The Impact of the Responsibility to Protect on State Behaviour: An Analysis

by

Eva Maria Jellinek

A thesis submitted in conformity with the requirements for the degree of Master of Laws
Graduate Program of the Faculty of Law
University of Toronto

© Copyright by Eva Maria Jellinek 2012
The Impact of the Responsibility to Protect on State Behaviour: an Analysis

LLM
Eva Maria Jellinek
Graduate Department of the Faculty of Law
University of Toronto

Abstract

The International Commission on Intervention on State Sovereignty was established with the intent of articulating more robust guidelines on how the international community should respond to humanitarian crises. In 2001, the Commission released its official report in which it proposed the creation of a new concept called the Responsibility to Protect (R2P). R2P sought to make nations more willing to address humanitarian crises.

This thesis examines how the concept of R2P has the potential of impacting state behaviour. Through examining its normative evolution and current impact on state behaviour, this thesis argues that while the concept clearly has led to an increase in political will to react, it is occasionally limited by the surrounding political realities.
Acknowledgements

I am truly delighted to honour and thank the people who helped contribute to this thesis. It was a privilege to work under the direction of Professor Jutta Brunnée, who has provided me with great support and comments throughout the year. I am grateful to my parents, who have always challenged me to achieve my best. It was through following their example of hard work and dedication, that I was able to complete this thesis and pursue my dreams of achieving a top legal education. My sister, who inspired me to undertake my university studies in English. Finally, I would also wish to thank Byron Marrello for the relentless love and support he has showed me through my writing of this thesis.
# TABLE OF CONTENTS

I. Introduction ..............................................................................................................1

II. The Inadequacy of Humanitarian Intervention ..................................................5  
   A. Humanitarian Intervention and Sovereignty ..................................................5  
   B. Humanitarian Intervention and Positivism ..................................................7  
   C. The Reinstatement of Humanitarian Intervention .......................................10  
   D. A New Perspective ..........................................................................................16

III. The Responsibility to Protect: An Attempt to Make Morality More Congruent with Legality .................................................................19  
   A. Conceptualising the Responsibility to Protect .............................................19  
   B. Subsequent Developments ............................................................................24  
   C. The Legal Status of the Responsibility to Protect Following the 2005 World Summit .................................................................30

IV. How the Responsibility to Protect Can Have Both a Negative and Positive Impact on Political Decision-Making ........................................34  
   A. The Misuse of the Responsibility to Protect ...............................................34  
   B. Increased Political Will ...............................................................................36

V. The Impact of the Responsibility to Protect in the Context of the Arab-Spring .................................................................41  
   A. Libya ............................................................................................................41  
   B. Syria and Beyond .......................................................................................45

VI. Concluding Remarks .......................................................................................51
I. INTRODUCTION

On the 25th of May 2012, it was reported that the central government of Syria brutally killed 108 civilians in the city of Houla.\textsuperscript{1} With this atrocity, there is now an estimated of 17,000 Syrians who have lost their lives since the conflict began in March 2011.\textsuperscript{2} As this unnecessary bloodshed continues in Syria today, a discussion of how the international community should react to humanitarian crises is as pressing as ever.

Historically, intervention in countries on humanitarian grounds has been seen as illegal under international law. During the 1990’s, the world witnessed numerous examples of domestic conflicts where the civilian population were deliberately targeted.\textsuperscript{3} While the legality of intervention on humanitarian grounds has remained contested, the military interventions into Northern Iraq, Somalia, Haiti, Bosnia and Kosovo, has been widely seen by the international community as ‘legitimate.’\textsuperscript{4} These actions were argued to be legitimate based on the pressing moral obligation of States to stop the cruelty.\textsuperscript{5}

While the unfolding of these events generated a growing international acceptance for the norm of ‘humanitarian intervention’, many States refused to fully condone the intervention.\textsuperscript{6} Even among its supporters, States did not consistently intervene to stop humanitarian atrocities. The situations in Rwanda, the Democratic Republic of Congo, and Sudan are just some examples where the international community was unwilling to

\textsuperscript{4} Ibid.
\textsuperscript{5} Ibid.
\textsuperscript{6} Ibid.
intervene, even though hundreds of thousands of civilians were being slaughtered.\(^7\) This deeply disturbing reality revealed to the world that forceful international reactions were not always initiated as a response to human catastrophes. The ‘pick and choose’ policy inherent to humanitarian intervention made States questions the capability of the norm to deal with humanitarian atrocities. In a heated address to the Member States of the United Nations (UN), the Secretary-General, Kofi Annan, articulated the dilemma facing the international community:

The inability of the international community in Kosovo to reconcile these two equally compelling interests – universal legitimacy and effectiveness in defence of human rights – can only be viewed as a tragedy... It has revealed the core challenge to the Security Council and to the United Nations as a whole in the next century to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand.\(^8\)

Against this backdrop, the Canadian government sponsored the creation of the International Commission on Intervention and State Sovereignty (ICISS).\(^9\) The ICISS was commissioned with the intent of articulating more robust guidelines on how the international community should respond to humanitarian crises.\(^10\) In its official report\(^11\) the commission proposed a new concept named the Responsibility to Protect (R2P), which sought to solve the dilemma caused by the previous norm of humanitarian intervention.

Since the release of the ICISS report, R2P has been debated during numerous international meetings. R2P’s rapid rise seems to reflect a growing international

\(^7\) Ibid.
\(^9\) Supra n. 3.
willingness to make sure that future humanitarian atrocities are properly addressed. The emergence of R2P can therefore be identified as an important step in promoting humanity around the world.

The purpose of this thesis is to engage in an assessment of how R2P has the potential of reshaping State behaviour. By analysing the history of the earlier norm regulating international humanitarian actions (humanitarian intervention) and the evolution of R2P, this thesis will offer insight on how the articulation of R2P will change the way in which States respond to future humanitarian atrocities.

On the basis of this analysis, the thesis will argue that while the concept clearly has led to an increase political will to react, it is occasionally limited by the surrounding political realities.

Chapter II provides a history of the earlier norm of humanitarian intervention, tracing the norm’s inadequacy to deal with humanitarian atrocities back to its lack of legality and conceptual construction.

Chapter III sketches ICISS’ articulation of R2P and the subsequent international responses. Through examining the international amendments of the concept, it will be shown how R2P has evolved into a well-recognized concept within international relations.

Chapter IV assess the way in which R2P has the potential of impacting State behaviour. By focusing on the misuse of R2P and the political will, it will be demonstrated that the concept can have both a negative and a positive impact on political decision-making.
Chapter V analyses R2P in the context of the Arab-Spring. Through examining the conflict in Libya and Syria, it will become obvious that while R2P might make States more willing to react to humanitarian catastrophes, the vigour of the international reaction is largely predetermined by the surrounding political realities.
II. THE INADEQUACY OF HUMANITARIAN INTERVENTION

The doctrine of humanitarian intervention has, ever since its inception, been firmly rooted in morality.12 The emergence of the doctrine as a legal norm was challenged during the sixteenth to nineteenth century.13 One of the factors that contributed to this was the drafting of the United Nations Charter (UN Charter).14 As the UN Charter outlawed interventions that lacked prior Security Council approval,15 States were barred from unilaterally intervening on humanitarian grounds. The human rights catastrophes that occurred in the 1990s served to shed light on the inherent weaknesses of the international legal system.16 Specifically, the catastrophes exposed the incapacity of the Security Council to deliver consistent and effective solutions.17 Once this fault was realized, the international legal system was forced to reconsider the debate on humanitarian intervention. As this illegal doctrine had an overwhelmingly moral attractiveness, a reconceptualization was attempted in the hopes of making the international legal system better apt to deal with future humanitarian atrocities.

A. Humanitarian Intervention and Sovereignty

During the sixteenth and seventeenth century, European moralists asserted that war could sometimes be justified on the basis of protection of natural law.18 Rulers where

---

13 Ibid. at 62-64.
14 Ibid. at 57.
15 Article 2(4) of the United Nations Charter prohibits the use of force. However, force is legal if the Security Council give its prior authorisation under Chapter VII of the United Nations Charter.
17 Ibid.
18 Supra n. 12 at 58.
therefore permitted to enforce natural law beyond their own realms.  

Hugo Grotius asserted that when sovereign rulers have abandoned the laws of the nature, “they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.” 

Grotius also promoted the more controversial idea of a ‘just war theory’. His ‘just war theory’ mandated that, “a war was lawful when fought for a just purpose by just means.” Given that humanitarian intervention was developed within this theory, the appropriateness of intervention was dependent on moral and practical considerations. The considerations included: proportionality, the requirement of last resort, right intention, just cause, rights authority, and prospects of success. While this theory can be championed as a noble attempt to constrain the use of force, the ambiguity of the moral underpinning unfortunately facilitated creative interpretation. With States allowed to subjectively determine who was fighting a just war and who was not, the ‘just war theory’ transformed from a restraint on war into a justification for war. The Grotius era thus exposed how the moral origin of humanitarian intervention was one of its inherent deficiencies.

The non-intervention principle arose as a reaction to the interventionist culture Grotius theory had facilitated. The principle was intrinsic to the idea of sovereignty, which was established by the Peace of Westphalia in 1698. The scholar Samuel Pufendorf wrote about this new approach to international law. Pufendorf poignantly

---

19 Ibid.
21 Ibid.
22 Ibid.
24 Ibid.
25 Supra n. 20.
26 Ibid.
27 Supra n. 12 at 62.
asserted that it is, “contrary to the nature equality of mankind for a man to force himself upon the world for a judge and decider of controversies...any man might make war upon any man upon such a pretence.”29 The new idea of national equality served to reduce inter-State violence by recognizing States' right to undisturbed governance. That being said however, the question on how to respond to domestic brutalities was unfortunately forgotten in the midst of ensuring political stability between States.

**B. Humanitarian Intervention and Positivism**

The advent of legal positivism during the eighteenth and nineteenth century spurred a continued erosion of humanitarian intervention.30 With legal positivism interpreting international law as being enacted by the joint will of sovereign States, principles that lacked support were seen as illegal.31 The writing of the English lawyer, William Edward Hall, provides an accurate insight on how humanitarian intervention was viewed at the time. Hall asserted that, “tyrannical oppression by a government of his own subjects, including religious persecutions or massacres and brutality in civil war, have nothing to do with relations between States.”32 Interpreted from this text is the revelation that jurists identified that the domestic borders of States were becoming increasingly irrelevant to international relations.33 Intrinsic to this ideology on international relations was the principle of self-determination.34 The principle confirmed the people's right to elect their own sovereign.35 The British philosopher, political economics and

29 *Cited from: Supra* n. 12 at 62.
30 *Supra* n. 12 at 63.
32 *Cited from: Supra* n. 12 at 63.
33 *Ibid.* at 63.
civil servant, John Stuart Mill, saw the principle of self-determination and humanitarian intervention as mutually exclusive.\textsuperscript{36} In one of his essays, Mill explained that people could only be truly liberated by winning their own freedom.\textsuperscript{37} In other words, Mill believed that foreign interventions, regardless of their purpose, were meaningless.

The UN Charter codification of authoritative principles of international law was arguably the most fatal strike against the doctrine of humanitarian intervention. Given that the drafting was conducted in the immediate aftermath of the Second World War, the drafters logically prioritised the articulation of principles that could prevent similar atrocities from reoccurring in the future. As the use of force against the territorial integrity of States was identified as the main threat towards international peace and security, it was expressly prohibited unless qualified under the most exceptional circumstances.\textsuperscript{38} The UN Charter prohibition on force naturally spurred commentators into questioning whether the doctrine of humanitarian intervention was still in existence.\textsuperscript{39} Encapsulated in Article 2(4), the UN Charter mandates 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, or in any other manner inconsistent with the purpose of the United Nations.”\textsuperscript{40} This principle in combination with Article 2(7) of the UN Charter (which mandated that, “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are

\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid.
\textsuperscript{38} The two exceptions to the prohibition of force are: force used in self-defence under Article 51 of the United Nations Charter, and force authorised by the Security Council under Chapter VII of the United Nations Charter.
\textsuperscript{39} Ian Hurd, “Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World” (2011) 25(3) Ethics & International Affairs 293 at 298.
\textsuperscript{40} Article 2(4) The United Nations Charter.
essentially within the domestic jurisdiction of any state” \(^{41}\) was interpreted by many scholars as outlawing humanitarian intervention.\(^{42}\)

Even though the primary focus of the UN Charter was restraining international use of force, a certain degree of humanitarianism was implicitly referenced.\(^{43}\) Under Article 1(3), the purpose of the UN is to, “Achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”\(^{44}\) Such language clearly identifies that the drafters of the UN Charter sought to place importance on human rights and their continued protection. With that said however, the attention given to the enforcement of human rights was limited.\(^{45}\) The only way in which force could be legally invoked for their protection, was through utilizing the exception provision of Chapter VII. This indirect avenue only allowed the Security Council to authorise force when they assessed that a situation to constitute a threat to “international peace and security.”\(^{46}\) This avenue of protection was obviously limited, and the cross-border conditions reveal that the principle of sovereignty still dominated international relations.

\(^{41}\) Article 2(7) The United Nations Charter.
\(^{43}\) Supra n. 39 at 299.
\(^{44}\) Article 3(1) The United Nations Charter.  
\(^{45}\) Supra n. 39 at 299.  
\(^{46}\) Chapter VII of the United Nations Charter.
C. The Reinstatement of Humanitarian Intervention

The traditional attitude towards State sovereignty underwent radical changes in the years following the drafting of the UN Charter. The growing importance of human rights implanted the idea that sovereignty should no longer be allowed to shield systematic human rights violations. This meant that human rights violations should be seen as illegal, even if they lacked cross-border effects. By establishing the universality of human rights, The Universal Declaration of Human Rights in 1948, and the two International Covenants of Human Rights in 1966, affirmed this new attitude towards domestic human rights violations.

While these human rights instruments were monumental, they only served to reshape the dynamic between State sovereignty and human rights to a limited extent. The Security Council remained determined to uphold their position that actions which fell outside the scope of the UN Charter could not be justified, even if they appeared legitimate from a human rights perspective. In effect, the Security Council’s stance showed the world that State sovereignty was still the most important principle of international law. This traditional attitude of the Security Council was clearly demonstrated in 1979, when Vietnam invaded Cambodia on humanitarian grounds. The intervention was initiated for the purpose of removing the genocidal regime operating under Pol Pot. Regardless of this genuine humanitarian intent, the UN
refused to identify the intervention as legitimate.\textsuperscript{54} To add insult to injury, the UN also seemingly condoned the continued rule of the Pol Pot regime by allowing a member of its administration to occupy the Cambodian seat in the UN General Assembly from 1982 to 1991.\textsuperscript{55}

While the Security Council at the time continued to act within the parameters of the UN Charter, actions by individual Member States revealed that the approach taken towards sovereignty was about to change. The international reaction to the Iraqi suppression of the Kurds in 1991 can be seen as marking the first shift in attitude. The oppression by the Kurds in Northern Iraq prompted UN debates on how to properly respond to crimes against humanity without violating Article 2(7).\textsuperscript{56} In an impassioned speech, the French Foreign Minister Roland Dumas asked, “When new crimes exist, why should not rules of law be planned to respond to these crimes?”\textsuperscript{57} Despite the question's inherent reasonableness, the Security Council sidestepped the resulting political controversy that embarking upon a reinterpretation of Article 2(7) would have had.\textsuperscript{58} Instead, the Security Council chose to operate within its traditional powers and passed Resolution 688. Under this Resolution, it “condemn[ed] the repression of the Iraqi civilian population in many parts of Iraq, including most recently in the Kurdish populated, the consequences of which threaten international peace and security in the region.”\textsuperscript{59} Although the Resolution did not include the key phrase “all necessary means,”\textsuperscript{60} French, English and American forces nonetheless proceeded to act for human

\textsuperscript{54} Ibid. at 472-473.
\textsuperscript{55} Ibid. at 473.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
\textsuperscript{59} Cited from: Ibid.
\textsuperscript{60} The Security Council’s intention to authorise force is generally introduced by making reference to ‘all necessary means’ within the resolution.
protection purposes, and created safe havens for the Kurdish refugees.61 This initiative has been referred to as a “watershed moment” of international relations, as major States for the first time refused to place sovereignty higher than human rights.62

Even with the enthusiasm that these individual Member States showed for human rights, unfortunately the problematic political realities embedded within the international legal system remained. The Security Council was still the sole entity that could authorize the use of force, and this meant that intervention for human protection purposes was only legal if the Security Council had given prior authorisation.63 The genocide in Rwanda in 1994, and the ethnic cleansing in Srebrenica in 1995, both exemplify the inherent problems created by the collective action requirement of the Security Council.64 As the international community failed to agree on how to address the on-going crises, the humanitarian atrocities in Rwanda and Srebrenica were unfortunately left unaddressed.65 The result of this political deadlock was the needless continuation of civilian bloodshed in both regions. Truly, this was a low point for the international community and the system of international law in general. A few years later, individual Member States decided to ignore the rigid UN Charter framework when the next humanitarian atrocities occurred in Kosovo.66 In response to the perceived failure of the international system to intervene in Rwanda and Srebrenica, some Member States decided human life was more important than respect for the international legal system.

61 Supra n. 47 at 473.
62 Ibid.
63 Chapter VII of the United Nations Charter permits the Security Council to authorise force when an internal situation constitutes a “threat to international peace and security.”
64 Supra n. 3.
65 Ibid.
The crisis in Kosovo occurred in 1999, when the federal government of Yugoslavia operating under President Slobodan Milosevic was identified to be ethnically cleansing the Albanian population in the province. As a Chapter VII Resolution authorising intervention could not be passed due to political disagreement within the Security Council, the North Atlantic Treaty Organization (NATO) took the controversial step of proceeding unilaterally. Instead of enunciating a new doctrine legalizing unilateral intervention, NATO explored an alternative justification for intervention. When the airstrikes over Serbia started, the Secretary General of NATO announced that, “We must stop the violence and bring an end to the humanitarian catastrophe now taking place in Kosovo. We have a moral duty to do so.” This NATO action immediately generated immense scholarly debate around the relationship between the moral duty to act and the legality of proceeding without a Security Council approval. Whereas some commentators asserted that the action was illegal due to the lack of a prior authorization, others argued that it was lawful due to the moral necessity. Most of the commentators however, ambivalently argued that as the action was a moral necessity it should be seen as illegal but legitimate.

The moral necessity of permitting unilateral humanitarian intervention led to a revival of the debate surrounding the status of humanitarian intervention under international law. In an attempt to legalize the norm, it was argued that force used solely for the protection of human rights does not threaten the territorial integrity of the State

67 Ibid. at 317.
68 The word ‘Unilaterally’ is meant to describe the international use of force without a prior Security Council approval.
72 Ibid. at 162.
73 Supra n. 39 at 294.
and is therefore not a violation of the UN Charter.\textsuperscript{74} The scholars of this viewpoint further argued that given that Article 56 of the UN Charter mandates States to take “joint and separate action” to achieve respect for human rights, force used accordingly cannot be contrary to the UN Charter.\textsuperscript{75}

The attempts to legalize unilateral humanitarian intervention were unsuccessful, and the majority of commentators agreed that the practice remained illegal.\textsuperscript{76} The main reason for its affirmed illegality rested on a plain reading of the exclusive prohibition of force enshrined within the UN Charter.\textsuperscript{77} This prohibition combined with the near constitutional status of the UN Charter was seen as rendering the purpose behind the use of force irrelevant.\textsuperscript{78} To intervene in a State for human protection purposes accordingly constituted the crime of aggression.

Given that the illegality of unilateral humanitarian intervention did not remove the pressing moral obligation to react, the international community was positioned in a dichotomy between morality and legality. This reality prompted commentators to advance multiple explanations of why intervention should be permissible on moral grounds. This was an inherently difficult undertaking as it involved reconciling morality with the black-letter law prohibiting the use of force against the territorial integrity of other nations. Professor Fernando Tesón was one of those who aspired to make unilateral intervention permissible on moral grounds. In one of his publications Tesón explained:

\textsuperscript{74} Christine Chinkin “The Legality of NATO’s Action in the Former Republic of Yugoslavia (FRY) under International Law” (2000) 49(4) The International and Comparative Law Quarterly 910 at 918.

\textsuperscript{75} Ibid.

\textsuperscript{76} Supra n. 39.

\textsuperscript{77} Ibid.

\textsuperscript{78} Ibid. at 300.
Because the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exist and so forfeits not only its domestic legitimacy, but its international legitimacy as well.\textsuperscript{79}

Simply put, Tesón asserted that States that engage in massive violations against human rights lose their right to sovereignty. It logically follows, suggest those that hold this view, that unilateral humanitarian intervention is warranted.

The prominent American political philosopher and public intellectual, Michael Walzer, also advanced a moral argument in favour of intervention.\textsuperscript{80} Walzer argued that interventions on humanitarian grounds should be permissible when governments engage in actions that “shock the conscience of mankind.”\textsuperscript{81} According to Walzer, certain fundamental rights should be protected regardless of the non-intervention principle intrinsic to the UN Charter.\textsuperscript{82}

Even though the majority of States opposed the idea of making unilateral force permissible on moral grounds, the doctrine of humanitarian intervention definitely had an undisputed appeal. The scholarly contributions made by Tesón and Walzer wisely point to the absurdity of allowing governments to go unpunished for infliction of excessive violence on their civilian populations. The doctrine however, was incapable of delivering an appropriate solution to the dilemma of how the international community should respond to humanitarian crises. To make unilateral intervention permissible on moral grounds would have been foolish, as this would have logically channelled the

\textsuperscript{81} Cited from: Ibid. at 675.
\textsuperscript{82} Ibid.
international community back to the intervention culture experienced during Grotius era.

Perhaps the biggest deficiency of the norm of humanitarian intervention was its inability to provide a robust framework on how the international community should respond to humanitarian atrocities. The lack of sturdy guidelines created a flexible environment, in which States could comfortably choose whether or not they wanted to engage in an intervention. This vaguely illegal but legitimate doctrine was thus inadequate, and a new direction in the debate was needed to clarify and improve States’ behaviour when humanitarian crises occurred.

D. A New Perspective

In 1999 the UN Secretary General, Kofi Annan, neatly summed up the dilemma inherent to humanitarian intervention,

Imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defence of the Tutsi population, but the council had refused or delayed giving the green light. Should such a coalition then have stood idly by while the horror unfolded?

To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one might equally ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system...? 83

The quote clearly highlights the twofold inadequacy of humanitarian intervention. Firstly, the norm of humanitarian intervention provided the international community with a problematic ‘pick and choose’ policy, which allowed States to choose whether or

83 Kofi Annan, "Two Concepts of Sovereignty" (September 18, 1999) The Economist.
not to react. Secondly, the moral legitimacy of the norm made unilateral force increasingly accessible on the international arena.

The international community acknowledged a need for a new international norm that encouraged a collective reaction to humanitarian crises. The fact that crises occurred inside the domestic boarders of a sovereign States was no longer seen as hindering a collective action. This attitude was affirmed when Kofi Annan asked the General Assembly, “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?” Kofi Annan presented his personal view, and asserted that “no legal principle – not even sovereignty [should] shield crimes against humanity.”

The obvious need for an improvement within this area prompted the Canadian government, on the initiative of the Foreign Minister Lloyd Axworthy, to sponsor the creation of ICISS. The Commission was formed with the express intent of creating an international consensus on the debate surrounding intervention for human protection purposes. By drawing members of the commission from developed and developing countries, the international community was given a reasonably fair representation. In an attempt to achieve some clarification on the subject, the commission travelled the world meeting and consulting with a variety of government and non-governmental officials.

---

85 Ibid.
86 The commission was co-chaired by Gareth Evans (former Foreign Minister of Australia) and Mohammed Sahnoun of Algeria (former Special Advisor to the UN Secretary General and Special Representative for Somalia and the Great Lakes; the other members were Giséle Côté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Corral Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein and Ramesh Thakur.
87 Supra n. 11 at VIII.
88 Ibid. at IX.
In 2001, the Commission released a report entitled *The Responsibility to Protect*\(^{89}\) which aimed at uncovering how the international community “should respond in the face of massive violation of human rights and humanitarian law.”\(^{90}\)

\(^{89}\) *Supra* n. 11.

\(^{90}\) *Ibid.* at 81.
III. THE RESPONSIBILITY TO PROTECT: AN ATTEMPT TO MAKE MORALITY MORE CONGRUENT WITH LEGALITY

The ICISS’s articulation of R2P was an ambitious enterprise, and aimed directly at reshaping the debate on humanitarian intervention. By redefining sovereignty, the commissioners sought to bring international law and international morality closer together.91 The recommendations made by the ICISS were not universally embraced, and some States were uncomfortable with the version of R2P presented in the report. R2P was therefore negotiated at length in order to make more States satisfied with its parameters. The vast amount of debates held for the purpose of negotiating R2P prompted its evolution, and ultimately led to it being a well-recognized concept within international relations.

A. Conceptualising the Responsibility to Protect

The ICISS attempted to, “develop consistent, credible, and enforceable standards to guide State and intergovernmental practice.”92 One of the commission members, Gareth Evans, clarified the objectives of the ICISS report.93 Evans first explained that the norm must be credible enough not offend lawyers or philosophers.94 The norm must also be robust enough not be rejected by, “either North or South, the permanent five members of the Security Council or any other major international constituency.”95 Ultimately, he described that the norm should be capable of, “mobilizing support when a situation

92 Supra n. 11 at 11.
93 Supra n. 10 at 78-89.
94 Supra n. 10.
95 Ibid.
demanding action arises.”96 These objectives show that the commission intended to create a norm that was workable in political decision-making. With that said however, the commission understood that the ambitious creation of such norm was very difficult as it required the cooperation and consensus of many States.97

The commission observed that the vocabulary, arguing for or against the right to intervene, had become an impediment for carrying the debate forward.98 A new approach was therefore recommended. By asserting that, “the principle of non-intervention yields to an international responsibility to protect,”99 the commission concluded that sovereignty implied responsibility. The shift in language from the ‘right to intervene’ to the ‘responsibility to protect’ was articulated so that States feel obliged to protect communities from mass killings.100 This reconceptualization can be seen as ground-breaking, as it presented a new approach to the humanitarian intervention debate. The new approach appeared to have the potential of channelling the international community away from the ‘pick and choose’ policy intrinsic to the previous norm of humanitarian intervention. Given that the security of human beings was identified as a global concern, this interpretation suggested that States have a collective duty to protect them. It logically followed that any of the pre-existing justifications for not addressing internal humanitarian catastrophes were removed.

The version of R2P presented in the ICISS report was articulated as an umbrella concept encompassing the responsibility to prevent, react, and rebuild.101 The prevent and rebuild component, had been ignored during the previous humanitarian

96 Ibid.
97 Ibid. at 81.
98 Ibid. at 83.
99 Supra n. 11 at xi.
100 Supra n. 10 at 82.
101 Supra n. 11 at xi.
intervention era.\textsuperscript{102} Their inclusion was envisioned to make the ultimate reaction more acceptable, as they showed that R2P was genuinely undertaken for human protection purposes.\textsuperscript{103} Thus, the all-encompassing nature of R2P revealed to the international community that the commission intended to make human security a matter of collective responsibility.

The commission observed that, as intervention for human protection purposes did not form part of the security debate the time during which the UN Charter was drafted, the international legal framework was not constructed to deal with such actions.\textsuperscript{104} The advent of new international actors, new security threats, and the increase attention on human rights required an adaption of the legal framework so that it better fit the contemporary issues.\textsuperscript{105} The commission sought to remedy the situation by arguing for a new approach to sovereignty.\textsuperscript{106} In accordance with this new approach, sovereignty should imply both an external and internal responsibility.\textsuperscript{107} Whereas the external responsibility required States to respect the sovereignty of other States, the internal responsibility required States to respect and protect the human rights of their own people.\textsuperscript{108} This observation led the commission to conclude that when a State is unable or unwilling to ensure the security of its own people, other States can intervene to fulfil this purpose.\textsuperscript{109}

\begin{footnotes}
\item[102] Supra n. 10 at 83.
\item[103] Ibid.
\item[104] Supra n. 11 at 114-115.
\item[105] Ibid.
\item[106] Ibid. at 117.
\item[107] Supra n. 10 at 83.
\item[108] Supra n. 10 at 83.
\item[109] Supra n. 11 at 17.
\end{footnotes}
The ICISS report further recommended that before a military action is undertaken, the international community must exhaust all options short of force.\textsuperscript{110} It is only after the alternatives to force have proven insufficient, that the international community can appropriately engage in a military intervention.\textsuperscript{111} The decision making criteria that guides a military intervention was articulated as: Just cause, right intention, last resort, proportionality, reasonable prospects, and right authority.\textsuperscript{112} The commission poignantly asserted that, a military intervention for human protection purposes is only justified if pursued with the intention of halting or preventing large-scale loss of life following ethnic cleansing, genocide civil war or State collapse.\textsuperscript{113} The narrowness of this framework can be argued to have been included to ensure that R2P did not turn into a blanket justification for other military interventions.

When the commission allocated the responsibility to authorise intervention it looked to Article 24 of the UN Charter, noting that it confers the Security Council with the, “primary responsibility for the maintenance of international peace and security.”\textsuperscript{114} With reading Article 24 in light with the Security Council’s power listed under Chapter VI to VIII, the commission concluded that, “there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding State sovereignty.”\textsuperscript{115} With that said, the commission did note that if the Security Council fails to reach a political consensus, “it is difficult to argue

\textsuperscript{110} Ibid. at 30-31.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid. at 32.
\textsuperscript{113} Ibid. at 31-31.
\textsuperscript{114} Ibid. at 47.
\textsuperscript{115} Ibid. at 49.
that alternative means of discharging the responsibility to protect can be entirely discounted.”

Given that the commission identified the Security Council to be the most appropriate body to authorise force, a reform was recommended aimed at enhancing the decision-making process of the Security Council. Unfortunately, the lack of democratic legitimacy of the Security Council was never dealt with in detail. Instead, the commission made a recommendation with regard to the veto power enjoyed by the five permanent members of the Security Council. The commission observed that it is, “unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern.”

Many of the commission members identified the veto power as the main obstacle to delivering efficient solutions to future humanitarian crises. A code of conduct was therefore recommended that would, provided that no national interests were involved, prevent permanent Members from vetoing what would otherwise be a majority resolution.

The commission’s decision not to condemn the illegal action of unilateral humanitarian intervention shows how the international community is increasingly prioritizing human security. Even though the authoritative principles of international law codified in the UN Charter still carries great weight, the international community is now identified to be more firmly acknowledging a moral duty to look beyond these rigid principles. In its report however, the commission expressly warned the international community of the potential consequences of not accepting the code of conduct. The commission saw two problems with such development. Firstly, as individual Member

---

116 Ibid. at 53.
117 Ibid. at 51.
118 Ibid.
119 Ibid.
States might misinterpret the urgency of the situation unilateral interventions risk be carried out for the wrong reason.\textsuperscript{120} Secondly, the credibility of the UN will be damaged if unilateral actions are carried out in accordance with the established principles and gain public support.\textsuperscript{121}

Overall, the strength of the report can be identified to be its consideration of a State reaction as a duty and not a right. The establishment of a duty to protect clearly makes it more difficult for States to justify their inaction if humanitarian crises were to occur. Given that a reaction was no longer a right but a duty, this articulation of R2P appeared to have addressed the conceptual inadequacy that plagued the previous norm of humanitarian intervention.

B. Subsequent developments

The reactions to the ICISS report following its publication were initially positive. Many commentators asserted that the biggest contribution of the report was its endorsement of a new language based on responsibilities as opposed to rights.\textsuperscript{122} To begin with, Kofi Annan embraced the concept and acknowledged that the shift in vocabulary will make it easier to reach an international consensus on the intervention debate.\textsuperscript{123} Other commentators similarly embraced the concept.\textsuperscript{124} Joelle Tanguy clearly

\textsuperscript{120} Ibid. at 55.
\textsuperscript{121} Ibid.
articulated the benefits following the reconceptualization. Tanguy observed that, “by evaluating interventions from the perspective of the victims rather than the interveners, it carves a new path for redefining the legitimacy and legality of interventions made in the name of human rights and humanitarianism.”

The warm welcoming of the report was unfortunately undermined by the developments following the terrorist attacks on the US in 2001. The subsequent British and US led invasion of Iraq in 2003, unfortunately produced a clear setback for the normative evolution of R2P. Evans has noted that, “few misunderstandings have been more persistent, or have done more damage to undermine global acceptance of R2P, than the perception that the coalition invasion of Iraq in 2003 was a good example of the responsibility to protect principle at work.”

The international uncertainty on how to respond to modern security threats impelled the UN Secretary General to create the High-Level Panel on Threats, Challenges and Change. R2P was included as a natural aspect of the security debate. In their report, the High-level Panel acknowledged, “the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort.” However, the High-level Panel did not fully embrace the ambitious version of R2P presented in the ICISS report. Even though the

126 Ibid. at 148.
129 Supra n. 127.
same types of actions were acknowledged to trigger a military intervention, the High-
Level Panel asserted that intervention could not be for preventive purposes.131 Put
differently, whereas the ICISS asserted the triggering event of force to be “serious and
irreparable harm” involving “large scale loss of life, actual or apprehended, with
genocide intent or not,” or “large scale ethnic cleansing, actual or apprehended,” the
High-level Panel required the crime to have taken place.132

Additional conceptual modifications of R2P were made by the Secretary General in
Human Rights for All,133 the Secretary General delivered his own proposal for reform.
The report represented a radical shift in thinking about the intervention component of
R2P, and sought to narrow the scope for what was considered permissible. Contrary to
the ICISS, the Secretary General took a strong stance against unilateralism and asserted
that, “the task is not to find alternatives to the Security Council as a source of authority
but to make it work better.”134 The Secretary General did however endorse the code of
conduct articulated by the ICISS, and asserted that its implementation could actually
improve the workings of the Security Council.135

The reluctance by the broader international community to embrace ICISS’s version of
R2P was made explicit during the 2005 World Summit. In the 2005 World Summit
Outcome document (Outcome Document) released following the negotiations, it
described R2P as primarily imposing a duty on individual States to protect its own
populations from “genocide, war crimes, ethnic cleansing and crimes against

131 See discussion: Supra n. 127.
132 Ibid.
Rights for All, Report by the Secretary-General, UN Document. A/59/2005 (21 March 2005) at 76.
134 Ibid. at 126.
135 Ibid.
humanity.” The scope of the concept was thus significantly limited as it transformed R2P from including humanitarian crises in general to only including the most atrocious crimes.

Furthermore, the Outcome Document also restrained how much the international community was allowed to get involved in crises. States role was describes as primarily “encourage and help states” to perform their responsibility, and secondly to “use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help to protect the populations.” The Outcome Document presented the Security Council with the responsibility of taking protection action under Chapter VII on a “case by case basis” after “peaceful means” has proven inadequate.

The multiple international debates on R2P avowed the political sensitivity of the concept. It was not a surprise that many States were left uncomfortable with the ambitious version of R2P proposed by the ICISS. The first version of R2P clearly imposed severe constraints on States’ political freedom to decide whether or not to react to humanitarian crises. The fear of accepting limitations on sovereignty almost prompted Russia and a group of developing countries to crush R2P outright. The fact that US and some European States recognised the concept was insignificant, as their credibility was damaged during the US led invasion of Iraq in 2003. Instead, it was the determination of the sub-Saharan African countries, the embrace of the limited-sovereignty principle

---

137 Ibid.
138 Ibid. at para 139.
139 Ibid.
140 Supra n. 123 at 714.
141 Ibid. at 715.
by Latin American countries, and some successful diplomacy by then Canadian Prime Minister Paul Martin, that led to the inclusion of R2P in the Outcome Document.\footnote{Ibid.}

The Outcome Document’s version of R2P was narrower than the one proposed by the ICISS. Perhaps the most significant difference between the two reports was their approach to unilateralism. Whereas the ICISS considered unilateral action to be a natural consequence following a Security Council failure to react, the Outcome Document allocated the authorisation of force exclusively to the Security Council. This fortunate development affirmed a continued respect for the collective security system, and it appeared as though unilateral humanitarian intervention decreased in legitimacy.

The international community continued to refine R2P. In 2009, the Secretary-General commissioned a report on \textit{Implementing the Responsibility to Protect}.\footnote{Implementing the Responsibility to Protect, Report by the Secretary-General, UN Doc. A/63/677, (12 January 2009).} The report analysed the ‘three pillar’ approach (primary responsibility of each state; international responsibility to build capacity to that end; and collective responsibility to act if national authorities are manifestly failing to protect) intrinsic to R2P.\footnote{Ibid. at para 11.} The report affirmed that even though the primary responsibility to protect is vested in each State, there is an international responsibility to, “respond collectively in a timely and decisive manner” when States fail to uphold its responsibility.\footnote{Ibid.} The report also explained that, “the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.”\footnote{Ibid. at para 3.} The report concluded its observations on the use of force by emphasizing that force can
only be used in “extreme cases” and must be authorised by the Security Council.\footnote{Ibid. at para 56.} The report made two remarks with regard to the workings of the Security Council. Firstly, the five permanent members of the Security Council were encouraged not to use their veto “in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome.”\footnote{Ibid. at para 61.} Secondly, the report observed that “the credibility, authority and hence effectiveness of the United Nations in advancing the principles relating to the responsibility to protect depend, in large part, on the consistency with which they are applied.”\footnote{Ibid. at para 62.}

Later the same year, the Secretary General’s report was presented to the UN General Assembly. During the subsequent plenary debate multiple international speakers gave their viewed on the matter. A staggering number of Member States, almost 60, embraced the Secretary General’s view that R2P was now established in international law.\footnote{Jutta Brunnée and Stephen J. Toope, “The Responsibility to Protect and the Use of Force: Building Legality?”, (2010) 2(3) Global Responsibility to Protect at 8.} The apprehensions towards ICISS’s version of the concept were similar to those in the past. Many States agreed that a collective action would “[o]nly rarely, and in extremis, ... include the use of force,” and force could only be used in relation to those international crimes identified in the Outcome Document.\footnote{Remarks by Ambassador Rosemary A. DiCarlo, at a General Assembly Debate on the Responsibility to Protect, in the General Assembly Hall (July 23 2009), Online http://responsibilitytoprotect.org/USA-ENG-1.pdf} A significant number of States articulated a concern about the functioning of the Security Council and embraced the Secretary-General’s recommendation that the five permanent members should not use their veto in order to block a resolution that includes R2P.\footnote{Supra n. 150 at 10.}
The process of developing an accepted version of R2P was clearly prolonged due to the abundant objections it faced. The initial political contestations were not a surprise, given the high sensitivity of force related concepts. States fortunately fought through the battles and managed to achieve a more accepted version of R2P. By the end of these negotiations, R2P had cemented itself as a well-recognized concept within international relations.

C. The Legal Status of the Responsibility to Protect following the 2005 World Summit

After the release of the Outcome Document, the two R2P advocates Evans and Arbour asserted that the concept is on its way to becoming a rule of customary international law.153 This positive assessment was not generally shared and led to commentators fiercely debating the legal status of R2P. Prior to the World Summit, Kofi Annan contributed to the debate by arguing that the aim should not be to create new law, but instead to improve the implementation of already existing international humanitarian law.154 Kofi Annan’s approach was specifically embraced by States afraid of advancing a legalization of an international duty to respond to humanitarian crises.155 The US was one of those States opposed to a legal obligation of intervention.156 The US attitude was clearly expressed by former ambassador to the UN, John Bolton, who a few weeks prior to the World Summit asserted that:

The international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the

153 See discussion by: Supra n. 91.
154 Supra n. 91.
155 Ibid.
156 Ibid.
international community is not of the same character as the responsibility of the host... We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.  

This political reluctance of accepting a legal obligation to protect was not a major setback for R2P’s evolution. The international determination to develop R2P overshadowed reluctance such as the one expressed by John Bolton. The concept had great support and its inclusion in the Outcome Document was important for its evolution. Subsequently at the World Summit, the crucial question was whether the inclusion of R2P in the Outcome Document constituted a moment of legalisation. Jennifer M. Welsh and Maria Banda have analysed the legal status of R2P following the World Summit. The two commentators argue that since the General Assembly is not a law-making body, R2P cannot be seen as law merely on the basis of its inclusion in the Outcome Document. The General Assembly’s incapacity to make law does however not mean that their statements are insignificant. As the General Assembly is highly representative of the world’s nations, political agreement within this forum can be seen as representing international opinio juris on the matter.

Pointing to the example of The Universal Declaration on Human Rights, Welsh and Banda explain the potential impact of a General Assembly resolution. The declaration was, like the Outcome Document, non-binding. Nonetheless, it inspired the enactment of various international human rights covenants and developed into customary law. A

---

157 Cited from: Supra n. 91 at 228.
158 Supra n. 91 at 229.
159 Ibid. at 229.
160 Ibid.
161 Ibid.
162 Ibid.
163 Ibid.
164 Ibid.
substantial amount of State practice is however necessary in order for the Outcome Document to have the same effect as The Universal Declaration on Human Rights.\textsuperscript{165} 

Welsh and Banda further assert that after the World Summit, R2P had the legal status of soft law.\textsuperscript{166} The two commentators explain that even though soft law is not legally binding to start with, it does have the potential of turning into hard law.\textsuperscript{167} However given that soft laws are open to a high degree of political contestation, Welsh and Banda acknowledge there is no guarantee that they will eventually crystallize into customary law.\textsuperscript{168} In their conclusion, Welsh and Banda point out that even though R2P cannot be seen as hard law, it has already shown itself to influence political decision-making.\textsuperscript{169} This final observation is highly significant, as it show the great potential R2P has of evolving in a binding rule of international law.

Jutta Brunnée and Stephen Toope has also analysed the status of R2P following the World Summit. In their article, Brunnée and Toope assert that R2P is a “candidate norm of international relations” and has a clear potential of evolving into a legal norm.\textsuperscript{170} With that said however, these scholars points out that the initial success of R2P does not guarantee positive end results as the surrounding political institutions will influence the concept’s ultimate effect.\textsuperscript{171} Brunnée and Toope point to the unfortunately reality that for R2P, “all the eggs of responsibility to protect have been thrown into the Security Council basket, a basket that has proven to be full of holes in the past.”\textsuperscript{172} Thus, the Security Council in its present form can be seen to pose a danger to the continued evolution of R2P, as internal political disagreement can smother its voice. Even if this is

\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid. 213 at 230.
\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid.
\textsuperscript{169} Ibid. 213 at 231.
\textsuperscript{171} Ibid. at 136.
\textsuperscript{172} Ibid.
the case, Brunnée and Toope nonetheless believe that the norm-building process is valuable as norms can be used as accountability mechanisms in decision-making.\textsuperscript{173} The unfortunate dynamic within our collective security system shall hence not discourage the continued development of R2P.

Against the backdrop of these scholarly contributions, it can be observed that R2P has rapidly evolved into a well-known concept within international relations. The scholarly contributions positively verify that R2P is on its way of becoming a customary norm of international law. That being said, Brunnée and Toope’s contribution to the debate serves as an important reminder of the context that R2P is being forged within. With the practical reality of the present institutions, the effectiveness of R2P might be diluted even if it is rooted more firmly within international law.

\textsuperscript{173} Ibid.
IV. HOW R2P CAN HAVE BOTH A NEGATIVE AND POSITIVE IMPACT ON POLITICAL DECISION-MAKING

The numerous international negotiations on the topic of R2P confirm that States are progressively taking a less self-centred approach to humanitarian catastrophes. States have shown themselves to be committed to the development of a concept that can improve their behaviour when humanitarian crises occur. The concept of R2P however is fairly young, which means that the success of its continued evolution is intrinsically linked to political decision-makers referencing it with caution. The reason for this hesitation is simple, if political decision-makers cave into the temptation of using R2P to develop individualistic use of force agendas, they could dilute R2P’s resolve and force it down a destructive evolution. Instead the concept should be used sparingly, and limited to genocide and other atrocity related crimes.

A. The Misuse of the Responsibility to Protect

While R2P can be used as a force for good, it also has the possibility of generating undesired use of force policies. As noted by the scholar Evans, the concept has alarmingly inspired policy makers to apply it in areas unrelated to the once internationally agreed on. The US led invasion of Iraq in 2003 exemplifies such misapplication of R2P.174 The States behind the intervention in Iraq perceived that the West’s inaction to the Iraqi massacres of the Kurds in the 1980s, and that of the Shiites in the 1990s, justified an application of R2P in this case.175 This can be seen as serious misapplication of R2P, as the concept was not developed to punish old crimes, but instead to prevent or avert a current threat to a large group of people.176 Evans explains

---

174 Supra n. 123 at 717.
175 Ibid.
176 Ibid.
that even if it appeared as though force could legitimately been used, a number of criteria should have been satisfied before the intervention was pursued.177 One specific criterion that Evans noted should have been first fulfilled in the Iraq incursion was a risk assessment that included a prediction of whether the intervention had the potential of generating positive results.178

Another destructive misapplication of R2P can be seen in the area of prevention strategies. In this capacity, policy makers can be seen to have overstepped the appropriate use of R2P, by attempting to justify international use of force in areas unrelated to those that have a broad international support. Evans points to a contribution made by Anne-Marie Slaughter and Lee Feinstein a few years ago.179 In 2004, Slaughter and Feinstein used R2P as a “springboard” to articulate the principle of a duty to prevent.180 The principle essentially sought to extend the legitimacy of using force for preventive purpose to weapons of mass destruction (WMD).181 In 2006, the US picked up this principle and showed express support for the idea. In their National Security Strategy, the US asserted that they would, “if necessary, act pre-emptively in exercising our inherent right of self-defence.”182

The US has maintained their ambition to extend R2P to include prevention strategies, and their most recent attempt was debated during the annual meeting of the American Society of International Law in 2012. The leading debater on the issue was Professor Rosa Brooks, who discussed the use of force implication that stems from R2P.183 Specifically, Professor Brooks drew attention to the US’s creative extension of

177 Ibid.
178 Ibid.
179 Ibid. at 718.
181 Ibid.
182 Cited from: Supra n. 123 at 718.
R2P to include the right to use drones in foreign countries that were either unable, or unwilling to suppress terrorism.184 She explained that as the "logic of R2P does not limit it to Security Council action, rather [the] lawfulness of action stems from the power to protect."185 This reality led Professor Brooks to conclude that today's decreased cost in using force and minimal risk for collateral damage, combined with the R2P framework increase the risk of unilateral use of force.186

The discussion of the use of force agendas shows that the articulation of R2P may have come at the cost of decreasing respect for sovereignty. In effect, the ambitious agendas for R2P can be seen to side-track the core purpose of R2P. Evans notes that such action is not particularly helpful for R2P, as corollary principles channel the focus away from its initial intention.187 The misuse of R2P can therefore be seen to cause serious damage to the concept's reputation, and thus damage its normative evolution. The international community must therefore protect R2P from further misapplication before the concept loses its current supporters.

**B. Increased Political Will**

The strength of R2P lies in its ability to prompt State reaction when humanitarian crises occur. As it has evolved into a well-recognized concept within international relations, States are expected to make human security part of their political agendas. That being said, R2P is extremely politicised. With not only the large economic and military commitment involved, but also the political sensitivity of authorising humanitarian intervention, such a realization is not surprising. States therefore have to take a balanced approach in their resolve, taking into account both R2P and their

184 Ibid.
185 Ibid.
186 Ibid.
187 Supra n. 123 at 718-719.
domestic interests. It logically follows that international reactions to humanitarian crises are partly predetermined on that political arguments can be made in favour of the action.\footnote{Ibid. at 721.} Evans has commented upon this reality, and explains that the arguments crucial to convincing States to react are, “party interests arguments designed to consolidate a government’s vocal domestic base; National interest arguments; or financial arguments. And if all else fails, they can even be moral arguments.”\footnote{Ibid.}

The international reaction to the humanitarian crisis in Darfur can be seen to verify this complex political dynamic. Through examining Darfur, it is evident that even though States are increasingly pressurised to take action, the surrounding political realities sometimes hinders a satisfactory response. The crisis in Darfur started after a rebellion had occurred in the region. The increase in violence led the Sudanese government to arm its militia forces mainly made up from Arab tribes from Northern Darfur.\footnote{David Lanz, “Why Darfur? The Responsibility to Protect as a Rallying Cry for Transnational Advocacy Groups”, (2010) 3 Global Responsibility to Protect 223 at 227.} These forces were let loose, aimed at stopping the rebels from continuing challenging the central government of Sudan.\footnote{Ibid. at 226.} From 2003 to 2004, the militant forces reportedly destroyed a large number of non-Arab villages, killed over 130,000 people, and forced 1.2 million Darfurians away from their homes.\footnote{Ibid. at 228.}

In 2004, the international community eventually responded to the crises.\footnote{Ibid.} The UN humanitarian coordinator in Sudan, Mukesh Kapil, addressed the situation and explained that Darfur was, “the world’s greatest humanitarian crisis... the only difference between Rwanda and Darfur is now the numbers involved.”\footnote{Cited from: Ibid. at 228.} The growing concern for the people of Darfur prompted the UN Security Council to set up an
International Commission of Inquiry to assess whether genocide was being committed.\textsuperscript{195} The Commission asserted that even though genocide could not be established, the crimes committed were, “no less heinous than genocide.”\textsuperscript{196} Against the backdrop of the growing international awareness of the conflict, activist argued that a robust UN peacekeeping force under the Chapter VII mandate was the best option for achieving peace in the region.\textsuperscript{197} As the government of Sudan was working against a UN peacekeeping mission, the Resolution that was being passed was an obvious compromise between the UN and the Sudanese government.\textsuperscript{198} The peacekeeping mission established by Resolution 1796 was appropriated described as being of, “predominantly African character,” and was under the joint authority of both the African union and the UN.\textsuperscript{199}

Unfortunately, the international attempts to halt the violence did not produce satisfactory results. Although the mortality rates were significantly decreased, intra-rebel violence and attacks on humanitarian organisations actually increased.\textsuperscript{200} In 2006, the International Crisis Group asserted that, “the international community has conspicuously failed to take the steps necessary to protect the people of Darfur.”\textsuperscript{201} Darfur was therefore seen as constituting an uncomfortable reality as it, “evoke[d] the failure of the international community to stop war crimes, crimes against humanity, genocide, and ethnic cleansing.”\textsuperscript{202} Despite these troubling observations, the international community decided not to engage in a more forceful reaction. Instead, they sat back and watched the crisis get worse. The ceased influx of international engagement

\textsuperscript{195} Supra n. 190 at 229.
\textsuperscript{196} Cited from: Ibid. at 229.
\textsuperscript{197} Supra n. 190 at 231.
\textsuperscript{198} Ibid.
\textsuperscript{199} Ibid.
\textsuperscript{200} Ibid. at 233.
\textsuperscript{201} Cited from: Supra n. 190 at 223.
here can be traced to prioritizing considerations other than the human security. One of these considerations was the lack of military capacity. Evans interestingly discusses how this impacts States’ decision to get involved. For him this issue is problematic, as States that have the biggest capacity, both in terms of personal and equipment, are often busy with deployments in other parts of the world. Even if there is no shortage in terms of military personal, Evans remarks that there, “will be issues of training, command, control and communications capability, transportability, and general logistic support.”

Evans submits that even though Darfur was not a case where he would argue that military force should have fought their way in, the situation nonetheless demonstrates the problem with lack of military capacity. The only State with military capacity at the time was the US, and their abstention from committing their military was not surprising considering that they deployed large military forces in Afghanistan and Iraq.

Relying on the unsatisfactory international response to the Darfur crisis, critics have argued that the concept does not make a difference because States will always give priority to their domestic interests. According to these critics, States will only address humanitarian crisis if crucial interests can be affected such as the prevention of terrorism or suppression of mass destruction. The commentator Alan J. Kuperman even argues that the articulation of R2P creates a “moral hazard”, because it boosts domestic violence in order to attract an international reaction. Such an argument can be easily rebutted, as R2P can be identified to make a difference by imposing a sense of

203 Supra n.123 at 719.
204 Ibid.
205 Ibid.
206 Ibid.
207 Supra n. 190 at 234.
208 Ibid.
209 Ibid.
obligation on States to take action. Thus, even though States will continue to give a certain degree of emphasis to their domestic interests, R2P serves to pressurize government to address humanitarian crises. Viewed through this lens, R2P can be seen to raise the bar of accountability by providing a framework of what is expected from States as international actors.

In Darfur, R2P was shown to provide advocates with a “rallying cry” around which they could mobilize and demand State reaction.211 Nicholas Wheeler elaborates on this point and explains that, “it is only through the mobilisation of intense pressure on the part of domestic publics that government will be prepared to embark on humanitarian policies.”212 The international reaction to the crisis in Darfur affirmed that States are indeed feeling pressured to address humanitarian crisis, even when they are occurring in strategically unimportant regions.

The fact that the international community never engaged in a more forceful military intervention is not a good enough reason to condemn R2P. David Lanz articulates that the probable cause of commentators drawing on Darfur as a negative example is that they still believe involvements short of force is a failure.213 This attitude is misplaced, and it is important to acknowledge that R2P does not guarantee perfect results. R2P cannot be expected to compel States to commit all the necessary military and economically resources whenever foreign atrocities occur. Such expectation is inherently unreasonable, and ignorantly forgets that political decision-makers are accountable to their civilian population. With these decision makers tied to the political will of their domestic interests, any decision to expend capital and resources on an intervention, must be logically considered in light of these factors.

211 Supra n. 190 at 226.
212 Cited from: Ibid. at 239.
213 Supra n. 190 at 247.
V. THE IMPACT OF R2P IN THE CONTEXT OF THE ARAB-SPRING

The political uprising that engulfed the Middle East and North Africa in 2011 is reported to have been triggered by the actions of a 26 year old man. In an act of defiance, a young man in Tunisia set himself on fire in order to draw attention to the inadequacies of the current political regime. This martyrdom inspired massive political protests across the region, and eventually led to the collapse of the political regimes of both Tunisia and Egypt. These anti-government protests reached far beyond Tunisia's neighbours, and were reported to occur in the nations of Algeria, Bahrain, Iran, Jordan, Lebanon, Palestine, and Yemen. When the political uprising from this movement reached Libya and Syria, the national authorities responded with overwhelming military force. In Libya, the international community showed a willingness to address the violence. Unfortunately for the citizens in Syria, the international community's reaction has not been as strong. By analysing R2P in the context of the Libyan and Syrian conflict, this thesis will provide an examination of the impact R2P has on State behaviour.

A. Libya

The Libyan conflict started when citizens mobilized in order to protest the oppressive methods used by the central government operating under Muammar Gaddafi. This group of disgruntled citizens was well-organized, and almost immediately established the Interim Transitional National Council, an opposition force that was equipped with its own military units. The creation of this Council caused almost immediate tension with the current regime, and conflict between the government and the opposition spread

---

215 Paul D. Williams, “The Road to Humanitarian War in Libya”, (2011) 3 Global Responsibility to Protect 248 at 250.
quickly from Benghazi to other parts of Libya. Once these conflicts started to escalate, it did not take long for media reports to confirm that civil war had broken out.\textsuperscript{216}

The international community reacted almost instantaneously to the on-going violence in Libya. First to respond was the League of Arab States (LAS).\textsuperscript{217} They reacted by suspending Libya’s participation in the organization until the violence was stopped.\textsuperscript{218} Shortly after, the UN Security Council reacted by unanimously passing Resolution 1970.\textsuperscript{219} The Resolution strongly condemned “the widespread and systematic attacks” on the civilians, and demanded Gaddafi to immediately stop the central government’s violence against the civil population.\textsuperscript{220}

The opposition remained strong despite Gaddafi’s brutal methods, and shortly after the Resolution had been passed the Interim Council declared itself the sole representatives of Libya.\textsuperscript{221} The Interim Council requested that the international community should, “fulfil its obligations to protect the Libyan people from any further genocide and crimes against humanity without any direct military intervention on Libyan soil.”\textsuperscript{222} Crucial regional organisations supported an international intervention in Libya, and the LAS encouraged the Security Council to:

bear its responsibilities towards the deteriorating situation in Libya, and to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation and to establish safe area in place exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nations residing in Libya, while respecting the sovereignty and territorial integrity of neighbouring States.\textsuperscript{223}

\textsuperscript{216} Ibid.
\textsuperscript{217} Ibid. 248 at 251.
\textsuperscript{218} Ibid.
\textsuperscript{220} Ibid.
\textsuperscript{221} Supra n. 215 at 252.
\textsuperscript{223} Council of the League of Arab States, Res. No. 7360, 12 March 2011, paragraph 1.
Even with such a strong international condemnation of their actions, the central government turned a blind eye and continued their brutal strategies. Gaddafi’s forces were clearly determined to crush the opposition, and showed no mercy in their efforts to do so. The viciousness of the central government was made explicit when Gaddafi described the protesters as “cockroaches” and publically announced that he intended to “cleanse Libya house by house” until the threat to the central regime was removed.224

When the Gaddafi regime refused to stop the violence against their citizens, the Security Council initiated yet another negotiation on how to respond to the Libyan conflict. As a result, Resolution 1973 was passed showing a broad international support for military intervention.225 The Resolution was passed with ten votes in favour (France, United Kingdom, United States, Bosnia, Colombia, Gabon, Lebanon, Portugal, Nigeria, and South Africa) zero votes against, and five abstentions (China, Russia, India, Brazil, and Germany).226 Even though the Resolution did not explicitly make reference to R2P, it authorised the use of, “all necessary measures... to protect civilians and civilian populated areas under threat of attack... while excluding a foreign occupation force of any form on any part of Libyan territory.”227 The authorisation of all necessary means meant that a collective armed intervention was legal under international law.

Gaddafi’s threat of, “cleansing Libya house by house,” did form the perspective of those States in favour of the Resolution, clearly indicated that time was running out.228 The member States in favour of the military intervention saw the Libyan conflict as an opportunity for the international community to fulfil their previous promise of

224 Supra n. 215 at 256.
226 Ibid.
227 Ibid.
228 Supra n. 215 at 256.
protecting civilians in danger.\textsuperscript{229} Even though killing leaders of nations is not within the R2P framework, the foreign intervention nonetheless facilitated the rebels’ initiative to doing so. In the immediate aftermath of Gaddafi’s death, the international reaction to the Libyan conflict appeared to have been a success. Throughout the conflict, the international community had ambitiously discussed their responsibility to protect the Libyan people. The reaction to the Libyan conflict could therefore be seen as representing a shift in State behaviour. Whereas old interventions focused on the international community’s right to intervene, this one was prompted by the relatively newly established global responsibility to protect.

In order to better comprehend how R2P impacted States’ behaviour during the Libyan crisis, an examination must be conducted into the relationship between international law and State behaviour. The scholars of Robert Howse and Ruti Teitel explain that international law contributes by changing the inter-State negotiations that surround those rules.\textsuperscript{230} Ian Hurd clarifies their argument by illustratively explaining that, for Howse and Teitel, “the law is a resource for State rather than a standard that distinguishes between lawful and unlawful behaviour.”\textsuperscript{231} Against the backdrop of these scholarly contributions, it can be observed that international norms impact State behaviour by virtue of being an aspect of the decision-making process. The international response to the Libyan crisis attested that R2P is today forming part of States’ decision-making process.

With that being said, these scholarly contributions equally clarifies that international norms operate in a broader political context, and other considerations will logically continue to influence their political decision-making. The international developments

\textsuperscript{229} Ibid.
\textsuperscript{231} Supra n. 39 at 310.
following the intervention in Libya illustrate how this political reality can skew the impact of R2P. In the wake of the international intervention in Libya, opponents of R2P were able to construct strong arguments for condemning the concept. International key players such as India, Russia, China, Brazil, and South Africa believed that the international reaction had generated many undesired results.232 In particular, the ultimate regime change caused particular dissatisfaction among the R2P critics.233 Maria Luiza Ribeiro Viotti, the Permanent Representative of Brazil to the UN, commented on the developments, and affirmed that the problem with Resolution 1973 was the precedent it set.234 The ultimate regime change unfortunately gave R2P critics a strong reason for arguing that the concept is a, “smoke screen for regime change.”235 The States already hesitant to R2P were not surprisingly uncomfortable with this development, as it affirmed R2P’s potential of threatening sovereignty.

B. Syria and Beyond

In March 2011, the political uprising in the Arab world reached Syria.236 It all began with protests against the torture of students who had painted anti-government graffiti.237 The anti-government protests spread quickly across the nation, and prompted the Syrian regime operating under president Bashar al-Assad to use excessive violence against the protesters. The brutality within Syria immediately drew international attention. Many States were quick to acknowledge their responsibility to protect, and

233 Ibid.
234 Ibid.
235 Ibid.
237 Ibid.
used non-force means as a first step in their attempts to stop the crisis. A variety of economic sanctions were put in place, aimed at pressuring the Assad regime to stop the violence. Furthermore, in March 2012 the UN-Arab League special envoy to Syria, Kofi Annan, put forth a six-point peace plan to be implemented in the country. In short, the components of Annan’s plan included: work with the international envoy, end violence by all parties under UN cease-fire, allow humanitarian aid, free detainees, ensure freedom of movement of journalists, and respect peaceful demonstrations.

Unfortunately as of the date this thesis was written, the international attempt to bring an end to the Syrian conflict has not yet succeeded. Instead the violence has escalated, and now it appears as if the only solution to stop the violence is through more forceful measures. Even though the international community is well aware of this reality, the increasingly problematic political context has discouraged States from taking the necessary further actions. One of the main aspects that impact the larger political context is the institutional dynamic intrinsic to the Security Council. China and Russia have, ever since the conflict started, blocked resolutions that authorises more meaningful reactions to the Syrian conflict. The hesitation of two States to allow intervention on R2P transcends beyond the Syrian conflict, and can be seen to extend all the way to R2P’s inception. Viotti has commented on the situation and asserts that, “in the aftermath of the Libyan Resolution, what we’ve seen is distrust on the part of the Security Council Members. Syria is a case in point: Many are saying they don’t even want to go down the road of putting sanction on Syria because they think it could lead to the

---

use of force,” under R2P.\textsuperscript{242} Russia’s reluctance to take more meaningful reactions can be traced back to their good relationship with Syria.\textsuperscript{243} As Russia’s influence and economic interests in the region is dependent on Syrian cooperation, it is only logical that they wish to maintain a good relationship with the Assad regime.\textsuperscript{244} This political bond has not only prevented the UN intervention, but has also allowed the Assad regime to keep their munitions reserves stocked. Reports have identified that throughout the conflict in Syria, Russia has continuously supplied them with weapons.\textsuperscript{245} James Traud, a Senior Fellow at the Global Centre for the Responsibility to Protect, comments upon this political reality by asserting that, “what determines action is the degree of isolation of the non-compliant State, and Libya didn’t have any friends... Syria has a lot of friend in its neighbourhood.”\textsuperscript{246}

The political disagreement within the Security Council verifies that considerations other than R2P continue to influence State behaviour. The veto system currently used by the Security Council can be seen to significantly worsen the prospects for R2P. As one member can unilaterally hinder the UN from taking action under R2P, the system weakens R2P’s impact. At this juncture it should be mentioned however, that R2P subtly impacts even the more hesitant States. Russia is a case on this point. The friendship between Russia and Syria did not keep Russia from condemning the massacres that took place during the summer in 2012. With that said however, the Russian government did not explicitly blame the Syrian government but took vaguer approach by stating that, “We have no doubt that this wrongdoing serves the interests of those powers that are not seeking peace but persistently seek to sow the seed of interconfessional and civilian

\begin{footnotesize}
\textsuperscript{242} Supra n. 232. \\
\textsuperscript{243} Ibid. \\
\textsuperscript{244} Ibid. \\
\textsuperscript{245} Ibid. \\
\textsuperscript{246} Ibid. 
\end{footnotesize}
conflict on the Syrian soil.” Even though the persuasiveness of R2P can be seen to have reached even Russia, it is highly unlikely that it will fundamentally reshape their political preferences. Russia has always taken a strong approach against concepts that threatens sovereignty, and it is only logical that they will continue to do so in the future. Against this backdrop, it is clear to observe that R2P is not stronger than the institutions that enforce it. Thus without a reform of the veto system used by the Security Council, the impact of R2P will evidently be limited in its application.

On a more positive note, the current international reluctance to contemplate unilateral humanitarian intervention in Syria does indicate that more robust guidelines on how to respond to human massacres are indeed being established. In comparison to the Kosovo massacre in the 1990s, the current international reaction to Syria shows that States are becoming more hesitant to engage in illegal action, despite the moral attractiveness of doing so. In the 1990s, NATO ignored the collective security system and used unilateral force when the Security Council failed to react. Today, the international community is refusing to act outside the parameters of the collective security system. In March 2012, Washington made it clear that the US would not pursue an intervention without a Security Council authorisation. When asked whether the US contemplates unilateral force, President Obama announced that, “for us to take military action unilaterally as some have suggested, or to think that somehow there is some simple solution, I think is a mistake.” Obama further asserted that military force is not the only way to deal with Syria, “We’ve got to think through what we do through the lens of

249 Ibid.
what’s going to be effective, but also what’s critical for US security interests.”250 The parameters of R2P are apparently being honoured, as there is currently no active discussion of engaging in a unilateral intervention.

Perhaps the most important thing to keep in mind when assessing R2Ps impact on State behaviour, is that there is no simple solution to humanitarian crises. R2P itself can never guarantee quick solutions. International reactions are inherently complex and only a naïve decision-maker would slavishly follow international norms without looking to the broader political context. The lack of more forceful reactions to the Syrian conflict should therefore not be seen as being due to incapacity of R2P, but rather due to an unfavourable political context. One thing that can be identified to have decreased States will to engage in more meaningful reaction, is the grave humanitarian and economic risk that would follow an intervention. A theoretical foreign intervention in Syria would be utterly problematic, as there is great uncertainty as to whether such action would actually lead to an improved situation.251 To begin with, even though NATO can summon a strong military action, the Syrian forces will be harder to defeat.252 The robustness of the Syrian army may lead to a prolonged conflict during which more civilians may be killed.253 It will also be difficult to find territories to preposition military units around Syria, as most of the nation’s neighbouring States are not willing to lend their territory to NATO forces.254 The stakes for States are obviously high, as the intervention would be both costly and dangerous.

250 Ibid.
252 Ibid.
253 Ibid.
254 Ibid.
Even the prominent human rights defender Kofi Annan appears to have given up in his attempt to put an end to the violence. In August 2012, Kofi Anna resigned as Syria’s envoy. In an heart-breaking speech Kofi Annan expressed that:

“You have to understand: as an envoy, I can't want peace more than the protagonists, more than the Security Council or the international community for that matter...My Central concern from the start has been the welfare of the Syrian people. Syria can still be saved from the worst calamity—if the international community can show the courage and leadership necessary to compromise on their partial interests for the sake of the Syrian people.”

It therefore looks as though this time around R2P has been defeated by the larger political context. This distressing reality could not have been prevented, even if R2P was at a later stage in its normative evolution. The previously discussed dynamic between international norms and State behaviour insinuate that international law is inherently limited by the political context. The legal status of R2P would therefore not have made a difference in Syria, as it is States’ attitude that determines the vigour of the international reaction. One can only hope that R2P soon reshape States’ attitudes in the future, so that the international community can collectively address the future massacres that unfortunately continue to plague mankind.

---

VI. CONCLUDING REMARKS

As was shown, the articulation of R2P has had the positive effect of making States more willing to address humanitarian crises. The relatively early stage of R2P's normative evolution makes it no less influential. The immense impact that R2P already has had on State behaviour confirms that its persuasiveness is not dependent on it becoming a binding rule of international law. States are nonetheless expected to give it attention, as it is a well-recognized concept within international relation. With that being said, the analysis of the dynamic between international norms and State behaviour affirmed that, as States are continuously influenced by considerations other than R2P, their reactions may not always appear satisfactory.

The international community has clearly come a long way in developing more robust guidelines on how to respond to humanitarian crises. A comparison with the previous norm of humanitarian intervention has showed that R2P has addressed the two earlier problems of inadequate conceptual construction and the lack legality. Firstly, the improved linguistics has proven to be an invaluable aspect in encouraging States to react even when crises occur in strategically unimportant regions. This has led to a significant decrease of the previous ‘pick and choose’ policy. Secondly, States current refusal to engage in a unilateral humanitarian intervention in Syria shows a striking difference in State behaviour in comparison the Kosovo intervention in the 1990s. Today, the focus is not on finding alternative grounds for intervention, but on improving the collective security system so that when actions are taken they are in conformity with international law.

A continued positive normative evolution of R2P is not however, set in stone. The misuse of R2P in controversial areas has been seen to threaten the credibility of the concept. The uncomfortable threats posed by international terrorism and WMD must
not tempt policy makers into a rash extension of R2P. Utilizing R2P to cover proactive use of force should not be allowed as it would not only constitute a clear misapplication of R2P, but also dilute and damage its reputation. In order to protect a continued evolution of R2P, States should only invoke it in areas that have been internationally agreed upon.

Ultimately, the recent political uprising in the Arab world has exposed that R2P has both inherent strengths and limitations in creating real change in State behaviour. When the Libyan regime had shown unwilling to protect their civilian population, the international community assumed their responsibility and addressed the situation. Those who believed that the international reaction to the Libyan conflict set a precedent that would be consistently followed, were mistaken. Given that international norms only constitute one aspect of the political decision-making, international reactions are still predetermined by the surrounding political context. Thus, as the political context of the on-going conflict in Syrian conflict has recently been proven problematic, States are logically showing a decrease willingness to take more meaningful reactions. This unfortunate development confirms that even though R2P can modify the negotiation process, it will not always be given main priority. With that being said, as R2P has raised the bar of what we expect States to do when humanitarian massacres occur, political actors are giving more weight to human security in their decision-making process. This should be championed as it serves to better mankind as a whole.
SECONDARY MATERIALS: ACADEMIC ARTICLES


Nardin, Terry, “The Moral Basis of Humanitarian Intervention” (2002) 16 (2) Ethics & International Affairs 57


Tanguy, Joelle, “Redefining Sovereignty and Intervention” (2003) 17(1) Ethics & International Affairs 141.


Williams, Paul D, “The Road to Humanitarian War in Libya” (2011) 3 Global Responsibility to Protect 248.
SECONDARY MATERIALS: NEWSPAPER ARTICLES AND MEDIA REPORTS


SECONDARY MATERIALS: OFFICIAL DOCUMENTS AND REPORTS


Implementing the Responsibility to Protect, Report by the Secretary-General, (12 January 2009), UN Doc. A/63/677.


United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI.


UN General Assembly, 2005 World Summit Outcome, UN document A/RES/60/1 (24 October 2005).


SECONDARY MATERIALS: WEBSITES


SECONDARY MATERIALS: LECTURES AND SPEECHES


