THE ROLE OF THE DOCTRINE OF THE ‘RESPONSIBILITY TO PROTECT’ (R2P) IN KENYA’S POST-ELECTION VIOLENCE

BY

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NOVEMBER 2013
DECLARATION

This project is my original work and has not been submitted for another Degree in any other University

Signature ........................................

Irene Nyanjau Wachira Date....................

This project has been submitted for examination with my permission as the University supervisor

Signature........................................

Dr. Ibrahim Farah Date......................
ACKNOWLEDGEMENT

My special thanks to God for giving me good health, provision and strength throughout the entire course. I also wish to acknowledge the efforts of my family members especially my dad, mum brothers and sisters for their moral support and encouragement throughout the entire research period.

I also take this opportunity to acknowledge the professional and intellectual support and advice of my supervisor Dr. Ibrahim Farah who guided me in writing this project proposal. Finally, I owe very special thanks to all my M.A. classmates for their encouragement and unfailing support.
DEDICATION

To my husband, James Mwangi for his encouragement and financial support.
ABSTRACT

This study explores the application of the doctrine of responsibility to protect (R2P) in Kenya during the 2007-08 post election violence. It dissects the two R2Ps which are the International Commission on Intervention and State Sovereignty (ICISS) R2P and the United Nations (UN) Secretary General Ban Ki-Moon. The objectives of this study were (1) To investigate whether the doctrine of responsibility to protect was applied in resolving Kenya’s post-election violence; (2) To explore the relevance of the doctrine of the responsibility to protect; (3) To draw lessons from the applicability of the doctrine of the responsibility to protect. The study employed qualitative approach; it sought to cover the exploratory, descriptive and explanatory elements of the research process. The first part of the study gives a background of the post election violence in Kenya and doctrine of responsibility to protect, giving its elements as outlined in the ICISS report. In the second part a presentation a theoretical overview and normative status of the doctrine responsibility to protect. In the third part, the position of the international community on the doctrine of responsibility to protect from the international community at the world summit and the 2009 general assembly is given, in the fourth part of the paper, a critical analysis of the concept of responsibility to protect where the emerging issues on the topic of interest is outlined. The findings of this study reveal that some of the abuses R2P seeks to address are not well defined to warrant applicability of the doctrine of R2P in the 2007-2008 post election violence in Kenya.
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>ECK</td>
<td>Electoral Commission of Kenya</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICG</td>
<td>International Crisis Group</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>IEBC</td>
<td>Independent Electoral and Boundaries Commission</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>IMT</td>
<td>International Military Tribunal</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>NATO</td>
<td>North American Treaty Alliance</td>
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<td>NGO</td>
<td>Non Governmental Organization</td>
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<td>OAU</td>
<td>Organization of African Union</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<td>PNU</td>
<td>Party of National Unity</td>
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<td>R2P</td>
<td>Responsibility to Protect</td>
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<td>SMS</td>
<td>Short Message Services</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Introduction

Kenya held its fourth multi party general elections on 27th December 2007. The civic and parliamentary elections were carried out smoothly without allegations of rigging and candidates were announced some on the same day and others on the second day\(^1\). The presidential elections were however controversial and hotly contested pitting three candidates incumbent president Mwai Kibaki vying on the Party of National Unity PNU, Raila Odinga of Orange Democratic movement and Kalonzo Musyoka of the Orange Democratic Movement Kenya ODM K. Although there were three leading candidates there was stiff competition between Mwai Kibaki PNU and Raila Odinga of ODM\(^2\).

After the elections early returns showed the ODM candidate opening a wide margin but which suddenly narrowed as results from perceived Kibaki strongholds were announced. This lead to claims of rigging by the Opposition candidate Raila Odinga and tension that engulfed the country at the moment increased. Amidst the confusion the Electoral Commission of Kenya (ECK) now Independent Electoral and Boundaries Commission (IEBC) declared Mwai Kibaki winner with 4.58 million votes against Raila’s 4.35 million


votes. A swearing in ceremony was hurriedly conducted as physical violence begun in most parts of the country\(^3\).

The opposition ODM swiftly rejected the results and called for mass protests countrywide. This led to unprecedented violence never seen in the country since independence which left at least 1500 people dead and another 300,000 displaced. The refusal of the two parties to talk to each other and each claiming a win as the country degenerated into violence and lawlessness led to a flurry of efforts by the international community to resolve the crisis mandated the introduction of the doctrine of responsibility to protect by international actors\(^4\). Kenya is a promising sign in the broader context of efforts to prevent atrocities and uphold the responsibility to protect (R2P). The peaceful referendum sharply contrasts with the wave of violence that erupted in the wake of the disputed December 2007 presidential election, when within hours of the announcement of the results violence broke out\(^5\).

The Responsibility to Protect (R2P) doctrine is a concept that was formally introduced in 2001. It came out of a commission formed by the Canadian government at the urging of the United Nations (UN) to look at ways of reconciling sovereignty and human rights. The basic principles of R2P are that state sovereignty implies responsibility, and a state is therefore the primary entity responsible for the protection of the people within a state. Therefore, when a state fails to meet this responsibility and a population is suffering grievous harm, the principles of

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\(^3\) Report of the International Commission on Intervention and State Sovereignty


non-intervention and traditional respect of state sovereignty yields to the international community’s responsibility to protect.⁶

According to the report issued by the original commission, there are three key elements of the R2P doctrine. R2P implies an international responsibility to prevent, to react, and finally to rebuild. The responsibility to prevent is, according to the architects of R2P, the single most important element of the doctrine. Prevention entails addressing both the root and direct causes of conflicts that put populations at risk.⁷ The responsibility to react is by far the most controversial element of R2P as it advocates that the international community must react to situations involving gross human suffering. Reactionary measures may include coercive actions, such as sanctions, prosecution, and in some cases military intervention.⁸ Finally, the responsibility to rebuild requires the international community to provide full assistance in the wake of post conflict situations for recovery, reconstruction, and reconciliation efforts.⁹

1.2 Statement of Research Problem

“In Larger Freedom,” Annan continued to use the language of the UN in support of his “Responsibility to Protect” argument: “As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection? The task is not to find alternatives to the Security Council as a source of authority but to make it work better.” The idea

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⁶ Report of the International Commission on Intervention and State Sovereignty
⁷ January 12th, 2009), UN Doc A/63/677
⁹ Ibid
of a legal right of protection, and human rights in general, taking precedence over state sovereignty is an international norm with broad support, especially in the West. The question is the channel through which this right is navigated.

Despite the support for protection as a responsibility, endorsement of a legal right to unilateral humanitarian intervention Bush administration ex post facto justifications for invading Iraq aside are hard to come by from heads of state. The problem is the language in the UN Charter, which has been the bible on use-of-force issues in international law since 1945. The Charter acts as a treaty, which almost every country on earth has signed, and strictly prohibits any member from using force to settle a dispute with any other member. It even forbids threatening the use of force.\textsuperscript{10} According to Louis Henkin, the prohibition on unilateral force was specifically designed to apply “universally”, and was a major incentive for many states to sign on.\textsuperscript{11} He said it assured nations of a “right to be left alone”, which logically also set up “the corresponding obligation to let others alone”.\textsuperscript{12} On the face of it, this hampstrings any attempt to legalize humanitarian intervention. The problem of justification of violence against innocent human kind under the pretext of humanitarian intervention justifies the need to rethink of a better way of protecting societies consequently the emergence of the principle of responsibility to protect.

The tension and physical violence experienced in the 2007 general elections in Kenya left more than one thousand people dead and 300,000 people internally displaced. For the first time

\textsuperscript{10} UN Charter, Chapter I, Article 2(4).
in the history of the country Kenyans were hosted in Uganda as refugees as the country degenerated into lawlessness. The two leaders stuck to their guns each claiming a win and the country’s president.

The violence shook the republic to its very core foundation. Though some semblance of peace was arrived at after the mediation process the quality of the solution arrived at will determine how the society moves forward and how it avoids or overcomes similar conflict situation in the future. The success or lack of it of the efforts of external mediators must be judged not only by the immediate outcomes but by the long-term sustainability of the solution arrived at. This study seeks to analyses the adoption of the doctrine of responsibility to protect in the wake of the post-election violence in Kenya in 2007/08.

1.3 Objectives of the study

The general objective of this study is to critically examine the application of the doctrine of the responsibility to protect, establish whether the doctrine of responsibility to protect was invoked in Kenya’s 2007/08 post election violence the objectives includes:-

i. To investigate whether the doctrine of responsibility to protect was applied in resolving Kenya’s post-election violence.

ii. To explore the relevance of the doctrine of the responsibility to protect

iii. To draw lessons from the applicability of the doctrine of the responsibility to protect.
1.4 Literature review

This section covers literature on the doctrine of responsibility to protect historically and an introduction to the debates on the doctrine, providing as well the elements of the doctrine and applicability of the doctrine.

1.4.1 Definitions and Debates

In the view of Thomashausen, R2P is a relatively new concept as it was only introduced in 2001\(^1\). She however, notes that it is one step in the evolving body of international law concerning humanitarian intervention and more broadly the responsibilities of the international community in the face of mass atrocities and large-scale human suffering.\(^1\)\(^4\) For much of the late 19th and early 20th centuries, the predominant norm of international relations was state sovereignty above all else, and states asserted that they had a right to wage war as they saw fit. However, in the aftermath of WWI it was clear that maintaining these norms came at an unacceptably high cost. The League of Nations sought to outlaw war as an instrument of foreign policy and push for the maintenance of peace and security at all costs. The League of Nations was a failure, and following WWII the international community sought middle ground.

The UN Charter defends the concept of sovereignty as it is principally concerned with keeping states from going to war with each other. In particular, Article 2(7) states, “nothing should authorize intervention in matters essentially within the domestic jurisdiction of any state\(^1\)\(^5\).” However, the UN Charter provides for two exceptions. Article 24 asserts that the UN Security Council has the responsibility for maintaining international peace and security and can


\(^4\) Report of the International Commission on Intervention and State Sovereignty January 12\(^{th}\), 2009), UN Doc A/6

\(^5\) Ibid
use force to maintain peace, and Article 51 allows for the use of force for the purposes of self-defense.\textsuperscript{16}

Beyond the UN Charter are several important treaties and tribunals that help to form the basis of respect for human rights within the confines of international law. The Universal Declaration of Human Rights, although not legally binding, was adopted by the UN General Assembly on December 10, 1948, and it enshrines vital concepts, such as the right to security of person and freedom from torture.\textsuperscript{17} Additionally, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly in 1948 and ratified several years later. This convention defines genocide as a crime under international law and mandates that the contracting parties seek to prevent and are authorized to punish any individual responsible for genocide.\textsuperscript{18}

During the Cold War interventions were essentially undertaken by the two major powers unilaterally and on many occasions outside the parameters of the UN Charter. In the post-Cold War era many in the international community thought that the world would enjoy a period of relative peace and security compared with the turbulence of the preceding century. However, the many tragedies of the early 1990’s from Somalia and Rwanda to Yugoslavia – proved that the decade would be anything but peaceful, and the mass atrocities committed against civilian populations brought the question of how to respond and the parameters that should be placed around forcible humanitarian interventions to the forefront.\textsuperscript{19}

\begin{flushleft}
\textsuperscript{16} Ibid
\textsuperscript{17}United Nations, ‘‘Universal Declaration of Human Rights,’’ United Nations Documents, 2001, pg 936.
\textsuperscript{18}Human Rights Web, ‘‘Convention on the Prevention and Punishment of the Crime of Genocide,’’ United Nations
\textsuperscript{19}Damrosch, Lori et al., ‘‘International Law: Cases and Materials,’’ West Group Publishing, 2001, pg 63
\end{flushleft}
Bellamy, opines that in 1999, then UN Secretary General Kofi Annan challenged the international community to develop a way forward on reconciling the principles of maintaining sovereignty and protecting fundamental human rights.\textsuperscript{20} Annan followed up on this challenge in the 2000 Millennium Summit Report by again asking UN members to look at the perceived tension between sovereignty and human rights while keeping three issues in mind that had been raised since his initial challenge, 1) Could humanitarian intervention be used as a cover for undue interference in the affairs of weaker states; 2) Would rebel movements deliberately use violent tactics to use a norm of intervention based on humanitarianism to their advantage; and 3) How would the international community avoid only selectively applying the principle of humanitarian intervention.\textsuperscript{21} Annan was cognizant of the challenges these legitimate concerns would pose to finding an acceptable solution. However, he responded by asking, “If indeed humanitarian intervention is an unacceptable assault on sovereignty…how should we respond to gross and systemic violations of human rights that offend every precept of our common humanity?”\textsuperscript{22}

1.4.2 The History of the doctrine of responsibility to protect

Within 100 days into the Rwandan genocide, about 800,000 were killed, neither a single state nor the UN Security Council seemed able to mandate a sufficiently equipped military force to intervene to halt the slaughter.\textsuperscript{23} Conversely, purportedly to halt the fighting and to secure the massive flow of Kosovo-Albanian refugees, but without Security Council authorization which

\textsuperscript{20} Ibid
\textsuperscript{21} Bellamy, Responsibility to protect: the global effort to end mass atrocities, 35
\textsuperscript{22} Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? (American Society of International Law 2007
\textsuperscript{23} NadjaKunadt, The Responsibility to Protect as General Principle of International Law 2001, pg 936.
had civilian casualties; North American Treaty Alliance (NATO) started into the direction of Kosovo.24

In both conflict, striking a balance two pillars of international law seemed difficult: the protection of human rights and the prohibition of use of force. Modern theories of “just war” have had a surprising reminiscence on what for a long time had been framed ‘humanitarian intervention.’ The talk has changed, instead of right to intervene; the notion of Responsibility to protect has gained ground.25

Canada responded to Annan’s challenge and formed the International Commission on Intervention and State Sovereignty (ICISS). Canada’s then Foreign Minister Lloyd Axworthy was very supportive of the initiative and set out three issues which the commission would urgently seek to address, including the norm of civilian protection, the political will to act when necessary, and the development of military and civilian capacity. The commission was chaired by former Australian Foreign Minister Gareth Evans and by former Algerian diplomat and UN special advisor Mohammed Sahnoun. There were ten other commissioners including five from Western countries (Canada, US, Germany, and Switzerland). The five remaining commissioners were from South Africa, the Philippines, India, Guatemala, and Russia. Only one of the twelve commissioners was a woman. Axworthy chaired the advisory board that oversaw the Commission.26

The history of the concept of responsibility to protect sounds almost like a fairy tale. The International Commission on Intervention and State Sovereignty developed this concept in its

24 Ibid
25 Ibid
26 Alex Bellamy, Responsibility to protect: the global effort to end mass atrocities, 35
2001 report The Responsibility to Protect. The central theme was the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. Under the concept of responsibility to protect, matters affecting the life of the citizens and subjects of a state are no longer exclusively subject to the discretion of the domestic ruler but are perceived as issues of concern to the broader international community (e.g., third states, multilateral institutions, and non-state actors).

The commission of state intervention and sovereignty approach responsibility to protect comprehensively. It developed the concept to protect to solve the legal and policy dilemmas of humanitarian interventions. The commission proposed dealing with this problem by recharacterizing sovereignty, that is, by conceiving of sovereignty as responsibility rather than control. The commission tried to distinguish the idea of responsibility to protect from the concept of humanitarian intervention in three ways. In the report it was emphasized that first of all, that responsibility to protect looks at intervention from a different perspective than the doctrine of humanitarian intervention. The commission stressed that responsibility to protect addresses the dilemma of intervention from the perspective of the needs of those who seek or need support (e.g., communities in need of protection from genocide, mass killings, ethnic cleansing, rape, or mass starvation), rather than from the interests and perspectives of those who carry out such action (entities asserting the "right to intervene").

Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? (American Society of International Law 2007)
Bellamy, Responsibility to protect: the global effort to end mass atrocities, 35
Second, the commission sought to bridge the gap between intervention and sovereignty by introducing a complementary concept of responsibility, under which responsibility is shared by the national state and the broader international community. The commission recognized that the primary responsibility to protect resides with the state whose people are directly affected by conflict or massive human rights abuses, and "that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.  

Third, the commission expanded the conceptual parameters of the notion of intervention, declaring that an effective response to mass atrocities requires not only reaction, but ongoing engagement to prevent conflict and rebuild after the event. The commission developed a multi-phased conception of responsibility, based on a distinction between responsibility to prevent and react and responsibility to rebuild. This conception of responsibility "means that if military intervention action is taken- because of a breakdown or abdication of a state's own capacity and authority in discharging its 'responsibility to protect'-there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development. 

A justification by the commission for the move from a right to intervene to a responsibility to protect was on the basis of a distinction between a state's internal and external responsibility. The commission recognized that states' authorities are responsible for the safety, life, and welfare of their citizens, and that they are also responsible to citizens internally. At the

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30 UNSG Report on Implementing the Responsibility to Protect (January 12th, 2009), UN Doc A/63/677
same time, the commission stressed that states bear an external responsibility with regard to the international community through the United Nations.33

Humanitarian intervention poses a hard test for an international society built on principles of sovereignty, non-intervention, and the non-use of force. These humanitarian principles often conflict with principles of sovereignty and non-intervention. Sovereign states are expected to act as guardians of their citizens” security, but what happens if states behave as criminals towards their own people, treating sovereignty as a license to kill? This study will attempt to document the development in the international spheres that are geared towards burying the concept of humanitarian intervention to the prominence of responsibility to protect.34 The responsibility to protect was adopted by the UN General Assembly in a formal declaration at the 2005 UN World Summit. Its advocates argue that it will play an important role in building consensus about humanitarian action whilst making it harder for states to abuse humanitarian justifications.

1.4.3 The Elements of R2P

Outlined in the ICISS are three elements of responsibility to protect they include responsibility to prevent, responsibility to react and responsibility to rebuild. Of all the elements, the commission holds that responsibility to prevent is the most important element. This is because this element first lies with the sovereign states and the local communities within those states. In this regard, the international community only intervene when need arises, just to offer support to the local efforts. Prevention helps to eliminate the need for intervention at a later stage.35 In order for prevention to be effective, the ICISS report site that knowledge for the fragility of the situation

33 Ibid
34 Williams, “The Responsibility to Protect, Norm Localisation, and African International Society,” 401
and the risks associated with it – so called ‘early warning’ must be known. In addition, there has to be understanding of the policy measures available that are capable of making a difference, finally political will to apply the measures must be in existence\textsuperscript{36}.

The commission acknowledges that there are non-governmental organizations, such as the International Crisis Group (ICG), that are exclusively devoted to conflict analysis and providing early warnings to policy makers. However, early warning systems need to be far more standardized, and the UN and regional bodies should have permanent and coordinated early warning systems in place.\textsuperscript{37}

Prevention efforts can take on many forms. There should be efforts at both the national and international level to address root causes of conflict, which can include marginalization of minorities, suppression of political and human rights, and poverty. Prevention of the root causes of conflict may involve addressing political needs, economic deprivation, strengthening legal institutions, and making structural reforms to the military. Political reform may involve capacity building assistance, facilitating power-sharing deals, and supporting freedom of the press and civil society. In terms of economic reform, ICISS specifically cites international trade reform and access to major markets for developing nations in addition to traditional development assistance. Legal reform involves a standard set of activities, such as strengthening the judiciary and rule of law in addition to fostering the development of robust legal protections for marginalized groups. Finally, security sector reform may also fall under efforts designated as prevention and can

\textsuperscript{36} International Commission on Intervention and State Sovereignty report.

involve any number of activities from professional development education for officers, demobilization programs, and tightened control over weapons.\textsuperscript{38}

Many of these activities are already being undertaken both independently by states and with the assistance of the international community. There are several agencies within the UN, such as the United Nations Development Program (UNDP) and the United Nations Conference on Trade and Development (UNCTAD) among many others, that undertake valuable work to address poverty and development issues.\textsuperscript{39} The element of responsibility to react to situations of compelling need for human protection is implied in responsibility to protect. Put explicitly, it is about preventive measures; if they fail, coercive measures should be applied and in extreme cases, military action.\textsuperscript{40}

The responsibility to react tenet of R2P is the most difficult aspect for both practical understanding and implementation. Political and diplomatic sanctions are the first tier of measures that can be taken to react to a crisis. Broad sanctions can hurt already vulnerable populations, so targeted sanctions against individuals or perhaps sanctions against certain industries that are known to be fueling the conflict are viewed as the better option.\textsuperscript{41} Political sanctions can include the withdrawal of diplomatic representation, bans on travel, or expulsion from regional or international bodies. Sanctions can be a valuable tool as beyond the consequences of the actual sanctions, they deliver a strong public rebuke to governments or individuals involved in a crisis. However, sanctions at these levels are very difficult to enforce and require broad international support. Very rarely is there adequate consensus within the

\textsuperscript{38} Ibid
\textsuperscript{40} Ibid
\textsuperscript{41} Report of the International Commission on Intervention and State Sovereignty.
international community to impose universal sanctions (although countries may impose them bilaterally). For example, under Security Council Resolution 1591 there is a Sudan Sanctions Committee that is responsible for monitoring a UN imposed arms embargo on Darfur and also has the power to impose targeted sanctions against individuals.

If all of these measures fail to stop the violence, ICISS recommends that military action should be taken, but only in extreme cases and when certain other criteria have been met. There are six criteria when considering the possibility of military intervention, including right authority, just cause, right intention, last resort, proportional means, and reasonable prospects of success. There are very few circumstances where military action would be justified and therefore meet the just cause criteria, and these are large-scale loss of life including genocide, mass killings, or ethnic cleansing (genocidal intent is not relevant). These circumstances could include crimes defined in the 1948 Convention on the Prevention and Punishment of Genocide, crimes against humanity or war crimes as defined by the Geneva Conventions, state collapse leading to civil war or mass starvation, or overwhelming natural disasters. Right authority entails authorization from the UN Security Council, which is designed to ensure that the intervention is being undertaken with the right intentions. It should be noted that ICISS only goes so far as to state that in ideal circumstances UN approval will be given. However, in subsequent discussions regarding R2P it is inferred that any intervention would have to be authorized by the Security Council.

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Meeting the criterion of right intention essentially mandates that there can be no ulterior motive for intervention beyond relieving humanitarian suffering and promoting international security. In order to meet the last resort criterion there must be no reasonable expectation that other measures, such as sanctions or diplomatic negotiations, could end the conflict. Finally, the intervention must involve proportional means and follow all norms of humanitarian law, and there must be a reasonable belief among policymakers that intervention will succeed in ending suffering and perhaps more importantly will not escalate or enlarge the crisis.\textsuperscript{44}

The responsibility to rebuild is the third element of the responsibility to protect concept. It is essential because a big number of countries that come out of war relapse into war in first five years. In the ICISS, the responsibility to rebuild analyses the obligations of the international community after the intervention as well as the limits that have to be taken into account.\textsuperscript{45}

The responsibility to rebuild is more widely embraced by the majority of states. The international community should aid with rebuilding if needed. However, there is an increased responsibility if a military intervention has taken place. ICISS outlines the three areas that need to be addressed in a rebuilding effort, which include security, judicial processes, and development. There are of course varying ways that these issues can be addressed depending on the nature of the conflict or natural disaster and the cultural context, and the key players in the rebuilding efforts must be local actors. Rebuilding is difficult process that takes time and funding.\textsuperscript{46} The international community should seek to ensure that locals or if needed a neutral body owns the process and that sovereignty and local autonomy is obtained to highest degree possible. Additionally, while international actors should have an exit strategy it should not be in


\textsuperscript{45}Ibid

\textsuperscript{46}Anne Orford, International Authority and the Responsibility to Protect, (Cambridge University Press 2011)
the form of a timetable that would place artificial constraints on the organic process of rebuilding.⁴⁷

1.4.4 The Application of R2P

The Responsibility to Protect provides an opportunity to overcome international inaction in exceptional situations of genocide or other mass atrocities. During R2P’s first decade, however, its unique potential to unite approaches in addressing mass atrocity situations has been hamstrung by uncertainty over whether a situation comes within the R2P remit from early prevention to the use of force as a last resort. This uncertainty stems in part from the fact that as a preliminary matter, there is not a common standard against which to measure and analyze incoming information to determine whether R2P applies. Over the past decade, R2P has been invoked in situations of widely different origin and intensity including Darfur, Kyrgyzstan, Myanmar/Burma, Cote d’Ivoire, Sri Lanka, Libya and Syria, with international responses ranging from ineffective to highly effective.⁴⁸

The practical consequences of invoking R2P will vary from situation to situation. R2P supports stakeholders acting based upon existing legal obligations and through a continuum of measurable and agreed steps by national and international actors. It does not dictate, however, the precise means by which R2P should be implemented in a given situation. Nonetheless, relevant stakeholders have been working to strengthen the understanding and the appropriate application of the concept. A widely-accepted standard specifically developed for R2P will assist in the effort of preventing atrocities and protecting populations in four ways: 1. Promote the full continuum of R2P action: While it is universally agreed that the best form of protection is

⁴⁷ United Nations, Universal Declaration of Human Rights, United Nations Documents,

⁴⁸ Anne Orford, *International Authority and the Responsibility to Protect*, (Cambridge University Press 2011)
prevention, the lack of common standards of assessment at early stages of potential developments is one factor for the continued focus and association of R2P with military intervention exclusively.

Common standards that span the full range of beneficial protection endeavors will help to ensure prevention is promoted forcefully where it is really needed and has a greater likelihood of success.\textsuperscript{49} 2. Target application of limited resources: Given the constraints on time and resources that stakeholders can direct to address mass atrocities, a common standard of assessment concerning which situations will benefit most from international assistance will ensure the most effective allocation of those limited resources.\textsuperscript{50} 3. Legitimizing effect: A unified, common standard will add a level of transparency, credibility and accountability to the deliberations over the application of R2P to a given situation which will, ultimately, result in greater consistency in outcomes of State action and norm legitimacy. A common standard of assessment, while inevitably open to interpretation by all parties, will, at a minimum, begin to require parties to explain their reasoning from a common reference point.

Actions that are taken will be seen as more legitimate if successfully applying the standards; decisions not to take a certain course of action will also be seen as more legitimate.\textsuperscript{51} 4. Reduce Uncertainty: A common standard, along with guiding principles, will increase the likelihood that all relevant stakeholders (including States, regional organizations, NGOs and international organizations) focus on a discussion of appropriate action in any situation of stress,

\textsuperscript{50} UNSG Report on Implementing the Responsibility to Protect (January 12th, 2009), \textit{UN Doc A/63/677} 
and reduce the depth and duration of debate that is centered on whether a situation would benefit from the application of the R2P.\textsuperscript{52}

### 1.5 Literature gap

The scale of the violence in Kenya after the elections and its widespread nature was unprecedented but some level of turmoil around the elections should have been anticipated and preventive action taken to avert possible atrocities\textsuperscript{53}. A warning of possible political unrest was issued by the African Peer Review Mechanism in 2006 and a pattern of violence, often of an ethnic nature, had marred elections in Kenya for over twenty years. It had developed as a result of a combination of factors including: politicization of ethnicity; corruption, abuse of power and non-adherence to the rule of law; a centralized and highly personalized form of governance; inequitable development and equally important, a winner-takes-all form of political victory that was perceived as benefiting the Kikuyu, together with a widespread perception that certain groups, including the Luo, were not receiving a fair share of resources\textsuperscript{54}.

A culture of impunity where perpetrators of past violence were not held accountable for their acts sent the signal that there would be no consequences for crimes committed around the 2007 election. In the months leading up to the election hate speech, including by political figures, was rampant as was the sending of incendiary SMS text messages. The government failed to address these warning signs or any of the underlying causes of the violence.

\textsuperscript{52} Ibid
The state’s ability to take protective action was impeded by institutional weaknesses. At times, poorly trained police forces committed crimes with impunity, and acted with allegiance to their ethnic groups and preferred political candidates rather than to the state. The military’s reach across the country was limited creating a greater reliance on the police. Reports indicate that some police refused to intervene, resorted to disproportionate force, or carried out extra-judicial killings with one third of the victims reportedly killed by the police. Senior government officials, political figures, and business leaders supporting both campaigns are also believed to have played a direct role in instigating the violence. Against is backdrop this study seeks to explore the application of the doctrine of R2P to end the violence witnessed in Kenya.

1.6 Justification of the study

The central theme at the initiation of the concept of responsibility to protect was the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. Under the concept matters affecting the life of the citizens and subjects of a state are no longer exclusively subject to the discretion of the domestic ruler but are perceived as issues of concern to the broader international community (e.g., third states, multilateral institutions, and non-state actors).

The conceptual parameters of the notion of intervention was expanded by the commission by declaring that an effective response to mass atrocities requires not only reaction, but ongoing engagement to prevent conflict and rebuild after the event. The commission developed a multi-phased conception of responsibility, based on a distinction between responsibility to prevent and

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react and responsibility to rebuild. This conception of responsibility means that if military
intervention action is taken because of a breakdown or abdication of a state's own capacity and
authority in discharging its 'responsibility to protect' there should be a genuine commitment to
helping to build a durable peace, and promoting good governance and sustainable development.
A justification by the commission for the move from a right to intervene to a responsibility to
protect was on the basis of a distinction between a state's internal and external responsibility. The
commission recognized that states' authorities are responsible for the safety, life, and welfare of
their citizens, and that they are also responsible to citizens internally. The concept of
responsibility to protect is explored in this study, its emergence, acceptance and implementation
not only at the international community but also at the national level.

1.7 Hypotheses

The study will test the following hypotheses:-

I. The doctrine of the responsibility to protect is not widely accepted by all states;

II. The doctrine of the responsibility to protect was invoked in Kenya’s post-election
    violence of 2007/2008;

III. Kenya’s post-election violence did not warrant the invocation of the doctrine of the
     responsibility to protect.

1.8 Theoretical Framework

Just war theory (or Bellum iustum) is a doctrine of military ethics of Roman philosophical and
Catholic origin, studied by moral theologians, ethicists and international policy makers, which
hold that a violent conflict ought to meet philosophical, religious or political criteria\textsuperscript{56}. The Indian epic, the Mahabharata, offers one of the first written discussions of a 'just war'. In it, one of five ruling brothers asks if the suffering caused by war can ever be justified, and then a long discussion ensues between the siblings, establishing criteria like proportionality (chariots cannot attack cavalry, only other chariots, no attacking people in distress), just means (no poisoned or barbed arrows), just cause (no attacking out of rage), and fair treatment of captives and the wounded.\textsuperscript{57}

Well embedded in the just in war theory are some principles of the concept responsibility to protect. The protection of non-combatants has been addressed in connection to both jus ad bellum and jus in bello. In St. Ambrose’s’ lies the endorsement of the protection of the innocent. Later, the protection of the innocent was explicitly formulated as a jus ad bellum criterion and more specifically as one of the just causes for resorting to lethal force by authors such as Fransisco de Vitoria and Fransisco Suarez. The commitment to the protection of non-combatants can also be detected in the jus in bello criteria and thus the criteria addressing how soldiers should conduct themselves in war. Principles of civilian protection in the just in war theory are that: First, the jus in bello criterion of discrimination says that parties to an armed conflict distinguish at all times between combatants and non-combatants, and it prohibits soldiers to apply direct, intended armed force against non-combatants.

Those who plan and decide upon an attack have the responsibility to consider potential side-effect harm that may follow from their decisions. Moral responsibility for unintended effects of attack also fall on those who carry out the attack: they have a responsibility to abort the

\textsuperscript{57} Evans, Mark. Just War Theory: A Reappraisal (Edinburgh University Press, 2005)
attack if it becomes clear to them that disproportionate harm to civilians will follow. Second, protection may also be seen as the long-term indirect outcome of traditional war fighting through the defeat of an enemy.

Second, protection may also be seen as the long-term indirect outcome of traditional war fighting through the defeat of an enemy. Formulated as a negative duty, and in the indirect sense just sketched, protection is not really a new task for the soldier. Michael Walzer suggests that, while protection is a part of soldiering, ‘the “reason” for soldiering is victory, and the “reason” for victory is the protection of one’s own people, not of other people.’ Since Walzer conceives of the responsibility to civilians mainly as a kind of agency responsibility, he seems to restrict responsibility and blameworthiness to cases where soldiers directly or indirectly inflict harm through their actions.

1.9 Research Methodology

The present research, employing a qualitative approach, seeks to cover the exploratory, descriptive and explanatory elements of the research process. The research is considered exploratory, as it seeks to apply the norm life cycle concept to a norm which, for all intents and purposes, is still to be considered developing, and which, has not progressed through all stages of the norm life cycle, and entered into the internalisation phase. The current research will thus aimed to contribute to this endeavor through the application of norm development approaches to a situation in which a norm is still developing, rather than a situation in which a norm historically developed at one point in time. In addition, the research seeks to be both descriptive and

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explanatory. Through both describing and making attempts towards analysing findings, the current research seeks to both apply Just War theory to empirical data, to assess which data both strengthen and detract from the theoretical approach, and to provide an assessment both of the findings through the perspective of the theory, and of the theory from the perspective of the findings.

Descriptively, each section of the research lays out a chronological sequence of events, paying attention to the manner in which each affects another, but going further by articulating a cohesive structure for the analysis of these events by configuring them in a particular manner which emphasises aspects of importance for the purposes of the research. Finnemore, borrowing from John Ruggie (who in turn adapted it from the work of Charles Pierce) labelled this approach ‘abduction’. Abduction, as described by Finnemore, is neither a process of deduction nor of induction, but a dialectical combination of the two. In each case of analysis, deductively derived hypotheses that shape the initial design of the inquiry are presented, but these are quickly shown to be limited in their explanatory power of events. Consequently, deductive arguments are supplemented with inductively derived insights to create an understanding of events which is plausible to others conducting a similar analysis. This approach contains considerable advantages to the research undertaken here, as, as also noted by Finnemore, no deductive arguments about the changing purpose of force are sufficiently well specified to test with

dispositive results\textsuperscript{62}. On the other hand, the use merely of induction does not provide clear guidance as to where the process of inquiry should commence.

Thus, combining both deduction and induction provides a good starting point for the research, but also allows the research design to be flexible enough to meaningfully evaluate the usefulness of findings in a reflexive manner.\textsuperscript{63} Building on this approach, the research will also make use of discourse analysis as a primary means of investigation. Using the state international organizations and the bureaucratic officials of international organizations as the units of analysis, the research seeks, through a review of primary (official records, communiqués, statements, speeches, submissions and other forms of documentation) and secondary (academic research, analyses of primary materials, reports, media analyses and other forms of documentation) source material to apply discourse analysis to generate, compare and assess findings\textsuperscript{64}.

\textsuperscript{62} UNSG Report on Implementing the Responsibility to Protect (January 12th, 2009), \textit{UN Doc A/63/677}

\textsuperscript{63}Ibid

1.10 Chapter Outline

Chapter One: Introduction of the study;

Chapter Two: The normative status of the responsibility to protect: A theoretical discussion;

Chapter Three: The role of the doctrine of the 'responsibility to protect' (R2P) in Kenya’s post-election violence;

Chapter Four: The role of the doctrine of the responsibility to protect (R2P) in Kenya’s post-election violence: A critical analysis;

Chapter Five: Conclusion.
CHAPTER TWO

THE NORMATIVE STATUS OF THE RESPONSIBILITY TO PROTECT: A THEORETICAL DISCUSSION

2.0 Introduction

The forgoing chapter provided an introduction to the study where it gave the background of the 2007-2008 Kenya’s post election conflict, the problem situation, hypothesis of the study, theoretical framework upon which the study is grounded, chapter outline and the methodology used to conduct this study.

This chapter presents the normative status of the doctrine of responsibility to protect where it elaborates the nature of international norms, the fundamental elements of the doctrine of R2P within the international community as a norm and the implications of humanitarian intervention of R2P by recognizing that the changing characteristics of violent conflicts require new approaches to their resolution while emphasizing that the use of force is no longer interpreted exclusively in terms of self-defense but also due to humanitarian necessity.

2.1 International Norms

The fundamental elements of R2P are widely known within the international community. However, there is much debate about whether R2P has reached the status of a norm. Sandholtz points that norms are difficult to define because they are at the same time both fixed and changing.\(^65\) They are fixed because as norms they must serve the function of, “providing stable

standards of conduct to guide the choices of those subject to them.\textsuperscript{66} It is however, important to note that norms are obviously changing because over time different norms and standards come into practice within the international system.

Finnemore and Sikkinkaever that the life cycle of a norm follows three stages. The first stage is norm emergence, the second stage is norm cascade, and the third phase is internalization. Between the first two stages is a tipping point when a critical mass of state actors adopts the norm.\textsuperscript{67} In a norm’s life cycle there are actors and institutions that promote the norm\textsuperscript{68}. In most cases there is a small group of norm entrepreneurs who introduce the idea of norm and attempt to persuade others of its value.\textsuperscript{69} In the case of R2P, the most important norm entrepreneurs were the members of the ICISS, in particular Gareth Evans. The UN also acted as a norm entrepreneur. Once the norm has been introduced, the norm entrepreneurs attempt to persuade others within the international community to accept the norm.

States operate within an international society, and it is within this arena that states and other international actors conduct and debate their activities and actions. The defining elements of any international society (which can imply a global society, such as the United Nations General Assembly, or regional organizations, such as the African Union) are membership and mutual recognition and recognized norms of conduct.\textsuperscript{70} Under the framework of international society, norm entrepreneurs can exert soft power to help compel acceptance of a norm, which

\textsuperscript{67} Ibid  
\textsuperscript{69} Ibid  
\textsuperscript{70} Paul Williams, “The Responsibility to Protect, Norm Localizations, and African International Society,” \textit{Global Responsibility to Protect} 1(2009), 395.
could include playing on a state’s desire to conform within the international system, to adopt the norms that more powerful states see as valuable, and to enhance international legitimization. These points tie into a state’s interest of gaining prestige in multiple arenas, including with domestic populations, within their region, and within the broader international system.71

A tipping point for the norm occurs when the norm entrepreneurs convince a critical mass of states to adopt the new norm. Finnemore and Sikkink estimate that the tipping point usually occurs when about one-third of total states in the system adopt the norm. However, it does matter which states adopt the norm, and crucial states vary from issue to issue. Generally, states that have more prestige within the international system are viewed as more likely to be critical states because other states will want to emulate their stance. Additionally, if a state is vital to the implementation of the norm then it becomes a crucial state. In the case of R2P, the states that have adequate financial, diplomatic, and military resources to respond to crises effectively would be crucial states.72 It is important to note that even after the tipping point a norm may not have universal acceptance. Even widely accepted norms within the international system do not automatically take root in all regions, and commitment to the principles of a norm may vary greatly depending on the local concept.73

The next step in the life cycle of a norm is internalization. This happens when a norm is so widely accepted within the international community that it is no longer an issue for

73 Ibid
discussion. An example of such a norm could be the prohibition against slavery. It is difficult to pinpoint where R2P falls in the norm life cycle. R2P has certainly not reached internalization as it is still a matter for fierce debate within the international system. However, R2P is also a complex and multi-faceted concept, and it is possible that some aspects of R2P have reached the tipping point while other aspects have still not been widely accepted. Aspects of R2P that have reached the tipping point appear to include the responsibility of the international community to prevent mass atrocities and humanitarian suffering and to assist in reconstruction efforts following a violent conflict. Both of these activities are undertaken on a regular basis by individual states and the international community. For instance, most states in the international system have signed onto the Convention of the Prevention and Punishment of Genocide among other notable treaties.

Additionally, in the past two decades several international justice mechanisms have been established to punish perpetrators on the assumption that it will promote reconciliation and help to prevent future atrocities. Finally, tremendous resources pooled from the international community contribute to agencies and programs aimed at reducing poverty, lessening the likelihood of armed conflict, and caring for vulnerable populations, such as refugees. The element of R2P advocating for humanitarian intervention under certain circumstances has certainly not reached a tipping point as there is still an ongoing and contentious debate.

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2.2 The Normative status of the responsibility to protect

Gareth Evans argues that R2P has reached the status of an international norm, indicating that the whole of R2P has reached the tipping point. He cites several events and constituencies that contribute to its status as an international norm. Most notably, Evans cites the inclusion of R2P language in the 2005 World Summit Outcome document. These paragraphs that were formally agreed upon were indeed significant, and they did give the Secretary General and the General Assembly a mandate to further explore R2P, its implications, and how it might be made operational. Furthermore, in April 2006 the Security Council adopted a resolution on the Protection of Civilians in Armed Conflict, and the resolution that re-affirms the World Summit conclusions related to R2P, specifically citing articles 138 and 139 of the World Summit Outcome document.78 One could argue that the approval of these documents by most members of the international system indicates that a critical mass of states has accepted R2P.

The R2P paragraphs included in the World Summit Outcome document do not represent a universal consensus on many of the fundamental principles and obligations outlined in the original R2P report. The issues of consensus that emerged during the World Summit were setting a very high bar for meeting just cause, the idea that the host state has the primary responsibility to protect, and against any notion that the Permanent 5 Members should voluntarily give up their veto power. The areas of disagreement were over two essential issues 1) whether only the Security Council had the authority to authorize armed intervention and 2) should any set of criteria guide the decisions on the use of force. The majority of states sought language expressly conveying that the Security Council must authorize the use of force.

Paragraph 139 emphasizes approval by the Security Council and through the UN, but it stops short of using stronger language and obliging states to do so. Any mention of criteria for when humanitarian intervention is appropriate and necessary was left out of the World Summit Outcome document. Most states were weary of the use of criteria. Some, such as the US and the UK, were hesitant because it would constrain the potential use of force while others, such as China, Russia, and many developing countries, were not supportive because they feared the criteria would be abused.79

On paragraphs 138 and 139 in the World Summit Outcome document the proponents were able to get agreement because of compromises on some of the fundamental points and also because of the support of some key leaders. The leaders of the African Union were particularly pivotal in helping to secure passage of the R2P paragraphs. This is in part because the African Union has language reflecting the key components of R2P included in its foundational documents.80 Article 4(h) of the African Union Constitutive Act essentially affirms the principles of R2P by stating, “the right of the African Union to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity.”81 Additionally, there are prominent figures in African politics whose support for R2P and their work as norm entrepreneurs has proved vital in helping to promote R2P. The work of Francis Deng essentially laid the foundation for R2P, and Ambassador Jean

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79 Alex Bellmay, “Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit,” 164-165
Ping of Gabon, formerly the President of the UN General Assembly and currently the Chairperson of the African Union Commission, is a strong proponent of R2P.82

Jean Ping was instrumental in rallying support for R2P within the General Assembly in 2005, and he has continued to speak in support of broader adoption of R2P while also acknowledging its complications. Speaking in 2008 at a high-level roundtable of experts on R2P in Africa, Ping outlined the reasoning behind his support for R2P, discussed the legitimate concerns of other nations, and posed several questions aimed at helping to clarify R2P. He cites the Rwandan genocide as an event that galvanized the continent to enshrine the principle of none indifference in its core principles. He also acknowledges that the sense of ownership felt by African Union (AU) Member States is not shared within the United Nations.56 Indeed, this is an important point as the AU had typically not looked favorably upon international interference in African matters, for example the 1994 French intervention in Rwanda the 2009 International

2.3 Conceptual aspect of the responsibility to protect

The conceptual core of the principle of responsibility to protect as drawn out in ICISS has two elements. It was first concerned with a shift in the understanding of sovereignty from “sovereignty as control” to “sovereignty as responsibility”.83 In this regard, sovereignty is no longer to be understood as a right to perform whatever internal actions the state pleases. In this report, the reason for sovereignty, it is submitted, is at base the protection of the people’s most fundamental rights from the most egregious acts of violence, and as such sovereigns have an inviolable responsibility to fulfil this protection. Secondly, it was concerned with an element that, while the state has primary responsibility for protecting its citizens, if the state should be

83 (ICISS), The Responsibility to Protect, p. 14
unwilling or unable to fulfil that mandate, then the responsibility shifts to the international community.  

The core principle of responsibility to protect is to fulfil what Ramesh Thakur calls “responsibility deficit” that arises when the state fails to fulfil its primary obligation. This core is a broad vision of human protection and the assignation of responsibilities to ensure it. It imposes a responsibility on states to not harm and to pro-actively protect their populations; and imposes a responsibility on the wider community to engage in appropriately authorised and multilateral actions including, if need be, using coercive force to protect those populations if the state cannot or will not live up to its responsibility.

Properly describing responsibility to protect as a new rule of customary international law at this point is quite a challenge. The norm of the Responsibility to Protect has received increasing international attention in the last few years. It widely depends on how the concept is implemented and applied in practice. However, given the weight behind it and the UN general assembly resolution adopted at the head of state and government level, the responsibility to protect can already be properly described as a new international norm: a new standard of behavior, and a new guide to behaviour, for every state. R2P is a concept that attempts to redefine sovereignty from its traditional basis on rights to one based on duties and responsibilities. Responsibility to protect attempts to shape global governance at a high level making it an initiative of policymaking at a global level. Bellamy notes that a more proximate

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84 Ibid
87 Gareth Evans (Co-Chair International Commission on Intervention and state sovereignty), The Responsibility to Protect: Consolidating the Norm
origin of R2P norm can be traced back to the breakup of Yugoslavia after the end of the Cold. To provide a forum for discussing the related issues of intervention and its relationship to sovereignty, the International Commission on Intervention and International Sovereignty was established in Canada in 2001. The final report recommended among other things to redefine sovereignty as responsibility rather than as a right. In addition, the report clearly stated that prevention and early warning should be used by the international community in addition to humanitarian intervention and post-conflict peace building. The report set the criteria for intervention to be when a government is unable or unwilling to prevent a great loss of life in its population. Finally, the report and the Secretary-General recommended the General Assembly and the Security Council to issue a declaration accepting the norm of R2P.

The 2005 negotiations resulted in a document which shifted emphasis away from international responsibility and towards the responsibility of individual states. International crimes were identified as the criteria to be used in order to determine the suitability of humanitarian intervention as a justifiable option. The 2005 document urged the establishment of the Human Rights Council but did not agree on its characteristics or jurisdiction and established the Peace building Commission with only a post-conflict role rather than also including prevention.

Determination of an international norm is not easy; however, some generalizations can be made in terms of the overall outcome of R2P. It weakened the concept of non-intervention in

90 Bellamy, A. J. (2009). Realizing the Responsibility to Protect. *International Studies Perspectives, 10*(2)
92 Ibid
international law, sovereignty was redefined as responsibility rather than as a right, and it empowered the international community and related humanitarian and development organizations in terms of their justification to intervene in crises involving intrastate strife. By weakening the norm of non-intervention and sovereignty, R2P has created a way to justify military intervention and forced regime change by the great powers.

The resources necessary to undertake a military intervention are concentrated in the developed Global North; R2P therefore opens the way for the North to interfere in the internal affairs of weak countries in the South. It is important at this point to take cognisance of the fact that the governments of the great powers are not always guided by the same altruistic values as global civil society and its humanitarian and development organizations. Thus, the virulent concept of national interest can be cloaked in the language of R2P and humanitarianism to further neo-realist and institutional-liberal goals of powerful countries in the developed world. Judging the outcome of R2P in terms of advantages and disadvantages proves to be an uphill task. Nevertheless, the norm has clearly strengthened the role of global civil society and of development oriented middle powers in dealing with international crises.

Since 2005 world summit declaration, the emergence of responsibility to protect as a norm as continued to progress. Of all the regional organizations capable of helping make R2P a reality, the twenty-seven-member EU brings by far the greatest potential strengths. Evans describes the

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98 Evans, *The Responsibility to Protect*
EU’s strengths as its population and wealth along with its economic and diplomatic interconnectedness.

Less than a year after the 2005 UN World Summit Declaration and the General Assembly’s landmark adoption of the principles of R2P namely sovereignty as a responsibility, the UN Security Council passed Resolution 1674, stating the UN “reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” In essence, the Resolution commits the Security Council to action to protect civilians in armed conflict, at the same time “express its deep regret that civilians account for the vast majority of casualties in situations of armed conflict.”

Resolution 1674 has been used to promote the norm of R2P. In a subsequent UN Security Council open debate Ambassador Gerhard Pfanzelter of Austria, speaking on behalf of the EU, collectively identified the World Summit, R2P and UNSC 1674 in an effort to emphasize the need of the UN to protect civilians. He stated: At the World Summit 2005 our Heads of State and Government underlined that of civilians in armed conflict is a concern of the international community. A number of important decisions and commitments have been taken. Most important was the historic agreement on the responsibility to protect populations from genocide,

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99 UNSG Report on Implementing the Responsibility to Protect (January 12th, 2009), UN Doc A/63/677

war crimes, ethnic cleansing and crimes against humanity, which has been reaffirmed by SC Resolution 1674.\textsuperscript{101}

The norm of R2P has had significant push by the UN member states, at the UN Security Council open debate on the protection of civilians in armed conflict on June 22, 2007, this was evident. In the discussion, the Belgium ambassador recapped the principles of R2P and pressed even further noting the “international community has the responsibility and even the duty to respond.”\textsuperscript{102} These words were also reinforced by the British ambassador Karen Pierce in stating “While national Governments have the primary responsibility to protect their citizens, the international community also has responsibilities. We should live up to them.\textsuperscript{103}

In support of the principle of R2P Africa is not left out either, the Nigerian ambassador Aminu Wali explicitly supported the norm of R2P in the discussions, he stated: We believe that the time has come for the international community to re-examine when it is its responsibility to protect civilians, without prejudice to the sovereignty of Member States. The genocide in Rwanda, the ethnic cleansing in Bosnia and the crimes committed against unarmed civilians in areas of conflict, especially in Africa serves as a constant reminder that we have to search for a generally acceptable understanding when the international community exercises its responsibility to protect.\textsuperscript{104}

2.4 Implications of humanitarian intervention

The changing characteristics of violent conflicts require new approaches to their resolution; the use of force is no longer interpreted exclusively in terms of self-defense but also due to humanitarian necessity. International legitimacy is especially focused on by constructivists. This is contrary to the traditional assumption that international relations are largely governed by power relations. The two concepts are complementary since the inverse of the legitimacy of power is the ‘power of legitimacy’.\(^{105}\) Legitimacy to Claude is important to power-holders because it makes them more secure. Wheeler provides an opinion closer to that of constructivist approach by arguing that legitimacy is constitutive of international action.\(^{106}\) In his view, state actions will be constrained if they cannot be justified in terms of plausible legitimating reasons. Norms, once established, will serve to constrain even the most powerful states in the international system, and, moreover, can pull the actions of states towards positive outcomes. On the other hand, there must first be found an agreed-upon source of legitimacy within international society to be able to set the criteria of legitimate intervention.

Changing the terminology from intervention to protection gets away from the language of humanitarian intervention. The last term has always deeply concerned humanitarian relief organizations, which have loathed the connotation of humanitarian with military activity.\(^{107}\) Talking about the responsibility to protect rather than the right to intervene has three other big advantages. First, it implies evaluating the issues from the point of view of those needing support, rather than those who may be considering intervention. The beam is on the duty

\(^{106}\) Wheeler, N., *Saving Strangers*
to protect communities from mass killing, women from systematic rape, and children from starvation. Second, this formulation implies that the primary responsibility rests with the state concerned. Only if that state is unable or unwilling to fulfill its responsibility to protect, or is itself the perpetrator, should the international community take the responsibility to act in its place. Third, the responsibility to protect is an umbrella concept, embracing not just the responsibility to react but the responsibility to prevent and the responsibility to rebuild as well. Both of these dimensions have been much neglected in the traditional humanitarian-intervention debate.\textsuperscript{108}

When considering R2P, it is also important to examine how the normative status of humanitarian intervention has evolved as this is still the most controversial aspect of R2P. One of the most prominent examples of armed international intervention is the first Gulf War. The Gulf War was a result of Iraq invading Kuwait and violating its sovereignty.\textsuperscript{109} A UN authorized force subsequently intervened to expel Iraq under the provisions of the UN Charter that prevent crimes of aggression and threats to international peace and security. One sovereign state invading another clearly fits into these provisions. However, the UN Security Council furthered the reach of these provisions in the wake of an initial crisis when a humanitarian crisis was unfolding inside Iraq.\textsuperscript{110} Rebellions began in the north and south of Iraq following the Iraqi government’s expulsion from Kuwait. The government moved quickly to brutally repress the rebellions.

\textsuperscript{108}Ibid


Thousands of civilians were massacred, and refugees began to flow over the border into Turkey and Iran.

By April 1991 it was estimated that the conflict had generated one million refugees, and 1000 refugees were dying daily due to lack of food, water, and medical necessities. On April 5, 1991 the massive flow of Iraqi refugees across borders created a situation that prompted action by the UN in the form of Security Council Resolution 688. The original resolution declared the situation a threat to international peace, appealed to the Iraqi government to cease repression of rebel groups and allow immediate access for humanitarian relief, and mandated that the UN and member countries use all available resources to contribute to the relief efforts.

However, the resolution was greatly expanded when it became clear that the original mandate would not be enough alleviate humanitarian suffering and stop the massive flow of refugees. On April 6, the United States announced that it and several other coalition partners would implement a no-fly zone in northern Iraq to prevent Iraqi forces from hampering aid efforts. Furthermore, on April 16, coalition forces announced Operation Provide Comfort, which would commit British, French, and American troops to setting up protective zones for displaced persons within Iraq. There was fierce operation from within the UN and several member states to committing troops to operate within Iraq. However, the coalition forces pushed ahead without gaining further UN authorization beyond the language in Resolution 688. After, the unilateral action taken by the coalition forces the UN, Kuwait, and the Iraq/Iran and

111 Ibid
113 Thomashausen, 33
Iraq/Turkey border areas signed a memorandum of understanding with Baghdad to allow for UN personnel to help provide humanitarian relief.\textsuperscript{114}

The actions of the international community in Iraq following their expulsion from Kuwait went a long way in helping to develop a norm that humanitarian intervention with the authorization of the UN Security Council is allowable under international law. Declaring a refugee situation that is happening as a result of an internal conflict a threat to international peace and security in a UN Security Council resolution was a huge step, and it is not a step that was not completely unopposed. Cuba, Yemen, and Zimbabwe voted against Resolution 688, and China and India abstained. The countries that voted against the resolution maintained that the actions mandated would violate article 2(7) of the Charter, and humanitarian catastrophes need to be addressed by UN agencies not the Security Council.\textsuperscript{115} The countries that voted in favor of the resolution were also weary of establishing a precedent of interfering in the internal affairs of a state based on internal humanitarian concerns.

The UN intervention in Somalia was the next step in the progression of developing a norm allowing for humanitarian intervention. In January 1992, the UN Security Council passed Resolution 733 which noted that the continuation of the humanitarian and security situation would constitute a threat to international peace and security and imposed an arms embargo.\textsuperscript{116} In April 1992, the UN Security Council passed Resolution 746, which established the United Nations Mission in Somalia (UNOSOM) with limited personnel to help monitor the ceasefire


\textsuperscript{115} Ibid

and ensure delivery of humanitarian aid.\textsuperscript{117} Finally, in December 1992, the UN Security Council passed Resolution 794. It determined that the magnitude of human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security\textsuperscript{.118} This resolution authorized the use of force under Chapter VII of the Charter to restore peace and stability in Somalia, and it was backed up with concrete resources.

The UN Security Council approved Resolution 794 unanimously, although member states did press for language to be included in the resolution which noted the exceptional nature of the conflict in Somalia. The resolution was incredibly important in establishing the norm of humanitarian intervention as it was the first time the UN Security Council explicitly authorized the use of force to respond to a humanitarian crisis. Furthermore, the situation in Somalia did not pose a grave threat to its neighbors. The humanitarian emergency was dire but largely contained within the sovereign borders of Somalia.\textsuperscript{119} Therefore, the UN declared a solely internal crisis a threat to international peace and security. This differs from the intervention in Iraq as the Security Council made it clear that the large refugee flows into neighboring countries was the relevant factor in declaring the situation a threat to international peace and security.\textsuperscript{120}

Iraq and Somalia established that humanitarian intervention is acceptable under international law if undertaken with the authorization of the Security Council. The question of whether or not other the Security Council is the only mechanism through which humanitarian

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\textsuperscript{117}Sandholtz and Stiles , 272
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intervention can take place has yet to be resolved.\textsuperscript{121} Furthermore, while the norm of the right to intervene under certain parameters was established, it was not mandated. The failed intervention in Somalia, while strengthening the norm, drastically lessened the willingness of the international community to support humanitarian intervention. This highlights the intersection between human security and national security.

Over the past several decades, human security has become increasingly important. As discussed previously, international law continues to move in a direction where individuals do have fundamental rights, and certain acts have become unacceptable. States have been increasingly willing to act to protect human security, and many developed states contribute funding and resources to foreign aid and diplomatic resolution of conflicts. However, states are not willing to jeopardize their national security to protect human security. This has drastic implications for R2P because while states may be willing to act in certain cases to stop mass atrocities the international community will remain reluctant to establish a norm of the responsibility to react, particularly if that involves intervention.\textsuperscript{122} The evolution of an African position on R2P principles is very interesting and tied to specific events. Under the Organization of African Unity (OAU), African states were very reluctant to interfere in the internal affairs of other states and even had a self-imposed ban on peacekeeping, arguing this was the responsibility of the UN. However, the Rwandan Genocide was the catalyst for the re-examination of this policy.\textsuperscript{123}


\textsuperscript{123} Bellamy, “Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit,” 151-152
While the leadership of the AU helped to push forward R2P during the 2005 World Summit, some countries expressed reservations. For example, Tanzania was hesitant to prioritize newsworthy tragedies, such as mass atrocities, above the everyday suffering of many Africans due to poverty. In addition, South Africa was uneasy about the continued lack of an international consensus on core R2P principles. There were, of course, ardent supporters of R2P, among them Rwanda and Ghana.\textsuperscript{124} It is important to highlight the discord within Africa despite the push of the AU leadership to support the concept. African states may not be seen as crucial states for the purposes of norm diffusion.\textsuperscript{125} However, the institutionalization of R2P principles in the AU Charter, and the fact that Africa has increasingly worked to respond to crises on the African continent, indicate a strengthening of the norm of R2P

\section*{2.5 Conclusion}

The changing nature of the international system has witnessed a normative shift in international security with an entrenchment of human rights regimes and the emergence of a concern for human security. Scholars posit the human security paradigm has broadened the scope of security by widening the threats and deepened it by extending the referents of security beyond the traditional state-centric view to the individual and onto supranational groups.\textsuperscript{126} Constructivists posit that this shift in the normative framework of security and the change in referent object emphasize a world of rising non-traditional actors, and non-conventional and transnational issues of concern. The state and non-state actors in a globalizing world leaves a clear message: the state is no longer able to monopolize the concept and practice of security.

\textsuperscript{124}Williams, “The Responsibility to Protect, Norm Localization, and African International Society,” 401
\textsuperscript{125}Finnemore, M. 2003. The Purpose of Intervention – Changing Beliefs about the Use of Force. Cornell University
CHAPTER THREE

THE ROLE OF THE DOCTRINE OF THE ‘RESPONSIBILITY TO PROTECT’ (R2P) IN KENYA’S POST-ELECTION VIOLENCE

3.0 Introduction

The previous chapter presented the normative status of the doctrine of responsibility to protect where it elaborated the nature of international norms, the fundamental elements of the doctrine of R2P within the international community as a norm and the implications of humanitarian intervention of R2P by recognizing that the changing characteristics of violent conflicts require new approaches to their resolution while emphasizing that the use of force is no longer interpreted exclusively in terms of self-defense but also due to humanitarian necessity.

This chapter examines the role of post election violence in Kenya, the international perspective to the doctrine of R2P and the elements of R2P in Africa.

3.1 Background

This section presents discussions on the Kenya’s post election violence, the relevance of applying R2P in the Kenya’s experience, and debates on the doctrine of R2P.

3.1.1 Kenya’s post election violence

On 27th December 2007 Kenya held its fourth multi party general elections. The presidential elections were controversial and hotly contested pitting three candidates’ incumbent president Mwai Kibaki vying on the Party of National Unity PNU, Raila Odinga of Orange Democratic movement and Kalonzo Musyoka of the Orange Democratic Movement – Kenya ODM – K.
Although there were three leading candidates there was stiff competition between Mwai Kibaki PNU and Raila Odinga of ODM.

During tallying, early returns showed the ODM candidate opening a wide margin but which suddenly narrowed as results from perceived Kibaki strongholds were announced. This lead to claims of rigging by the Opposition candidate Raila Odinga and tension that engulfed the country at the moment increased. Amidst the confusion the Electoral Commission of Kenya (ECK) declared Mwai Kibaki winner with 4.58 million votes against Raila’s 4.35 million votes. a swearing in ceremony was hurriedly conducted as physical violence begun in most parts of the country\textsuperscript{127}.

The opposition ODM swiftly rejected the results and called for mass protests countrywide. This led to unprecedented violence never seen in the country since independence which left at least 1500 people dead and another 300,000 displaced. The refusal of the two parties to talk to each other and each claiming a win as the country degenerated into violence and lawlessness led to a flurry of efforts by the international community to resolve the conflict\textsuperscript{128}.

The violence experienced towards the end of 2007 and beginning of 2008 was the worst the country has ever experienced because it almost brought the country’s economy on its knees. The violence was reported at the coast, Rift valley, Central and Nairobi provinces. Kenya had

\textsuperscript{127} Gareth Evans and Mohamed Sahnoun, The Responsibility to Protect, Council of foreign Affairs.

previously registered electoral violence in 1992 and 1997. This violence was mostly felt before voting begun but once the results were announced it fizzled out. 129

3.1.2 The Relevance of the doctrine of R2P to Kenya’s post election violence

Immediately following the polling, many in the international community congratulated Kenya on its elections and called for results to be respected. However, as the extent of the rigging became clear and the violence spiraled out of control, world leaders exerted significant diplomatic pressure on the Kenyan government130. In the case of the conflict in Kenya, whereas there was a regional concern to end the conflict, several mediators made failed attempts because the parties did not agree on them mediating the conflict.

The South African Archbishop Desmond Tutu was the first to arrive but he is believed to have failed because he came at the wrong time when each party felt it could get what it wanted. Cyril Ramaphosa was the second mediator to arrive in the country to try and find a solution to the conflict. Ramaphosa was rejected by PNU on grounds that he was a business partner to one of the ODM leaders. The former African Union head and former Ghanaian president also tried to make Kibaki and Raila agree on a way forward but he also did not get them to talk or meet after he held separate meetings with the both leaders. It is Kufuor who fronted the idea of sending Kofi Annan the former United Nations General Secretary to Kenya to mediate in the conflict. Kofi was respected by both ODM and PNU and was agreed to be the right candidate to mediate

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in the conflict. It was agreed therefore Kofi should be helped by the committee of African eminent persons.\textsuperscript{131}

Annan, was to negotiate with the two parties on 1) finding measures that would end the violence and restore the political rights of the Kenyan people; 2) addressing the humanitarian crisis and promoting reconciliation; 3) finding a political solution to Kibaki-Odinga stand-off; and 4) creating institutional reforms that would address the underlying cause of the violence. The international community strongly supported this effort and devoted high level political resources to help ensure its success. For example, Assistant Secretary of State for African Affairs Jendayi Frazer traveled to Kenya in early January to persuade the parties to find a solution. The Security Council issued a statement expressing support for Annan, and when the negotiations were stalling, US Secretary of State Rice and AU Chairperson Jakaya Kikwete both weighed in to push for a settlement. The United States also put financial pressure on Kenya by publically stating that foreign aid would be reviewed.\textsuperscript{132}

The agreement, achieved with the help of Annan, created a power sharing government. Kibaki would maintain the presidency while Odinga would become prime minister. The prime minister has considerable powers and can only be dismissed by Parliament. The cabinet positions in the government are split between ODM and PNU, and both the president and the prime minister must agree before a minister can be removed from office\textsuperscript{133}. Two deputy prime minister Positions were also created with each party appointing one. Finally, the newly formed cabinet agreed to work out a new constitution that would address the long-standing grievances within

\textsuperscript{131} \url{www.conflicterisis.org}
\textsuperscript{132} Gavin, “Policy Options Paper-Kenya”.
Kenyan society that helped inflame the post-elections violence. Progress has been in slow in implementing this agreement, and the political elite in Kenya appear to be delaying on key benchmarks, such as constitutional reform, forming a commission to organize the next national elections to be held in 2012, and creating a judicial process to investigate and potentials prosecute politicians for war crimes related to the violence. These are serious deficiencies that need to be addressed. However, it is promising that violence has not broken out again in Kenya, and the international community has remained involved in continuing to pressure Kenya’s political leaders to fully implement the power-sharing agreement.

International actors responded swiftly to crimes that appeared to rise to the level of crimes against humanity, crimes that states committed themselves to protect populations from in adopting R2P at the 2005 World Summit. This response, consisting primarily of an African Union (AU) led mediation process but also supported by the UN, Kenya’s neighbors, key donors, and civil society, helped stem the tide of violence. Human Rights Watch and others referred to the response as “a model of diplomatic action under the responsibility to protect.”

Kenya is an example of one of the strengths of the R2P concept. The international community recognized the potential for a humanitarian catastrophe and responded quickly. However, the tools that the international community employed were not inappropriately coercive and focused more on offering the Kenyan government support for crafting a workable solution. The UN provided diplomatic capacity by sending Kofi Annan to help mediate a settlement, and the region and the international community gave unified support to this approach. Furthermore, in the beginning of the crisis and when negotiations were stalling, the international community

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136 United Nations, “Implementing the responsibility to protect: Report of the Secretary General,” 23
appropriately pressured Kenya’s political elite by publicly stating that those who fostered violence would be held criminally responsible and foreign aid and investment could be jeopardized. This early intervention supported at the highest levels of international politics helped to stave off a much larger crisis that could have been far more devastating for the Kenyan people and the larger region\textsuperscript{137}. In the case of Kenya, the obligations under R2P were perceived differently, and the international community focused on early and sustained diplomatic intervention to stop the crisis.

3.1. 3 The Debates on the doctrine of R2P

When the idea of responsibility to protect was taken up in 2004 in the context of debate on reforms, it pointed to international responses to the "successive humanitarian disasters in Somalia, Bosnia, Herzegovina, Rwanda, Kosovo and Sudan.‖ In a report titled ‘report A More Secure World: Our Shared Responsibility’ the high level panel on threats, challenges and change stated that there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community-with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies.\textsuperscript{138} The high level panel further spoke of an emerging norm of a collective international responsibility to protect encompassing not only “the ‘right to intervene’ of any State but the responsibility to protect of every state when it comes to people suffering from avoidable catastrophes.”\textsuperscript{139}


\textsuperscript{139} Ibid
The concept of responsibility to protect was incorporated into the outcome document of the high level meeting of the General Assembly. The document contains two paragraphs (paras 138 and 139) on the responsibility to protect. The assembled heads of states recognized the responsibility of each individual state to protect its populations from such crimes, and a corresponding responsibility of the international community.

According to Bellamy, responsibility to protect continues to be a controversial concept within the international system, both because of its normative status and how it is viewed. During the 2005 World Summit Outcome debate the European Union (EU), Canada, and the AU were the primary proponents of the concept. Among the Permanent 5 Members of the Security Council, the US, Russia, and China expressed skepticism of responsibility to protect during the Summit. The UK and France were supportive in many respects, and the US gradually expressed support for some R2P concepts. Russia and China remained reluctant throughout the debate because of concerns that the intervention component would be abused. Given the regional focus of the case studies discusses in the upcoming sections, the views of the AU are of particular importance. The evolution of an African position on R2P principles is very interesting and tied to specific events. Under the Organization of African Unity (OAU), African states were very reluctant to interfere in the internal affairs of other states and even had a self-imposed ban on peacekeeping, arguing this was the responsibility of the UN.

140. 2005 World Summit Outcome, GA Res. 60/1, paras.1 38-39 (Oct. 24, 2005)
141. Ibid, para 139.
143. Ibid
However, the Rwandan Genocide was the catalyst for the re-examination of this policy. The AU Charter (the regional organization that replaced the OAU) under article 4(h) completely reversed this policy and promotes regional responsibility in the event that a Member State is unwilling or unable to prevent mass atrocities. In practice the AU has had difficulty implementing the policy enshrined in article 4(h), and among African states there is still disagreement on the parameters.

Williams asserts that while the leadership of the AU helped to push forward R2P during the 2005 World Summit, some countries expressed reservations. In particular, he points out that Tanzania was hesitant to prioritize newsworthy tragedies, such as mass atrocities, above the everyday suffering of many Africans due to poverty. In addition, South Africa, was uneasy about the continued lack of an international consensus on core R2P principles. There were, of course, ardent supporters of R2P, among them Rwanda and Ghana. It is important to highlight the discord within Africa despite the push of the AU leadership to support the concept. African states may not be seen as crucial states for the purposes of norm diffusion. However, the institutionalization of R2P principles in the AU Charter, and the fact that Africa has increasingly worked to respond to crises on the African continent, indicate a strengthening of the norm of R2P.

The high level panel report on the debate about the responsibility to protect was directly related to institutional reform of the United Nations. The high-level panel saw the idea of responsibility to protect as a means to strengthen the collective security system under the Charter. The concept was treated in two parts by the panel, in introduction, the link between

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144 Williams, “The Responsibility to Protect, Norm Localisation, and African International Society,” 399
145 Williams, “The Responsibility to Protect, Norm Localisation, and African International Society,” 401
146 Ibid
sovereignty and responsibility is mentioned. Subsequently the delineations of the concept in the context of the "use of force, "in a section entitled "Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect" is developed. The report highlighted collective responsibility to protect of every state when it comes to people suffering from avoidable catastrophes mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. Responsibility for ‘every state’ provides room for different interpretations, at the same time, the primer also does allow for a broader reading that endorsed a wider concept of "responsibility" under which the responsibility of the host state shifts to every other state in cases where the former is unable or unwilling to act.

A significant aspect of the High-Level Panel Report is the linkage of the panel’s vision of shared responsibility directly to the UN. The panel associated the concept of Collective responsibility in particular with action by the Security Council. It retained that the Security Council has not only the authority, but also a certain responsibility to take action to combat humanitarian crises. The report stated that the Security Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective responsibility to protect, the Council "can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a ‘threat to international peace and security’. The panel combined this appeal to responsibility with a plea for a more transparent and responsible use of the right of veto by the five permanent members of

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147 High-Level Panel Report
148 Ibid
149 <http://www.responsibilitytoprotect.org/index.php/pages/2>
150 High-Level Panel Report
the Security Council. The permanent members were urged by the panel to pledge themselves from the use of veto in cases of genocide and large-scale human rights abuses.\textsuperscript{151}

In the statements, the panel’s intention to make the Council both a vehicle for, and an addressee of, the concept of responsibility to protect is evident. The panel took the position that UN members must resort to the collective security system in all cases of military intervention, including operations carried out by regional organizations.\textsuperscript{152} The panel's treatment of collective security culminated in the identification of "five basic criteria of legitimacy" for the use of force (seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences). In establishing these legitimacy criteria, the panel did not contemplate solving the impasse of unauthorized interventions, but intended to enhance "the effectiveness of the global collective security system."\textsuperscript{153}

The report of the secretary general stressed his awareness of the sensitivity of the emergence of the norm of collective responsibility to protect.\textsuperscript{154} The concept was removed from the section on the use of force and placed in the section dealing with freedom to live in dignity, so as to detach the idea of responsibility from an automatic equation to armed force. In this report, the concept was removed from the section on the use of force and placed on the section on covering freedom to live in dignity, so as to detach the idea of responsibility from an automatic equation to armed force. Consequently, the thematic focus of the concept changed. Responsibility to protect was no longer exclusively viewed as a substitute for humanitarian intervention but as a strategy to promote the commitment of all nations to the rule of law and

\textsuperscript{151}Ibid
\textsuperscript{152}Ibid
\textsuperscript{153}Ibid
\textsuperscript{154}Report of the Secretary-General
human security.\textsuperscript{155} The Secretary-General report did not expressly rule out the possibility of unilateral action in any circumstances (e.g., where the veto is used to block action in a case of genocide).\textsuperscript{156} The secretary general’s report was silent on alternative means of carrying out interventions for purposes of human protection is a sign of reluctance to accept military action without the Security Council’s authorization.\textsuperscript{157} The 2005 World Summit Outcome Document did mention the R2P, but in such a way that the host state was mainly responsible. The responsibility of the international community was stated as follows:

The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. (…) We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.\textsuperscript{158}

The drafting process of the Outcome Document of the 2005 World Summit made the difference of the conception of the notion of responsibility to protect very apparent. Both the structure and silhouettes of the concept were intensively debated before the high-level plenary meeting. States like Algeria, Belarus, Cuba, Egypt, Iran, Pakistan, the Russian Federation, and Venezuela expressed reservations about including the responsibility to protect in the Outcome Document.\textsuperscript{159} Some delegates doubted that it was compatible with the Charter, noting that there is no shared responsibility in international law outside the responsibility of a state to protect its

\textsuperscript{155}Ibid
\textsuperscript{156}Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? The American Journal of International Law, Vol. 101, No. 1 (Jan., 2007)
\textsuperscript{157}Ibid
\textsuperscript{158}World Summit Outcome, 2005, 138-139
\textsuperscript{159}Ibid
own citizens and the institutional mandate of the United Nations to safeguard international peace and security, others argued that the concept was too vague and open to abuse.\textsuperscript{160} Notwithstanding, the legal nature of the responsibility to protect was questioned by others who sought to frame this idea in terms of a moral principle\textsuperscript{161}. U.S. ambassador John R. Bolton, for example, stated in a letter dated August 30, 2005, that the United States would "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."\textsuperscript{162}

Consequently, the U.S. delegation recommended that the idea of an international responsibility to protect be defined in the structure of a "moral responsibility" of the international community to "use appropriate diplomatic, economic, humanitarian and other peaceful means, including under Chapters VI and VIII of the Charter to help protect populations from ... atrocities."\textsuperscript{163} The Outcome Document is a compromise solution seeking to bridge the different positions. Reduction of the idea of responsibility to protect to a purely moral concept was avoided by states. In the Outcome Document of 2005 a rather curious mixture of political and legal considerations which reflects the continuing division and confusion about the meaning of the concept was presented. In the document, the responsibility of the international community is framed in more cautious terms. The Outcome Document relied wholly on the distinction between responsibility to prevent, responsibility to react, and responsibility to rebuild made by the Commission on State Sovereignty and Intervention. Conversely, each of these concepts is treated in individual terms with varying degrees of support.

\textsuperscript{160} \url{http://www.responsibilitytoprotect.org/index.php/pages/2}
\textsuperscript{161} Gareth Evans and Mohamed Sahnoun, The Responsibility to Protect, Council of foreign Affairs.
\textsuperscript{162} Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? The American Journal of International Law, Vol. 101, No. 1 (Jan., 2007)
\textsuperscript{163} Ibid
The idea of responsibility to prevent is phrased in terms of a general appeal ("should, as appropriate") to the international community to assist states and the United Nations in the prevention of crimes. Responsibility to react is stated unconditionally that “the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other Peaceful means, in accordance with Chapters V I and VIII of the Charter, to help to protect Populations from genocide, war crimes, ethnic cleansing and crimes against humanity." The idea of responsibility to react thus enjoys some acceptance with regard to measures falling short of the use of force.

As regard responsibility to take collective action through the Security Council under Chapter VII, the Outcome Document assumes a more reserved stance. The idea is placed under a double qualifier; first, the heads of state and government merely reaffirm their preparedness to take such action. What’s more, states commit themselves to act only "on a case-by-case basis" through the Council, which is in contrast to the assumptions of a systematic duty. The tenor of the Outcome Document is distinguished from the responsibility driven approach of the high level panel toward collective security by the dual position and also reflect the view of those states that questioned the proposition that the Charter creates a legal obligation for Security Council members to support enforcement action in the case of mass atrocities. The concept of responsibility to rebuild received less support, the heads of state and government merely expressed their intention to commit themselves, "as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and

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164 The Outcome Document of 2005
165 Ibid
166 Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? The American Journal of International Law, Vol. 101, No. 1 (Jan., 2007)
crimes against humanity and to assisting those which are under stress before crises and conflicts break out.\textsuperscript{167}

The Commission on State Sovereignty and Intervention provides a comprehensive treatment of the concept of responsibility to protect. The concept was essentially developed by the commission to solve the legal and policy dilemmas of humanitarian intervention. The commissions’ focus was on the relationship between sovereignty and intervention, to gross and systematic violation of human rights that offend every precept of our common humanity, if humanitarian intervention is indeed an unacceptable assault on sovereignty.\textsuperscript{168} The commission suggested dealing with this problem by recharacterizing sovereignty, by conceiving of sovereignty as responsibility rather than control. The commission thus used a rhetorical trick: it flipped the coin, shifting the emphasis from a politically and legally undesirable right to intervene for humanitarian purposes to the less confrontational idea of a responsibility to protect.\textsuperscript{169}

A distinction between the idea of responsibility to protect and the concept of humanitarian intervention was presented by the commission in three ways: First, an emphasis that responsibility to protect looks at intervention from a different perspective than the doctrine of humanitarian intervention. The commission further stressed that addresses the dilemma of intervention from the perspective of the needs of those who seek or need support (e.g., communities in need of protection from genocide, mass killings, ethnic cleansing, rape, or mass starvation), rather than from the interests and perspectives of those who carry out such action

\textsuperscript{167}The Outcome Document of 2005
\textsuperscript{168}Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? The American Journal of International Law, Vol. 101, No. 1 (Jan., 2007)
\textsuperscript{169}Ibid
(entities asserting the "right to intervene").\textsuperscript{170} Second, the commission sought to bridge the gap between intervention and sovereignty by introducing a complementary concept of responsibility, under which responsibility is shared by the national state and the broader international community.

The commission acknowledged that the main responsibility to protect resides with the state whose people are directly affected by conflict or massive human rights abuses, and "that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place."\textsuperscript{171} Third, the conceptual parameters of the notion of intervention was expanded by the commission, by declaring that an effective response to mass atrocities requires not only reaction, but ongoing engagement to prevent conflict and rebuild after the event. A multiphased conception of responsibility, based on a distinction between responsibility to prevent and react and responsibility to rebuild was developed by the commission. This conception of responsibility "means that if military intervention action is taken- because of a breakdown or abdication of a state's own capacity and authority in discharging its 'responsibility to protect'-there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development."\textsuperscript{172}

On the basis of a distinction between state’s internal and external responsibility there was a move from a right to intervene to a responsibility to protect. The commission recognized that states' authorities are responsible for the safety, life, and welfare of their citizens, and that they are also responsible to citizens internally. The commission also stressed that at the same time

\textsuperscript{170}Ibid
\textsuperscript{171}Ibid
\textsuperscript{172}Ibid
states bear an external responsibility with regard to the international community through the United Nations. In the commission’s view the dual responsibility would require “action by the broader community of states to support populations that are in jeopardy or under serious threat.” Three circumstances in which the ‘residual responsibility’ of the broader community of states is activated were identified: "when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect"; "when a particular state ... is itself the actual perpetrator of crimes or atrocities"; or "where people living outside a particular state are directly threatened by actions taking place there."\(^{174}\)

The commission’s report enjoyed a broad support because it avoided taking a final position on the question of the legality/legitimacy of unauthorized interventions. The commission left open whether and under what circumstances an "intervention not authorized by the Security Council or the General Assembly" would be valid in legal terms.\(^{175}\) At the same time, it advised that when the Council fails to discharge what the commission would regard as its responsibility to protect, a balancing assessment should be made as to where the most harm lies: "in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered.\(^{176}\) In addition, the commission developed five criteria of legitimacy for interventions, which were deemed to apply to "both the Security Council and UN member states," namely, just cause, right intention, last resort, proportionality of means, and a reasonable prospect of success.\(^{177}\)

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\(^{173}\) Ibid
\(^{174}\) Ibid
\(^{175}\) Ibid
\(^{176}\) Ibid
\(^{177}\) Ibid
The current UN secretary general Ban Ki-moon in the report titled ‘Implementing the responsibility to protect’ made it clear that 2005 World Summit was indeed not the finishing point in the R2P discussion. ICISS report tried to bridge the gap between intervention and state sovereignty. Sovereignty was redefined as the responsibility to protect people from abuses of human rights. The three responsibilities were however substituted with three pillars in the Ban report. ‘Pillar one is ‘protection responsibilities of the State’- In the Summit Outcome it is clear that each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This is the root of the first pillar which Ban Ki-moon translates into: ‘Pillar one is the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. In the statements, it is apparent that Ban Ki-moon mentions the Responsibility to protect non-nationals and paying attention to the incitement of atrocities. In so doing, the obligation of the states is not only derived from the R2P principle but ‘are firmly embedded in pre-existing, treaty bases and customary international law’. From this point we realize that the responsibility of the state backed with the international criminal court and different UN tribunals.

Pillar two is ‘international assistance and capacity building’ for the State – this pillar commits the international community to assist the state in meeting its obligations should the state fail in its protection responsibility. Pillar two is based on the part of the Summit Outcome mentioning that ‘the international community should, as appropriate, encourage and help States to exercise this responsibility’. This international assistance can take one of four forms:

180Ibid
Encourage the state to meet its responsibility under pillar one; Helping the State to exercise this responsibility; Helping the State to build up their capacity to protect and lastly assisting the State ‘under stress before crises and conflicts break out.¹⁸¹

Pillar three is ‘timely and decisive response’ by the international community¹⁸² - in the event that the elements in the first two pillar fail, pillar three elements can be used to back them up. Ban Ki-moon wrote: ‘Paragraph 139 of the Summit Outcome reflects the hard truth that no strategy for fulfilling the responsibility to protect would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military action in extreme cases’.¹⁸³ This enforcement measure is described in the third pillar: ‘Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection. (…) A reasoned, calibrated and timely response could involve any of the broad range of tools available to the United Nations and its partners’. It is obvious that the threshold for action under pillar two is much lower than under pillar three. Making clear that the ‘more robust the response, the higher the standard for authorization’.¹⁸⁴ If a state refuses international assistance (pillar two), the international community is responsible according to the Summit Outcome paragraph 139 to undertake coercive measures.

The Security Council is, according to Article 41 and 42 of the UN Charter, the right actor to authorize these measures. If the Council fails in its responsibility the General Assembly can authorize coercive measures, by making state on the Uniting for Peace-procedure. But in effect

¹⁸¹ Ibid
¹⁸² Ibid
¹⁸³ Ibid
¹⁸⁴ Ibid
such an authorization is not legally binding. Regional organizations or arrangements can only use coercive measures if they are prior authorized by the Security Council.

3.2 Elements of the Responsibility to Protect in Africa

In response to the rapidly disintegrating situation in Libya, the relevant organs of the UN laid the ground for the subsequent intervention in a series of condemnatory statements. The UN High Commissioner for Human Rights issued a statement affirming that the protection of civilians should be the paramount consideration in maintaining national order and the rule of law. ‘Widespread and systematic attacks against the civilian population may amount to crimes against humanity’. The Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect issued a release which sought to remind the Libyan regime of its international obligations. ‘If the reported nature and scale of … attacks are confirmed, they may well constitute crimes against humanity, for which national authorities should be held accountable’.

The Security Council issued a press release which covered similar ground. Deploying the R2P doctrine, the release called on the Libyan Government to meet its responsibility to protect its population. It should ‘act with restraint, to respect human rights and international humanitarian law, and to allow immediate access for international human rights monitors and

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185 Ibid
186 Ibid
humanitarian agencies’. The Security Council, it said, would follow the situation closely. In Libya, nothing changed. The Human Rights Council convened a special session on the situation of human rights in the Libyan Arab Jamahiriya on 25 February. Introducing the session, the High Commissioner for Human Rights described the Libyan descent into violence and chaos as ‘shocking and brutal’. It represented a callous and worsening disregard for the rights and freedoms of the Libyan people, she said, that had been characteristic of the Libyan leadership for more than four decades. A statement from all special procedures mandate holders expressed concern that ‘several hundred people have died.

Many others have been arrested. Thousands are injured. The human suffering continues to rise’. On the same day, the Security Council adopted Resolution S-15/1. The resolution expressed deep concern with respect to the deteriorating situation and strongly condemned reported human rights violations including indiscriminate attacks on civilians, extrajudicial killings, arbitrary arrests and detention and torture of peaceful demonstrators. It called on the Libyan Government to ‘meet its responsibility to protect its population [and] to immediately put

Illustrations and equations are not supported in this model. The text is readably provided as natural language.
an end to all human rights violations’.\textsuperscript{196} It recommended that the General Assembly consider the expulsion of Libya from Security Council membership.\textsuperscript{197} The Assembly suspended Libya on 1 March.

It was highly significant that, immediately before the Human Rights Council met, the key regional organisations traditionally sympathetic to Middle Eastern and North African regimes joined the chorus of international protest and made recommendations for immediate ameliorative action.\textsuperscript{198} Between 20–23 February, the Security Council of the League of Arab States, the Secretary-General of the Organisation of Islamic Cooperation (‗OIC’) and the Peace and Security Council of the African Union all issued statements condemning the descent into violence in Libya and calling for the establishment of immediate talks between the contending parties to arrange a ceasefire and to work towards a mediated solution of the conflict.\textsuperscript{199} In an unprecedented move, the Arab League went one step further and suspended Libya’s membership of the League.\textsuperscript{200}

These statements and resolutions signalled the international community’s heightened concern with respect to events in Libya and provided the necessary backing for decisive action by the Security Council when it met to consider the Libyan crisis on 26 February. At this meeting the Security Council adopted \textit{Resolution 1970}.\textsuperscript{201} The resolution expressed grave

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{196} ibid
  \item \textsuperscript{197} Ibtd
  \item \textsuperscript{198} Alex J Bellamy, ‘Libya and the Responsibility to Protect: The Exception and the Norm’ (2011) 25 Ethics & International Affairs 263, 266.
  \item \textsuperscript{200} Paul D Williams, ‘Briefing: The Road to Humanitarian War in Libya’ (2011) 3 Global Responsibility to Protect 248, 251.
  \item \textsuperscript{201} Ibid
\end{itemize}
\end{footnotesize}
concern about the Libyan conflict. It deplored the gross and systematic violation of human rights in the country. It welcomed the condemnation by the Arab League, the African Union and the OIC. It condemned the deliberate killing of civilians and it recalled the Libyan authorities’ responsibility to protect its population.

The resolution demanded an immediate end to hostilities; the observance of human rights; access for human rights monitors; and safe passage for humanitarian and medical workers and supplies into the country. It also set in place a set of coercive measures. It imposed an arms embargo; a travel ban on key figures in the Libyan administration; a freeze on their assets overseas; and it called for a review of progress with respect to these measures within 120 days. The Libyan Government responded on 2 March stating its belief that the Security Council resolution was premature and requesting that its operation be suspended until the claims made within it could be confirmed. On the ground, the killings, torture and arbitrary detentions continued unabated.

Regional organizations became even more vocal as the violence escalated. The Gulf Cooperation Council released a statement on 7 March, which called upon the Security Council to ‘take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya’ and further condemned the state-sponsored violence. In a dramatic turn of events, the Libyan Ambassador to the UN defected from the regime and called upon UN member states to recognize the Libyan Interim Council as the legitimate Libyan authority. The OIC came in behind the Arab League and also endorsed the creation of a no-fly zone. It stopped short, however, of endorsing foreign military intervention on the ground. On 12 March, the Arab League intervened forcefully

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202 Ibid
203 Ibid
to call upon the Security Council to establish a no-fly zone and to create safe areas in places exposed to shelling.\textsuperscript{204} It urged the Security Council to set in place measures to protect the civilian population from widespread human rights abuse and declared that the existing Libyan authorities had lost all legitimacy.

The Security Council met again on 17 March to review the situation and determine what further action was required. The outcome of its deliberations was the groundbreaking \textit{Resolution 1973}.\textsuperscript{205} The resolution deplored the failure of the Libyan authorities to comply with \textit{Resolution 1970}, expressed grave concern at the deteriorating human rights situation and escalating violence in the country and reiterated the responsibility of the Libyan Government to protect the Libyan population.\textsuperscript{206} It recalled the condemnation of the Libyan regime by the Arab League, the African Union and the OIC, and their demand for the creation of a no-fly zone and of safe havens for civilians under threat of shelling.

Following from this the Security Council, for the first time, authorized coercive military intervention in a sovereign state without the consent of that state’s governing authorities. \textit{Resolution 1973} strengthened and extended the arms embargo, asset freeze and travel restrictions imposed in \textit{Resolution 1970}. It deplored the flow of armed mercenaries into the country to assist government forces in suppressing the rebellion. Most importantly, however, it authorised the use of force by a coalition of nations under the North Atlantic Treaty Organization’s umbrella in two separate ways. First, the Security Council resolved that ‘all necessary measures’ could be taken to protect civilians and civilian populated areas under threat of attack.\textsuperscript{207}

\begin{footnotesize}
\footnotesize\textsuperscript{204} Ibid
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\textsuperscript{205} Ibid
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\textsuperscript{206} Ibid
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\textsuperscript{207} Ibid
\end{footnotesize}
The measures, however, could not include the deployment of any ‘foreign occupation force of any form on any part of Libyan territory’.\textsuperscript{208} Secondly, the Security Council determined that a no-fly zone should be established over Libya in order to protect civilians and authorised NATO to take ‘all necessary measures’ to enforce the ban on flights.\textsuperscript{209} The aim of all these measures was to force the Libyan regime to desist from grievous abuses of human rights and humanitarian law, abuses which by that time had clearly assumed the status of potential crimes against humanity.\textsuperscript{210} The designation of crimes against humanity having been advanced, R2P could be invoked by the Security Council to shape an international military intervention designed to prevent the occurrence of existing and probable atrocities.

\subsection*{3.3 Conclusion}

In committing to uphold R2P the Kenyan government accepted the responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing\textsuperscript{211}. The government thus had a responsibility to: ensure that government officials did not incite or facilitate the commission of crimes; mitigate rampant hate speech; deter private actors from inciting, aiding or perpetrating crimes; arrest and prosecute perpetrators; and ensure that the police and the military observe international human rights standards and develop the capacity to respond rapidly to threats of atrocities\textsuperscript{212}.

\begin{flushleft}
\footnotesize
\textsuperscript{208} Ibid
\textsuperscript{209} Ibid
\textsuperscript{210} Ibid
\end{flushleft}
In the context of a contested election the government was unable and unwilling to take the steps necessary to protect its population. When incumbent President Mwai Kibaki, a member of the Kikuyu ethnic group, was declared the victor over Raila Odinga, a Luo, on 27 December 2007, people swiftly took to the streets to protest the perceived rigging of the election. The protests, which had clear ethnic undertones, led to looted stores, destroyed homes, and displaced and killed Kenyans. The violence at first seemed spontaneous, but it soon became apparent that much of it was organized and targeted. Retaliatory killings, perpetrated often by militias (formed frequently along ethnic lines, and comprised of disenfranchised youth) became commonplace.  

4.0 Introduction

The previous chapter presented the international perspective to the doctrine of R2P. It averred that when the idea of responsibility to protect was taken up in 2004 in the context of debate on reforms, it pointed to international responses to the successive humanitarian disasters in Somalia, Bosnia, Herzegovina, Rwanda, Kosovo and Sudan. It further outlined the application of R2P in the Kenya’s post election violence case.

This chapter examines a critical analysis to the doctrine of R2P where it discusses the emerging issues from the study. Some of the emerging issues in this study that it elaborates include the forms of abuses that R2P seeks to address, the concept of R2P vs. the issue of sovereignty and the challenges facing the implementation of R2P.

4.1 Emerging Issues

4.1.1 The forms of abuses under R2P

The responsibility to protect is a principle which seeks to ensure that the international community never again fails to act in the face of genocide and other gross forms of human rights abuse. “R2P,” as it is commonly abbreviated, was adopted by heads of state and government at the World Summit in 2005 sitting as the United Nations General Assembly.214 The principle stipulates, first, that states have an obligation to protect their citizens from mass atrocities;

second, that the international community should assist them in doing so; and, third, that, if the state in question fails to act appropriately, the responsibility to do so falls to that larger community of states. R2P should be understood as a solemn promise made by leaders of every country to all men and women endangered by mass atrocities.\(^{215}\)

The UN’s 2005 World Summit Outcome Document explicitly limits the application of the norm to four types of mass atrocities: first, genocide which is a crime under international law which can be committed both in times of peace and war, and which is prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).\(^{216}\) Article II of the Convention defines genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births in the group; (e) Forcibly transferring children of the group to another group.\(^{217}\)

Article I of the Genocide Convention imposes on the state parties an obligation to prevent and to punish genocide. It does not explicitly prohibit them from committing it, but the ICJ has pronounced that the obligation to prevent also implies a prohibition to commit genocide.\(^{218}\) The Convention has to date been ratified by 142 states, but according to the ICJ, the prohibition of


genocide is also a customary norm of international law, and thus binding on all states, whether or not they have ratified the Convention.\textsuperscript{219} The Court has also recognized it as a peremptory norm of international law (jus cogens), which means that it is “accepted and recognized by the international community as a whole as a norm from which no derogation is permitted”\textsuperscript{220}.

Ethnic cleansing which is not as such criminalized under international law. It is not a legal term,\textsuperscript{89} but an expression referring to a policy of serious human rights violations aiming to expel an ethnic group from a certain area, in order to change the composition of the population in that area. Ethnic cleansing is not prohibited in its own right in any international convention, but such a policy is in violation of international law, because the different acts constituting it can be subsumed under crimes against humanity, war crimes and in some cases even genocide. Ethnic cleansing can, however, be classified as genocide, if the acts constituting it can be characterised as “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and if the for genocide necessary “intent to destroy” is present\textsuperscript{221}. This could, according to the commentary to the draft Convention on the Crime of Genocide, be the case if the displaced population is intentionally exposed to circumstances likely to lead to its death, for example if “people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, heat, cold and epidemics”\textsuperscript{222}.

In conclusion, although ethnic cleansing is not as such a crime prohibited under international law, the acts constituting it are, because they also fall under crimes against

\textsuperscript{222} Ibid
humanity, war crimes and in some circumstances even genocide. Therefore, depending on under which of these other crimes the acts of ethnic cleansing can be subsumed, the states have an obligation to protect populations their own or foreign from ethnic cleansing to the same extent than from crimes against humanity, war crimes and genocide. In the following Chapters, ethnic cleansing will not always be dealt with as a separate category of criminal acts, but it will simply be assumed that these acts also fall under one of the other three “R2P crimes”.

War crimes which are violations of international humanitarian law that creates individual criminal responsibility under international law.\(^{223}\) International humanitarian law in its turn is a vast body of international treaty and customary law that regulates the conduct of armed conflict and seeks to protect persons who are not taking part in the hostilities.\(^{224}\) There are different definitions of war crimes in different international instruments, but the most comprehensive and precise one can be found in Article 8 of the Statute of the International Criminal Court (Rome Statute).\(^{225}\)

Regarding international armed conflicts, in the responsibility to protect context it is the fourth Geneva Convention and the first Additional Protocol to the Geneva Conventions (Additional Protocol I) which are of interest, because these instruments contain provisions for protection of civilians. When it comes to internal armed conflicts, although the four Geneva Conventions are mainly applicable only in international armed conflicts, the common Article 3 to the these Conventions imposes on the state parties certain minimum obligations that must be

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\(^{224}\) Ibid

respected also in internal armed conflicts. The states thus have an obligation to treat humanely all persons who do not take active part in the hostilities “in all circumstances”.

Finally, R2P seeks to address crimes against humanity, commission of these crimes is, however, prohibited under customary international law, and their prohibition has also been recognized as a jus cogens norm. Crimes against humanity were for the first time criminalized in the Charter of the International Military Tribunal of Nuremberg (IMT) in 1945, but more recently also for example in the Statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).

Following the peremptory character of the prohibition of crimes against humanity, it is also an obligation erga omnes. In the absence of an international convention in force, there are no codified obligations for the states to prevent these crimes, but following their prohibition under customary international law, all states do have a duty to refrain from committing them. According to Hannikainen, peremptory norms oblige the states to prevent violations of these norms within their own jurisdiction, and it can therefore be argued that the states do have a customary duty to prevent crimes against humanity within their own territory.

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228 Ibid
229 Ibid
231 Ibid
4.1.2 The concept of R2P vs. the issues of sovereignty

The concept of sovereignty which established a system of independent and equal units dates back from the Treaties of Westphalia in 1648. The concept lies at the heart of both customary international law and the UN Charter and remains an essential component of the maintenance of international peace and security as well as a defense of weak states against the strong. The ICJ has recognized in the Corfu Channel case that between independent states, the respect for territorial sovereignty constitutes an essential foundation of international relations. Later on in the Nicaragua case, the Court has again referred to state sovereignty as the fundamental principle on which the whole international law rests. The core elements of sovereignty include three main requirements: a permanent population, a defined territory, and a functioning government.

These elements were codified in a series of international documents such as the 1933 Montevideo Convention on the Rights and Duties of States, the UN Charter and the UNGA Declaration on Principle of International Law Concerning Friendly Relations among States. According to Article 2(1) UN Charter, the world organization is based on the principle of the sovereign equality of all member states which denotes the competence, independence, and legal equality of states. Sovereignty is normally used to encompass all matters including the choice of political, economic, social, and cultural systems and the formulation of foreign policy, in which...
each state is permitted by international law to decide and act without intrusions from other sovereign states.\textsuperscript{237}

Following the principle of non-interference in affairs that are essentially within the domestic jurisdiction of those states is enshrined in Article 2(7) UN Charter, a sovereign state is empowered in international law to exercise total jurisdiction within its territorial borders. In turn, other states have the duty not to intervene in the internal affairs of a sovereign state.\textsuperscript{238} Jurisdiction broadly refers to the power, authority, and competence of a state to govern persons and property within its territory. Jurisdiction exercised by states is then the corollary of their sovereignty. Jurisdiction is clearly founded on territorial sovereignty but extends beyond it. Jurisdiction is \textit{prima facie} exclusive over a state’s territory and population, and the general duty of nonintervention in domestic affairs protects both the territorial sovereignty and the domestic jurisdiction of states on an equal basis. According to the arbitral award in the \textit{Island of Palmas case}, an important component of sovereignty has always been an adequate display of the authority of states to act over their territory to the exclusion of other states.\textsuperscript{239} Furthermore, the words “\textit{essentially} within the domestic jurisdiction of States” refer to those matters that are not regulated by international law. In the \textit{Aegean Sea case}, the ICJ stated that the question whether a certain matter is solely within the domestic jurisdiction of a State or not is an essentially relative question that depends on the development of international relations. Consequently, it seems

\begin{itemize}
\item \textsuperscript{238} C., Abbott, “Rights and Responsibilities: Resolving the Dilemma of Humanitarian Interventions”, \textit{Oxford research Group} 2005, 1-2
\item \textsuperscript{239} C. M., Ryan, “Sovereignty, Intervention and the law: A tenuous relationship of Competing Principles”, \textit{Millennium: Journal of International Studies} 1997, p 77
\end{itemize}
hardly conceivable that terms like “domestic jurisdiction” were intended to have a fixed content, regardless of the subsequent evolution of international law.\textsuperscript{240}

Prior to the establishment of ICISS, the focus among policy makers was clearly on whether it can ever legitimate to intervene in another state’s affairs. The terms of the debate were shifted from the right to intervene to the responsibility to protect, enabling at last to find common ground on what had been for decades a hugely divisive issue. Building on the concept of “sovereignty as responsibility” developed in the 1990’s the UN special rapporteur on internally displaced persons (IDP’s), the ICISS concluded that sovereignty was not only a matter of control but also of responsibility. There is a dual responsibility for every state to respect both the sovereignty of other state (external sovereignty) and the dignity and basic human rights of the people within the state.\textsuperscript{241}

Today, the doctrine of state sovereignty must be interpreted in the context of the changing value systems of the international community, whereby sovereignty is increasingly viewed as hinging on a state’s responsibility to protect its citizens. Sovereignty imposes on states to behave in accordance with certain minimum standards vis-à-vis their own populations. From that perspective, R2P is not an adversary of sovereignty, but its ally. The focus is no longer on the states’ duty to refrain from action and intervention, but inversely on a possible mandate of an international response, should a state not live up to its responsibility as sovereign.\textsuperscript{242} Therefore, a government can no longer hide behind the shield of sovereignty, claiming non-intervention by other states in its internal affairs, if it fails to protect the people under its jurisdiction from massive violations of human rights. States that fail to protect their populations against serious

\textsuperscript{240} Ibid
\textsuperscript{241} ICISS Report, para 1.35
\textsuperscript{242} A. Peters, “The Security Council’s Responsibility to Protect”, \textit{International Organization Law Review} 2011, 3-4
crimes are viewed as having effectively waived their national sovereignty and may not invoke sovereignty as protection. It is this fundamental notion of sovereignty which lies at the heart of the principle of the responsibility to protect.\textsuperscript{243}

States have long accepted limits on their conduct, whether towards their own citizens or others. The UN Universal Declaration of Human Rights requires that states protect individual and social rights; the Geneva Conventions and various treaties and covenants prohibiting torture, trafficking in persons, or nuclear proliferation similarly restrict the right of states to behave as they wish.\textsuperscript{244} At the same time, there has been a shift in the understanding of sovereignty, spurred both by a growing sensitivity to human rights and by a reaction to atrocities perpetrated upon citizens by their own leaders. Sovereignty is increasingly defined, not as a license to control those within one’s borders, but rather as a set of obligations towards citizens.

Kofi Annan\textsuperscript{245} spoke of the sovereignty of the individual as well as of the state. Francis Deng, the Special Adviser on the Prevention of Genocide and the former representative of the Secretary-General on internally displaced persons developed the concept of “sovereignty as responsibility.” And chief among those responsibilities, he and others argued, is the responsibility to protect citizens from the most atrocious forms of abuse. Simply put, people come first. Armenian genocide - 1.5 million people were killed between 1915 and 1923; the Holocaust - 6 million people were killed during World War II; Cambodian genocide - 2 million people were killed from 1975 to 1979; Rwandan genocide - 800,000 people were killed in 90


days in 1994; Bosnian genocide - 200,000 people were killed between 1992 and 1995; Darfur genocide - 200,000 to 400,000 people killed between 2003 to 2010. “...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 offend every precept of our common humanity? ...Surely no legal principle -- not even sovereignty -- can ever shield crimes against humanity ... Armed intervention must always remain the option of last resort, but in the face of mass murder, it is an option that cannot be relinquished.246

After the horrors of the Holocaust were revealed, the international community appeared to vow, “Never Again”. “Never again” would the international community allow genocide to occur. Kofi Annan, Speech at the Stockholm International Forum on eleventh February 2004. Despite the pledge, four genocides have been committed since World War II, resulting in approximately 3.2 million deaths.247 The genocide in Darfur continues despite the international community’s awareness of committed atrocities.248 Why hasn’t the international community taken more decisive action to prevent these genocides or to stop them once the systematic killing has begun? Tony Blair summed up the issue in a speech he gave in Chicago in 1999. He said, “The most pressing foreign policy problem we face is to identify the circumstances in which we should get actively involved in other people’s conflicts.249

In an attempt to reconcile the issues of intervention versus state sovereignty, the International Commission on Intervention and State Sovereignty (ICISS), a task force of a dozen

experts on international law and conflict, published in December, 2001 a 91-page report entitled The Responsibility to Protect. The report proposed that while state sovereignty gives states the right to control their borders and to establish governance over their citizens without interference from the international community, it also creates the responsibility for states to protect their citizens. The report suggested that if a state fails to protect its citizens from atrocities like genocide, ethnic cleansing, crimes against humanity, and war crimes, the international community bears the responsibility to protect the state’s citizens by preventing, reacting, and ultimately rebuilding areas affected by mass suffering.²⁵⁰

The responsibility of prevention is based on the theory that genocides and other atrocities are planned. Planning consists of implemented stages, such as classification of citizens into groups like ethnic or religious groups, promotion of hatred of the targeted group through publicized propaganda, dehumanization of the targeted group, and round up of the targeted group. The stages that lead to these horrors are discernible, thus prevention is possible through intervention, such as the use of negotiations, political pressure, sanctions, and aid that helps a state establish economic development, political stability, and an effective judicial system.²⁵¹

The responsibility to react advocates military intervention when the use preventive measures and reactive techniques, such as negotiations, political pressure, and sanctions, fail. In order to determine if military intervention should be used, six thresholds must be met.²⁵² (1) There must be just cause in that crimes against humanity that “shock the conscience” are being committed; (2) military intervention must be the last resort after all other nonviolent means of

²⁵² un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement.
intervention have been exhausted; (3) the level of military intervention must be the least encroachment on state sovereignty as possible; (4) success of the military intervention must be reasonably likely and likely to do more good than harm; (5) military intervention must be used solely to protect citizens and not for the selfish interests of the interveners; (6) military intervention should occur with the authority of the United Nations Security Council or, if not granted, then authority from the General Assembly or a coalition of nations as long as the other thresholds have been met.²⁵³

The responsibility to rebuild requires the international community to provide, particularly after a military intervention, the state with assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.²⁵⁴ The United Nations publicly adopted the concept of Responsibility to Protect in 2005 at the UN Summit of World Leaders.²⁵⁵ In 2006, the UN Security Council adopted Resolution 1674, which said: “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity... The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means... to help to protect populations... In this context, we are prepared to take collective action... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes

²⁵⁵ un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement.
against humanity. They also agreed that if a state fails to do so, it is then the responsibility of the international community to protect that state’s population.

The international community has strived to implement portions of the R2P doctrine such as peace negotiations to end the genocide in Darfur; however, the genocide continues in Darfur. The steps of military intervention and strong sanctions to end the genocide have been blocked by states that see R2P as a threat to state sovereignty, in that advocating military intervention will in the long run lead to abuses and trumped-up reasons for invasion of countries. United States invasion of Iraq provided ammunition for states fearing that interest in protecting citizens would translate to interveners pursuing their own selfish interests at the expense of the citizens, state and mission.

The responsibility to protect will remain an ideal until the perception that intervention equals abolishment of sovereignty is changed. For this change to occur, clear guidelines must be established that define in detail the circumstances requiring international intervention. Those guidelines must be agreed upon by the international community as the universal standard for action. States must be reassured that only intervention that is backed by the majority of the international community will be advocated. Strong sanctions must be established to punish unilateral intervention. Until similar steps are taken, state sovereignty will prevail over human rights.

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Perhaps the central critique leveled at R2P, and the main impediment to action on its behalf, is the view that R2P is a “Trojan horse” a rhetorical vehicle for increased self-interested invasions by powerful international actors.\textsuperscript{259} In its strongest form, some member states (and the President of the UN General Assembly) recently charged that R2P was a vehicle for, effectively, “redecorated colonialism”.\textsuperscript{260} More mildly, it may be argued that R2P\textsuperscript{2005} at least opens the door to such worries by being a force for unilateral coercive action.\textsuperscript{261} Proponents of R2P in response have emphasized its multilateralism, in particular the way R2P (2005) authorises action only with UN SC imprimatur.\textsuperscript{262} (However, it has also been pointed out that even preventive measures well short of coercive military force can be intrusive, and hence in tension with state sovereignty.\textsuperscript{263}

As might be expected, this “Trojan Horse” challenge assumed a central role after the US-led war in Iraq.\textsuperscript{264} This is not the only problem for R2P opened by the invasion of Iraq; the treatment of Iraq can be offered as an exemplar when counterpoised with the treatment of Israel, say of the selectivity of and inconsistency in geopolitical actions.\textsuperscript{265} When justifications in terms of Weapons of Mass Destruction were found to be fraught, the US and UK laid increasing emphasis upon humanitarian justifications.\textsuperscript{266} This made it possible for a conceptual link to be

\textsuperscript{259} Alex Bellamy. "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq." \textit{Ethics and International Affairs} 19, no. 2 (2005): 31-53.
\textsuperscript{261} Ibid
\textsuperscript{262} Ibid
\textsuperscript{263} W. Hohfeld. \textit{Fundamental Legal Conceptions, as Applied in Judicial Reasoning}. Edited by W. Cook. New Haven: Yale University, 1946.
\textsuperscript{265} Ibid
drawn between US-style pre-emption and R2P. In response, R2P advocates like Evans and Weiss hold that Iraq would have been rightly on a R2P watchlist, but with no imminent catastrophe looming, the situation could not have been a justifiable case for military intervention under its aegis. While a critic of R2P, Hehir is dismissive of the Trojan horse charge:

The link between the emergence of R2P and the invasion of Iraq can only be sustained if we can determine that without the framework of R2P the United States-led coalition would not have been able to justify its invasion on humanitarian grounds. This is patently not the case. More generally, R2P proponents have emphasized the current limitations on R2P (such as its scope) or potential limitations (such as limitations (i.e. use of set criteria or thresholds) on SC action regarding military intervention for humanitarian purposes) that would serve to cabin its capacity to be used for neo-colonialist purposes. Peters has also argued as a general matter that the current geo-political situation offers very little incentive for colonialist ventures by liberal democracies like the US: The era of globalization is post-imperial.

Other issues in regard to sovereignty have also arisen, even outside military interventions. With the shift in emphasis towards Pillar Two duties rather than Pillar Three interventions, sovereignty concerns have been raised regarding early warning and information gathering. One further part of the charge of colonialism is the view that R2P is a peculiarly Western concept. Advocates of R2P have been keen to rebut this view pointing out its significance in Africa, and in particular the presence of the central claims of R2P (what I termed R2Pcore) in the Constitutive Act of the African Union, five years prior to the World Summit Outcome

268 Ibid
269 Ibid
The limited but significant R2P commitments of China and Asia-Pacific region have also been well documented.

One response to worries with colonialism has been to emphasize the international community’s R2P duties to support states by empowering them to adequately perform their obligations to their citizens. Ideally, this has the twofold effect of, a) illustrating that the international community is indeed committed to preventing harms to civilian, rather than casting about for justifications for neo-colonial ventures, and, b) reduces the likelihood of situations where sending in the marines is the only practical option.

4.1.3 Challenges facing the implementation of R2P in Kenya

While R2P was accepted unanimously by heads of state at the World Summit in 2005, skepticism about R2P remains among some member states, this appears to relate less to the basic principles of the responsibility to protect than to fears over how the concept might be applied in real crises. These worries are most pronounced with regard to the coercive element of pillar II and II of the R2P. Three distinct issues are at the heart of these worries. First, some states fear that the great powers could abuse the Responsibility to Protect. Second, there are concerns that the United Nations Security Council may apply this concept selectively. Third, a number of states are apprehensive that the scope of the responsibility could be expanded beyond genocide, war crimes, ethnic cleansing, and crimes against humanity at some point in the future.


First, many states fear that R2P could be abused by powerful states as justification for interventions that serve their political interests. This suspicion clearly indicates the need to root R2P in the framework of the UN Charter, which bars unilateral military action except in self-defense. Second, some states also fear that the responsibility to protect, though universal in theory, will be applied selectively in practice. Great powers and their allies may be able to use their leverage to prevent timely and decisive action by the Security Council in the event of their failure to protect their own populations.

This raises the question of whether there are situations where the international community has an obligation to take action. However, one thing that the R2P principle has achieved is to raise the political costs for perpetrating mass atrocities and obstructing effort of the international community to take action in the face of widespread calamities. In addition, the UNSG has urged the Permanente Members of the Security Council to show some constrain in using their veto power in situations where a state is manifestly failing to live up to its obligations to protect its citizens. In the event that the debates within the Security Council offer no chance of success, the member states seeking to take action can always refer the matter to the UNGA under the Uniting for Peace special procedure. Finally, there is a broad understanding that the R2P only applies to genocide, war crimes, ethnic cleansing and crimes against humanity. Trying to turn the R2P into a principle designed to human rights and human security would dilute its conceptual clarity and jeopardize political support by many UN member states.

275 UNSG Report on Implementing the Responsibility to Protect (January 12th, 2009), UN Doc A/63/677, para 11
276 E., Luck, “Taking Stock and Looking Ahead- Implementing the Responsibility to Protect”, DA FAVORITA PAPERS 2010, 62
Kenya is a promising sign in the broader context of efforts to prevent atrocities and uphold the responsibility to protect (R2P).\textsuperscript{277} The peaceful referendum sharply contrasts with the wave of violence that erupted in the wake of the disputed December 2007 presidential election, when within hours of the announcement of the results violence broke out. Less than two months later 1,133 Kenyans had been murdered, unknown numbers raped, and over 500,000 forcibly driven from their homes. The perpetrators included individuals, militias and the police with victims often targeted on the basis of their ethnicity and corresponding perceived support for a particular presidential candidate.

International actors responded swiftly to crimes that appeared to rise to the level of crimes against humanity, crimes that states committed themselves to protect populations from in adopting R2P at the 2005 World Summit. This response, consisting primarily of an African Union (AU) led mediation process but also supported by the UN, Kenya’s neighbours, key donors, and civil society, helped stem the tide of violence. Human Rights Watch and others referred to the response as “a model of diplomatic action under the responsibility to protect.”\textsuperscript{278}

As the country moved towards elections in 2013, R2P remained relevant as the risk of reoccurrence of atrocities was present. The AU, UN and key states, had to work with, and urge, the government to uphold its responsibility to protect. While implementing the reforms agreed to in the groundbreaking referendum was crucial, as many are intended to address the underlying causes of violence, this alone will not be sufficient. Additional strategies to prevent atrocities and

address protection gaps, including through the creation of contingency response plans to halt atrocities should they re-occur, will need to be developed.279

In committing to uphold R2P the Kenyan government accepted the responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing. The government thus had a responsibility to: ensure that government officials did not incite or facilitate the commission of crimes; mitigate rampant hate speech; deter private actors from inciting, aiding or perpetrating crimes; arrest and prosecute perpetrators; and ensure that the police and the military observe international human rights standards and develop the capacity to respond rapidly to threats of atrocities.280

In the context of a contested election the government was unable and unwilling to take the steps necessary to protect its population. When incumbent President Mwai Kibaki, a member of the Kikuyu ethnic group, was declared the victor over Raila Odinga, a Luo, on 27 December 2007, people swiftly took to the streets to protest the perceived rigging of the election. The protests, which had clear ethnic undertones, led to looted stores, destroyed homes, and displaced and killed Kenyans. The violence at first seemed spontaneous, but it soon became apparent that much of it was organized and targeted. Retaliatory killings, perpetrated often by militias (formed frequently along ethnic lines, and comprised of disenfranchised youth) became commonplace.281

The scale of the violence and its widespread nature was unprecedented but some level of turmoil around the elections should have been anticipated and preventive action taken to avert possible atrocities. A warning of possible political unrest was issued by the African Peer Review Mechanism in 2006 and a pattern of violence, often of an ethnic nature, had marred elections in Kenya for over twenty years.\textsuperscript{282} It had developed as a result of a combination of factors including: politicization of ethnicity; corruption, abuse of power and non-adherence to the rule of law; a centralized and highly personalized form of governance; inequitable development and equally important, a winner-takes-all form of political victory that was perceived as benefiting the Kikuyu, together with a widespread perception that certain groups, including the Luo, were not receiving a fair share of resources.\textsuperscript{283}

A culture of impunity where perpetrators of past violence were not held accountable for their acts sent the signal that there would be no consequences for crimes committed around the 2007 election. In the months leading up to the election hate speech, including by political figures, was rampant as was the sending of incendiary SMS text messages. The government failed to address these warning signs or any of the underlying causes of the violence.\textsuperscript{284}

The state’s ability to take protective action was impeded by institutional weaknesses. At times, poorly trained police forces committed crimes with impunity, and acted with allegiance to their ethnic groups and preferred political candidates rather than to the state. The military’s reach across the country was limited creating a greater reliance on the police. Reports indicate that


\textsuperscript{283} UNSG Report on Implementing the Responsibility to Protect (January 12th, 2009), \textit{UN Doc A/63/677}, para 11.

\textsuperscript{284} UNSG Report on Implementing the Responsibility to Protect (January 12th, 2009), \textit{UN Doc A/63/677}, para 11.
some police refused to intervene, resorted to disproportionate force, or carried out extra-judicial killings with one third of the victims reportedly killed by the police. Senior government officials, political figures, and business leaders supporting both campaigns are also believed to have played a direct role in instigating the violence.\footnote{Wayne, S. & Kenda, S. (2008) International Norms and Cycles of Change (New York: Oxford University Press, 2008)}

Galvanized by the violence unfolding and the government’s failure to protect, regional and international actors responded swiftly. The Chairman of the AU, President Kufour of Ghana, authorized a panel of ‘Eminent African Personalities’ to mediate between the two presidential candidates. The panel consisted of the former UN Secretary-General Kofi Annan, former Tanzanian President Mkapa, and the former first lady of Mozambique, Graca Machel. On 10 January, Odinga and Kibaki agreed to participate in a ‘national dialogue’ led by the panel.\footnote{United Nations, Universal Declaration of Human Rights, United Nations Documents, http://www.un.org/en/documents/udhr/}

By entering into these negotiations, starting on 22 January, the parties agreed to address three agenda items in four weeks: (1) ending the violence; (2) addressing the humanitarian crisis and allowing the internally displaced to return home; and (3) creating a coalition government to lead the country and a commission of inquiry to examine the electoral process and attendant violence. By early February violence had greatly subsided and on 28 February a power-sharing government was formed.\footnote{Williams, “The Responsibility to Protect, Norm Localization, and African International Society,”}

Much remains unknown about the various factors that contributed to a cessation in violence. Undoubtedly international engagement, primarily through the AU panel, played a key role. The panel creatively used the media to update the public on the dialogue’s progress and
ensured that images of Kibaki and Odinga together, and messages calling for calm and unity, were regularly transmitted to the public.\textsuperscript{288} Kenyan civil society, notably Concerned Citizens for Peace, complemented international efforts by disseminating messages of peace at the local level.\textsuperscript{289}

4.2 Conclusion

For those who regarded R2P as little more than military intervention, Kenya revealed how non-coercive tools, such as mediation, can help halt atrocities when employed early, with sufficient resources and international support. The response also provided a critical counter-argument to those who assert that R2P is about the powerful meddling in the affairs of the weak\textsuperscript{290}. The response was regionally driven, supported by the international community and is a powerful reminder of how R2P can save lives\textsuperscript{291}. The successful referendum is a positive step and the momentum must not be lost as the risk of atrocities remains. Preventive action must be taken today by the government, with international support, to avert crimes, and the need for a more costly and difficult response to halt crimes, in the future.

\textsuperscript{289} United Nations, “About Development,” United Nations,
\textsuperscript{291} un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement.
CHAPTER FIVE

CONCLUSION

5.1 Summary

This paper has presented how R2P came into being, entailing the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states\textsuperscript{292}. In the ICISS report, the responsibility to protect is divided into the responsibility to prevent, to react and to rebuild.

The responsibilities to prevent and to rebuild have minor influence on the concept of sovereignty, because they are based on mutual consent. Answering the circumstances, under which military intervention is allowed, the responsibility to react changes the existing relations between states\textsuperscript{293}. This intervention is defined by the ICISS report as ‘the kind of intervention with which we are concerned in this report is action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective’\textsuperscript{294} the existing order is changed when the question of when such intervention is allowed as touches the essence of sovereignty.

The same question is asked whether the Ban Ki-moon also tries to change the existing order. The Ban Ki-moon R2P and the ICISS R2P are incomparable because of their

\textsuperscript{293} Ibid
constructions. The ICISS report describes the R2P principle in terms of ‘prevention’, ‘reaction’ and ‘rebuilding’, whereas the Ban Ki-moon report describes the R2P in the form of three pillars. These pillars are: ‘the protection responsibilities of the state’, ‘international assistance and capacity-building’, and ‘timely and decisive response’. Evans compares the two approaches using a cake analogy, ‘Think of a cake with three layers labelled respectively, from the bottom up, ‘prevention’, ‘reaction’ and ‘rebuilding’ which is then sliced vertically into three big wedges, labelled respectively Pillars One, Two and Three’\textsuperscript{295}. Because every pillar has elements of the three responsibilities, states cannot partly agree with the R2P principle but need to agree with it in total.

Evans further posits that the international community made it clear from the moment of publication of the ICISS report that it wanted ‘the whole cake on the table before it will even contemplate digesting the one small bite of it (…) that is involved in reaction by way of coercive international military intervention\textsuperscript{296}. Proponents of the ICISS R2P can support a much stronger position because military intervention is only situated in the ‘responsibility to react’. If the international community does not accept the idea of military intervention then it only affects the responsibility to react, without changing the other two responsibilities.

5.2 Key findings

R2P has made some positive contributions to conflict resolution in Africa. The aspects emphasizing the role the international community can play in building capacity within states and responding to crisis early through diplomatic means are especially valuable. The case study of

\textsuperscript{295} Gareth Evans (Co-Chair International Commission on Intervention and state sovereignty), \textit{The Responsibility to Protect: Consolidating the Norm}.

\textsuperscript{296} International Commission on Intervention and State Sovereignty report
Kenya illustrates that if the world recognizes a crisis early and responds with robust diplomatic pressure while also providing resources, such as international mediators, the crisis can be resolved before reaching catastrophic levels. It is important to note that Kenya is a relatively democratic country with political leaders that are responsive to the concerns of the international community. There are countries with far more repressive leadership where the same strategy may not have produced the same results. Despite this caveat, the value of the early response through appropriate means and capacity building mechanisms remains.

The pillar of R2P that recognizes that states have the primary responsibility for protecting their citizens from mass atrocities is also valuable. This pillar is reinforced through the capacity building mechanism. However, it is unfortunately undermined by the aspect of R2P that promotes forcible military intervention to stop atrocities if certain threshold conditions are met. There is an inherent tension between these two aspects of R2P, and many states are extremely skeptical of R2P because of the military intervention component. In the case of the AU, it is true that the Charter is very forward leaning and also mandates the responsibility of its collective members to respond if a state is unwilling or unable to stop mass atrocities within its borders.

However, in practice the AU has been unwilling to enforce this aspect of its Charter. A tremendous weak spot for R2P is the inconsistency with which it is applied. In Kenya, R2P concepts were applied effectively. The AU did deploy a peacekeeping mission and has been trying to contribute to viable solutions. However, the AU interventions have only been able to

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gain significant traction when the national security interests of regional states were at risk, and the AU simply does not have the capacity or the resources to support a peacekeeping mission even when there is the political will to do so. While there is much more work that the AU could and should do to show meaningful and sustainable commitment to the R2P principle, it is important to acknowledge that the institutional means for effective prevention of humanitarian crises have been put in place. Several entities are designated under AU law to work toward the achievement of that goal and these include the Peace and Security Council, the AU Commission; the African Standby Force; the Panel of the Wise; the Continental Early Warning System and a Special Fund. However, for the ideal of R2P to be put forward without a serious commitment on the part of the international community to consider how it could be applied in all appropriate scenarios undermines its credibility.

On the whole, R2P would be a far more effective and applicable concept if the military intervention aspect was removed. The tension between the fundamental R2P pillar of states maintaining primary responsibility for their populations while including language on military interventions is simply too great. Many states are suspicious of the norm of R2P because of the inclusion of military intervention aspect. The appropriate use of military intervention to stop humanitarian suffering should continue to be discussed.

There are three major challenges in moving R2P from theory to practice. The first is conceptual to ensure that the scope, and limits, of the norm as it has evolved are well understood in all parts of the world, so that misunderstandings (for example that R2P is only about military

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300 Ibid
intervention) do not persist, and that as new situations arise requiring preventive or reactive action by the international community, there will be broad consensus about what to do.

The second is institutional, to ensure that governments and intergovernmental organizations have available all the diplomatic, civilian and, as necessary, military capability needed to ensure effective early warning and early action, to provide essential assistance to those countries who need and want it and most importantly, to people desperately in need of protection. The third, as always, is political: to ensure that when mass atrocities next occur, the necessary commitment will be there from the decision-makers that matter. This means having arrangements in place for effective mobilization by both governments and civil society. Crises threatening large-scale loss of life are bound to continue to arise, and with them debates over issues such as the most appropriate response to the killing of civilians in Darfur, Cyclone Nargis in Myanmar, and to the violence surrounding the elections in Zimbabwe.

The international community of states will encounter extremely difficult and painful questions about the applicability of R2P, which only demonstrates the need for clarity over the reach and limits of this new principle. The attempt to forge political consensus in any given case will depend in part on reaching agreement over exactly what it was that the states agreed to do when they adopted R2P in 2005. But it will depend as well on an evolution of public sentiment. Leaders will take real risks only if citizens demand it; and publics have only recently begun to demand that their leaders confront the issue of human rights violations abroad. As the clamor grows so will the likelihood of action.

Until very recently there has been no consensus at all on how the international community should respond to these situations. The prevailing idea was that it was none of the world’s business if a state put the lives of its citizens massively at risk. Even after World War II, with the creation of the UN and the slogan of never again there was no generally accepted principle in law to challenge the sacrosanct principle of state sovereignty. The end of the cold war came with the hope that that state of mind could be changed. However, several cases of conscience-shocking situations repeatedly arose, especially in Rwanda and in Srebrenica. The failure of the international community to respond effectively in the face of widespread calamities and the NATO’s 1999 unilateral intervention in Kosovo has triggered a very divisive debate among the member of the international community.  

We have seen that the principle of R2P is only designed to apply in very exceptional circumstances involving genocide, war crimes, ethnic cleansing and crimes against humanity. Therefore de R2P is deeply rooted in international law and as such it creates no new legal obligation for states or for the international community. However, it is possible to see a difference between the nature of the obligations of states under the Pillar of the R2P and the obligations of the international community under Pillar II and II of the principle.  

The responsibility for state is a legal one and the R2P here is only reaffirming the already existing obligation of states under customary and statutory international law. A failure to comply can trigger the responsibility of state for an internationally wrongful act under the provision of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the


criminal prosecution against the perpetrators of mass atrocity crimes. On the other hand, the responsibility of the international community is not of a legal nature. Given the negotiating history and the language of the 2005 World Summit Outcome Document, the obligation of the international community under the R2P must be considered as a political or moral commitment to take timely and decisive action in accordance with international law when a state is manifestly failing to exercise its primary responsibility to protect its population\textsuperscript{305}.

### 5.3 Recommendations

All of the documents examined are silent on the fundamental question of how to deal with violations of the responsibility to protect. This issue has been addressed only in cursory fashion by the architects of the concept. Some agreement appears to have taken hold on the idea that inaction by the host state can be remedied through collective action. But what if states or international authorities do not live up to their residual responsibility to protect? Should such omissions equally be subject to some sanction; and, if so, how should they be remedied? To be able to answer these pertinent questions, the study recommends the need for further research in addressing the unanswered areas of concern.

In particular, the study recommends that there is need to address the conceptual challenge of R2P by ensuring that the scope and limits of the responsibility to protect are fully and completely understood in a way that is clearly not the case now\textsuperscript{306}. In particular, it is to ensure that R2P is seen not as a Trojan horse for bad old imperial, colonial and militarist habits, but


rather the best starting point the international community has, and is maybe ever likely to have, in preventing and responding to genocide and other mass atrocity crimes. A number of misunderstandings about the scope and limits of R2P – some of them cynically and deliberately fostered by those with other axes to grind, or interests to protect, but the majority the product of quite genuine misapprehension as to what R2P is all about307.

Much still need to be done to address the institutional preparedness in applying R2P in order to build the kind of capacity within international institutions, governments, and regional organization that will ensure that, assuming that there is an understanding of the need to act – whether preventively or reactively, and whether through political and diplomatic, or economic, or legal or policing and military measures there will be the physical capability to do so. The institutional preparedness will ensure that R2P is effectively operational; there are a huge range of issues that need to be addressed308.

For a start, who is actually capable of doing what? There is a large cast of actors potentially available in the international community: the multiple entities that make up the UN system, other global and regional intergovernmental organizations (including the EU, AU and NATO), national governments, and nongovernmental organizations. But who among them can best do whatever job is required, by whatever means are needed—supportive, persuasive, or coercive? And in terms of process, what more needs to be done, in the crucial areas of diplomatic, civilian and military capability, to improve the effectiveness of the response to R2P situations, again across the whole spectrum from prevention to reaction to rebuilding?


It is also in the interest of this study to suggest the need to address the issues of political preparedness to ensure full acceptability of the doctrine of R2P. How to generate that indispensable ingredient of will: how to have in place the mechanisms and strategies necessary to generate an effective political response as new R2P situations arise. Everything else can be in place, but without the will to make something happen by someone capable of making it happen, the institutional capability to deliver the right kind of response at the right time whether at the preventive, reactive or rebuilding end of the spectrum – simply won’t be there, and even if the capability is there, it will not be used. For almost any spread of options, inertia will have the numbers.


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