consensus and dialogue, (d) local dispute resolution capacity, and (e) capacity to replicate capacity, primarily through conflict resolution training.93

In sum, the United Nations has sought to redefine the doctrine of multilateral responses to the threats to peace and security created by genocide, war crimes, ethnic cleansing and crimes against humanity by balancing the responsibility of all states to prevent, react, and rebuild.94 The second salient feature of this emerging doctrine has been the emphasis on strengthening relations with regional bodies, such as the African Union. Considerable innovative thinking, stimulated by the ICISS and senior staff in the Secretary-General’s office, has provided the basis for a twenty-first century doctrine of “never again” to the extent that the responsibility to protect is genuinely a watershed and not merely a new bottle for the old wine95 of humanitarian intervention.

IV. R2P AS A NEW BOTTLE FOR THE OLD WINE

While the responsibility to protect may provide a focal point for studies by international commissions and the UN Secretariat, as well as NGOs, including at least one coalition devoted entirely to R2P, its potential will be considerably limited if its novelty is more in packaging than substance and if it is not transformed into practice. Without meeting these challenges, the commitments made by heads of state and governments in paragraphs 138 and 139 of the World Summit Outcome will have little significance, and fail to fulfil their objective: ensuring that the gross atrocities of genocide, war crimes, ethnic cleansing, and crimes against humanity never again confront the conscience of humanity. The question remains whether the responsibility to protect moves us past the shortcomings of previous doctrine or is using different rhetoric for the same reality. To answer this question, we must examine first the relevant principles of international law, the older doctrines of just war and humanitarian intervention, and then the responsiveness of states to efforts to apply R2P in the post-2005 Summit world.

A. Reaffirmation of Basic Principles of International Law

In the five years following the 2005 Summit, much has been made of states'

93. Implementing R2P, supra note 29, at ¶ 45.
94. 2005 WORLD SUMMIT OUTCOME, supra note 25, at ¶ 77-78.
95. The term was used by Molière, supra note 21.
willingness to accept the notion of sovereignty as responsibility. The seeming shift from the notion of sovereignty as a right to control provides the basis for the responsibility to protect doctrine. While states have a right under international law to non-interference in their domestic affairs, reaffirmed in paragraph 5 of the World Summit Outcome document,96 this right is predicated on the sovereign legitimacy of the state. As a state's sovereign legitimacy is acquired through the fulfilment of the social contract with its citizens by guaranteeing their fundamental rights, it follows that when the state is systematically unwilling or unable to fulfil this responsibility, its right to non-interference may be superseded by the responsibility of the international community to protect the state's citizens from mass suffering.

However as noted above, this theory of sovereignty as a responsibility, rather than as a right to control, is not new. The Global Center for the Responsibility to Protect points out that "states have long accepted limits on their conduct, whether towards their own citizens or others."97 In essence, all human rights treaties and declarations seek to provide checks on the power of the state. By assenting to human rights standards, states agree to uphold defined rights of persons under their jurisdiction. Similarly, as the duty-bearer of the responsibility to guarantee order in the state, it is also their responsibility to guarantee that these rights are upheld. As such, in theory if not always in practice, the responsibility to protect is as old as the principle of human rights itself.

This basis is readily acknowledged in the formulation of the responsibility to protect. The framework draws on a wide range of pre-existing human rights standards, including the Universal Declaration of Human Rights, the four Geneva Conventions, the Rome Statute of the International Criminal Court, the Genocide Convention, the Convention Against Torture, and the International Covenants.98 In light of this long tradition of human rights principles, can it really be said that the responsibility to protect is a new doctrine, or merely the rearticulating of a previously well-acknowledged standard of respect for human rights? Reflecting on this tradition, the provisions contained in the World Summit Outcome do not advance the discipline of human rights, but provide a focal point for previously agreed standards, granting one more avenue to hold states accountable for previous commitments. In theory, at least, the responsibility to protect may be accurately characterized as a case of "old wine in new bottles."99

The task before the ICISS, then, was to define as precisely as possible which "exceptional circumstances" of a breach in states' obligations were grave enough to maximize the chance of consensus in any given case.100 By this process, their

96. 2005 World Summit Outcome, supra note 25, at § 5.
97. R2P Primer, supra note 36.
100. ICISS Report, supra note 22, at 31.
global consultations led to the selection of affronts to human conscience already enshrined in international law: genocide, war crimes, ethnic cleansing, and crimes against humanity. The process was essentially a political one: in identifying the four crimes, the Commission agreed upon breaches of human rights of severity and magnitude that would find little objection from the community of states in preventing or responding to their perpetration. It is worth noting that this process severely restricted the breadth of applicability of the responsibility to protect. As noted by UN Secretary-General Ban Ki-moon,

[the responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.]

Additionally, R2P does not extend to the protection of other rights that may not lead to consensus, such as the prohibition of torture or non-discrimination, except insofar as they are components of the listed crimes. The restriction of applicability, ratione materiae, of the responsibility to protect is indicative of the essence of the concept as a higher expectation to protect populations from a limited number of recognized human rights abuses rather than advancing the corpus of human rights to cover new areas.

The strength of international consensus on the four crimes is underlined by the international community's desire to act in previous cases, but without agreeing on an effective course of action. The vast majority of United Nations members agreed that egregious crimes were occurring in Somalia, Cambodia, and Rwanda, for example, but the halting and partial measures taken were the result of lack of consensus on the means of action but not on the characterization of the crimes. Thus, the international community did not need the codification of the responsibility to protect to accept that certain internal atrocities call for international action. That principle of R2P is not new. It would be a novel concept if it provides a political tool to ensure consistency and effectiveness of the response to such atrocities. Therefore, one must explore whether and to what extent R2P innovates in prescribing a course of action different from the traditional doctrines of just war and humanitarian intervention in international law.

B. Just War and the Doctrine of Humanitarian Intervention

In situations compelling an international response, the ICISS Report, the Summit Outcome and other UN reports have stipulated a number of basic

101. Implementing R2P, supra note 29, at ¶ 10.B.
criteria that must be met before actions restricting or breaching state sovereignty are regarded as legitimate. The ICISS Report, that of the High-Level Task Force on Threats, Challenges and Change, and that of the Secretary-General, In Larger Freedom, each suggested that while the merits of an international military response can be individually tailored, the standards of these responses must be impermeable. To qualify as a legitimate response, an action must be:

1. In response to actual or intended large scale loss of life or large scale ethnic cleansing (just cause);
2. Undertaken with the primary purpose of halting or averting human suffering (right intention);
3. The last resort, where all other options for prevention or peaceful resolution have been explored and would not have/did not succeed (last resort);
4. The minimum necessary scale, duration, and intensity to secure the defined human protection objective (proportional means);
5. Undertaken with a reasonable chance of success in halting or averting the atrocity (reasonable prospects);
6. Legitimate, undertaken with the right authority (right authority).

All three reports advocated for the formal adoption of these criteria by the Security Council in determining the appropriateness of military intervention in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.

While the formal adoption of these basic standards would mark a significant development in transparency and accountability, what has been less noted in the literature is that these standards were by and large already well-established in the Just War framework. The criteria listed above neatly conform to those elaborated since St. Augustine of Hippo in the fifth century, as well as by other Just War thinkers, such as Thomas Aquinas and Grotius in the thirteenth and seventeenth centuries, respectively. Indeed, both the R2P and Just War provisions can be seen as “a cluster of injunctions” combining jus ad bellum and jus in bello standards limiting the ability and conduct of states and the international community when contemplating a violation of sovereignty. Richard Miller’s summary of the fundamental principles of the Just War tradition unequivocally presents this similarity.

104. See generally Nicholas Rengger.Id.
106. Hum. Int. and Just War, supra note 36, at 287.
Criteria 1 through 6 of the *jus ad bellum* standards encompass the full spectrum of provisions contained in the ICISS and UN reports. However, the standards set forth by the responsibility to protect framework overlook two criteria previously articulated in the Just War tradition: relative justice and open declaration. Mona Foxidal and Dan Smith note that the criterion of open declaration is satisfied by the current process of intervention authorization in that, by requiring approval of the UN Security Council, the decision to authorize intervention is made in a public forum and is, therefore, “openly declared.” Similarly, Fioxidal and Smith assert that the provision of relative justice should inform the “appropriate tone of discussion on intervention” rather than its outcome, “avoid[ing] the language of absolute condemnation as well as of total partiality to either side in a conflict.”

Considerations of these final two criteria aside, it is worth exploring in greater depth the development of the six overlapping standards presented in the responsibility to protect framework.

The earliest enunciation of Just War principles, and three of the basic standards for humanitarian intervention, can be traced back to St. Augustine in the fifth century. Writing in the European context of monarchs and kingdoms, St. Augustine stated that a war must have a just cause involving fault of the opposing side (just cause), the undertaking to avoid evil (proportionality), and the authority of the sovereign (right authority). In light of the work of Grotius and Locke, the last of these criteria may be contemporarily perceived as the authority granted by the people under the notion of “popular sovereignty,” or the authority of the international community. Writing in the thirteenth century, Thomas Aquinas reasserted these three basic premises and noted their complementarity, while also stressing the need for proportionality.

107. *Id.* at 291.
Fixdal and Smith distinguish the criterion of just cause as based on "assessing and appropriately responding to a situation that gives rise to injury," and the criterion of right intention, which concerns motives. The Just War, then, is undertaken in response to an objective recognition of grievous violations (just cause), using those means that cause less harm than the actions they are designed to prevent (proportionality), with the authorization of a body or position under an appropriate mandate (right authority), and with no ulterior motive such as "profit, power, and glory" (right intention). The basic criteria stipulated in the ICISS and UN reports embrace these four Just War principles, incorporating them into the six standards necessary for legitimate intervention. One can see a parallel with that statement in the ICISS Report that "[t]he degree of legitimacy accorded to intervention will usually turn on the answers to such questions as the purpose, the means, the exhaustion of other avenues of redress against grievances, the proportionality of the riposte to the initiating provocation, and the agency of authorization." Others have noted the similarity between Just War principles and R2P.

Since the thirteenth century, the Just War tradition has expanded to include two additional aspects of particular relevance to contemporary humanitarian interventions: "last resort" and "reasonable hope." As the responsibility to protect makes clear, the primary duty-bearer for protecting the needs of a community is the state. Only when the state is unwilling or unable to fulfill this responsibility does it fall to the international community to intercede, and grounds are established for a violation of state sovereignty. The criterion of "last resort" ensures that this stipulation is upheld. However, there is no consensus in the Just War literature as to whether the "last resort" criterion necessitates that all other means before military engagement have been attempted and failed, or whether intervention is legitimate if there is no reasonable expectation that other methods will be successful. While no consensus exists, Fixdal and Smith suggest that the "last resort" criterion should be considered as a requirement that the severe nature of military intervention be adequately recognized, and that other options for achieving peace have been carefully considered and either attempted or discarded due to unreasonable prospects of success.

Similar criteria were applied as the doctrine of humanitarian intervention evolved in the nineteenth century. Antoine Rougier clarified this doctrine at the beginning of the twentieth century. Building on the experience of the Concert of Europe and its interventions in the Levant, he identified five conditions, which

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110. *Id.*
111. ICISS Report, supra note 22, § 2.27.
must be met before a forceful intervention for humanitarian purposes is legal under customary international law. These conditions are:

(a) **Grievousness of the harm:** The potential or ongoing harm to the population must be contrary to “the laws of humanity” (les lois de l’humanité). Rougier refers to “acts of tyranny” or “acts of inhumanity,” attributable to public authorities. They are “excesses of injustice and cruelty that profoundly shock our mores and our civilization.” The legal foundation for the proscription of these acts is the concept of “common law of mankind” (droit commun de l’humanité), which is the highest of three levels of social organization after municipal law and international law and distinct from the moral foundation of natural law. This legal domain is rather based on human solidarity, according to the theory. In describing the sort of inhumanity justifying humanitarian intervention, Rougier complains that the doctrine only proposes “vague hypotheses all too often unlikely” and draws on an example that sends chills up the spine of anyone aware of what happened in Nazi Germany just thirty years later. The doctrine, Rougier explains, supposes the presence in the middle of Europe of a little potentate burning and torturing his subjects such that “the smoke from their cadavers rises to the brains of the neighbors.” He goes on to explain that the acts must violate universal human rights, defined as those rights which are prior to and higher than any political organization and placed under the protection of all nations, namely, life, liberty, and rule of law. Rougier also includes public health among these human rights, citing the example of a country where cholera, yellow fever, or plague has broken out that fails to take measures to control the epidemic. Intervention, under such circumstances, would be “legitimate both for the general interests of humanity and the direct interests of the intervening powers.”

(b) **Collective intervention:** One or a very few nations are not enough to legitimize the intervention. A larger group must decide to avoid the appearance or fact of political motive. In order to have “legitimate authority,” the intervention must be collective, and the larger the number of intervening states, the greater the authority. The intervening states are deemed to represent the Society of Nations. Recognizing that states are unequal, Rougier acknowledges that the authority of the intervening states depends also on having an adequate level of social and legal development and economic, financial, and military power.

115. *Id.* at 478.
116. *Id.* at 473.
117. *Id.* at 491-492.
118. *Id.* at 492.
119. *Id.* at 510, citing V. AMÉZ, in *VIII REV. DR. INT’L ET DE LEGISLATION COMPARÉE* (1876).
120. *Id.* at 515.
121. *Id.* at 517. “Only the violation of these essential rights constitutes a just cause for intervention.” *Id.*
122. *Id.* at 518.
123. *Id.* at 499-502.
124. *Id.* at 504.
(c) **Lack of ulterior motive by the intervening powers.** None of the intervening powers may have a political motive or territorial ambition, or use the humanitarian purpose as a pretext. Rougier explains that humanitarian intervention is "by definition disinterested." 125 It is regarded as an essential condition of the intervention that the intervening party neither seek nor gain an advantage. Humanitarian intervention cannot be a pretext "to gain indirectly some political outcome, either by dominating the state, for example by setting up a protectorate, or by generating a conflict which it plans to turn to its advantage." 126

(d) **Necessity:** Without the intervention the grievous harm to the population must be almost certain to occur. Rougier is not explicit on this point but he does exclude the situation in which the territorial state is sufficiently developed to restore human rights in due course and where the intervention would only aggravate matters. 127

(e) **Proportionality:** The geographic scope and intensity of the intervention must not exceed what is required to protect the affected population. 128 Again, Rougier is not explicit but in his discussion of the disinterest criterion, he makes clear that intervening states are acting only to stop the harm to the affected population and not for any broader territorial or political purpose. One of his conditions of opportunity is to assess the "extent of the scandal" and limit intervention to "exceptionally grave disorders that upset the life of the nation." 129

Of key importance to the contemporary application of modern military humanitarian intervention is whether these conditions have adapted to post-1945 international law and are adequate to generate reasonable hope that a more robust application of the doctrine would provide a preferable basis for effective actions in places like Somalia, Darfur, and the Democratic Republic of the Congo.

Let us consider each condition:

(a) **Grievousness of the harm:** The nineteenth century idea "laws of humanity" or "common law of mankind" has been replaced by the modern corpus of human rights and humanitarian law. The specific "excesses of injustice and cruelty that profoundly chock our mores and our civilization" is easily replaced by the more precisely defined four crimes enumerated by the R2P doctrine, namely genocide, war crimes, crimes against humanity, and ethnic cleansing, all the more so since the first three were codified in the ICC Statute and are generally considered serious crimes under international law for purposes of universal jurisdiction. 130

(b) **Collegiality of the decision to intervene:** The requirement that a large

125. Id. at 502.
126. Id. at 503.
127. Id. at 524.
128. Id.
129. Id.
number of states acting on behalf of the society of nations is clearly the function of the General Assembly acting under Chapter VI and of the Security Council acting under Chapter VII of the Charter. The discussion within the doctrine of humanitarian intervention of the reality of inequality, favouring "civilized" nations, or nations having significant economic and military power as intervening powers is paralleled by the continuing misgivings over the current composition of the Security Council. The requirement and advantages of collegiality as a check on ulterior motives and the awareness of the implied inequalities among states capable of intervening are further examples of the close parallel between the older doctrine and the current state of the use of coercion or diplomatic intervention in the face of atrocities, including R2P. The Concert of Europe, for purposes of collective decision-making, is clearly replaced by the Security Council, although that body may be considered by many states as too exclusive a club based on power relations in 1945. The role of the General Assembly, mentioned by the Secretary-General and the ICISS, is more democratic. According to the Secretary-General, the Assembly "may exercise a range of related functions under Articles 10 to 14, as well as under the "Uniting for Peace" process set out in its resolution 377 (V)."

(c) Lack of ulterior motive by the intervening powers: Just as the Concert of Europe's intervention in the Ottoman Empire was dictated by geopolitical interests more than by purely humanitarian motives,132 the interventions of India in East Pakistan in 1971, of Tanzania in Uganda in 1979 and of Vietnam in Cambodia in 1978, and even of the United States and coalition forces in Iraq in 1991 and 2003 were claimed to be for humanitarian purposes, but the political interests of the intervening powers placed the exclusive humanitarian motivation in doubt.133 NATO's action in Kosovo had a more credible claim but has been criticized as being based on the security interests of that military alliance. The concern with motivation reflects the contemporary relevance of this older requirement of humanitarian intervention.

(d) Necessity: The presumption of Chapter VII operation that there has been a breach of international peace and security or that there is a serious threat contains elements of necessity. Indeed, coercive action is supposed to "maintain or restore international peace and security."134 Without the intervention, the grievous harm to the population is almost certain to occur.

131. IMPLEMENTING R2P, supra note 29, ¶ 11; See also ¶ 52.
133. See Thomas G. Weiss, The Responsibility to Protect in a Unipolar Era, 35 SECURITY DIALOGUE 149 (2004). (Calling this argument a "humanitarian veneer applied after no evidence was found of either the purported WMDs or links to Al-Qaeda").
134. UN CHARTER, Art. 39.
(e) Proportionality: The principle of proportionality, like that of necessity, continues to be a principle of international law and would be relevant to any claimed humanitarian intervention. In the first Gulf War, for example, the coalition forces did not march on to Baghdad in 1991 in part because the use of force was authorized to ensure that Iraq withdraw its forces unconditionally to their positions prior to the invasion of Kuwait. While the first Gulf War is not an example of modern humanitarian intervention, and the U.S. government had other strategic calculations, the application of the principle of proportionality is nevertheless a feature of the legality of that operation, which was absent in the second Gulf War. Any action of strict humanitarian intervention would be expected to be limited in geographical scope and intensity to protecting the population in danger. NATO’s Kosovo operation has been examined from that perspective.135

This formulation of the updated traditional doctrine of humanitarian intervention makes R2P appear redundant at least with respect to the responsibility to react, but not for the responsibility to prevent or to rebuild.

One of the advantages of R2P is that it is placed in the context of the broader objectives of In Larger Freedom and the Summit Outcome and, therefore, is concerned with the creation of a sustainable peace. The Just War doctrine, reflected in the standards presented by the ICISS and UN reports, demands that before such intervention is undertaken there must be a reasonable chance of achieving this lasting peace.136 Recognizing the limits to action by appropriately noting the probability of success will not immediately help the victims of atrocities. However, it may strengthen the credibility of international humanitarian peace enforcement by avoiding ineffectual and prolonged engagements, and may also avoid unnecessary casualties. The six Just War criteria and five conditions for humanitarian intervention listed above constitute the full spectrum of conditions demanded by the responsibility to protect when considering military intervention. The standards presented are not new and nor is the idea that military intervention should meet basic criteria before being undertaken. They constitute the re-articulation of pre-existing standards, drawn from the Just War and humanitarian intervention traditions, which seek to limit the situations in which military action is legitimate and legal, and restrict the range of permissible actions in the ensuing conflict. The responsibility to protect principles are indistinguishable from their Just War counterparts, and only provide a novel development in the humanitarian intervention discipline if they are universally accepted and consistently applied in international and regional decision-making, a topic we will return to later.

135. Independent International Commission on Kosovo agreed “that NATO succeeded better than any air war in history in selective targeting that adhered to principles of discrimination, proportionality, and necessity, with only relatively minor breaches that were themselves reasonable interpretations of ‘military necessity’ in the context.” Independent International Commission on Kosovo, supra, note 26; See also W.J. Penick, Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia, 12 Eur. J. Int’l L. 489, 502 (2001).
### Table 2: Comparing R2P, Humanitarian Intervention Doctrine, and Just War Doctrine

<table>
<thead>
<tr>
<th>Responsibility to Protect</th>
<th>Humanitarian Intervention Doctrine</th>
<th>Just War Doctrine</th>
</tr>
</thead>
<tbody>
<tr>
<td>“[P]urpose” (ICISS REPORT, ¶ 2.27): “ultimate purpose of the responsibility to protect: to save lives by preventing the most egregious mass violations of human rights [genocide, war crimes, ethnic cleansing and crimes against humanity]” (IMPLEMENTING R2P, ¶ 67)</td>
<td>Acts “in violation of human rights” or “contrary to the laws of humanity” (Rougeix 478), “acts tyranniqus” (Rougeix 498) attributable to public authorities</td>
<td>Just cause</td>
</tr>
<tr>
<td>“[T]he agency of authorization” (ICISS REPORT, ¶ 2.27): “must be authorized by the Security Council” (IMPLEMENTING R2P, ¶ 11 (c))</td>
<td>Legitimate authority (Rougeix 503)</td>
<td>Right authority</td>
</tr>
<tr>
<td>“[T]he best way to discourage States or groups of States from assuming the responsibility to protect for inappropriate purposes would be to develop fully the United Nations strategy, standards, processes, tools and practices for the responsibility to protect.” (IMPLEMENTING R2P, Summary)</td>
<td>Absence of ulterior motive, “déstinteresse” (Rougeix 478, 502)</td>
<td>Right intention, relative justice</td>
</tr>
<tr>
<td>“[T]he exhaustion of other avenues of redress against grievances” (ICISS REPORT, ¶ 2.27): “the use of force should be considered a measure of last resort.” (IMPLEMENTING R2P, ¶ 40)</td>
<td>Necessity</td>
<td>Last resort, reasonable hope</td>
</tr>
<tr>
<td>“[T]he proportionality of the reponse to the initiating provocations” (ICISS REPORT, ¶ 2.27)</td>
<td>Proportionality</td>
<td>Proportionality</td>
</tr>
<tr>
<td>“[T]he means” (ICISS REPORT, ¶ 2.27): “targeted sanctions, such as on travel, financial transfers, luxury goods and arms” (IMPLEMENTING R2P, ¶ 57)</td>
<td>N/A</td>
<td>Open declaration</td>
</tr>
</tbody>
</table>

### C. Aggiornamento, Not Innovation

The emergence of the responsibility to protect therefore does not provide a new take on an old problem, but seeks to codify prior customary international law and best practice, and reiterate pre-established commitments under international law relating to the use of force, human rights, and humanitarian protection. The decisions of the United Nations to authorize the use for force for humanitarian purposes in Haiti in 1994 and again in 2004, for instance, were not undertaken as a result of a new convention or treaty, but because the UN Security Council deemed the situation a threat to international peace and security.\(^{137}\) The action in Haiti drew on the R2P principles, although they were not referred to as such, as well as the emerging norm of democratic governance, according to which the international community should respond when democratically elected regimes

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are overthrown by undemocratic means. The 2005 World Summit came after the 2004 Haiti resolution and the Council did not refer to the ICISS Report (published in 2001). It did broaden the concept of “threat to international peace and security” in its 1994 and 2004 Haiti resolutions by allowing the internal situation to trigger international coercive action, making it in that sense a precursor to the responsibility to protect. Though labelled an “exceptional” circumstance, the Security Council has more than once in the past two decades expanded the notion of a “threat to international peace and security” as mandated by Chapter VII of the UN Charter to justify intervention in a “sovereign state.” It is this broadened conception of security that is called for by the responsibility to protect.

What may make Haiti such an “exceptional circumstance” is not the magnitude and scale of human rights violations, but that the interests of the permanent members of the Security Council were not threatened by the intervention. The willingness of the Security Council to broaden its conception of a threat to international peace and security in the case of Haiti but not apply the same principles of human security in the case of the most extreme violations of genocide, war crimes, ethnic cleansing, and crimes against humanity lends support to the notion that, as affirmed in the Summit Outcome, “the relevant provisions of the (UN) Charter are sufficient to address the full range of threats to international peace and security.” What is lacking is not innovation in interpretation of the provisions of the Charter, but its consistent application to cases where the state is unwilling or unable to guarantee the most basic rights of its citizens.

The responsibility to protect was an attempt by member states to implement this codification, not to extend the responsibilities of the international community further than they had been previously. The responsibility to protect is therefore not a watershed change in thinking about the role of the international community when confronted with mass human suffering, but an attempt to codify pre-existing principles to guarantee consistency of application.

In his Report on Implementing the Responsibility to Protect, the Secretary-General identified a range of programs and best practices within the UN system to strengthen its prevention and rebuilding functions, in addition to the continued strengthening of UN military intervention capacity. These included the critical capacities of conflict-sensitive development analysis, fostering indigenous mediation, building consensus and dialogue, local dispute resolution and capacity to replicate capacity. The programs and policies for developing these capabilities play a key role in the UN’s ability to adequately fulfill its responsibility to protect. However, as with the norms included in the responsibility to respond, these capacity-building programs were already in place in the UN system, such as the

139. ICISS Report, supra note 22, at 6.
140. 2005 WORLD SUMMIT OUTCOME, supra note 25, at ¶ 79.
141. See supra note 102.
joint UNDP Department of Political Affairs Programme for Conflict Prevention, and the Inter-Agency Framework on Coordination for Preventive Action. As noted by UN Secretary-General Ban Ki-Moon, what are needed are not “costly new programs or radically new approaches,” but a bolstering of the capacity of pre-existing programs to address the demands placed upon them. The ICISS Report affirmed that

The direct prevention “toolbox” has essentially the same compartments — political/diplomatic, economic, legal and military — as the one for root cause prevention, but different instruments, reflecting the shorter time available in which to make a difference.

The ability of the United Nations to avert and help rebuild societies from genocide, war crimes, ethnic cleansing, and crimes against humanity has not been limited by a shortage of good ideas, best-practice guidelines or programs. What has been lacking is the commitment, both financial and political, to ensure that these programs are effectively implemented. The responsibility to protect neither created the recognized need for these programs, nor the programs themselves, but called for their elevation and expansion. The creation of the Peacebuilding Commission as an intergovernmental advisory body following the 2005 World Summit did not involve the founding of an operational agency to implement and oversee community rebuilding, but to marshal resources and advise governments and UN agencies on best-practices. The strategies for post-conflict rebuilding are not new, but the responsibility to protect framework led to their codification and the potential creation of a focal point for their delivery.

D. Source of Authority and Legitimacy for Intervention

As the body charged with the primary responsibility for the maintenance of international peace and security, the UN Security Council is the primary entry point for coercive action under the responsibility to protect. This primacy was highlighted in the World Summit Outcome:

In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII ... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

142. Implementing R2P, supra note 29, at § 45.E.
143. Id. at § 68.
144. ICISS Report, supra note 22, at 23.
145. 2005 World Summit Outcome, supra note 25, at § 79.
146. Id. at § 139.
With this responsibility, the Security Council is the gatekeeper of legitimacy. In a number of situations, this legitimacy has been provided ex post, such as in the case of the NATO campaign in the former Yugoslavia. In the majority of cases, however, the legitimacy or illegitimacy of a coercive action is determined ex ante. The responsibility to protect does not seek to change this process, but rather to make existing structures such as the Security Council work better than they have in the past.  

Kofi Annan referred in his report, *In Larger Freedom*, to the globalization of threats and to the need to reconceptualize international peace and security. The community of states has recognized the need for collective action to combat such threats, and looks to the Security Council as the judge of legitimacy of coercive action to ensure its protection. The implementation of the responsibility to respond within the responsibility to protect relies on the Security Council’s interpretation of “international peace and security” to authorize coercive action in the case of genocide, war crimes, ethnic cleansing, and crimes against humanity. The reaffirmation by states of the continued sufficiency of the UN Charter for the full range of threats and challenges compels the Security Council to reconsider its interpretation of cases that constitute a “threat” to peace and security.

In the majority of circumstances, the Security Council has thus far failed to expand its interpretation past the traditional notion of cross-border conflict, with few exceptions. In January 2007, Russia and China vetoed a resolution that characterized the situation in Burma as constituting a threat to international security. In their explanatory statements, the Chinese and Russian representatives, in addition to the South African representative, stated that the proposed resolution fell outside the mandate of the Security Council, as the situation did not threaten international or regional peace, and was therefore not appropriate for action by the Council. Further, the Chinese representative charged that “the Myanmar issue is mainly the internal affair of a sovereign state.” The unwillingness of the Security Council to meaningfully reinterpret “international peace and security” limits the effective implementation of the responsibility to protect. Without a commitment by the Security Council to reform its interpretation, the response of the world community to genocide, war crimes, ethnic cleansing, and crimes against humanity will remain as it was prior to the 2005 Summit and ICISI Report. While the rhetoric may change, the outcome will stay the same: selective responses based primarily on the interests of the permanent Security Council members.

148. *In Larger Freedom*, *supra* note 24, at § 80
149. *Id. at § 91.
151. *Id.*
153. *Id.*
The concern surrounding the use of the veto by the permanent members has raised substantial ethical issues on its use in response to violations of civilian protection. One of the primary goals of the responsibility to protect doctrine was to de-politicize the issue of civilian protection by limiting its scope of applicability to crimes on which there was consensus that “something must be done.” While R2P succeeded in narrowing the scope of applicability, it is unclear whether this has resulted in a de-politicization of decision-making at the highest echelons of the UN. In addition to concerns about the outdated applicability of the Security Council’s interpretation of “international peace and security” is the corollary concern that state interest will continue to supersede the protection of human rights.\textsuperscript{154} Nowhere is this potential more clearly demonstrated than in the Security Council where, if taken to an extreme, one vote against a resolution by a permanent member can override the consensus of all other states. The matter is particularly acute in the case of a permanent member exercising the veto power when it is manifestly failing to fulfil the responsibility to protect its population from genocide, war crimes, ethnic cleansing, or crimes against humanity or is protecting a key ally or trading partner that is failing to fulfil its responsibility.

To address these dilemmas, the ICISS strongly recommended the formal adoption of a “code of conduct” by the permanent members of the Security Council:

The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.\textsuperscript{155}

Two key aspects of the proposed code of conduct should be highlighted. First, the code of conduct would only apply in situations where a permanent Council member is resisting majority support for action. Compliance with the code of conduct would enhance the role of non-permanent members in decision on coercive measures and thus move the Council towards more democratic governance by giving greater voice to representations of the broader community of states. Similarly, by allowing permanent members to exercise their veto when their vital interests are at stake, these powerful states would not become victims of a “tyranny of the majority.” Second, the code would force an acknowledgement on the part of the vetoing state that it is acting to protect vital state interests; and not necessarily in the interests of broader humanity. More importantly, however, the inclusion of the clause would not resolve the dilemma of non-action in the case that a permanent member is manifestly failing to fulfil its responsibility, as it would surely regard a challenge to its sovereignty through coercive measures.

\textsuperscript{154} ICISS Report, supra note 22, at 51; R2P:CS Principle to Practice, supra note 86, at 6.

\textsuperscript{155} ICISS Report, supra note 22, at xiii.
as affecting vital state interests. Unsurprisingly, nine years after the release of the ICISS Report, the permanent members of the Security Council have not yet adopted such a code of conduct, nor adapted its decision-making process in light of the consensus reached by heads of state and government at the 2005 World Summit. Their commitment at the World Summit allows the permanent members to continue to prioritize their self-interest behind the fig leaf of the World Summit Outcome, and remain unaccountable to the intended beneficiaries of the responsibility to protect.

Of similar concern is the fact that the Security Council has not formalized any standards, principles or guidelines for the use of force when a state is manifestly failing to fulfil the R2P, seemingly as a result of its commitment to reviewing situations on a case-by-case basis. In and of itself, the concept of assessing the need for collective action on a case-by-case basis is a prerequisite for the fulfilment of the responsibility to protect, as highlighted in the ICISS Report. While genocide, war crimes, ethnic cleansing, and crimes against humanity all involve large-scale intentional harm to civilian populations, the actions necessary to prevent, respond and/or rebuild from these acts will vary depending on the circumstances of each case.

However, the principles of a case-by-case approach are not incongruous with the establishment of principles for the application of collective action. The goal of a case-by-case approach is to ensure that the response of the international community is tailored to the individual circumstance of the violation. Elshtain notes in this regard “military intervention cannot simply be a knock-down conclusion that follows from the articulation of triggering stipulations and claims.”156 Instead, the means of protecting the rights of populations must be context-specific. What a case-by-case approach does not specify is that the response must be taken in absence of a set of basic standards, as asserted by the responsibility to protect.157 By establishing six precautionary principles for the use of force (just cause, right intention, last resort, proportional means, reasonable prospects, and right authority), the ICISS, the High-Level Task Force on Threats, Challenges and Change, and the Secretary-General each acknowledged that the principles of Just War should apply in all cases of military humanitarian interventions.

However, as with its refusal to adopt a code of conduct for the use of the veto, the Security Council has refused to formally adopt these standards that would result in a more structured, principled, and accountable decision-making framework for the use of force. While the body may draw upon the Summit Outcome in deciding whether to act in response to the perpetration of genocide, war crimes, ethnic cleansing, or crimes against humanity, its failure to adopt basic principles, standards or guidelines inevitably challenges the assertion that the ascendancy of the responsibility to protect has meaningfully changed the

international community’s response to these crimes.

There have been a number of calls from both the developed and developing world to expand the range of intervention-legitimizing bodies. Foremost among potential bodies suitable for granting legitimacy for the use of force is the UN General Assembly. While the UN Charter gives the Security Council “primary responsibility” for the maintenance of international peace and security, it also affords the General Assembly general responsibility over all matters within the UN mandate, and non-binding powers in cases of international peace and security under Article 11.158 Use of the 1950 “Uniting for Peace” General Assembly resolution 377 is one such mechanism proposed by the ICISS when the Security Council fails to take action because of the veto of a permanent member. Resolution 377

[re]solves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.159

The resolution calls for the creation of a Peace Observation Commission to observe situations of a threatened or actual breach of international peace and security, and to make recommendations to member states for collective action, including the use of force. The Uniting for Peace resolution requires a two-thirds affirmative vote from member states present and voting to add an item to the agenda of an emergency session of the General Assembly.160

The ICISS Report notes that with such overwhelming majority support, a recommendation for the use of force in a state manifestly failing to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity would derive the legitimacy necessary to fulfil the sixth precautionary principle of “right authority.”161 As such, the General Assembly, in cases where the Security Council is failing to act because of the use of the veto by one or more permanent members, is a promising avenue through which the international community may principally and faithfully fulfill its responsibility to protect.

158. UN, CHARTER OF THE UNITED NATIONS, Article 11 (1945).
160. Id. at Annex § 5.
161. ICISS Report, supra note 22, at 53-54.
E. Failure of Political Will

The doctrine of humanitarian intervention was objectionable both because it was abused by imperialist powers and because even when proposed for purely humanitarian purposes, it almost never generates sufficient political will to implement the policy, however couched, without dissent.

Since the doctrine was posited (whether dated from the ICISS Report in 2001 or the Summit Outcome in 2005), there are at least eight cases where the doctrine could have been applied but has not been: Darfur, Burma, Zimbabwe, The Democratic Republic of the Congo, Sri Lanka, Georgia, Gaza, and Somalia. Each of these cases is complex and cannot be analyzed in detail here, although some brief observations, based on their study by the Coalition for the Responsibility to Protect, will support the claim that the political will to put R2P into practice has failed.

Darfur: The government of Sudan is generally regarded as responsible for ethnic cleansing conducted by the janjaweed militias, which resulted in the death of over 400,000 and displacement of 2.5 million persons. Although the President of Sudan, Omar Al-Bashir, has been indicted by the International Criminal Court, the European Union Parliament has referred explicitly to R2P, and the Security Council authorized the deployment of a joint UN-African Union force for Darfur, it is a classic case of justice denied to victims of grave abuses. A study by the Institute for Security Studies of South Africa concluded that "[f]or the moment, it does appear that the state sovereignty has won the tactical round in the operational campaign to propel the normative R2P discourse to the centre stage of international politics."162

Burma: Since the military coups d’etat of 1962 and 1988, the Burmese governing military junta have been accused of widespread human rights abuses directed towards two population subgroups, viz. the Karen and Rohingya peoples. The junta’s forceful crackdowns following the 1990 national election and the 2007 Saffron Revolution, including the reported use of systematic rape as a weapon of war, destruction of over 3000 villages of minority ethnic groups, and widespread recruitment of child soldiers, have spurred efforts by national governments, civil society, and scholars to catalyze the implementation of the international community’s responsibility to react. Despite calls from the UN Human Rights Council, the British Parliament, numerous NGOs including Human Rights Watch, the United Nations Association of the United States of America, and a consortium of Norwegian NGOs, and economic sanctions from the United States, France, and the United Kingdom, the UN Security Council has failed to consider the situation in Burma a “threat to international peace and

security,” subverting the potential utility of R2P as a call to action.163

Zimbabwe: The conditions in Zimbabwe since 2000, both the repression by state security forces, including enforced disappearance, murder, torture, and rape, and the severe economic collapse, including two hundred and thirty one million percent hyper-inflation and eighty percent unemployment due to failed state policies, displacement of over 1 million civilians, and grave failure of the sanitation and healthcare, have been cited as evidence of the failure of the ruling ZANU-PF leadership to fulfill its responsibility to protect. The potential for Zimbabwe to be considered ripe for R2P action by other states was increased by the extreme violence following the March 2008 presidential election, including “torture, beatings, mutilations, murder, rape, land seizures and forced displacement, enforced disappearances, deprivation of access to food, and summary executions ... perpetrated against leaders and supporters of the opposition.”164

Neither the AU, which belatedly condemned the post-election violence, nor the South African Development Community (SADC) has taken R2P action. China and South Africa have successfully averted any action by the Security Council. NGOs are divided as to whether invoking the R2P would be helpful, “considering the limited political will of regional and foreign states to commit to any significant preventive or reactive measure.”165

Further to the September 2008 Global Political Agreement, a unity government was put in place in February 2009 without resolving Zimbabwe’s economic, social, or political crisis.166 Whether the acts and omission attributable to the Mugabe government constitute R2P crimes is a matter of debate. What is certain is the lack of political will that would be required for any meaningful R2P action in the case of Zimbabwe.

The Democratic Republic of Congo: Despite the formal cessation of conflict in 2003, sub-state and international violence has continued in the Democratic Republic of Congo (DRC), claiming 5.4 million lives since 1998, while 1.25 million remain internally displaced, 7000 children remain in government and other armed forces, and rape as a weapon of war continues to exist “on a scale seen nowhere else in the world.”167 Though the UN Security Council imposed sanctions on the DRC in 2004 and authorized the deployment of the MONUC

peacekeeping force in 1999, repeated appeals for the force’s strengthening have gone relatively unheeded. In late 2008, Francis Deng, UN Special Adviser on the Prevention of Genocide, found that “massive violations of international human rights and humanitarian law were being committed on the basis of ethnicity and national origin.” The Human Rights Council devoted a special session to the situation of human rights in the Eastern DRC in 2008 and adopted a resolution calling for the immediate end to all human rights violations and facilitation of humanitarian assistance, stressing the Government’s primary responsibility to protect the civilian population and to investigate and bring to justice perpetrators of violations of human rights.

Seven UN experts have issued two reports on the situation in the DRC. Neither mentions the responsibility to protect, nor is it mentioned in the Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the DRC. Among the numerous NGO studies and statements on the situation, the head of Oxfam in the DRC, said “the world is failing in its Responsibility to Protect the Congo’s innocent civilians.” The International Coalition for the Responsibility to Protect finds some progress in the responsibility to react and rebuild but concludes that the situation in the DRC “has undeniably reached the “Responsibility to Protect” threshold.” Of particular importance in this regard are the DRC cases at the ICC in The Hague, which “contribute significantly to efforts to end impunity and achieve justice and rule of law in the DRC.”

Sri Lanka: The twenty-five year civil war between the Sri Lankan Government and the Liberation Tigers of Tamil Eelam (LTTE) led to mass civilian suffering on both sides of the conflict, including 100,000 deaths. The United Nations estimated that approximately 7000 civilians were killed in the first five months of 2009, until the Sri Lankan Government declared victory on May 18. By mid-June 2009, 550,000 ethnic Tamils remained displaced. Allegations of war crimes by both the LTTE and Sri Lankan military, including the military’s use of heavy artillery in densely populated areas, and the LTTE’s use of human shields near the end of the conflict, “prompted many advocates to consider the crisis in

170. A/HRC/10/59 (Mar. 5, 2009); A/HRC/13/63 (Mar. 8, 2010).
171. A/HRC/13/64 (Jan. 28, 2010).
173. Id.
175. Id.
Sri Lanka an R2P situation, especially given the alarmingly high death toll.”\textsuperscript{176} The international community and civil society repeatedly called on the parties to protect the civilian population. The Global Center for the Responsibility to Protect sent an open letter to the Security Council invoking the R2P norm and calling on the Security Council, inter alia, to “authorize “timely and decisive measures” to prevent or halt mass atrocities.”

UN officials, including the High Commissioner for Human Rights, called on the Sri Lankan government to comply with the responsibility to protect the rights of citizens within its territories. But neither did the government respond (except to denounce its critics) nor did the international community effectively intervene. The Human Rights Council held a special session on “The Human Rights Situation in Sri Lanka” in May 2009, but in its resolution adopted on May 27, 2009, by a vote of twenty-nine in favour, twelve against\textsuperscript{177} and six abstentions, commended the measures taken by the Government of Sri Lanka to address the urgent needs of the internally displaced persons and welcomed the continued commitment of Sri Lanka to the promotion and protection of all human rights.\textsuperscript{178} It did welcome the announcement of the proposal to safely resettle the bulk of the internally displaced persons within six months, and encouraged the Government to proceed in these endeavours with due respect to persons belonging to national, ethnic, religious, and linguistic minorities.\textsuperscript{179}

The conclusion of the conflict has led to little more adherence to R2P principles regarding the responsibility to rebuild, but the Sri Lankan Government has rejected calls from the international community and civil society for impartial international investigation into allegations of war crimes committed during the conflict, declaring its intent to “resist external pressure in the management of its internal affairs.”\textsuperscript{180}

\textit{Georgia:} In August 2008, Russia used the rhetoric of the Responsibility to Protect to justify its invasion of South Ossetia, Georgia, charging that violence towards Russian citizens in the state constituted genocide. Civil society groups have criticized this seeming misapplication of R2P, questioning the legality of the intervention. Though Russia bears primary responsibility for the protection of the rights of citizens within its territory, when Russian citizen’s rights are systematically violated outside of its borders, and the host state is either unwilling or unable to prevent the abuses, the responsibility to protect falls to the international community as a whole, rather than any single state. Russia’s unilateral actions in 2008, without authorization from the UN Security Council, therefore fall outside

\textsuperscript{176} \textit{Id.}
\textsuperscript{177} Bosnia and Herzegovina, Canada, Chile, France, Germany, Italy, Mexico, Netherlands, Slovakia, Slovenia, Switzerland, United Kingdom, and Northern Ireland.
\textsuperscript{179} \textit{Id.}, ¶ 4 and 7.
the framework established by the Responsibility to Protect doctrine.\textsuperscript{181}

_Gaza_: The 22-day military offensive by the Israeli Defence Force into the Gaza Strip in December-January, 2008-'09, left 1300 dead, 5450 wounded, and key infrastructure destroyed due to Israel's pre-existing siege of Gaza since Hamas took control in 2007. Subsequent investigations by Richard Falk, UN Special Rapporteur on the Occupied Palestinian Territories, the Independent Fact Finding Committee on Gaza of the Arab League, and the UN Fact Finding Mission on the Gaza Conflict found that war crimes and potential crimes against humanity had been committed by both sides during the twenty-three day conflict, highlighting the potential applicability of the Responsibility to Protect. However, "questions remained as to whether invoking R2P would have brought the desired changes to protect civilians in this deeply politicized situation," potentially explaining the unwillingness of the international community to fulfil their responsibilities under R2P, perpetuating the stalemate seen today.\textsuperscript{182}

_Somalia_: Somalia has been in a continuous state of civil war since 1991. The majority of Somalia is no longer under the control of the federal government, and successive UN and NATO peacekeeping forces have been unable to shore continued insecurity, from the UN-led UNOSOM I and the United States led UNITAF (1992-1993) to UNOSOM II (1993-1995). The International Coalition for the Responsibility to Protect asserts that up to "2007, each party to the armed conflict has committed serious violations of international humanitarian law, in some cases, amounting to war crimes."\textsuperscript{183} In 2008, Human Rights Watch stated that approximately 700,000 people were internally displaced in 2007 alone, and more than ten percent of the total population was displaced at the close of 2007.\textsuperscript{184} Despite these allegations, the United Nations has failed to authorize further UN peacekeeping missions, and has not acted to meaningfully realize its obligations under the Responsibility to Protect doctrine.

CONCLUSION

The pledge made by heads of state and government in the 2005 World Summit Outcome has the appearance of a diplomatic watershed in the international community's commitment to ensuring — through the concept of R2P — that the atrocities of genocide, war crimes, ethnic cleansing, and crimes against humanity never again plague the conscience of humanity. Paragraphs 138 and 139 provide a


potential framework of individual and collective accountability of member states. By characterizing the failure on a massive scale of states to guarantee the survival of their citizens as a threat to international peace and security, governments have provided the normative basis for the responsibility of states to protect their population, failing which, it falls upon the broader community of states to ensure such protection.

Reference to armed intervention for that purpose is softened by including in the doctrine the strengthening of the UN’s capacity to prevent and help rebuild from conflict. A further precaution was to centre the debate on the rights of its intended beneficiaries and limit collective action to respond to the most egregious violations of human rights: genocide, war crimes, ethnic cleansing, and crimes against humanity. The emerging doctrine of the responsibility to protect avoids the most objectionable features of the traditional doctrine of humanitarian intervention by stressing the continuum necessary to ensure protection of populations through the responsibility to prevent, the responsibility to respond, and the responsibility to rebuild. Were it limited to coercive responses, it would be the “old wine” of humanitarian intervention in the “new bottle” of R2P. But is this added value enough to claim the emergence of a new norm of international law?

There are two core issues that determine whether the concept of R2P should become a new norm of international law. The first is whether the purported gap between legality and legitimacy in the Kosovo intervention reveals a defect in international law, which a new norm based on R2P would fill. Another way of putting the same issue is to ask whether the Kosovo experience presents the international community with a choice between respect for the rule of law in international relations with morally repugnant consequences, on the one hand, and acting on moral claims at the expense of the rule of law, on the other.

The presumption that the Kosovo operation was legitimate but illegal is, of course, rebuttable, but that is not the point. Assuming arguendo that there are situations in which lives must be saved but the Security Council will not authorize the use of force to prevent or halt the atrocities, do we need a new norm to replace Chapter VII of the UN Charter? R2P, as articulated in the 2005 Summit Outcome, evaded this issue by integrating Chapter VII action into the concept of R2P. So paragraphs 138 and 139 do not really propose a new norm, nor does the ICtISS Report. The latter stated clearly,

[1] those who challenge or evade the authority of the UN as the sole legitimate guardian of international peace and security in specific instances run the risk of eroding its authority in general and also undermining the principle of a world order based on international law and universal norms.185

185. ICtISS Report supra notes 22, ¶ 6.9.
Thus current law must not be undermined. The Commission also noted that there was "not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law."\textsuperscript{186} However, the Report continues, "growing state and regional organization practice as well as Security Council precedent suggest an emerging guiding principle — which in the Commission’s view could properly be termed ‘the responsibility to protect.’"\textsuperscript{187} Further, "the Commission believes that the Charter’s strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds."\textsuperscript{188} It is particularly significant in this regard that the Secretary-General considered that "the provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in well-established principles of international law."\textsuperscript{189} Moreover, he wrote, "the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter."\textsuperscript{190} This, even though the ICISS was hinting at the putative emerging new norm (or at least a "guiding principle"), does not appear to either proffer a basis in fact nor a need for a new norm.

The second issue is whether the shift in language between humanitarian intervention and R2P is semantic and accomplishes little more than assuaging former colonized countries that find "humanitarian intervention" to be toxic words reminiscent of imperialism. For many governments, humanitarian intervention conjures up — and for good reason — Western European powers attacking the Ottoman Empire to protect Christian populations, or, more generally, the powerful using claimed suffering as a pretext to violate the sovereignty of weaker states in pursuit of their strategic interests. One author has described the abuse of the doctrine as "the natural outflow of the European powers’ tendency to camouflage imperialist interests by lofty religious ‘precepts’."\textsuperscript{191}

Thomas Weiss concludes that "[t]he sun of humanitarian intervention has set for now. . . . The current moment is dark, but that is not to say that humanitarian intervention will not dawn again [especially if the United States accepts the doctrine]."\textsuperscript{192} The Secretary-General showed sensitivity to this perception when he noted that the Summit Outcome "made absolutely clear [that] the responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive

\textsuperscript{186} Id., § 2.24.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Implementing R2P, supra note 29, ¶ 3. ("The Summit’s Enunciation of the Responsibility to Protect was not intended to detract in any way from the much broader range of obligations existing under international humanitarian law, international human rights law, refugee law and international criminal law. It should also be emphasized that actions under paragraphs 138 and 139 of the summit outcome are to be undertaken only in conformity with the provisions, purposes and principles of the Charter of the United Nations. In that regard, the responsibility to protect does not alter, indeed it reinforces, the legal obligations of refrain from the use of force except in conformity with the Charter.")
\textsuperscript{190} Id.
\textsuperscript{191} Köchler, supra note 132, at 11.
\textsuperscript{192} See Weiss, The Responsibility to Protect in a Unipolar Era, supra, note 133, at 149.
and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian intervention. He is correct that humanitarian intervention is narrower in the sense, as mentioned above, that it is limited to the responsibility to react and does not address the responsibility to prevent or to rebuild. However, calling R2P "an ally of sovereignty" is a semantic sleight of hand. It signals that the same rules governing use of force and human rights can be interpreted and repackaged so as to provide a sanitized blueprint for responding to humanitarian disasters.

Implementing the Responsibility to Protect does a masterful job of repackaging humanitarian intervention and Just War doctrines and linking them to lessons learned since Boutros Boutros-Ghali’s Agenda for Peace, which identified the sequencing from conflict prevention to peacemaking to peacekeeping to post conflict peace building. In Implementing the Responsibility to Protect, Boutros-Ghali calls on states to “mainstream” the goals of R2P, “whether in the areas of human rights, humanitarian affairs, peacekeeping, peace building, political affairs or development.” Thus, the mix of means to respond to crises as identified in the early 1990s have been restated in R2P in language that reassures governments that the rules of sovereignty have not changed, and reassures those concerned with humanitarian protection that the international community has made firm commitments to draw on the full range of national and international processes to prevent and halt the four acts on which R2P focuses.

However, the World Summit Outcome did not create a legally binding norm. Paragraphs 138 and 139 represent 269 words out of a document of over 17,000 words, the aim of which was to express political commitment. For that commitment to be backed up by genuine political will requires a change in thinking, a change in process, and a change in implementation. Without meaningful reform of the United Nations and associated organisations, the responsibility to protect will remain stillborn. The commitments of member states at the World Summit did not create new human rights or additional obligations of states. Rather, it provided a framework for ensuring that the global community responds within existing rules and means to genocide, war crimes, ethnic cleansing, or crimes against humanity. The threat or use of the veto by the permanent members of the UN Security Council still has the power to prioritize state interests above those of vulnerable populations. Similarly, R2P does not guarantee consistency of response. However, as noted in the ICISS Report, just because it is unrealistic to intervene in every case warranted, does not mean that it should never occur.

The eight recent crises briefly reviewed above further substantiate the claim that R2P is stillborn. Finally, the responsibility to protect does not ensure that

193: Id. at § 10(A).
195: IMPLEMENTING R2P, supra note 29, § 68
196: F Dastoor, supra, note 112, at 32-43.
the international community is equipped with the capacity to act when it is warranted, but does stress the need to create the capacity for effective early warning, diplomatic, civilian, and, in extreme cases, military resources to guarantee the prevention or cessation of atrocities.

While the World Summit strengthened the United Nations's commitment to building capacity to prevent and assist in rebuilding from conflict, the United Nations has not done much beyond political commitment. Two fundamental recommendations of the ICISS Report have been ignored by the UN Security Council: enacting a “code of conduct” for permanent members of the Security Council, perhaps for good reasons, and the formal adoption of standards and principles for the appropriate use of force. These failures have enabled the international community to use the rhetoric of R2P as a fig leaf, while not addressing the underlying changes required to meaningfully fulfilling the responsibility to protect.

Before the responsibility to protect can accurately be characterized as a watershed in human rights protection justifying support for a new norm, states must muster the courage to act on their commitment. However, recent experience suggests such courage is sorely lacking. For the victims of genocide, war crimes, ethnic cleansing, and crimes against humanity and other failures to protect civilians from harm in Burma, Darfur, Zimbabwe, the Democratic Republic of the Congo, Sri Lanka, Gaza, Georgia, and Somalia — to name the most cited recent cases — the cry of “never again” rings hollow.

In the broader historical perspective, the halting first steps to transform the words of R2P into deeds may be similar to the half century from the anticipated "international penal tribunal" of the 1948 Genocide Convention until the adoption of the Rome Statute of the ICC in 1998. In sum, the putative doctrine of R2P is essentially a repackaging of existing norms into a framework that is potentially valuable but so far not followed by practice. If and when the political will emerges to take resolute action based on it, R2P could eventually crystallize into a customary norm of international law.

197. Id. at 44-46.
198. Id. at 46-48.