The Need for Post-Conflict Investigatory Mechanisms in the R2P Doctrine

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Abstract

In the wake of atrocities arising from internal armed conflicts in the 1990s, the International Commission on Intervention and State Sovereignty introduced the Responsibility to Protect doctrine ("R2P") as a solution to reconcile the notion of state sovereignty with the need to protect citizens. The lack of available protection for internal armed conflicts and the subsequent evolution of the humanitarian intervention debate facilitated the unanimous acceptance of R2P’s fundamental principles by all UN member states. This paper examines the development of the R2P doctrine and its current status as customary law. By identifying its inadequacies, the paper raises questions of the doctrine’s viability in fulfilling the emerging norm of the collective responsibility to protect. In order to remedy these shortfalls and ensure the doctrine’s effectiveness, the paper argues the need to incorporate post-conflict investigatory mechanisms into the R2P.
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I. Introduction

In 1997, of the twenty-five major armed conflicts that were waged around the world, all but one was an internal armed conflict.¹ Within the twentieth century alone, internal conflicts and tyrannical regime victimization has resulted in more than 170 million deaths.² After WWII, the destruction caused by international armed conflicts has decreased dramatically, while the destruction caused by internal armed conflicts continues to devastate humanity.³

However, hesitant to interfere with the sovereignty of states, international humanitarian law, also known as the “law of war”, failed to evolve so as to offer adequate substantive laws to regulate the conduct of internal armed conflicts. In response to the atrocities of the 1990s, the desire by many UN member states to reconcile the notion of state sovereignty with the need to protect citizens led to the Responsibility to Protect doctrine.

This paper examines the evolution of the Responsibility to Protect (“R2P”) doctrine and its effectiveness in alleviating the suffering faced by individuals in most internal armed conflicts. This paper will argue that without supplementing the doctrine with some form of post-conflict investigatory mechanism, the current inadequacies of the doctrine will be exploited, making the doctrine ineffective.

This paper is divided into two parts. Part I of the paper examines the need for protection in non-international conflicts and the recent development the R2P doctrine as an answer. The paper examines the lack of protection offered by international humanitarian law for internal conflicts. The paper then examines the impact of customary law on internal armed conflicts and the humanitarian intervention debate. The paper then outlines the development of the R2P doctrine and its current status as customary law.

³ In this paper, the terms “internal armed conflict” and “non-international armed conflict” will be used interchangeably.
Part II of the paper examines the inadequacies of the R2P doctrine in fulfilling the collective responsibility to protect and uses two case studies, Darfur and Sri Lanka, to contextualize these inadequacies. The paper then proposes that a post-conflict investigatory mechanism should be supplemented into the R2P doctrine.
PART I – NEED & “SOLUTION”

II. The Need in Internal Armed Conflicts

i. Treaty-based Definition and Protection

International humanitarian law was developed primarily to regulate the conduct of international armed conflicts, and thus, the full ambit of humanitarian law is available to international armed conflicts. However, for conflicts that are non-international in nature, the scope and rules of humanitarian law vary depending on whether the internal conflict can be characterized as: (i) a national liberation movement; (ii) internal tensions and disturbances; or (iii) an internal armed conflict.

“National liberation movements” are regarded to include “armed conflicts in which peoples are fighting against colonial domination and against racist regimes in the exercise of their right to self-determination”. Additional Protocol I was the first treaty to draw this distinction within internal armed conflicts, and also extended the full ambit of international humanitarian law to this unique type of internal armed conflict. However, if a state is not a party to Additional Protocol I, then different legal norms would apply since a national liberation movement is not covered by the Geneva Conventions. Many of the states that are entangled in internal armed conflicts are not parties to either of the Geneva Additional Protocols. Therefore, de jure, armed conflicts in such states cannot be seen as national liberation movements, and thus cannot avail to the full scope of rules of international humanitarian law.

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4 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 (in force 7 December 1979), art. 1(4) [Additional Protocol I].
5 The definition is not included in any of the four Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287 [Geneva Conventions].
Situations that can be characterized as “internal tensions and disturbances” involve conflicts between nationals and the government, where the use of force falls short of an armed conflict, but nonetheless, the force is usually repressive in nature. Article 1(2) of Additional Protocol II provides a non-exhaustive list of examples of “internal tensions and disturbances”, and includes “riots, isolated and sporadic acts of violence, and other acts of a similar nature.”

International humanitarian law does not apply in this type of internal conflict; however, international human rights law does apply, subject to permissible limitations or derogations by domestic law.

Most internal conflicts taking place within the borders of a state usually fall under the characterization of “internal armed conflicts.” By definition, “internal armed conflicts” are all armed conflicts which are not international armed conflicts, national liberation movements, or internal tensions and disturbances. This residual category of “internal armed conflict” is dictated by two main sources of humanitarian law: Article 3 common to the Geneva Conventions (“Article 3 Common”) and Additional Protocol II to the Geneva Conventions.

Article 3 Common has virtually universal acceptance by UN member states. However, wishing not to encroach upon the notion of sovereignty at the time, Article 3 Common only provided for certain minimal rules of war for internal armed conflicts. Article 3 Common provides that persons not taking part in hostilities should be treated humanely, and that the wounded and sick should be cared for and treated with respect.

Additional Protocol II was the first treaty to provide a rudimentary set of rules to adhere to in internal conflicts. However, most of the states facing the most serious internal armed conflicts are not parties to Additional Protocol II, including Thailand, Nepal, Israel, Myanmar,

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6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 (in force 7 December 1978), art. 1(2) [Additional Protocol II].
7 Ibid.
8 Additional Protocol II, supra note 6, art. 1.
Pakistan, and Sri Lanka. Additional Protocol II has currently no direct binding consequences on the majority of the conflicts it was designed to regulate.

Since there is no international mechanism to characterize internal conflicts, the differences in the applicability of international humanitarian law have not been realized. It is usually left to the state(s) involved to portray the conflicts as they see fit, and states tend to characterize the conflict in a way that minimizes the applicability of international humanitarian law. Various analysts have shown support for international machinery capable of characterizing a conflict, so that there could be a consensus on the applicability of the law. If such machinery were to exist, analysts suggest that the common state practice of denying the applicability of relevant humanitarian law to situations might be reversed.

Many governments facing internal armed conflicts normally assert that the domestic conflicts are just an internal disturbances or tensions, which allows the state to conduct the conflict in accordance with their domestic laws without having regard for any humanitarian laws. However, the residual nature of the “internal armed conflict” definition allows for most armed conflicts taking place within the borders of a single state to fall within this category of armed conflicts. When discussing the relevant international laws in internal conflicts, this paper will limit its scope to the analysis of the laws applicable to “internal armed conflicts.”

ii. Need for Customary Law in Internal Armed Conflicts

The laws of war were born through general customs that were practiced on the battlefield. Until the mid-nineteenth century, the laws remained customary in nature, recognized because the

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9 International Committee of the Red Cross (ICRC), State Parties to the Following International Humanitarian Law and Other Related Treaties (3 March 2010), online: ICRC <http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf> [IHL Parties].
12 It should be noted that, depending on whether a state is a party to Additional Protocol I, a “national liberation movement” will attract equal or more protection as an “internal armed conflict.” Therefore, any laws applicable to “internal armed conflicts” will be applicable to “national liberation movements.”
rules had developed and existed over a long period of time, and because the demands of
civilization dictated a minimization of destruction, even in the conduct of war.\(^{13}\) Then, with the
adoption of treaties like the *Geneva Convention for the Amelioration of the Condition of the
Wounded in Armies in the Field*,\(^ {14}\) the foundation was laid for treaty-based international
humanitarian law. Now there are over one hundred treaties or additional protocols to treaties in
the field of international humanitarian law.\(^ {15}\)

However, the importance of the role of customary law in defining current law and
shaping future law should not be overlooked. In 1995, at the 26th International Conference of
the Red Cross and Red Crescent in Geneva, the International Committee of the Red Cross
(ICRC) was given the painstaking task of creating a report identifying the customary rules of
applicable international law in international and non-international armed conflicts. In the report,
the president of the ICRC, Dr. Jakob Kellenberger, discussed three reasons why customary law
remains extremely important.\(^ {16}\) First, customary law helps in the interpretation of treaty law. It
is a general principle of interpretation that a treaty must be read in good faith, having due regard
to any relevant rules of international law.\(^ {17}\) Customary law, one of the few sources of
international law, is therefore highly relevant in interpreting treaties.

Secondly, although a few treaties, such as the *Geneva Conventions*, enjoy universal
adherence today, the same is not true for the majority of the treaties. The Additional Protocol II
to the Geneva Conventions – the chief treaty that addresses conduct in internal armed conflicts—
provides an example of a treaty that is not heeded. As mentioned above, this treaty is not ratified
by the key states that are facing internal armed conflicts, and thus, the protocol does not apply to
a majority of the situations for which it was specifically designed. On the other hand, Dr.
Kellenberger declared, customary international law, “binds all states and all parties to the

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\(^{13}\) Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary Humanitarian International Law Volume I: Rules*
\(^{14}\) *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864,
11 L.N.T.S. 440, (in force August 9, 1907).
\(^{15}\) IHL Parties, supra note 9.
\(^{16}\) ICRC Report, supra note 13.
\(^{17}\) *Vienna Convention of the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (in force on 27 January 1980), art. 31
[VCLT].
Dr. Abdul G. Koroma, Judge at the International Court of Justice (ICJ), also noted in the ICRC report that customary international law, while being known for its imprecision, is important because it binds states that are not persistent objectors to any customary rule while it was in formation. This requirement of universal adherence to customary law allows for a much more equitable application of the law of armed conflict.

The final importance of customary humanitarian international law applies specifically to internal armed conflicts. Dr. Keelenberger stressed that any protection offered through international humanitarian law for non-international armed conflicts falls significantly short of the needs arising from these conflicts demand. Article 3, common to the Geneva Conventions and the Additional Protocol II, only offer the most rudimentary set of rules. Dr. Keelenberger explained that customary humanitarian law, which has developed through state practice, offers greater protection to internal armed conflicts, since most states agree that the essence of customary law applies to all conduct of hostilities, regardless of whether it is international or non-international in nature.

However, customary law does possess one key obstacle that makes it difficult for it to be used as a source of law – the recognition of the precise content of the customary law. Any law that has received universal recognition as customary law usually has been codified into statute. Therefore, jurists face challenges in showing that customary law that has not been codified is a general and accepted practice with legal obligations for states.

The ICRC Report outlined what the authors believed to be customary law for both international and non-international conflicts. It is a persuasive document that will weigh on the declaration of customary law up to the twenty-first century and the development of future customary law.

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18 ICRC Report, supra note 13.
19 Ibid. foreword by Dr. Abdul G. Koroma at xviii.
20 As mentioned above, a majority of the states facing internal armed conflicts are not parties to Additional Protocol II, and thus are not formally required to adhere to this rudimentary set of rules.
Nonetheless, following various atrocities in the 1990s, most UN Member States, international organizations, and academics have vigorously discussed the ways to reconcile sovereignty with the need to protect citizens. These discussions have pushed to the forefront the issues surrounding the humanitarian intervention. The next section seeks to examine the discussion and relevant law surrounding the humanitarian intervention debate.

III. The Humanitarian Intervention Debate

i. Rwanda

The internal armed conflict that re-ignited a world-wide debate on humanitarian intervention was the Rwandan genocide. On April 6, 1994, the Rwandan presidential aircraft was shot down, killing, amongst others, President Habyarimana of Rwanda and President Ntaryamira of Burundi. This act sparked certain Hutu extremists to execute a pre-planned campaign of human rights violations, including large-scale crimes against humanity and genocide, targeted at Tutsis and moderate Hutus. The massacres began right after the plane crash and lasted for approximately 100 days.\(^{22}\) Conservative estimates have placed the death toll of unarmed civilians at 500,000,\(^{23}\) while other UN organizations have stated that reliable estimates could put this toll up to one million.\(^{24}\)

Having failed to react in time to prevent the genocide, and after having admitted that “acts of genocide” had occurred,\(^{25}\) the UN Security Council asked the Secretary-General to set

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\(^{25}\) UN Security Council, *Extension of the Mandate and Deployment of the 2 Additional Battalions of the UN Assistance Mission for Rwanda and Settlement of the Conflict in Rwanda (1994)* S/RES/925. Note in the Resolution the UN Security Council did not declare that genocide had occurred. If it had, the UN Member States would have had a legal obligation under Article 1 of the Genocide Convention, *infra* note 74, to prevent it. Rather, they declared that “acts of genocide” had occurred, and thereby, with this wordplay, they were able to dodge the legal obligation to act. For further discussion, see below in “The Inadequacies of the R2P Doctrine.”
up a commission of experts to examine the Rwandan situation. After the experts had delivered a preliminary report that authoritatively stated there was evidence of large-scale crimes against humanity and acts of genocide that had occurred in Rwanda, the UN Security Council declared, \textit{inter alia}, that the situation in Rwanda continued to constitute a threat to international peace and security. Acting under Chapter VII of the UN Charter, The Security Council decided to establish an international tribunal to prosecute persons responsible for genocide and other serious violations of international law.

The international community had many prior warnings of the genocide that unfolded in Rwanda. The day before the plane crash, the UN Security Council noted its concern for the “deteriorating security in the country.” After the massacres started, the UN Security Council convened on six different occasions, each time expressing their escalating concern for the violations that were taking place in Rwanda. However, after all of the indications and evidence available to the international community before and during the genocide, they stood still for over 100 days, unable and/or unwilling to stop one of recent history’s worst tragedies.

\textbf{ii. The Humanitarian Intervention Debate}

The inaction of the international community and the UN in Rwanda reignited the humanitarian intervention debate. The need for states to have absolute sovereignty over their domestic matters seemed irreconcilable with the need to prevent serious and large-scale

\begin{footnotesize}

\begin{enumerate}
\item UN Security Council, \textit{Requesting the Secretary-General to Establish a Commission of Experts to Examine Violations of International Humanitarian Law Committed in Rwanda} (1994), S/RES/935 at para. 1.
\item UN Security Council, \textit{Establishment of an International Tribunal and Adoption of the Statute of the Tribunal} (1994), S/RES/955 at para. 1. It is important to note that although the UN Security Council could have acted under Chapter VII without the Rwandan Government’s consent, the Tribunal was requested by the Government of Rwanda. The level of cooperation with the offending state made the process of post-conflict justice much easier.
\end{enumerate}
\end{footnotesize}
violations against citizens of a state. For the most part, sovereignty over domestic affairs seemed to be paramount, even in light of the perpetration of large-scale human rights violations.

In broad terms, sovereignty denotes the idea of state independence, competence and legal equality. More specifically, it is a state’s right to exercise its own laws over its territories. On its face, this notion does not seem contentious, but students and scholars in this field are quite familiar with the litigious views on sovereignty. One scholar most succinctly summarized the debate as follows:

Few subjects in international law and international relations are as sensitive as the notion of sovereignty. Steinberger refers to it in the Encyclopaedia of Public International Law as ‘the most glittering and controversial notion in the history, doctrine and practice of international law.’ On the other hand, Henkin seeks to banish it out from vocabulary and Lauterpacht calls it a ‘word which has an emotive quality lacking meaningful specific content,’ while Verzijl notes that any discussion on this topic risks degenerating into a Tower of Babel. More affirmatively, Brownlie sees sovereignty as ‘the basic constitutional doctrine of the law of nations’ and Alan James sees it as ‘the one and only organising principle in respect of the dry surface of the globe, all that surface now…being, divided among single entities of a sovereign, or constitutionally independent kind.’ As noted by Falk, ‘There is little neutral ground when it comes to sovereignty.’

The idea of sovereignty has been the defining principle in inter-state relations for the past several hundred years. It is entrenched in both the UN Charter and international customary law. The UN Charter has given clear emphasis on the protection of state sovereignty. It declares that no threat or act of force could be used against the political independence or territorial integrity of any state, or in any manner inconsistent with purposes of the UN. Furthermore, there is an explicit prohibition against the UN intervening in matters which are “essentially within the domesticity jurisdiction” of any state. This principle of non-intervention has been

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35 ICISS Supplementary, supra note 32 at 5.
36 *Charter of the United Nations*, 26 June 1945 Can. T.T. 1945 No.7 (in force 24 October 1945), art. 2(4) [UN Charter].
affirmed by the ICJ on various occasions,\textsuperscript{38} referring to it as “the fundamental principle of state sovereignty on which the whole of international law rests.”\textsuperscript{39}

If there is such clear legal authority for the protection of sovereignty, upon what do pro-humanitarian-interventionists base their legal justification? The most significant limit placed on sovereignty is the ability for the UN to act under its Chapter VII powers to “prevent threats to international peace and security.”\textsuperscript{40} The drafters of the UN Charter were aware that there would be a tension between the idea of sovereignty and the collective requirement under the Charter to prevent threats to international peace and security.\textsuperscript{41} Therefore, through Article 2(7) of the UNC, states have agreed to the possibility of sovereignty being eroded by a collective action by the UN under Chapter VII to prevent “threats to international peace and security.”

The extent of the erosion of state sovereignty will depend on the breadth that “threats to international peace and security” could assume. Could matters occurring solely within a state affect international peace and security? The UN’s exercise of its Chapter VII powers in places like, Haiti, Somalia and Kurdish areas in northern Iraq— all examples of conflicts which were substantially within the borders of one state – has shaped the definition of “international peace and security” to beyond just inter-state actions. Scholars like Sam M. Makinda and Nicholas J. Wheeler have argued that the UN’s actions in the above-mentioned conflicts have redefined the concept of international peace and security.\textsuperscript{42} Wheeler went further and posited that the UN Security Council’s actions on humanitarian grounds could indicate the development of a new customary norm.\textsuperscript{43}

\textsuperscript{38} See Island of Palmas (Miangas) Case (United States of America v. Netherlands), (1928), 2 R.I.A.A. 829 (P.C.A.) at 838-9; See also Corfu Channel Case (Merits) (United Kingdom of Great Britain and Northern Ireland v. Albania), [1949] I.C.J. Rep. 4 at 35.


\textsuperscript{40} See UN Charter, supra note 36 at art. 2(7), Chapter VII.


\textsuperscript{43} Wheeler, supra note 42. It should be noted although humanitarian issues arguably justified the interventions, the humanitarian aspects were framed as threats to international peace and security.
However, other scholars have not been ready to accept that a new customary norm has been developed through these interventions. Although admitting that the above mentioned interventions could have possibly redefined the idea of international peace and security, scholars argue that the motivations for the three interventions differ remarkably from one another. An essential element of the development of customary law is the observance of “universal practice” by states. The differences in motivations by the various parties are argued to be too inconsistent to meet the “universal practice” criterion.44

Another dimension to the humanitarian debate is the concern by developing nations that “humanitarian interventions” will be used by Western powers to intervene in states where they have concealed political and economic agendas. The hidden agenda of powerful countries has remained a dominant concern from the onset of the debate around humanitarian intervention, and recent actions by Western powers have emboldened this concern even further. 45

An additional apprehension within this debate focuses around the unauthorized use of humanitarian interventions. Although it is clear that only the Security Council can authorize any intervention under Chapter VII in domestic affairs, the Kosovo intervention by NATO without UN authorization has fostered further mistrust behind the use of humanitarian intervention.46

After Rwanda, additional conflicts were adding to the dimensions of the humanitarian intervention debate. When NATO led an intervention in Kosovo without UN authorization, the debate reached a tipping point.47 This highly contentious time led the UN Secretary-General, Kofi Anan, to make a plea to the UN General Assembly in New York:

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45 This concern became the highlight of the debate after US’s invasion of Iraq, which possibly could have stifled the development of the concept of humanitarian intervention. See Eric A. Heinze, Waging Humanitarian War: The Ethics, Law and Politics of Humanitarian Interventions, (New York: State University of New York Press, 2009), Chapter 5 [Heinze].
47 Ibid. at 22-3.
If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?48

As a response to the Secretary-General’s request, Canada set up the International Commission on Intervention and State Sovereignty (ICISS), with the mandate of reconciling state sovereignty and the need to respond in the face of massive violations of human rights and humanitarian law. The Commission was asked to foster global consensus on this topic so as to move away from the paralysis that had plagued the international system on this topic.49 The Commission was composed of eminent scholars and experts from around the world in an attempt to fairly represent the various geographic regions and perspectives.50

The next section will look at ICISS’s final report, the Responsibility to Protect,51 and the status of the responsibility to protect norm as customary law. The focus on the next section is not to examine the specificities of the doctrine itself, but to highlight the developing norms relied on by the Commission to develop the doctrine.

IV. The Emerging Responsibility to Protect

i. R2P

The Responsibility to Protect doctrine52 declares that state sovereignty includes a responsibility to protect its people. The doctrine asserts that if a state is unable or unwilling to discharge this responsibility while its population suffers serious harms, the principle of non-intervention yields to the international responsibility to protect.

49 ICISS Supplementary, supra note 32 at 341.
50 Ibid.
52 Any mention of the Responsibility to Protect doctrine in this paper refers to the procedural doctrine outlined in the ICISS report. One should be aware of the distinction between the doctrine itself and the doctrine’s underlying principle, the collective “responsibility to protect.” This norm is the substantive legal premise in which the detailed R2P doctrine is based.
The doctrine shifts the focus of the humanitarian intervention debate from the right of states to intervene to the collective responsibility of states to both prevent and protect against mass human rights abuses. The doctrine explains that the responsibility to protect must, first and foremost, focus on the need to prevent by addressing the causes behind the suffering. This responsibility also encompasses the need to react to compelling human suffering with the appropriate measures, which can include sanctions, international prosecutions, and as a last resort, military intervention. There is a weighty emphasis on the idea of the UN Security Council being the proper authority to authorize military intervention. If military intervention is used as a last resort, an accompanying responsibility arises to rebuild the state by addressing the underlying causes of harm that necessitated the intervention.

The ICISS Report is premised on the emerging norm of the collective responsibility to protect. The legal basis for this emerging norm is anchored on the principles of conditional sovereignty and the general emphasis on conflict prevention. Together, these principles give a legal standing for the norm of collective responsibility to protect. In the next section, I will discuss this emerging norm and examine whether principle has elevated itself to customary law.

ii. The Responsibility to Protect Norm as Law

The ICISS Report was released two months after the September 11, 2001 terrorist attacks in the United States. With the US’s response and the ensuing “war on terror” in the forefront of most international discussions, the R2P doctrine did not receive much attention for the following few years. However, in the September 2003 UN General Assembly meeting, the UN Secretary-General announced his intention to create the High-Level Panel on Threats, Challenges, and Change with a mandate to identify major threats facing the international community and to

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53 Other alternatives to Security Council authorization are provided in the event of the failure of the Council to discharge this duty. However, as discussed below in “The Inadequacies of the R2P Doctrine,” the options provided are not viable.  
54 ICISS Report, supra note 51 at XI. The responsibility to rebuild, as espoused by the ICISS report, is only engaged after the military intervention option is engaged.  
55 Ibid. at XI, 11-13.
generate new ideas about confronting these threats.\textsuperscript{56} The next year, the High-level Panel released its Report, which declared, amongst other things, its support for a substantial part of the original R2P doctrine.\textsuperscript{57} Furthermore, the High-level Panel unequivocally endorsed the principle of the collective responsibility to protect and declared it as an emerging norm:

\begin{quote}
We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.\textsuperscript{58}
\end{quote}

In the March 2005 Report entitled “In Larger Freedom,” Secretary-General Kofi Anan passionately endorsed the High-level Panel Report, including the idea of the collective responsibility to protect.\textsuperscript{59} He further declared that although there were sensitivities involved with this issue, he believed that the R2P doctrine should be embraced.\textsuperscript{60}

This emerging support carried over when the UN General Assembly convened in September 2005 for the World Summit as part of the United Nations Millennium Project. In the Final Outcome Document, the General Assembly gave its unanimous endorsement of the emerging norm, the responsibility to protect:

\begin{quote}
\textbf{Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity}
\end{quote}

138. Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help states to

\begin{footnotes}
\textsuperscript{57} Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change: A More Secured World, Our Shared Responsibility (2004) UN Doc. A/59/565 [High-level Panel Report]. Although the Panel endorsed the doctrine, the Panel did not emphasize all of its elements. For example, the Panel emphasized the need for UN authorization of military intervention without endorsing the ICISS alternatives.
\textsuperscript{58} Ibid. at para. 203.
\textsuperscript{60} Ibid. at 34-5.
\end{footnotes}
exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.\(^\text{61}\)

The endorsement retracts from the R2P doctrine in two important aspects. First, it stated that the collective responsibility to protect should be exercised when a state “manifestly” fails to protect its populations. This is a vaguer and a more difficult threshold to meet than the “unable or unwilling” threshold that was endorsed up until the World Summit. Secondly, the endorsement offered protection specifically against genocide, war crimes, ethnic cleansing and crimes against humanity. This is a narrower protection than was endorsed by the ICISS report or the High-level Panel. Although the full scope of the R2P doctrine was not endorsed, these two paragraphs are a clear indication of the unanimous support for the emerging norm of the collective responsibility to protect.

Shortly after the unanimous endorsement at the World Summit, the UN Security Council passed a resolution in which they re-affirmed paragraphs 138 and 139 of the World Summit Outcome Document.\(^\text{62}\) After some years of inaction on the topic, on January 30, 2009, the UN Secretary-General Ban Ki-moon released the first comprehensive UN document on

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\(^{61}\) Resolution Adopted by the General Assembly: 2005 World Summit Outcome (2005), A/RES/60/1 at para 138-9 [World Summit Outcome Document].

\(^{62}\) UN Security Council, Protection of Civilians in Armed Conflict (2006), UN Doc. S/RES/1674 at para. 4. This was again remembered in UN Security Council, Reports of the Secretary-General on the Sudan, (2006), UN Doc. S/RES/1706.
“Implementing the Responsibility to Protect.” The Report suggested a “three-pillar approach” and also drew attention to the role of prevention and early warning. This report led to a successful debate in the General Assembly over several days in July 2009, which marked the first time the UN General Assembly had come together to discuss the R2P since the 2005 World Summit. The debate ended with a general consensus that further consideration was needed on a few important matters regarding implementation: active participation of regional organizations like the African Union; strengthening early warning mechanisms in the UN; and better defining the roles of UN bodies in implementing the R2P.

To formalize their commitment to the doctrine, the General Assembly passed a Resolution taking note of the Secretary-General’s Report and deciding to continue its consideration of the responsibility to protect.

It is clear that states have yet to agree on the precise details of the original R2P doctrine espoused in the ICISS Report. Nevertheless, does that mean that states are not currently bound by some underlying emerging norm of the collective responsibility to protect? It is well understood that states can bind themselves through customary law, which requires both opinio juris and a consistent and general international practice. Usually, the most difficult element is to ascertain the opinio juris, which is a state’s subjective conviction that the practice is a legal obligation. However, in this situation there has been a universal acceptance that an obligation exists; an obligation to help states protect their citizens, and if a state fails to do so, it becomes the collective obligation of the international community to protect those citizens.

On the other hand, the second element - evidence of general and consistent practice - does not exist to persuasively declare that the collective responsibility to protect has become customary law. As discussed above with respect to the UN reaction to the various conflicts in the 1990s, the actions taken thus far by the international community have been inconsistent and

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63 Secretary-General Ban Ki Moon, Implementing the Responsibility to Protect (2009), UN Doc. A/63/677 [Implementing R2P].
64 Ibid. at 8-9. The three pillars consist of i) the protection responsibilities of the state; ii) the international assistance and capacity-building in helping states achieve pillar I; and iii) the timely and decisive collective response upon failure of the state to provide the protection.
66 Ibid.
driven by different motivations. Therefore, for want of consistent practice it is hard to conclude that this emerging norm has fully enshrined itself as customary law. However, with the universal acceptance of the substantive principle, and a growing resolve to implement the doctrine, the doctrine could soon become binding international law.

Nonetheless, would the adoption of the R2P doctrine, even in its most ambitious ICISS form, fully satisfy the emerging obligation of the collective responsibility to protect?

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68 See Makinda, *supra* note 44.
PART II – SHORTFALL & PROPOSAL

V. The Inadequacies of the R2P Doctrine

In this part of the paper, I try to identify why the R2P doctrine, even in its complete form as espoused by the ICISS report, is inadequate to fulfill the emerging norm of the collective responsibility to protect. I focus solely on the aspect of the R2P doctrine that authorizes the use of military intervention. Although the R2P doctrine has stressed that this option be exercised as a last resort, this aspect of the doctrine creates the most controversy in its application. By identifying these problems, I do not suggest that the doctrine is flawed or that there is a better option to exercise military intervention. Rather, I try to identify the practical and political realities that will prevent even the most ambitious version of the doctrine from being implemented in all necessary situations.

i. Reliance on the UN Security Counsel

By still emphasizing that the decision ultimately lies with the UN Security Council, the R2P doctrine does not address one of the key problems of implementing intervention: the paralysing nature of the UN Security Council caused by individual interests of the permanent member states. The vetoing power of the five permanent members allows for individual state interests to take priority over the need to protect against grave human rights and humanitarian law violations.

The R2P doctrine makes it clear that the doctrine is meant to make the Security Council work better, not to bypass it.69 In improving the effectiveness of the Security Council, the ICISS Report offers possible alternative options for authorization in the event that the Security Council fails to discharge its duties properly. However, the report also admits that serious difficulties

69 ICISS Report, supra note 51 at 54-5.
exist in implementing these alternative options, which suggests that these options will never be effectively exercised.\textsuperscript{70}

Furthermore, the High Level Panel and the World Summit did not expressly endorse the alternative methods of authority, but rather emphasized that the authority for any intervention lies with the UN Security Council. This adds to the low likelihood of the alternative options being supported and utilized.

Moreover, assuming these alternatives become available, the triggering criterion for bypassing the Security Council is riddled with practical difficulties. The ICISS Report states:

If the Security Council \textit{expressly rejects} a proposal for intervention where humanitarian or human rights issues are \textit{significantly at stake}, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.\textsuperscript{71}

It is impractical to imagine a scenario where the Security Council “expressly rejects” a humanitarian situation that puts human rights issues “significantly at stake.” From previous practice, we can infer that if there is clear evidence of significant humanitarian issues, the Security Council tends not to “expressly reject” the matter. Rather, the council tends to consider the matter, while demonstrating concern for the situation. What aggravates this process further is that the UN Security Council’s consideration of the matter prevents the General Assembly from making any recommendations about the matter.\textsuperscript{72} This type of counter-productive paralysis was demonstrated when the Rwandan genocide unfolded.

Before the Rwandan genocide had commenced, it was well known throughout the international community - specifically within the US, France and among UN officials - that there were plans for serious human rights violations being plotted in Rwanda.\textsuperscript{73} Article 1 of the

\textsuperscript{70} \textit{Ibid}. at 53-4.
\textsuperscript{71} \textit{Ibid}. at 53 [emphasis added].
\textsuperscript{72} UN Charter, \textit{supra} note 36, art. 12.

Genocide Convention\textsuperscript{74} obligates states to undertake measures to prevent the international crime of genocide. Although having ample indications that the crime of genocide was taking place, the UN Security Council, on six different occasions, ducked its legal responsibility under the Genocide Convention by referring to the crimes as “serious violations of international law” and “acts of genocide.”\textsuperscript{75} The failure of the UN was not due to a void of information or a legal responsibility to act, but rather the political will to act. \textsuperscript{76}

Although the R2P doctrine acknowledged UN Member States’ political will and private interests as a major factor impeding the proper implementation of the collective responsibility to protect, the doctrine has provided no real solutions to address this paralysis.

ii. The Need for Evidence

The R2P doctrine is triggered when a population is suffering massive human rights violations and the state is unable or unwilling to act to avert it. This implicitly would require credible and verifiable evidence of a population suffering massive human rights violations and evidence of the state’s inability or unwillingness to avert it. In other words, assuming that the political will of the UN Security Council to act is equal and unwavering for all conflicts, the problem of marshalling enough evidence to the UN Security Council to demonstrate that the triggering criteria still exists remains a challenge. This gathering of evidence will largely depend on the amount of access allowed by a particular state.

The amount of access to an internal-armed conflict carries a significant impact on the responses invoked by the international community. The final battles of the Sri Lankan civil war and the present day Darfurian conflict stand to highlight this reality. Although both of these conflicts took place at approximately the same time period and are similar in the nature of the humanitarian tragedies that ensued, the international reaction to these conflicts was noticeably

\textsuperscript{75} Supra note 31.
\textsuperscript{76} The Preventable Genocide, supra note 73 at para 10.8.
different.\textsuperscript{77} In the next section, I explain the differences in the levels of access to both conflicts. I argue that the information available to the “international community” was the predominant reason for the differing international response to the conflicts.\textsuperscript{78}

Sri Lanka

Sri Lanka, a former British colony, is a small island off the southern coast of India. After independence in 1948, the majoritarian Sinhala community undertook several measures, which led the minority Tamil community to feel disenfranchised.\textsuperscript{79} Some of the actions that the Tamil community perceived as disenfranchising included making Sinhala the only official language of the country, and declaring Buddhism as the state religion. After 30 years of civil disobedience that failed to deliver any substantial outcome, and sparked by orchestrated pogroms that killed thousands of Tamils, various groups of Tamil minorities took up arms, demanding a separate state as a solution to the conflict. The most organized and dominating of the rebel groups was the Liberation Tigers of Tamil Eelam (L.T.T.E.), which has been listed as a terrorist organization by 32 countries. The L.T.T.E. has led the insurgency against successive Sri Lankan governments for 30 years.\textsuperscript{80} Unable to sustain the war, both parties entered a ceasefire agreement in February of 2002. After the election of a new President in November 2005, the open armed hostilities resumed until the rebels were finally decapitated in May 2009. Initial estimates put the civilian death toll during the final months of the war in Sri Lanka at about 7000, while acknowledging the actual figures could be much higher.\textsuperscript{81} However, recent information has revealed that the

\textsuperscript{77} As we will see below, the Darfur conflict had a visibly larger quantifiable devastation, including the number of deaths and displaced people. However, both being large-scale international crimes, I proceed on the assumption that for these crimes, the international outcry focuses on the actions of parties causing the devastation. However, this is not to discount the enormous amount of destruction both conflicts have endured.

\textsuperscript{78} As the availability of information on both conflicts, but especially on Sri Lanka, was scarce, the information was collected from various sources available at the time of writing, including online news articles, US State Department, and NGO reports. This paper does not try to test the validity of the allegations, but instead tries to find independent sources available to the author at the time of writing.


final weeks of the war alone might have caused tens of thousands of civilian deaths, with some suggesting a death toll of 40,000 people.

A report submitted by the U.S. State Department outlines alleged incidents that transpired in the final stages of the war, which may “constitute violations of international humanitarian law, crimes against humanity, or other related harms.” However, the report outlines that these allegations could not be corroborated since both sides of the conflict had restricted any observers to the conflict areas, creating what is often to as the “War without Witnesses.” The systematic attempt by the Government of Sri Lanka (GSL) to suppress any evidence of violations of international humanitarian law (IHL) was emphasized in the Report:

There are allegations that GSL restrictions on access were part of a systematic attempt to hide violations of IHL and human rights abuses. Some governments and organizations that were contacted during the preparation of this report indicated that they have additional information that may pertain to relevant incidents but were unwilling to provide it at this time for a variety of reasons, including fears for the safety of their sources.

The widespread attempts to silence the media and hide violations of IHL was a dominant strategy of the Sri Lankan government during the war: many media personnel were threatened, assaulted, abducted, tortured or imprisoned; over 50 media workers were killed; over 50 journalists fled the country and were forced into exile; and many foreign journalists were stopped at the airport and deported back to their countries. The actions by the Sri Lankan government to suppress and intimidate the media led to Sri Lanka being ranked 165 out of 175 countries in

83 Australia Broadcasting Corporation, “Hell or High Water” (9 February 2010), online: ABC <http://www.abc.net.au/foreign/content/2009/s2814960.htm>.
84 US Report, supra note 80 at 3.
87 Ibid. at 9-10.
2009 for the press freedom index by Reporters Without Borders - the lowest ranking for any democratic country.\(^9^9\)

The systematic attempt to hide violations extended to interfering with NGOs working in the conflict zone in Sri Lanka. There were longstanding attacks on local and international NGOs working in the country. In July of 2005, in one of its most furious displays of attack against an NGO, it was highly suspected that the Sri Lankan armed forces executed 17 aid workers belonging to Paris-based Action Against Hunger.\(^9^0\) Before the conflict intensified, the government also formally withdrew from the ceasefire agreement, forcing the 33 member Sri Lankan Monitoring Mission, an international monitoring mission established during the 2002 ceasefire, to vacate the island.\(^9^1\) At its height, in September 5, 2008, against heavy protests, Sri Lanka formally ordered all UN agencies and NGO’s working in the conflict zone to vacate.\(^9^2\)

In a preliminary report released by the Permanent People’s Tribunal, a non-binding opinion tribunal of eminent scholars, the tribunal found that the allegations and evidence provided indicated that Sri Lanka could be guilty of war crimes, crimes against humanity, and adding that the charge of genocide needs further investigations.\(^9^3\) At the time of the writing of this paper, the UN Secretary-General has set up a Commission of Experts to advise him on the Sri Lankan rights violations issue, which is receiving heavy opposition in Sri Lanka.\(^9^4\)


\(^{9^1}\) “03/01/08 SLMM statement”, online: SLMM <http://www.slmm.info/STATEMENTS/2008/03%2F01%2F08+SLMM+statement.9UFRrM2V.ipx>.


Darfur

Sudan, too, has a history of a decades-old ethnic conflict, between the Arab Muslim and the African non-Arab communities. As the North-South conflict was reaching its resolution with the signing of the Comprehensive Peace Agreement between the Sudanese government and the SPLA/M Southern guerrillas in January of 2005, a new phase of conflict broke out between the government-backed Arabs, namely the “Janjaweed,” and the tribal groups of non-Arab Africans in the extremely marginalized Darfur region of Sudan. On April 8, 2004 a cease-fire agreement was signed between the Darfurian rebels and the Sudanese government. On May 5, 2006, another Darfur Peace Agreement (DPA) was signed between the government and an SLM/A guerrillas. Despite several rounds of talks and the signing of new agreements, large-scale human rights violations continued.95 The death toll in the Darfur conflict has yet to find consensus, but commonly accepted figures put the death toll in Darfur in the several tens of thousands, with another two million internally displaced.96

Sudan also holds a poor record for cooperation with the media, NGOs, and UN agencies. There are numerous reports of journalists being assaulted by the state’s armed forces or its paramilitaries. Reporters Without Borders have accounted many incidents of foreign journalists being denied visas without being offered any valid reasons. Those that are within the conflict zones are restrained from traveling freely to cover the stories.97 However, despite these difficulties, some journalists have often found themselves to be able to report from the conflict zones. In the same Press Freedom Index of 2009 where Sri Lanka ranked 165th out of 175 countries, Sudan ranked 148th.98

NGOs, for the most part, have been allowed to function within the conflict zones in the past. However, recently, they have also come under severe governmental restrictions to the

95 Heinze, supra note 44 at 125-6.
96 Ibid. at 126; see also “2009 Human Rights Report: Sudan” (March 11, 2010), online: U.S Department of State <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135978.htm>.
97 Ibid.
98 WPFI Rankings, supra note 88.
conflict zones. In one of its extreme examples, the government of Sudan in March of 2009 expelled 13 NGOs while closing down three Sudan-based NGOs in conflict zones.99

In addition to restricted access maintained by several NGOs and media personnel, access to the conflict zone was also maintained by the African Union (AU) military observers, United Nations Mission in Darfur, and the hybrid UN and AU forces known as the UNAMID. The totality of this access gave the outside world a continuous, although not complete, glimpse of what was happening inside the borders of Sudan. Unlike the Sri Lankan government, the Sudanese government had not imposed a complete blackout on the atrocities unfolding within its borders.

As the information from Sudan continued to highlight the fate of the civilian population to the rest of the world, it became difficult to keep outside actors oblivious to the conflict, triggering a range of reactions: there were world-wide protests and grass-root movements seeking to end the humanitarian crises; the US government declared that a genocide had been committed in Darfur;100 and on the 4th of March, 2009, the International Criminal Court (ICC) issued an arrest warrant against Sudanese President Omar Al-Bashir for five counts of crimes against humanity and two counts of war crimes.101

In contrast, the Sri Lankan government was able to carry out its war without evoking a heavy reaction from the international community because it had effectively controlled the number of independent observers allowed in the conflict zones. Firstly, since credible allegations claiming serious human rights violations102 and war crimes103 could not be

99 These acts came as a response to an ICC arrest warrant for President Al-Bashir of Sudan.
100 “Background Note: Sudan” (February 2010), online: U.S Department of State <http://www.state.gov/r/pa/ei/bgn/5424.htm>. It should be noted that UN has not recognized genocide in Darfur. Eric A. Heinze argues that this inaction by UN in Darfur was a direct consequence of US’s illegitimate invasion of Iraq. For further discussion see Heinze, supra note 44 at 126-35.
101 Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Warrant of Arrest (4 March 2009) at 8 (International Criminal Court, Pre-Trial Chamber). It should be noted that this paper does not try to suggest these outcomes are the desired outcome. Rather, these outcomes are presented to highlight the amount of international response that was prompted by access to the conflict.
corroborated by independent sources who witnessed the conflict, no evidence of serious harm could be conclusively proved. Secondly, by repeatedly denying that any deaths were occurring in Sri Lanka, and claiming that the government was doing all it could do to prevent civilian casualties, there also was no conclusive evidence that the government of Sri Lanka was unable or unwilling to act to protect its citizens. If the R2P doctrine had been wholly integrated into international law, without access to information it still would have been of little use to the Sri Lankan conflict. Sri Lanka had created an air tight procedure on how to conduct an internal strife without international scrutiny or response.

Sri Lanka has squeezed through the existing holes in international humanitarian law and could possibly have set a precedent on how to conduct an internal armed conflict without having to respect its obligations to its citizens and to the international community. The implementation of the R2P doctrine, as it currently stands, cannot fill the hole that Sri Lanka has managed to masterfully exploit. The key to avoiding accountability is to leave no traces of evidence at the scene of the crime. And if one has the ability to prevent anyone from entering the scene during and after a crime is committed, then an ideal utopia is created for those wanting to escape accountability.

iii. The Need for Accountability in the R2P Doctrine

The R2P doctrine is premised on helping states prevent massive humanitarian and human rights violations. If preventive measures prove unsuccessful in resolving or containing a situation and a state continues to fail to protect its citizens, then the responsibility to protect shifts to the international community to react in a timely manner through some form of interventional measures. The R2P doctrine states that military intervention must be used as a

last resort, and emphasizes that “tough threshold conditions” have to be satisfied before military intervention is contemplated. 106

In order to pass a high threshold in a timely manner, obtaining fair and accurate information is essential. In order for credible evidence to be gathered and for the R2P doctrine to be equitably applied to conflicts, the international community would need access to the conflict areas. When access is restricted, problems occur in obtaining credible evidence. The ICISS Report acknowledges that acquiring trustworthy evidence is complicated when versions of events are produced by the parties to the conflict with the specific purpose of leading or misleading external opinion. 107

While acknowledging that problems exist in obtaining evidence, the report diverts the concern by suggesting the problem could be remedied through various avenues— including other UN organs/agencies or the Secretary General. The report suggests that through these other avenues, credible information and assessments could be obtained. 108 However, the ICISS Report does not consider the possibility of these UN bodies and organs also being restricted from having access, as seen in Sri Lanka. It does not consider the paralysing nature of the R2P doctrine in protecting citizens when a complete blackout of information is implemented by the parties to a conflict. As seen through the Sri Lankan context, a full restriction on media personnel, NGOs and UN agencies can leave the international community to decipher the facts from the various versions of events being propagated by the parties to the conflict. As shown in the aftermath of the Sri Lankan war, this type of blind deciphering can cost tens of thousands of lives.

The ICISS report also acknowledges that no institutional solution exists to the problem of obtaining evidence. 109 Although the R2P doctrine works on the premise that evidence can be gathered through some means, this has not been proven to be the case. Explanations such as military necessity and national security present states with reasons to restrict access to conflict areas. This reality cannot be altered without forbidding states to restrict access to conflict zones.

106 ICISS Report, supra note 51 at 29.
107 Ibid. at 34.
108 Ibid.
109 Ibid. at 34.
With the principle of non-intervention being the foundation of domestic affairs, it seems unlikely that states would agree to the idea of limiting their sovereignty in ways that would affect their means of restoring peace.

By restricting access to any independent observers, the parties facing internal armed conflicts will be able to attain their ends with complete disregard to massive human rights violations. Understanding this option, parties would be encouraged to follow suit with the precedent Sri Lanka has set. This notion has moved from a possible theory to a very plausible reality. After the Sri Lankan armed conflict had been brought to an end, “the Sri Lankan option,” which involved “a tough military response, a refusal of a political solution, the dismissal of international concerns and a willingness to kill large numbers of civilians,” was being considered as an answer to insurgencies by various countries including Israel, Myanmar, Thailand, Nepal, Pakistan, Colombia and the Philippines.110

The “Sri Lankan option” allows states to conduct its armed hostilities without regard for human rights violations and without having to concern itself about the R2P doctrine being invoked – a doctrine created to prevent massive human rights violations. Therefore, in order to prevent states from exploiting this loophole in the R2P doctrine into ineffectiveness, I argue that the R2P doctrine must incorporate some form of accountability. Some form of accountability must be made available for situations in which access was denied to independent observers during an internal conflict preventing the military intervention element of the R2P doctrine from being triggered, and which later caused allegations of human rights violations.

In the next section, I will review the development of individual accountability and examine how this development differs specifically within the context of internal armed conflicts. I will then investigate whether the current accountability mechanisms would suffice to hold those accountable in the situation described above.

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110 ICG Report, supra note 82 at 29.
VI. The Search for Accountability

Students of domestic criminal law know that accountability serves essential objectives in our society, including rehabilitation, punishment, deterrence and a form of closure for victims of crimes. When studying experimental collective action games focused on public good, researchers observed that one-third of the participants on average do not cooperate. When these games are repeated, the mere presence of these defectors leads to a rapid erosion of cooperation. The cooperators also start resisting participation after having seen the defectors free-riding with impunity. Social theorist Joseph Heath has observed that the only way to foster cooperation is to establish a “correlation” in the strategies being played by the players. In practice, this translates into the cooperators being given the opportunity to punish the defectors, either by banishing them from participating or depriving them of access to the benefits of cooperation. Therefore, some form of punishment and individual accountability is a requirement not only to foster a society to develop public good, but more importantly, not to erode the already developed public good.

Protecting human dignity from violations internationally is regulated by three bodies of law: international humanitarian law, international human rights law, and international criminal law. Individual accountability can be sought through avenues in these three sources: through international human rights law, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; through certain international humanitarian laws, such as the Geneva Conventions; and through international criminal law, such as the Rome Statute of the International Criminal Court. These three spheres of international law, many times overlapping, are the foci in locating sources of international legislative accountability. Accountability can also be found nationally, through legislation or some form of

112 Ibid.
113 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1974), UN Doc. A/RES/39/46.
114 Geneva Conventions, supra note 5.
domestic structure. The following discussion will examine the developments of international accountability, focusing on its relevance to internal armed conflicts. After looking to international avenues for accountability, the paper examines accountability through domestic structures.\textsuperscript{116}

i. Development of the Law Surrounding Accountability

International law made few contributions to the idea of individual accountability until 1946 with the creation of the International Military Tribunal at Nuremberg (“Nuremberg Tribunal”). Up until then, an almost absolute impunity existed for leaders and their agents who committed crimes within their own borders. The creation of the Nuremberg Tribunal was instrumental in combating impunity and legitimizing the body of international criminal law. It propelled the idea that individuals, and not merely states, could be held responsible for violations of human dignity. Within a year of establishing the Nuremberg Tribunal, the International Military Tribunal for the Far East (“Tokyo Tribunal”) was created with a Charter similar to that of Nuremberg.\textsuperscript{117}

Soon after the creation of the Nuremburg and Tokyo Tribunals, the Genocide Convention and Geneva Conventions on armed conflict further added to the body of law holding individuals accountable for egregious crimes. In a matter of few years, the prescription of a good body of substantive law had arisen to regulate armed conflicts. However, since the Conventions, governments stopped developing mechanisms to enforce the laws through sanctions against individuals.\textsuperscript{118}

It was not until the massacres of the 1990s when the world implemented accountability measures for massive human rights violations. Drawing from the precedent set by the

\textsuperscript{116} This examination is only a peripheral overview. There are enormous amounts of literature on the different forms of accountability. The following discussion only seeks to present an overview of the discussion by looking at the mechanisms and examining its effectiveness within an internal armed conflict.


Nuremberg Tribunals, the UN established international tribunals for the former Yugoslavia and Rwanda. These *ad hoc* tribunals put accountability back in the forefront of international conversations. Following the establishment of these tribunals, governments came together in 1998 and created the International Criminal Court (ICC), a permanent court to prosecute the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. In addition to the creation of criminal courts and tribunals, the proliferation of democracy since the 1980s in South America, Eastern Europe and parts of Africa, Central America, and Asia has increasingly prompted countries to devise strategies to come to terms with the human rights abuses of prior regimes. These strategies were created under domestic law, setting up mechanisms tailored to individual circumstances, including criminal trials and truth commissions.

Although these advancements seem to show some trend towards accountability, impunity through *de jure* or *defacto* amnesties remains the prevailing policy in many states. Furthermore, the advancements made towards accountability did not resonate as far for internal armed conflicts as they had for international armed conflicts; the mountains of labour expended produced only a mouse.

### ii. Accountability in Internal Armed Conflicts

With atrocities being committed increasingly within internal armed conflicts, the law surrounding accountability is sadly inadequate and inconsistent in regulating internal armed conflicts. Two major reasons exist for this shortfall: i) the scope of crimes that are explicitly covered for internal armed conflicts are narrower than for international armed conflicts; and ii) the states where a majority of the atrocities occur are not parties to the few statutes that try to foster accountability.

The elements of the crimes of genocide and crimes against humanity are not dependent on the nature of the armed conflict. Genocide or crimes against humanity can occur during

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armed hostilities or during peace, within an international armed conflict or internal armed conflict.

War crimes are dependent on the nature of the armed conflict and have evolved differently for international armed conflicts and internal armed conflicts. The laws regulating armed conflicts developed initially by regulating the conduct of warfare between states. States were more reluctant in creating international law that would regulate the conduct of internal armed conflicts, which they held was within the reserved domain of each state. The idea of limiting the sovereignty of states to keep the laws of war for internal conflicts at par with the laws of war for international conflicts proved to be a difficult endeavour. States were slow in developing the laws regulating internal armed conflicts, and any laws that were accepted involved the basic principles of humanity derived from the laws of international armed conflicts. Over time, parallels have developed between the two bodies of law, but the parallelism is far from being complete.\footnote{Eve La Haye, War crimes in Internal Armed Conflicts (Cambridge: Cambridge University Press, 2008) at 32 [La Haye].}

Another roadblock preventing accountability to pierce through the blanket of impunity for atrocities within a state is the lack of state support for the statutes promoting accountability in internal armed conflict. The Rome Statute has 111 parties,\footnote{“The State Parties to the Rome Statute” (24 March 2010), online: ICC <http://www.icc-cpi.int/Menus/ASP/states+parties/>.} but the states where a majority of atrocities are taking place have yet to become parties to the statue, including Sri Lanka, India, Nepal, Iraq, Israel, Myanmar, Pakistan, and Thailand. Not coincidentally, these same states are not parties to Additional Protocol II, one of the other few fundamental treaties providing basic regulations for internal armed conflicts.\footnote{IHL Parties, supra note 9.}

This limited state involvement has translated into selective accountability. To date, the Office of the Prosecutor (OTP) of the ICC has received over 8733 communications since July 2002 from more than 140 countries. However, only five formal investigations have been opened under Article 53 of the Rome Statute. Three of these cases, Uganda, Democratic Republic of
Congo and Central African Republic, were referred to the Prosecutor by states Parties.\textsuperscript{124} One case, Sudan, was referred to the Prosecutor by the UN Security Council.\textsuperscript{125}

The fifth and most recent case has commenced through an investigation \textit{propr\'io motu}, initiated for the first time by the Prosecutor acting ex officio.\textsuperscript{126} The Pre-Trail Chamber of the ICC authorized an investigation into the possible charges of crimes against humanity committed in the Republic of Kenya during the 2007-2008 election period.\textsuperscript{127} Looking at this case in isolation, it exemplifies an ideal case in point of accountability for atrocities committed within a state: within approximately a year of the hostilities ending in Kenya, the Prosecutor indicated his intent to look into the situation; soon afterwards, the Prosecutor compiled evidence of initial allegations of crimes against humanity, which included 1,133 deaths, forced displacement of approximately 350,000 people, rapes, and other inhumane acts causing serious injury.\textsuperscript{128} Shortly thereafter, he submitted a request to open a formal investigation into Kenya and it was approved.

However, a closer look at the Kenyan case shows that this historic use of the Prosecutor’s power under the Rome Statute is not as precedent-setting as one might have initially thought it to be. The Kenyan case seems to be a unique exception towards the path of combating impunity, not an emerging norm. The Prosecutor was able to initiate an investigation given that Kenya is a party to the Rome Statute. Although the Prosecutor had initiated the investigation ex officio, the leaders of Kenya – the same leaders who were fighting for power during the violence - have been welcoming of the ICC decision and indicated that they plan to be cooperative with the

\textsuperscript{124} “Communications and Referrals”, online: ICC, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referals+and+communications>. Referrals by state parties are authorized by Article 13(1)(a) of the Rome Statute.


\textsuperscript{126} The Prosecutor can initiate an investigation \textit{propr\'io motu} through powers given through Article 15 of the Rome Statute. After relying on information submitted as “communications” by crime victims, the Prosecutor must make a determination whether there is reasonable basis to proceed with an investigation. If this determination is made, the Prosecutor must submit to the Pre-Trial Chamber a request for an investigation. If the Pre-Trial Chamber agrees, an investigation is officially commenced.

\textsuperscript{127} \textit{Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya} (31 March 2010), ICC-01/09 at 83 (International Criminal Court, Pre-Trial Chamber II). After examining the material, the Pre-Trial Chamber allowed investigation into any crimes against humanity committed between 1 June 2005 (When Kenya became a party to the ICC Statute) and 26 November 2009 (the date of the filing of the Prosecutor’s request).

\textsuperscript{128} \textit{Ibid.} at 57-66.
The rarity of this joint participation allowed the Prosecutor to confidently exercise the powers provided under the Rome Statute. It seems unlikely that these opportune circumstances will present itself often for the Prosecutor. Furthermore, juxtaposed to other atrocities around the world, many crimes are just as inhumane, or arguably more inhumane, than the Kenyan case, which further highlights the selective nature of international accountability.

### iii. Domestic Accountability

Analysts have argued that prosecutions of war crimes committed during internal armed conflicts are a necessary ingredient for accountability and in securing a lasting peace in the aftermath of a civil conflict. Professor Roht-Arriaza has gone even further to opine that there exists a duty on all countries to investigate, prosecute and provide redress for gross violations of human rights, whether nationally or internationally.

Conversely, others like Gahima and Hughes argue that to address the individual responsibility of a particular state at hand, a suitable mechanism must be chosen reconciling the ethical and legal demands with the political realities of that country. They argue that in order to be practical one has to accept the reality that accountability comes only with some form of compromise. The resulting mechanism might not always satisfy our sense of ideal justice. When situations arise where prosecutions are neither desirable nor possible, national alternatives to adjudication must be considered, including truth and reconciliation commissions and, as in Rwanda, gacaca courts. These scholars posit that practical hurdles might come in the way of

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130 La Haye, supra note 121 at 2; The French Representative, Final Record of the Diplomatic Conference of Geneva of 1949 (1951), II.B at 10.


implementing prosecutions. When there are practical hurdles preventing international or national prosecutions, alternative national structures can provide for some form of accountability.\textsuperscript{133}

Although national alternatives could provide a satisfactory version of accountability, these alternatives are usually implemented only after there has been a regime change; where the perpetrators who committed the crimes have lost their grip on power and when the new power holders feel that it is in their interest to address the human rights abuses of the old regime. This can result in a selective application of accountability, which, as Joseph Heathe has posited, has the effect of both defecting possible cooperators and eroding any possible developments of accountability.\textsuperscript{134} This type of approach raises some important questions. What happens, as in the case of Cambodia, when the persons who committed the crimes stay in power for decades after the atrocities; what would have been the outcome if the Rwandan Patriotic Front (RPF) did not overtake the country after the Rwandan Genocide, and therefore, could not have given consent to the UN to set up the ICTR; what happens to the RPF members who committed significant human rights violations during the genocide?\textsuperscript{135} All these concerns remain, demonstrating the difficulties associated with domestic alternatives for accountability in internal armed conflicts - only victor’s versions of “accountability” exist.

\textbf{iv. Plugging the Holes}

Accountability has found progress both nationally and internationally. Whether or not these developments imply the materialization of a duty on states to hold human rights abusers accountable, they do underscore the increasing recognition by states for the need of such a duty and for mechanisms to enforce this duty.\textsuperscript{136}

However, the selective application of accountability in national structures and the reduced international scrutiny for crimes in internal armed conflicts, combined with the

\begin{flushright}
\textsuperscript{133} Beyond Transitional Justice, \textit{Ibid.}
\textsuperscript{134} Heath, \textit{supra} note 111.
\textsuperscript{135} This claim has been generally accepted. See Gerard Prunier, \textit{The Rwandan Crisis: History of a Genocide} (Kampala: Fountain Publishers, 1995) at 244-6.
\textsuperscript{136} Ratner, \textit{supra} note 118 at 9.
\end{flushright}
unwillingness of the internally troubled states to bind themselves to be regulated makes accountability in internal armed conflicts more the exception than the rule.

This lack of accountability in internal armed conflicts has only played into the hands of troubled states wishing to further exploit impunity to achieve their ends—leading to a proliferation of atrocities within their borders. It has been estimated that since World War II—since the development of individual accountability - there has been more than 240 internal conflicts resulting in victimizations by tyrannical regimes. These conflicts have resulted in an estimated 86 million casualties.\textsuperscript{137}

Without a fundamental shift in the handling of human atrocities, accountability will be an illusionary term, used as a political tool by those who gain benefit. The R2P doctrine tries to conceptually become this shift by placing the emphasis on the collective responsibility to protect and prevent atrocities. However, for the reasons outlined in this paper, the doctrine has a large loophole which has been exploited to cause mass human rights violations in Sri Lanka. This option is now being considered by many other countries, and if employed, has the potential to cause many more catastrophes.

Scholars have suggested that accountability is the “antithesis of impunity” and a necessary element for deterrence.\textsuperscript{138} The current accountability measures do little to hold those accountable who committed atrocities following a model like the “Sri Lankan option.” As mentioned above, there exists a serious possibility that other states will follow the “Sri Lankan option,” restricting the flow of information from their borders in order to prevent the current R2P doctrine from being invoked. Furthermore, if the international community fails in invoking the military intervention component of the doctrine and mass human rights violations occur, there is no mechanism currently in the doctrine to hold those who committed the violations accountable. As it stands now, the R2P doctrine is both ineffective in preventing atrocities and holding those accountable for committing the atrocities.

In order to strengthen the accountability process, I propose that the R2P doctrine must incorporate a “post-conflict” \textsuperscript{139} investigatory mechanism to supplement the current existing methods of accountability. Upon the lessening of the military necessity concern post conflict, an investigatory mechanism should be implemented if access was restricted to conflict areas and if allegations of grave human rights violations have arisen.

In the next section, I will look at need for post-conflict investigatory mechanism. I will highlight the existing mechanisms and then suggest the revitalization of an unused mechanism, the International Humanitarian Fact-Finding Commission.

\section*{VII. Post-Conflict Investigatory Mechanism}

Accountability has been understood to be an indispensible factor needed for peace and reconciliation. As outlined above, there are various mechanisms to help advance accountability both nationally and internationally. The measures which help fight impunity and create “justice” ranges from the establishment of the truth to prosecution of the perpetrators. The common thread that any fair and credible accountability mechanisms share is the process of exhausting the truth. Regardless of the accountability measure chosen, if it is to have a lasting effect in contributing to peace and reconciliation, the process must search for the truth. As the eminent scholar Professor M. Cherif Bassiouni, a United Nations war crimes expert, has emphasized:

\begin{quote}
At a minimum, central truths, as relative as they may be, must be established in order to provide a historic record of what occurred to mitigate the simmering effects of the hardships and hardened feelings resulting from violent conflicts that produce victimization, to dampen the spirits of revenge and renewed conflict, to educate people, and ultimately to prevent future victimization.

Truth is, therefore, an imperative, not an option to be displaced by political convenience because, in the final analysis, there truly cannot be peace (meaning reconciliation and the prevention of future conflict arising out of previous conflictual episodes) without justice (meaning, at the very least, a comprehensive exposé of what happened, how, \cite{footnote}
\end{quote}

\textsuperscript{139} The term “post-conflict” in this paper is used to denote any reasonable time after a period in the conflict when a state has considered, for military necessity or national security reasons, to restrict access to media, UN and NGOs.
why, and what the sources of responsibility are). Forgiveness can follow only from the satisfaction of all parties, particularly those who have been victimized, after the truth has been established.\textsuperscript{140}

As Professor Bassiouni capably stated, the truth is essential to “dampen the spirits of revenge and renewed conflict” and to “ultimately prevent future victimization.”\textsuperscript{141} As the R2P doctrine’s foundational principle is based on the responsibility to prevent, the doctrine mandates that the truth be established post-conflict so as to prevent future atrocities.

By restricting access to independent observers, a state will have already shown some aversion to establishing the truth. This aversion by the state amongst allegations of mass human rights abuses must be remedied by ensuring that the truth comes to the surface. The precise accountability mechanism best suited for a particular state will be context-dependent. However, there will be a universal need for investigating the truth in order to, among other reasons, document what has happened as well as for any future national, international or hybrid prosecutions.

The question that arises in investigating for the truth is the level of imposition the international community can practically assert on a state. Too much imposition has the potential to be viewed by a state as unnecessary interference in its attempt to restore peace. However, too little imposition would allow the state to dodge any sense of real accountability and can allow impunity to flourish.

Any investigatory mechanism chosen must balance the need to respect the sovereignty of a state while allowing for independent and impartial post-conflict investigations to be conducted in order to ascertain the truth. The following canvasses two types of existing international mechanisms that already have the structures in place to conduct post-conflict mechanisms: through UN-sanctioned commissions or representatives, and through the International Humanitarian Fact-Finding Commission.

\textsuperscript{140} Boussiani, supra note 137at 23-4.
\textsuperscript{141} Ibid.
i. UN-sanctioned Commissions or Representatives

Internationally established investigatory commissions and designated individuals are existing forms of investigatory mechanisms that can be utilized to gather information. These independent information collectors would allow for a form of reliable accountability. Such a committee can be commissioned through a UN Security Council Resolution.\textsuperscript{142} Also, the Human Rights Council can establish Rapporteurs and Special Rapporteurs whose work and involvement in the last few years have proven to be invaluable.

A report released on July 14, 2000 by the UN Secretary-General Ban Ki Moon as a follow up on the considerations in implementing the Responsibility to Protect doctrine identifies the instructional weaknesses on the UN’s ability to gather and analyze information in a timely manner.\textsuperscript{143} The Secretary-General reminds Member States of their agreement in the 2005 World Summit of their obligations with respect to the responsibility to protect. Furthermore, the Secretary-General points to paragraph 140 of the World Summit Outcome Document, where Member States agreed to fully support the Secretary-General’s Special Advisor on the Prevention of Genocide (“SAPG”). The SAPG’s responsibilities depend heavily on collecting information primarily from within UN systems, to act as an early-warning and assessment mechanism, and to give recommendations to the Secretary-General to prevent or halt genocide.\textsuperscript{144}

The report addresses the past weaknesses and gaps of the UN in early-warning and assessment capabilities, including: the insufficient sharing of information between existing UN bodies and organs; the failings in analysing information through the R2P lens; and the need to develop assessment tools to allow for efficient responses to the R2P situations through Chapter VI, VII, and VIII of the UN Charter.\textsuperscript{145}

\textsuperscript{144} \textit{ibid}. at para 7.
\textsuperscript{145} \textit{ibid}. at para 8-12.
This report addresses, as discussed above, the dominant reason for the ineffectiveness of the R2P doctrine in the past: the shortcomings to the process of gathering and assessing evidence of R2P situations. Improving early warning tools and capacities will improve the UN’s ability to react more efficiently when evidence of R2P situations come to light.

However, the early warning tools cannot truly prevent R2P situations, regardless of how effective they become, unless these tools are complemented with tools to analyse allegations of serious human rights violations post-conflict as well. The Office of the Special Advisor on the Prevention of Genocide (“OSAPG”), or an affiliate UN organ, must have the mandate to investigate a post-conflict situation where credible allegations of war crimes, ethnic cleansing, crimes against humanity and/or genocide are alleged. Without such a mandate, the SAPG will only be able to selectively improve its preventative capabilities. By only having the ability to gather and analyse information as an early warning tool, the OSAPG will be rendered helpless if, like in the Darfur and more so Sri Lanka, a state implements a full black-out on all information emanating from conflict areas. Therefore, at this juncture where states are seemingly in agreement to cooperative with the SAPG, an expansion of the Office’s mandates should be canvassed to encompass post-conflict investigatory mechanisms.

However, it is important to note that while these organs may be able to implement protocols that allow for effective preventative measures, this does not guarantee that states will welcome these organs. For example, although these UN-created commissions or representatives can provide for reliable investigations, the commission or representative, being a UN organ, might be viewed by some states as politically biased. Also, the organs carry a direct stigma of criminal liability implication and states have tended to resist this mechanism.\textsuperscript{146} The following section discusses another existing international commission, the International Humanitarian Fact-Finding Commission, which provides an investigative mechanism that is independent of the UN.

\textsuperscript{146} War Crime Rift Grows, supra note 94.
ii. International Humanitarian Fact-Finding Commission

A possible solution and compromise to this balancing act between collecting the truth and respecting sovereignty is to revitalize the never-used International Humanitarian Fact-Finding Commission (IHFFC). Frequently referred to as the Article 90 Commission, the IHFFC was established in 1991 under Article 90 of Additional Protocol I. It was created with the purpose of ensuring compliance with international humanitarian law of armed conflicts through clarification of facts alleged to be war crimes. Although the Commission was originally expected to cover international armed conflicts, the Commission has declared its readiness to carry out investigations in cases of internal armed conflicts, subject to the consent of the parties.

There are several benefits of using the IHFFC. The Commission is a permanent body that has not been linked to the United Nations, ICRC or any other international or national organization. This allows the Commission to enter a state without any political connections or agenda. The Commission also has the advantage of not being a Tribunal or judicial body and its only function is to investigate the facts and to communicate the findings to the parties of the conflict. The Commission is currently filled with members of various professions and disciplines, including high-ranking military officers, medical doctors, experts in international humanitarian law and diplomats.

Although there are certain downfalls with the IHFCC, including the need for adequate funding, this Commission might be the best option to guarantee that some form of the truth is investigated in the aftermath of atrocities. In order to achieve accountability and ensure compliance with international humanitarian law, it is essential that the truth be investigated through some form of post-conflict investigatory mechanism.

VIII. Conclusion

The R2P doctrine seeks to finally dispel the old contention that state sovereignty cannot be reconciled with the idea of humanitarian intervention during times of grave human suffering. The doctrine seeks to change the discussion from the right of any particular state to intervene to a collective responsibility of all states to protect their own people from massive human rights violations and to assist other states by all appropriate means. The doctrine aspires to prevent mass atrocities through focusing on prevention, and if that is not possible, acting within a timely manner to protect. If implemented, this doctrine will send a strong signal to any state that they cannot use the notion of state sovereignty to shield any atrocities they commit against their citizens.

However, due to the practical realities of being able to implement the doctrine within a timely manner, the doctrine might at times fail to achieve its ends. This possibility has become more likely to occur, than not, after the popularization of the “Sri Lankan option.” Without some form of a post-conflict investigative mechanism being incorporated in the R2P doctrine, the doctrine now stands to fail at both preventing mass human violations, as well as holding those who committed the violations accountable.

Hon. Gareth Evans, the Co-Chair of the ICISS stated in an address to the General Assembly during its debate on the R2P, that “it’s not about solving all the world’s problems, just one small sub-set of them.”149 The Co-Chair acknowledged that the R2P doctrine was not meant to stop all of the world’s rights violations but only a subset of them. However, with the “Sri Lankan option” being looked at as a possible method for conducting warfare, the R2P might prove fatally ineffective in solving even a small sub-set of problems, unless a strong foundation for ‘post conflict investigatory mechanism’ is created to redress this issue. The Responsibility to Protect has to move beyond being an idea of protection and accountability, to a practice that is enforced by the international community.

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