On the Responsibility to Protect
an assault on international order?

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There is no greater barrier to clear political thinking than failure to distinguish between ideals, which are utopia, and institutions which are reality. (...) The ideal, once it is embodied in an institution, ceases to be an ideal and becomes the expression of a selfish interest, which must be destroyed in the name of a new ideal. This constant interaction of irreconcilable forces is the stuff of politics. Every political situation contains mutually incompatible elements of utopia and reality, of morality and power.

Edward Carr, *The Twenty Years Crisis*

*Cover illustration: M. K. Boersema*
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### INTRODUCTION

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### CHAPTER 1: THE RESPONSIBILITY TO PROTECT AND THE ENGLISH SCHOOL

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<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>BRIC</td>
<td>Brazil, Russia, India and China</td>
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<td>EU</td>
<td>European Union</td>
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<td>GA</td>
<td>General Assembly</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IDP</td>
<td>internally displaced person</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>JWT</td>
<td>just-war theory</td>
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<td>NAM</td>
<td>Non-Aligned Movement</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NGO</td>
<td>non-governmental organization</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<tr>
<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<td>P5</td>
<td>Permanent members of the Security Council</td>
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<td>R2P/RtoP</td>
<td>Responsibility to Protect</td>
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<td>SC</td>
<td>Security Council</td>
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<td>SG</td>
<td>Secretary General of the United Nations</td>
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<td>UN</td>
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Introduction

Pursuing the ideal of preventing crimes against humanity turns out to be the opening of Pandora’s Box. In reality the dozens of diverging opinions on this matter have created a lack of consensus that cause inaction with horrible results. We only need to look at the situation in Rwanda and Šrebrenica during the nineteen nineties to see that the international community easily condemns atrocities but refuses to start swift and coherent action. The history of Biafra, Cambodia and southern Sudan show that this is a recurrent pattern, making clear that the international community is not willing or prepared to prevent crimes against humanity.

State leaders are not always to blame for inaction to prevent crimes against humanity, because national and international law often obstructs intervention. The legal obstruction to intervention is mainly derived from the notion of state sovereignty, which means that every state has the right to determine its internal affairs. For instance the United Nations (UN) Charter limits the use of force to Security Council authorization or self-defence (UN Charter Art. 2(4), 25, and 52).

These restrictions on intervention and the hesitation to intervene have created a deadlock in which governments can commit atrocities and get away with it. The positive side of this deadlock however, is that it restricts the possibilities for random intervention and aggressive foreign policy. The prevention of atrocities is therefore a balancing act between order and justice. In the last decades a number of approaches have been proposed to prevent atrocities in a way in which the balance between justice and order would not be changed to drastically. Most of these programs concentrated on the responsibility of neighbouring countries (e.g. Vietnam and Tanzania) or the international community, to take measures to prevent atrocities. The reason why these programs were generally not effective is because they lacked support and a roadmap for implementation, which made it easy to obstruct them. All in all it did not seem very likely that an international norm would appear that could deal with the balance of order and justice.

In 2001 however, a new and promising approach came to light with the publication of the report *The Responsibility to Protect*, written by the International Commission on Intervention
and State Sovereignty (ICISS). The central idea behind the ‘Responsibility to Protect’ (R2P)\(^1\) is to solve the stalemate of intervention to prevent crimes against humanity, by presenting a new definition of state sovereignty. To state it briefly, the R2P principle\(^2\) links the traditional concept of sovereignty to the protection of civilians. If a government fails to protect its citizens it thereby loses its sovereign rights, giving other states the possibility to intervene and protect these citizens. The strength of the R2P principle is the combination of the responsibility of each state to protect its own citizens, and the responsibility to monitor whether other governments fail in their internal obligations. By commenting the policy of other countries, backed up by the possibility to intervene, the R2P can prevent the outburst of serious atrocities.

The R2P principle sounds promising, but the question remains how it is going to work out in reality. We described above that if the R2P is to become effective it needs to be in line with three aspects. Firstly, the international society has to accept the R2P and put it into practice. Secondly, the R2P principle should not be obstructed by international law. And finally, the R2P principle should not disrupt the existing international order. In this thesis we try to find out to what extent the R2P principle is able to come up with the right balance between these elements. The central question that we are therefore going to answer is: *To what extent can the existing international order be influenced by the way the Responsibility to Protect principle tries to achieve a more just international society?*

Before we can say anything about ‘order’ and ‘justice’, we need to explain what we mean by these terms. In defining order we follow Hedley Bull who says that to display order is: ‘*To say that they are related to one another according to some pattern, that their relationship (…) contains some discernable principles*’\(^3\) (Bull, 2002, 3). In the definition of justice we follow Bull as well who defines justice as: ‘*The moral rules conferring rights and duties upon*

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\(^1\) The phrase ‘Responsibility to Protect’ or the abbreviation ‘R2P’ revert to the same. In some literature instead of ‘R2P’ the abbreviation ‘RtoP’ is used. But we decided to use the abbreviation ‘R2P’ because we take a fancy for it.

\(^2\) It is possible to refer to R2P as e.g. an approach, a principle, a concept or a norm. For instance Alex Bellamy treats the ‘R2P as a ‘concept’ in the period between its articulation by the ICISS and adoption at the 2005 World Summit and as a ‘principle’ thereafter’ (Bellamy, 2009, 7). In this thesis we are referring most of the time to R2P as a principle, but do not divide it from R2P as a ‘concept’ in the way Bellamy does. This is because we do not think that the 2005 World Summit is the major watershed moment in the evolution of the R2P.

\(^3\) By defining ‘order’ and ‘justice’ in these terms, we do not try to pretend that we have conducted a value-free enterprise, but from our point of view the definitions that we use describe the terms in a way that they can be used either by proponents and opponents. We think that it is fair to follow Bull’s definition of order, because it is widely accepted as a good starting point for a discussion of order in international relations (see for instance Paul and Hall’s *International Order and the Future of World Politics*, 1999, 2-4). The same can be argued for Bull’s definition of Justice. Bull’s definition of justice is quite similar to other definitions, for instance John Rawls sees justice as: “*the rights, duties, benefits, and burdens of fair social cooperation*” (Gensler, 2008, 149-152).
Before we can answer our main question we firstly need to know how the existing international order is constructed. Secondly we need to analyse to which moral rules the R2P principle is referring, and finally we need to know how justice and order are related to each other. To answer the first question we summarize the discussion that resulted in the notion of R2P, and give an analysis of different perspectives on the international society and international law. The second question is going to be answered by analysing the R2P principle. And to answer the final question we use the theoretical framework of the English School. The English School is very useful because it consists of two approaches to explain the relation between order and justice in the international society. These approaches are pluralism, which emphasizes the importance of order within international society, and solidarism which emphasizes the importance of justice. The English School is both an explanatory model in the way that it explains the relation between order and justice, as it is a normative model, because it describes towards what moral rules we should strive.

To answer our main question we are going to compare the R2P principle with the moral rules that English School supports, and describe how this emphasis on justice can, according to the English School, influence the relation within the international society. To compare these elements consistently we translate the different perspectives into the six elements of the just-war theory. We thereby focus on the way that the R2P principle legitimizes intervention on humanitarian grounds. Not because R2P is equal to humanitarian intervention, but because the R2P influences the international order the strongest when it is used to authorize intervention to prevent or put a stop to atrocities.

There are four chapters that together construct an answer to the central question. The first chapter is a general introduction to the concept of R2P, its development and current debate. It also introduces international law and explains how the English School can shed light on the connection between order and justice in the international society. The second chapter is a

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4 Instead of ‘actors’, Bull uses for his definition of international justice the term ‘states and nations’ and for individual or human justice he uses the term ‘individual human beings’ (Bull, 2002, 78-9).

5 In this analysis we try to avoid the term ‘humanitarian intervention’ because the relation between R2P and the classical juridical notion of ‘humanitarian intervention’ is unclear. For instance Gareth Evans states that ‘Since the 2005 World Summit, the language of ‘humanitarian intervention’, and the debate about it, is for all practical purposes dead in international diplomatic discourse’ (2010, 321). Others, however, see R2P as a new interpretation of ‘humanitarian intervention’. For instance Thakur and Weiss state that ‘R2P is a more sophisticated, and politically a far more broadly acceptable reformulation of the more familiar ‘humanitarian intervention’ (2009, 22). We do not agree with such a definition because the R2P principle entails more than humanitarian intervention does. To avoid understanding ‘humanitarian intervention’ in its classical legal meaning, we shall use the term ‘intervention on humanitarian grounds’. 
thorough investigation of the R2P concept and the way in which it can be effective in the international society. In the third chapter the relation between order and justice is analysed, both from a solidarist and a pluralist English School perspective. In the final chapter the R2P principle is analysed and compared with the English School vision. The conclusions that are derived from this comparison are compared with recent literature in which the R2P principle is discussed.

The purpose of this research is to show the pros and cons of the R2P principle by analysing the way the R2P principle influences order and justice in the international society. This research is of significant importance because these questions have not been adequately answered in the past. The principle of R2P tries to change the relations between states to give way to intervention on humanitarian grounds. This position can have a positive impact on the international society but can also change the international society into an unstable and dangerous environment. Determining the influence that the R2P principle has on the relation between order and justice shall therefore indicate whether the R2P is the way forward.
Chapter 1: The Responsibility to Protect and the English School

Introduction
The International Commission on Intervention and State Sovereignty (ICISS), chaired by Gareth Evans and Mohamed Sahnoun, published in December 2001 the report *The Responsibility to Protect* (ICISS, 2001). The concept of Responsibility to Protect (R2P) is a new approach to achieve order and justice in international society, that tries to establish a fundamental change in the position of the state in the international society. To explain these notions: by de term ‘state’ we mean the sovereign state, that has a permanent population, a defined territory and a government that effectively controls its territory and is able to enter into relations with other sovereign states (Shaw, 2003, 178). The cooperation between these states can be compared with the relations within a society, and we call it therefore an ‘international society’. The ‘international society’ is a central concept in the thought of the so-called English School.⁶

If the principle of R2P is accepted as a new definition of state sovereignty, it will change the relations within this international society. In the general introduction it was noted that the project of R2P is a balancing act between order and justice, and it is not clear how the R2P principle is going to change the relation between order and justice. In this chapter we are going to outline the principle of R2P and the way the English School deals with the relation between order and justice. The central question of this chapter is therefore: *What does the R2P principle entail and to which extent can the English School be used to shed light on the relation between order and justice in the international society?* To understand the implications of this report we deem it necessary to establish a clear picture of the history that led to this report.

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⁶ The English School states that ‘international society’ means that ‘[s]tates can form a society by agreeing amongst themselves to establish common rules and institutions for the conduct of their relations and by recognizing their common interest in maintaining these arrangements’ (Buzan, 2010).
§1.1 The history of the R2P principle

1.1.1 The concept of state sovereignty
In the history of the modern world, the state has always been an important actor but not the only powerful actor. Starting with Constantine in the fifth century A.D., the Church has also been a major power. In the medieval thought the sovereignty of a government was not seen as equal to absolute power because only God was sovereign in this respect. The Church situated itself as ‘the representative of God on earth’, with power that was not limited to supranational issues but consisted of the power of the Church to interpret the will of God and decide between wrong and right. At its heyday from the 9th to the 16th century the (Catholic) Church competed with states for power and assets. The great decay in the influence of the Church came when Martin Luther and John Calvin, with the help of the printing press, spread their ideas about religion. This reformation of the Church resulted in the German civil wars that, together with the separation of the Anglican Church from the Catholic Church by King Henry VII, diminished the incredible power of the Bishop of Rome. The result is clearly visible in the outcome documents of the peace of Augsburg of 1555, and Westphalia of 1648. These documents are the foundation of the modern concept of state sovereignty: every state is allowed to determine its own religion (cuius regio, eius religio), and each state is free to determine its internal policy without the risk of foreign intermingling. This so-called ‘Westphalian order’ did not appear because the rulers in the sixteenth and seventeenth century desired it to happen, but as Chris Brown points out: ‘[I]t took place because the factors that previously had sabotaged their ambitions were slowly removed’ (Brown, 2002, 23).

1.1.2 Problems with the notion of sovereignty
With such a concept of sovereignty at the foundation of international order, the tension between order and justice is obvious. Sovereign states have absolute power that can be used for evil purposes when they are either unwilling or unable to guarantee the freedoms and rights of their citizens. This leads to the question as formulated by Alex Bellamy: ‘Should sovereignty and the basic order it brings to world politics be privileged over the rights of individuals, or should it be overridden in certain cases, so as to permit intervention for the purpose of protecting those fundamental rights’ (Bellamy, 2009, 9).
It took a long time before this tension attained a central place in the debate. This change was caused by the horrific situation in Rwanda in 1994 and the ethnic cleansing in the Yugoslavian town of Šrebrenica in 1995. It became clear that to stop these atrocities the notion of sovereignty needed to change seriously. The logical starting point for this endeavour was the almost universally accepted human rights doctrine that emerged after the Second World War in the Universal Declaration of Human Rights. However, this declaration did not saw sovereignty as a responsibility and obligation to realise these Human Rights (p. 21).

One of the most important contributions to this discussion came from the Sudanese diplomat Francis Deng, by then the UN special representative for internally displaced persons (IDPs). Deng held a positive account of sovereignty and saw sovereignty as containing some responsibilities for governments. According to Deng, this meant that when states were unable to protect their IDPs they were obliged to ask for international assistance (p. 23). Deng however was not clear on how to make sure that states did not forfeited this ‘sovereign duty’. He argued that a higher authority above the state should keep the sovereigns accountable.7 Although Francis Deng encountered much resistance to his work8, he started a line of thought that the then Secretary General of the UN, Kofi Annan, continued and linked to a reform of the Security Council (SC). This reform received a lot of attention in March 1998 when Serbians started ethnic cleansing in Kosovo. The leaders of the UK and US, Tony Blair and Bill Clinton, asked for an international response but were obstructed in the SC by the Russians and the Chinese who opposed intervention. Such was the situation when Annan gave a speech to the Ditchley Foundation in which he showed the possibilities of a new norm of humanitarian intervention. The speech contained two moves; on the one hand Annan insisted that there are certain responsibilities inherent to sovereignty that are embedded in the Charter of the UN. On the other hand he noted that states alone are not prepared to judge the situation in other states, which means that a decision to intervene needs to be taken collectively. According to Annan, the only way that this can be done is through the SC. The viewpoint of Annan sounded promising but the rapidly evolving events in the Balkan showed that Annan’s solution was less applicable in reality.

7 It can be argued that this higher authority can be found in the UN Security Council (SC), although the SC does not completely fit the image of Deng because the SC does not have the full power to held countries accountable for their actions.

8 For instance the Peoples Republic of China (PRC) stated in 1993 that Deng’s concept of sovereignty was used to legitimize interference in the postcolonial world. The Chinese representative spoke:

The urgent issue is to remove as soon as possible the imposition of their own human rights concepts, values and ideology by a few countries who style themselves as ‘human rights judges’: and the interference in internal affairs of other countries by using human rights as a means of applying political pressure (UN report, cited in Bellamy, 2009, 27).
When the Kosovo war continued, a lot of (especially European) countries felt the need to intervene in Kosovo. Because the SC was still blocked by China and Russia they needed to look elsewhere for support, and eventually found the NATO willing to intervene. Surprisingly, this intervention was neither condemned by the SC nor by Annan. Instead, Annan used the situation to develop three benchmarks for intervention: 1.) A principle of intervention should be ‘fairly and consistently applied’. 2.) Intervention should embrace a ‘more broadly defined more widely conceived definition of national interest’’ (Annan cited in Bellamy, 2009, 32). This meant that decisions should be taken on the basis of common good and not on the basis of national interest. 3.) The SC should accept its responsibility to respond to humanitarian action. Otherwise it would not be a surprise that ‘if the collective conscience of humanity (…) cannot find in the United Nations its greatest tribune, there is a grave danger it will look elsewhere for peace and justice’ (Annan, 1999).

1.1.3 Sovereignty as a responsibility
Kofi Annan saw the concept of sovereignty as crucial in the process of peace and justice. To flesh out his ideas on sovereignty, he published in 1999 an article in The Economist. In this article he stated that there are two concepts of sovereignty. He labelled the first ‘traditional sovereignty’, which he saw as the concept that states have a right to determine their own form of government, backed-up by a strong rule of non-intervention. The second concept was ‘sovereignty as responsibility’, in which a failure to fulfil these responsibilities could legitimise an intervention by a foreign power (Annan, 1999, 15).

The traditional notion of sovereignty is based on the idea that states have a fundamental right to determine their own culture and system of governance. After the Second World War this idea is anchored in the basic human rights of individuals and the non-intervention rule. Especially in the postcolonial era of the 1960’s and onwards, the idea of non-intervention was directly linked to freedom, and intervention to neo-colonialism. The central idea was that ‘a relaxed attitude to intervention would create disorder, as states would wage war to protect and export their own cultural and political preferences’ (Bellamy 2009, 17). Annan however saw sovereignty as a responsibility, he wrote: ‘States are now widely understood to be instruments at the service of their peoples, and not vice-versa’ (Annan, 1999, 1). The position of Annan was made clear during his Ditchley speech of 1998 we previously talked about, in which he stated: ‘In reality, this ‘old orthodoxy’ [traditional sovereignty] was never absolute. (…) The Charter protects the sovereignty of peoples. It was never meant as a
license for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power’ (Annan, cited in: Bellamy, 2009, 28). Although this sounds radical and new, it is a vision that has already been written down in the *Placcaert van Verlatinge* of 1581. In this document the Dutch provinces explained that they had the right to declare themselves independent from King of Spain after he had multiple times violated their rights as civilians.⁹ (Mout, 1979, 94-125) This idea can also be found by Thomas Jefferson, who wrote in 1776 that men have certain inalienable rights. Jefferson stated that if these rights are violated by a government these people have the right to throw off such government (Bellamy, 2009, 20).

§1.2 The creation of the R2P principle

1.2.1 The formation of the ICISS

Inspired by the discussion that Annan incited, a number of Canadian officials began in the year 2000 to advocate an ‘International Commission on Humanitarian Intervention’ (Bellamy, 2009, 35). The Canadian Minister for Foreign Affairs, Lloyd Axworthy, recognized that such a commission could only be effective if it was broadly based. Therefore he asked Annan to accept the final report of the commission. Annan suggested that he was willing to accept the outcome document, but only if the commission was placed outside the UN. Axworthy agreed and found the Canadian government willing to sponsor the commission. After some concerns that the term ‘humanitarian intervention’ would internationally not be conceived the same, the name of the commission was changed into the International Commission on Intervention and State Sovereignty (ICISS) (Weiss and Hubert, 2001, 341-344).

The ICISS was chaired by Gareth Evans and Mohamed Sahnoun and consisted of ten other commissioners from all over the world. The entire commission met five times, and

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⁹ After summing up the atrocities that the King of Spain had conducted in the Dutch provinces, the original text states:

*Alle t’welck ons meer dan ghenoegh wettighe oorsake ghegeven heeft om den Coninck van Spaegnien te verlaten ende een ander machtigh ende goederterien Prince, om de voorsz. landen te helpen beschermen en voor te staen, te versoecchen, te meer dat in alsuiccken desordre ende overlast de landen bat dan twintigh jaren van heuren Coning zijn verlaten geweest ende ghetrackteert niet als ondersaten, maer als vyanden, heur soecckende heur eyghen heer met cracht van wapenen t’onder te brengen* (Mout, 1979, 121).

Translated in English (JvD):

*All in all it gave us more than enough legitimate reasons to leave the King of Spain and ask another powerful and benevolent ruler to help protect and defend our countries. Especially since our countries for more than twenty years suffer from hardship while being abandoned by our King. We were not treated as subjects, but as enemies, because our own master tried to keep us down by using force.*
organized eleven regional roundtables. These regional roundtables were attended by commissioners and participants from the governments and the non-governmental sector. (Bellamy, 2009, 38). During the first ICISS roundtable at Ottawa, the co-chairs of the ICISS pointed out that they wanted to solve the impasse of humanitarian intervention by a change of concept, just as the Brundtland Commission has done so effectively before. Between the first roundtable and the second that was going to be held in Geneva, co-chair Gareth Evans published a discussion paper in which he came up with the idea of reframing the debate in terms of a ‘Responsibility to Protect’ (R2P) (Evans, 2009, 20). This discussion paper was received with enthusiasm, and it was recognized that the new phrase has four advantages, namely: 1.) It can shift the focus from military intervention to a wider range of activities. 2.) The resistance to humanitarian intervention that is grounded in sensitivities of colonialism and self-determination can be tackled. 3). It gives way to new legal rules to govern intervention. 4). Such a new approach can give more attention to the responsibilities of different actors (Weiss and Hubert, 2001, 355).

During the roundtables the discussion centralised around four subjects, namely the R2P: terminology, criteria, institutions/authority and modalities. To elaborate on it, there was a discussion on the change of terminology in the debate about humanitarian assistance. At most of the roundtables the R2P terminology was warmly received because it shifted the discussion of humanitarian intervention from a military dimension towards a more holistic approach, which also contained a commitment to prevention and rebuilding. But there were also doubts about the value of this change of terminology. Some even argued that the ICISS report should make clear that it supported the rule of non-intervention (p. 360). Secondly there was a lack of consensus on criteria to guide the process of intervention. At the roundtables of Geneva, Cairo and New Delhi, there was a strong consensus on the crucial importance of strong criteria, but at other roundtables the opinions where more diffuse or even outright sceptic. China for instance preferred a case-by-case approach, whereas French officials made clear that criteria would not make so much difference because the interpretation would be different in every country (p. 381). Furthermore there was a discussion about institutions and authorities. The outcome of this discussion was a wide acceptance that the Security Council was the appropriate authority to authorise intervention, although not all the participants at the roundtables saw the Security Council as the solemn

10 During the late 1980s the Brundtland Commission developed the phrase ‘sustainable development’ as an approach to deal with the apparently irreconcilable issues of environmental protection and economic development. In a comparable way the ICISS tried to bridge the gap between humanitarian intervention and state sovereignty.
authority that could authorise intervention. It was recognized by a lot of participants that intervention could be legitimized in other circumstances, for instance when regional organizations where involved, or host states gave their consent (Bellamy, 2009, 48). Finally a discussion about the modalities of R2P emerged, consisting of a broad agreement that prevention and rebuilding should be a part of the R2P principle next to intervention. Even though this kind of consensus existed, the outcome of the debate lacked special recommendations on how this prevention and rebuilding should be given its actual form (Weiss and Hubert, 2001, 363).

1.2.2 The report of the ICISS

The report of the ICISS was completed at the end of 2001.11 The central idea behind the R2P in the report is the primary responsibility of states ‘to protect their citizens from genocide, mass killing and ethnic cleansing and that whenever they proved either unwilling or unable to fulfil their duties, the Responsibility to Protect was transferred to international society’ (Bellamy, 2009, 52). The report divided the R2P into three responsibilities, namely the responsibility to prevent, the responsibility to react and the responsibility to rebuild. The ICISS described the responsibility to prevent as the most important dimension of the R2P (ICISS, 2001, xi), because the goal of saving lives can best be achieved through prevention rather than restoring peace (Bellamy, 2009, 52). This prevention had - according to the ICISS- four dimensions, namely, a political one, an economic one, a legal one and a military one (ICISS, 2001, 66). Next to these dimensions, the ICISS identified two possible problems for prevention. The first behold that if countries gave their consent to the international community to take measures to prevent conflict, they internationalised the conflict. With this internationalisation of their problems, countries could be worried that they started on a slippery slope towards intervention. Secondly by giving space to a third party to arrange prevention, that party could give rebels a legitimate status as a negotiating partner.

Although the ICISS said that prevention was the primary goal for the R2P, the commission did not came up with any serious proposal to centralise the worldwide conflict prevention efforts and capacity for early warning. Moreover the commission failed to formulate a consensus on which early warning signs have to result in a particular action

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11 ‘The report was completed in august 2001, and after 9/11 the report was only slightly changed, leaving the rationale intact’. Kofi Annan endorsed the report a few weeks later and called it ‘the most comprehensive and carefully thought-out response we have seen to date’ (Annan, 2002; Bellamy 2009, 51).
This primacy given to prevention has received some harsh critique, for instance by Thomas Weiss who stated:

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\text{[M]ost of the mumbling and stammering about prevention is a superficially attractive but highly unrealistic way to try and pretend that we can finesse the hard issues of what essentially amounts to humanitarian intervention. The ICISS’s discourse about prevention is a helpful clarification, but it nonetheless obscures the essence of the most urgent part of the spectrum of responsibility to protect those caught in the crosshairs of war (Weiss, 2007, 52).}
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The commission is criticized for being confusing about the way prevention can be satisfactory carried out. Overall, as Alex Bellamy puts is: ‘There is a fast gulf between the commission’s sophisticated and nuanced treatment of intervention and its brief, confused and unoriginal take on prevention and rebuilding’ (Bellamy, 2009, 52-53). This apparent schism can be solved in two ways; on the one hand it is possible to see R2P as primarily concerned with military intervention. The alternative would be to further develop and clarify the responsibilities to prevent and rebuild (p. 53). Not only the responsibility to prevent is criticized, the same critique is uttered for the responsibility to rebuild. The ICISS concluded in its report that the interveners should make a plan how they want to rebuild a society after a conflict. The interveners are obliged to protect the citizens and start a process of justice and reconciliation and they have an obligation to start a program to encourage economic growth (ICISS, 2001, 39-42).

Describing the responsibility to react, the commissioners struggled to develop a clear and viable course of action, thereby making clear that intervention should only take place in extreme situations. The problem of the competent authority for intervention proved to be difficult as well. Giving the fact that the Security Council was not unanimously seen as the competent actor for authorizing intervention, the ICISS developed a three-layered approach for the responsibility to react (Table 1.1). In this structure the government of the host state has the primary responsibility; secondary responsibility is given to the agencies of the host state who can work closely together with foreign agencies. When the primary and secondary levels of the system fail to prevent a humanitarian crisis, the responsibility is automatically transferred to the international society (p. 49). At this tertiary level the Security Council is the first to have legal authority for intervention. If the Security Council fails to give authorisation and it is clear that intervention is justified, the potential interveners can ask the General Assembly to support the intervention. If even this General Assembly support fails, the
intervention can be conducted by regional organisations or ‘coalitions of the willing’ (pp. 53-5). Surprisingly the ICISS report does not mention a time frame in which one of the layers (Table 1.1) should have undertaken action.

Table 1.1 *The ICISS three layered approach*

| Layer one (Primary responsibility) | Host state |
| Layer two (Secondary responsibility) | Domestic agencies that can work closely together with foreign agencies |
| Layer three (Tertiary responsibility) | International society |
|  | 3.1 First responsible: Security Council |
|  | 3.2 Second responsible: General Assembly |
|  | 3.3 Third responsible: Regional Organizations or ‘coalitions of the willing’ |

Source: based on (ICISS, 2001, 49, 53-5).

1.2.3 The World Summit interpretation of R2P

In 2005, a few years after the publication of the ICISS report, the world leaders came together at the UN in New York to discuss Kofi Annan’s reform package for the UN, of which a proposal to adopt R2P was an important part. In short, the discussion at the 2005 World Summit proved that most of the countries were not willing to adopt the R2P in the way as it was presented by the ICISS. In the Outcome Document the World Summit did mention the Responsibility to Protect, but in such a way that the host state was mainly responsible. The responsibility of the international community was stated as follows:

> 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. (...) 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 (World Summit Outcome, 2005, 138-139).

The summit declaration did mention the R2P principle, but in such a different form that it gave commentators reason to call it ‘ineffective’ or to see it as a mediocre form of R2P calling
it ‘R2P Lite’ (see for instance: Luck, 2009, 20). However not all reactions were outright negative, for instance Alex Bellamy saw the 2005 outcome not in the first place as a disappointment, but as a first step in the process of a well-functioning principle of R2P. He stated:

[T]he R2P which emerged from the World Summit amounted to an important formal recognition of the responsibility of sovereigns to their own citizens, a reaffirmation of the idea that the Security Council has the authority to intervene if it sees fit to do so. (...) True, this was much less than had been envisaged by the ICISS, but it marked an important milestone in the normative development [see § 1.4] of international society and it pointed towards a weighty policy agenda for international institutions, regional organisations and individual states (Bellamy, 2009, 91).

1.2.4 Ban Ki-moon and a new interpretation of R2P
In 2009 it became clear that the 2005 World Summit was indeed not the finishing point in the R2P discussion. Ban Ki-Moon12, the new Secretary General of the UN, came with the report *Implementing the responsibility to protect*. This report was presented as a follow-up to the 2005 World Summit. In the next chapter we are going to compare the Ban Ki-moon and ICISS interpretation of R2P more thoroughly, but to give a brief impression, we can state that Ban uses the R2P to strengthen the UN, and has a much more restricted idea on the responsibility of states to protect people outside their own borders.

We have seen that the ICISS report tried to bridge the gap between intervention and state sovereignty. This problem was initially solved by limiting the sovereigns ‘impunity’; sovereignty was redefined as the responsibility to protect people from abuses of human rights (Chandler, 2010, 162). The Ban Ki-moon report however substituted the three original responsibilities, the responsibility to prevent, react and rebuild, with three pillars. ‘Pillar one is ‘protection responsibilities of the State’; Pillar two is ‘international assistance and capacity-building’ for the State; Pillar three is ‘timely and decisive response’ by the international community’ (Chandler, 2010, 163).

By concentrating on the institutional shortcomings that lay at the foundation of mass atrocities, the capacity building becomes the central point of attention for the international

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12 Because the family name of Ban Ki-moon is ‘Ban’ we are going to talk about Ban R2P.
community in its obligation for R2P. This has been a major change, because ‘[t]here is no longer a question of challenging international law or of conditioning the rights of sovereignty to allow military intervention. It appears that it is military intervention itself which is problematised by R2P’ (Chandler, 2010, 162).

§1.3 The legal perspective

1.3.1 The scope of international law
We have seen the evolution of the R2P principle through the ICISS report; the 2005 World Summit Outcome; and most recently the 2009 Report of the UN Secretary General titled Implementing the responsibility to protect. Before we are able to analyse the relation between order and justice in the next chapters, we need a short introduction into two important frameworks. The first is international law, the second is the English School thought.

In this thesis we feel free to describe the current international law as a codification of the existing relation between order and justice in international society. To underpin this statement we look at the definitions of order and justice. As stated in the introduction we define order as: ‘the way that entities are related to one another according to some pattern, that their relationship contains some discernable principles’ (Bull, 2002, 3). And we define justice as: ‘The moral rules conferring rights and duties upon actors’ (p. 78). If we combine these two definitions to construct a definition of international law we arrive at: The moral rules conferring rights and duties upon actors that determine the way that entities are related to one another and the discernable principles that their relationship contains. This is very similar to the definition of T.J. Lawrence who early in the twentieth century defined International Law as ‘The rules which determine the conduct of the general body of civilised States in their dealings with each other’ (Lawrence, 1925, 1).

The main actors in international law are sovereign states. By which we understand sovereignty as the Westphalian concept of sovereignty, meaning the ‘legal identity of a state in international law’ (ICISS, 2001, 12). To become an accepted member of the international

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13 The report of Ban Ki-moon states: ‘Genocide and other crimes relating to the responsibility to protect do not just happen. They are, more often than not, the result of a deliberate and calculated political choice, and of the decisions and actions of political leaders who are all too ready to take advantage of existing social divisions and institutional failures’ (SG report, 2009, §21).
society the state needs to be a member of the United Nations (p. 13) and thereby accept that sovereigns are equal, and act in respect to the sovereign rights of other states (UN Charter Article 2.1 and 2.7).

International law does not only consist of positive law, but is also grounded in international norms. There are many sources of international law, and there is a vast amount of literature in which the sources of international law are determined. But to be brief we concentrate on the Security Council (SC) resolutions and on General Assembly (GA) resolutions. In general the Security Council resolutions are accepted as international binding, but the GA resolutions are much more disputed. In our analysis of R2P it is useful to describe to what extent the GA resolutions are part of the international law, because the GA has in the past accepted resolutions to recognize the responsibilities of states to protect the weak. According to the traditional positivist viewpoint, the resolutions of the GA are not legally binding. Nevertheless such resolutions, especially when they are widely supported, are an indication of existing customary law. Rosalyn Higgins contends that ‘Resolutions of the General Assembly (...) provide a rich source of evidence about the development of customary law’ (Bull, 2002, 143). The precise extent of the scope of these GA resolutions can be found in an article from 1972 in which Rosalyn Higgins discusses the position of Article 25 of the UN Charter. The full text of Article 25 is as follows:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 25 is situated in Chapter V: ‘The Security Council’, this Chapter is followed by Chapter VI which is entitled ‘Pacific settlement of Disputes’ and Chapter VII: ‘Action with respect to threats to the peace, breaches of the peace, and acts of aggression’ (Higgins, 1972, 270-1, 275). There are a lot of interpretations of Article 25, in which its content is only binding to Chapter VII. For instance the United Kingdom Government states that UN members can only be bound by the Security Council under Article 39 (pp. 273, 282). The questions then arises whether decisions can be taken under Chapter VI that are binding for UN members (p. 277).

Higgins tries to point out that it is much more defendable to argue that Article 25 is designed to be used in the whole UN Charter. But ‘it is less easy to see in the wording of Chapter VI any opportunities for ‘decision’ (p. 278). Higgins analyses different cases in the late forties and early fifties in which the applicability of Article 25 was rather ambiguous (pp.
The binding or non-binding nature of those resolutions turns not upon whether they are to be regarded as “Chapter VI” or “Chapter VII” resolutions (…) but upon whether the parties intended them to be “decisions” or “recommendations” (Higgins, 1972, 281-2).

The first point on which Higgins focuses is the position of the General Assembly. In the separation of Namibia from South-Africa, the General Assembly had in 1966 (GA resolution 2145) terminated the mandate of South Africa over Namibia. But has the GA the right to terminate such a mandate? According to the ICJ this is partly the case because the General Assembly can ‘pass resolutions which are legally operative’ but the Security Council needs to accept these resolutions to make them ‘legally effective’ (Higgins, 1972, 273).

1.3.2 International law and justice
We have seen that the SC resolutions are binding international law, and the GA resolutions are also of significant importance in the international law. We described international law as a codification of the current relation between order and justice. Such a definition makes plain that international law is not only about achieving a just international society. The question therefore arises what to do when certain laws are ethically wrong. This problem was addressed by Dame Rosalyn Higgins, the former President of the International Court of Justice, at the Cleveringa Lecture at Universiteit Leiden in 2009. She discussed the relation between ethics and international law, and stated that the major problem in this relation occurs when the judge is confronted with ‘unjust laws’. The judge, just as an ordinary citizen, cannot ‘pick and choose’ between the laws that he or she likes, because ‘the law is the law’ (Higgins, 2009, 277-8). According to Higgins, a solution to this problem can be found in the so-called ‘Radbruch formula’ or ‘intolerability formula’ which states:

[The] positive law (…) takes precedence even when its content is unjust and it fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute … is flawed law and must yield to justice (Higgins, 2009, 279).
This formula is not only highly debated in public law, but also in international law. Higgins states that ‘law is really to be seen not as rules but as opposing norms which must be chosen between (no use of force/self-defence). And that can only be done by articulating the values which can be promoted by the one choice over the other’ (p. 279). The Radbruch formula is attractive, but the problem with it is that everybody has a different idea about when this ‘intolerable degree’ has been reached (p. 280). The questions that arise from this issue need to be answered by brave judges and citizens and there is no global answer to every case. Higgins states: ‘our understanding of the differences between a law that is detested and a law that is intolerable may be assisted by a framework of reference. And that is to be found in existing laws that underpin the values of our society’ (p. 280).

In the international society these ‘existing laws that underpin the values of our society’ are related to peremptory norms of international law (jus cogens). Although it is not clear which norms are jus cogens there are certain norms, as for instance the prohibition of genocide, that are widely accepted as jus cogens. The norms that are used to legitimate intervention are also highly disputed. For instance John Moore states that humanitarian intervention may take place in case of an ‘immediate and extensive threat to fundamental human rights, particularly a widespread loss of human life’. On the other hand, Fernando Tesón states that ‘basic civil and political rights’ can legitimate humanitarian intervention (Moore and Tesón cited in Molier, 2003, 65-7). According to Higgins, this discussion is divided between states who like to constrain the use of force to situations in which the UN Charter Articles 2(4) and 51 come into play, whereas other states find ‘some situations so appalling that to watch and do nothing is the ultimate immoral act’ (Higgins, 2009, 284).

1.3.3 International law and the R2P
We like to find out how the R2P principle deals with international law and its peremptory norms. According to Higgins the R2P principle tries to open this discussion and places intervention into a wider context of international law and international norms (pp. 285-6). In the ICISS report the human rights regime is used to judge state conduct without directly opposing sovereign rights. The UN committed itself in ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language and religion’ (UN Charter Article 1.3). Together with the Universal Declaration of Human Rights of 1948 and the two Covenants of 1966 (on civil political and social economic and cultural rights), it laid the foundation for the modern notion of human rights (ICISS, 2001,
This development was backed up by NGOs when they began to use human rights to judge state conduct. Together with the establishing of the international legal norm and the International Criminal Court, the international society changed to a situation that the ICISS describes as ‘a parallel transition from a culture of sovereign impunity to a culture of national and international accountability’ (p. 14).

With this change, the question became evident how the international community should be held accountable. In the UN Charter this is described in article 2.4 and 2.7 in which the UN members declare that they ‘shall refrain from the threat or use of force against the territorial integrity or political independence of any state’ (2.4). The United Nations itself is not allowed to ‘intervene in matters which are essentially within the domestic jurisdiction of any state (…) but this principle shall not prejudice the application of enforcement measure under Chapter VII’ (2.7). This Chapter VII is about ‘threats to the peace, breaches of the peace and acts of aggression’. If we interpret article 2 in its most strict form it means that even ‘large scale loss of life’ and ‘large scale ethnic cleansing’ are part of the domestic jurisdiction of the state. Article 2 therefore rules out any form of foreign interference in domestic issues. However, such an interpretation can eventually disturb the international order in international relations, because as Kofi Annan said: ‘If the collective conscience of humanity (…) cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice’ (Annan, 1999). Therefore the ICISS interprets article 2 more broadly giving way to ask the question what the ‘domestic jurisdiction of any state’ entails.

We have seen that a strict interpretation of the applicable international law (most exemplary the UN Charter) excludes humanitarian intervention. The ICISS concludes that with the change to a culture of national and international accountability the UN Charter has to be interpreted differently. The ICISS comments: ‘Based on our reading of state practice, Security Council precedent and established norms, emerging guiding principles, and evolving customary international law, the Commission believes that the Charter’s strong bias against intervention is not to be regarded as absolute when decisive action is required on human protection grounds’ (ICISS, 2001, 16). The answer to the question ‘when such decisive action is required’ depends on our perspective of order and justice in international society. This balance between order and justice is discussed in the English School, which is now going to be discussed.
§1.4 The English School of International Relations

1.4.1 The English School
Every approach to regulate intervention on humanitarian grounds (including the R2P principle) touches the essence of moral philosophy because it ‘entails fundamental moral reasoning and challenges determinist theories of human behaviour and international relations theory’ (Weiss and Hubert, 2001, 129). Although there are a lot of different ideas about intervention on humanitarian grounds, at the core there is a broad consensus that genocide, ethnic cleansing and crimes against humanity could legitimate intervention (p. 130). The downside of this legitimation is the blurring of the relation between order and justice in the international society, because a legitimization of intervention purely on humanitarian grounds undermines the notion of state sovereignty (p. 131). To analyse the position and relation of order and justice the two strands of the English School can be very helpful. On the one hand they explain how justice and order are related to each other, and on the other hand they describe whether order or justice should be given priority within these interstate relations.

The English School is a way of thinking about International Relations which started in the aftermath of the Second World War. The central idea of the school is that the international society is in a state of anarchy because there is no authority above the sovereign state. (Linklater and Suganami, 2009, 86, 105). The English School states that the domestic analogy is not compatible with reality, because the absence of rule does not necessarily need to evolve in disorder and confusion (Bull, 1966, 35). Because this international society is still very orderly the English School calls it an anarchical society. This order is caused by the fact that warring states are afraid of reprisals; they feel that they are obliged to keep their promises and stay close to their ethical contemplations. To summarize: English School thought begins with a condition of anarchy but deems global improvement through cooperation realistic (Linklater and Suganami, 2009, 89).

We can detect two different branches of the English School, namely solidarism and pluralism. Solidarism and pluralism are two sides of a continuum; the differences that we therefore describe are a caricature. In the pluralist perspective the societal relations develop in a minimalist way. The common goal in such a society is restricted to the maintenance of the coexistence of the different political communities. The solidarist perspective on the other hand seeks a development of the societal relations in a more advanced way, in which the goal should be the ‘protection of human rights across separate communities’ (p. 8). After the Cold
War most of the English School thinkers are solidarist, but some thinkers stayed close to the pluralist ideal. For instance Robert Jackson, who wrote in 2000: ‘[T]he stability of international society, especially the unity of the great powers, is more important, indeed far more important, than minority rights and humanitarian protections’ (Jackson, 2000, 291). Because the main difference between solidarism and pluralism is situated in the way they deal with order in international relations, we are going to explain how these concepts of justice and order function at the different levels of the international society.

1.4.2 The concept of order
The most influential text of the English School, Hedley Bull’s *The Anarchical Society*, presents itself as a study of order in world politics. Bull states that order means that the relationship between actors contains a discernable principle, relating things to each other according to a pattern. Bull detects three different kinds of order, namely social order, international order and world order. The order that we are looking for in our social life is a pattern which is causing a particular result promoting certain goals or values (Bull, 2002, 3, 4). Bull writes:

> All societies seek to ensure that life will be in some measure secure against violence resulting in death or bodily harm. Second, all societies seek to ensure that promises, once made, will be kept, or that agreements, once taken, will be carried out. Third, all societies pursue the goal of ensuring that the possession of things will remain stable to some degree, and will not be subject to challenges that are constant and without limit. By *order in social life* I mean a *pattern of human activity that sustains elementary primary or universal goals of social life such as these* [italics mine] (Bull, 2002, 4, 5).

Next to this order in social life, Bull speaks of an international order. This international order is a pattern sustaining elementary or primary goals of the international society (p. 8). Such an international society exists when a number of states realise that they share common values and interests. By forming a society they feel bound by a common set of rules and the working of common institutions (p. 13). International order however is not what Bull deems to be the highest achievable order. Instead he recognizes world order as a final goal, which he characterizes as:
By world order I mean those patterns or dispositions of human activity that sustain the elementary or primary goals of social life among mankind as a whole. International order is order among states; but states are simply groupings of men, and men may be grouped in such a way that they do not form states at all (Bull, 2003, 19).

According to Bull this world order is morally prior to international order (p. 21) and is therefore the central point of attention for the English School. In *the Anarchical Society*, Bull sees that members of the international society are cooperating without a higher authority that is regulating the relationships. It looks like an ‘invisible hand’ is regulating the relationships. Given the fact that there is no supranational authority regulating the interstate relations Bull calls this society anarchical, but with a positive connotation. This anarchical society should be protected because it creates order in international relations and order is fundamental for the wellbeing of people.

1.4.3 The concept of justice
In the English School ‘justice’ and ‘order’ are closely related because order is an essential condition for a just and prospering international society. Bull himself makes clear that justice can only be realised in a context of order, but this framework of international order is in essence quite inhospitable to projects of world justice (Bull, 2002, 83). Bull recognizes three different forms of justice

Firstly, *International or interstate justice*: ‘[T]he moral rules held to confer rights and duties upon states and nation, for example the idea that all states, irrespective of their size or their racial composition or their ideological leaning, are equally entitled to the rights of sovereignty’ (p. 78). Secondly, *individual or human justice*: ‘[T]he moral rules conferring rights and duties upon individual human beings’ (Bull, 2002, 79). Finally, *cosmopolitan or world justice*: ‘[I]deas which seek to spell out what is right or good for the world as a whole,

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14 At the heart of the different interpretations of justice lay four differences.

1. Difference between justice as identical with virtuous or righteous conduct in general, and ‘particular’ justice, justice as one species of right conduct among others (Bull, 2002, 75).
2. Difference between ‘substantive’ justice; the recognition of rules conferring certain specified rights and duties, and on the other hand ‘formal’ justice; the like application of these rules to like persons, irrespective of what the substantive content of the rules may be (Bull, 2002, 76).
3. Distinction between ‘arithmetical justice’ in the sense of equal rights and duties, and ‘proportionate justice’, or rights and duties which may not be equal but which are distributed according to the end in view (Bull, 2002, 77).
4. Distinction between ‘commutative’ and ‘distributive justice, commutative justice lies in the recognition of rights and duties by a process of exchange or bargaining. Distributive justice by contrast, comes about by a decision of the society as a whole, in the light of the consideration of its common good or interest (Bull, 2002, 77).
for an imagined *civitas maxima* or cosmopolitan society to which all individuals belong and to which their interests should be subordinate’ (Bull, 2002, 81).

If we put these definitions of order and justice in a scheme we can see that the three levels of order and justice can be linked to each other (Table 1.2). This offers a framework for analysing the relationship between order and justice within the English School perspectives of pluralism and solidarism, that shall be conducted in chapter 3. But first we are going to investigate the different concepts of R2P and their ideas about international society more thoroughly in the second chapter.

Table 1.2 *Definitions of order and justice*

<table>
<thead>
<tr>
<th>Order</th>
<th>Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definition:</strong>&lt;br&gt;<em>Order is the pattern to which actors are related to one another, and the discernable principles that their relationship contains.</em></td>
<td><strong>Definition:</strong>&lt;br&gt;<em>The moral rules conferring rights and duties upon actors.</em></td>
</tr>
<tr>
<td><strong>Order in social life:</strong>&lt;br&gt;<em>A pattern of human activity that sustains goals such as:</em>&lt;br&gt;- security against violence&lt;br&gt;- ensuring that promises will be kept&lt;br&gt;- the possession of things will (to some degree) remain stable</td>
<td><strong>Individual or human justice:</strong>&lt;br&gt;<em>The moral rules conferring rights and duties upon individual human beings.</em></td>
</tr>
<tr>
<td><strong>International and interstate order:</strong>&lt;br&gt;<em>A pattern sustaining elementary or primary goals of the international society.</em></td>
<td><strong>International and Interstate justice:</strong>&lt;br&gt;<em>The rules held to confer rights and duties upon states.</em></td>
</tr>
<tr>
<td><strong>World order:</strong>&lt;br&gt;<em>Patterns or dispositions of human activity that sustain the elementary or primary goals of social life among mankind as a whole.</em></td>
<td><strong>Cosmopolitan or world justice:</strong>&lt;br&gt;<em>Ideas which seek to spell out what is right or good for the world as a whole, for an imagined civitas maxima or cosmopolitan society to which all individuals belong and to which their interests should be subordinate.</em></td>
</tr>
</tbody>
</table>

Source: based on (Bull, 2002, 3-20, 79-81) and (Bull, 1984a).
Conclusion

In this chapter we obtained a general notion of the R2P principle. In 2001 the ICISS tried to redefine the concept of sovereignty to achieve a more just international society. The UN member states were hesitating to accept the document and agreed at the 2005 World Summit with a mediocre version of R2P. Although it was for the ICISS R2P promoters a huge deception, R2P after the World Summit still has the possibility to evolve into the R2P as envisaged by the ICISS. This is not the case in the 2009 UN Secretary General report *Implementing the responsibility to protect*. In this report Ban Ki-moon used the R2P principle to strengthen the position of the UN and diminish the individual responsibility of states to protect the oppressed. These different ideas on the R2P are in essence caused by different views on the relation between order and justice.

We have seen that the English School deals with this balance of order and justice in international relations. Most important in this respect is the notion that justice is only possible if it is grounded in order. This order in international relations is at present not realized by a supranational actor but is an anarchical *modus vivendi* that leads to some kind of international society. The different lines of thought within the English School offer an excellent framework to analyse the proposed changes to the international society by the ICISS and the Ban Ki-moon report. Before we can conduct this analysis, it is necessary to outline the differences between the ICISS and the Ban Ki-moon report, which is going to be conducted in the next chapter.
Chapter 2: Analysing the Responsibility to Protect

Introduction
In the first chapter we have seen how the R2P principle emerged and developed. In this chapter we are inspecting the principle in a more theoretical way, trying to pin down the exact relation between order and justice in the R2P principle. The key question in this respect is: *What is the central idea behind the R2P principle, and how does it deal with order and justice in the international society?* To refer to ‘the R2P principle’ is a bit of a simplification because there are a number of views on R2P. In this context we concentrate on the two most comprehensive views of R2P, namely the R2P principle in the ICISS report (ICISS R2P) and the Ban Ki-moon report (Ban R2P).

In this chapter we try to answer the question how the R2P principle deals with order and justice in the international society. In the first place we need to know how the ICISS R2P and Ban R2P interpret international law, because we interpret international law as the current relation between order and justice in the international society. In the second place we need to know which peremptory norms of international law (*jus cogens*) can set the current international law aside. Related to this investigation we look at the different actors that according to the R2P approaches are authorized to intervene. After we have answered these questions we are going to describe the criteria that the R2P approaches formulate for military intervention. These formulations will be used in the third and fourth chapter to compare the R2P principles with the branches of the English School.

§2.1 The R2P principle in general

2.1.1 Intervention as an assault on state sovereignty
There can be no two ways about the fact that intervention can disrupt relations at home and abroad. The developments during the nineteen nineties gave Annan reason to ask the question: ‘[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Šrebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity’ (ICISS, 2001, 2).
The question that arises from this statement of Annan is whether intervention to prevent atrocities is indeed an unacceptable assault on sovereignty. At first sight it seems that such an intervention is in conflict with the notion of sovereignty because it contradicts the non-intervention principle that has often been seen as the essential feature of sovereignty. But is this is not the whole story. Although concepts of sovereignty and non-intervention are closely related, there exist at least four anomalies which indicate that this relationship is more complex. These four anomalies are:

1.) In recent history the concept of sovereignty has not been a barrier to intervention. If we inspect for instance the interventions of Vietnam in Cambodia and Tanzania in Uganda, we see that both interventions were justified, but *Realpolitik* eventually determined the international response to both interventions (Bellamy, 2009, 10-11).

2.) There is the idea that sovereignty and human rights are opposed to each other, but there are also people who claim sovereignty in the name of human rights. Such a claim is based on the idea that sovereignty is founded on the rights of people to choose their own form of government, grounded in the right to liberty (pp. 11-12). Exemplary in this respect are the *Placcaert van Verlatinge* of 1581 and the *Declaration of Independence* of 1776.

3.) To see sovereignty as some kind of absolutism, means that sovereign states can act however they please. In reality this vision never won any support in the society of states, because it was recognized that sovereign states have responsibilities, to each other and to their own people (Bellamy, 2009, 12-13).

4.) It is the question whether sovereignty and non-intervention are two sides of the same coin.

Before the UN charter was ratified, sovereigns had the legal right to wage war, so non-intervention is not a corollary of sovereignty per se (pp. 13-15).

These anomalies make clear that the relationship between sovereignty, the non-intervention principle, and intervention to prevent atrocities is at least a controversial one.

2.1.2 How can the R2P principle be effective in international society?
In the first chapter we have seen how these controversies fuelled a discussion that led to the report of the ICISS in which the terms of the debate were reframed into a ‘Responsibility to Protect’. This entailed ‘the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader
community of states’ (ICISS, 2001, VII). In the ICISS report this responsibility is divided into the responsibility to prevent, to react and to rebuild. The responsibilities to prevent and to rebuild have minor influence on the concept of sovereignty, because they are based on mutual consent. The responsibility to react however changes the existing relations between states, because it tries to answer the question under which circumstances military intervention is allowed. The ICISS defines this intervention as follows: ‘The kind of intervention with which we are concerned in this report is action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective’ (p. 8). By answering the question when such intervention is allowed, it touches the essence of sovereignty and changes the existing international order.

It is the question whether the R2P principle of Ban Ki-moon also tries to change the existing order. The ICISS R2P and the Ban Ki-moon R2P are difficult to compare because they are constructed differently. The ICISS report describes the R2P principle in terms of ‘prevention’, ‘reaction’ and ‘rebuilding’, whereas the Ban Ki-moon report describes the R2P in the form of three pillars. These pillars are: ‘the protection responsibilities of the state’, ‘international assistance and capacity-building’, and ‘timely and decisive response’. Gareth Evans explains that these two different approaches can be compared with a cake: ‘Think of a cake with three layers – labelled respectively, from the bottom up, ‘prevention’, ‘reaction’ and ‘rebuilding’ – which is then sliced vertically into three big wedges, labelled respectively Pillars One, Two and Three’ (Evans, 2010, 322), see Figure 2.1.

Figure 2.1 The R2P Cake

| Pillar one: The protection responsibilities of the State |
| Pillar two: International assistance and capacity-building |
| Pillar three: Timely and decisive response |

Source: based on (Evans, 2010, 322-3) and (SG report, 2009, 8-9).

Because every pillar has elements of the three responsibilities, states cannot partly agree with the R2P principle but need to agree with it in total. According to Evans, the international
community made it clear from the moment of publication of the ICISS report that it wanted ‘the whole cake on the table before it will even contemplate digesting the one small bite of it (...) that is involved in reaction by way of coercive international military intervention’ (Evans, 2010, 323). For the implementation of the R2P principle, the structure of the Ban R2P has as a logical consequence that it would result in a more moderate position on for example military intervention. This is caused by the fact that when such an intervention would not be accepted, the whole principle has to be set aside. Supporters of the ICISS R2P on the other hand can support a much stronger position because military intervention is only situated in the ‘responsibility to react’. If the international community does not accept the idea of military intervention then it only affects the responsibility to react, without changing the other two responsibilities.

§2.2 The ICISS report

2.2.1 The three responsibilities in the ICISS report
In the above we have seen that the R2P principle in the ICISS wording is constructed of three different responsibilities. Before we focus on the relation of the ICISS report with the international law and ethics, we describe these three responsibilities.

1. The responsibility to prevent: The ICISS report points out that an essential element of the Responsibility to Protect has to be a responsibility to prevent (ICISS, 2001, 19). Such prevention can be effective if three essential conditions have been met, viz: ‘early warning’, a ‘preventive toolbox’, and finally ‘political will’ (p. 20). The ICISS writes about two different kinds of causes for conflict, namely root causes and direct causes. The root causes are problems like poverty or a failing state that eventually lead to conflict or crimes against humanity. Root causes can for instance be tackled by strengthening political and legal institutions and arrange economic opportunities (pp. 21-3). Prevention of direct causes is logically the taking down of direct causes of conflict. Such prevention can have all forms and can even consist of the threat to use force (pp. 24-5). Essential to a well-functioning direct prevention is an operational strategy leading to a quick impact (p. 26).

2. The responsibility to react: In chapter four of the ICISS report the responsibility to react is discussed. Such a reaction may only be military if no other means are available (p. 29). The alternative measures that can be done are sanctions, such as arms embargoes, targeting
foreign assets or aviation bans (p. 30). If military intervention is the only viable option, it has to be conducted, but when it is carried out it has to be in line with the non-intervention principle (p. 31). Military intervention is therefore only allowed on grounds of ‘large scale loss of life’ and ‘large scale ethnic cleansing’ as a result of state action or the absence of state action. (p. 32).

3. The responsibility to rebuild: The fifth chapter of the ICISS report consist of the commitment to build a durable peace after a conflict. To some extent this idea of rebuilding reminds to the ‘trusteeship’ concept, thereby undoubtedly reviving (post)colonial sentiment. But the ICISS states clearly that the responsibility to rebuild has nothing to do with ‘Western’ meddlesomeness: ‘Sovereignty issues necessarily arise with any continued presence by the intervener in the target country in the follow-up period. Intervention suspends sovereignty claims to the extent that good governance – as well as peace and stability – cannot be promoted or restored unless the intervener has authority over a territory. But the suspension of the exercise of sovereignty is only de facto for the period of the intervention and follow-up but not de jure. (…) The objective overall is not to change constitutional arrangements, but to protect them’ (p. 44).

2.2.2 ICISS report: International law and the UN charter
In the first chapter we saw the basic rules of international law, and the position of UN Charter within international law. The ICISS concludes that with the change to a culture of national and international accountability the UN Charter has to be interpreted differently. The ICISS comments:

Based on our reading of state practice, Security Council precedent and established norms, emerging guiding principles, and evolving customary international law, the Commission believes that the Charter’s strong bias against intervention is not to be regarded as absolute when decisive action is required on human protection grounds (ICISS, 2001, 16).

The ICISS sees the UN Charter in the light of the ‘Responsibility to Protect’. This causes three major changes: First, the R2P changes the point of view from those who are considering intervention, to those needing support. Secondly, the state concerned has the primary responsibility to protect, and only if the state fails can the international community act in its place. Thirdly R2P consists of ‘responsibility to react’ but also the ‘responsibility to prevent’ and the ‘responsibility to rebuild’ (pp. 17-8). This idea about intervention effects the way that
intervention on humanitarian grounds can be authorized. In the following pages we describe how the ICISS R2P principle understands the authorizing position of the Security Council, the General Assembly and regional organizations.

2.2.3 The Security Council
The ICISS finds in the military authorization of the United Nations the best facilitator for peace and justice, because it speaks on ‘behalf of the entire international community’ (ICISS, 2001, 52). Within the UN this authorization has to be done by the Security Council whose responsibility is clearly described in the UN Charter. For instance in article 24.1, the members of the UN have given the Security Council ‘the primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf’. The SC is also obliged to investigate the ‘threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42’. These two articles state that the SC may ‘call upon the Members of the United Nations to apply such measures’ (41), and ‘take such action (…) as may be necessary to maintain or restore international peace and security’ (42). As we have seen in the first chapter of this thesis, the authorization of the SC is not only limited to Chapter VII of the UN Charter. In Article 25 of the Charter we read that the Security Council can also command the Members of the United Nations to carry out one of their decisions, as long as they are in line with the Charter.

2.2.4 The General Assembly
The ICISS recognizes the primary responsibility of the Security Council, but places it in a wider range of options to realize the R2P under the Charter (ICISS, 2001, 48). Most important in this respect is the General Assembly authorization. In article 10 and 11 of the UN Charter the General Assembly is given the responsibility ‘with regard specifically to the maintenance of international peace and security – albeit only to make recommendations, not binding decisions’ (p. 48). During the Korean War the so called Uniting for Peace resolution gave the General Assembly the right to intervene if the Security Council failed to achieve consensus. The Uniting for Peace resolution (UN 377) reads:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in
any case where there appear to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security (UN res. 377: Uniting for Peace).

The UN Charter points out that the General Assembly does not have the power for a direct authorization of intervention. But the ICISS makes clear that a decision by the General Assembly, especially if it is supported by a great number of UN members ‘would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position’ (ICISS, 2001, 53).

2.2.5 Regional organizations
If the Security Council and the General Assembly fail in their responsibility, the ICISS emphasizes the responsibility of regional organizations. That does not mean that such regional organizations are less powerful than the UN. Although the ICISS is clear about the fact that the UN is the only organization that can authorize military action on behalf of almost the whole international community, it is also powerless because it can only authorize intervention since it lacks its own military and police forces. The ICISS therefore concludes: ‘What will be increasingly needed in the future are partnerships of the able, the willing and the well-intended – and the duly authorized’ (ICISS, 2001, 52). The ICISS derives this position from the UN charter article 52, in which the regional organizations are given considerable flexibility for collective action within their boundaries. Article 52.1 reads:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

In strict terms, the regional organizations need authorization from the Security Council but as the ICISS writes: ‘there are recent cases when approval has been sought ex post facto, or after the event (Liberia and Sierra Leone), and there may be certain leeway for future action in this regard’ (ICISS, 2001, 54).
The ICISS is crystal-clear on the fact that the authorization of the Security Council is of the utmost importance. However in some cases only an individual state can undertake action against crimes against humanity. In such a situation the ICISS does not condemn action without authorization. It could for instance be possible that such a state can get authorization after the event in a case of *ex post facto*.

### 2.2.6 ICISS report: Ethical threshold for military intervention

The right to intervene is described in the report of the ICISS in the part about the responsibility to react. Although the way the ICISS discusses the principles for military intervention uses new formulations in the discussion, its foundation is not new at all. If we closely inspect the Responsibility to Protect, we see that it is based on the just-war theory (JWT). The JWT is an approach that has developed over a long period of time, starting with the book *Civitate Dei* written by Augustine of Hippo (354-430) and the book *Summa Theologiae* by Thomas Aquinas (1225-1274) (van Bruggen, 2008). The aim of the JWT is not to justify war, but to bring international relations under the control of political morality, thereby reducing the risk and destructiveness of war (Amstutz, 2008, 113-4). The JWT has no legal status, but it shows the current way we look at war and interstate relations. This is analysed in the ‘rights to conduct war’, the so-called *jus ad bellum*, and the ‘rights in war’ called *jus in bello*. In the last decade there has been an appeal to add a third way, namely the rights and duties after a war, called the *jus post bellum*, which has some remarkable resemblance with the concept of ‘responsibility to rebuild’ (p. 115). In this thesis we use the JWT as a framework to compare the ICISS and Ban ethical legitimisation of intervention (the second chapter), with the two branches of the English School theory (the third chapter). The moral reflections on the R2P principles in the fourth chapter, are therefore derived from the English School debate, and not from the traditional JWT.

In the case of R2P, we are not evaluating war, but inspecting when and how intervention is allowed. These ‘principles for military intervention’ are part of the

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15 The ICISS states: ‘As a matter of political reality, it would be impossible to find consensus, in the Commission’s view, around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or General Assembly. But that may still leave circumstances when the Security Council fails to discharge what this Commission would regard as its responsibility to protect, in a conscience-shocking situation crying out for action. It is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by’ (ICISS, 2001, 54-5).
‘responsibility to react’ and can be compared with the *Jus ad bellum* in the JWT. In the ICISS report the principles for military intervention are summarized (ICISS, 2001, XII, see Annex I).

Table 2.1 Comparing *Jus ad Bellum* with the *Principles for Military Intervention*

<table>
<thead>
<tr>
<th><strong>Just-war Theory: Jus ad Bellum</strong></th>
<th><strong>Responsibility to Protect: Principles for Military Intervention (ICISS report)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Just cause</strong></td>
<td>(1) The just cause threshold</td>
</tr>
<tr>
<td>Justification for war is to deter</td>
<td>Military intervention is allowed when serious and irreparable harm occurs to</td>
</tr>
<tr>
<td>aggression, defend against unjust</td>
<td>human beings or is imminently likely to occur of the following kind:</td>
</tr>
<tr>
<td>attack or right a grievous wrong.</td>
<td>A. large scale loss of life</td>
</tr>
<tr>
<td></td>
<td>B. large scale ‘ethnic cleansing’</td>
</tr>
<tr>
<td><strong>2. Competent authority</strong></td>
<td>(3) Right authority</td>
</tr>
<tr>
<td>Force has to be authorised by a government.</td>
<td>Intervention should be authorized by the Security Council (SC), if the SC fails the General Assembly (GA) can authorize intervention, and if the GA fails regional or sub-regional organizations can take their responsibility.</td>
</tr>
<tr>
<td><strong>3. Right intention</strong></td>
<td>(2) The Precautionary principles</td>
</tr>
<tr>
<td>A war is only just if it restores a just peace.</td>
<td>(2A) Right intention</td>
</tr>
<tr>
<td></td>
<td>To halt or avert human suffering.</td>
</tr>
<tr>
<td><strong>4. Limited objective</strong></td>
<td>(2C) Proportional means</td>
</tr>
<tr>
<td>A war is only just if it goals are limited.</td>
<td>Scale, duration and intensity of the intervention should be the minimum necessary to secure the defined human protection.</td>
</tr>
<tr>
<td><strong>5. Last resort</strong></td>
<td>(2B) Last resort</td>
</tr>
<tr>
<td>All peaceful means have to be exhausted before war can be legitimate.</td>
<td>All non-military options have to be exhausted.</td>
</tr>
<tr>
<td><strong>6. Reasonable hope of success</strong></td>
<td>(2D) Reasonable prospects</td>
</tr>
</tbody>
</table>


If we compare the principles for military intervention with the jus ad bellum (Table 2.1), we can see that the elements of the R2P principle are to a large extent analogous to the elements of the JWT. There is however one major difference between legitimising war and military intervention; namely the authority allowed to intervene. To elaborate on this; in the JWT the

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16 Because it has no direct connection with R2P, this sixth criteria will be neglected in this thesis.
just cause is to deter aggression, defend oneself against an unjust attack or to right a grievous wrong. These three reasons to wage war have everything to do with self-defence or the direct protection of assets. Only the authority that is directly hit is allowed to take the appropriate measures to restore order and justice. In the case of military intervention of the R2P there is no direct link between the just cause and the authority that is allowed to intervene. Instead of giving the right to intervene to a government, the R2P develops a three layered approach in which the SC has the first right to authorise intervention, the GA the second, and (sub)regional organizations the third responsibility (ICISS, 2001, XII-XIII, or see Table 1.1).

To summarize, the ICISS principle of military intervention allows states to intervene for reasons that were not part of the original JWT. In cases of crimes against humanity their exists a responsibility to react that clearly changes the focus on justice in international relations. By giving new reasons for intervention and broadening the number of states that can justify an intervention it also changes international order.

§2.3 The Ban Ki-moon report

2.3.1 Ban Ki-moon report: International law and the UN charter
In the final pages of the ICISS document there is a recommendation to the UN Secretary General (SG) to ‘adopt a draft declaratory resolution embodying the basic principles of the responsibility to protect, and containing four basic elements’ (ICISS, 2001, 74). These recommendations eventually led to the 2005 World Summit Outcome Document and the 2009 report of the Secretary General of the UN, Ban Ki-moon. In the Outcome Document of the 2005 World Summit, the international society committed itself to a certain extent to the R2P. Even though their existed a lot of opposition, Ban Ki-moon was enthusiastic about the Summit Outcome. He stated therefore:

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17 These four elements consist of the ‘affirmation of the idea of sovereignty as responsibility’ and the responsibility of the international community to prevent, to react and to rebuild. The ICISS recommended the SG to affirm that ‘large scale loss of life or ethnic cleansing’ can justify military intervention. Finally the SG needed to articulate the ‘precautionary principles (right intention, last resort, proportional means and reasonable prospects) that must be observed when military force is used for human protection purposes’ (p. 74). Next to these recommendations to the SG, the ICISS also recommended the Security Council to ‘seek and reach agreement on a set of guidelines, embracing the “Principles for Military Intervention”’ (p. 74).

18 The paragraphs 138-140 of the Outcome Document spoke of the Responsibility to Protect. The strongest commitment to the R2P principle in the Outcome Document is paragraph 139, stating: ‘[W]e 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
It would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraphs 138 and 139 of the Summit Outcome. Those provisions represent a remarkable good outcome, which will well serve the ultimate purpose of the responsibility to protect: to save lives by preventing the most egregious mass violations of human rights, while reinforcing the letter and spirit of the Charter and abiding principles of responsible sovereignty' (SG Report, 2009, 28).

The task that Ban Ki-moon undertook in its report *Implementing the responsibility to protect*, was to ‘find ways of implementing its decisions in a fully faithful and consistent manner’ (p. 4). According to the Secretary General the Responsibility to Protect can be applied to four atrocities, namely: genocide, war crimes, ethnic cleansing and crimes against humanity. The response to such situations should be comprehensive but with the use of ‘appropriate and necessary means’ (World Summit Outcome, 2005, 138). For Ban Ki-moon, the best way to implement R2P is by connecting it to three pillars, namely: 1.) the protection responsibilities of the State; 2.) international assistance and capacity-building; and 3.) timely and decisive response19 (SG Report, 2009, 8). In the next part of this chapter we are going to describe these pillars in more detail.

2.3.2 Pillar one: The protection responsibilities of the State

In paragraph 138 of the Summit Outcome we read: ‘Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity’. This is the core of the first pillar which Ban Ki-moon translates into: ‘Pillar one is the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. The latter, I would underscore, is critical to effective and timely prevention strategies’ (SG Report, 2009, 8).

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.’ The document stated that the international community should recognize its responsibility, thereby neglecting the warning of the ICISS than when ‘everyone is responsible, no one is actually responsible’ (ICISS, 2001, 71). The Outcome Document was received in general with huge opposition. According to some critics the document spoke about R2P in such careful terms that it was better to call it ‘R2P lite’ (see 1.2.3).

If the government is not able to meet the responsibility, the ‘international assistance and capacity-building’ of the second pillar comes into play. But if a political leadership is ‘determined to commit crimes and violations relating to the responsibility to protect (…) the international community would be better advised to begin assembling the capacity and will for a ‘timely and decisive response’” (SG Report, 2009, 15).
If we compare these two statements, we can see that Ban Ki-moon explicitly mentions the Responsibility to Protect non-nationals and pays attention to the incitement of atrocities. By doing this he notes that the obligations of states are not only derived from the R2P principle but ‘are firmly embedded in pre-existing, treaty bases and customary international law’ (p. 12). The responsibility of the state is therefore backed up by the International Criminal Court, and different UN tribunals.20

2.3.3 Pillar two: International assistance and capacity building
If the state fails in its protection responsibility (pillar one), the second pillar commits the international community to assist the state in meeting its obligations (SG Report, 2009, 9). Pillar two is based on paragraph 138 of the Summit Outcome mentioning that ‘the international community should, as appropriate, encourage and help States to exercise this responsibility’. This international assistance can take one of four forms:

1.) Encourage the state to meet its responsibility under pillar one (Summit Outcome document, § 138).
2.) Helping the State to exercise this responsibility (§ 138).
3.) Helping the State to build up their capacity to protect (§139).
4.) Assisting the State ‘under stress before crises and conflicts break out’ (§139; SG Report, 2009, 15)

2.3.4 Pillar three: Timely and decisive response
If the elements of the first two pillars fail, the third pillar elements can be used to back them up. Ban Ki-moon wrote: ‘Paragraph 139 of the Summit Outcome reflects the hard truth that no strategy for fulfilling the responsibility to protect would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military action in extreme cases’ (SG Report, 2009, 25). This enforcement measure is described in the third pillar: ‘Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection. (…) A reasoned, calibrated and timely response could involve any of the broad range of tools available to the United Nations and its partners’ (p. 9). It is obvious that the

20 Also – although not mentioned by Ki-moon- by national courts, that for instance in the Pinochet Case limited the sacrosanct position of heads of state.
threshold for action under pillar two is much lower than under pillar three. Making clear that the ‘more robust the response, the higher the standard for authorization’ (p. 22).

If a state refuses international assistance (pillar two), the international community is responsible according to the Summit Outcome paragraph 139 to undertake coercive measures. The Security Council is, according to Article 41 and 42 of the UN Charter, the right actor to authorize these measures. If the Council fails in its responsibility the General Assembly can authorize coercive measures, by making state on the Uniting for Peace-procedure. But in effect such an authorization is not legally binding (SG report, 2009, 27). Regional organizations or arrangements can only use coercive measures if they are prior authorized by the Security Council (p. 25).

2.3.5 Ban Ki-moon report: Ethical threshold for military intervention
Now we have seen that the report of Ban Ki-moon interprets order and justice in international relations and international law, we translate the position of Ban Ki-moon into the six points of the just-war doctrine (see Table 2.2). As indicated this gives us the possibility to determine which moral rules the Ban R2P confers upon actors. These rules can then easily be compared with the ICISS R2P and the English school subdivisions of pluralism and solidarism. Much of the differences between the Ban R2P and the ICISS R2P in Table 2.2 are caused by the centralization of the UN by Ban, and the more normative outlook of the ICISS. These differences can for instance be found in the first criteria in which the Ban R2P has a more strict formulation of ‘just cause’. In the second criteria the Ban R2P states that SC authorization is an essential criteria of intervention, whereas the ICISS supports a less restricted approach. In the third criteria of ‘right intention’ the difference between Ban and ICISS appears most clearly. On the one hand, the Ban R2P authorizes intervention from the perspective of the state, which is the main actor in the perspective of the UN. The ICISS on the other hand focuses on the individual in the international society, and intervention can therefore be defended on grounds of protecting individual people in the international society.

<table>
<thead>
<tr>
<th>Table 2.2 Comparing the Ban Ki-moon report with the ICISS report</th>
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<tbody>
<tr>
<td><strong>Responsibility to Protect: Principles for military intervention, (Ban Ki-moon report)</strong></td>
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<tr>
<td>(1) The just cause threshold</td>
</tr>
<tr>
<td>Military intervention is allowed when serious and irreparable harm occurs to human beings</td>
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</table>
or is imminently likely to occur of the following kind:
A. genocide
B. war crimes
C. ethnic cleansing
D. crimes against humanity

(2) Right authority
Intervention should be authorized by the Security Council (SC). If the SC fails in its responsibility the General Assembly (GA) can authorize coercive measures. But in effect such an authorization is not legally binding. Regional organizations or arrangements can only use coercive measures if they are prior authorized by the SC.

(3) Right intention
Help the state to meet its internal obligations.

(4) Limited objective
The threshold for ‘International assistance and capacity building’ under pillar two is much lower than ‘Timely and decisive response’ under pillar three. Making clear that the ‘more robust the response, the higher the standard for authorization’

(5) Last resort
Military response in the third pillar can only be used if the actions in the first two pillars fail.


Conclusion

The purpose of this chapter is to show the central idea behind the R2P principle and indicate how this principle can be effective in the international society. We have seen how the R2P principle can be divided into the ICISS R2P and the Ban R2P. These interpretations describe the R2P in different ways; the ICISS R2P defines three responsibilities, and the Ban R2P
three pillars. The ICISS and Ban Ki-moon agree that there already exist international law that supports international order and justice in international society. But in both lines of thought is stated that the international society will become more just and orderly if the R2P approach will become a new norm of state conduct. There are differences how this international law should be interpreted, and how the balance between justice and order should be interpreted; Ban sticks close to the existing institutions of the UN, whereas the ICISS focuses more on responsibility of individual states.

This relation of order and justice within the international society can be explained in terms of the English School. To give an answer to the central question of this thesis to what extent the R2P principle influences international order, we are now going to investigate the English School thought. Not only because it analyses the relation between order and justice in the international society, but also because it offers a normative model to what extent we should focus on justice and order.
Chapter 3: Order and Justice in the English School

Introduction
In the previous chapter we have seen how the R2P approaches try to achieve more justice in international society, and how that could be in line with order in the international society. To analyse whether the two R2P approaches could change the balance between order and justice, we use the English School to explain how justice and order in international society are related to each other. The English School offers a framework to understand the relation between justice and order in international society. In this chapter we describe the English School by focussing on the two extremes of solidarism and pluralism, seeing pluralism as preferring order, and solidarism preferring justice. The central question we therefore like to answer is: 

As seen from both the solidarist and the pluralist perspective of the English School, to what extent does the R2P principle influence the relation between justice and order in the international society?

We start this chapter by describing the thought of pluralism and solidarism in the English School as a model that explains the relation between order and justice in the international society. Secondly we focus on the English School as a normative model. We thereby focus mainly on the way solidarism and pluralism deal with intervention on humanitarian grounds, because that can be very helpful in analysing the R2P concept of order and justice in the international society.  

§3.1 The origin of the English School

3.1.1 What is the central idea of the English School
The English School is the term given to an important line of International Relations theory that started in the aftermath of the Second World War and is still widely supported. The term ‘English School’ has an extraordinary history. It was first coined in a 1981 article by Roy Jones, titled ‘The English School of International Relations: A Case for Closure’ (Jones, 1981). The purpose of this article was to end the project of what has been previously called by Hedley Bull ‘the classical approach’. The publication of Jones article fuelled a discussion on questions whether there was indeed such a school, who its

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21 I could not find any literature in which pluralism and solidarism are directly linked to the R2P principle, but there are a number of publications in which the relation between the concepts of the anarchical society and R2P are discussed. For instance by Ramesh Thakur (Thakur and Weiss, 2009).

22 The term ‘English School’ has an extraordinary history. It was first coined in a 1981 article by Roy Jones, titled ‘The English School of International Relations: A Case for Closure’ (Jones, 1981). The purpose of this article was to end the project of what has been previously called by Hedley Bull ‘the classical approach’.
School thinkers agree that no single tradition can ‘fully and accurately depict the world’ (Bull 2002, 41-2); but all endorse that sovereign states form an ‘anarchical society’ since there is no authority above the sovereign state (Linklater, 2009, 86, 105).

Essential in the origin of the English School is an article that Hedley Bull presented to the British Committee on the theory of International Politics in 1961, called ‘Society and Anarchy in International Relations’ (Bull, 1966). In this paper Bull tries to determine the limits of the domestic analogy, which had been a key concept of International Relations theory for centuries (p. 35). The radical new point of view in the article can be found in a footnote, literally. The second footnote of the text states:

Anarchy: ‘Absence of rule; disorder; confusion’ (OED [Oxford English Dictionary]) The term here is used exclusively in the first of these senses. The question with which the essay is concerned is whether in the international context it is to be identified also with the second and the third (Bull, 1966, 35).

In this footnote Bull indicates that the absence of rules does not need to evolve into disorder and confusion, because states feel that they belong to an international society. Other causes for this international order could be that warring states are afraid of reprisals; that they feel obliged to keep their promises, or some ethical considerations (Linklater, 2009, 89). The anarchical society that Bull describes is therefore orderly and less inter-state violence takes place than could have been expected on grounds of the domestic analogy.

Because the English School is a label for a group of international relations thinkers, the paradigm of the English School depends on who we include as its members. By determining the membership of the English School, we follow Aberystwyth Professor Hidemi Suganami. He concludes that the English School ‘is best seen as a historically evolving cluster of (so far) mainly UK-based contributors to International Relations. They were initially active in the latter part of the twentieth century and broadly agree in treating Rationalism, in Wight’s leading members were, and about the main strengths and weaknesses of the school (Linklater and Suganami, 2006, 17). Eventually the result of the Jones article turned out to be contraire to its initial purpose. By advocating the closure of the English School, Jones had recognized the English School thought as a separate approach to International Relations and gave life to the ideas of the School (p. 18).

This domestic analogy is the idea that international relations, the relations between states, can be compared with domestic relations which are the relations between individuals. A lot of realist thinkers, for instance Hobbes and Machiavelli, argue that a situation of anarchy shall create a situation in which ‘the live of man, [is] solitary, poor, nasty, brutish and short’ (Hobbes, 1994, 76). This situation is a struggle to survive in which everybody is capable to take the lives of its fellow citizens. In this domestic anarchical situation only a sovereign can restore justice. According to the realists thought, people are in the international situation substituted by states, who equally live in a constant state of war, ‘having their weapons pointing and their eyes fixed on one another’. Only a sovereign authority can restore justice in such an international situation (p. 78).
sense [see 3.1.3], as a particular important way to interpret world politics’ (Linklater and Suganami, 2006, 41). 24 Given these characteristics Suganami notes that the following theorists can be seen as English School members: ‘C. A. W. Manning, Martin Wight, Hedley Bull, Alan James, John Vincent and Adam Watson have a strong case to be treated as the School’s central figures in its early stages’ (pp. 41,42). More recently Andrew Hurrell, Tim Dunne, Nicholas Wheeler and Robert Jackson followed in the footsteps of the early English School thinkers (p. 25).

3.1.2 The relationship with other schools of thought
Before the English School was founded, its central ideas were already expressed by a number of thinkers. One of the most influential thinkers in the English School, Martin Wight, sees the thought of Hugo Grotius, especially in his book De Jure Belli ac Paci (1625), as the underlying foundation of the English School. Martin Wight describes this thought of Grotius as ‘rationalism’ or the ‘Grotian tradition’ (Linklater 2009, 87). The central idea of rationalism is that ‘despite the formally anarchical structure of world politics, inter-state relations are governed by normative principles in the light of which states can, and to a remarkable degree do, behave reasonable towards each other’ (Wight, 1991, 13-14). According to Wight, this tradition can be used as a via media between the paradigms of the ‘realism’ or the ‘Machiavellian tradition’ and ‘revolutionism’ or ‘Kantian tradition’ (Linklater and Suganami 2006, 30).

Next to this division of Wight we can determine the position of the English School in relation to other schools of thought. The purpose of the English school thinkers is to create a ‘conceptual space needed to examine international society’ (Little, 2000, 396), thereby making use of the possibilities for progress in the anarchical society (Linklater and Suganami, 2006, 9). The English School differs from realism when it does not see this anarchy as a struggle for power and security, but as a condition in which global reform can take place. The English School pays serious attention to order, but it also has an eye for norms and values in the context of order in the state-systems. These state-systems are ‘rare achievements and [they] require ‘tremendous conscious effort’’ (p. 11). This is contraire to neorealist thought which

24 The ties between the members of the English school were initially formed at the London School of Economics and were cultivated within the British Committee of International Politics. But overall the School can be seen more as a cluster of thinkers than an exclusive club, and there is therefore ‘no strong boundary between its ‘insiders and outsiders” (Linklater and Suganami, 2006, 41)
sees the interstate relations as the: ‘international order reproduces itself through the operation of the invisible hand under anarchy’ (p. 11).

The English School also differs from utopianism because utopian (and liberal) thinkers reflect on the possibility of a world community. Although the English School sees the international society as far from a state of war, it is still possible that ‘noble efforts to improve international politics can cause large moral disagreements which can destroy relations between states and damage the international order’ (Linklater, 2009, 89). It is undoubtedly possible to make some changes in the international order but it is impossible to transform it into a world community, because ‘efforts to improve international politics can cause large moral disagreements which can destroy relations between states and damage the international order’ (p. 89).

3.1.3 The difference between pluralism and solidarism
All English School theorists share the idea of an anarchical international society, but there is a huge difference between their visions on the possibility for change and the position of order and justice within this society. To get a clear idea of the lines of thought in the English School, Hedley Bull introduced in 1966 the division between pluralism and solidarism. Pluralism and solidarism referred at the beginning to two empirical interpretations on the question whether there was enough solidarity in the international society to make law-enforcement workable. Nowadays however, pluralism and solidarism are two contrasting normative positions. Pluralism meaning a ‘minimalist goal of the orderly coexistence of states’ and solidarism going further to ‘include a more demanding goal of the international protection of human rights standards globally’ (Linklater and Suganami, 2006, 6). The pluralist argue that humanitarian intervention is ‘a violation of the cardinal rules of sovereignty, non intervention and non-use of force. (...) [The] attempts to pursue individual justice through unilateral humanitarian intervention place in jeopardy the structure of inter-state order’ (Wheeler, 2000, 11). Solidarism on the other hand has a conflicting opinion: ‘Rather than see order and justice locked in a perennial tension, solidarism looks to the possibility of overcoming this conflict by developing practices that recognize the mutual interdependence between the two claims’ (Wheeler, 2000, 11).

It is difficult to make a clear division between solidarist and pluralist thought, no less because some thinkers have shifted their position in the cause of their lives. Most exemplary in this respect are John Vincent and Hedley Bull (Linklater, 2009, 97). In the next part of this
chapter we are going to investigate the thought of Bull to clarify the differences between pluralism and solidarism. We focus on Bull because he is generally seen as the most important thinker within the paradigm of the English School. And in his shift from pluralism towards solidarism he gives us a clear view of the sometimes subtle differences between pluralist and solidarist thought. It is therefore better to speak about a continuum with on the extremes pure pluralist thought and pure solidarist thought. In reality no one is a pure solidarist or a pure pluralist; all thinkers combine elements of each side of the spectrum.

§3.2 Pluralism, solidarism and Hedley Bull

3.2.1 Bull’s pluralism: order above justice?
According to Bull the sovereign states have ‘inherited from Renaissance Europe’ an international society, an ordered system for their international arrangements. Bull ads: ‘This society is an imperfect one: its justice is crude and uncertain, as each state is judge of its own cause; and it gives rise to recurrent tragedy in the form of war; but it produces order, regularity, predictability and long periods of peace, without involving the tyranny of a universal state’ (Bull, 1959, 41-4). Bull recognizes that this society does not respect justice, but that to achieve more justice, the order that this society produces is crucial. Bull states: ‘Without a balance of power, and without sustained and stable understandings between the major powers on the conduct of their mutual relations then the softer elements of international order (international law, international organizations, the existence of shared values) will be so many castles in the air’ (Alderson and Hurrell, 2000, 5). We can therefore say that Bull saw order as the most important value in international relations. But this *modus vivendi* in the international society was not the final goal, because this existing situation was not a just one. This led Bull to argue that ‘order might be overridden by other considerations such as the desire to advance justice’ (Linklater and Suganami, 2006, 226). Bull is then (according to Andrew Linkletter) interpreting sovereignty and the non-intervention principle as hypothetical imperatives because states only need to comply to them if they want to preserve the existing international order.

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25 Hypothetical imperatives have according to Kant only instrumental value, which means that agents need to follow them if they want to achieve particular goals. These hypothetical imperatives are in Kant’s view less important then categorical imperatives, which needed to be followed ‘no matter what’. In the thought of Bull, the concept of sovereignty and the non-intervention principle are hypothetical imperatives because states only need
In the final part of *The Anarchical Society* (1977), Bull asked the question whether order has to be based on ‘minimal ideological consensus. If this consensus was essential to order, more ‘solidarists sentiments’ were needed in the society of states (Wheeler and Dunne, 1996, 98). Bull tried to solve this tension between justice and order by declaring that an unjust world is also disorderly. He stated for example in 1983: ‘We must take the Third World seriously primarily because of the vital interest we have in constructing an international order in which we ourselves will have a prospect of living in peace and security into the next century and beyond’ (Bull cited in Wheeler and Dunne, 1996, 101). By acknowledging that a solidarist perspective was necessary, he turned his view from pluralism towards the development of a ‘solidarist community of humankind’.

The solidarist perspective tries to subordinate the use of force to ‘the collective will of the society of states’ (Bull, 2002, 238). In Bull’s early writings there are two different manifestations of this will, respectively ‘police action’ in which states ‘exhibit solidarity’ in their response to states that violate the rules of the society of states. At the second level, solidarism might challenge the non-intervention principle, because states ‘are guardians of human rights everywhere’ (Wheeler and Dunne, 1996, 95). However in his early work Bull condemns this solidarist idea as being ‘morally unsound… constituting too simple a view of the moral dilemmas of international politics, and as being a system which it may be dangerous even to attempt to put into practice’ (Bull cited in Wheeler and Dunne, 1996, 95).

3.2.2 Bull’s solidarism: justice above order?
In his early work Bull made clear that justice is a subjective concept that is interpreted differently in every state. The strength of pluralism is that states with ‘different conceptions of justice’ can agree on ‘minimum state order’ (Wheeler and Dunne, 1996, 96). Later on, Bull however admitted that such a ‘minimum state order’ can evolve in an undesirable situation. Bull remarks: ‘The idea of sovereign rights existing apart from the rules laid down by international society itself and enjoyed without qualification has to be rejected in principle’. Not at least because ‘the idea of the rights and duties of the individual person has come to have a place, albeit an insecure one’ within the society of states ‘and it is our responsibility to seek to extend it’ (Bull, 1984a, 11-12). Order alone does not say anything about the moral value of such a society, if we want to say whether such an order is desirable we can judge it in
to comply to them if they want to preserve the existing international order and their own position within this order. If states should decide that they want to transfer a part of their power to a world government, the concept of sovereignty would loose its importance. Leaving Bull to note that sovereignty is ‘not an unconditional value or an eternal political ideal’ (Linklater and Suganami, 2006, 224-5).
‘terms of the contribution to individual well-being’. Bull admitted that such a society based on communitarian principles is difficult to achieve. Firstly there is no consensus among states about what the human rights consists and secondly there is the question about what ‘constitutes human suffering’. As an illustration of the fact we can see that the attention of the western community is most of the time pointed to famine and civilians in war zones, but overseeing the thousands of children that die every day as a result of malnutrition.

Bull’s change of mind is most apparent in his Hagey Lectures, in which he discussed the concept of justice in international relations. He saw the relationship between the developed and the developing countries in the world as a manifestation of a broad evolution of the international system; making clear that the Western World needed to pay attention to justice in its relation to the rest of the world. To show that there are actually good reasons for a change in this system, Bull articulated the demands that the third world had for more justice: ‘We imply, when we say that a person is treated justly, that he or she is treated not arbitrarily but in accordance with rules; that these rules in their substance are themselves fair or non-discriminatory (…) and that the rules are applied or administered fairly or impartially’ (Bull 1984a; Alderson and Hurrel, 2000, 208). Third World countries are demanding justice, to stop discrimination and unfair and unequal treatment and to get the rights and benefits that are their due. Although Bull sees these demands of the developing countries as fair, he nevertheless ironically notes that all these demands are derived from western moral premises (Bull, 1984a, 213).

By now the reader might be well aware of the complexity of the relation between order and justice. As is explained before, order and justice are not opposite to each other but are part of a continuum. In the above we have seen that the vision of Bull on the relation between order and justice has changed. In Table 3.1 we have tried to summarize his (change of mind) on the relation between order and justice.

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26 In the early eighties Bull wrote a number of articles and papers on the topic of international justice that eventually culminated in the Hagey lectures, a number of speeches that Bull held at the University of Waterloo in 1983. While dealing with the Third World challenge, Bull moved in these lectures towards a more solida rist conception of international society (Alderson and Hurrell, 2000, 206-7). Two years after the lectures, in May 1985, Bull died. If he had lived any longer, he might had written an accompanying volume to his book the Anarchical Society on the subject of justice, as he had already promised in the first part of this book.

27 These demands can be divided in five different areas. First, the third world countries demanded equal rights of sovereignty and independence and an end to the way in which the third world countries were treated as inferior. Second, just and equal self determination. Third, racial justice and equality. Fourth, economic justice. Fifthly, the Third World countries demanded justice in cultural affairs and freedom of expression (Bull, 1984a, 209-12).
Table 3.1 Differences between Bull’s pluralism and solidarism

<table>
<thead>
<tr>
<th>Bull’s Pluralism</th>
<th>Bull’s Solidarism</th>
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<tbody>
<tr>
<td><strong>The significance of order for justice</strong></td>
<td><strong>The significance of order for justice</strong></td>
</tr>
<tr>
<td>We can only accomplish more justice if this justice is grounded on a strong international order. A balance of power is essential for realising international law, and the existence of shared values.</td>
<td>Order can only be worth the effort if it sustains justice within a society: Order alone has nothing to say about the moral value of such a society, for such a society has to be judged in ‘terms of the contribution to individual well-being’.</td>
</tr>
<tr>
<td><strong>The significance of justice for order</strong></td>
<td><strong>The significance of justice for order</strong></td>
</tr>
<tr>
<td>Justice is not necessary to achieve order: States with a minimum of justice can agree on state order.</td>
<td>An unjust world is also disorderly: order has to be based on ‘minimal ideological consensus and therefore ‘solidarist sentiments’ are needed in the society of states.</td>
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§3.3 The English School as a normative model

3.3.1 The harm principle

We have seen the different ways in which solidarism and pluralism understand the relation between order and justice. In the above we saw how justice and order are related according to the English school. We have defined justice as the moral rules conferring rights and duties upon actors. However we have not yet seen how the English School determines which moral rules confer rights and duties upon actors. To answer this question we now turn to the moral foundation of the English School, namely the ‘harm principle’, and we shall find out how this principle is related to the principles of ‘good international citizenship’.

The English School believes that the society of states places restrictions on the state’s ‘power to hurt’ (Linklater and Suganami, 2006, 117-8). These restrictions are not only derived from concerns about the balance of power, but also from ethical considerations. More specific, these restrictions can come from the idea of states (according to Donolan) that they have a
‘negative duty to minimize injury to others’ (p. 170). The English School is concerned with this so-called ‘harm principle’ to the extent that it can contribute to order between states.

The thought of Immanuel Kant can be very helpful in this respect. According to him states try to escape from a state of nature, and thereby substitute a lawless situation with civil society. This society offers ‘each party equal protection from the injurious actions of others’ in other words, this society embraces a ‘harm principle’ (Linklater and Suganami, 2006, 170). This ‘harm principle’ needs to be backed up by moral notions of sovereignty in which states are responsible for global moral principles (p. 173). The international theory of Kant is concerned with the question how states can evolve in cooperation with the cosmopolitan ideal that individuals are entitled ‘to the protection of the harm principle in their own right’ (p. 159). Kant makes in his book Perpetual Peace a distinction between rules that are immediately binding and more flexible principles. This suggests that Kant is trying to move from an international system towards an international society based on cosmopolitan values, in which ethics are approached with prudence (pp. 169-70).

Kant tries to deepen ‘political commitments to the harm principle so that international order would respect not only equal rights of all states but also the moral standing of non-sovereign communities, including indigenous peoples, and all human beings as ends in themselves’ (p. 174). To accomplish this goal the international society has to be transformed to a situation in which the ‘individuals rather that states are the fundamental members of

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28 When Jackson combines this insight with the idea that everything in international ethics depends heavily on the context, it led him to argue that you need the ‘political virtue’ of prudence to implement the rule ‘to take care not to harm others’ (Jackson, 2000, 19, 20).

29 Linklater describes that there are three reasons why the harm principle has an important role to play.
   1. History shows that states want to inflict harm on other states. One of the central problems in international society is to persuade states to stop using their power to hurt.
   2. Because of the vulnerability of men they are members of ‘bounded political communities’. People develop ‘limited sympathies’ and ‘limited altruism’ that does not exceed the boundaries of their political group, this can have damaging effects on the cosmopolitan ideas.
   3. Societies and individuals often have ‘irreconcilable’ ideas about ‘the good life’. But did does not mean that they can not agree on eliminating injurious action (Linklater and Suganami, 2006, 177). This last reason is closely related to Bull’s idea that every political order seeks to protect primary goals even tough there are serious differences about the meaning and place of justice (p. 177).

30 For instance Linklater points out that Kant is much more related to the rationalism of the English School than was pointed out by Wight and Bull. Linklater attacks the ideas of Wight and Bull (e.g. Bull, 2002, 24) to see Kant as a revolutionist. Linklater states that although Kant believed in the possibility of perpetual peace he is not an advocate of the world government because he preferred a loose confederation in which states tried to achieve this perpetual peace. Kant thought that an international society can be achieved in which individual human rights were respected, a position that is closely related to the English School solidarist perspective (Linklater and Suganami, 2006, 161-2). But Kant did defend the principle of non-intervention because he thought that it could easily evolve into global despotism (Kant, 1970, 223). He thought that it would be better to maintain the sovereignty principle and try to improve the international society by bringing violations of human rights to the attention. This is formulated by Linklater as: ‘Kant found a solution to the tension between pluralist and solidarist principles in the development of a rudimentary global public sphere in which non-state actor would take the lead in ‘constructing world culture’ (Linklater and Suganami, 2006, 162).
international society – the main agents of moral standing’ (p. 179). If we want to accomplish this goal, Kant clarifies that it requires consideration in three different areas, namely:

1.) Protection from unnecessary injury in warfare: In this respect ‘the society of states has made significant progress in incorporating the (Stoic) principle that states and their representatives which harm individuals unnecessarily stand outside the human community’ (p. 180).

2.) Security from human rights abuses caused by national governments: ‘Members of the English School who have focused on the respects in which the universal human rights culture can bridge the gulf between international order and world order have contributed to the restoration of a Kantian cosmopolitan project which was once generally regarded as incompatible with the sophisticated study of international society’ (p. 181).

3.) Protection from the wrongs that occur within world society: Vincent (1986) claims that the affluent societies have the responsibility to take care of the victims because ‘their well-being and the misery of others are not unrelated’ (Vincent, 1986, 127, 147). The problem however is that these relationships are difficult to prove, but if the affluent countries benefit from arrangements that cause harm on the vulnerable, there is no reason to see this as less serious than harm (Linklater and Suganami, 2006, 184).

Kant believed that moral agents have to recognize the ‘positive obligations of benevolence’ and the ‘negative obligations to avoid injury’. Just as modern English School members such as Jackson (2000), Kant sees this positive duty as limited to close associates such as co-nationals. He then concludes that human society might survive without acts of benevolence but not without prohibitions on conducting harm (Linklater and Suganami, 2006, 178-9). We could by now state that the harm principle is essential to ideas on how states should behave in the international society. Linklater therefore summarizes: ‘Pluralist arrangements build respect for the harm principle into the society of states; solidarist principles of good international citizenship demonstrate how existing normative commitments to minimize harm can be pushed in a cosmopolitan direction’ (p. 243).

3.3.2 Good international citizenship

In the 1980’s, Gareth Evans, (the future co-chair of the ICISS, by then the foreign minister of Australia) coined the term ‘good international citizenship’. He used it to describe a vision of ‘more internationalist Australian foreign policy in which the promotion of legitimate national interests and goals would be moderated by what Bull (1973) called ‘purposes beyond
ourselves’’ (Linklater and Suganami, 2006, 227). According to Wheeler and Dunne this idea of good international citizenship can be placed within the international society tradition of the English School (Wheeler and Dunne, 1998, 856). It suits to Bulls conviction that it is the states responsibility to ‘strive to reconcile the need for order with the desire for justice’ (Linklater and Suganami, 2006, 227). At first instance it might seem that the idea of good international citizenship is an element of the solidarist mind-set. However, if we see good international citizenship as a part of the ‘international society tradition’ then it might support the pluralist idea of the importance of sovereignty and the principle of non-intervention.

Linklater and Suganami formulate some basic principles of good international citizenship. According to them, good international citizenship should at least contain the following principles:

1.) The need for restraint in the pursuit of national objectives.
2.) Respect for the principle of reciprocity.
3.) Recognition of the existence of the security dilemma.
4.) The commitment to a fair balance between national security and feelings of insecurity for other nations (p. 237).

When the idea of human rights is given a place within this idea of good international citizenship, some other principles should be followed as well. Linklater and Suganami then recognize an additional seven principles of good international citizenship.

1.) Subject to United Nations approval, solidarist states can exercise a collective right of intervention on humanitarian grounds when gross violations of human rights occur.
2.) The good international citizen may believe there is a strong moral case for unilateral intervention, but doubts about legality require a global dialogue.
3.) Solidarists have a prima facie duty to avoid being complicit in human rights violations in other societies.
4.) There is a related obligation to avoid exploitation as well as profiting form unjust enrichment.
5.) There is a duty to protect vulnerable peoples from terrible hardship.
6.) Affluent societies have global environmental responsibilities.
7.) Obligations to protect the vulnerable require the establishment of global political structures (Linklater and Suganami, 2006, 254).
The principles of good international citizenship summed up above are not accepted by everyone as the general rules of what it means for a state to behave justly. For instance the pluralist and the solidarist have a different idea of this good international citizenship, and we are therefore going to mention briefly their main arguments.

3.3.2.1 The pluralist principles of good international citizenship
Discussing pluralist principles of good international citizenship shows that there a lot of different ideas of order and justice within pluralism. For instance Martin Wight understands the position of the state as a trustee of its citizens. States should therefore protect the rights of the people they serve and are ‘bound to give away anything that their people may in justice claim (Linklater and Suganami, 2006, 234). Not all pluralist thinkers share this line of thought. For instance Robert Jackson claims that the ‘first duty of a government is to protect its own people, after that it can try to help whomever else it can’ (Jackson, 1995, 122).

Linklater makes clear that states have a responsibility to outsiders if they want to behave as good international citizens. More precisely, Linklater is convinced that governments are not allowed to place costs on outsiders that are too high. ‘Principles of good international citizenship in a pluralist international society are concerned with creating and preserving international harm conventions which work to the advantage of the great powers (...) but they are not the same as efforts to develop cosmopolitan harm conventions which have the specific objective of extending protection to individuals and non-sovereign communities in their own right’ (Linklater and Suganami, 2006, 240; Bull, 1984b, 187).

3.3.2.2 The solidarist principles of good international citizenship
According to some solidarists, states can be good international citizens if they try to prevent crimes against humanity through some kind of security community. According to Linklater this security community ‘weakens the significance of national sovereignty and (...) replace[s] the balance of power as the keystone of international order’ (Linklater and Suganami, 2006, 246). This position is for instance supported by Wheeler and Dunne who state that good international citizens do have a responsibility to use force to ‘prevent genocide and mass murder’ (Wheeler and Dunne, 1998, 869). They declare that states can authorize ‘killing to defend human rights, the good international citizen must be prepared to ask its soldiers to risk and, if necessary, lose their lives to stop crimes against humanity’ (p. 184). In reaction to this
statement, Linklater notes that ‘[t]he notion that good international citizenship requires this form of self-sacrifice goes well beyond the English School’s traditional thinking about such matters’ (Linklater and Suganami, 2006, 230). And by making such a strong statement the pluralist vision on good international citizenship appears weak and might even be regarded as a ‘second best’ morality (p. 242).

From our point of view there are two reasons to differ from Linklater in this perspective. The first reason is that the strong wording of Wheeler and Dunne does not place them directly outside the English School thought. We can for instance refer to Bull who emphasized that some crimes are so abhorrent that ‘it is possible for practical purposes to proceed as if [there] were natural rights’ (Bull cited in Linklater and Suganami, 2006, 243). Secondly, because solidarism and pluralism have a different idea of the way justice and order are interrelated; it is easy to explain their different ideas on justice. As a result, the position of Wheeler and Dunne does not necessarily lead to a description of pluralist thought as ‘second best morality’. Because if pluralists agree that all people at any time deserve to be protected, the best way to realise this goal can be the securing of order in the anarchical society. This point of view can be found in Linklater’s writings when he stated that: ‘Pluralist arrangements build respect for the harm principle into the society of states; solidarist principles of good international citizenship demonstrate how existing normative commitments to minimize harm can be pushed in a cosmopolitan direction’ (p. 243).

§3.4 The English School and intervention on humanitarian grounds

Now we have summarized the different ethical considerations within the continuum of pluralism and solidarism, we are going to analyze how pluralism and solidarism deal with intervention on humanitarian grounds. It is obvious that the relationship of the Western states with the post-colonial world of the early seventies has changed significantly during the last decades. The most important changes are the flux from the bi-polar world of the Cold War, into the single superpower of the United States, and afterwards the decline of the US and the rise of the BRIC countries. The question arose on the effect of this change for the international order, and most notably what this change meant for the idea of intervention on humanitarian grounds. This question led to contradicting opinions within the English School
between next generation pluralist and solidarist thinkers. Two groundbreaking works in this respect where both published in the year 2000, namely the pluralist *Global Covenant* written by Robert Jackson and the solidarist *Saving Strangers* written by Nicholas Wheeler. Wheeler (together with Timothy Dunne) argued that the end of bipolarity made it possible for states to agree that new principles of intervention on humanitarian grounds should be embedded in the constitution of international society. Jackson on the other hand did not agree. According to Jackson, most serious violations of human rights did occur during military conflicts. Preserving constraints on violence between states, and enhancing the stability between the great powers should therefore take priority over ‘humanitarian war’.

3.4.1 A pluralist idea of intervention on humanitarian grounds

Jackson recognized that in the classical international ethics, non-intervention is a preventive norm to stabilize international society. Intervention can therefore only be justified if the non-intervention principle can be set aside. Setting the non-intervention principle aside can be justified on three different grounds, namely 1.) protection of the international order, 2.) consent of the target state, and 3.) humanitarianism (Jackson, 2000, 252). Ever since the ratification of the UN Charter, the international society is hostile towards the practice of using humanitarianism (#3) to legitimate intervention. Most exemplary in this respect is the UN General Assembly declaration of 1970 on ‘Principles of International Law concerning Friendly Relations and Cooperation among States’ asserting that ‘the practice of any form of intervention violates the spirit and letter of the Charter’ (Jackson, 2000, 253-4). Jackson subscribes that it might be against the Charter to use humanitarianism to justify intervention and it is even potentially dangerous for international order.

Jackson continues his discussion by analyzing four (then) recent interventions on humanitarian grounds in Iraq, Somalia, Bosnia and Kosovo. These case studies made plain that normative grounds for intervention are not too important. Jackson sees the development that states (e.g. the USA) do not want to risk the lives of their soldiers for humanitarianism or to protect human rights. He did however not conclude that humanitarianism is empty rhetoric, because normative considerations have a significant value for the players involved. ‘But it would be a mistake to conclude from these cases that solidarism is pre-empting pluralism in international ethics. Rather, they indicate that humanitarianism can be pursued within the pluralist framework of international society at least up to a point’ (p. 289). Jackson However

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31 Jackson continues his argument by noting that abstract philosophical inquiry, instrumental policy analysis or political economy analysis are not useful in the discussion on humanitarian intervention, because they are not able to offer a way in which the non-intervention principle can be set aside (Jackson, 2000, 250-1).
is such a convinced pluralist that in critical situations he sets aside these ethical considerations. He stated: ‘In my view, the stability of international society, especially the unity of the great powers, is more important, indeed far more important, than minority rights and humanitarian protections in Yugoslavia or any other country – if we have to choose between those two sets of values’ (p. 291). To strengthen his argumentation Jackson gives an analysis of the intervention in Kosovo. According to him it is difficult to analyse after a conflict whether an intervention had a positive effect on the population. Therefore it might be better to fall back on the classic international ethics such as the non-intervention principle. In the case of Kosovo the intervention from NATO ‘may have made the humanitarian disaster worse rather than better. What it made definitely better were the secessionist prospects of the Kosovo Albanians’ (p. 293).

3.4.2 A solidarist idea of intervention on humanitarian grounds

In the same year that Robert Jackson published *Global Covenant*, Nicholas Wheeler published his book *Saving Strangers* (2000). In this book Wheeler stated that ‘humanitarian intervention exposes the conflict between order and justice at its starkest’ (Wheeler, 2000, 11). The book builds upon Bull’s project in showing how pluralism and solidarism create competing approaches on the legitimacy of intervention on humanitarian grounds (p. 12). According to Wheeler we should ask ourselves why we need to follow the rules that constitute the international pluralist society if they ‘enable states to commit gross abuses of human rights’. The solidarists therefore claim that ‘states that massively violate human rights should forfeit their right to be treated as legitimate sovereigns, thereby morally entitling other states to use force to stop the oppression’ (p. 12). This is a statement that is strikingly similar to the principle of the ICISS R2P, but it is also a statement that is not widely supported within the international society.

Wheeler explains that most pluralist defend the rules that regulate the society of states on the ground that they contain ‘plural conceptions of the good’. This idea of the good is based on the notion that order is the best we can try to achieve. Because (according to Bull) order is essential for the ‘protection and promotion of the individual well-being’. This is a defence of the non-intervention principle on basis of ‘rule consequentialism’; the well-being of all the individuals is better served by a central rule that prohibits interventionism, then allowing states who have the power to carry it out. Wheeler describes that pluralists prefer to control the existing order and embrace the diversity between states. However, in controlling
this order we have to respect the diversity between states, and it is this diversity that give states ‘the right to mistreat their populations’ (Brown cited in Wheeler, 2000, 27). Wheeler writes: ‘The pluralist concern is that, in the absence of an international consensus on the rules governing a practice of unilateral humanitarian intervention, states will act on their own moral principles, thereby weakening an international order built on the rules of sovereignty, non-intervention, and non-use of force’ (p. 29).  

The above makes clear that solidarism in the perspective of Wheeler is not an unrestricted effort to try to increase the amount of justice ‘no matter what’. Therefore Wheeler tries to formulate restrictions, in which he finds the American philosopher Michael Walzer very helpful. According to Michael Walzer intervention on humanitarian grounds ‘is justified when it is a response (with reasonable expectations of success) to acts ‘that shock the moral conscience of mankind’ (Walzer, 2006, 107). Wheeler formulates four requirements that an intervention should meet before it can qualify as humanitarian. These criteria are derived from the Just War tradition.

1.) Just cause: Wheeler calls it ‘supreme humanitarian emergency’. This is the case when the ‘only hope for saving lives depends on outsiders coming to the rescue.

2.) Last resort: states are only allowed to use force if that is the last resort. Did does not mean that the have to wait ‘for thousands to die’ but they need to explore ‘all avenues that are likely to prove successful in stopping the violence.

3.) Proportionality: the level of force should not exceed the harm that it tries to prevent.

4.) Positive humanitarian outcome: It is never sure whether action will lead to a just end but the outcomes can be judged on the question whether people are ‘rescued’ (short term goal) or ‘protected’ (long term goal) (Wheeler, 2000, 34-7).

Table 3.2 is designed to grasp the pluralist and solidarist ideas of respectively Jackson and Wheeler on the significance of order and justice within intervention on humanitarian grounds.

32 Other objections to intervention on humanitarian grounds are raised by realist. Their first objection is that humanitarian claims are a cover for national self-interest. The second objection is that states only want to risk the lives of their soldiers if ‘vital interests’ are at stake. Third, legitimating intervention on humanitarian grounds would mean that states would apply the rules more selectively. Wheeler takes these realist and pluralist visions seriously, and agrees with Bull that questions of intervention on humanitarian grounds can be of a great danger to international order because states have different ideas of justice (p. 29).
Table 3.2 Jackson’s and Wheeler’s vision on intervention on humanitarian grounds

<table>
<thead>
<tr>
<th>Jackson’s Pluralism</th>
<th>Wheeler’s Solidarism</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The significance of order in intervention on humanitarian grounds</strong></td>
<td><strong>The significance of order in intervention on humanitarian grounds</strong></td>
</tr>
<tr>
<td>The stability of international society is far more important than ‘minority rights and humanitarian protections’. The difficulty of determining whether an intervention had a positive effect makes it better to fall back on the non-intervention principle.</td>
<td>Intervention on humanitarian grounds can be a great danger to international order because states do have different ideas of justice. Solidarism in the perspective of Wheeler is therefore not an unrestricted effort to try to increase the amount of justice ‘no matter what’.</td>
</tr>
<tr>
<td><strong>The significance of justice in intervention on humanitarian grounds</strong></td>
<td><strong>The significance of justice in intervention on humanitarian grounds</strong></td>
</tr>
<tr>
<td>Intervention on humanitarian grounds is potentially dangerous for the international society, because in the absence of an international consensus on the rules governing a practice of unilateral intervention on humanitarian grounds, states will act on their own moral principles, thereby weakening an international order.</td>
<td>The central idea of solidarism about intervention on humanitarian grounds is that ‘states that massively violate human rights should forfeit their right to be treated as legitimate sovereigns, thereby morally entitling other states to use force to stop the oppression’.</td>
</tr>
</tbody>
</table>


3.4.3 Pluralist and solidarist principles for intervention on humanitarian grounds

In this chapter we have seen how the English School subdivisions of solidarism and pluralism understand the international society. Most notably in this respect are their different ideas on the place of order and justice in international society. In this thesis we like to answer the question to what extent the existing international order can be influenced by the way the Responsibility to Protect principle tries to achieve a more just international society. Giving an answer to this question requires a specific framework, which is in our case the solidarist and pluralist perspective. For the sake of comparing the perspectives of the ICISS and Ban Ki-moon and the pluralist and solidarist point of view Table 3.3 summarizes the solidarist and pluralist point of view on intervention on humanitarian grounds. If we compare Table 3.3 with Table 2.2 we can see that there are certain similarities. We think that it is fair to state that the Ban Ki-moon report has pluralist characteristics, whereas the ICISS report has some
solidarist characteristics. These differences and similarities are going to be compared in the next chapter.

Table 3.3 *Ideas of just intervention on humanitarian grounds according to pluralism and solidarism*

<table>
<thead>
<tr>
<th>Pluralist ideas of just intervention on humanitarian grounds</th>
<th>Solidarist ideas of just intervention on humanitarian grounds</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Just cause</strong></td>
<td><strong>1. Just cause</strong></td>
</tr>
<tr>
<td>- Intervention in the internal affairs of member states to promote some vision of human decency or human justice is prohibited.</td>
<td>- Intervention on humanitarian grounds ‘is justified when it is a response (with reasonable expectations of success) to acts ‘that shock the moral conscience of mankind. Wheeler calls it ‘supreme humanitarian emergency’. This is the case when the ‘only hope for saving lives depends on outsiders coming to the rescue.’</td>
</tr>
<tr>
<td>- Intervention can be legitimated (if the target state does not agree) by an appeal to:</td>
<td></td>
</tr>
<tr>
<td>1.) Protection of the international order</td>
<td></td>
</tr>
<tr>
<td>2.) Humanitarianism</td>
<td></td>
</tr>
<tr>
<td>Using humanitarianism to justify intervention might be against the UN charter and it is even potentially dangerous for international order.</td>
<td></td>
</tr>
<tr>
<td><strong>2. Competent authority</strong></td>
<td><strong>2. Competent authority</strong></td>
</tr>
<tr>
<td>- The only actor that might be competent for intervention on humanitarian grounds is the state, but the authorisation for intervention need to come from the Security Council.</td>
<td>- For the solidarist the international society consists of individuals and the various communities and associations to which they belong. This led to the fact that Sovereignty does not entitle states to be free from ‘the legitimate appraisal of their peers’ with respect to human rights.</td>
</tr>
<tr>
<td>- Because of their unique military capabilities the great powers should assume special responsibilities which are determined by mutual consent for preserving international order.</td>
<td>- There are some restrictions to the competence of the higher authorities, for instance superior orders do not justify violations of humanitarian international law. And the acts of states should be in compliance with the international law of human rights.</td>
</tr>
<tr>
<td><strong>3. Right intention</strong></td>
<td><strong>3. Right intention</strong></td>
</tr>
<tr>
<td>- States have an duty to try to maintain an equilibrium of power</td>
<td>- States have responsibilities as custodians of human rights everywhere. Regard for human rights requires respect for non-sovereign communities and requires the society of states to protect minority nations and indigenous peoples from unnecessary suffering.</td>
</tr>
<tr>
<td>- An essential purpose of foreign policy is to make changes to international society which will satisfy the legitimate interests of rising powers and new member states.</td>
<td></td>
</tr>
<tr>
<td><strong>4. Limited objectives</strong></td>
<td><strong>4. Limited objectives</strong></td>
</tr>
</tbody>
</table>


- Proportionality in war should be respected along with the principle that defeated powers should be readmitted as equals into international society.

5. Last resort
- Humanitarian intervention should be heavily restricted because the use of force is justified in self-defence and in response to states that seek preponderant power.

- Unnecessary suffering and cruelty to individuals and their immediate associations should be avoided in the conduct of war. And the level of force should not exceed the harm that it tries to prevent.

5. Last resort
- States are only allowed to use force if that is the last resort. This does not mean that they have to wait ‘for thousands to die’ but they need to explore ‘all avenues that are likely to prove successful in stopping the violence.’


Conclusion

In this chapter we created a framework to analyse the way intervention on humanitarian grounds influences the relation between order and justice in the international society. In this chapter we saw how pluralism and solidarism have a different understanding of the value of order and justice in international relations. Secondly we saw how these differences lead to conflicting ideas about what it means for a state to be a ‘good international citizen’. In the third place we saw how solidarism and pluralism come into conflict when they discuss intervention on humanitarian grounds. And finally we tried to translate the differences between the solidarist and pluralist interpretation of order and justice into the criteria of the just-war theory, that we used in second chapter to compare the ideas about the R2P of the ICISS and Ban Ki-moon.

In this thesis we try to answer the question: To what extent can the existing international order be influenced by the way the Responsibility to Protect principle tries to achieve a more just international society? The thorough analysis of pluralism and solidarism and their different interpretation of justice have given us the tools to analyse the relation between justice and order. We can therefore use the differences between solidarism and pluralism as an explanatory model of the way that the concept of R2P influences the
international society. But next to using the pluralism and solidarism as an explanatory model, they are also a normative model, describing how states should behave. In the final chapter of this thesis we are going to use the solidarist and pluralist ideas about humanitarian intervention as an explanatory model and as normative model to analyze the ICISS and Ban interpretations of R2P.
Chapter 4: Analysing order and justice in the R2P

Introduction
In this final chapter we are bringing the research of the previous chapters together, draw a conclusion, and compare this conclusion with recent literature on the R2P. The central question of this chapter is: To what extent can order and justice in the international society be changed by the R2P principle, and does the current discussion on the R2P deal with the problems that could arise from this change?

An answer to this main question is going to be formulated in four different paragraphs. In the first paragraph we are going to determine whether the R2P principle can influence the international order. In the second paragraph we are going to point out what kind of justice the ICISS R2P and the Ban R2P try to achieve. In the third paragraph, we are going to use the framework of the English School to describe how the R2P principles might influence the existing international order. In the final paragraph we are going to compare our findings with recent literature and determine whether the recent literature on R2P deals adequately with the difficulties that are addressed in this thesis.

§4.1 The R2P principle and its effect on the international order

In the first chapter we have described international law as a codification of the existing relationship between order and justice in international society. To determine to what extent the R2P principles can influence the international order, we need to know how the R2P approaches are related to international law. In general, both R2P approaches respect the current international law. This is not a surprise because the ICISS report was supported by the UN, and the Ban Ki-moon report was written under the auspices of the UN. Both reports accept the current Westphalian concept of sovereignty, as it can for instance be found in UN charter article 2.1 and 2.7 (ICISS, 2001, 12-4; SG Report, 2009, 4). The two concepts furthermore recognize the non-intervention principle, and the way the UN institutions could set this non-intervention principle aside in particular situations. The acceptance of the UN framework is an acceptance of the way order in international relations is regulated. This does not mean that the reports totally agree with the way order in the international community is
regulated, but they state that the current international law is their starting point. Both the ICISS R2P and the Ban R2P recognize moral obligations for the international community, for instance the Universal Declaration of Human Rights of 1948 and the two Covenants of 1966 (ICISS, 2001, 14; SG Report, 2009, 5,6).

There is a huge difference between completely agreeing with international law or taking it as a point of departure. If we are confronted with international laws that are unjust, we should turn to ‘existing laws that underpin the value of our society’ (Higgins, 2009, 280). Rosalyn Higgins describes the R2P as a framework to discuss the issues of intervention that can be used in the case that intervention is obstructed by international law. Because the ICISS- and Ban R2P are including ethical considerations into their R2P principles, they make it possible to analyse to what extent the international law is just.

Next to the use of the R2P principle to evaluate international law, the R2P principle can itself become international law. In this respect we can mention the 2005 World Summit Outcome Document, that is to a certain extent binding to the UN Member States. A discussion of other influences of the R2P principle on the international law can for instance be found in an article by Alex Bellamy and Ruben Reike’s, titled: The Responsibility to Protect and International Law. In this article two sets of legal responsibilities are discussed; namely the responsibility of the state towards its population, and secondly the responsibilities of states to people in other states (Bellamy and Reike, 2010, 267). In relation to the first issue, Bellamy and Reike formulate that R2P does not change anything because their already exists customary international law, considered to be *jus cogens*, by which states have a peremptory responsibility to protect their population (pp. 275-9, 285). In relation to the legal responsibility of the international community, Bellamy and Reike point to the *Bosnia v. Serbia* case (2007) in which the International Court of Justice (ICJ) ‘found that the Article 1 obligation to prevent genocide requires states ‘employ all means which are reasonably available to them’’ (Bellamy and Reike, 2010, 281). If we combine this verdict with the R2P principle, it ‘goes some way towards establishing a legal duty to intervene on the part of the UN Security Council’ (p. 283). That is going to ‘indicate an emerging legal duty to intervene to prevent and halt genocide’ (p. 285). Bellamy and Reike detect that statements by the ICJ and the International Law Commission (ILC) might lead in the end to an ‘evolution of a legal duty to respond decisively to genocide and mass atrocities that inheres on Member States generally, the Security Council in particular, and the UN system as a whole (p. 286). All in all this made clear that the R2P principle could certainly influence the international order,
moreover, there are already international norms that support the R2P’s objective to prevent crimes against humanity.

§4.2 The element of justice in the R2P principles

In the third chapter we already saw the importance of the harm principle and the principles of good international citizenship. By means of these principles we can evaluate to what extent political decisions and international law can be called ‘just’. If we want to know to what extent the ICISS and Ban approaches of R2P considers states to be morally obliged to prevent crimes against humanity, the harm principle and the principles of good international citizenship are a good starting point.

4.2.1 R2P and the harm principle

The harm principle includes that states have a negative duty to minimize injury to others (Linklater and Suganami, 2006, 170). According to Kant, this harm principle helps to escape the state of nature, because it offers protection against injurious actions of others. Kant tries to deepen ‘political commitments to the harm principle’ (p. 174). This leads to a situation in which the international order respect the equal rights of all states, and respect ‘all human beings as ends in themselves’ (p. 174). To accomplish this goal the international society needs to accept that ‘individuals rather than states are the fundamental members of international society – the main agents of moral standing’ (p. 179). To determine whether the R2P approaches are connected to this interpretation of the harm principle we look at three different areas, namely: 1.) Protection from unnecessary injury in warfare. 2.) Security from human rights abuses caused by national governments. 3.) Protection from the wrongs that occur within world society (pp. 180-184). In Table 4.1 we can find a brief overview of this commitment of the R2P approaches to the harm principle.

Table 4.1 R2P and political commitments to the harm principle

<table>
<thead>
<tr>
<th>Political commitments to the harm principle</th>
<th>Ban R2P</th>
<th>ICISS R2P</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.) Protection from unnecessary injury in warfare</td>
<td>Yes SG Report, 2009,22</td>
<td>Yes ICISS, 2001, 37</td>
</tr>
</tbody>
</table>
4.2.2 R2P and the principles of good international citizenship

The harm principle in the international context is closely related to the principles of good international citizenship. We have seen that the principle of good international citizenship originated in the 1980’s and is in line with Bull’s idea that we should ‘strive to reconcile the need for order with the desire for justice’ (Linklater and Suganami, 2006, 227). Basic principles of good international citizenship are formulated in Table 4.2, in which we compare these principles with the ICISS- and Ban R2P. In this table we see that the Ban R2P and the ICISS R2P are very similar in the way that they suit to the principles of good international citizenship. The only major difference between the Ban R2P and the ICISS R2P can be found in the fifth principle ‘protect vulnerable peoples from terrible hardship’. The Ban R2P is not willing to agree with this element at the first stance, whereas the ICISS sees it as a central element of the R2P.

Table 4.2 The R2P principles and the principles of good international citizenship

<table>
<thead>
<tr>
<th>Good international citizenship</th>
<th>Ban R2P</th>
<th>ICISS R2P</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Restrains in the pursuit of national objectives.</td>
<td>Yes/No</td>
<td>Yes</td>
</tr>
<tr>
<td>(2) Respect for the principle of reciprocity.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>(3) Recognition of the existence of the security dilemma.</td>
<td>Yes</td>
<td>Not clear</td>
</tr>
<tr>
<td></td>
<td>SG Report, 2009, 23-25</td>
<td></td>
</tr>
<tr>
<td>(4) Commitment to a fair balance between national security and feelings of insecurity for other nations.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>1. Subject to United Nations approval, solidarist states can exercise a collective right of humanitarian intervention when</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

gross violations of human rights occur.

2. The good international citizen may believe there is a strong moral case for unilateral intervention, but doubts whether legality requires a global dialogue.  

Yes  
SG Report, 2009, 24  
Yes  
ICISS, 2001, 16, 31

3. A *prima facie* duty to avoid being complicit in human rights violations in other societies.  

Yes  
Yes  
ICISS, 2001, 19-26

4. There is a related obligation to avoid exploitation as well as profiting from unjust enrichment.  

Not relevant

5. There is a duty to protect vulnerable peoples from terrible hardship.  

No  
Yes  
ICISS, 2001, 54-5

6. Affluent societies have global environmental responsibilities.  

Not relevant

7. Obligations to protect the vulnerable require the establishment of global political structures.  

Yes  
SG Report, 2009, 15-20  
Yes  
ICISS, 2001, 19-26


By comparing the ICISS R2P with the Ban R2P in Table 4.1 and 4.2 there are appear at first sight only minor differences. In the case of the harm principle, the only minor differences are a less strict interpretation of the second and third ‘political commitment’. In the case of the principles of good international citizenship the only major difference can be found in the fifth principle. At closer inspection however, these minor differences are significant. This can be seen if we look at Table 2.1 in which we saw:

<table>
<thead>
<tr>
<th>International and interstate order:</th>
<th>International and Interstate justice:</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>A pattern sustaining elementary or primary goals of the international society.</em></td>
<td><em>The rules held to confer rights and duties upon states.</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>World order:</th>
<th>Cosmopolitan or world justice:</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Patterns or dispositions of human activity that sustain the elementary or primary goals of social life among mankind as a whole.</em></td>
<td><em>Ideas which seek to spell out what is right or good for the world as a whole, for an imagined civitas maxima or cosmopolitan society to which all individuals belong and to which their interests should be subordinate.</em></td>
</tr>
</tbody>
</table>

If we compare the way in which the ICISS and Ban interpret the harm principle and the principles of good international citizenship, it is fair to defend the point of view that the ICISS tries to achieve cosmopolitan justice, and as a result world order. On the other hand
concentrates the Ban R2P on international justice and international order. As a consequence the ICISS R2P and Ban R2P have different objectives, which results in a different analysis of the way in which the R2P principle should influence the international order. For the Ban R2P this international order is the final goal, whereas the ICISS R2P tries to achieve a world order.

§4.3 The English School and the influence of the R2P principles on the international order.

4.3.1 English School as an explanatory and normative model
In this thesis we have used the English School as a framework to understand the relation between order and justice in the international society. The English School in this perspective is to a certain extent a value free framework designed to understand the relations between states. In the third chapter we saw the subdivisions within the English School of pluralism and solidarism. These subdivisions were described at an early stage as two ‘contrasting empirical interpretations’. Later on these subdivisions evolved in two ‘normative positions’ (Linklater and Suganami, 2006, 6). This change led to the situation in which the English School is no longer only an *explanatory model* that gives us the tools to understand the way order and justice are related to each other. But it is also a *normative model*, from our point of view this normative model can explain to a large extent the differences between the R2P principles.

In the previous chapters we have concentrated mainly on the R2P justification of intervention on humanitarian grounds, because this most clearly shows how the relation between justice and order could be influenced by the R2P principle. This analysis was constructed around the theoretical framework of the just-war theory (JWT). By comparing the ICISS and Ban Ki-moon interpretation of JWT with the English School perspectives of solidarism and pluralism (Table 4.3), we can conclude that the ICISS has certain solidarist characteristics, whereas the Ban R2P entails some pluralist elements. In this paragraph we are going to compare these approaches more thoroughly to get an idea of the way the R2P deals with the relation between order and justice.
4.3.2 R2P and humanitarian intervention
Because we like to find out to what extent the two approaches of R2P could change the relation between order and justice, we are going to compare them with the English School theory. It would consume too much space to compare the tables from chapter 2 in detail with the tables from chapter 3. But we can see in Table 4.3 to a certain extent how the two R2P’s are in line with the pluralist and solidarist ideas of intervention on humanitarian grounds. In Table 4.3 we can see 1.) that the Ban R2P is in line with pluralism, and 2.) the ICISS R2P is in line with solidarism.

1.) The ICISS principles for military intervention (Table 2.2) are closely related to the solidarist ideas of just humanitarian intervention (Table 3.3). If we compare the content of these tables, we see that the ICISS and solidarist criteria of ‘just cause’ are similar, although the solidarists describe it in less detail. The criteria of ‘competent authority’ are in both cases broad defined, and do not just consist of authorization from the SC. The criteria of ‘right intention’ are in the ICISS and solidarist case centred on the responsibilities for states to stop human suffering. In the case of the criteria of ‘limited objectives’/ ‘proportional means’ the ICISS and the solidarist interpretation do not exclude each other. And the ICISS and solidarist interpretation of the criteria of ‘last resort’ are both concentrating on the fact that before a military intervention of any kind, all other options should be exhausted. By comparing the criteria of the ICISS with the solidarist perspective, we conclude that these theoretical perspectives are closely related to each other. All in all it might be fair to state that the ICISS interpretation of R2P is a solidarist interpretation of R2P.

2.) The Ban interpretation of principles for military intervention (Table 2.2) are closely related to the pluralist ideas of just humanitarian intervention (Table 3.3). If we look at the criteria that are derived from the just-war theory, we see the following resemblance: First, the interpretation of the criteria ‘just cause’, is in the pluralist case formulated in a more restricted way than in the Ban R2P. But the four options that Ban describes that could legitimate intervention (genocide, war crimes, ethnic cleansing and crimes against humanity) can easily be described in terms of protection of the international order, and humanitarianism. Secondly, the criteria of ‘competent authority’ are in the Ban and pluralist interpretation based on the SC which is the only authority that can authorize intervention. This is a much tighter interpretation of ‘competent authority’ than the ICISS and the solidarist interpretations. The third criteria: ‘right intention’ is in the Ban and the pluralist formulation both concentrated on the position on the state. Intervention is not concentrated on protecting individuals, but has to do with helping states to meet their internal obligations which will result in stable
international society. According to the pluralists and Ban the criteria of ‘last resort’ means that the use of force is heavily restricted. This is because the use of force in the UN charter is justified in case of self-defence.

Table 4.3 Comparing the Ban and ICISS table on military intervention (Table 2.2) with the Ideas of just intervention on humanitarian grounds according to pluralism and solidarism (Table 3.3)

<table>
<thead>
<tr>
<th>Criteria from Just War Theory</th>
<th>Ban R2P</th>
<th>ICISS R2P</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Pluralist</td>
<td>Solidarist</td>
</tr>
<tr>
<td>1. Just cause</td>
<td>In line</td>
<td>Partly in line</td>
</tr>
<tr>
<td>2. Competent authority</td>
<td>In line</td>
<td>Partly in line</td>
</tr>
<tr>
<td>3. Right intention</td>
<td>In line</td>
<td>Partly in line</td>
</tr>
<tr>
<td>4. Limited objectives</td>
<td>In line</td>
<td>Partly in line</td>
</tr>
<tr>
<td>5. Last resort</td>
<td>In line</td>
<td>Partly in line</td>
</tr>
</tbody>
</table>

Source: based on Table 2.2 and Table 3.3

4.3.3 R2P and the relation between order and justice
In the above we brought together the R2P approaches and the English School divisions. It became clear that the ICISS R2P is strong related to the solidarist thought of the English School, whereas the Ban R2P is closely related to the pluralist perspective.

We have seen that the English School is as well an explanatory model to evaluate the relation between order and justice as it is a normative model. Now we have shown how the R2P interpretations are related to the English School we can analyse how its normative position influences the R2Ps position on justice and order. In the next part we use the English School to get an idea of the way the ICISS and Ban R2P’s could influence the relation between order and justice.
4.3.3.1 R2P and the English School as an explanatory model

In Table 3.1 we saw how, according to the pluralist and solidarist perspective, justice and order are related to each other. We can state that from a pluralist perspective, order is more important than justice, because justice can only be accomplished if it is grounded in a strong international order. A balance of power is therefore essential for maintaining international law, and sustaining shared values. Justice is not necessary to achieve order because states can agree on state order with a minimum of justice.

If we compare this viewpoint to the ICISS R2P, the ICISS strong focus on justice in international society has a disrupting effect on the international order. This is because the ICISS transfers power from the UN SC to individual states, which changes the existing order in international relations and could thereby seriously harm the anarchical society. The Ban R2P on the other hand does not change the current order, because it only proposes minor changes and tries to strengthen the institutions of the UN. If the Ban R2P is going to be a new definition of state sovereignty it will be a safeguard for the existing relations between order and justice, by which the international community is well served.

Solidarism as an explanatory model places more emphasis on justice. Whereas pluralism sees order as an end in itself, according to solidarism order cannot be the final goal, because order has only value if it sustains justice within a society. Order on its own has nothing to say about the moral value of such a society, because a society needs to be judged in ‘terms of the contribution to individual well-being’. According to solidarism an unjust world is also disorderly, and minimal ideological consensus is needed in the society of states.

From the perspective of solidarism the ICISS R2P should be preferred because it emphasizes justice. Through the ICISS R2P, states will become more responsible to protect the weak and oppressed. This shall result in an international society that is much more predictable, which supports the current order in the international society. The ICISS R2P shall therefore not only improve cosmopolitan justice but also world order. If we analyse the Ban R2P from the perspective of solidarism we come to the conclusion that Ban’s approach will disrupt international order. Ban’s primary focus on order in international society, underestimates the importance of justice to achieve a durable order.

4.3.3.2 R2P and the English School as a normative model

It is also possible to use the English School as a normative model that prescribes the way in which the ICISS R2P and the Ban R2P should try to improve the international society. In
Table 4.3 we already saw that when we talk about legitimizing intervention on humanitarian grounds, the ICISS is closely related to solidarism, whereas Ban is related to the pluralist framework.

The stability of international society is according to pluralists far more important than ‘minority rights and humanitarian protections’. The difficulty of determining whether an intervention has a positive effect ensures that it is better to fall back on the non-intervention principle. In the absence of an international consensus on the rules governing a practice of unilateral intervention on humanitarian grounds, states will act on their own moral principles, thereby weakening international order. This normative perspective of pluralism is in line with the Ban R2P. In the third chapter of this thesis we saw the pluralist perspective of Jackson and Bull in which they emphasized that justice is only of minor importance, and an appeal to justice is not sufficient to legitimize intervention on humanitarian grounds. The way in which the Ban R2P uses justice is therefore nothing more than window-dressing because the actual objective is the reinforcement of the international order.

Solidarism as the other branch of the English School does not only explain the relation between order and justice in the international society, but also describes what kind of justice states should try to achieve. This kind of justice differs between the different solidarist thinkers, but in general it is some kind of cosmopolitan justice. According to solidarism, a violation of this justice can disrupt the international order and therefore legitimate an intervention on humanitarian grounds. The central idea of solidarism about intervention on humanitarian grounds is that ‘states that massively violate human rights should forfeit their right to be treated as legitimate sovereigns, thereby morally entitling other states to use force to stop the oppression’. This statement is strikingly similar to the ICISS R2P. Solidarism can therefore on the one hand be used to explain the way in which the ICISS tries to achieve a more just international society. On the other hand, the ICISS R2P can use the solidarist thought as a normative model to defend its position.

4.3.4 Evaluating the ICISS R2P and Ban R2P
Whether we should prefer the ICISS R2P or the Ban R2P is to a large extent determined by the question whether we support a pluralist or a solidarist worldview. In this chapter we have described the complex relation between the English School and the R2P principle. This complexity is mainly caused by the fact that this relation is two-sided. On the one hand, the
English School gives us the tools to analyze the relation between order and justice, but on the other hand, the English School is a normative model, making plain how states should behave. In their dealing with the criteria from the just-war theory, we saw that the ICISS R2P principle is connected to the solidarist approach, whereas the Ban R2P is connected to the pluralist approach. In our analysis of the harm principle and principles of good international citizenship, we stated that the ICISS R2P is more concerned with the individual in the international society than the Ban R2P. The Ban R2P is endorsing almost the same principles of good international citizenship as the ICISS R2P does, with the important exception of protecting vulnerable people from terrible hardship. We therefore linked the ICISS R2P to cosmopolitan justice and the Ban R2P to international justice. From this perspective the Ban R2P stays close to current international law which is also mainly concerned with the safeguarding of the international order. The ICISS on the other has a more progressive stance in which the protection of the individual becomes the centre of state sovereignty.

The question whether we should prefer the Ban R2P or the ICISS R2P could never be answered in an completely objective way. From our point of view however, the ICISS R2P is preferable because it offers an international society that is more just and more orderly. The first statement is easy to defend. The ICISS R2P tries to achieve cosmopolitan justice. This would create more justice because it gives every individual the opportunity to enjoy its human rights. The Ban R2P on the other hand tries to achieve international justice, in which the state is not responsible to create a society in which the individual is free and protected.

The second statement in which we stated that the ICISS R2P would create a more orderly international society is more difficult to defend. Our argumentation is based on different aspect. In the first place we mention Rosalyn Higgins who stated that judges cannot pick and choose which laws they use, but need to follow the law as it is. However, in the case that ‘the conflict between statute and justice reaches such an intolerable degree (…) the law must yield to justice’. In the international law, intervention is prohibited, but in case of peremptory norms of international law, for instance to prevent genocide, intervention can be legitimate. Because the ICISS R2P places more responsibility to individual states, outside the Security Council authorization. The ICISS R2P offers an approach to deal with individuals that are oppressed and, in the case of gross violation of human rights, the ICISS R2P describes that states are obliged to intervene. The Ban R2P on the other hand is much more open in such situations. This leads to a situation in which there is much uncertainty on whether states need to undertake action. It can therefore be argued that the ICISS R2P leads to an international society that is much more predictable than it would be in the case of the Ban
R2P. In other words, the ICISS R2P offers a framework to use peremptory norms of international law, which eventually makes the international society more orderly.

The question then arises whether this ICISS R2P is not too different from the current international law and would therefore disrupt the current international order. There are a number of reasons why this is not the case. In the first place we have seen that the ICISS R2P is closely related to different peremptory norms of international law. In the second place the ICISS R2P is in line with Security Council and General Assembly resolutions. And in the third place, the ICISS R2P is in line with recent jurisprudence of the ICJ in the *Bosnia v. Serbia case* of 2007, that states have a duty to ‘employ all means which are reasonably available to them’ to prevent genocide’. These points illustrate that the ICISS R2P can become a working norm in the international society and would support the international order.

§4.4 Discussion of R2P in recent literature

The discussion on the R2P principle that we find in recent literature illustrates that there is a lack of consensus on at least three questions. The first question is to what extent the R2P is accepted as a new definition of state sovereignty. The second is whether justice or order are more important in the R2P principle. And the final question is whether the Ban Ki-moon report on R2P is a positive contribution to the R2P debate. By giving a brief summary of recent published articles, we try to show how the discussion is developing, and to what extent it is in line with the analysis of the R2P in this thesis.

4.4.1 R2P a new norm definition of state sovereignty

The discussion whether the R2P is a new definition of state sovereignty is focussing on the questions to what extent R2P is accepted by the international community, and to what extent it is a new norm of international law. The first subject is discussed by Noel Morada who describes the way in which the ASEAN countries were dealing with R2P in the construction of the ASEAN Charter in 2007. According to Morada, this charter affirms the traditional

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33 The articles that we discuss in this paragraph are derived from the journal *Global Responsibility to Protect*. This journal was erected by Alex Bellamy and Sarah Davies in January 2009. In this paragraph we have tried to analyze all the relevant articles of our discussion that where published in the first seven editions.
state-centred norms and affirms consensus decision making. It is therefore strongly limiting the possibilities for R2P in the ASEAN countries (Morada, 2009, 206-7).

In the article of Carment and Fischer, Morada’s analysis of the ASEAN charter is supported. Of all the regional organizations, ASEAN has the weakest endorsement of R2P and the African Union (AU) the strongest. This endorsement of the AU can for instance be found in the fourth article of the AU Constitutive Act which states: ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity’ (AU Constitutive Act, cited in Carment and Fischer, 2009, 274). In the article of Carment and Fischer other regional organization are discussed as well, e.g. the EU, the OSCE and the OAS. Most of these regional organizations do not relate the R2P principle to the use force, because this has enormous political and financial costs (Carment and Fischer, 2009, 263). The prevention element of R2P on the other hand has more impact on the regional organizations.

The issue whether R2P is already a norm of international law is discussed by Jutta Brunnée and Stephen Toope. According to them, most observers conclude that R2P ‘has not yet become a binding norm of international law’ (Brunnée and Toope, 2010, 192). For an international norm to develop, it is important that the ‘norm building process’ has widely shared understanding, and this understanding should be cultivated over time. In this case, textual representation can be helpful. It is therefore important to note that the Summit Outcome was not seen as the ‘culmination of the norm building process, but rather as a platform for further normative interaction and deliberation’ (p. 204). Brunnée and Toope conclude their article by stating that R2P is increasingly supported, but it ‘falls short on several legal criteria (…) notably on generality, clarity, consistency and constancy over time’ (p. 211). If R2P should become a legal norm, then it ‘would shrink the space for political assessments in cases involving failures to protect populations against grave crimes’. This might cause major resistance which would not be limited to the members of the NAM (p. 212).

In an article written by Jennifer Welsh and Maria Banda, the relation between R2P and international law is discussed following two questions. The first question is what the source, and who the bearer is of R2P, the second question is whether R2P has become a legal norm (Welsh and Banda, 2010, 214). According to Welsh and Banda, R2P is not a rule of hard law, but it is a soft-law norm. R2P suffers from indeterminacy, because it is not clear who should be the bearer of remedial responsibility. In general, Welsh and Banda state that R2P’s primary
function is ‘to remind all states of the obligations they have to their own citizens and to clarity the extraterritorial responsibilities they have to strangers’ (Welsh and Banda, 231).

These articles give us an idea of the current view on the question whether the R2P is becoming a new definition of state sovereignty. In general these articles share the point of view that the R2P is just a soft-law norm. To some extent this discussion reminds to the difference between R2P and R2P-lite, that are discussed in our first chapter. For instance in the article of Morada and the article of Carment and Fischer, it is shown that the regional organizations pick and choose between the original elements of the R2P as proposed by the ICISS. Considering international law, it can be argued that R2P does not have a direct legal status but has definitely influenced the development of a new legal norm that gives state the responsibility to prevent genocide. In two articles on R2P and international law, it is stressed that the R2P is not yet a legal norm, and R2P is not a rule of hard law, but a soft-law norm. From our point of view however, the R2P is an emerging legal norm, and it is too early to draw conclusions on whether or not the R2P principle can evolve into international law. But we have described a number of examples that indicate that the R2P is evolving into international law.

4.4.2 Justice and order in the R2P principle

Another major topic in recent published articles on the R2P, is the debate on justice and order in the R2P principle. The first article that we are mentioning was written by Wheeler and Egerton in October 2008, just before the report of Ban Ki-moon on R2P was published (2009, 115-119). In this article they describe the different ways in which the principle of R2P has been used in the years since the publication of the ICISS report. They focus on the Iraq war to illustrate that the different positions on intervention in 2004 were all justified in terms of a responsibility to protect (pp. 125-127). To make it possible to discuss the right way to protect people, an open and fair discussion needs to take place. However in the end this does not take place, because states are not willing to ‘place the lives of their military personnel at risk to save strangers’ (p. 131). Wheeler and Egerton cite in this respect David Reiff who states about the twentieth century that ‘no century had better norms and worse realities’ (Wheeler and Egerton, 2009, 131). And they conclude by stating that Ban Ki-moon can make a change because he has committed himself to the development of R2P.
In November 2008 Ban Ki-moon appointed Edward C. Luck as his Special Adviser on R2P. In an article that Luck published in 2009, he stated that during the 2005 World Summit both the developing world and the developed countries where opposing the R2P. According to Luck, the developing countries where afraid that the R2P could limit their territorial sovereignty, whereas the developed countries where afraid their decision-making sovereignty might decrease. (Luck, 2009, 17-20). According to Luck, most of the resistance came from the idea that R2P is a new concept that might change international relations. Luck illustrates that the R2P concept is closely related to the thought of Thomas Hobbes, who in his *Leviathan* illustrates that the power of the sovereign should not go any further than the sovereign’s capacity to protect. According to Luck that is just what R2P is trying to do, namely protecting people from organized violence (p. 14).

The article of James Pattison emphasizes that the recent change from the notion of ‘humanitarian intervention’ towards a ‘responsibility to protect’ has ‘exacerbated the focus on *ad bellum* issues’ (Pattison, 2009, 365). Pattison states that *jus in bello* is also important for the discussion on humanitarian intervention and R2P. Therefore it should be incorporate within the framework of R2P. Pattison thereby focuses on the justice within R2P, but he neglects the fact that the ‘Principles for Military Intervention’ in the ICISS report are closely related to the JWT.

Adelman describes the discrepancy between the rhetorical success in the adoption of R2P and the absence of practices consistent with it (Adelman, 2010, 127). According to Adelman “there is the problem that there exists no overarching principle that can overcome the differences between those who espouse different fundamental premises for determining international policy”. Adelman indicates John Bolton, as a classical realist who believes that the ‘prime determinants of international affairs are self-interest and power (p. 2010, 144). Adelman warns against placing too much emphasis on the concern for moral principles, because they do not necessarily have to evolve into action. He states: ‘If coherence can be established only by using an overarching ethical theory that can resolve these differences, then we lack the necessary foundation for constructing effective actions’ (Adelman, 145).

Without going in to much detail, from our point of view, citing Hobbes in this respect is not fair. Luck is referring to the ‘right to self-preservation’ which is called by Hobbes the Right of Nature. But in *Leviathan*, Hobbes derives from this right nineteen laws of nature that give ethical responsibilities to states. Hobbes is therefore not only talking about order, but also about justice. Although Luck gives a strong analysis of the reasons why states have obstructed the R2P implementation, he neglects the element of justice within the discussion. See for instance Paul Ricoeur’s *The Course of Recognition* (2005, pp. 161-171). Ricoeur states that the Hegelian notion of *Anerkennung*, which gives an ethical meaning to the notion of recognition, is based on Hobbes ideas about the state of nature.
Adelman then sums up what he calls ‘meta-ethical complementary second order norms’, namely correspondence, coherence, control, consistency, and context (p. 147). He states: ‘So there is a way out of the morass that has little to do with R2P and everything to do with contextualizing solutions to develop policies which are continuing, consistent and coherent but correspond to real facts on the ground and a recognition of the location of the real locus of control for humanitarian policy in a region’ (p. 148). From my point of view, what Adelman tries to achieve, is nothing less, than grounding the elements of justice in R2P in international order. In that respect, the approach of Adelman is not so different from Ban’s interpretation of R2P.

In the articles that we summarized above we can detect that order has a central position in the discussion of the R2P principle. In his book in his book The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All (2008), Gareth Evans tries to defend the element of justice in the R2P principle. In two recent articles Chris Brown and Robert Jackson are strongly opposing the position of Evans. Brown states that Evans constructs his argument around the dichotomy between action to end atrocities and inaction (Brown, 2010, 311). According to Brown this is not fair, because even without legitimation intervention could be excusable. In the end, it might even be better not to make intervention acceptable, because that alters the way people deal with intervention. Brown compares this discussion with euthanasia, which is in most countries an illegal practice, but under some circumstances euthanasia is regarded as a desirable practice and doctors who conduct the practice are not prosecuted. Brown states that to ‘set out in detail the circumstances when euthanasia is acceptable (…) is asking for trouble’ (p. 313). This is because people will exploit such rules which causes people to fear that the euthanasia regulation will be used against. The point that Brown tries to illustrate is quite clear, R2P will ‘change the rules of the international game’. He continues: ‘The possibility that the rules might be exploitable for nefarious purposes, and, worse, the fear that states will have that others might exploit them in such a way, will poison the discussion’ (p. 313).

Robert Jackson displays in his article a strong pluralist point of view. His criticism is mainly pointed towards the sixth chapter of Gareth Evans book in which Gareth Evans tries to

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35 This position of Brown is certainly pluralistic, but it is also closely related to the thought of Reinhold Niebuhr (e.g. Moral Man and Immoral Society, 2004, 22) and Michael Walzer (e.g. Just and Unjust Wars, 2006, 107-108).
Answer the question ‘when is it right to fight?’ (Jackson, 2010, 315, Evans, 2008, 128-47). Jackson is certainly a supporter of the second (pragmatist) viewpoint, in which exclusion of human rights as a cause for war is ‘regrettable but necessary to avert humanitarian wars’. War is a brutal activity that should be prevented because it brings almost always more harm than good.

In an article in the journal Global Responsibility to Protect, Gareth Evans, responds to the criticism of Brown and Jackson (Evans, 2010). In his response to Brown, Evans writes that Brown prefers ad hoc decisions above R2P that seeks to ‘legitimate and mandate intervention more generally’ (p. 324). But according to Evans, ‘this kind of ad hocery is exactly what we have had for so many decades’ and it turned out to be ‘horrifying ineffective’ (p. 324). In the final part of the article, Evans attacks the position of Jackson in a villainous way by stating that Jackson did not ‘wasted any of his time’ on reading Evans book (p. 325). Although we cannot say whether Evans is right in this accusation, it can be argued that this idea of Evans is caused by the fact that he and Jackson are holding different perspectives; Evans is defending a solidarist perspective, whereas Jackson a pluralist one. This is tacitly illustrated when Evans state that ‘it is nonsense to suggest that its advocates [of R2P, JvD], including me, do ‘not squarely face and fully come to grips with’ the issue of the downside risks’ (p. 325). But is a fact that solidarist thought including Evans, would like to change the relations between states what might cause downside risks, whereas pluralist would like to keep the situation as much contained as possible.

This overview of articles proves that there is a serious lack of consensus on the discussion of justice and order. In the articles of Wheeler & Egerton, Pattison, and Evans, justice is more important than order. Whereas in the articles of Luck, Adelman, Brown and Jackson, order is given the central place. From our point of view, the problem with this discussion is that it is not an objective discussion on whether R2P could improve the relations between states, but is more of a normative discussion. These articles show the same pattern as we saw in our analysis of the English School thought. On the one hand the English School is an explanatory model for the relation between order and justice in the international society, but on the other hand it is a normative model as well formulating what kind of order we should strive to

36 Jackson states: ‘Advocates of the responsibility to protect doctrine seem to regard that [the exclusion of violations of human rights as a justification for waging war, JvD] as a regrettable exclusion that fails to address mass atrocity crimes carries out with impunity inside of sovereign nations. Those who disagree are likely to see the exclusion as regrettable but necessary to avert humanitarian wars that could disrupt the sovereignty of states, undermine international peace and security, and cause - perhaps inadvertently – additional human suffering’ (Jackson, 2010, 316).
achieve. This normative and explanatory aspects are interwoven which makes it rather difficult to discuss the relation between order and justice. The same difficulty will appear in the next article that discusses whether the Ban R2P is a positive development in the evolution of the R2P principle.

4.4.3 Discussing the SG report of Ban Ki-moon on the R2P
In much of the recent literature the criticism and support for the SG Report of Ban Ki-moon centers around the position of the UN in relation to R2P. For instance Jennifer Welsh (2010) describes Ban’s report in a positive way, but she remarks: ‘in some sections the report calls for greater UN activism in areas traditionally seen as being within the domestic jurisdiction of states’ (Welsh, 2010, 151). She concludes her article by stating that the SG Report is an ‘important attempt to build consensus around one of the thorniest issues of our time’. Successful implementation should depend on 1.) The willingness of states to take prevention seriously. 2.) The capacity of the UN to absorb the R2P requirements 3.) the ability and authority of the SC to mandate specific action. By underwriting these three elements, Welsh support Ban in its connection of R2P and the UN. The comment of Mónica Serrano on the SG Report is even more positive. She states that it is ‘a document inspired by the need to move the Responsibility to Protect ‘from promise to practice’(Serrano, 2010, 170). And that the SG report should be read as ‘a political treatise intended to add substance to the significance if the 2005 verdict’ (Serrano, 170-1).

There is also criticism on the SG report, for instance from Oxford scholar Hugo Slim. In short, Slim compares the report of Ban with the current state of affairs in Zimbabwe. He states that the focus on the report on the development of values in the country where atrocities might take place, is not suitable to reality. In Zimbabwe, the ruling elite is suppressing the population. Formulated by him, ‘‘doing R2P’ is not just a technical exercise. It is often a deadly struggle’ (Slim, 2010, 160). Other opposition to the SG report comes from the British professor David Chandler. He is strongly opposing Ban’s R2P, because it is very different from the R2P as formulated in the ICISS report. Chandler describes that the R2Ps initial ‘powerful normative challenge to the UN’s status’ is transformed by Ban into one which ‘will enforce its international authority’ (Chandler, 2010, 161). According to Chandler, the 2005 World Summit ‘inverses the problematic at the heart of the 2001 ICISS report – the problem is seen to be the weak institutional capacity of some sovereign states not the legal barrier of sovereignty itself” (p. 164). The SG Report does not revisited this position from the World Summit (§2). To illustrate this point Chandler cites the SG Report in which we can read: ‘the
responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter’ (SG Report cited in Chandler, 2010, 161-2). With this formulation, Ban’s R2P ‘shifts responsibility away from direct Western solutions, whether economic, political or military, and towards indirect Western engagement’ (p. 164-5). According to Chandler, the report of Ban describes that atrocities are caused by institutional shortcomings. Therefore the non-Western state in which most of the atrocities take place, is the bearer of responsibility for mass atrocities. Chandler condemns this rhetoric because: ‘Theses policies flow less from evidence linking institutional frameworks to mass atrocities (§44), than from the desire to lower expectations about both Western willingness and capacity to make a substantial difference to ongoing conflicts and instability’ (Chandler, 2010, 166). In other words, Chandler attacks the way the SG Report transforms the ICISS R2P with its focus on justice, into the Ban R2P that focuses on order. This new approach thereby would be less effective because it neglects the position of the Western states to prevent atrocities.

Edward Luck, the special advisor of Ban Ki-moon, wrote a response to the four articles (discussed above) that Welsh, Serrano, Slim and Chandler published on the SG report (Global Responsibility to Protect, (2010), 149-183). In his response Luck explains that the SG-report is constructed on the World Summit of 2005 (Luck, 2010, 178). Giving this restricted interpretation of R2P, the SG Report focuses on an implementation of R2P placing prevention and state-building at its core. Luck is definitely focusing on the international order, because he thinks that it is the only way that R2P can be put into practice. Luck uses several tautologies to defend his point of view. For instance Luck states:

Policymakers in capitals and delegates in New York are neither stupid nor naïve. In a policy area as consequential and sensitive as RtoP, they are not going to endorse an implementation plan that is clearly hollow, skewed, or unrealistic (Luck, 2010, 179).

In an earlier article Luck uses the same rhetoric:

One of the things that unites states in their approach to RtoP, not surprisingly, is that they are all concerned about preserving their national sovereignty, just in different ways. After all, they are all states and that is what states do (Luck, 2009, 21).
Luck is not referring to ethical obligations for intervention, but concentrates on the existing international order. According to him, the only way that R2P can get a place in international order, is when it suits to state behavior. Welsh warns against such an implementation of R2P, because it might ‘obscure what is truly novel about the concept – namely, generating and exercising the international responsibility to respond to mass atrocities when state authorities fail to protect their populations’ (Welsh, 2010, 151).

The discussion of Ban Ki-moon’s report on R2P is related to the question whether we should focus more on order or justice. Welsh, Serrano and Luck are supporting Ban’s approach, whereas Slim and Chandler are much more skeptic. This discussion centers around two questions that we tried to answer in this chapter. The first is the question whether we should prefer order or justice as the most important element of R2P policy. And secondly, how we think justice and order are interrelated. In this discussion Edward Luck defends himself by pointing to state practice: ‘they are all states, and that is what states do’. The question however, is not only about what states do, but also what states ought to do and how we can change the current behavior of states. These articles show that the discussions on the R2P principle are complicated discussions, in which the arguments are not based on objective research but on personal ideas about international relations.

Conclusion

In this chapter we have tried to answer the question To what extent can order and justice in the international society be changed by the R2P principle, and does the current discussion on the R2P deal with the problems that could arise from this change? In the first part of this chapter we discovered that the R2P principles support the current relation between order and justice in the international society, and that they are able to influence this relationship. We used the pluralist and solidarist framework of the English School to explain the relation between order and justice. Pluralism on the one hand stated that the Ban R2P would result in a much more stable and just international society, than it would be in the case of the ICISS R2P. On the other hand we saw that solidarism stated that the ICISS R2P has to be preferred. When we focused on the English School as a normative model, it became clear that the ICISS R2P is closely related to the solidarist thought, whereas the Ban R2P is related to pluralism. By
explaining the relation between R2P and the English School both from explanatory model and a normative model, it became evident that this relation was rather complex. The reason why we would prefer the ICISS R2P or the Ban R2P would heavily depend on whether we have a solidarist or a pluralist worldview.

When we look at recently published literature in which the R2P principle is discussed, it appears that the complexity of this relation is not always clearly understood. In this literature, little attention is paid to the difference between seeing the relation between justice and order from an explanatory or a normative side. This results in a confusing situation in which the different standpoints are defended by using different lines of argumentation, which results in a never ending discussion. To escape this vicious circle an objective research should be conducted on the question to what extent order and justice are related to each other.
Conclusion

Time and again the international society is unable to respond properly to crimes against humanity. Recent history has shown us dozens of examples in which the international community condemned atrocities but was not willing to start swift intervention. In this thesis we discussed a new and promising solution to this inaction in international society, namely the Responsibility to Protect (R2P). The R2P principle is a completely new way to deal with the issue of intervention on humanitarian grounds because it connects the traditional concept of sovereignty to the protection of civilians. The strength of the R2P principle is the combination of the responsibility of the state to protect its own citizens, and the responsibility to monitor whether other governments fail in their internal obligations. By commenting the policy of other countries, backed up by the possibility to intervene, states can use the R2P principle to prevent the outburst of serious atrocities.

In this thesis we have tried to analyse whether the R2P as a positive effect on the relation between order and justice. Determining the influence that the R2P principle has on this relation shall indicate whether the R2P is the way forward. The central question that we tried to answer is: To what extent can the existing international order be influenced by the way the Responsibility to Protect principle tries to achieve a more just international society?

We started our analysis by describing the development of the R2P principle. The first problem that we faced is that there ain’t no such thing as the R2P principle, because there are different interpretations of this principle. We decided to concentrate on the two major approaches to R2P, namely the original R2P concept as it was formulated in the ICISS report: The Responsibility to Protect (ICISS R2P), and the concept that we found in the report of UN Secretary General Ban Ki-moon: Implementing the responsibility to protect (Ban R2P).

To determine the way in which these R2P principles influence the existing international order, we need to know how the international order is constructed and to what extent the R2P principles endorse this existing international order. In our process to reach this objective we described justice and order in the formulation of Hedley Bull, and discovered that these definitions were closely related to the definition of international law. We therefore found it reasonable to view international law as a codification of the current relation between order and justice. By analysing the ICISS R2P and Ban R2P we saw that both R2P principles respected the way in which the current international law is constructed, but both would like to
move this international law in a certain direction. For instance the ICISS report states that ‘the Charter’s strong bias against intervention is not to be regarded as absolute when decisive action is required on human protection grounds’ (ICISS, 2001, 16). Dame Rosalyn Higgins, explained that when we are confronted with unjust laws we should concentrated on ‘existing laws that underpin the values of our society’. In this respect, the R2P offers a way to deal with unjust laws by linking it to peremptory norms of international law.

But are the ICISS R2P and the Ban R2P trying to achieve the same level of order and justice? To answer this question we looked at the harm principle and the principles of good international citizenship. When we compared the way the ICISS R2P and the Ban R2P interpreted these principles, we detected that the ICISS tries to achieve cosmopolitan justice and world order, whereas the Ban R2P tries to achieve international justice and international order. The main difference between these types of order and justice in the R2P principles is the centralization of the rights of the individual in the ICISS R2P and the centralization of the state in the Ban R2P.

After we had determined the relationship between the R2P principles and the current order in international society, we needed to explain the relation between order and justice. To analyse the way in which the ICISS R2P and Ban R2P could influence the international society, we concentrated on the English School. The English School offers different approaches to analyse the relation between order and justice in international society, divided into ‘pluralism’ (emphasizing order) and ‘solidarism’ (emphasizing justice). The English School thought is on the one hand a model that explains the relation between order and justice, but on the other hand it is a normative model that describes to what extent states should strive to achieve justice and order in the international society.

To find out to what extent the English School thought and the ICISS and Ban R2P are related, we used the criteria of the just-war theory. By formulating the pluralist and solidarist perspective and the ICISS- and Ban R2P in terms of the criteria of the just-war theory, it became possible to compare the currents of the English School with the R2P principles. By comparing these perspectives we discovered that the ICISS R2P is closely related to solidarism whereas the Ban R2P is related to pluralism.

We designed this theoretical structure to answer our main question, but it showed al together that it is not possible to answer our main question in an objective way. This is because the English School is on the one hand an explanatory model that illustrates how the order and justice are related, but it is on the other hand a normative model that describes what
kind of justice and order should be preferred. Whether we have a pluralist or solidarist worldview determine therefore the way in which we see the position of the international society. We therefore formulate two possible answers to our main question, the first is based on the pluralist perspective and the second on the solidarist perspective.

By using the pluralist perspective we see that justice cannot be achieved without order. The Ban R2P is focussing on order in international society and tries to achieve international justice by using the existing institutions of the United Nations. Because the Ban R2P is on a normative level related to the pluralist perspective, the pluralists state that the Ban R2P would have a positive impact on the international society. This is because it creates a more just international society, and also international order.

From the perspective of solidarism the ICISS R2P would be much more desirable. According to solidarism the international society needs to be just, before it can achieve order. The ICISS R2P tries to achieve a world order with cosmopolitan justice. The ICISS uses to a certain extent the existing structure of the international society, but emphasizes that the protection of individuals is more important than respecting the existing notion of sovereignty. From the solidarist perspective the ICISS R2P will change the international society in a positive way. This would result in an international society that is in the end much more orderly.

The question whether we should prefer the Ban R2P or the ICISS R2P cannot be answered in a completely objective way. From our point of view however, the ICISS R2P is preferable because it offers an international society that is more just and more orderly. The first statement is easy to defend. The ICISS R2P tries to achieve cosmopolitan justice, which would create more justice because it gives every individual the opportunity to enjoy its human rights. The Ban R2P on the other hand tries to achieve international justice, in which the state is not responsible to create a society in which the individual is free and protected.

The second statement that the ICISS R2P would create a more orderly international society is more difficult to defend. Our argumentation is based on different aspect. In the first place we mention Rosalyn Higgins who stated that judges cannot pick and choose which laws they use, but need to follow the law as it is. However, in the case that ’the conflict between statute and justice reaches such an intolerable degree (...) the law must yield to justice’. In the international law, intervention is prohibited, but in case of peremptory norms of international law, for instance to prevent genocide, intervention can be legitimate. In the case of the ICISS R2P the individual state is given more responsibility, without the need for Security Council
authorization. The ICISS R2P therefore offers an approach to deal with individuals that are oppressed and, in the case of gross violation of human rights, the ICISS R2P describes that states are obliged to intervene. The Ban R2P on the other hand is much more open in such situations, which results in much more uncertainty on whether states need to undertake action. It can therefore be argued that the ICISS R2P leads to an international society that is much more predictable than it would be in the case of the Ban R2P. In other words, the ICISS R2P offers a framework to use peremptory norms of international law, which eventually creates much more order in the international society.

The question then arises whether this ICISS R2P is not too different from the current international law and would therefore disrupt the current international order. There are a number of reasons why this is not the case. In the first place we have seen that the ICISS R2P is closely related to different peremptory norms of international law. In the second place the ICISS R2P is in line with Security Council and General Assembly resolutions. And in the third place, the ICISS R2P is in line with recent jurisprudence of the ICJ in the *Bosnia v. Serbia case* of 2007, in which we read that states have a duty to ‘employ all means which are reasonably available to them’ to prevent genocide’. These points illustrate that the ICISS R2P can become a working norm in the international society and would support the international order.

In this thesis it was shown that it is not possible to give an objective answer to the question to what extent the R2P focus on justice changes order in international society. This is on the one hand because there are different R2P principles and on the other hand because our explanation of the relation between order and justice depends on the framework that we use. These difficulties are neglected in almost all the recent literature in which the R2P principle is discussed. If the principle of R2P wants to become effective in the future it should be emphasized that not only do the ICISS- and Ban R2P have a different normative idea of international society, but they also have a different idea of the relation between order and justice. This has to result in a more objective analysis of the relation between order and justice in the international society. But should also in a philosophical analysis to what kind of justice state should strive. Only then can consensus emerge in the international society on the questions what the R2P principle should entail and how the international society should respond to crimes against humanity.
LITERATURE


Reports and other consulted documents


