

UNIVERSITY OF NAIROBI
INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

“The Responsibility To Protect: Burying the Concept of Humanitarian Intervention”

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DECLARATION

I, Caroline Wangari Karanja, declare that this dissertation is my original work and has not been submitted for the award of a degree in any other university.

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DEDICATION:

Dedicated to my Wonderful mother Elizabeth Gikonyo and to the memory of my father Joseph Karanja Gikonyo

ACKNOWLEDGEMENT

I would like to thank a number of people who have encouraged me as I wrote this project, including my wonderful mother Elizabeth Nyaguthii Gikonyo for always believing in me and my capacity to fulfill my dreams; my brothers Kennedy Gikonyo and David Murage; my friends Ediwnah Mechah and Evelyn Muttai for all the encouragement during the tough period of my life. Last, but certainly not least, I thank my supervisor, Professor Makumi Mwangi of the University of Nairobi for his kind guidance and direction. I hope that you will very much enjoy this work as well as find it immensely educative.

ABSTRACT

Humanitarian intervention lies at the fault-line in international relations between the principles of international law and state sovereignty on the one hand, and morality and the protection of human rights on the other. Whereas the former international-society theory defines humanitarian intervention as a violation of the cardinal rules of order, it is being challenged by the latter view that seeks to strengthen the legitimacy of the international community by developing its commitment to justice. As a result, a solidarist international community is one in which states accept a moral responsibility to protect the security, not only of their own citizens, but of humanity everywhere.

This study explores the emergence of the doctrine of responsibility to protect (R2P) outlining the circumstances that warranted the emergence. 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 first part of the study gives a background of the doctrine of responsibility to protect, giving its elements as outlined in the ICISS report. The legal framework humanitarian intervention and a further presentation of the demise of humanitarian intervention and the emergence of the doctrine of R2P are done in this part.

In the second part a presentation of interventions as an emerging norm is given, giving the normative status of the doctrine of R2P and humanitarian intervention. In the third part, the position of the international community on the doctrine of R2P is given, in the fourth part of the paper, a further exploration of the demise of humanitarian intervention and the emergence of the doctrine of R2P is outlined. The final bit of the study is an examination of international discourse on the doctrine of R2P where the divide on the opinions of the international community on the doctrine of R2P are presented.

The final bit of the study is an examination of international discourse on the doctrine of R2P where the divide on the opinions of the international community on the doctrine of R2P are presented. The study has in its conclusion noted that, while some states initially welcomed the doctrine, some were equivocal or utterly rejected the document.

LIST OF ACRONYMS

AU	African Union
CEG	Capability-Expectations Gap
EU	European Union
HRW	Human Rights Watch
ICG	International Crisis Group
ICISS	the International Commission on Intervention and State Sovereignty
NAM	Non-Aligned Movement
NGO	Non-Governmental Organizations
R2P	Responsibility to Protect
SC	Security Council
UK	United Kingdom
UN	United Nations
UNSC	United Nations Security Council
US	United States
WFM	World Federalist Movement

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CHAPTER ONE

INTRODUCTION TO THE STUDY

Responsibility to protect and Humanitarian Intervention

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.¹ Conversely, purportedly to halt the fighting and to secure the massive flow of Kosovo-Albanian refugees, but without Security Council authorization which had civilian casualties, the North American Treaty Alliance (NATO) started into the direction of Kosovo.² 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.³ 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 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."⁴ 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 (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 re-characterizing sovereignty, that is, by conceiving of sovereignty as responsibility rather than control.

¹ *Nadja Kunadt, The Responsibility to Protect as General Principle of International Law*

² *Ibid*

³ *Ibid*

⁴ *Carsten Stahl, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?* (American Society of International Law, 2007) accessed from <http://www.jstor.org/stable/4149876>

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 (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"). 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 same time, the commission stressed that states bear an external responsibility with regard to the international community through the United Nations. 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. 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.

Elements of responsibility to Protect

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 intervenes when the need arises, just to offer support to the local efforts. Prevention helps to eliminate the need for intervention at a later stage.⁵ In order for prevention to be effective, the ICISS report site that knowledge for the fragility of the situation 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,⁶ finally political will to apply the measures must be in existence. 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.⁷ 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.⁸

⁵ International Commission on Intervention and State Sovereignty report

⁶ Ibid

⁷ Supra note 5

⁸ Ibid

1.1 Statement of the Research Problem

Humanitarian intervention as a concept remains contentious, in part because of the debate over terrorism and the invasion of Iraq in 2003. Many states are suspicious that humanitarian intervention is merely a rationalization by major powers for strategic interventions. Nevertheless, there are indications that the international community is moving towards a new set of norms governing humanitarian intervention. In 2005, the heads of state and government of United Nations member states assembled for the World Summit, which formally adopted the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Since 2005, the United Nations has moved from the affirmation of this principle to an extensive discussion of its scope and substance and, more recently, toward turning promise into practice. The primary responsibility to protect populations from mass atrocities lies with each government. However, the way states discharge their responsibility to protect affects their ownership of the steps needed to avert mass atrocities. When a state is unable but willing to meet the standard of sovereign responsibility, the international community can offer its assistance and encouragement in a cooperative manner. However, if a state is genuinely unwilling to protect its population, or if its government is perpetrating mass atrocities, it may well refuse to engage constructively with regional and international organizations seeking to ensure the safety of its population. In this case, the international community may have to pursue more robust action. The dialogue on the responsibility to protect at intergovernmental forums initiated by the general assembly to turn it into a norm is still underway. Thereby, the General Assembly should continue addressing the concerns of some member states on the implementation of the Responsibility to Protect. The concept of responsibility to protect in this study is comprehensive in that it encompasses the responsibility to prevent, the responsibility to react and the responsibility to rebuild, many principles remain unresolved if implementation of the principle responsibility to protect is to be successful. This study documents the emergence of the concept of responsibility to protect and the subsequent disappearance of the concept of humanitarian intervention, focusing on the acceptance of the former globally.

1.2 Objectives of the study

- i. To establish the relevance of the mandate for responsibility to protect
- ii. To determine the acceptance and implementation of the concept of responsibility to protect at the international paradigm
- iii. To establish the willingness of states to protect its citizens

1.6 Literature review

1.6.1 Legal framework for humanitarian intervention

Foes of humanitarian intervention point to international law, Article 2(4) of the UN Charter which contends, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."⁹ In addition, in accordance to the UN Declaration on the Inadmissibility of Intervention, "no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."¹⁰ However, use of force in intervention has been taken care of under Article 51 of the UN Charter, which asserts "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."¹¹

The basis for humanitarian intervention seems to be prohibited by Article 2(7) of the UN Charter as it proclaims that, "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter;" however, "this principle shall not prejudice the application of enforcement measures under Chapter VII."¹²

⁹Michael Byers and Simon Chesterman, "Changing the Rules about Rules: Unilateral Humanitarian Intervention and the Future of International Law," in *Humanitarian Intervention*, ed. Holzgrefe and Keohane, 181; in *Global Justice*, ed. Mandle, 192-197.

¹⁰UN General Assembly Resolution 2131 (XX), 1965

¹¹United Nations Charter, in Murphy: *The United States and the Rule of Law in International Affairs*, 142.

¹²Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, UK: Oxford University Press, 2000), 42

Arguments have been put forward that since Article 2(4)'s prohibition of the use of force, and because there is not an explicit exception for humanitarian intervention, international law does not recognize the right of humanitarian intervention.¹³

There has been great development in international human rights law, since World War II and the writing of the UN Charter, including agreements such as the International Covenant on Civil and Political Rights, among others as well as regional instruments such as the European Convention on Human Rights. Arguments by Nicholas Wheeler and Martha Finnemore front that international society has reached a point where a state's violations of the human rights of its own population are no longer considered an internal matter.¹⁴

1.6.2 The emergence of responsibility to protect and burying the concept of humanitarian intervention

Whenever there is a debate on sovereignty, a dilemma arises on whether sovereignty is a right or a responsibility: The traditional philosophy of "sovereignty as a right", that has held sway since the Peace of Westphalia in 1648, has been that a country's internal affairs are its own and that other states do not intervene unless it threatens them, or breaches a treaty, or triggers an obligation of alliance. At the conclusion of World War one for what would now be known as 'crime against humanity', an illustration of the traditional sovereignty is presented when the United States Secretary of State Robert Lansing who, when declining to take action against the leaders of Germany, Austria and Turkey said "the essence of sovereignty is the absence of responsibility".¹⁵ In so concluding, it can be inferred that then, sovereign leaders were immune from prosecution. Nevertheless, responsible sovereignty requires that states provide the appropriate standard of political goods and services to ensure the protection and well-being of their citizens.¹⁶ If states refuse assistance, there is a responsibility by the international community to react.

¹³Oscar Schachter, "The Legality of Pro-democratic Invasion," *American Journal of International Law*, 78 (1984): 646. by Byers and Chesterman, "Changing the Rules about Rules: Unilateral Humanitarian Intervention and the Future of International Law," 177 and 181.

¹⁴Supra note 13.

¹⁵Power, a Problem from Heli America and the Age of Genocide.. 14.

¹⁶Stuart Croft, *International Relations and Africa*, African affairs 96, no. 385 (1997)

Humanitarian intervention and state sovereignty remained a dilemma for a long time till the year 2000 when the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS) was set up to resolve the dilemma. When the ICISS published its report on the Responsibility to Protect in December 2001, three pillars were developed: prevent, react, and rebuild.¹⁷ In the view of Gareth Evans, co-chair of ICISS, R2P has made four main contributions to the humanitarian intervention contest: first, turning the focus of the debate from humanitarian intervention to a responsibility to protect people trapped in conflict situations; secondly, developing a new understanding of sovereignty where the state does not control but primarily protects its citizens; thirdly, setting up clear criteria of what the R2P, in practice, should mean, clarifying that it consists of much more than just military intervention; and finally, mandating that if coercive action is seen as necessary, it must be legal and legitimate.¹⁸

It was imperative for the proponents of R2P to sell their idea to the global south especially Africa which had suffered most conflicts.¹⁹ In 2003, the Constitutive Act of the AU drastically altered Africa's efforts concerning conflict management.²⁰ In September 2005 Kofi Annan opened the largest gathering of world leaders in history at the UN headquarters in New York, in the so-called "World Summit." By the end of the summit, the Outcome Document, which explicitly endorsed R2P in paragraphs 138 and 139, was adopted with the consent of all heads of states. However, the principle of R2P was restructured from the original ICISS proposal and was divided into two parts. First, the obligation of the state to protect those living within its own borders was stressed. The second part of R2P addressed the case in which a third-party state fails to protect its own citizens from the threat of mass atrocities within its borders or represents the cause of the threat itself.²¹

¹⁷International Commission on Intervention and State Sovereignty (ICISS). *The Responsibility to Protect* (Ottawa: IDRC, 2001).

¹⁸Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: Brookings Institution Press, 2008), 41–43.

¹⁹Jeremy Sarkin, "The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect," *Journal of African Law* 53, no. 1 (2009)

²⁰Paul D. Williams, "From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture," *African Affairs* 106, no. 423 (2007).

²¹Aidan Hehir, *Humanitarian Intervention After Kosovo: Iraq, Darfur and the Record of Global Civil Society* (New York: Palgrave Macmillan, 2008)

The notion that human beings matter more than sovereignty radiated brightly, even though briefly, across the international political horizon of the 1990s. The wars on terrorism and in Iraq – the current obsession both in the United Nations and in the United States (Boulden & Weiss, 2004; Weiss, Crahan & Goering, 2004) – suggest that the political will for humanitarian intervention evaporated at the outset of the new millennium.²² In its 2001 report the International Commission on Intervention and State Sovereignty developed the concept of responsibility to protect with a central theme of an 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.²³ In other words, while the state has a primary responsibility, the international community has a secondary responsibility to protect civilians from genocide, war crimes, ethnic cleansing and crimes against humanity. In December 2004, the idea was taken up in the context of a debate on United Nations reform. Pointing to international responses to the "successive humanitarian disasters, "the High-Level Panel on Threats, Challenges and Change stated in its report *A More Secure World: Our Shared Responsibility* 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.²⁴

In the UN's Secretary General report in 2005: "In Larger Freedom: Towards Development, Security and Human Rights for All," which emphasized the idea that the security of states and that of humanity are indivisible and that threats facing humanity can be solved only through collective action.²⁵

²² Weiss, Thomas G., and Don Hubert. *The Responsibility to Protect: Research, Bibliography, Background*. International Commission on Intervention and State Sovereignty, 2001. Available from <http://www.icissciise.gc.ca/menu-e.asp>.

²³ ICISS, the responsibility to protect. at VIII (2001). available at <<http://www.iciss.ca/report-en.asp>>

²⁴ *A More Secure World: Our Shared Responsibility*. Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 2004. available at <<http://www.un.org/secureworld/report.pdf>>

²⁵ *In Larger Freedom: Towards Development, Security and Human Rights for All*. Report of the Secretary-General

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. This development is part of a growing transformation of international law from a state and governing-elite-based system of rules into a normative framework designed to protect certain human and community interests.

The concept of responsibility to protect has risen quickly from an idea to allegedly legal norm raising some suspicions from a positivist perspective. Successful implementation of the principle of responsibility to protect is still elusive as certain issues remain unresolved: First, the concept of responsibility put forward is not one that entails liability. There are no mechanisms developed to hold governments, or individuals, liable for a failure to protect civilians at risk, and the document is thus silent on the fundamental question of how to deal with violations of the principle to protect. Second, there is the problem of duty allocation: who has to contribute how much to an intervention? Third, since the report is mainly concerned with the responsibility to intervene at the level of *ad bellum*, the responsibility to protect the civilian population at the level of *in bello* remains ambiguous in many respects.

1.6.3 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."²⁶ 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 (third states, multilateral institutions, and non-state actors). Humanitarian intervention is buried as the concept of responsibility to protect emerges; 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

UN Doc. A/59/2005, available at <<http://www.un.org/largerfreedom-contents.htm>>

²⁶Supra note 4

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 Theoretical framework

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 Francisco de Vitoria and Francisco 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 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 Waizer 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'.²⁷ 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 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, as will be argued later, has not progressed through all stages of the norm life cycle, and entered into the internalization phase.

Other attempts at delivering a comprehensive analysis of norm development have tended to be more historical. Researchers have to date focused on assessing norm development retrospectively, making use of the advantages brought with historical hindsight. Thus, norm development research has focused on the rise of environmentalism²⁸, the development of anti-apartheid thinking²⁹, the abolition of the slave trade, the emergence of human rights, and the fortification of gender equality.³⁰ Yet very little work has been conducted on norms which are still in the development process, and where their application or strength has not been tested several times. Whilst it is possible to understand norm development from a historical point of view, it is more difficult to be able to predict the development trajectory of a newly developed or still developing norm. Yet an enhanced understanding of norm development, and the factors which are most likely to impact on the development trajectory of a norm, are critical to generating an enhanced understanding of which normative frameworks are more, and which less, useful to contemporary international society. Such an understanding is critical to the creation and operationalisation of structures and systems which have meaning, and which are relevant to their

²⁷ Walzer, Michael (2004). *Arguing About War*. New Haven: Yale University Press.

²⁸ Conca, K. 1995. "Environmental Protection, International Norms, and State Sovereignty: The Case of the Brazilian Amazon" in Lyons, G. M. and Mastanduno, M. (Eds.) *Beyond Westphalia? State Sovereignty and International Intervention*. Baltimore: Johns Hopkins University Press. pp. 147 – 169.

²⁹ Klotz, J. 1995. "Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa" *International Organization*. Volume 49, Number 3, Summer Edition. pp. 451 – 478.

³⁰ Finnemore, M. and Sikkink, K. 1998. "International Norm Dynamics and Political Change". *International Organization*. Volume 52, Number 4, Autumn Edition. 867 – 917.

intended purpose. Therefore, understanding norm development from a historical point of view is useful, but understanding norm development given prevailing contextual conditions is important as well. The current research will thus aim to contribute to this endeavour 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 explanatory. Through both describing and making attempts towards analyzing findings, the current research seeks to both apply Constructivist norm development 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. It is therefore not assumed that only the theory can inform the validity of the findings, or that the findings can inform the validity of the theoretical approach, but that both the theoretical approach and the findings generated through the application of this approach must inform one another. The research process is therefore considered both deductive and inductive and hypothesis-testing and hypothesis-generating. 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 emphasizes 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) labeled 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.³¹ 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. 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

³¹ Finnemore, M. 2003. *The Purpose of Intervention – Changing Beliefs about the Use of Force*. Cornell University Press: Ithaca.

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.³²

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.

This application of discourse analysis will be made at the level of individual states, as well as at the level of international organizations and their bureaucratic officials. Indeed, as Michael Barnett and Martha Finnemore (2004) have illustrated, international organizations can be treated as autonomous actors in international relations, which not only regulate but also constitute and construct the social world. In turn, the bureaucratic officials of international organizations can be viewed as representing the interests of international organizations, of formulating and articulating the interests of these organizations, and of using international organizations as platforms for impacting on the behaviour of their member states.

This analysis of behaviour individually and collectively should not easily be dismissed as an analysis of diplomatic rhetoric or showmanship. Indeed, it cannot be denied that states use the fora provided by international organizations to pursue their (perceived) national interests, but an undercurrent of Cosmopolitanism also exists in the language and actions of states in these fora. Similarly, international organizations and their bureaucratic officials as actors in the international system hold interests, and use the platforms provided by international organization to articulate and advance these interests, sometimes representing the interests of states, and sometimes not.³³

³²Ibid

³³Barnett, M. And Finnemore, M. 2004. *Rules for the World – International Organizations in Global Politics*. Cornell University Press: Ithaca.

1.10 Chapter outline

Chapter 1: Introduction – A brief background of the research opportunity and the proposed objectives of the study are presented here, the methodology of the research is also introduced in this chapter.

Chapter 2: Emerging Norms in justified Humanitarian Interventions: A theoretical overview normative status of responsibility to protect where a definition of international norm, status of responsibility to protect as a norm and the norm of humanitarian intervention and its implication to responsibility to protect will be presented.

Chapter 3: A presentation of international perspective to responsibility to protect borrowing from the international community at the world summit and the 2009 general assembly will be highlighted in this chapter.

Chapter four will be dedicated to examining the burying of the norm of Humanitarian intervention by the norm of R2P.

Chapter five will have a presentation of international discourse on the doctrine of R2P.

CHAPTER TWO

EMERGING NORMS IN JUSTIFIED INTERVENTIONS

Introduction

The changing nature of the international system since the end of the Cold War 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 note 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.¹ 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 emerging shift in the international norms of relationship between the power of 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.”² Finnemore and Sikkink define the term norm as “a standard of appropriate behavior for actors with a given identity.”³ There are different types of norms, the most common distinction “is between regulative norms, which order and constrain behavior, and constitutive norms, which create new actors, interests, or categories of action.”

2.1 Normative status of 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”.⁴ 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

¹ *Alexandra Amouyel*, “What is Human Security?,” *Human Security Journal* no. 1 (2006): 17

² *Gerd Oberleitner*, “Human Security: A Challenge to International Law?,” *Global Governance* 11, no. 2 (2005): 190.

³ *Finnemore, M. and Sikkink, K.* 1998, “International Norm Dynamics and Political Change”, *International Organization*, Volume 52, Number 4, Autumn Edition, 887 – 917.

⁴ ICISS, *The Responsibility to Protect*, p. 14

fundamental rights from the most egregious acts of violence, and as such sovereigns have an inviolable responsibility to fulfill 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 unwilling or unable to fulfill that mandate, then the responsibility shifts to the international community.⁵The core principle of responsibility to protect is to fulfill what Ramesh Thakur calls “responsibility deficit” that arises when the state fails to fulfill its primary obligation.⁶This 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 authorized 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.⁷It 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 behavior, for every state.⁸R2P is a concept that attempts to redefine sovereignty from its traditional basis on rights to one based on duties and responsibilities.⁹ 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 origin of R2P norm can be traced back to the breakup of Yugoslavia after the end of the Cold.¹⁰To 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 2001.¹¹ The final report recommended

⁵ Ibid

⁶ Ramesh Thakur, “Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS”. *Security Dialogue*, 33, no. 3 (2002)

⁷ Otto von Feigenblatt, *International Policymaking: The Case of the Norm of the Responsibility to Protect*, RCAPS Working Paper No. 09-6 (2009)

⁸ Garcilá Evans (Co-Chair International Commission on Intervention and state sovereignty). *The Responsibility to Protect: Consolidating the Norm*

⁹ Brunnée, J. & Toope, S. J. (2006). *Norms, Institutions and UN Reform: The Responsibility to Protect*.

¹⁰ Bellamy, A. J. (2009). *Realizing the Responsibility to Protect*. *International Studies Perspectives*, 10(2). Brunnée,

J., & Toope, S. J. (2006). *Norms, Institutions and UN Reform: The Responsibility to Protect*.

¹¹ Ibid

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.¹² 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.¹³ Finally, the report and the Secretary-General recommended the General Assembly and the Security Council to issue a declaration accepting the norm of R2P.¹⁴ 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.¹⁵ 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 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.¹⁶ By weakening the norm of nonintervention and sovereignty, R2P has created a way to justify military intervention and forced regime change by the great powers.¹⁷ 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 cognizance 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

¹²Ibid

¹³Ibid

¹⁴Council, S. (2006). *Resolution 1674*. Retrieved from <http://accessdods.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement>.

¹⁵Brunnee, J., & Toope, S. J. (2006). *Norms, Institutions and UN Reform: The Responsibility to Protect*.

¹⁶Mack, A. (Ed). (2005). *Human Security Report 2005: War and Peace in the 21st Century*. New York: Human Security Centre, Oxford University Press.

¹⁷Saul, B. (2006). *The Dangers of the United Nations' New Security Agenda: 'Human Security' in the Asia-Pacific Region*. *Asian Journal of Comparative Law*, 1(1), 1-35.

powerful countries in the developed world.¹⁸ 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.¹⁹ Evans describes the 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.”²⁰ 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.”²¹ 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, war crimes, ethnic

¹⁸Feigenblatt, O. F. v. (2007b, October 4-5). *Japan and Human Security: 21st Century Official Development Policy Apologetics and Discursive Co-optation*. Paper presented at the International Development Studies Conference on Mainstreaming Human Security: The Asian Contribution, Bangkok.

¹⁹Gareth Evans. *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: Brookings Institution Press, 2008)

²⁰UNSCR 1674,

<http://daccessdds.un.org/doc/UNDOC/GEN/N0633199/PDF/N0633199.pdf?OpenElement>

²¹Ibid

cleansing and crimes against humanity, which has been reaffirmed by SC Resolution 1674.²²

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.”²³ 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.”²⁴

In support of the principle of R2P Africa is not left out either, the Nigerian ambassador Aminu Waii explicitly supported the norm of R2P in the discussions, he stated:

We believe that the time has come for the international community to reexamine 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.²⁵

2.2 The norm of humanitarian intervention

The 21st century offers challenges in international relations, and thus presents international relations scholars with new problems to consider and address. 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.

²²Statement by Ambassador G. Pfanzelter of Austria on behalf of the European Union, June 28, 2006, http://www.responsibilitytoprotect.org/index.php/government_statements

²³Statement by Ambassador J. Verbeke of Belgium, June 22, 2007, http://www.responsibilitytoprotect.org/index.php/government_statements

²⁴Statement by Ambassador K. Pierce of Great Britain, June 22, 2007, emphasis added, http://www.responsibilitytoprotect.org/index.php/government_statements

²⁵Statement by Ambassador A. Waii of Nigeria, June 22, 2007, http://www.responsibilitytoprotect.org/index.php/government_statements

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.'²⁶ 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.'²⁷ In Wheeler's 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.²⁸ 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 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. Bringing them back to center stage should help make the concept of reaction itself more palatable.²⁹

²⁶ Claude, J., *Collective Legitimation as a Political Function of the United Nations*, International Organization, 20, 1966

²⁷ Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, UK: Oxford University Press, 2000), 42

²⁸ Gareth Evans and Mohamed Sahnoun, *The Responsibility to Protect*, Council of Foreign Affairs.

²⁹ *Ibid.*

Sovereignty as a concept remains widely accepted; however, even the strongest supporters of state sovereignty admit today that no state holds unlimited power to do what it wants to its own people. Impliedly, sovereignty has a dual responsibility: externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.³⁰

Sovereignty as responsibility has become the minimum content of accepted international citizenship. Although this new principle cannot be said to be customary international law yet, it is sufficiently accepted in practice to be regarded as a de facto emerging norm: the responsibility to protect.³¹

³⁰ Ibid
³¹ Ibid

CHAPTER THREE

INTERNATIONAL PERSPECTIVE OF RESPONSIBILITY TO PROTECT

Introduction

In December 2004, the idea of responsibility to protect was taken up in the context of the debate on United Nations reform.¹ Pointing to international responses to the "successive humanitarian disasters in Somalia, Bosnia, Herzegovina, Rwanda, Kosovo and Darfur, Sudan," the High-Level Panel on Threats, Challenges and Change stated in its report: *A More Secure World: Our Shared Responsibility* 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."²

The UN high level panel went ahead to speak 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"³ A UN Secretary-General report entitled "In Larger Freedom: Towards Development, Security and Human Rights for All," endorsed the findings in march 2005 fostering the idea that the security of states and that of humanity are indivisible and that threats facing humanity can be solved only through collective action.⁴

¹Carsten Stahn, notes and comments: responsibility to protect: political rhetoric or emerging legal norm?

²A More Secure World: Our Shared Responsibility Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/665, at 56-57, para.201 (2004), available at <<http://www.un.org/secureworld/report.pdf>>

³Ibid

⁴In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005, paras 16-22 (2005), available at <<http://www.un.org/largerfreedom/contents.htm>>

The concept of responsibility to protect was incorporated into the outcome document of the high level meeting of the General Assembly.⁵ 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.⁶ The inclusion of the concept of responsibility to protect marks one of the important results of the 2005 World Summit, it is also a testimony to a broader systemic shift in international law, namely, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of "human security."⁷ The concept of responsibility to protect holds that 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). This development is part and parcel of a growing transformation of international law from a state and governing-elite-based system of rules into a normative framework designed to protect certain human and community interests.

The concept of responsibility to protect is treated differently in the four documents associated with its origin, namely, the report of the Commission on State Sovereignty and Intervention, the High-Level Panel Report, the Report of the Secretary-General, and the Outcome Document of the 2005 World Summit.

3.1 The High-Level Panel Report

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 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.⁸

⁵2005 World Summit Outcome, GA Res. 60/1, paras. 138-39 (Oct. 24, 2005)

⁶*Ibid.*, para. 139.

⁷Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 *ETHICS & INT'L AFF.* 143 (2006), at <http://www.eceia.org/resources/journal/20_2/articles/5384.html

⁸High-Level Panel Report

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.⁹ 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.¹⁰

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'".¹¹ 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 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.¹²

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.¹³ 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

⁹Ibid

¹⁰<<http://www.responsibilitytoprotect.org/index.php/pages/2>>

¹¹High-Level Panel Report

¹²Ibid

¹³Ibid

the impasse of unauthorized interventions, but intended to enhance "the effectiveness of the global collective security system."¹⁴

3.2 The Secretary General's report

The secretary general stressed his awareness of the sensitivity of the emergence of the norm of collective responsibility to protect.¹⁵ 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 human security.¹⁶

The Report of the Secretary-General 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).¹⁷ 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.¹⁸

3.3 Outcome of the 2005 World Summit

In the Outcome Document the World Summit did mention the Responsibility to Protect, but in such a way that the host state was mainly responsible. The responsibility of the international community was stated as follows:

"The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. (...) We stress the need for the General Assembly to continue

¹⁴Ibid

¹⁵Report of the Secretary-General

¹⁶Ibid

¹⁷Supra note 1

¹⁸Ibid

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.”¹⁹ 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.²⁰

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 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.²¹ 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. 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.”²² 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.”²³ 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

¹⁹ Supra note 5

²⁰ Ibid

²¹ <<http://www.responsibilitytoprotect.org/index.php/pages/2>>

²² Supra note 1

²³ Ibid

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. 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."²⁴ 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.²⁵ 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.²⁶ 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 crimes against humanity and to assisting those which are under stress before crises and conflicts break out."²⁷

²⁴Supra note 5

²⁵Ibid

²⁶Supra note 1

²⁷The Outcome Document of 2005

3.4 The Approach of the Commission on State Sovereignty and Intervention

The Commission on State Sovereignty and Intervention provides a comprehensive treated 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.²⁸ 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.²⁹ 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 (entities asserting the "right to intervene").³⁰ 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."³¹ 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 multiphase conception of responsibility, based on a distinction between

²⁸Carsten Stahn. Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? The American Journal of International Law. Vol. 101. No. 1 (Jan.. 2007)

²⁹Ibid

³⁰Ibid

³¹Ibid

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."³²

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 states bear an external responsibility with regard to the international community through the United Nations.³³ 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."³⁴ 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.³⁵ 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."³⁶ 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.³⁷

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

3.6 Ban Ki-moon and a new interpretation of R2P

In the report titled *Implementing the responsibility to protect*, Ban Ki-moon 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.³⁸ The three responsibilities were however substituted with three pillars in the Ban report. 'Pillar one is 'protection responsibilities of the State'; Pillar two is 'international assistance and capacity building' for the State; Pillar three is 'timely and decisive response' by the international community'.³⁹

3.6.1 Pillar one: The 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'.⁴⁰

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.

3.6.2 Pillar two: International assistance and capacity building

The second pillar commits the international community to assist the state in meeting its obligations should the state fail in its protection responsibility.⁴¹ 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: Encourage the state to meet its responsibility under pillar one; Helping the

³⁸Chandler, D. (2010). 'R2P or Not R2P' More Statebuilding, Less Responsibility'. *Global Responsibility to Protect* (2) (2010)161-166

³⁹Ibid

⁴⁰SG Report (Ban Ki-moon) (2009). *Implementing the responsibility to protect. Report of the Secretary-General*. retrieved from <[http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/206/10/PDF/N0920610.pdf](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/206/10/PDF/N0920610.pdf?)>

⁴¹Ibid

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.'⁴²

3.6.3 Pillar three: Timely and decisive response

If the elements of the first two pillars fail, the third pillar elements can be used to back them up. Ban Ki-moon wrote: 'Paragraph 139 of the Summit Outcome reflects the hard truth that no strategy for fulfilling the responsibility to protect would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military action in extreme cases'.⁴³ 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'.⁴⁴

If a state refuses international assistance (pillar two), the international community is responsible according to the Summit Outcome paragraph 139 to undertake coercive measures. The Security Council is, according to Article 41 and 42 of the UN Charter, the right actor to authorize these measures. If the Council fails in its responsibility the General Assembly can authorize coercive measures, by making state on the Uniting for Peace-procedure. But in effect such an authorization is not legally binding.⁴⁵ Regional organizations or arrangements can only use coercive measures if they are prior authorized by the Security Council.⁴⁶

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

CHAPTER FOUR:

BURYING THE CONCEPT OF HUMANITARIAN INTERVENTION

Introduction

The notion of the responsibility to protect emerged at the beginning of the new millennium out of a fierce debate on the seemingly apparent contradiction between the concepts of humanitarian intervention and state sovereignty. It followed on a decade after the conclusion of the Cold War, during which intra-state conflicts had developed as new phenomena in international relations, with the United Nations (UN) having proved ill-equipped to respond properly, as the events in Somalia, Rwanda and the Balkans sadly evidenced. Indeed, the UN was born into an international system fundamentally influenced by two horrific World Wars, in which a primary preoccupation with conflicts between states seemed self-evident. From the very outset, it outlawed any use of force in interstate discords, except for in cases of self defence or with authorisation of the Security Council, while also upholding the notion of non-interference into state's domestic affairs. Thus, the UN established an international system in 1945 which has since been mainly based on the principles of state sovereignty and non-interference. In light of the above mentioned atrocities in the course of the 1990s and an apparent 'Capability-Expectations Gap'(CEG) on behalf of the UN to deal with such crises effectively, it was then UN Secretary-General Kofi Annan, who at the 2000 General Assembly challenged member states by posing to them a question: "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?".¹ Reacting to Annan's call upon the international community to seek a path of reconciling the two concepts, then Canadian Prime Minister Jean Chrétien announced the establishment of the International Commission on Intervention and State Sovereignty (ICISS), "with a mandate to promote a comprehensive debate on their relationship and a view to fostering a global political consensus on how to move from polemics towards action within the international system" (ICISS. 2001b. "The Establishment and Progress of the

¹Annan, 2000

Commission" sec., para. 3): the report of which ultimately led to the coining of the term responsibility to protect. In line with the UN secretary general's call, the ICISS's account deals with the "right of humanitarian intervention": the question of when, if ever, it is appropriate for states to take coercive – and in particular military - action, against another state for the purpose of protecting people at risk in that other state".² It concludes that the perception of state sovereignty has shifted from of a Westphalian notion of *sovereignty as control* to a conception of *sovereignty as responsibility*, corresponding to the persistently mounting authority of international norms on human rights and the concept of human security in a globalised world.³ The interpretation as both an internal and external connotation, in that authorities are responsible for the protection of citizens and the promotion of their welfare towards the people themselves as well as the wider international community through the United Nations. This implies that when "a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect"⁴

4.1 Intervention as an assault to sovereignty

The question that arises following Koffi Annan's statement is whether intervention to prevent atrocities is indeed an unacceptable assault on sovereignty. At the face value it seems that such an intervention is in conflict with the notion of sovereignty because it contradicts the non-intervention principle that has often been seen as the essential feature of sovereignty. But is this is not the whole story. There exist at least four anomalies which indicate that this relationship is more complex although the concepts of sovereignty and non-intervention are closely related. The anomalies are; first, in recent history the concept of sovereignty has not been a barrier to intervention. If for instance the interventions of Vietnam in Cambodia and Tanzania in Uganda, inspect it is seen that both interventions were justified, but Realpolitik eventually determined the international response to both interventions.⁵ Second, there is the idea that sovereignty and human rights are opposed to each other, but there are also people who claim sovereignty in the

² ICISS, 2001a, p. vii

³ Carlo Focarelli, *The Responsibility to Protect and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 2008

⁴ Supra note 2

⁵ Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*,

20 ETHICS & INT'L AFF. 143 (2006), at <http://www.cceia.org/resources/journal/20_2/articles/5354.html

name of human rights. Such a claim is based on the idea that sovereignty is founded on the rights of people to choose their own form of government, grounded in the right to liberty.⁶ Third, to see sovereignty as some kind of absolutism, means that sovereign states can act however they please. In reality this vision never won any support in the society of states, because it was recognized that sovereign states have responsibilities, to each other and to their own people,⁷ and lastly, the question whether sovereignty and non-intervention are two sides of the same coin. Before the UN charter was ratified, sovereigns had the legal right to wage war, so nonintervention is not a corollary of sovereignty per se.⁸

4.2 How to make R2P effective in the International community

In the previous sections, we have seen 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'.⁹ 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. 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'¹⁰ 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 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

⁶Ibid. p.12

⁷Ibid. p.12

⁸Ibid. p. 13

⁹Supra note 2

¹⁰Ibid. p. 8

capacity-building', and 'timely and decisive response'. Evans compares the two approaches using a cake analogy, 'Think of a cake with three layers – labeled respectively, from the bottom up, 'prevention', 'reaction' and 'rebuilding' – which is then sliced vertically into three big wedges, labeled respectively Pillars One, Two and Three'.¹¹ 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'.¹² 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.

4.3 R2P and humanitarian intervention

It can be said that the two R2P's are in line with the pluralist and solidarist ideas of intervention on humanitarian grounds. Precisely, the Ban R2P is in line with pluralism, and the ICISS R2P is in line with solidarism. The criteria of 'right intention' are in the ICISS and centered on the responsibilities for states to stop human suffering. The ICISS interpretation of the criteria of 'last resort' is concentrating on the fact that before a military intervention of any kind, all other options should be exhausted. The Ban interpretation of principles for military intervention is closely related to the pluralist ideas of just humanitarian intervention. Deriving from the just war theory, the following resemblance can be seen: First, the interpretation of the criteria 'just cause' is not formulated in a more restricted way in the Ban R2P. But the four options that Ban describes that could legitimate intervention (genocide, war crimes, ethnic cleansing and crimes against humanity) can easily be described in terms of protection of the international order, and humanitarianism. Secondly, the criterion of 'competent authority' is in the Ban interpretation based on the SC which is the only authority that can authorize intervention. This is a much tighter interpretation of 'competent authority' than the ICISS interpretation. The third criteria: 'right intention' is in the Ban formulation and it concentrates on the position of the state.

¹¹ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: Brookings Institution Press, 2010)

¹² Ibid

Intervention is not concentrated on protecting individuals, but has to do with helping states to meet their internal obligations which will result in stable international society. According to the Ban criterion, of 'last resort' means that the use of force is heavily restricted. This is because the use of force in the UN charter is justified in case of self-defense.

4.4 Who has the mandate to implement R2P?

The ICISS report acknowledges the Security Council as the main authority under the UN Charter that holds the primary responsibility to maintain international peace and security, but also states that there is no better or more appropriate body than the Security Council to deal with military interventions for humanitarian purposes.¹³ It is the Council that has the authority to authorize interventions for the purpose of the protection of human security, and such authorization must always be sought for before an intervention. It has also suggested that the P-5 should not exercise their veto powers unless their vital interests are threatened. On authority issue, the report states that:

There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.

Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.

The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.

¹³International Commission on Intervention and State Sovereignty. *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*. International Research Centre Ottawa 2001 p.49.

The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.¹⁴

In the supplementary volume, it is mentioned that the Security Council practice of the 1990s as a watershed in which the Security Council became active in humanitarian aspects of conflicts, and that there appear to be no theoretical limits to the ever-widening interpretation of a 'threat to the peace' under Article 39 of the UN Charter.¹⁵ An endorsement with respect to the external R2P by military means was made at the World Summit of 2005, the primary responsibility of the Security Council for the maintenance of international peace and security. No other alternative actor was explicitly mentioned to hold a subsidiary right or role to use such force. Regional organizations were mentioned but in connection with appropriate co-operation with the Security Council in paragraph 139. The issue of a reformed veto application was also omitted from the Outcome Document. States thus agreed at the 2005 World Summit that they may take collective action through the Security Council, in accordance with the UN Charter including Chapter VII, and in co-operation with regional organizations, on a case-by-case basis in order to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity – should peaceful means be inadequate and the state itself manifestly fails to protect its population. The world Summit Outcome Document states quite clearly in that R2P action should be channeled through the United Nations, and in particular the Security Council, albeit in co-operation with relevant regional organizations when appropriate. The Document points out the primary right authority to be the Security Council, but also mentions regional organizations as possible co-actors in the area of R2P.

¹⁴ICISS. *The Responsibility to Protect*, pp. XII-XIII.

¹⁵International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*. Research Bibliography, Background. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty. International Development Research Centre. Ottawa, 2001. pp. 158-159.

4.5 The R2P verge for military intervention

The original proposal by the ICISS that the 'just cause threshold' (large-scale loss of life or large-scale ethnic cleansing) must be met for the responsibility to protect to be carried out by the Council appears to limit the authority and powers of the Council in its determination of what constitutes a 'threat to the peace' under Article 39 of the UN Charter. A must, obligation or duty for the Council to execute its responsibility to protect when the R2P threshold or criteria are met, arguably does not conform with *lex lata* and neither could it develop into such a legal duty.¹⁶

There are many situations in the world where such crimes occur, and it would be neither politically nor militarily feasible to take enforcement action or even peace-enforcement action in all such cases, particularly in the territory of a permanent member state, but also in states where major powers have political, military or economic interests. This problem of 'selectivity' with the R2P was also acknowledged and discussed in the ICISS report. Council authorization must be on a case-by-case basis, as stated in the Outcome Document. The Outcome Document's criteria for R2P, comprising any of the grave crimes (war crimes, genocide, crimes against humanity or ethnic cleansing), with the state concerned manifestly failing to protect its population from those crimes, also set up a threshold, or qualifier, that would appear to limit the Council in its deliberations for future humanitarian interventions. A dilemma on whether the R2P doctrine on military intervention changes the Council's action in humanitarian crises, or if it is more or less the same thing as humanitarian intervention exists. Would it be necessary to distinguish future Council practice authorizing humanitarian interventions for the protection of human rights from military 'R2P authorizations', depending on whether the R2P criteria are present or not.¹⁷ May the Council authorize humanitarian interventions in situations where the R2P criteria are not present?¹⁸ The recent decline in authorized humanitarian interventions does not point to a broadening of the conception. Were they to occur, then 'R2P interventions' could arguably constitute a specific or qualified form of 'humanitarian intervention.' Nevertheless, if the Security Council trend of including civilian protection mandates in its peace support operations, using a double legal basis under Chapter VII and host state consent, becomes a permanent model for the future, the traditional cases of authorized humanitarian interventions

¹⁶The Security Council has a primary responsibility for the maintenance of international peace and security in accordance with Article 24 of the UN Charter, but it seems this responsibility has its political and military limitations.

¹⁷ ICISS, *The Responsibility to Protect*, p. 33

¹⁸ *Ibid*

that we characteristic in the first half of the 1990s may not appear on the scene again. With such an institutionalisation of the protection of human security, there might be need to reformulate the concept of humanitarian intervention or find a new category for describing enforcement action with protection mandates including consent, possibly dropping the 'intervention' element in the terminology. Future consensual UN authorized peace-enforcement measures with a dominant humanitarian purpose and extensive civilian protection mandates would not operate under the principles of humanitarian intervention. It is possible that in such a case, only unauthorized humanitarian interventions will be referred to as 'humanitarian interventions'. It could be argued that the external R2P for the Security Council is thus subsumed under a double qualifier due to the Chapter VII requirements for military enforcement action. The situations do not only have to fulfill the R2P criteria, but also other factors will and must be taken into account. The R2P criteria for military intervention are only necessary but not sufficient criteria for the Security Council to take on its external responsibility to protect when military means are necessary. The question is whether the R2P criteria therefore in fact limit or inhibit Council action for the protection of human security, instead of enabling or triggering such action?

4.6 The Security Council's post-Cold War humanitarian interventionism and R2P

The practice of the Security Council of authorized humanitarian intervention in a series of cases in the 1990s shows that the Council has established that flagrant and grave violations of human rights and international humanitarian law within a state may constitute threats to peace. The relevant cases are the authorized interventions in Bosnia (1992-1993), Somalia (1992), Rwanda (1994), and East Timor (1999). Not only has the Council extended the interpretation of what constitutes a 'threat to the peace' under Article 39 of the UN Charter, but has also shown in these cases that military enforcement measures may be necessary to address a humanitarian crisis. In recent years, almost all writers and governments have accepted humanitarian intervention if authorized by the Security Council.¹⁹ The Council decided to authorize military interventions to address humanitarian crises of a different but similar kind in these cases. In all of them, the humanitarian crises emanated from internal armed conflicts, but not solely, with the possible exception of the mixed armed conflicts in the case of Bosnia. The humanitarian crises in the different cases have their own particular circumstances of origin such as the genocide in

¹⁹ Bowie Alan, Chinkin, Christine. *The Making of International Law*. Oxford University Press, Oxford, 2007. p. 111.

Rwanda, the policy of ethnic cleansing in Bosnia, the drought, food shortages, widespread malnutrition and starvation in Somalia, the colonial background in the Indonesian persecution and harassment of the seceding East Timorese, and the ethnic and/or environmental and resource related conflict in Darfur. All of the humanitarian crises also had international repercussions that were considered to threaten the security and stability of other states or regional stability, Somalia being the only exception. Thus a legal right of the Security Council to authorize humanitarian interventions in such humanitarian crises is confirmed by this practice.²⁰

4.7 Legitimacy of the Security Council responsibility to protect with military means

Is an external R2P norm developing, or does the Security Council already have such a legal right to protect by military means under the UN Charter and international law? Could the practice of authorized humanitarian intervention in the 1990s amount to evolutionary interpretation developing a legal right for the Council to protect human security by military means? Does this right have similarities with the external R2P formulated in the Outcome Document paragraph 139? Borrowing from the above studies, it can be said that the Council's extensive interpretation of Article 39 of the UN Charter through its practice also included the grave crimes of genocide, crimes against humanity, war crimes or ethnic cleansing. The extended interpretation of a 'threat to the peace'²¹ would thus arguably also cover part of the R2P criteria as set out in paragraph 139 of the Outcome Document, so that any of these grave crimes may be determined to constitute a threat to the peace under Article 39. The practice of the Council in the post-Cold War period by which it has authorized UN forces, member states and regional organizations to conduct forceful humanitarian interventions, shows that it perceives itself to have not only a legal right but also a moral and political responsibility to protect people in need from genocide, ethnic cleansing, crimes against humanity and war crimes committed within a state under certain circumstances.

²⁰ *Teson, Fernando R., Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd edition, Transnational Publishers Inc., Ardsley, 2005, pp. 188-189

²¹ The R2P criteria: any of the grave crimes against international law and the state manifestly failing to protect. The assessment as to whether or not peaceful means are found inadequate is a political decision that the Council may make with respect to Articles 41 and 42, and it does not affect the interpretation of Article 39.

4.8 R2P as a redecorated colonialism

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.²² 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”.²³ Proponents of R2P in response have emphasized its multilateralism, in particular the way R2P2005 authorizes action only with UN SC imprimatur.²⁴ As might be expected, this “Trojan Horse” challenge assumed a central role after the US-led war in Iraq.²⁵ (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.²⁶) When justifications in terms of Weapons of Mass Destruction were found to be fraught, the US and UK laid increasing emphasis upon humanitarian justifications.²⁷ This made it possible for a conceptual link to be drawn between US-style pre-emption and R2P. More generally, R2P proponents have emphasized the current limitations on R2P (such as its scope²⁸) or potential limitations (such as limitations (i.e. use of set criteria or thresholds) on SC action regarding military intervention for humanitarian purposes²⁹) 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.”³⁰

²² Bellamy, “Trojan Horse?” esp. pp. 38-42 here Bellamy notes the explicit use of the Greek legend itself by the government of Sudan in relation to Darfur; Bellamy, “Whither the Responsibility to Protect?”

²³ ICRtoP, Report on the GA Plenary Debate, pp. 3, 7.

²⁴ Sialin, “Political Rhetoric or Emerging Legal Norm?” p. 106.

²⁵ Cottee, “The New Politics”, pp. 429-430. Bellamy, “Trojan Horse?” esp. pp. 47-51; Bellamy and Williams, “The Crisis in Darfur”, pp. 36-7, 40-44.

²⁶ Ayoob, “Third World Perspectives”, pp. 110-113; this worry with selectivity vis-à-vis Iraq and Israel stretches back to the 1991 war; Ian Clark, “Legitimacy and Norms”, in *Legitimacy in International Society* (Oxford: Oxford University Press, 2007)

²⁷ Evans, “From Humanitarian Intervention to the Responsibility to Protect”, p. 717

²⁸ Luck, *The United Nations and the Responsibility to Protect*, p. 5.

²⁹ Thakur, “In Defence of the Responsibility to Protect”, pp. 174-5

³⁰ Peters, “Humanity as the A and Ω of Sovereignty”, p. 532

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.³¹

³¹ Beilamy, 148

CHAPTER FIVE

CONCLUSION: ENTRENCHING THE RESPONSIBILITY TO PROTECT IN POLITICAL DISCOURSE

Upon release in December 2001, the ICISS report was received most favorably by Canada, the initial sponsor and advocate of the ICISS, and found a favorable reception among the governments of France, Germany and Japan, as well as in the United Kingdom, though received with some hesitation there as to the prescriptive nature of the responsibility to protect. All of these countries had been exploring the potential of developing criteria to guide decision making within international society for interventions on humanitarian grounds, particularly since the NATO intervention in Kosovo, and found the notion of the responsibility to protect commensurate with the criteria of intervention quite useful. Other early advocates of the norm included Argentina, Australia, Colombia, Croatia, Ireland, New Zealand, Norway, Peru, Rwanda, Sweden South Africa and Tanzania. South Korea also expressed its support for the norm, but argued that the UN should create clear modalities of implementation to limit the extent to which the norm could be invoked to override sovereignty; in essence arguing for greater clarity as to the means by which sovereignty was considered transferred from the host state to states.¹ While some Western and some sub-Saharan African and Latin American countries appear to have welcomed the report at an early stage, others particularly in the developing world were more cautious. China's argument was that no intervention in the affairs of a sovereign state could be rendered justifiable within international society, mixed responses to the report came from Russia, on one hand, agreeing in principle that states were responsible both internally and externally while on the other remaining opposed to the notion that sovereignty could be rendered violable.

¹ Bellamy, A. J. (2006). Realizing the Responsibility to Protect. *International Studies Perspectives*, 10(2)

Though the reception of the report was mixed at the state level, non-state actors generally commended it, and many international NGOs, including the World Federalist Movement (WFM), Human Rights Watch (HRW) and the International Crisis Group (ICG) became vocal advocates of the report, engaging in lobbying activities both domestically and at the level of international organizations to ensure continued dialogue on the norm was taking place. Coalitions of civil society organizations also sprung up, aiming to exert pressure on states to adopt a normative framework of intervention on humanitarian grounds, centered on the responsibility to protect, that would assist in the prevention of future genocide. At the level of the UN too much public support for the norm was expressed, particularly by Kofi Annan, who led the organization in ardent support of the responsibility to protect. Yet despite these efforts, the regional disparities which had emerged continued to dominate debate. Early in 2002, at a regional forum on military intervention hosted by the Fund for Peace in South America, delegates adopted the language of the responsibility to protect in their outcomes document and explicitly accepted the responsibility of governments to protect civilians from atrocities. Yet a similar conference in East Asia revealed that governments and regional organizations still firmly clung to the norms of sovereignty and non-interference in internal affairs, and support for the responsibility to protect was not forthcoming.²

At several levels, the regional disparities were felt. When the UN Security Council, at its annual informal retreat in May 2002, met with ICISS co-chairs Gareth Evans and Mohammed Sahnoun to discuss the report, almost all of the permanent members expressed disquiet with the notion of formalizing criteria to guide intervention. US opposed the establishment of strict criteria as it did not wish to offer pre-commitments to engage its military forces in areas where it had no national interest to advance, and was also reluctant to restrain its right of when and where to utilize force. Russia was not opposed to the responsibility to protect as such, but insisted that no action should be taken without prior Security Council authorization, warning that the norm risked undermining the UN Charter if the Security Council was bypassed. China similarly insisted that all matters relating to the use of force be deferred to the Security Council, in accordance with the UN Charter. This central focus on the Security Council was rejected by the United States, the United Kingdom and France, all of which argued that a deadlock in the Security Council could constrain

MacFarlane, S. N. et al. 2004. "The Responsibility to Protect: is anyone interested in humanitarian intervention?". *Third World Quarterly*, Volume 25, Number 5, pp. 977 – 992.

action from being taken where most required. France and the United Kingdom, two of the more vocal advocates of the ICISS report, however expressed their own misgivings about the responsibility to protect, arguing that the formulation and acceptance of criteria to govern intervention on humanitarian grounds would not bring about the political will and consensus required to undertake interventions when required.³

5.1 International Political discourse on R2P

In the community of states, the R2P report has, indeed, excited anything but a uniformly positive reaction.⁴ While some states, notably Canada, Germany and the UK, at least initially welcomed the initiative,⁵ other states are more equivocal, or utterly rejected the concept. The divide of opinions has become apparent both in the international community at large and within the Security Council.⁶ The permanent members of the Council reacted predominantly with skepticism.⁷ China had voiced its rejection of the concept of humanitarian intervention already during the consultation process of the ICISS, when the commission held its roundtable consultation in Beijing in June 2001, and consistently appeared to disapprove of the outcome document as well.⁸ Given this opposition at the outset, it has been regarded as a “significant breakthrough for the growing acceptance of the norm” when China later endorsed the responsibility to protect in an official paper on UN reforms.⁹ Similarly, the US had, from the inception, opposed the idea of criteria proposed by the ICISS, out of fear that it would be compelled to engage military forces in situations where its national interests were not at stake, while, conversely, being constrained to intervene in situations that it deemed appropriate cases for action.¹⁰ The US government’s initial reactions thus gave little reason to believe that it would subscribe to the substance of the report or even support its further development.

³Bellamy, 2005: 36 and 2006: 151 - 152

⁴Bellamy, “Whither the Responsibility to Protect”, 151-152

⁵Ibid

⁶Ibid

⁷Ibid

⁸MacFarlane, Thiellering & Weiss.

⁹Weiss, Ideas

¹⁰Bellamy, “Whither the Responsibility to Protect”

Nevertheless, R2P has subsequently been acknowledged by a task force that had been commissioned by the US Congress in December 2004.¹¹ The Russian response to the ICISS report, for comparison, has been described as “lukewarm”. Indifferent or hostile reactions emanating from the country have been ascribed to “the feeling that Moscow will not be in a position to influence significantly the humanitarian intervention agenda anyway”, or the concern that a pro-interventionist rule could be used to justify action over the humanitarian situation in Chechnya.¹² At least the rhetoric of the report has, however, found the support of the Russian government, coupled with a reiteration of the Security Council as the only legitimate body for authorizing intervention.¹³ The most favorable, while not unqualified, responses to R2P in the Security Council came from France and the UK, who were still concerned, however, that the establishment of criteria for humanitarian intervention would not necessarily produce the required political will.¹⁴ Outside the Security Council, the Non-Aligned Movement (NAM), consisting of currently 118 members and thus arguably constituting the most representative group aside from the UN²² has noted “similarities between the new expression ‘responsibility to protect’ and ‘humanitarian intervention’¹⁵, a right which it explicitly rejects. More equivocally, the Group of 77, when jointly commenting on the Secretary-General’s report “In Larger Freedom”, did not address the issue of a responsibility to protect.¹⁶ Still, a continued preoccupation with the principles of state sovereignty and non-interference is visible particularly in East Asia.¹⁷ Finally, the majority of African states refrained from making any individual comments on the responsibility to protect at the 2005 World Summit.¹⁸

¹¹ American Interests and UN Reform: Report of the Task Force on the United Nations (Washington, DC: United States Institute of Peace, 2005), online: United States Institute of Peace

¹² Bellamy, “Whither the Responsibility to Protect”

¹³ Ibid

¹⁴ Jennifer M. Welsh, “Conclusion” in Jennifer M. Welsh, ed., *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004) 176 at 204, n.4 (Welsh, “Conclusion”)

¹⁵ Bellamy, “Whither the Responsibility to Protect”

¹⁶ Group of 77 and China, Statement on the Report of the Secretary-General entitled “In Larger Freedom: Towards Development, Security and Human Rights For All” (A/59/2005), delivered by H.E. Ambassador Stafford Neil, Permanent Representative of Jamaica to the United Nations and Chairman of the Group of 77 (6 April 2005), online: Group of 77 <<http://www.g77.org/Speeches/040605.htm>>

¹⁷ MacFarlane, Thielking & Weiss, *supra* note 35 at 982-983.

¹⁸ Bellamy, “Whither the Responsibility to Protect”

A favorable response to the R2P came, by contrast, from the Americas.¹⁹ Ultimately, it was mainly states from Latin-America, the Western hemisphere, and sub-Saharan Africa on whose support the proponents of R2P could count at the UN World Summit in 2005.

¹⁹Fund For Peace, *Regional Responses to Internal War: Perspectives from the Americas on Military Intervention*, vol. 3 (June 2002), online: Fund For Peace <http://www.fundforpeace.org/publications/reports/fibramericas_conference.pdf> at 4-5 [Fund For Peace, Americas]; MacFarlane, Thielking & Weiss, *supra* note 35 at 982.

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