Recognizing a Legal Responsibility
The Responsibility to Protect as a Legal Norm of International Law

by

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A thesis submitted in conformity with the requirements
for the degree of Masters of Law

School of Law
University of Toronto
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Abstract

Today there exists a legal norm that declares the existence of a global responsibility to protect civilians from mass atrocities. Previous doctrines of non-intervention and permissibility were inadequate and demonstrated the need for a new outlook. From a commission proposal to international acceptance the doctrine of a responsibility to protect (R2P) developed quickly and legitimately. Recent events, especially the events in Libya during the Arab Spring, highlight the conceptual evolution of the norm and, more importantly, an international acceptance of its binding quality. Therefore, it is apparent R2P has achieved the status of a legal norm of international law.
# Table of Contents

Recognizing a Legal Responsibility ........................................................................... 1

The Inadequacy of Non-Intervention and Permissibility ............................... 2
  Sovereignty and Non-Intervention ....................................................................... 4
  Challenge against Non-Intervention .................................................................... 7
  A New Direction ..................................................................................................... 9

The Responsibility to Protect (R2P) ................................................................. 11
  Evolution of R2P ................................................................................................. 12
  Adoption of R2P ................................................................................................. 19
  Overcoming Objections ....................................................................................... 25

The Establishment of R2P as an International Legal Norm ..................... 32
  A Candidate International Legal Norm ............................................................ 32
  Impact of Arab Spring and Subsequent International Response ................. 37
  The Legal Norm of R2P as it Exists Following the Arab Spring .................. 42

Conclusion ............................................................................................................... 50

Bibliography ............................................................................................................ 51
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Recent events of the Arab Spring brought to the forefront of international attention the debate about how far foreign states can go to protect civilians from brutal atrocities in states other than their own. The collective action taken by UN and NATO in Libya helped settle many of the lingering questions surrounding this topic. It was distinct evidence that a developing doctrine of a responsibility to protect civilians was now a recognizable part of international law. The status of this doctrine as a norm of international law can be traced back to the previously demonstrated inadequacy of the doctrines of non-intervention and permissibility. The proven failures of these two aspects of international law within previous decades provided strong legitimacy for the birth of the new doctrine. Its swift rise through the ranks from a commission proposal to UN adoption highlights its foundation of established principles of international law. The changes that occurred to the content of the norm during this ascension drew many criticisms yet critically impact how the doctrine later applied on the international stage. The mixed results and perceived initial ineffectiveness of its application to international affairs drew questions as to whether the doctrine truly could reach the status of a legal norm. However, the swift decisive action the international community took in response to the atrocities in Libya by invoking the doctrine of responsibility is conclusive evidence of its status as part of international law. It highlights the level of binding force states attach to the norm and sheds light on how the international community interprets the doctrine. Further analysis of norm in the context of the Libyan action shows how
previous concerns about the norm’s content potential conceptual deficiencies can be addressed. The following evaluation of this new doctrine of responsibility takes a closer look at each of these aspects of its development to conclude that the responsibility to protect is a norm of international law and should be recognized as such.

The Inadequacy of Non-Intervention and Permissibility

The doctrine of Humanitarian intervention, historically, has had a place within international law. Grotius saw it as legally and morally permissible in some circumstances within “just war” theory. More recently, Teson even suggested this permissibility could go further and turn actions of humanitarian intervention into obligatory acts. However, state practice throughout centuries did not create a stable norm of intervention and a practice of non-intervention in favour of state sovereignty caught tract. In the 1990s, this proved troublesome as the decade revealed many weaknesses in this area of international law. The debate on humanitarian intervention became divided into two polar opposites, one in favour of sovereignty and another in favour of intervention. The two principles were seen to be mutually exclusive. Furthermore, with a growing focus on human rights in the international arena, even mere legal permissibility of humanitarian intervention was proving to be inadequate at preventing tragedies in various parts of the world. A different perspective was needed on this debate in order for a workable legal norm to have credibility and potential for acceptance.
Tradition of Permissibility

Throughout the development of international law, there has always been a role for interventions within another state for the prevention of grand atrocities and other humanitarian disasters. Sohn and Buergenthal speak about a long tradition of humanitarian intervention stemming from 1579 when interference “in behalf of neighbouring peoples who are oppressed on account of adherence to the true religion or by any obvious tyranny”.\(^1\) They also mention Grotius allowed for interventions against a tyrant who “practice atrocities towards his subjects which no just man can approve”.\(^2\) The tradition of “just war” theory clearly had a place for humanitarian intervention from its onset. As international law developed under this tradition, the conditions that justified these types of interventions evolved. Given the moral aspects of “just war” theory, these conditions revolved around moral and practical considerations as opposed to pure legal ones. They included aspects of proportionality, requirement of “last resort”, right intention, just cause, appropriate authority and prospect of success.\(^3\) Walzer offers a strong defence in favour of these types of criteria and concludes there can be plenty of moral reasons to permit intervention in certain scenarios.\(^4\) Some even allege a positive obligation that creates a duty of humanitarian intervention can exist under “just war” principles. Teson argues that we all have “an obligation to rescue victims of tyranny or

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\(^2\) Ibid. at 3
\(^3\) C Coady, “The Ethics of Armed Humanitarian Intervention” (2002) 45 US Institute of Peace at 19
anarchy, if we can do so at a reasonable cost.\textsuperscript{5} Davidovic goes further and claims that simple permissibility for humanitarian intervention inherently implies a duty to intervene.\textsuperscript{6} This is because if the atrocities that warrant such interventions are shocking enough to meet the requirements of permissibility then an intervention is a “minimally decent action” and this reflects the existence of an element of obligation.\textsuperscript{7} Aside from the general criticisms that are levied against “just war” theory, these advocates of humanitarian interventions faced fierce opposition from staunch supporters of the doctrine of sovereignty. Furthermore, there was little evidence the doctrine was endorsed by the international community and since mere moral permissibility cannot constitute legality without state practice or support from other sources of international, the doctrine of permissibility had little impact on state behaviour.

Sovereignty and Non-Intervention

The main argument against humanitarian intervention stemmed from the age-old doctrine of state sovereignty. A staple principle established at the Peace of Westphalia in 1648, state sovereignty has been enshrined in the fabric of international law. This led to many early opponents of humanitarian intervention who saw the two ideas as mutually exclusive.\textsuperscript{8} Mill was an early strong opponent of interventions for humanitarian


\textsuperscript{7} \textit{Ibid}. at 137

\textsuperscript{8} A Rougier, “La Theorie de L'Intervention d'Humanite” (1910) 17 R.G.D.I.P. at 525
reasons as he did not believe anything could usurp sovereignty.\(^9\) The amplitude of the sovereignty versus intervention debate is neatly summed up by Vincent who says “if sovereignty, then non-intervention”.\(^{10}\) One of the main arguments against intervention the risk of abuse. This risk that humanitarian intervention could potentially be used as a pretext for aggressive force has been cited by many esteemed scholars such as Bilder\(^{11}\), Brownlie\(^{12}\), Franck\(^{13}\), Henkin\(^{14}\), Schachter.\(^{15}\) Furthermore, the concept of state sovereignty has been clearly embedded into the UN Charter. Article 2(4) of the Charter states that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”.\(^{16}\) This combined with Article 2(7), which states that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”, reaffirmed the strength of the doctrine of state sovereignty.\(^{17}\) However, Article 2(7) allows for UN enforcement actions under Chapter VII. Articles 39, 41 and 42 of the Charter allow for the use of military and non-military


\(^{10}\) R John, Human Rights and International Relations (Cambridge: Cambridge University Press, 1986) at 113

\(^{11}\) R Bilder, “Kosovo and the “New Interventionism”: Promise or Peril?” (1999) 9 J. Transnational L. & Policy at 160


\(^{14}\) L Henkin, How Nations Behave: Law and Foreign Policy, 2nd ed (New York, Columbia University Press 1979) at 144

\(^{15}\) O Schachter, International Law in Theory and Practice (Netherlands: Marinus Nijhoff Publishers, 1991) at 126

\(^{16}\) United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI at Article 2(4)

\(^{17}\) Ibid. at Article 2(7)
means, approved by the Security Council, to maintain or restore “international peace and security”. The contentious nature of this phrase has been the source of many debates about humanitarian intervention.

Despite the strength of the doctrine of national sovereignty within the Charter, some have argued that instances of humanitarian intervention can still be legal under some interpretations. It also did not stop nations from taking action under the umbrella of humanitarian intervention. India’s intervention in East Pakistan in 1971, Tanzania’s intervention in Uganda in 1978 and Vietnam’s intervention into Cambodia in 1978 all amount to instances of unilateral interventions based on humanitarian reasons. Even then, it was recognized that more effective measures were needed to protect grave and systematic human rights violations.

More recently, instances of action, or inaction, of the international community energetically refueled the debate about the legal nature of humanitarian intervention. In 1994, the world stood still while genocide in Rwanda resulted in as many as one million deaths. The UN, even though it authorized some form of action, failed to prevent mass killings in Somalia in 1993 and ethnic cleansing in Srebrenica in 1995. These atrocities prompted unilateral action by NATO in Kosovo in

\[^{18}\text{Ibid. at Articles 41 and 42}\]
\[^{21}\text{Estimates range between 500 000 to 1 000 000 000 deaths from various media sources}\]
\[^{22}\text{Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: IDRC Books, 2001) at 1}\]
1999 claiming its bombing campaign was for humanitarian reasons. Instances like these raised many questions about the morality and legality of humanitarian intervention and the possible role of the UN.

At the end of the 1990s, confusion and controversy surrounded the status of humanitarian intervention in the international arena. State practice clearly showed that an authoritative doctrine of non-intervention was not in effect. If humanitarian intervention was to be considered permissible only under certain circumstances, there was clear disagreement as to the legal authority for these actions and the circumstances under which they can take place. Furthermore, the apparent discord between the UN Charter and international customary law under the “just war” tradition cast doubt on the legality of any unilateral humanitarian interventions. Various interpretations of the Charter led to vastly different conclusions. Lastly, the UN failed to provide any coherent principle because of its evident ineptitude and ineffectiveness in responding to tragic circumstances. The failure of the Security Council to act, and act swiftly, with minimal political motivations proved too great to establish a pattern of behaviour under Chapter VII in regards to cases of humanitarianism. These reasons alone justified the need for a new approach to the issue of humanitarian intervention.

Challenge against Non-Intervention

Other factors were also instrumental in the push for a new direction in this old debate.

23 Ibid. at 1
The fantastic advent of universal human rights to the forefront of international law proved a direct challenge to the principle of non-intervention. The Universal Declaration of Human Rights from 1948 as well as two International Covenants of Human Rights from 1966 “confirm(ed) the universal character of human rights”. The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 adopted by the UN also stressed the emphasis on human rights and the prevention of atrocities. The outlawing of genocide was recognized as a *jus cogen*, or peremptory norm, within international law by the ICJ when it stated that “genocide, as also form(s) the principles and rules concerning the basic rights of the human person”. This is a strong nod in favour of permissibility for some form of humanitarian intervention. This strong emphasis on human rights, even at the expense of state sovereignty, was perceived to be acknowledged by the UN when it passed Resolution 688 condemning the treatment of Kurds in northern Iraq in 1991. Even though the resolution omitted the use of the famed phrase “to use all necessary means”, French, American and British forces were deployed to provide some form of protection for the Kurdish population. This was seen as a “watershed” moment in the doctrine of sovereignty as it was no longer placed atop the international legal prism.

Semb points towards two other important challenges to the doctrine of non-intervention. The first stems from the conditions of de facto statehood. She points to the intervention

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26 A Semb, *supra* note 24, at 473
in Somalia as evidence that “quasi-states” no longer enjoy the protection of non-intervention.\textsuperscript{27} Without a government, the UN Security Council saw the emerging humanitarian situation as a threat to international peace and as a result of Security Council Resolution 794, a US-led task force began operations in Somalia soon after. Furthermore, and more controversially, Semb suggests that requirements for democratic rule can serve as a challenge to the doctrine of non-intervention.\textsuperscript{28} She points to Security Council Resolution 940 which approves military intervention in Haiti in order to depose a military regime and return a legitimately elected president to power. She believes this is evidence that through Security Council approval, the scope of humanitarian intervention can not only be quite large but also trump the traditional interpretation of state sovereignty. These last examples of UN behaviour point to a progressive softening on the principle of non-intervention.

A New Direction

The advent of universal human rights legislation combined with state practice after the Cold-War made it was obvious that the principle of non-intervention was battling a credibility deficit. This resulted in further questions as to the nature of permissibility of humanitarian interventions and possible resultant legality. However, there was a distinct lack of clarity as to process, guidelines, and legitimacy surrounding permissible humanitarian interventions. It was clear that the principle of non-intervention or mere permissibility of humanitarian intervention was inadequate for the modern world. In

\textsuperscript{27} Ibid. at 474
\textsuperscript{28} Ibid. at 476
1999, Kofi Annan, the UN Secretary General at the time, asked member states of the UN to find common ground and agree on a way to act “in defence of our common humanity”. The shocking events of Rwanda and Srebrenica were still fresh in the world’s collective memory. With a common voice, many world leaders vowed to never again allow such atrocities. In his Millennium Report, Mr. Annan asked how the doctrine of sovereignty and events like Rwanda and Srebrenica can be reconciled.

He attempts to answer his own question by proposing a reconceptualization of sovereignty into two parts; state sovereignty and individual sovereignty. Due to globalization and international cooperation, state sovereignty was being redefined as an instrument at the service of people. Individual sovereignty, which Mr. Annan sees enshrined in the UN Charter, was an increasingly important facet of international consciousness. He harshly criticizes international inaction during Rwanda but equally sternly questions the legitimacy of interventions without UN authorization, such as Kosovo. He sees a defining role for the UN in further humanitarian interventions and recommends the continual re-evaluation of traditional concepts like sovereignty and intervention to see if the two contrasting principles can no longer be construed as mutually exclusive. The following year, the Canadian government established the independent International Commission on Intervention and State Sovereignty (ICISS)

29 Responsibility to Protect, supra note 22, at 2
30 Ibid. at 2
32 Ibid. at 49
33 Ibid. at 49
34 Ibid. at 50
with a mandate to reconcile the doctrines of humanitarian intervention and state sovereignty. In an attempt to find consensus on the subject, the Commission consulted over 200 governmental and non-governmental officials, studied broad academic thinking and expertise, comprised members from various UN member states and held multiple meetings over a year in many areas of the world. The document it produced spawned a new era in the discussion of humanitarian intervention.

The Responsibility to Protect (R2P)

Remarkably, the Responsibility to Protect (R2P) document and its main principles have become part of almost any current conversation regarding the use of coercive means for humanitarian reasons. It radically changed the debate by reconceptualizing both sovereignty and intervention and moving the debate away from traditional pitfalls. The document contained no discussion of sovereignty versus intervention but of a collective duty to protect people. This shifted talk squarely away from permissibility in favour of responsibility. R2P did not only serve as a solid foundational principle for further discussions about intervention, but also became a tenet of international relations which many countries quickly embraced. Overwhelming consensus was reached among the members of the Commission regarding the content of R2P yet this did not translate to the same equally broad consensus on the international stage. However, some consensus emerged and a version of the doctrine was surprisingly adopted by the UN in the Outcome Document of the 2005 World Summit. Critics dismissed this progress and quickly jumped on the watered-down version that came through the political
waterboarding process of the Summit. That process highlighted the political nature of the discussions and the strong need for state practice in accordance to the principles of R2P before the doctrine could garner legitimacy and credibility. However, the main principles behind R2P survived and were recognized as an emerging norm of international law.

Evolution of R2P

The ICISS Commission wanted to “develop consistent, credible, and enforceable standards to guide state and intergovernmental practice” in relation to humanitarian interventions. They were looking for consensus on a legitimate doctrine that would outline the procedures and conditions of such interventions at minimal human and institutional costs and would eliminate causes of conflict leading to these types of interventions. This led to a conclusion that state sovereignty implies a responsibility to protect one’s peoples and once a sovereign state fails at this responsibility, “the principle of non-intervention yields to an international responsibility to protect”. The foundations of this principle were found in obligations inherent in the concept of sovereignty, UN obligations under Article 24 for the maintenance of peace and security, legal obligations under human rights declarations and developing state practice through regional organizations and the Security Council. The overarching principle to protect

35 Responsibility to Protect, supra note 22, at 11
36 Ibid. at 11
37 Ibid. at xi
38 Ibid. at xi
involved a responsibility to prevent, react, and rebuild.\textsuperscript{39} The document also provided guidance as to just cause, precautionary principles, right authority and operational principles for humanitarian actions.\textsuperscript{40} The document drew on existing international law, the “just war” tradition and contemporary emphasis on human rights in order to reconcile the previously conflicting principles of sovereignty and intervention. Given the failures of the doctrine of non-intervention and the confusion surrounding mere permissibility, the Commission found surprising consensus around this novel idea of responsibility. For the first time, there was recognition of a previously inexistent element of obligation in regards to state actions that aim to protect civilians from mass atrocities.

This obligation rises from the Commission’s focus on contemporary international issues and concerns. The arrival of new actors in the international arena, such as non-state actors, new types of issues due to advents in technology and globalization and the increasing focus on human rights all point to a need for an international norm that would be in line with international needs and expectations.\textsuperscript{41} International law was not effective enough to deal to guide state practice and meet the needs of the international community. For this to happen, the concepts of sovereignty and intervention need to operate in tandem and within the framework of international law. The Commission believed discussions surrounding “humanitarian” interventions tended to pre-judge the issues at hand due to the connotation of the word “humanitarian” and incorrectly

\textsuperscript{39} Ibid. at xi
\textsuperscript{40} Ibid. at xii-xiii
\textsuperscript{41} Ibid. at 3-7
focused questions on its defensibility rather than its effectiveness. To avoid this, it provided a modern interpretation of state sovereignty in light of universal human rights. The Commission believed state sovereignty implies two positive duties: an external duty to respect the sovereignty of other states and an internal duty to respect the basic rights of all people within the state. When considered against the backdrop of humanitarian atrocities, the omission of the term “humanitarian” and the resulting shift away from issues of permissibility leads to the conclusion there exists an international responsibility to protect. The primary responsibility falls on member states to provide the necessary protection for its own population. However, a residual responsibility also befalls the rest of the international community when a member state is unable or unwilling to provide requisite protection.

The Commission saw a pivotal role for the UN and the Security Council in establishing authority for situations requiring action in accordance to the responsibility to protect. It recognized that collective actions authorized by the UN are regarded as legitimate while unilateral interventions are seen as illegitimate due to apparent self-interested behaviour of nations. Therefore, the UN needs to play an important role in providing authorization for actions under the umbrella of responsibility. The Commission looked at the Articles of the UN Charter and provided an interpretation of Articles 10 and 2(7) that

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42 Ibid. at 9
43 Ibid. at 13-16
44 Ibid. at 17
45 Ibid. at 17
46 Ibid. at 48
allows for gross humanitarian atrocities to fall under the scope of UN authority.\textsuperscript{47} Taking into consideration Chapters VII and VIII of the Charter, the Commission saw a vital part for the Security Council in authorizing actions under R2P. Nonetheless, given the Council’s repeated failure to act in politically contentious situations, it also mentioned that actions without the authorization of the Security Council but with the approval of over two-thirds of the General Assembly could also make a strong argument for legitimate authority.\textsuperscript{48} This conclusion suggests strong moral force must exist behind the proposal for action under R2P legality can be bestowed to such actions.

The Commission discussed the Security Council’s responsibility and legitimacy when dealing with this new doctrine. It recommended possible reform of the Council in order to increase democratic legitimacy yet refused to deal with this issue in great detail. It did, however, make a recommendation for the existing composition of the Security Council. It suggested permanent members be disallowed to use the veto where its national interests were not involved and a resolution would be otherwise be passed by majority vote.\textsuperscript{49} It also reminded the Security Council of its duty under Article 24 of the Charter to act promptly when issues of international peace are under consideration. The Commission concluded that the UN has the “moral legitimacy, political credibility, and administrative impartiality to mediate, moderate and reconcile the competing pulls and tensions that still plague international relations”.\textsuperscript{50} Clearly, the UN is seen as the primary

\textsuperscript{47} Ibid. at 47-48
\textsuperscript{48} Ibid. at 48
\textsuperscript{49} Ibid. at 51
\textsuperscript{50} Ibid. at 52
body which can grant legitimacy as well as legality to actions under R2P. Despite the Commission’s earlier acknowledgment that actions authorized only by the General Assembly or regional organizations can gain legitimacy under contentious and controversial circumstances, the failure of the Security Council to act could lead to failed interventions and decreased legitimacy for the entirety of the UN itself. It is important to note that the Commission made no mention on whether unilateral actions can turn out to be legitimate or legal. It is evident that the doctrine of R2P can gain legitimacy and legal force if the Security Council resolves to act swiftly, decisively and with minimal political motivations.

The bulk of the content regarding the responsibility to react under R2P deals with the criteria of necessity, particularly the “just cause” threshold and the other type of precautionary criteria. The Commission first made recommendations as to other types of possible interventions under R2P aside from military action, such as financial or military sanctions. It is evident the doctrine of responsibility is much more encompassing than the doctrine of humanitarian intervention. For the responsibility to react with military means to be invoked under R2P, there would need to be demonstrably extreme cases that shock the conscience of mankind and include large scale loss of life. This includes genocide, ethnic cleansing, state collapse or civil war. The scope of R2P is obviously meant to be wide and the responsibility to react with

51 Ibid. at 54
52 Ibid. at 55
53 Ibid. at 30-31
54 Ibid. at 31-32
military force is only applicable in limited scenarios. Interestingly, the principles behind the responsibility to reach indicate a reliance on the ideas of “just war” theory. The precautionary principles included by the Commission, like right intention, last resort, proportional means and reasonable prospects for success, necessitate consideration before invoking the responsibility to react.\textsuperscript{55} This makes anticipatory actions under R2P legitimate if the situation meets the elevated criteria set out under these principles. The stringent restriction on the responsibility to react due to the precautionary principles and the high-threshold for just cause is set up in order to reduce possible abuse of the doctrine.

Two other important aspects of R2P are the responsibility to prevent and the responsibility to rebuild; together with the responsibility to react, they form the overarching responsibility to protect. While the content of these two principles is of little importance to the main points evaluated in this essay, their inclusion as part of R2P is notable. They represent the strong desire of the Commission to restrict the number of instances when military action is undertaken under the umbrella of R2P. A culture of prevention, with either root cause or direct cause prevention efforts, is the main aspect of the duty of states to protect its citizens. At first, the duty falls on the states themselves and a residual duty rests with the rest of the international community only once the state fails to fulfill that initial primary duty.\textsuperscript{56} This principle is a clear indication that R2P is not designed to create more instance of intervention but to actively reduce the number of atrocities that warrant a military response. This underlying objective is important to the

\textsuperscript{55} Ibid. at 35-37
\textsuperscript{56} Ibid. at 19-26
construction of R2P. The responsibility to rebuild relies again on moral considerations from “just war” theory to ensure that legitimate intentions are maintained throughout the entirety of an action and purely self-interested motives are eliminated. The responsibility to prevent and rebuild are a large and important part of the moral force behind all actions taken under the responsibility to react.

The R2P document served as a major breakthrough in the debate on humanitarianism. The envisioned conceptual shift in the doctrine of sovereignty along with the rise of international human rights produced a welcomed duty to protect civilians. This avoids the many previously contentious and seemingly unresolvable issues that surrounded the traditional sovereignty versus intervention debate. The doctrine relies on interpretations of existing international law, the UN Charter and “just war” considerations in such a way as to create an all-encompassing workable and morally legitimate doctrine that can guide state behaviour. Incorporating established sources of international law within the new doctrine is a way to ensure future legal credibility and potential binding force. Additionally, bringing the UN to the centre of all decisions eliminates any predetermined judgments of illegality or illegitimacy. The doctrine was developed with overwhelming consensus by the Commission and was void of any major internal deficiencies. This consensus, along with the focus on the UN as a central part of its practice, R2P can claim impartiality and not risk alienation from any particular groups of states. However, a prescription from a doctor does not necessarily result in a healthier patient. The treatment must be undertaken by the patient itself. Therefore, the doctrine could not be seen as part of international law until its principles were adopted.
by the UN or routinely practiced by states under shared common understandings and perceived legal binding power.

Adoption of R2P

Unfortunately, the R2P document was released in December 2001, only a few months after the tragic events of 9/11. International state support for a new principle of humanitarianism was difficult to find following such an event. Additionally, the actions of the United States in Iraq only two years later and the use of humanitarian intervention as one of the reasons for its actions only served as a further setback for any quick adoption of R2P. However, the doctrine was initially welcomed with some key support. Mr. Annan declared himself a big fan and many esteemed academics like Tanguy, Roberts, Williams, Burgess, Welsh, Thielking & MacFarlane, provided positive reviews of the document. Even critics saw “considerable moral force” behind R2P. More importantly, the international community began converging around the main ideas of the doctrine. A High-level panel on Threats, Challenges and Change adopted the

57 G Evans, “From Humanitarian Intervention to the Responsibility to Protect” (2006) 24 Wis. Intl. L. J. at 712
notion that a responsibility to protect, under authorization of the Security Council, exists when a state is unable to carry out its duty to protect its own citizens.\textsuperscript{65} This proved to be only the first milestone for R2P as Mr. Annan, in his capacity as UN Secretary-General, stated in March 2005 that “we must embrace the responsibility to protect, and, when necessary, we must act on it”.\textsuperscript{66} A World Summit followed later that year celebrating the UN’s sixtieth anniversary and the doctrine was placed on the agenda of the Summit. The 2005 World Summit proved to be the greatest milestone yet for the doctrine of R2P. Despite the harsh political reality of UN negotiations, the Outcome Document of the Summit contained two important paragraphs that officially recognized the doctrine of a responsibility to protect on the world stage. Firstly, it recognized that each state “has the responsibility to protect its populations” from grave humanitarian crimes.\textsuperscript{67} Secondly, it recognized that the international community also had a responsibility through the UN Charter, in particular Chapter VII, to take decisive collective military action should peaceful means be inadequate and national authorities fail to protect their own populations.\textsuperscript{68} This was a decisive step away from the tradition of non-intervention and towards a doctrine where a responsibility is bestowed upon the international community to protect civilians. However, this stripped down version of R2P, without the mention of precautionary principles and the responsibility to prevent and

\textsuperscript{65} UN General Assembly, \textit{Note [transmitting report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world : our shared responsibility"]} (2 December 2004) A/59/565 at para 203

\textsuperscript{66} UN General Assembly, \textit{In larger freedom : towards development, security and human rights for all: report of the Secretary-General} (March 21, 2005) A/59/2005 at para 135

\textsuperscript{67} UN General Assembly, \textit{2005 World Summit Outcome : resolution / adopted by the General Assembly} (24 October 2005) A/RES/60/1 at para 138

\textsuperscript{68} \textit{Ibid.} at para 139
rebuild served as a prime example of the real-world political challenges that R2P would face.

The adoption of a responsibility to protect in the Outcome Document of the 2005 World Summit somewhat conceals the lack of a broad consensus among member states. Evans, one of the chairmen of the ICISS Commission, points out that it was only due to persistence from sub-Saharan African countries, the embrace of limited-sovereignty principles of Latin American countries and some effective last minute personal diplomacy from, then Canadian Prime Minister, Paul Martin which ensured the recognition of any aspect of R2P in the Outcome Document.69 Limited support from EU Countries and the US, which did not prove overly beneficial in the shadow of the Iraq War, and strong resistance from Russia and other small developing countries proved to be a considerable obstacle.70 After the initial publication of R2P, there was little state support for its adoption. The US rejected the accompanying criteria to the responsibility to react and Russia and China saw little use for doctrine entirely as they believed all questions relating to the use of force, including for humanitarian reasons, should be dealt with by the existing UN Charter.71 The Non-Allied Movement (NAM), which included India as a leading member, believed it was already sufficiently empowered under the Charter and customary law to deal with humanitarian interventions and the

69 G Evans, supra note at 57, at 715
70 Ibid. at 714
71 A Bellamy, Responsibility to Protect (Cambridge: Polity Press, 2009) at 67
Group of 77 (G77) was equivocal in its rejection of R2P due to its shift away from the traditional meaning of state sovereignty and territorial integrity.\textsuperscript{72}

These initial state objections to R2P highlight the importance of the 2005 Outcome Document and how far, and surprisingly swiftly, international consensus rallied around R2P’s basic principles. Strong Canadian advocacy of R2P soon after its publication led to “norm-building” initiatives and a dedication to ensuring elements of R2P would be applied through small, yet, practical measures that increased the protection of civilians.\textsuperscript{73} It was believed these actions could inherently build consensus in favour of R2P in the long run. This produced initial results in 2003 when the newly formed African Union (AU), under its Constitutive Act, adopted a right of intervention for humanitarian reasons. While this was far from the responsibility to protect civilians inherent in R2P, it signaled an important step away from the tradition of non-intervention. Furthermore, the categorical support of Mr. Annan for the entirety of the R2P document proved invaluable in getting in on the agenda for the 2005 Summit.\textsuperscript{74} The Summit brought to head all the separate objections of states to R2P yet revealed a layer of consensus around the need for a new way of protecting civilians from mass atrocities. The negotiations during the Summit proved more difficult and protracted than initially envisaged. Slowly but surely, various elements of R2P were negotiated away in order to achieve some type of consensus. The Permanent Five members of the Security Council remained opposed to

\textsuperscript{72} Ibid. at 70, 68
\textsuperscript{73} Ibid. at 71
\textsuperscript{74} Ibid. at 76
any code of conduct which would restrict their veto powers. Mr. Annan had suggested language that included an “obligation” to react when the just cause threshold had been met; interestingly, this language was vehemently opposed by the US who agreed only to a “responsibility”. This distinction in terminology is vital as it exposes a view that any responsibility under R2P is not absolute in itself. As the language of R2P was drafted, negotiations on other parts of the Charter took place and politics took centre-stage. The final language of the two paragraphs relating to R2P reflects the outcome of these complex negotiations.

Media reviews after the Summit in regards to the progress of R2P were quite mixed. On one side, the two paragraphs were seen as “a revolution in consciousness in international affairs”. On the other, it was thought the concept had been diminished so greatly that it could not offer any type of protection for threatened populations. Thakur, the other chairman of the ICISS welcomed the developments from the Summit. Evans, the other chairman of ICISS, saw the Outcome Document as a “considerable achievement” given the relative youth of the doctrine yet also expressed “deep disappointment” believing the Summit to be a “huge wasted opportunity”. Regardless of the immediate post-Summit reviews, two things were undeniable: the concept of sovereignty had been redefined and the basic principle of R2P had been developed

75 Ibid. at 83
76 Ibid. at 85
77 T Lindberg, “Protect the People” Washington Post (27 September 2005)
78 M Byers, “High Ground Lost on UN's Responsibility to Protect” Winnipeg Free Press (18 September 2005)
79 G Evans, supra note 57, at 715
80 A Bellamy, supra note 71, at 92
from a commission proposal to an international principle recognized by the entire UN membership.\textsuperscript{81} This, at the very least, had the potential to become a frame of reference to future state actions in response to humanitarian crises.

The move from a recognized international principle to its practical implementation and execution would be a difficult test even for the watered down principle that came from the 2005 Summit. Evans correctly envisaged four main obstacles that R2P would face on its path to implementation: the problem of Security Council buy-in, false friends, capacity and political will.\textsuperscript{82} The first obstacle speaks to the Security Council’s refusal to accept the guiding criteria of the responsibility to react that ICISS originally proposed as part of R2P. Without this criteria, R2P could potentially be looked at as a simple statement without moral backing and a detailed process. The second obstacle was due to the fear that R2P can be abused for different purposes than intended; this fear was exacerbated by the recent events in Iraq. The issue in question was whether “the ideals of liberal interventionism captured in the R2P principle...are all to easily capable of misapplication”.\textsuperscript{83} The third obstacle related to capacity and dealt with operational concerns once an action under R2P takes place. Without any clear guidance in regards to planning, mission control, field command, etc, there would be a great risk of failure for any proposed action and this could greatly undermine the legitimacy of R2P. The crisis in Sudan was cited as a great example of this type of failure.\textsuperscript{84} The last obstacle dealt

\textsuperscript{81} Ibid. at 92-95
\textsuperscript{82} G Evans, \textit{supra} note 57, at 716
\textsuperscript{83} Ibid. at 718
\textsuperscript{84} Ibid. at 719
with the lack of political will in favour of actions under R2P. This is a natural concern as “we have to live with these vagaries in the human psyche” and can only attempt to build up political will through the advancement of “good arguments”.\(^\text{85}\) The outcome of the 2005 Summit served only as a starting point towards the implementation of an R2P norm within international law. The obstacles that lay ahead could only be overcome by the actors of the international arena. However, the norm-building process would face many critics.

Overcoming Objections

The development of R2P as an emerging norm of international law was not without its share of disappointments. Some of the more ardent and persuasive objections to R2P would need to be addressed in order to maintain the momentum of the norm-building process. One such objection is that R2P did not go far enough to ensure more instances of intervention.\(^\text{86}\) This is in part due to its threshold criteria not including instances of the overthrow of democratically elected regimes and massive abuse of human rights.\(^\text{87}\) This did not make R2P a trendsetter as it only manages to find middle ground in existing state practice. However, this was precisely the goal of the ICISS Commission; a new trendsetting doctrine was not in their mandate, but merely a workable legal doctrine that reflected existing international affairs and expectations.

\(^\text{85}\) Ibid. at 721


\(^\text{87}\) Ibid. at 139
Additionally, the Commission’s desired reform of Security Council behaviour was misplaced and its energy would’ve been better spent on identifying the instances when American multilateralism would kick in.\textsuperscript{88} The 1990s highlighted the fact that American support for humanitarian actions was extremely useful, maybe even necessary, to the perceived legitimacy and implementation of those actions.\textsuperscript{89} This last point is a valid criticism as the Outcome Document soon highlighted the lack of desire to control any actions of the Security Council, either through reform or restrictions on the use of the veto. However, American military actions after the 1990s included the Afghanistan and Iraq wars, both contributing negatively moral standing of the US and its allies on the world stage. It is doubtful that American support for military actions carries the same level of credibility and it is appropriate to base the doctrine of R2P in international institutions rather than nations.

Others continually criticized the doctrine of R2P for its inherent conceptual failures. De Waal saw the R2P doctrine as a failure in Darfur due to its inadequate conceptualization as a workable doctrine.\textsuperscript{90} This is primarily because he placed the issue of intervention in Darfur under the terms of the original sovereignty versus intervention debate. Evans’ response to this criticism as well as the issue of Darfur are addressed later. One important criticism of R2P is that it contains too many ambiguities for it to become a working doctrine.\textsuperscript{91} This argument is based on the notion that the idea of responsibility is

\textsuperscript{88} Ibid. at 146
\textsuperscript{89} Ibid. at 146
\textsuperscript{90} A de Waal, “Darfur and the Failure of the Responsibility to Protect” (2007) 83:6 Intl. Affairs at 1054
ambiguous, there is no determinant element of obligation, no criteria exists for measuring a state’s capacity to protect its own citizens, lacks clear guidelines in relation to authority once the Security Council does not act and fails to provide guidance on instances of failed states.\textsuperscript{92} With these criticisms in mind, some have pointed to R2P simply as having empowered members of the Security Council to deal with situations on a case-by-case basis taking into account primarily their own interests.\textsuperscript{93} These are legitimate criticisms that apply even if the Security Council would’ve adopted as a package the original R2P document. While the notion of responsibility can be ambiguous there can be no denial that some element of obligation is attached. The difference between responsibility and obligation will be addressed later on when the content of the R2P legal norm is discussed. Also, in practice is it highly doubtful that much contention can arise in the discussion of whether a national government fails to protect its own citizens; the fact of a large number of deaths cannot be challenged. However, it is important to establish methods of observation that can provide such facts. Furthermore, the only way for R2P to gain the endorsement of states was to have issues of authority delegated to Security Council. There is no alternative to providing legality, legitimacy and broad support for R2P aside from handing over, and putting significant faith in, the Security Council. It is also important to remember the way the Council handles its responsibility impacts its own legitimacy. It is in the best interest of all concerned for the Security Council to be seen as a legitimate authoritative figure.

\textsuperscript{92} Ibid. at 211-212
\textsuperscript{93} Ibid. at 212
Bellamy is another constant critic of R2P since its inception by the ICISS Commission. He initially criticized R2P as being a potential Trojan Horse whose language could be abused by interventionists and that it did little to change the underlying dynamics of the previous sovereignty versus intervention debate. He followed this up by pointing to a problem of indeterminacy of R2P, specifically in regards to the inherent tension between R2P’s goals to enable genuine interventions and prevent abuse. This only built upon his previous criticisms. He further criticized the Outcome Document as having done little to prevent future Rwandas or Kosovos as it was missing key elements of the already precarious doctrine proposed by the ICISS Commission. He maintained that the language of R2P has done little to change the behaviour of important state actors and R2P could only best serve as a policy tool rather than a legal doctrine. However, Bellamy misses the point that the ICISS Commission was given a mandate to develop a doctrine that responded to expectations of existing international affairs. The two competing doctrines were reconciled in light of the development of universal human rights and this achievement is present even the doctrine’s reduced form in the Outcome Document. The goal of ICISS was not to develop a liberal interventionist doctrine or drastically alter the behaviour of state actors. Furthermore, the failure of measures under R2P, particularly those which fall short of military action, cannot be attributed to

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94 A Bellamy, “Responsibility to Protect or Trojan Horse? The Crisis in Darfur and the Humanitarian Intervention after Iraq” (2005) 19:2 Ethics & Intl. Affairs at 52


96 Ibid. at 169

the failure of the doctrine itself. This will be shown when recent actions under R2P are considered.

Having seen the steady build-up of critics against R2P soon after the 2005 Summit, Evans hoped to aid the by addressing what he thought were the five most common misunderstandings in relation to R2P. The first misunderstanding is the confusion of R2P as another name for humanitarian intervention. The coercive military nature of humanitarian interventions is nowhere to be seen in the doctrine of R2P, including the Outcome Document of 2005. He reiterates the importance of prevention within the original R2P document and its mention within the Outcome Document. He recalls the that prevention is the most important aspect of the whole doctrine and the responsibility to react only follows once this aspect fails. He hits out at critics who refuse to see the conceptual differences between the two doctrines and continue to attack R2P by engaging in the old ideological argument of sovereignty versus intervention; he specifically points out de Waal as being guilty of this. The second misunderstanding he deals with is that in extreme cases, R2P is seen as always meaning the use of coercive military force. He points to the criteria established in the original R2P document as evidence this is not the case and blames the omission of this criteria from the 2005 Outcome Document as being the root cause for this misunderstanding. He cites Darfur and his interpretation that it is an extreme situation under the R2P umbrella

99 Ibid. at 57
100 Ibid. at 58
101 Ibid. at 59
102 Ibid. at 60
but one where military action is not the answer due to its many strategic and operational problems. He does admit the ineffectiveness of R2P in Darfur but not because of non-application of coercive force but due to the failure of the other measures that have been applied. ¹⁰³ The next misunderstanding is that R2P only applies to weak and friendless countries and never the strong. ¹⁰⁴ He recognizes the prima facie plausibility of this argument but ties it with the previous one. He accepts there may be instances where it would be implausible to take military action against a state even though the just cause threshold is passed. ¹⁰⁵ This is because military action would be imprudent and the application of the original criteria for military actions within the R2P document would reveal this. The ability to apply coercive military force in extreme cases should not be the yardstick by which R2P is measured as there will be countries for whom such actions will never be a practical option. ¹⁰⁶

The fourth misunderstanding that Evans addresses is that R2P covers all human protection issues. ¹⁰⁷ Aside from the fact that only a limited number of specific cases are listed in the original document or the Outcome Document, there is little sense in developing R2P into a broad human rights doctrine. ¹⁰⁸ Furthermore, the just cause threshold in the original document is restricted to instances of mass killings and the Outcome Document only mentions genocide, war crimes, ethnic cleansing and crimes

¹⁰³ Ibid. at 61
¹⁰⁴ Ibid. at 61
¹⁰⁵ Ibid. at 63
¹⁰⁶ Ibid. at 64
¹⁰⁷ Ibid. at 64
¹⁰⁸ Ibid. at 65
against humanity as falling under the ambit of R2P. Even under this reading, it is easy to see how R2P could be linguistically manipulated and used to apply to all types of human rights violations. However, it is in the interest of R2P for it to be construed narrowly if it is to gain legitimacy in the international arena.\textsuperscript{109} Evans' point, though valid, fails to answer how this can be avoided solely under the language of the Outcome Document. This is also addressed later in a discussion of the content of R2P and how it is interpreted by states. The last misunderstanding Evans attempts to correct is that the Iraq war in 2003 is an example of R2P and how it will be applied in the future.\textsuperscript{110} Evans adamantly counters that the Iraq War only serves as a prime example of how not to apply R2P. To begin with, there was no Security Council approval or any mitigating factors to could have countered its perceived illegitimacy and illegality.\textsuperscript{111} Iraq may have been a prime candidate for R2P in the early 1990s during the incidents against Iraqi Kurds but the 2003 scenario would’ve have failed the just cause threshold and the criteria attached to the original R2P document.\textsuperscript{112} Claims by some members of the coalition of the willing, particularly the UK, that its actions were for humanitarian reasons should not automatically have certified the action as a valid action under R2P. From this, it is evident that the just cause threshold and elements of the criteria attached to the original R2P document have a pivotal role to play in ensuring the legitimacy of any legal R2P norm.

\textsuperscript{109} Ibid. at 68
\textsuperscript{110} Ibid. at 69
\textsuperscript{111} Ibid. at 69
\textsuperscript{112} Ibid. at 70
The Establishment of R2P as an International Legal Norm

While a debate over conceptual aspects of R2P was taking place, another debate regarding the doctrine was occurring simultaneously: a debate as to whether R2P had become an international legal norm. After the 2005 World Summit, actions under R2P began to appear within international practice. This important milestone raised questions as to whether the doctrine had achieved the status of law at the international level. This did not prove to be as contentious an issue as there was sufficient consensus that it had not achieved legal norm status just yet. Some maintained it has the status of an emerging legal norm but lacks important aspects common to a majority of legal norms. However, recent events of the Arab Spring brought the doctrine of R2P back to the forefront of international relations. The actions of the international community in response to these events, particularly in Libya, serve as an example of how R2P guides current state behaviour. Additionally, state practice in accordance with R2P principles highlights important aspects in respect to the content of R2P as a full-fledged legal norm.

A Candidate International Legal Norm

The discussion about R2P’s standing within international law was ignited by the initial 2004 High-level Panel report which described it as “an emerging norm of a collective international responsibility to protect”.113 The Outcome Document and the official

113 UN General Assembly 2004, supra note 65, at paras 201, 202
recognition of R2P by members of the UN further promoted the emergence of R2P as a candidate to become part of international law. In 2006 the UN Security Council made reference to R2P in resolution 1674.\textsuperscript{114} However, the quick rise of R2P as an emerging legal norm within international law became quickly disputed. It gave rise to questions as to how a new approach to humanitarianism can be adopted so quickly and whether the underpinning concepts of R2P are not as innovative as portrayed.\textsuperscript{115} It is evident that R2P caught tract as a political policy tool in the international arena as it is grounded in established concepts of international law.\textsuperscript{116} As a result, it is also reasonable to conclude that R2P contains various “normative propositions that vary considerably in their status and degree of legal support”.\textsuperscript{117} However, there was little support in regard to the question of whether foreign entities have a positive duty to react under the umbrella of R2P. It was claimed that the principle lacks the requisite clarity, certainty as well as state action and support for it to be recognized as a legal norm.\textsuperscript{118}

The idea of R2P as a policy tool rather than an organizing norm of international affairs attracted consensus in the academic field. Brunnée and Toope analyze the status of R2P in international law shortly after the publication of the Outcome Document. They correctly point out its global recognition did not automatically result in its recognition as

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\textsuperscript{116} G Moller, “Humanitarian Intervention and the Responsibility to Protect After 9/11” 53 Netherlands Intl. L. R. at 37-38
\textsuperscript{117} C Stahn, supra note 115, at 102
\textsuperscript{118} Ibid. at 120
\end{flushleft}
They conclude that R2P, at the time, was “only a candidate norm in international relations” as it was never included in a binding normative document or generated sufficient state practice.\textsuperscript{120} They point out there is a strong foundation upon which efforts of norm entrepreneurship could take place.\textsuperscript{121} However, Brunnée and Toope correctly point out that every norm needs to be grounded in legitimacy and this may prove a great obstacle for the future development of R2P.\textsuperscript{122} The consistent ineffectiveness of the UN Security Council in dealing with humanitarian concerns has led to a legitimacy deficit that can, consequently, harm an R2P norm that puts all its eggs in the Security Council basket.\textsuperscript{123} International legal norms are built and require shared understandings but also require a level of effectiveness. However, Brunnée and Toope do point out that even successful norms do not guarantee outcomes and legal norms can exist even though they may be widely breached.\textsuperscript{124} This initial review of R2P post the 2005 World Summit was not discouraging by any means and left the door open for the positive future development.

Bellamy, an early critic of R2P since its inception provided a damning conclusion in 2010 that the doctrine was nothing more than a policy tool and far from capable to achieve legal norm status.\textsuperscript{125} On a developmental level, he strongly criticizes the results

\begin{footnotes}
\item[120] Ibid. at 133
\item[121] Ibid. at 133
\item[122] Ibid. at 134
\item[123] Ibid. at 136
\item[124] Ibid. at 135-136
\item[125] A Bellamy, supra note 97, at 166
\end{footnotes}
of R2P in instances when it had been invoked. While he recognizes the strong efforts inside the UN, especially from the Secretary-General’s office, to create consensus around R2P, he cites seven examples where R2P language had been invoked by either the UN or state actors and no tangible results materialized. He also cites four instances of inaction where he believes the atrocities in those cases warranted action under R2P. He is particularly critical of R2P in the case of Somalia. In 2006, war crimes, ethnic cleansing and crimes against humanity clearly occurred within the country yet the situation was not viewed through the prism of R2P. In that instance, the Security Council had accepted the recommendation of the Secretary-General and decided the time was not appropriate for a military response as sufficient forces could not be gathered in order to make a decisive impact. The crisis in Somalia had a strong international effect and brought back memories of the UN’s failure to act in Rwanda. On a conceptual level, Bellamy is skeptical as to R2P’s compliance pull due to the norm’s potential indeterminacy. He agrees, though, that R2P is universal and enduring and that questions should not be raised in regards to its applicability but how to best take action in light of the doctrine. This is where Bellamy sees R2P’s critical failure as the doctrine is unclear on exactly what type of actions should take place once states decide to respond. He points out that while R2P has had success when it has

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126 Ibid. at 148-149
127 Ibid. at 149
128 Ibid. at 157
129 Ibid. at 156
130 Ibid. at 162
131 Ibid. at 158
132 Ibid. at 161-162
been associated with the use of diplomacy to prevent crises from turning into grave atrocities, it has little utility when attempting to generate political will in response to the same atrocities once they happen.\footnote{\textit{Ibid.} at 164-166}

Brunnée and Toope undertook another assessment of R2P in 2010 and concluded that the doctrine’s status as only a candidate legal norm had not changed.\footnote{J Brunnée and S Toope, “The Responsibility to Protect and the Use of Force: Building Legality?” (2010) 2:3 Global Responsibility to Protect at 211} They analyze R2P through an interactional account of international law where the legal status of norms is evaluated on shared understandings, criteria of legality and reciprocated state practice.\footnote{\textit{Ibid.} at 193} Even though evidence exists that shared understandings about R2P have developed, the doctrine still falls short of legal norm status as it fails the other two aspects of the test.\footnote{\textit{Ibid.} at 211} The efforts of concerted norm entrepreneurship post 2005 have resulted in international shared understandings in the form of state consensus around the notion that the doctrine is grounded in established international legal aspects like customary law,\footnote{\textit{Ibid.} at 201} another General Assembly Resolution\footnote{UN General Assembly, \textit{The responsibility to protect : resolution / adopted by the General Assembly (7 October 2009) A/RES/63/308}} and agreement that R2P is an applicable doctrine despite its obvious necessary refinement.\footnote{J Brunnée and S Toope, \textit{supra} note 134, at 205} Also, there is little concern when R2P is judged against the eight criteria of legality; R2P is deemed to only make explicit facets of international law that already exist in the form of universal human
rights or *jus cogens*.\textsuperscript{140} However, one issue of concern is the lack of guidelines in regards to actions under R2P and how this has the potential to raise issues of generality, clarity and constancy.\textsuperscript{141} Additionally, there is no record of reciprocated state behaviour pursuant to the legality of the doctrine.\textsuperscript{142} There is a clear need for examples of state practice where countries recognize a binding quality to R2P and coordinate their behaviour in respect to it before the norm is to be considered legal in nature.

Impact of Arab Spring and Subsequent International Response

In December of 2010, a jobless citizen burned himself in Tunisia in protest due to a severe lack of jobs in his country.\textsuperscript{143} This triggered month-long country-wide protests against the existing political regime with frequent violent clashes between protesters and state authorities. In mid-January 2011, the situation in Tunisia came to a climax when the country’s president fled to Saudia Arabia. Soon after, another man set himself on fire in Egypt for similar reasons triggering massive organized protests in Cairo against the Egyptian president. By this point, small number of protesters took to the streets in many surrounding Arab countries challenging the existing political rule. Egyptian protests continued to grow to historic numbers and eighteen days after the first protest the Egyptian president, Hozni Mubarak, resigned. With protests reported in

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid.} at 206-208
\item \textit{Ibid.} at 209
\item \textit{Ibid.} at 211
\item The Guardian Newspaper, “Arab Spring: An Interactive Timeline of Middle East Protests”. Available at: \url{http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline}. All facts presented in the review of this event have been obtained from this source.
\end{enumerate}
\end{footnotesize}
Algeria, Bahrain, Iran, Jordan, Lebanon, Palestine, and Yemen the world turned its attention to Benghazi, Libya, where state security forces reportedly responded with violent force to similar protests. Tensions rose in Benghazi and other parts of Libya with the death toll passing two hundred within the first week. Soon after, reports emerged that Benghazi had been taken over by rebel forces and a full-fledged civil war erupted. With death toll estimates in the thousands and threats by Libyan president, Muammar Gaddafi, to continue his assault on rebel forces in spite of mounting civilian casualties, the UN Security Council passed Resolution 1973 on March 18th, 2011, authorizing “all necessary measures” to protect civilians and civilian populated areas. The Resolution, despite not explicitly calling on R2P, reiterates “the responsibility of the Libyan authorities to protect the Libyan population” and includes various sanctions such as a no-fly zone, arms embargo and the freezing of assets. The next day the US, UK and France launched strategic air strikes against Libya. As of this writing, Gaddafi is reported to have fled Tripoli and with help of Western military air strikes, rebel forces are on the verge of capturing the capital city.

The events of the Arab Spring of 2011, particularly the collective state action against Libya, under the authority of the UN Security Council, serve as sufficient proof that nations see a binding quality to R2P and act accordingly. At first glance, this may not be evident from the brief summary of events provided above. First and foremost, the accompanying international dialogue that prefaced and followed Resolution 1973 centered on R2P. This is most evident in President Obama’s remarks about the

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resolution when he stated that nations “bear both the responsibility and the cost of enforcing international law” and that the US was ready to “meet their responsibility to protect the people of Libya and uphold the mandate of the international community”.145 Similar statements came from other world leaders acknowledging a responsibility to protect the civilians of Libya. Secondly, the unprecedented and historic speed with which the Security Council treated this humanitarian issue is important to point out. The Security Council reacted swiftly to international calls for action after many unilateral and multilateral diplomatic efforts to initiate a cease-fire in Libya failed. Thirdly, the resolution had broad international support, including regional support from the Arab League, who explicitly asked for a no-fly zone to be established over parts of Libya. Broad international consensus that the just cause threshold for action had been crossed combined with an effective Security Council that was not mired in political squabbles resulted in quick action in accordance to a recognized international responsibility to protect civilians. This action did not comprise of full military force and required only the establishment of a no-fly zone, a variety of sanctions and various types of aid to rebel forces and civilians. It is an example of an extreme case under R2P which does not require the full extent of military force. All these factors combine to showcase an effective implementation of R2P given that the civil war is now close to its finality. The international response to the Libyan crisis can be explained as a result of the world recognizing the binding nature of R2P and using it as a call to take action and protect civilians.

Protests in other parts of the Arab world and the lack of an international collective action in response to them is an important contrast to the Libyan response and illustrates how the doctrine of responsibility is employed in practice. There is little doubt that nations felt an obligation to react in the Libyan situation and so the lack of action in response to other protests suggests there is little consensus on whether the just cause threshold had been passed in other scenarios. Evans previously pointed out that it isn’t in the interest of R2P for it to be interpreted widely and the responsibility to react should only be invoked when there are, or there is an impending apprehension of, mass atrocities. The death tolls in the rest of Arab world was not close to devastating acts like genocide or ethnic cleansing or even the death toll in Libya. The only other example that may resemble events in Libya is Syria where most recently national forces have employed heavy weaponry on protesters resulting in an increasingly alarming death toll, similar to Libyan proportions before the UN resolution. The difference is that protests started around the same time as in Libya but have not grown to the sizes of those in Egypt or formed into rebel groups as in Libya. Initial incidences only produced small numbers of fatalities and only recently has this changed. While there have been diplomatic efforts, including unilateral sanctions against Syria’s president from the US and EU, the UN Security Council has yet to pronounce itself on this matter; the Security Council has failed to produce even a resolution condemning the situation. This should not be construed as a failure of R2P as there are some marked differences in the two scenarios.
The fact that collective action has been taken under a responsibility to protect civilians in Libya and not Syria demonstrates there is some criteria under consideration before invoking R2P. Firstly, there is nearly not enough international consensus around the Syrian situation; there is not even broad regional consensus as the Arab League is itself divided on the issue. In Libya, there was broad international support as well as emphatic regional support from the Arab League. It appears that regional and international support for any action is necessary for it to be seen as legitimate under the practice of R2P. Secondly, the development of violence in Syria has been slower and less violent than Libya. There are also many well known security problems within that region that lead to regular violence within the country. Protesters have also not formed any type of organized rebellion as they did in Libya. It appears that the nature, regional and historical context and the evolution of violence that leads to mass atrocities are important factors to consider before action is taken under R2P. Thirdly, the Security Council appears divided on the issue as long-standing interests in that region on behalf of some members of the Council, in particular the US, can be misinterpreted as being the motivation behind any potential military action. It is too early to claim the failure of the Council to act as it can still effectively respond to the crisis with various other non-military options. Lastly, the inherent long-standing political and religious divide within Syria itself has the potential to destroy any legitimacy for external coercive military action. Once again, the potential legitimacy, both in the eyes of the world and in the eyes of those on whose behalf the action takes place, seems paramount before any commencement of military actions under R2P. It is important to point out that some of these factors exist as a result of each other. For example, broad regional and
international support for military action because of a shocking rise in violence and deaths in an otherwise peaceful state could aid in ensuring members of the Security Council temporarily put their political interests aside. Inaction from the Security Council can at times point towards deeper underlying, and logical, reasons as to why military action is not be advisable. The interpretation of R2P during the Arab Spring demonstrates that the norm is not as conceptually flawed or developmentally challenged as previously maintained by critics.

The Legal Norm of R2P as it Exists Following the Arab Spring

It is critical to analyze the impact of R2P through the political realities of international relations. The realpolitik of international law cannot be ignored and any notion of a collective international responsibility to protect has to be looked at through through this prism. It is a fact that some level of self-interested behaviour based on political, economical and strategic grounds will always play a role in the actions of international entities. Yet, the important role of international law in guiding state behaviour should not be dismissed or understated either. It would be foolish to judge the level of compliance-pull, or binding force, of R2P on the results of how often it is applied by the UN Security Council or brought into international dialogue. The level of impact it has on the behaviour of international actors is much more indicative as to the amount of binding force states attribute to R2P. As such, the behaviour of international actors prior to the adoption of R2P is important in making this determination. The decades prior to the development of R2P highlighted a distinct lack of moral legitimacy to wildly inconsistent
and inefficient actions of humanitarian intervention. The legality of such interventions was consistently challenged. The development of R2P was meant to take into account established international norms as well as previous state practice and provide a new legal standard for future state behaviour that matched the expectations of the era of human rights. As shown, academic commentators as well states recognized the existing underlying legal norms that the doctrine of R2P was established upon. In light of this, it is evidently clear that the doctrine of R2P, post 2005, was more widely applicable than the doctrine of humanitarian intervention due to its universality and constant applicability. Unlike humanitarian intervention, the doctrine is not evaluated in light of events and subsequent international responses; events and potential responses are, instead, judged in light of R2P. This is a marked improvement over the previous status quo and underlines the value of R2P.

A simple analogy with speed limits and the laws of the road illustrates how R2P is applied at the international level. Speed limits exist on all our roads and are in effect at all times. Similarly, R2P has a universal quality of always being in effect. Many motorists are compelled to drive within those limits. Under R2P, the primary responsibility to protect lies with states themselves and many abide by it. However, speed limits do not prevent all instances of speeding just like states not always fulfill their primary duty to protect. A motorist caught going over the speed limit can be is equivalent to the Security Council determining that the just cause threshold has been passed and some level of action is required. Though, a speed limit is a fixed and determinable aspect and the just cause threshold of R2P is not should not detract too much from this comparison. Walzer
agrees that the fact we cannot draw a definite line as to the just cause threshold is not debilitating.\textsuperscript{146} The amount of speed over the limit that a motorist is traveling at makes a strong impact on the potential punishment; this can range from a small fine to a large fine with demerit points, the suspension of one’s license and the immediate impounding of one’s vehicle. Under R2P, the UN Security Council, under authority of Chapter VII, has the right to take various actions against offending states ranging from minor economic sanctions to full-fledged military force.

Even so, sometimes an identical speeding offence can lead to relatively different results if the offender takes the case all the way to court. Similarly, in seemingly identical situations, the Security Council can choose to take different measures. Lastly, there are many informal parts throughout process of enforcement of speed limits. As an example, three separate motorists, at different times, traveling at an identical rate of speed can get pulled over for breaking the speed limit. One may escape with a warning, another may receive a ticket for a lower offense and the last one may get the full prescribed legal fine. Admittedly, the level of informal discretion varies with the gravity of the infraction. Likewise, there is an apparent informal criteria when determining the level of action to take in cases where the just cause threshold is passed. Judging on instances where action has been taken under R2P, particularly during the Arab Spring, the criteria, while not overly clear or defined after the 2005 Outcome Document, appears to be grounded on “just war” principles such as proportionality, right intention and, especially, the prospect of success. Additionally, the level of international and regional support as

\textsuperscript{146} M Walzer, \textit{supra} note 4, at 14
well as historical and cultural considerations appear to round out this criteria. The fact this criteria is not explicitly outlined does not mean it has no influence on the way R2P is applied. Therefore, even though the UN did not adopt the original precautionary principles contained in the R2P document does not mean the principles have no impact on the operation of the doctrine. They can simply exist as non-binding guidelines. Obviously, international law is much more complex than traffic law. This simplistic speed limit analogy is only useful in the context of the extensive analysis already performed on the conceptual nature and developmental progress of R2P.

Commentators who classify R2P as only a candidate legal norm commonly point to the potential for inconsistent results due to the application of R2P relying on the Security Council. It is true that inconsistent or ineffective results can lead to a legitimacy deficit for the doctrine similarly to how little or no enforcement of speed limits can lead to complete ignorance of them. However, as Brunnée and Toope point out, given the intricacies of international law and the various sources it draws upon, a norm can still have legal status even though it is “widely breached”.147 The ultimate objective of R2P is prevention and it is unreasonable not to recognize R2P as a legal norm simply due to a potential risk of inconsistent results. The advent of universal human rights is not challenged due to consistent and wide failure to provide some of these basic rights to a majority of the global population. There is a strong normative element to both aspects that is based on moral legitimacy. Therefore, the aspirational element of R2P should

147 J Brunee and S Toope, supra note 119, at 135-136
only encourage more commentators and states to recognize its standing as a legal norm and not rely solely on state practice.

Additionally, many of the above critics point to possible scenarios where there could be a distinct lack of political will or physical capacity to take action. This would render the objective of R2P, to ensure no more Rwandas or Kosovos, meaningless. Bellamy refers to the indeterminacy of the doctrine as the root cause of this problem and points this out in the examples of failed international action in the Democratic Republic of Congo and complete inaction in the case of Somalia.\textsuperscript{148} In each of the two crises, it is obvious the just cause threshold was reached due to the large number of deaths reported. At first glance, this appears to contradict the emergence of R2P as a legal norm. However, even Evans’ admitted that despite the limitation on the use of military forces in only extreme cases, there may yet be instances where this is still inadvisable.\textsuperscript{149} R2P should not be perceived as an ultimate salvation; there will be atrocities which will have advanced too far and that no international action would be able to reverse it. Unfortunately, the situations of Congo and Somalia are two examples of this. Darfur falls in the same category. The amount of ground forces that would’ve been required to make any significant impact was too large to be considered reasonable; even then, the prospects of success were not overwhelmingly positive. In these cases, the failure was not the responsibility to react but the responsibility to prevent. However, the fact that international dialogue included considerations of possible responses under R2P in Congo, and in the other six examples that invoked R2P since 2005 as listed by

\textsuperscript{148} A Bellamy, \textit{supra} note 95, at 162

\textsuperscript{149} G Evans, \textit{supra} note 98, at 61
Bellamy, shows awareness of some level of the doctrine. This awareness can be interpreted as having influenced the actions, or inaction, taken by the international community in those situations. Acknowledgment of a responsibility to protect and a willingness to consider action under this responsibility reflects how international actors interpret R2P as more than a policy tool. Therefore, the recognition of this principle by state actors and a contemplations of responses indicate R2P began developing its compliance-pull way before the Arab Spring. It is true that one instance of successful implementation of the responsibility to react using military means does not equate in the creation of a legal norm. Hence, the action taken in Libya is only a result of the consistent and build-up of a binding force behind R2P. It is often impossible to determine exactly when a norm achieves legal status in international law. Again, when actions were ineffective or no action was taken does not mean states ignored the principle entirely. Failed or ineffective responses under R2P do not necessarily indicate the failure of the doctrine as a whole. R2P had already achieved legal norm status before the Arab Spring took place and its swift implementation and careful application in the Libyan scenario proves this.

One proviso in relation to R2P as a legal norm is the fact that responsibility does exactly not equate to obligation. There is some level of obligation to the notion of responsibility but it does not represent a perfect obligation. The principle of responsibility indicates a lower level of binding force than a full-fledged obligation. A legal responsibility and a legal obligation are conceptually different; it would be imprudent for such an obligation to exist in the international arena. A perfect obligation to react would necessitate much
clearer guidelines of behaviour than accepted by states in the Outcome Document. Furthermore, it is dangerous to agree to the use of any type of military force before careful examination of the merits, risks and prospects of success on a case-by-case basis. Such an obligation would create a greater risk that the doctrine could be used as a Trojan Horse. A perfect obligation would also imply there would be penalties for failing to abide by the obligation; it would be strategically and politically daft to commit a nation’s armed forces to a future unknown conflict with the risk of penalties for failing to do so. The responsibility to react is just one possible course of action under R2P and to construct it under a perfect obligation would have gutted the initiative from the onset. It would have made little sense for the ICISS Commission to recommend the creation of a legally enforceable positive duty to act in a system of law which has no direct enforcement mechanism and relies on the consent of participating countries to recognize the binding force of laws. The limitation that R2P only raises a general responsibility to protect, and not a direct obligation imputable on specific parties, needs to be accepted as a reality of the practice of R2P post 2005. This may mean the doctrine does not go normatively as far as its original drafters intended. The belief in a problem of indeterminacy associated with R2P reflects the elevated expectations of the doctrine without acknowledging the way R2P has been accepted and applied by the community of states. It may be valuable to argue about the originally expected effects of R2P and how they may fall short in current application but this should not be done in the same context as evaluating the doctrine’s status as a legal norm of international law.
The doctrine of R2P also provided no resolution to many questions surrounding unilateral military actions for humanitarian actions. The ICISS Commission was silent on this issue and there is no mention of it in any of the UN’s resolutions in conjunction with R2P. A perception of illegitimacy and illegality surrounds the majority of unilateral military actions. As the international community grows smaller due to improvements in technology and continual globalization, unilateral actions imply there is no broad support or consensus within the international community for the action taken. The legality of an international norm rests on the moral force of the respective norm. Therefore, since there is little moral legitimacy to unilateral military actions, incorporating support for them in the doctrine of R2P would’ve crippled it in its infancy.

The doctrine of R2P put established international legal principles, which had previously led to wildly unpredictable results of intervention, into a coherent format that was widely approved through the UN General Assembly and has been used to guide state behaviour, directly or indirectly. The results of measures taken in the spirit of R2P, with their success or failures, should not be the primary or sole yardstick for how the legal status of the norm is judged. The fact that countries now see themselves bound by a responsibility to protect is sufficient for the recognition of a legal norm in international law. The Arab Spring was a signal that R2P is, in fact, a legal norm. There is clear proof that shared understandings have sufficiently developed around the doctrine. Its subsequent interpretation and application highlight that previous conceptual concerns about the content do not stand in the way of the doctrine being attributed significant binding force by the international community.
Conclusion

The doctrine of humanitarian intervention that was meant to govern state behaviour in preventing mass atrocities at the turn of the millennium was lacking the necessary moral and legal force to be considered an effective binding aspect of international law. There was a proven need for a new way of approaching humanitarian actions that provides some level of clarity and certainty. The emergence of R2P from the ICISS commission set off a flurry of international debates surrounding the issue. The new doctrine incorporated many recognized aspects of international law and this was an important factor in its rapid ascension to global recognition at the 2005 World Summit. The doctrine kept evolving from its 2001 formulation and was progressively adopted in international dialogue and state behaviour. This produced mixed results which drew significant criticisms and threw into doubt its content and impact. However, the events of the Arab Spring, particularly the collective response in Libya, indicate a sufficient binding force now exists behind R2P to guide state behaviour. This, along with other aspects of the doctrine highlight its evolution to a full-fledged legal norm of international law.
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