Responsibility to Protect (R2P)

A New Paradigm of International Law?

Edited by

Peter Hilpold
University of Innsbruck

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Peter Hilpold

1 Introduction

Thirteen years ago the International Commission on Intervention and State Sovereignty published its voluminous report on the Responsibility to Protect – R2P.[1] In a period of only one year that commission, established by the Canadian Prime Minister Jean Chrétien, managed to analyse this concept in depth and to provide it with rich material content so as to bring to life[2] a wholly new vision of international law that is here to stay.[3]

As is well known, in international law doctrine still plays a very important role,[4] even though the gap between international legal theory resulting from the leading manuals and that relating to practical legal life has diminished

1 The present contribution further develops earlier studies by this author, such as *P. Hilpold*, The duty to protect and the Reform of the United Nations – a new step in the development of International Law? in: 10 Max Planck Yearbook of United Nations Law 2006, pp. 35–69; idem, From Humanitarian Intervention to Responsibility to Protect: Making Utopia True? in: U. Fastenrath et al. (eds.), From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma, OUP: Oxford 2011, pp. 462–476; idem, "Intervening in the Name of Humanity: R2P and the Power of Ideas," in: 17 JCSL 1/2012, pp. 49–79 and idem, "Die Schutzverantwortung im Recht der Vereinten Nationen (Responsibility to Protect) – auf dem Weg zur Etablierung eines umstrittenen Konzepts?" in: 21 SZIER 2–2011, pp. 231–324.

2 The concept of R2P as such is, however, a few years older. As is well known, on the terminological level this concept was coined by Francis M. Deng with the aim of promoting the protection of internal refugees. See *F.M. Deng*, Sovereignty as Responsibility: Conflict Management in Africa, Washington, D.C. 1996. See also R. Cohen/F.M. Deng, Masses in Flight: The Global Crisis of Internal Displacement, Washington, D.C. 1998.

3 The report was issued on 10 September 2011, exactly one day before the disastrous events of "9/11" that shook human conscience and changed history.

4 On the relevance of doctrine in international law see, for example, *R. Jennings*, International Lawyer and the Progressive Development of International Law, in: J. Makarczyk (ed.), Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski, Kluwer Law International: The Hague et al. 1996, pp. 413–424 as well as *A. Bleckmann*, Die Funktionen der Lehre im Völkerrecht, Heymann: Köln et al. 1981 and N. Onuf, Global Law-Making and Legal Thought, in: N. Onuf (ed.), Law-Making in the Global Community, Carolina Academic Press: Durham 1982, pp. 1–82.

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considerably over recent centuries.[5] As international law knows no central legislator and state practice is often contradictory and inconsequential, doctrine may fill an important lacuna by devising overarching structures in an otherwise largely disordered legal reality.

This may at least partly explain why in this field the conceiving of new concepts and approaches is so popular. These new ideas can change the way international law is seen and, in the end, on a practical level, the very substance of the law. New concepts come and go. At some moments in time they may be highly popular. No legal scholar can afford to ignore them; they have to be cited whenever possible. Regularly, however, they very rapidly lose their attraction, and those authors who continue to refer to them attest to the broader public that they are no longer up to date. Only a very few ideas, concepts and approaches stand the test of time.[6] Although R2P is still a rather young concept there are many hints that it may fall into this distinguished category.

The most prominent steps in the process of its development were the following:

- The Outcome document of the World Summit of 15 September 2005, in paras. 138 and 139 referred to R2P as marking a breakthrough many had not thought possible.
- In 2006 the UN Security Council (SC) also officially recognized this concept in Resolution 1674 on the Protection of Civilians in Armed Conflict.[7] In this context the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity was confirmed.[8]
- During the Libyan crisis broad calls for military intervention were made and the concept of R2P had to stand its most crucial test on the practical level.

5 Of course, there are also exceptions to this proposition. *Emer de Vattel* (1714–1767) who wrote his "Droits des gens" as an account of practical diplomatic life may be the foremost example.

6 For different examples of such concepts with a widely diverging destiny see those of the "holiness of treaties," the "state community," the "erga omnes" effect of international legal norms, solidarity in international law, "self-contained regimes," the "common heritage of mankind," status treaties in international law, the humanization of international law, the doctrine of the three generations of human rights or the "emerging right to democratic governance." That such concepts can be extremely short-lived can be shown below in the context of a discussion strictly related to R2P. As will be evidenced, UN General Secretary Kofi Annan had conceived the idea of the "two sovereignties" which evolved very soon (at least partially) into the concept of R2P.

7 SC Res. 1674 of 28 April 2006, S/RES/1674 (2006), para. 4.

8 See also the following SC Res. 1894 of 11 November 2009 where the SC again referred to the concept of R2P.

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> This test was passed when the SC in 2011 adopted Res. 1970 and 1973. Res. 1970 recalled Libya's "responsibility to protect" and imposed a series of sanctions short of the use of force. By Res. 1973 the SC authorized the use of force, first in the form of the introduction of a no-fly zone and second when it called for the adoption of "all necessary measures to protect civilians and civilian populated areas under threat or attack…while excluding a foreign occupation force of any form."

This resolution led to military intervention under NATO command ("Unified Protector") which started on 22 March 2011 and ended on 31 October 2011 with the complete destruction of Libyan dictator Gaddafi's military forces.

– Reference to R2P was made by the SC also in Res. 1975 of 30 March 2011 concerning the post-election crisis in the Cote d'Ivoire.[9]

A pivotal role in the development of this concept was played by the UN Secretary-General Kofi Annan and his successor Ban Ki-Moon. While Kofi Annan can be considered one of the principal authors of the concept and its main advocate in the first years of its development, Ban Ki-Moon, with his own style and with a more reserved and diplomatic approach, continued this fight with great enthusiasm and success.[10]

Together with his Special Advisor on R2P, who had taken office in February 2008, he elaborated a new fundamental paper on R2P which was presented in 2009.[11] In the following years, a new report on special aspects of R2P was presented annually.[12]

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9 This UN intervention was prompted by gross human rights violations perpetrated by the incumbent president Laurent Ghagbo and his followers who were not prepared to accept election defeat by Alassane Quattara.

10 SG Ban Ki-Moon also promoted the adoption of organizational measures to underpin the concept of R2P. Thus, on 29 May 2007 he appointed Francis Deng, the author of the term R2P, the second Special Advisor for the Prevention of Genocide. In August 2007, he proposed to the SC the creation of the position of a Special Advisor on R2P, a proposal accepted by the sc with the nomination of Dr. Edward Luck.

At the same time in New York the "Global Centre for the Responsibility to Protect" was established at the Ralph Bunch Institute for International Studies of the City University. A joint office was created for the two Special Advisors.

11 U.N. Secretary General, Implementing the Responsibility to Protect, U.N. Doc. A/63/677 (12 January 2009).

12 These reports, to which we will return later on, had the following titles:

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Many celebrities as well as religious and moral authorities such as Pope Benedict XVI declared their support for this concept.[13]

Last but not least, we must mention the broad network of human rights activists, NGOs and semi-official institutions which has promoted the development of this concept and the diffusion of the underlying ideas. In recent years many seminars on this subject have been organized. Activists, human rights experts and politicians have been brought together so that in this area an unparalleled network, assembling academia, human rights experts and the world of politics, has been established. There are probably few norm-creating processes in which official institutions, NGOs, IOs and their representatives, distinguished academics and ordinary activists have collaborated in a similar form in a common endeavour to shape a completely new norm.[14]

As further confirmation of the uniqueness of this development mention can be made of the fact that within a very short period of time a new journal in a renowned academic publishing house was dedicated to this concept.[15]

In the main, this concept has met with approval. It is seen as an important step in the quest for the further humanization of international law and for the strengthening of the international peace order. As will be shown below, there are, however, also diverse points of criticism that can be advanced against the concept.

The advocates of R2P have chosen the following approach for the promotion of this idea: R2P is presented as a wholly new instrument that is equivalent to an epochal step of development in international law. In what follows (and in a separate contribution also included in this book) special attention shall be given to the question whether such an approach makes sense and what its limits are. To this end, a historical flashback may be useful.

– "Early warning, assessment and the responsibility to protect," (A/64/864, 14.7.2010);
– "The role of regional and subregional arrangements in implementing the responsibility to protect" (A/65/877-S/2011/393, 27.6.2011);
– "Responsibility to protect: timely and decisive response," A/66/874-S/2011/393, 25.7.2012;
– "Responsibility to Protect: State Responsibility and Prevention," A/67/929–S/2013/399, 9 July 2013.

13 Cf. R. Thakur/Th.G. Weiss, R2P: From Idea to Norm and Action? in: 1 GR2P 2009, pp. 22–53.

14 For an account of this extraordinary interaction between the most varied quarters of society see, for example, R. Thakur/Th.G. Weiss, R2P: From Idea to Norm and Action? in: 1 GR2P 2009, pp. 22–53.

15 The journal is entitled "Global Responsibility to Protect" (GR2P) which is published in 2014 in its sixth year – with four issues a year – by Martinus Nijhoff/Brill.

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2 R2P and Sovereignty

International law as it is traditionally understood finds its roots in the Westphalian order in which territorial domination stood at the core of the concept. In this sense, sovereignty is interpreted on the internal level as "autonomy and supreme authority within a certain territory" and externally as equivalent to "independence and equality of states."[16] Generally it is said that the R2P approach, while upholding the earlier definitive elements of sovereignty, goes beyond that in seeing sovereignty also as responsibility. At a closer look, however, this step is not as radical as it may seem at first sight. In fact, the association of sovereignty with absolute powers and the extension of these powers up to an extreme point may have been characteristic of the thinking in the 19th century state chancelleries of the European powers, but such thinking has long been abandoned and it may surely not be referred to as typical if the whole period since the inception of this concept is considered.[17] It is therefore much too simplistic – if not just plain wrong – to define the development of the sovereignty concept as a two-step process epitomized, respectively, by two years, 1648 and 2001 (or 2005).[18] It will be shown that essential elements of the R2P concept can be traced far back into the past even though, of course, the individual manifestations of this idea adapt to the circumstances of the time. The years 2001/2005 are, therefore, surely important mile stones on the path of this development, but at the same time they are no more than stepping stones in a long and ongoing process, marked by a long series of fits and starts. In this process particular attention has to be paid to the year 1945 with the entry into force of the UN Charter, although this caesura became fully evident only much later on.

Starting from very early on, occasionally the impending change of paradigm could be spotted very clearly. In the ICJ's Corfu Channel case, for example, Judge Alvarez made the following famous statement:

16 See A. Reinisch/H. Neuhold, Abgrenzungen, Strukturmerkmale und Besonderheiten der Völkerrechtsordnung, in: ÖHVR, Manz: Vienna 2013, para. 29. See also the considerations by Thomas Giegerich on internal and external sovereignty in his contribution: "Die Souveränität als Grund- und Grenzbegriff des Staats-, Völker- und Europarechts," in: U. Schliesky et al. (eds.), Die Freiheit des Menschen in Kommune, Staat und Europa, C.F. Müller: Heidelberg et al. 2011, pp. 603–631 (604).

17 See Ch. Möllers, Souveränität, in: W. Heun et al. (eds.), Evangelisches Staatslexikon, Kohlhammer: Stuttgart 2006, sect. 2174–2180 (2178).

18 As already mentioned, these two years mark, respectively, the advent of sovereignty and the creation of the R2P concept.

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"We can no longer regard sovereignty as an absolute and individual right of every State, as used to be the case under the old law founded on the individualist regime, according to which States were only bound by the rules which they had accepted. To-day, owing to social interdependence and to the predominance of general interest, the states are bound by many rules which have not been ordered by their will."[19]

The development process unfolded only very slowly. Two main reasons for this stand out. First of all, the structure of the UN Charter precluded more rapid change in perspective, as that document, on a formal reading, is not very clear as to the importance that should later be attributed to the protection of human rights,[20] interestingly primarily by reference to the Charter. A second reason is to be found in the Cold War, which greatly hampered the identification of common core values. The construction of a broad edifice of human rights instruments, both on the UN level and on a regional basis, therefore took several decades. There is now common consent[21] that the invitation to respect human rights cannot be considered as a prohibited intervention.[22]

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19 ICJ Reports, Corfu Channel, 1949, 39 (43).

20 See Articles 1, 13, 55, 56, 62, 68 and 76 of the UN Charter. While originally in literature it was prevailingly sustained that the Charter would only offer a basis for the "promotion" of human rights, over the years a far more comprehensive approach was developed which also comprised "protection" and "prevention." Finally, it was said that human rights should mainstream all UN activities. See for more details M. Nowak, Einführung in das internationale Menschenrechtssystem, NWV: Vienna/Graz 2002, pp. 87ss.

21 This does not, however, mean that voices to the contrary have not repeatedly been heard, especially from various quarters of the third world. This criticism is usually associated with fears of abuse. See F.M. Deng, From 'Sovereignty as Responsibility' to the 'Responsibility to Protect', in: 2 Global Responsibility to Protect 4/2010, pp. 353–370 (362) referring to a statement by the representative of the People's Republic of China in the Human Rights Commission:

"The practice of distorting human rights standards, exerting political pressure through abuse of monitoring mechanisms, applying selectivity and double standards have led to the violation of principles and purposes of the UN Charter and the impairing of the sovereignty and dignity of many developing countries. Thus the beautiful term of human rights has been tarnished." (E/CN.4/1993/SR.40, 1993).

22 See Art. 4 2nd sentence of the "Vienna Declaration and Programme of Action": "In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community." A/CONF.157/23, 12. July 1993. In this context, too, the judgment in the Nationality Decrees case of 1923 has to be cited. In that case, the PCIJ, when examining what makes part of the internal jurisdiction, famously stated as follows: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the

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As early as in 1991 UN SG Javier Pérez de Cuellar acutely presaged the sea change, posing questions that, however, still remain unanswered:

"We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents.... Does [intervention] not call into question one of the cardinal principles of international law, one diametrically opposed to it, namely, the obligation of non-interference in the internal affairs of States?"[23]

A year later, in 1992, UN SG Boutros Boutros-Ghali in his "Agenda for Peace" called for new sovereignty thinking:

"The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world."[24]

The 1990s were marked by excesses of violence that hardly anybody had considered possible in this era. These events happened in Africa, but also in ex-Yugoslavia, immediately in front of the gates of the EU. The crimes committed in Rwanda[25] and in Srebrenica[26] evidenced that a radical change of view was required as regards the relationship between state sovereignty and the State Community's right to intervene.

The advocates for such a change found a prominent campaigner in UN SG Kofi Annan. In 1999 he developed the concept of the "two sovereignties," that

development of international re/lations." See "Nationality decrees in Tunis and Morocco," PCIJ, Series B, no. 4, 7 February 1923. If we apply this statement to the developments starting with 1945 we can say that the strengthening of the human rights concept has strongly circumscribed the area of internal jurisdiction.

The instrument of the "Universal Periodic Review" (UPR) introduced by the UN in 2006 underscores these findings. See UNGA Res. 60/251 of 3 April 2006, A/RES/60/251. Only a century ago the prevailing literature came to completely different conclusions:

"A reader, after perusing Phillimore's chapter upon intervention, might close the book with the impression that intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland." See P.H. Winfield, The History of Intervention in International Law, in: 3 BYIL 1922/1923, pp. 130–149 (130).

23 UN Press Release SG/SM/4560 v. 24. April 1991, cited according to F.M. Deng, 2010, p. 363 with further references.

24 An Agenda for Peace, un Doc. A/47/277-S/24111, 17 June 1992, para. 17.

25 The acts of violence perpetrated in the first half of 1994 claimed the lives of more than half a million people.

26 In July 1995 the troops of General Mladic killed 8.000 civilians in the Bosnian city of Srebrenica, at that time under the UN flag.

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implied the need to find a balance between state sovereignty and individual sovereignty.[27]

Eventually, however, this approach was too far-reaching for the state community, in particular insofar as it seemed to imply the attribution of sovereign rights to individuals. The NATO intervention in Kosovo of the same year created a further quandary: intervention was an absolute necessity when the need for protection was considered, but was it legal? Although this question was answered in the affirmative by many commentators, in particular in the German-speaking area,[28] in the end a sceptical stance prevailed.[29] "Legitimate, but illegal," "necessary but not allowed by International Law," "prohibited by International Law but excusable" were some of the formulae drafted in this regard. It is interesting to note that with the exception of Belgium not even the intervening NATO states referred to humanitarian intervention when sued by Yugoslavia in the ICJ in 1999.[30]

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27 Kofi Annan, Two Concepts of Sovereignty, Economist, 18. September 1999, p. 49: "State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."

28 See, for example, K. Ipsen, Der Kosovo-Einsatz – Illegal? Gerechtfertigt? Entschuldbar? in: R. Merkel (ed.), Der Kosovo-Krieg und das Völkerrecht, pp. 160–166 und J. Delbrück, Effektivität des UN-Gewaltverbots, in: Die Friedens-Warte 1999, pp. 139–158. As to the Anglo-American area see for example R. Wedgwood, NATO's Campaign in Yugoslavia, in: 93 AJIL 1999, pp. 828–834; Ch. Greenwood, Humanitarian Intervention: The Case of Kosovo, in: 10 Finnish Yearbook of International Law 1999, pp. 141–177 and L. Henkin, Kosovo and the law of "humanitarian intervention," in: 93 AJIL 1999, pp. 824–828.

29 For a contribution arguing against international law conformity of the Kosovo intervention see P. Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal? in: 12 EJIL 2001, pp. 437–467

30 Case Concerning Legality of Use of Force (Yugoslavia v. United States of America) (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Canada) (Serbia and Montenegro v. France) (Serbia and Montenegro v. Germany) (Serbia and Montenegro v. Italy) (Serbia and Montenegro v. Netherlands) (Serbia and Montenegro v. Portugal) (Yugoslavia v. Spain) (Serbia and Montenegro v. United Kingdom). Belgium, however, explicity referred to humanitarian intervention as a justification:

"L'OTAN, le Royaume de Belgique en particulier, était tenu d'une véritable obligation d'intervenir pour prévenir une catastrophe humanitaire qui était en cours et qui avait

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In 2000 Kofi Annan reacted to these developments by posing a rhetorical question which at least implicitly could be seen as an utterance in favour of humanitarian intervention:

"If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights?"[31]

The predicament created by this situation was enormous: the general prohibition of the use of force or the use as an exclusive monopoly of force by the United Nations does not allow for exceptions. The qualification of Art. 2 para. 4 of the Charter by the introduction of an exception in favour of "just wars" is generally not considered desirable. On the other hand, experience shows that very often the United Nations do not intervene in civil wars, even if they are associated with a dramatic humanitarian crisis. In specific situations some states or groups of states may take the risk of an intervention even if thereby they are exposing themselves to the accusation of a breach of international law with ensuing sanctions. It is evident, however, that this solution is not satisfactory.

The newly created concept of R2P should bridge this gap – if only by a redefinition or a re-grouping of existing normative structures. A responsibility to protect individuals is not to be seen as an antithesis to the defence of state sovereignty, nor is R2P the successor concept to sovereignty. The responsibility to protect is rather an integral part of sovereignty, and today one of its foremost elements ("sovereignty as responsibility").[32]

était constatée par les résolutions du Conseil de sécurité pour sauvegarder quoi, mais pour sauvegarde des valeurs essentielles qui sont elles aussi érigées au rang de *jus cogens*. Est-ce que le droit à la vie, l'intégrité physique de la personne, l'interdiction des tortures, est-ce que ce ne sont pas des normes érigées au rang de jus cogens? [...] Donc pour sauvegarder des valeurs fondamentales érigées en *jus cogens*, une catastrophe en cours constatée par l'organisation du Conseil de sécurité, L'OTAN intervient. [...] jamais L'OTAN n'a mis en question l'indépendance politique, l'intégrité de la République de Yougaslavie [...]."

See Case Concerning Legality of Use of Force (Serbia v. Belgium), Order of 2 June 1999, ICJ Reports 1999, 10.

For a detailed analysis of the position taken by NATO member states see A. Prandler, The Concept of 'Responsibility to Protect' as an Emerging Norm Versus 'Humanitarian Intervention', in: Isabelle Buffard et al. (eds.), International Law between Universalism and Fragmentation, Liber Amicorum in Honour of Gerhard Hafner (Brill, Leiden, 2008) 711–728 (724).

31 See Kofi Annan, "We, the Peoples" – The Role of the United Nations in the 21st Century, U.N. Doc. A/54/2000, 27 March 2000, para. 217.

32 See ICISS Report 2001, para. 2.14 ss.

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According to the ICISS Report of 2001 R2P gives life to three different subspecies of responsibility:

– the responsibility to prevent;
– the responsibility to prevent grave breaches of human rights obligations and
– the responsibility to rebuild.

R2P applies to grave human rights breaches with "large scale loss of life or large scale ethnic cleansing." Events of this kind are to be examined by the Security Council in a fast track procedure and the Permanent Five are asked not to use their veto power in this field.[33]

R2P should be prompted by situations characterized by the presence of the following criteria: just cause, right intention, right authority, last resort, proportional means and reasonable prospect.

As a matter of principle, measures of military intervention for the purposes of human protection should be authorized by the Security Council.[34] In this regard, the General Assembly should, however, be assigned a particular role according to the Uniting for Peace Resolution.[35] In cases where the SC fails to exercise its primary responsibility for the maintenance of international peace and security the relevant authority would shift to the General Assembly which should decide by a two-thirds majority.[36]

A special role was given to Regional Organizations according to Chapter VIII of the UN Charter which were also authorized to take measures, acting within their defining powers, in the event of a failure by the Security Council to discharge its responsibilities in "conscience-shocking situations." The ICISS acknowledges that a literal reading of the Charter requires action by such organizations always to be subject to prior authorization by the Security Council, but the Commission voices the (highly problematic) opinion that approval could also be sought *ex post facto*.[37]

Particular attention deserves to be paid to the way in which the ICISS Report resolves the question whether unilateral measures, i.e. measures without

33 Ibid., para. 6.21.
34 Ibid., para. 6.28.
35 GA Res. 377 (V) of 3 November 1950.
36 ICISS Report 2001, para. 6.30. The ICISS acknowledges the weakness of this instrument but is confident that the mere existence of such an alternative path to the authorization of forcible measures would prompt the SC to act "decisively and appropriately." Ibid.
37 Ibid., para. 6.35.

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authorization by the SC, should also be allowed. Again, the Charter is clear in this regard in prohibiting such actions, but the Report adopts a pragmatic approach in order to overcome the unsatisfactory impasse resulting from the frequent inability by the SC to act. In the relevant passage the Report argues in more political than legal terms and there is also an implied warning to the SC:

"*The first message is that if the Security Council fails to discharge its responsibilities in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations. If collective organizations will not authorize collective intervention against regimes that flout the most elementary norms of legitimate governmental behaviour, then the pressures for intervention by ad hoc coalitions or individual states will surely intensify. And there is a risk then that such interventions, without the discipline and constraints of UN authorization, will not be conducted for the right reasons or with the right commitment to the necessary precautionary principles.*"[38]

The ICISS Report does not pass judgement on the legality of this attitude, but gives out a warning to the SC: unilateralism will take the place of ordered UN interventions if the state community does not take up its responsibility. This implies, however, that the ICISS considers the preparedness to intervene to be much greater at the beginning of the 21st century than it has been in the past.

3 The Further Course of the Discussion and the Adoption of the Outcome Document at the World Summit 2005

The first few years after the publication of the ICISS report were characterized by the effort to breathe life into the new concept of R2P and to affirm it definitely in the international legal order. This was no easy undertaking if we think only of the fact already mentioned that only one day after the publication of the report the attack on the twin towers changed the perception of many legal issues surrounding the use of force and standing at the core of the report.[39]

38 Ibid., para. 6.39.

39 This holds true in particular for the pre-conditions for the use of force. As is known, the events of 9/11 led to a re-formulation of the US's National Security Strategy (NSS) that should explicitly allow for pre-emptive self-defence also against imminent attacks (and not just, as the text of Art. 51 of the UN Charter would suggest, against attacks that had already occurred). See Th. G. Weiss, Humanitarian Intervention – Ideas in Action, Polity: Cambridge 2007, p. 125 and A.N. Guiora, Anticipatory self-defence and international law: a re-evaluation, in: 13 JCSL 2008, pp. 3–24.

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The consequences of this attack were far-reaching: The immediate consequence was the US-led (and UN-approved) war in Afghanistan, and then the intervention in Iraq, this time without UN approval but by recourse to (and the abuse of) the R2P rhetoric.[40] The newly conceived National Security Strategy (NSS) based on the so-called Bush doctrine seemed even to permit preventive action against the threat of an attack, and justifications were very close to the argument used in the ICISS report. These developments were, however, not beneficial to the case of R2P, but quite the opposite, as the suspicion was raised that R2P could become a facile excuse for unilateral intervention at will by the great powers, in particular the US.

And, in fact, the new US policy met with sharp criticism on a world-wide scale. In many quarters the attitude taken by the United States was conducive to the side-lining of the UN and the assertive demeanour of US ambassador John Bolton (since July 2005), who did not really attempt to conceal his critical attitude towards the United Nations,[41] did not help to alleviate these fears.

In view of these events it seemed little short of a miracle that R2P made it in the Outcome document of 2005. The reasons why the advocates of R2P had the upper hand in the end were mainly the following:

- UN SG Kofi Annan lobbied relentlessly to make sure that the atrocities of the 1990s would not happen again. Over the years this task had become one of his primary missions.
- A world-wide alliance of states had taken shape that wanted to tackle this issue outside the usual thinking in traditional ideological categories.

With regard to the first element, SG Kofi Annan had in 2003 appointed a High-level Panel (HLP) to prepare an in-depth study of the whole subject. In the report presented in December 2004[42] the HLP was wise enough not to depict

40 The same happened in 2008 on the occasion of the Russian intervention in Southern Ossetia.

41 John Bolton also attracted a lot of attention for his outspoken attitude. For example, the doubts he voiced about the very existence of the United Nations are famous: "There is no such thing as the United Nations. There is only the international community, which can only be led by the only remaining superpower, which is the United States." See E. Voeten, The practice of political manipulation, in: E. Adler/V. Pouliot, International Practices, CUP: Cambridge 2011, pp. 255 ss. (262), citing "Hawkes Sit Out Phoney Peace While War Machine Rolls On," in: The Observer, 12 January 2003.

42 A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, U.N. Doc. A/59/565 (2 December 2004). With regard to this report see P. Hilpold, Reforming the United Nations: New Proposals in a long-lasting

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the prohibition of the use of force as outdated and ripe for substitution by an alternative mode. This body of experts rather tried to prepare proposals to make the existing procedures within the UN more efficient.[43]

Subsequently, in spring 2005, the Secretary-General presented his own report entitled "In Larger Freedom." Kofi Annan did not propose an alternative model to the existing UN system based on the prohibition of the use of force but again looked for ways to improve the instruments and the procedures the Security Council had at its disposal to fulfil its functions. To this end, he elaborated a set of criteria that should make decision-taking more transparent and objective in the face of serious human rights abuses.[44]

As to the overall political framework it has to be noted that the increasing complexity of international challenges has brought about a network of alliances that transcended traditional regional, political and ideological groupings. It is true that R2P has found powerful proponents in the Western world (and there not only in Europe but in particular in Canada and in Australia), but the breakthrough at the World Summit of 2005 is primarily to be attributed to the overwhelming support this concept had gained from Third World countries. In this, states from sub-Saharan Africa – still deeply shocked by the genocide in Rwanda, to which the state community had reacted much too late – played a pivotal role.[45]

Endeavour, in: LII NILR 2005, pp. 389–431 and H. Neuhold, High-level Panel on Threats, Challenges and Change, in: MPEPIL, online edition.

43 "The task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has." Ibid., p. 3.

44 See Kofi Annan, In larger freedom, 2005, para. 126:

"The task is not to find alternatives to the Security Council as a source of authority but to make it work better. When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion. **I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force.**" (emphasis in original).

45 In this context a rather ambiguous attitude was taken by the US government. On the one hand the government was interested in the inclusion of R2P in the Outcome document. On the other hand it tried to soften the legal stringency of the content. The role played in this field by US ambassador John Bolton, was also remarkable. While he had taken a

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In the Outcome Document of 2005 R2P is regulated in para. 138 and 139:

"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 which are under stress before crises and conflicts break out."

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critical stance towards a series of proposals that could have jeopardized sovereign rights of his home country he did not reject R2P outright. He rather tried to avoid concomitant obligations for the US: "We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene in international law"; John Bolton in: "Letter Sent to UN Member States Conveying US Amendments to the Section on the Responsibility to Protect oft he Draft Outcome Being Prepared for the September 2005 High Level Event," 30. August 2005, cited according to: Th. Reinold, The United States and the Responsibility to Protect: Impediment, Bystanders, or Norm Leader? in: 3 GR2P 2011, pp. 61–87 (69). Anne-Marie Slaughter and Lee Feinstein used instead a different terminology writing of a "duty to prevent" thereby giving rise to a controversial discussion.

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This approach evidences remarkable differences in comparison to the way R2P is defined in earlier documents. The content of R2P has been somewhat diluted, and that is why the – ironic – formula of "R2P-lite" has evolved:[46]

- The boundaries of R2P had been clarified and at the same time circumscribed to the most abhorrent events that are also foreseen as crimes in international criminal law: genocide, war crimes, ethnic cleansing and crimes against humanity.[47]
- Furthermore, the attempt to devise criteria which should guide the SC when exercising its responsibility to protect (and which could either restrict its discretion or prompt it to act) was abandoned. It is interesting to note that in this regard a broad consensus between the veto powers emerged, even though the motives behind it differed: China and Russia feared the creation of an intervention mechanism, while the US was more wary of the risk of losing control over the employment of its troops.[48] The insertion of the expression "as appropriate" cannot be considered as the introduction of a criterion or as a reference to some external material criteria. It serves only to emphasize the political discretion by the SC in this field.
- The previous attempts to introduce a code of conduct for the SC in relation to its veto power were also abandoned.[49]
- The proposal by the ICISS to attribute to the GA a role similar to that played by the SC was not heeded. In view of the controversial discussion the "Uniting-for-Peace" resolution has given rise to, it is therefore hardly arguable that the SC could be supplanted by the GA in the exercise of the functions resulting from R2P.

Despite all these limitations the success achieved in 2005 was nonetheless enormous. As is known, it has long been doubtful whether the SC is authorized at all to take coercive measures on the basis of Chapter VII with respect to an internal situation like a civil war. While it is true that in the past the SC has

46 See Th.G. Weiss, Humanitarian Intervention, Polity: Cambridge, 2007, p. 117.

47 As is known, "ethnic cleansing" does not constitute a specific criminal offence. Regularly there are, however, connections with the other criminal offences mentioned. For the related definition problem see R. Geiß, Ethnic Cleansing, in: MPEIL online edition 2011.

48 See above the considerations about the attitude taken by the US ambassador to the United Nations, John Bolton, note 45.

49 For references to the present discussion about this concept see note 78 and accompanying text.

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authorized such measures with regard to situations that had to be qualified as internal according to a pragmatic perspective, the SC always managed to avoid any generalization by hinting at cross-border elements ("massive flow of refugees over the borders")[50] or by reference to the exceptional nature of the case.[51]

As a consequence of the introduction of R2P it is no longer necessary to look for cross-borders effects of an internal crisis: so-called spill-overs. It is sufficient that the facts mentioned materialize so that, after consideration of all relevant circumstances, a decision on the necessary measures can be taken. The importance of the message associated with this legal development can hardly be overestimated. In fact, emphasis is put on the fact that the crimes to which the 2005 concept of R2P relates engender effects erga omnes and prompt a responsibility to protect on a potentially world-wide scale. Values are affected that are attributed directly to the state community; it is no longer necessary to demonstrate specific cross-border effects. This new kind of responsibility is no longer blocked by the walls of national sovereignty. It is not even necessary to look over these walls as R2P in itself forms part of this new concept of sovereignty.

4 The Relationship of R2P with the Modern System of International Law and Some Questions Regarding Its Future

After this unexpected success, attempts had to be made to find a specific place for R2P in the international legal order. In comparison to the ICISS Report the Outcome Document 2005 had adopted a far more restricted approach.

Little was left of the comprehensive perspective that was so characteristic of the original concept. While preventive measures were still mentioned in the Outcome Document they had now faded into the background.[52] The same

50 See SC Res. 688/1991 of 5 April 1991 which was interpreted as authorizing the establishment of no-fly zones in Northern Iraq; SC Res. 794 of 3 December 1992 concerning the authorization of US intervention in Somalia and SC Res. 940 of 31 July 1994 concerning Haiti and authorizing a multinational force to use "all necessary means."

51 This was the case with SC Res. 940 of 31 July 1994. For a detailed analysis of these resolutions see P. Hilpold, Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte, in: 54 ZÖR 1999, pp. 529–602 (592ss.).

52 For the difficulties associated with the introduction of effective preventive measures see A.J. Bellamy, Conflict Prevention and the Responsibility to Protect, in: 14 Global Governance, 2008, pp. 135–156. See in general for the role of prevention within the R2P concept S.P. Rosenberg, Responsibility to Protect: A Framework for Prevention, in: GR2P 2009, pp. 442–477.

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has to be said about peacebuilding. Although the World Summit of 2005 had laid the basis for the creation of the Peacebuilding Commission,[53] in contrast to the original proposals no preventive tasks were assigned to this new institution.[54]

With a mixture of fear and suspicion many governments looked at this new concept with a mixture of fear and suspicion, as for some it was associated with a far-reaching restriction of their domaine reserve, if not tantamount to a

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See, however, in the meantime the fifth Report on R2P by the UN SG of August 2013 on "The Responsibility to Protect: State Responsibility and Prevention," expressing a stronger commitment by the UN for prevention.

53 This happened by UN GA Res. 60/180 of 30 December 2005, UN GA acting concurrently with the SC.

54 According to Res. 60/180 the main purposes of this Commission are the following:

"(a) To bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery;

(b) To focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and to support the development of integrated strategies in order to lay the foundation for sustainable development;

(c) To provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, to develop best practices, to help to ensure predictable financing for early recovery activities and to extend the period of attention given by the international community to postconflict recovery."

Therefore, first of all, this Commission is endowed with coordinative functions in respect to the various existing international institutions that are already operative in the field of peacebuilding. They are partly located directly within the UN, but also encompass the World Bank, the International Monetary Fund as well as a large number of NGOs. The ways in which these institutions are contributing to peacebuilding are very varied. On the one hand they exercise a consultative function for the competent UN organs (in particular the Security Council), while on the other they operate like clearing agents with regard to the enormous flood of political, economic and technical information that can find use for peacebuilding.

If this Commission is to fulfil the high-flying expectations with which it is confronted a painstaking confidence-building process has to take place in order to address the deep-rooted fears of many states that institutions of this kind could imperil their sovereignty. At the same time the problem of resources, a problem which infests the UN as a whole, has to be addressed. Furthermore it has to be clarified what leeway for specific actions is to be given to the Commission.

See Weinlich, Weder Feigenblatt noch Allheilmittel – Die neue Kommission für Friedenskonsolidierung der Vereinten Nationen, in: Vereinte Nationen 1–2/2006, pp. 2–11 and B. Wegter, Emerging from the Crib: The Difficult First Steps of the Newly Born UN Peacebuilding Commission, in: International Organizations Law Review, 2007, pp. 343–355.

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disguised justification for humanitarian intervention. Others feared that the implementation of R2P would engender new commitments and drain their financial and military resources. Nonetheless, the overall consensus was that R2P was here to stay. Notwithstanding all the uncertainties as to the ways and means of its implementation R2P filled a clear gap in the structure of the international legal order.

The task of further clarifying this concept to make it more amenable to the State Community and to dissipate the fears mentioned was vigorously taken up by Un SG Ban Ki-Moon, who hitherto has presented five Reports that should not only keep alive the concept presented by his predecessor but develop it further in close dialogue with governments. These Reports are the following:

– "Implementing the Responsibility to Protect" (2009)[55]
– "Early warning, assessment and the responsibility to protect" (2010)[56]
– "The role of regional and subregional arrangements in implementing the responsibility to protect" (2011)[57]
– "Responsibility to protect: timely and decisive response" (2012)[58]
– "Responsibility to Protect: State Responsibility and Prevention" (2013).[59]

The first Report was already ground-breaking as it contained an unconditional commitment by the UN SG in favour of the concept, even though Ban Ki-Moon at the same time expressed his intention to impress his own note on the concept. In particular, in these Reports the softly-spoken, diplomatic and consensus-oriented nature of their author came out. Like the ICISS Ban Ki-Moon also adopted a pillar structure for R2P although it was in many ways different as it was more oriented on paragraphs 138 and 139 of the Outcome Document 2005. This approach lays more emphasis on the responsibility of States; it further gives them the assurance that they will be encouraged and assisted by the UN in exercising this responsibility and only in a subordinate way. If States are not able or not willing to take up this responsibility, the United Nations is prepared to take collective action "in a timely and decisive manner."

The SG declared that he interpreted R2P as "narrow but deep." According to him "[t]o try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005

55 U.N. Doc. A/63/677, 12 January 2009.
56 U.N. Doc. A/64/864, 14.7.2010.
57 A/65/877-S/2011/393, 27.6.2011.
58 A/66/874-S/2011/393, 25.7.2012.
59 A/67/929–S/2013/399, 9 July 2013.

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consensus and stretch the concept beyond recognition or operational utility."[60] At the same time, "the response ought to be deep, employing the wide array of prevention and protection instruments available to Member States, the United Nations system, regional and subregional organizations and their civil society partners."[61]

At the centre stands the responsibility of the states. They can no longer contend that a limitation of their sovereignty is imposed on them from outside, but are rather invited to take seriously their own responsibility, flowing from a modern interpretation of sovereignty.

The SG's intention to portray R2P as part and parcel of existing international law is clearly recognizable, thereby countering any criticism by the states that their sovereignty is going to be unduly limited. By emphasizing the states' own responsibility for upholding the main human rights he is pursuing exactly this path. In this regard the approach taken by the SG is most convincing as it was sufficient to refer to existing international law obligations imposing in particular the prevention of genocide.[62]

Nonetheless, there is no reason for self-indulgence, as the international legal order still evidences many imperfections in this field that are also hinted at in this Report. There is, for example, the need to extend the reach of the most important treaty instruments. The SG invites the states to become parties to the relevant international instruments on human rights, international humanitarian law and refugee law, as well as the Rome Statute of the International Criminal Court.[63] The Rome Statute of 2008 is of particular importance as it aims at punishing, and therefore also preventing, the crimes referred to in paras. 138 und 139 of the Outcome Document.[64]

60 "Implementing the responsibility to protect," 2009, para. 10, lit. (b).

61 Ibid., lit. (c).

62 See Art. 1 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." See also the "Genocide case," ICJ Report 2007, where the International Court of Justice identified a rather far-reaching obligation to prevent genocide: "For a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them." Ibid., para. 438.

63 "Implementing the responsibility to protect," 2009, para. 17.

64 The crimes mentioned in these paragraphs are largely although not totally identical with those of the Rome Statute. As is well known, unlike the Rome Statute, the Outcome Document also mentions "ethnic cleansing" while it does not consider the crime of aggression.

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Ban Ki-Moon becomes very plain when he addresses the typical excuses states put forward when they try to explain why they are not able to respect the most basic obligations in the field of human rights. He identifies intolerance, bigotry and exclusion as the roots of a self-destructive process.[65] He leaves no doubt that "if principles relating to the responsibility to protect are to take full effect and be sustainable, they must be integrated into each culture and society without hesitation or condition, as a reflection of not only global but also local values and standards. This should not be an impossible task since no community, society, or culture publicly and officially condones genocide, war crimes, ethnic cleansing or crimes against humanity as acceptable behaviour."[66] This is an important statement as purported cultural differences are often and all too light-heartedly used as a pretext for not implementing basic human rights obligations. In reality, however, cultural differences in the field of human rights are far less accentuated than sustained.[67]

Ban Ki-Moon highlights the importance of fostering individual responsibility, and he spells out confidence that even in the worst crisis there are enough individuals that stick to basic principles of humanity: "Even in the worst genocide, there are ordinary people who refuse to be complicit in the collective evil, who display the values, the independence and the will to say no…"[68]

With regard to the other two pillars, the argument becomes more complex. The second pillar on "international assistance and capacity-building" comprises a whole array of measures and initiatives of differing intensity. The extensive considerations by the SG on this subject bear out that no "one-size-fits-all" approach can be adopted here. Assistance has rather to be closely tailored on a case-by-case basis with respect to the specific needs of the case.

65 Ibid., para. 21.

66 Ibid., para. 20.

67 For some very enlightening thoughts about this issue see, for example, Rein Müllerson, From E Unum Pluribus to E Pluribus Unum in the Journey from an African Village to a Global Village? in: S. Yee/J.-Y. Morin (eds.), Multiculturalism and International Law, Brill/Martinus Nijhoff 2009, pp. 33–58: "Cultural relativists, emphasizing differences between societies…fail to appreciate the commonalities that exist in all or in most human communities… Our common humanity seems to be deeper, and therefore also more hidden, than our differences that are usually on the surface and therefore immediately invisible." Ibid., p. 39. See in this regard also the apt remark by the former UN SG Kofi Annan: "It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so." See also World Summit Outcome of 16 September 2005, UN Doc. A/RES. 60/1 (2005), para. 121.

68 Ibid., para. 27.

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For a more structured approach in this area it seems that more studies are necessary. Nonetheless, the Report of 2009 highlights some basic principles that will find broad approval. Thus, assistance will crucially depend on local acceptance and the involvement of local capacities. The Report rightly brings to mind that more information is necessary to understand the interrelations between the various factors involved and the country- and region-specific differences: "[t]o strengthen pillar two, a cumulative process of country-to-country, region-to-region, and agency-to-agency learning is needed on prevention, capacity-building and protection strategies, doctrines and practices have fared over years."[69]

Assistance and capacity-building are also instruments of prevention. As already mentioned, States are very wary in this field as they fear undue interference even in situations that would be manageable internally under full respect of human rights. These fears are less acute if the crisis is extensive and associated with grave human rights violations. First of all, in such a situation the risk of abuse is reduced. Furthermore, the extreme character of such a situation and the deliberate choice by the perpetrator State to violate international law make it easier for other States to allow preventive measures, as under these conditions it is unlikely that they will find themselves exposed to similar sanctions.

On the whole, in view of the delicacy of the situation, it is small wonder that the SG did not address the question of prevention directly in the Report but relegated it to the Annex. Only in his second Report of 2010[70] did he take up this issue squarely when he emphasized, as he had already done in the Annex to his first Report, the necessity to establish early warning mechanisms or to strengthen them. UN investigations with regard to the massacres in Rwanda 1994 and Srebrenica 1995 showed that there had been severe flaws and omissions in early warning and risk analysis.[71] Effective prevention is, of course, far more demanding, but it has become evident that most urgent were improvements in the UN's "capacity to analyze and react to information and in the flow of information within the United Nations system and to the Security Council."[72] Of course, this approach taken by the SSG was also most palatable to the States as the need for change was identified primarily at the UN and the states were largely exempted, at least at this stage, from encroachments on their (traditionally understood) sovereignty.

69 Ibid., para. 44.

70 "Early warning, assessment and the responsibility to protect," A/64/864 of 14 July 2010.

71 Ibid., para. 7.

72 Ibid.

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With regard to the first Report of 2009, however, the wider public paid most attention to the third pillar of R2P concerning the commitment by the State Community to make a timely and decisive response if one of the crimes indicated in paras. 138 and 139 of the Outcome Document unfolds and States are unwilling or unable to assume their – primary – responsibility.

As this pillar stands very close to the concept of "humanitarian intervention" which, as is known, has given rise to very controversial discussions, prudence was imperative. Accordingly, the SG in his first Report of 2009 makes clear that the response to the crimes here at issue may not only be measures consisting in the use of force but may also include the whole array of peaceful (non-coercive) measures mentioned in Chapter VI and in Chapter VIII of the UN Charter. Also individual ("targeted") sanctions are mentioned.[73] The SG tries hard to devise an approach as sovereignty-friendly as possible and to rule out any form of unilateralism. Coercive measures require UN authorization. In general, the principle applies: "The more robust the response, the higher the standard for authorization."[74] At the same time, the SG rejects a purely formalistic approach: "the UN must remain focused on saving lives through 'timely and decisive' action, not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results."[75]

On the whole, the first Report by UN SG Ban Ki-Moon might convey the impression of diplomatic restraint and avoiding uncharted waters, but on two points it demonstrates courage:

– He attributes a subsidiary responsibility to the GA for the maintenance of peace and security according to the "Uniting-for-Peace" Resolution (UN GA Res. 377 (V) of 3 November 1950).[76]

73 See P. Hilpold, EU Law and UN Law in Conflict: The Kadi Case, in: 13 Max Planck UNYB 2009, pp. 141–182; idem, UN Sanctions Before the ECJ: the Kadi Case, in: A. Reinisch (ed.), Challenging Acts of International Organizations Before National Courts, Oxford University Press: Oxford 2010, pp. 18–53, idem., "Kadi die Dritte – EU-Recht und UN-Recht weiter auf Kollisionskurs," in: EuZW 22/2010, p. 844; N. Lavranos, The impact of the Kadi judgment on the international obligations of the EC Member States and the EC, in: 28 Yearbook of European Law 2009, pp. 616–625 and G. de Búrca, The European Court of Justice and the international legal order after Kadi, in: 51 Harv. Int. LJ 1/2010, pp. 1–49.

74 "Implementing the responsibility to protect," 2009, para. 50.

75 Ibid.

76 Ibid., para. 63: "Article 24 of the Charter confers on the Security Council 'primary', not total, responsibility for the maintenance of peace and security, and in some cases the perpetration of crimes relating to the responsibility to protect may not be deemed to pose a threat to international peace and security. Moreover, under the 'Uniting for peace'

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– Furthermore, he takes up the ICISS's idea of urging the Security Council to use the right of veto in a responsible way: "I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect."[77]

Most probably, neither of these two specific proposals will find a majority within the State Community. As for the Uniting-for-Peace initiative, it must be said that this approach is much contested already from the strictly legal viewpoint, and on the practical level at the moment it seems to have no greater relevance. It is more than doubtful whether a majority could be found in the GA to re-animate this concept.[78]

As to possible limitations of the veto power this proposal was amply discussed also in recent legal literature,[79] but the implementation of such an approach would meet with considerable barriers. First of all, there are problems as a matter of principle in holding States responsible for their voting in international organizations, in particular, if their function is associated with broad discretionary powers, as is the case for members of the SC. What is more, the question whether or not to intervene is almost never a black-or-white option where intervention would be unconditionally the "good" or "right" decision, while non-intervention would be "bad" or "wrong," possibly even causing

procedure, the Assembly can address such issues when the Council fails to exercise its responsibility with regard to international peace and security because of the lack of unanimity among its five permanent members." It is interesting to note that in his fourth Report of 2012 which is dedicated to the question of the "timely and decisive response" no more mention is made of the Uniting for Peace Resolution.

77 Ibid., para. 61.

78 See with regard to this concept Ch. Tomuschat, Uniting for Peace – General Assembly resolution 377 (V), New York, 3 November 1950, in: http://legal.un.org/avl/ha/ufp/ufp.html (20 August 2014)

79 The introduction of such a restriction was supported A. Blätter and P.D. Williams. See A. Blätter/P.D. Williams, The Responsibility Not To Veto, 3 Global Responsibility to Protect 2011, pp. 301–322. See also A. Peters, The Responsibility to Protect: Spelling out the hard legal consequences for the UN Security Council and its Members, in: U. Fastenrath (Hrsg.), From Bilateralism to Community Interest, Liber Amicorum Bruno Simma, OUP: Oxford 2011, pp. 297–325, idem, T he Responsibility to Protect and the Permanent Five – The Obligation to Give Reasons for a Veto, in: J. Hoffmann/A. Nollkaemper, Responsibility to Protect – From Principle to Practice, Pallas Publications: Amsterdam 2012, pp. 199–211 and L. Arbour, The Responsibility to protect as a Duty of Care in International Law and Practice, in : 34 Review of International Studies 2008, pp. 445–458.

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state responsibility. This holds true even more so if a decision in favour of intervention entails (if only de facto) an obligation to provide resources (be they of a financial, technical or human nature). And even if the decisions by the veto power were subjected to ex-post control the next question would be who should be responsible for carrying out such control. While it is true that in literature the opinion has been voiced that the ICJ could be responsible for the control of SC decisions,[80] this opinion did not go unchallenged.[81] A further obstacle to the implementation of this proposal is the question of causality. With so many actors involved in a decision on intervention and such complex interdependencies existing between them how can one hold responsible individual members of the SC?

As mentioned, the SG has also emphasized the relevance of regional institutions for the effective implementation of R2P.[82] For these institutions, the actual potential for contribution to the further development of R2P varies greatly. Probably the greatest potential lies in their reciprocal interaction that may generate important reciprocal learning effects.[83] Thus, for example, the office of the OSCE High Commissioner for National Minorities has built up an impressive early-warning and quiet diplomacy capacity in respect of group conflicts,[84] the European Union is a world-wide leading actor when it comes to devising and implementing programmes for the promotion of democracy and the rule of law,[85] and subsequent to one of worst humanitarian catastrophes in

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Contra D.H. Levine, Some Concerns About "The Responsibility Not to Veto," in: 3 Global Responsibility to Protect 2011, pp. 323–345. This author is right when he emphasizes that R2P and decision power by the SC are situated on two different levels: "R2P is a quasi-judicial concept and the UNSC is a political entity, so the fit will never be perfect." Ibid., p. 340. See for a critical stance also A. Zimmermann, The obligation to prevent genocide: Towards a general Responsibility to Protect? in: U. Fastenrath et al. (eds.), Liber Amicorum Bruno Simma, OUP: Oxford 2011, pp. 629–645.

80 See L. Glanville, The Responsibility to Protect Beyond Borders, in: 12 Human Rights Law Review 1/2012, pp. 1–32 (22).

81 See L. Glanville, The International Community's Responsibility to Protect, in: 2 Global Responsibility to Protect 2010, pp. 287–306 (301 s.).

82 "The role of regional and sub-regional arrangements in implementing the responsibility to protect," Report of 27 June 2011, A/65/877-S/2011/393.

83 See also D. Carment/M. Fischer, R2P and the Role of Regional Organisations in Ethnic Conflict Management, Prevention and Resolution: The Unfinished Agenda, in: 1 GR2P 2009, pp. 261–290.

84 See the Report of 27 June 2011, para. 18.

85 See, for example, P. Kotzian et al., Instruments of the EU's External Democracy Promotion, in: 49 JCMS 2011, pp. 995–1018, Ph. Dann, Solidarity and the Law of Development Cooperation, in: R. Wolfrum/Ch. Kojima (Hrsg.), Solidarity: A Structural Principle of International

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recent African history the African Union has built up an intervention mechanism that is unparalleled anywhere in the world.[86]

On the whole it can be said that the SG plays a pivotal role for the further development and implementation of the R2P concept. The support given to R2P by both Kofi Annan and his successor Ban Ki-Moon was of crucial importance for this concept to assert itself on the universal scene.

While support by the two Secretaries-General was decisive for this concept to come to life the backing of the SC led to its broad recognition. Interestingly, initially this body was rather hesitant in this regard. In Res. 1674 on the Protection of Civilians in Armed Conflict adopted on 28 April 2006 the SC for the first time explicitly referred to R2P reaffirming "the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." This special function of R2P was again confirmed by SC Res. 1894 of 10 November 2009. The real sea change happened,

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Law, Springer: Heidelberg 2010, pp. 55–77 as well as P. Hilpold, "EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance," in: 7 European Foreign Affairs Review 1/2002, pp. 53–72. With regard to the role the EU plays on the Balkans Carment/Fischer, 2009 remark pointedly: "The EU's attempts at conflict prevention in the Balkans were probably a failure up until 1995. However important lessons were learned and successfully applied later on in Kosovo and Macedonia." Ibid., p. 282. See also I. Lirola Delgado, The European Union and Kosovo in the Light of the Territorial Issue, in: P. Hilpold (ed.), Das Kosovo-Gutachten des IGH v. 22. Juli 2010, Martinus Nijhoff: Leiden/Boston 2012, pp. 129–152.

86 This mechanism is regulated in Art. 4 lit. (h) of the Constitutive Act of the African Union (AU) of 11 July 2000:

"The right of the Union to intervene in a Member State…in respect of grave circumstances, namely war crimes, genocide and crimes against humanity."

The circumstances that prompt the responsibility to protect and that at the same time remain at the centre of International Criminal Law can therefore also be taken as a justification for military intervention within the order of the AU.

Nonetheless, the AU has taken a rather ambivalent attitude with regard to interventions. On the one hand, many governments evidenced a genuine resolve to make sure that a fall-back into barbarity would no longer occur. On the other hand, the same governments were very wary about shielding their sovereignty against any actual and potential interferences that could be read in a neo-colonialist perspective. See extensively on this subject K. Aning/S. Atuobi, Responsibility to Protect in Africa: An analysis of the African Union's Peace and Security architecture, in: 1 Global Responsibility to Protect 2009, pp. 90–113 as well as E.Y. Omoroghe, The African Union, Responsibility to Protect and the Libyan Crisis, in: LIX NILR 2012, pp. 141–163 and, for the most comprehensive analysis on this subject to date D. Kuwali/F. Viljoen (eds.), Africa and the Responsibility to Protect, Routledge: London/New York 2013.

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however, as a consequence of the two SC Resolutions regarding the situation in Libya (Res. 1970 of 26 February 2011 and Res. 1973 of 17 March 2012).

By Res. 1973/2011 the SC for the first time authorized the use of force according to Chapter VII of the Charter by reference to R2P. On this basis a no-fly zone was enforced which was used, beyond the authorization by the SC, to bring about regime change in Libya.

Was this intervention a success? At first sight and from a military perspective we can say yes. Thereby a cruel and corrupt regime, responsible for grave human rights abuses and the sponsoring of terrorism was removed. At the same time, however, it cannot be ignored that this intervention and the ensuing large-scale availability of weaponry, coming mostly from looted state armouries, fuelled further violence and also to a considerable extent destabilized neighbouring countries. This situation may call to mind the famous analysis by Zhou Enlai according to which historical mega events can never be judged definitively as the long-term effects are not foreseeable.[87] Most importantly, the intervention in Libya demonstrated how fitting was the insertion of the phrase "on a case by case basis" into para. 139 of the Outcome Document 2005. This makes it clear that an authorization for military intervention by the Security Council, which should in any case constitute an exception, can never constitute a precedent of any kind.

5 R2P as a Legal Concept

5.1 *The Legal Nature of the Responsibility to Protect*

In the course of the attempt to demonstrate the legal bindingness of R2P much energy was expended in the attempt to trace the origins of the concept back to existing International Law. And, in fact, this attempt will succeed with regard to the first pillar of R2P, as the first report on R2P by the SG demonstrated convincingly. A vast array of obligations of such a kind can be derived from the tight-knit network of human rights instruments, but also from the system of international humanitarian law.[88]

87 As is known, this analysis was couched in the bon mot that it was too early to assess the implications of the French revolution. According to recent revelations this bon mot was, however, a misunderstanding as Zhou Enlai, when he made the famous remark in 1972, did not mean the revolution of 1789 but the student protests of 1968 in Paris. See http://mediamythalert.wordpress.com/2011/06/14/too-early-to-say-zhou-was-speaking-about-1968-not-1789/ (24 January 2014).

88 Art. of the Geneva Conventions 1949.

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With regard to the obligation to provide reciprocal aid and to build up prevention capabilities it appears to be difficult to find specific International Law norms currently in force. Norms of this kind could achieve an international order of solidarity. While it is true that more and more elements of solidarity are becoming apparent in the international legal system they are still mainly of an emerging character. Only sporadically have they found specific concretization.[89]

With regard to the third pillar, the responsibility to prevent, more specific hints for obligations can be identified in the international legal order even though the overall picture remains sketchy. First of all, reference can be made in this context to the jurisprudence of the ICJ and to the activities of the International Law Commission (ILC).

With regard to the ICJ's jurisprudence in the Genocide case (Bosnia and Herzegovina vs. Serbia and Montenegro)[90] the Court refrained from attributing to Serbia direct responsibility for the acts committed, because, as the ICJ noted, "it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied – and continued to supply – the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was underway; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such."[91]

On the other hand, the ICJ came to the conclusion that Serbia had failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, and that its international responsibility was thereby engaged.[92] While this obligation is clearly set out in Art. 1 of the Genocide Convention its actual scope of application, in particular in cross-border situations, was rather uncertain. By the judgment in the Genocide case the ICJ has left no doubt that the obligation to prevent genocide extends

89 See P. Hilpold, "Solidarität als Rechtsprinzip – völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen," in: 55 Jahrbuch des öffentlichen Rechts 2007, pp. 195–214; idem, Solidarität als Prinzip des Staatengemeinschaftsrechts, in: 51 AVR 2013, pp. 239–272 as well as R. Wolfrum/Ch. Kojima (eds.), Solidarity: A Structural Principle of International Law, Springer: Heidelberg 2010.

90 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007.

91 Ibid., para. 422.

92 Ibid., para. 438 and 450.

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beyond a state's territorial jurisdiction. Of course, this obligation to prevent is not an unconditional one. States are rather required to apply due diligence and "to employ all means reasonably available to them, so as to prevent genocide as far as possible."[93]

These findings are further corroborated by the norms on state responsibility.[94] Without doubt the prohibition of genocide is part of ius cogens. According to Art. 41 para. 1 of the ILC draft articles on State Responsibility States are to cooperate to bring to an end by lawful means any serious breach of peremptory norms. As a peremptory norm, the obligation to prevent genocide has also erga omnes character. According to Art. 48 of the ILC draft articles, in the event of a breach of an obligation owed to the international community as a whole any State may require the State responsible to cease performing the internationally wrongful act, as well as to perform the obligation of reparation in the interest of the injured State. As the ICJ stated, "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[95]

The obligation to prevent cannot be made dependent on the certainty, or even merely the likelihood, that the efforts in question will succeed, as the ICJ clearly stated in the Genocide case: "The obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court's reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place."[96]

Many questions remain open in this context, in particular as regards the form in which the obligation to cooperate is to be implemented and whether the obligations arising from the committing of the worst crime ("the crime of

93 ICJ, Bosnia v. Serbia, 2007, para. 430. "A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the state manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide." Ibid.

94 See the ILC draft articles on State Responsibility adopted unanimously by UNGA Res. 56/83 of 12 December 2001.

95 ICJ, Bosnia v. Serbia, 2007, para. 431.

96 Ibid., para. 463. As William Schabas has written, "[t]his obligation has never been stated so clearly." See W. Schabas, Genocide, in MPEPIL online edition, para. 39.

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crimes") also arise from the other crimes generating R2P.[97] On the whole, however, it can be said that both the ICJ and the ILC have pointed to a series of elements demonstrating that at least individual elements of R2P are now firmly anchored in positive international law and that other elements are in process of entrenching themselves in the international legal order.

Nonetheless it has to be remarked that the process of R2P's juridification has, so far, reached only half-way. Its definition as half a legal, half a political concept is unsatisfactory and does not really do justice to the substance of R2P. As with many other concepts in international law the legal nature of R2P cannot be simply deduced from Art. 38 of the ICJ Statute regulating the sources of international law. In fact, this could give rise to the danger that consent, the true basis for the normativity of international law, will find too little consideration.[98]

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97 See in this regard L. Glanville, The Responsibility to Protect beyond Borders, 2012. With regard to the ICJ judgment in Bosnia vs. Serbia see also A.J. Bellamy, The Responsibility to Protect – Five Years On, in: 24 Ethics & International Affairs 2/2010, pp. 143–169.

98 In this regard, Bruno Simma has aptly remarked: "Zwar haben sich…bestimmte formalisierte Verfahren der Rechtsschöpfung herausgebildet. Sie sind in Art. 38 IGH-Statut aufgezählt. Diese Verfahren hindern aber die Staaten als Herren des positiven Völkerrechts nicht, dieses einvernehmlich in formloser Weise weiterzuentwickeln, da es ihnen obliegt, die Normen des positiven Völkerrechts in einem ihrem Ermessen überlassenen Verfahren weiterzubilden und den jeweiligen Bedürfnissen anzupassen. Die Erzeugung des Völkerrechts ist also nicht in bestimmten formalisierten Gestalten erstarrt, sondern befindet sich gewissermaßen noch in einem flüssigen Aggregatzustand. Die Staaten bedienen sich neben der formalisierten Rechtsetzung in den Bahnen des Art. 38 also auch einer formlosen Rechtserzeugung, indem sie in einem ständigen Ringen, durch Anerkennung, Duldung und Bestreitung von Ansprüchen und Situationen, sowie durch formlose Abmachungen, also in einem 'process of continuous interaction, of continuous demand and response' (McDougal, Hydrogen Bomb Tests, AJIL 49, 1955, 336) das geltende Völkerrecht nicht nur feststellen, sondern auch weiterbilden." B. Simma, Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung, in: R. Bernhardt et al. (eds.), Fünftes deutsch-polnisches Juristen-Kolloquium, vol. 2: Die Bedeutung der Resolutionen der Generalversammlung der Vereinten Nationen, Nomos: Baden-Baden 1981, pp. 45–76.

For critical remarks as to the traditional discussion on the sources of international law see also J. Crawford, Brownlie's Principles of Public International Law, OUP: Oxford 2012, p. 21: "Neither an unratified treaty nor a report of the International Law Commission (ILC) to the General Assembly has any binding force as a matter of treaty law or otherwise. However, such documents stand as candidates for public reaction, approving or not as the case may be. They may approach a threshold of consensus and confront states which whish to oppose their being given normative force in a significant way."

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The overwhelming approval shown for R2P evidences that this concept fills a gap in the international legal order, and that its effects correspond to the expectations of the community of states. R2P can therefore be considered an authoritative and effective norm of international law.[99]

5.2 *Is R2P Really a New Norm?*

In the first few years after R2P had come into being the attempt was made to deny any relationship with concepts of the past, in particular with the idea of humanitarian intervention, tarnished as this idea was by actual or alleged abuses. Only a modern, future-oriented argument could be crowned with political success. It was this question of "norm entrepreneuship." This idea had to be sold to politics, and for that it had to be newly dressed up.

As is known, in international law, perhaps more than in other branch of the law, for a situation to be consensually regulated it can be decisive to find the appropriate conceptual frame and terminology. As has been pointedly remarked by Martti Koskenniemi, "[w]hen vocabularies change, things that previously could not be said, are now spoken by everyone."[100]

In the case of R2P the vocabulary was ably chosen so that broad political acceptance came about very rapidly. Once generally accepted, R2P was, however, only more in need of definition.

Friedrich Nietzsche was of the opinion that concepts mirroring a whole semiotic process would be unsuited for definition; according to him only those concepts that had no history were definable.[101] Unfortunately, in law, and even more so in international law, such an approach is most often useless. In the field of law, the approach adopted by Ralf Dreier seems much more appropriate. He stated that law theory uninformed by history is bad legal theory.[102]

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99 By recourse to the New Haven approach (Yale school) the legal nature of R2P can therefore be clearly affirmed. The approach developed by Brunée/Toope (referring to Lon Fuller) who argued for the normativity of R2P by stating that "legal norms arise when shared normative understandings evolve to meet the criteria of legality, and become embedded in a practice of legality" is closely related to it. See J. Brunée/S.J. Toope, The Responsibility to Protect and the Use of Force: Building Legality? in: 2GR2P 2010, pp. 191–212 (203).

100 M. Koskenniemi, Miserable Comforters: International Relations as New Natural Law, in: 15 EJIL 3/2009, pp. 395–422 (395). See also P. Hilpold, Intervening in the Name of Humanity: R2P and the Power of Ideas, in: 17 JCSL 2012, pp. 49–79.

101 F. Nietzsche, Zur Geneaologie der Moral, p. 62: "alle Begriffe, in denen sich ein ganzer Prozeß semiotisch zusammenfaßt, entziehen sich der Definition; definirbar ist nur Das, was keine Geschichte hat."

102 See R. Dreier, Rechtstheorie und Rechtsgeschichte, in: Rechtsdogmatik und praktische Vernunft, Symposium zum 80 Geburtstag von Franz Wiecker, Göttingen 1990, pp. 17–34.

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In order fully to grasp the manifold opportunities the new concept of R2P offers, a broader perspective has to be chosen that also considers the most important ancestor of R2P, humanitarian intervention, of course taking also into account the profoundly changed international legal order.[103]

6 What Can Be Learnt from a Comparison between R2P and Humanitarian Intervention?

This is a challenging, yet still little explored field. In the course of the last few years interest in the changing legal justifications for humanitarian intervention has been steadily growing. If this discussion is connected with the one on R2P additional insights for both concepts can be gained. In fact, if the pertinent literature on humanitarian intervention, dating in part as far back the 19th century, is studied, structures of reasoning surface that appear to be surprisingly modern, both for the advocates of intervention and for its detractors.

A reading of the classics reveals how little the present-day thinking about humanity differs from that of the past, the ways in which transnational aid and intervention measures were mobilized in the 19th century resemble so closely those of modern times even if the available technology was radically different (i.e. much less evolved), but also how timeless the warnings of the opponents of intervention are. These warnings may in part have been fuelled by cynicism and hypocrisy, attitudes which often also characterize present-day discussions on intervention, but in part they are the result of far-sighted and sober analysis of the limits of available intervention capacity and of the risk of a failure. On the whole, these considerations lead to a result that is much the same as it has been in the past: military intervention and the recourse to force can only be a last resort and the relevant decision must be taken with the utmost caution.

103 On the whole it is probably the case that addressing R2P from the perspective of Legal Realism will more likely have as a result that legal normativity of this concept is affirmed than it is the case if we adopt an approach based on Legal Formalism as it traditionally finds application in Europe. As to this distinction see S. Ratner, Legal Realism School, in Max Planck Encyclopedia of Public International Law online edition, 2007. See, however, E. Strauss, A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect, in: 1 Global Responsibility to Protect 2009, pp. 291–323, who argues on the basis of the traditional system of international law sources and who comes to the result that the concept of R2P can contribute to the further development of international customary law by influencing the respective *opinio iuris*.

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R2P is now a firmly established concept, and therefore it should be fairly unproblematic to look back, even if a strong relationship with humanitarian intervention thereby becomes evident. Now time has come to work more closely on the definition of R2P, and defining identity also means looking for ancestry. While the overall legal system has been subject to profound changes it is interesting to note that there are so many structural parallels between these two concepts that lead to comparable assessments. An ampler historical perspective will reveal how timeless the considerations about the pro and cons for intervention are. The pillar construction of R2P has been praised as an important new trait in the discussion about intervention; in reality, however, it can be traced far back to the past, even if by then it appeared only to be an unspecified element of the respective actors' mindset, in a time when military measures stood at the forefront and were primarily talked about.

7 The Extent of R2P

As shown, at the World Summit of 2005 the State Community opted for a restricted concept of R2P and the pillar structure of the ICISS Report was not immediately taken up. If we look at the two sides of R2P, the first, regarding the responsibility of the home state, is often ignored. In fact, states are already obliged by various human rights norms to protect their people within their own territorial jurisdiction.[104] Therefore, again the responsibility of the Community of States (where home states are not able or not willing to assume their primary responsibility) moves to the centre of attention and the danger arises that R2P is equated lock, stock and barrel with the traditional concept of humanitarian intervention. It is therefore tempting for opponents of R2P to cry foul and to maintain that R2P is no more than an attempt to re-label an old concept fallen into disfavour with the State Community. This danger should not be taken too: as stated above, there can be no doubt that ideas, concepts and slogans wield enormous power in international law, a branch of law which is intimately tied in with politics. On the other hand, it will rarely suffice merely to re-dress a concept in order to be able to change its standing in international law. As a consequence, it is very important really to make a difference, not only in form, but also in substance. Otherwise R2P will suffer the same destiny as

104 As is known there are not only treaty-based human rights obligations that states have to obey but also Charter-based obligations. With the introduction of the Universal Periodic Review in 2007 all UN member states have to report on their human rights situation at regular intervals.

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humanitarian intervention, and this would not only be most unfair to the concept of R2P but also betray the efforts of so many idealists who have fought so hard for the extraordinary success this new approach can so far report.

The time has therefore come for a comprehensive, thorough-going discussion about R2P. In this context both the restrictive definition adopted for this concept in the past and the many objections that have been raised against R2P shall be subject to closer scrutiny. We will examine whether the concept of R2P could be extended so as, for example, also to include the responsibility for aid in the event of natural disasters.[105]

As meanwhile R2P receives broad consideration and has clearly affirmed itself on the international scene, this seems like a good point at which to proceed to a deeper analysis. For the time being we are probably only at the beginning of an investigation into the manifold ramifications of this concept. The potential R2P offers is currently laid bare only to a very limited extent.[106]

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106 In this context one could refer to the subject "R2P and women/gender" (see the contribution by Martina Caroni in this volume as well as the articles published in GR2P, vol. 4, no. 2/2012) or to "R2P and the protection of minorities" (see in this respect the contribution by Ferdinand de Varennes in this volume).

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