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Whose Responsibility? Responsibility to Protect and the Role of the Security Council

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To my loving parents
Shrimati Sugunavathi and Shri Siva Prasad Rao and to my Beloved Sai

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INDEX

ABBREVIATIONS

AU	African Union
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CRC	Convention on the Rights of the Child
DPA	Department of Political Affairs
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
GA	General Assembly
ICISS	International Commission on Intervention and State Sovereignty
ICTY	International Criminal Tribunal for Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organization
OCHA	Office for the Coordination of Humanitarian Affairs
PBC	Peace Building Commission
R2P	Responsibility to Protect
Secy. Gen.,	Secretary General
SPLM/A	Sudan Peoples Movement/Army
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMID	UN African Union Mission in Darfur
UNDP	United Nations Development Programme
UNHCR	United Nations Refugee Agency
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children’s Fund
UNIFEM	United Nations Development Fund for Women
UNSC	United Nations Security Council
U.S.	United States of America
WFP	World Food Programme
WHO	World Health Organization

ABSTRACT

Responsibility to Protect (R2P) is a novel concept. Adopted in 2005, it nevertheless attracted ample controversy within a short span of time. The present Secretary General of the United Nations is committed to see R2P in action. R2P is still a concept and is yet to be fully understood and developed. Its scope and limits are not clear yet. It has both supporters and critics. Supporters of R2P see it as a doctrine--an emerging norm, a revolutionary concept in international law; while critics argue that it reinforces humanitarian intervention and is a threat to national sovereignty-a new means of colonialism. R2P is deeply rooted in the already existing international legal system. It in fact, strengthens sovereignty. It does reinforce humanitarian intervention using force only under the auspices of the Security Council and condemns unilateral intervention. Security Council is the key player as it is vested with the responsibility to ensure international peace and security. The thesis analyses the role of the Security Council in putting R2P into action and suggests methods that the Council should consider.

German Translation

"Responsibility to Protect" (R2P) ist ein neuartiges Konzept. Erst 2005 ins Leben gerufen, hat es dennoch bereits innerhalb dieser kurzen Zeitspanne zahlreiche Kontroversen hervorgerufen. Der amtierende Generalsekretär der Vereinten Nationen engagiert sich, um R2P umzusetzen. R2P ist immer noch ein Konzept und muss erst voll durchdacht und entwickelt werden. Der Wirkungsbereich und die Grenzen des Konzepts sind noch nicht klar. Es hat sowohl Unterstützer als auch Kritiker. Unterstützer von R2P sehen es als Doktrin – eine in Entstehung begriffene Norm, als ein revolutionäres Konzept im internationalen Recht; Kritiker hingegen argumentieren, dass dadurch humanitäre Interventionen bestärkt werden und es eine Bedrohung der nationalen Souveränität darstellt – ein neues Instrument des Kolonialismus. R2P ist allerdings im schon bestehenden System des internationalen Rechts tief verwurzelt. Tatsächlich stärkt es die Souveränität. Es unterstützt humanitäre Interventionen, in denen militärische Mittel nur unter der Leitung des Sicherheitsrats eingesetzt werden und missbilligt unilaterale Interventionen. Der Sicherheitsrat ist der Hauptakteur, da er die Verantwortung hat, Frieden und Sicherheit international zu garantieren. Die vorliegende Masterarbeit analysiert die Rolle des Sicherheitsrats bei der Umsetzung von R2P und zeigt Methoden auf, welche der Rat beachten sollte.

INTRODUCTION

> "Today, the responsibility to protect is a concept, not yet a policy; an aspiration, not yet a reality. Curbing mass atrocities will be neither easy nor quick. There is no certain blueprint for getting the job done. We are all novices in this field."
>
> United Nations Secy. Gen. Ban Ki Moon, Berlin, July 15, 2008

Responsibility to Protect has become a buzz word in the field of human rights today. Since its adoption it has rejuvenated our hopes for world with better human rights. However, it continues to face many challenges; to see it in action is the real challenge for the United Nations (U.N.). One could think that the future of R2P is uncertain by looking at the manner the events unfolded in Darfur. The situation in Darfur is challenging the basic tenets of the UN principles adopted under the UN Charter and the international legal and human rights system. In the discourse on sovereignty, humanitarian intervention using force haunts like an evil at a time when there is a need to provide help to people who need it the most. The challenges posed by the geo-politics, further, preclude us from taking dynamic steps forward.

Many supporters perceive Responsibility to Protect as a timely doctrine that would help re-haul the existing UN system without changing it much. Nevertheless, five years since its adoption, many are still arguing if there is a need for it. Lack of clarity has led many to question its scope and application. Many say that the doctrine hinders nations from taking actions or breaches the basic tenets of international law by allowing intervention in a state's internal matters. The debate on the subject is not clear. Responsibility to Protect is a part of soft law as it has been unanimously adopted by the General Assembly Resolution. If successfully implemented, R2P could help the United Nations in preventing genocides, crimes against humanity, war crimes and mass atrocities from taking place.

In fact, the United Nations was established in response to the tragic events of the Second World War that shook the conscience of our common humanity. It has been estimated that nearly 50 million people were killed[1]; millions of others were wounded or went missing during the war.

[1] http://warchronicle.com/numbers/WWII/deaths.htm

20 to 30 million civilians had been killed, the majority through the holocaust, forced labour and concentration camps, acts of revenge, deportation and displacement.[2] The horrors of Nazi Holocaust united the world to wrestle against such events and to avert similar horrors in the future. The heads of the states in 1945 came together to establish the United Nations to fulfil this purpose. Since then, the newly independent states started to look at UN for global membership and recognition. They considered UN as a platform to give voice to their concerns and its membership increased gradually over the years. The UN Charter lays down the fundamental rules which every nation undertakes to oblige as a respectful member of the international community.

The Preamble of the UN Charter begins with the following determination, "We the peoples of the United Nations determined to save the succeeding generations from the scourge of war, which twice in our life time has brought untold sorrow to mankind."[3] With regard to human rights the Preamble of the UN Charter sets forth, "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women."[4] One of the main purposes of the United Nations, as article 1(3) provides is, "…to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."[5] Thus, a look at the Charter and the working of the UN during the last six decades show us that, ever since its establishment, human rights have been at the centre of its work.

The establishment of the United Nations signifies the responsibility shared by the world community to protect human rights, to maintain international peace and security in the world and to restrain states from acts of aggression. UN is the right place for providing the right institutions to achieve these goals. As Ekkard Strauss observes, "The UN Charter reflects awareness of the interrelationship between the respect for human rights and international peace and security. It contains not only institutions setting provisions, but establishes fundamental norms for the

[2] See Ekkehard Strauss, The Emperor's New Clothes?: The United Nations and the Implementation of the Responsibility to Protect (Nomos, 2009). Pg 18

[3] See Preamble, Charter of the UN, Para 1available at http://www.un.org/en/documents/charter/preamble.shtml

[4] Id. Para 2,

[5] See Article 1 para 3, Charter of the UN, available at http://www.un.org/en/documents/charter/chapter1.shtml

behaviour of states in their International Relations."[6]

United Nations plays a pivotal role in the world affairs. It is a focal point for global security issues, a world forum for debate, a network for developing universal norms and standards, and a vehicle for administering humanitarian assistance around the world.[7] It is based on the principles of national sovereignty, non intervention in the internal affairs of states and of friendly relations and cooperation among states. Article 2 (4) of the UN Charter specifies that, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[8] The only exceptions are the actions taken by the Security Council under its Chapter VII powers and actions taken by a country in its right to self defense during an event of armed attack as specified under Article 51 of the UN Charter.[9]

Sovereignty, the founding principle of the UN, is a cherished norm. The principle of non intervention which is limited to matters that are essentially within the domestic jurisdiction of the States is another cardinal principle. States for many years have guarded these two principles. As Michel Flower and Julie Mari Bunck state, "Many governments consider the principle of non intervention a defense against the threats and pressures from former colonial powers and their allies."[10] Today, globalization has drastically changed the world we live in. Matters within the limit of a state have international effects and cease to be matters exclusively within its jurisdiction. Furthermore, the nature of wars has dynamically changed during the twentieth century. From wars between the states it has become wars within the states and often states are perpetrators of human rights violations. Intractability of these wars forced UN to forge into this area. Primarily established for peace and security concerns, UN is now more concerned with human security issues within the states. Nevertheless, national sovereignty posits a great challenge.

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[6] See Supra note 2

[7] See Jean D. Krasno, The UN Landscape: An Overview, The United Nations: Confronting the Challenges of a Global Society, Ed. By Jean E. Krasno, 2004, Lynne Reiner Publishers, Boulder, London, pg 3

[8] Supra note 5 See Article 2(4) of the UN Charter

[9] Id. See Article 51of the UN Charter

[10] See Michael Flower and Julie Marie Bunck, Law, Power and the Sovereign State: The Evolution and Application of the Concept of sovereignty, Penn State Press, 1995

Recent developments in international law suggest that state sovereignty no more signifies immunity from interference but rather imposes strict responsibility on the state to protect its citizens. There are global standards that states should adhere to and UN is the only organization in the world that can set globally accepted standards and norms of behavior. Through UN, we have a strong international human rights law developed through treaties and covenants which the member states are obliged to implement in their domestic fields. This branch of international law has been ever growing to meet the demands of the 21st century and the demands of the individuals.

After the UN Charter and the Universal Declaration of Human Rights (UDHR), the Convention on the Prevention and Punishment of the Crime of Genocide was immediately adopted. It came into force in 1948. This convention has been described as the quintessential human rights treaty.[11] It made genocide a punishable crime. Genocide is defined as, "…acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group. These acts include; killing members of the group, causing serious bodily or mental harm to members of the group, imposing conditions on the group calculated to destroy it, preventing births within the group; and forcibly transferring the children from the group to another group."[12] It has been labeled as the crime of crimes and is often described as the most heinous crime. Furthermore, the Rome Statute also provides the International Criminal Court (ICC) with the jurisdiction with respect to the crimes against humanity, war crimes and the crimes of aggression.

Thus, according to the international treaties, human rights have become the core and ever more important. States can no more escape for the wrongs they commit on their citizens under the pretext of sovereignty. Impunity is no longer a luxury and Universal jurisdiction has been adopted in certain treaties. Pinochet case stands as an example. The recent case of the indictment

[11] Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May-18 July 1997, UN Doc A/52/10 para 76, cited in William A. Schabas, An Introduction to the International Criminal Court, Third Edition, Cambridge University Press, 2007, at pg 92

[12] Article 6, Rome Statute of the International Criminal Court, available at http://www.un.org/icc/romestat.htm

of Al Bashir by the International Criminal Court shows further development in this field of law. It is for the first time that a sitting President has been indicted for human rights violations.

In the 21st century protection of the rights of the individual has taken a centre stage. The establishment of International Criminal Tribunal for Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and more recently the International Criminal Court (ICC) highlight further developments in this regard. These developments point out that the world community will not stand as bystanders in the event of mass violations of human rights such as genocide, ethnic cleansing, crimes against humanity and war crimes and if such crimes ever take place international community will do its best to halt them and bring the perpetrators to justice. As David Matas observes, "Today, through United Nations resolutions, declarations, conventions and covenants, we have a body of international law of human rights. There are protocols or optional protocols that recognize the status of individuals. The instruments that have developed have served to chop away at the doctrine that protecting human rights is an intervention in the domestic affairs."[13]

However, despite such major developments, treaties, conventions and affirmations, twentieth century has experienced many untold challenges. The world has witnessed major humanitarian crisis in different parts of the world. For example, the Cambodian horrors during 1975-79 claimed two million lives.[14] 800,000 men, women and children were killed in just few weeks during the Rwandan genocide.[15] Between 1992-95, nearly 200,000 people were killed in the Bosnia-Herzegovina genocide.[16] The Kosovo episode displaced nearly 400,000 people during 1998-99.[17] The Security Council (SC) did not interfere during the Cambodian genocide. During the Rwandan episode, the Security Council passed a resolution withdrawing the UN troops despite the availability of information. The Security Council stood standstill when the Kosovo

[13] See David Matas, No More: The Battle Against Human Rights Violations, Dundum Press Ltd., 1994, pg 166

[14] See Pol Pot in Cambodia, The History Place, Genocide in the 20th century available at http://www.historyplace.com/worldhistory/genocide/pol-pot.htm

[15] Id. Rwanda 1994

[16] Id. Bosnia- Herzegivona 1992-95

[17] By Geoffrey Hoon MP, Secretary of State for Defence, Kosovo: Lessons From the Crisis, Crown 2008, available at http://www.mod.uk/NR/rdonlyres/31AA374E-C3CB-40CC-BFC6-C8D6A73330F5/0/kosovo_lessons.pdf

issue was at its table. UN and the Security Council were heavily criticized for their failure to fulfill their promise to stop such crimes.

NATO's action in Kosovo bypassed the SC's authority and posed serious questions to the international legal order. Similarly, war on Iraq questioned the humanitarian motives of big powers when intervening in weaker states and questioned the legitimacy of the doctrine of humanitarian intervention? Questions were raised as to whether there is a right called right to intervention? Kofi Annan, the former Secy. Gen., often called the member countries to unite to stop genocides, mass atrocities and other crimes against humanity from taking place. In 1999 the Secy. General in his speech to the General Assembly questioned, "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Sebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?"[18] He repeatedly said that sovereignty entails responsibility and asked the international community to forge a consensus in this regard.

Interestingly in 2005, the world leaders came together and unanimously adopted the UN resolution on Responsibility to Protect (R2P). Through R2P, countries have pledged to act in a timely manner to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[19] It clearly said that the fundamental responsibility to protect lies with the sovereign himself. The responsibility shifts to international community only when the state concerned is a part or is manifestly failing to prevent crimes against humanity. The doctrine embraces three core responsibilities namely-- responsibility to prevent, react and rebuild. The doctrine emerged as a result of both international failure to act in Rwanda and international action in Kosovo.

Rwandan genocide was considered the worst and fastest ever genocide where the international community failed to act, especially the Security Council. During Kosovo, NATO

[18] Former Secy. Gen., Kofi Annan, Millennium Report 2000, available at http://www.un.org/millennium/sg/report/ch3.pdf at pg 48

[19] See generally the UN World Summit Resolution, 2005 A/RES/60/1, available at http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf

acted but without a proper SC authorization. The Kosovo Commission headed by Richard Goldstone and Carl Tham concluded that NATO's intervention was illegal but legitimate.[20] The Kosovo episode threw open challenges to the international system, especially, the effects of bypassing UNSC and further deepened the debate on humanitarian intervention. Scholars questioned "the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by."[21] What should be done when the Security Council is in a deadlock? Who matters the most, the people or the powerful five? It is to these questions that R2P attempts to answer. It reaffirms our moral and ethical believes to protect strangers. Few scholars see R2P as an historic achievement for human rights and consider it an international norm or doctrine; others see it as a threat to national sovereignty. Critics of R2P attack the notion arguing that it's a western idea to interfere in the internal matters of weak states and that R2P is just another name for humanitarian intervention.

Since its inception, R2P, loomed into controversies and has generated considerable debate and a compelling body of research. One of the major developments regarding research on R2P has been the establishment of research institutes such as the Global Centre for the Responsibility to Protect at the Ralph Bunche Institute for International Studies, the International Coalition on the Responsibility to Protect, the R2P Coalition and the Asia-Pacific Center for Responsibility to Protect. Many other international organizations and NGOs are strongly involved in addressing and advocating this doctrine. R2P rightly interpreted and properly put into practice could help us prevent mass atrocities. There is a need to understand R2P for the purposes for which it was conceived, to keep its meaning narrow and achieve its objective which is to prevent genocides and other mass atrocities.

R2P faces three main challenges namely: conceptual challenges, institutional challenges

[20] SEE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED, OXFORD, 2000

[21] Simon Chesterman, Legality Versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law, 33 Security Dialogue, 293 (2002)

and political challenges.[22] R2P can be effectively implemented when these challenges are successfully addressed. The present Secy. General Ban Ki Moon is committed to see R2P in action. Security Council is a key player and is the first port of call for any kind of intervention. The most important question the thesis seeks to address is: Whose responsibility is to protect and in this regard what is the role of the Security Council? It is very important to analyze the role of the Security Council in order to address the three core challenges that R2P faces. The point here is to develop a mechanism that could actually help the Security Council in taking a decision.

The thesis is divided into five main parts. The first part outlines a brief history of the emergence of R2P. It charts the various phases of the development of the R2P doctrine before it was finally adopted. It gives a brief overview of various phases from the point of its conception to adoption. The second part conceptualizes R2P and clarifies many misunderstandings surrounding it. In this part, its meaning and its scope of application is clarified by analyzing if R2P is a threat to sovereignty, and if R2P is another name for humanitarian intervention as critics argue. I further analyze if R2P is based on already existing international legal system and if R2P is an emerging norm as claimed by the supporters of R2P. It analyzes the main aspects of R2P and finds out what is novel about it. The third part of the thesis deals exclusively with the Security Council and analyzes the responsibility of the Security Council with respect to human rights protection. It critically analyzes the Council's spurt in action and attitude in the nineties. In the fourth part various methods existing within the UN mechanism are suggested and analyzed that could assist the Council to concretely arrive at decisions. Finally, in the fifth part the thesis concludes its findings and suggests how the Security Council can act better and take up a more proactive role in order to improve its credibility in the international system. Thus, the thesis presents a timely discussion on R2P and addresses an area of compelling intellectual interest.

[22] See Rebecca Hamiliton, The Responsibility to Protect, From Document to Doctrine. What of Implementation? 19 Harvard Law Journal, 289-297

BIRTH OF RESPONSIBILITY TO PROTECT

After the Kosovo episode and the war on Iraq, the international community was losing confidence in UN and questions about the credibility of the Security Council arose. The best way forward was to create a doctrine that would turn the whole debate and appeal to everyone. The challenges posed by the debates on humanitarian intervention and state sovereignty were clearly articulated by Kofi Annan. In 1999 the former Secy. Gen., Kofi Annan in his speech to the General Assembly questioned, "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Sebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?"[23] Again, the Secy. Gen., in his 2000 report to the General Assembly challenged the international community to try to forge consensus around the basic questions of principle and process involved: when should intervention occur, under whose authority, and how.[24] In response to his question, the Canadian Government, on the initiative of the foreign minister Lloyd Axworthy, sponsored the establishment of the International Commission on Intervention and State Sovereignty in 2000.

A. International Commission on Intervention and State Sovereignty, 2001

The International Commission on Intervention and State Sovereignty (ICISS), sponsored by the Canadian government, was co –chaired by Gareth Evans from Australia and Mohamed Shahnoun from Algeria and consisted of members who are experts in their respective areas. The Commission was asked to wrestle with the whole range of questions - legal, moral, operational and political - rolled up in this debate, to consult with the widest possible range of opinions around the world, and to bring back a report that would help the Secretary-General and everyone else find some new common ground.[25] The Commission came up with its report within a year in 2001 which concluded after intensive research, worldwide consultations and deliberations and produced a 90 page report and a 400 page supplementary volume which compiled the

[23]Former Secy. Gen., Kofi Annan, Millennium Report 2000, available at http://www.un.org/millennium/sg/report/ch3.pdf at pg 48

[24] www.vmpeace.org/pages/international_law_responsibility_to_protect.htm

[25] See Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December 2001, available at http://www.iciss.ca/report-en.asp

Commission's research essays, bibliography and back ground material.[26]

The main theme of the Commission's report was "Responsibility to Protect". In its report, the Commission propagated the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.[27] Thus, the Commission steered the whole debate about humanitarian intervention into a new direction. Instead of debating intervention, the Commission stressed upon responsibility. It clearly stated that state sovereignty implies responsibility and the primary responsibility for the protection of its people lies with the state itself. It said that when a population is suffering from 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 responsibility shifts to the broader international community.

The Commission with its report rewrote the definition of sovereignty in the contemporary time. It relied and borrowed the concept, 'sovereignty as responsibility', heavily from the work of Francis Deng and his colleagues who believed, "sovereignty should no longer be seen as a protection against external interference in a state's internal affairs. Rather, the state must be held accountable to domestic and external constituencies."[28] They augmented that, "living up to the responsibilities of sovereignty becomes in effect the best guarantee of sovereignty. Governments could best avoid intervention by meeting their obligations not only to other states, but also to their own citizens. If they failed, they might invite intervention."[29] The Commission reinforced this concept in its report.

Furthermore, the Commission stated that the foundations of the responsibility to protect are deeply rooted and found in the obligations inherent in the concept of sovereignty, the responsibility of the Security Council under Article 24 of the UN Charter, for the maintenance of international peace and security, specific legal obligations under human rights and human

[26] Id.
[27] Id.
[28] See Deng and et. al, Sovereignty as Responsibility: Conflict Management in Africa, The Brookings Institution, Washington D.C. 1996
[29] Id. At pg. 15

protection declarations, covenants and treaties, international humanitarian law and national law, and finally in the developing practice of the states, regional organizations and the Security Council itself.[30] The Commission was serious about intervention as well. It laid down that for an intervention to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, or should involve large scale loss of life.[31] The Commission identified three main elements associated with responsibility to protect, namely: responsibility to prevent, responsibility to react and the responsibility to rebuild. With respect to military intervention the Commission noted major principles such as; the just cause threshold principle, the precautionary principle, right authority and outlined operational principles.[32] The Commission noted that military interventions for humanitarian purposes should be used as an exceptional and extraordinary measure. The Commission stressed on the preventive aspect as the single most important dimension of R2P.

The report made considerable contribution. Firstly it invented a new way of talking about humanitarian intervention. Gareth Evans said that the Commission sought to turn the whole weary- and increasingly ugly- debate about the right to intervene and re characterize it not as an argument about the right of states to do anything but rather about their responsibility. Secondly it insisted upon a new way of talking about sovereignty, thirdly it clearly spelled out what responsibility to protect means, and finally it provided guidelines for military intervention.[33] The Commission and its report generated quite a discussion at various levels. The Commission should be applauded for the gigantic task that it accomplished. However, the efforts of the Commission have not been incorporated in the UN system and the report remains as a reference document. However, although the Commission was not commissioned by the UN itself, the UN has recognized the work and gave life to the concept in its successive deliberations.

[30] Supra note 25 ICISS report
[31] Id.
[32] Id.
[33] See Gareth Evans, The Responsibility to Protect: Ending Mass Atrocities Once and For All, Brookings Institution, 2008

B. United Nations High Level Panel on Threats, Challenges and Change, 2004

In order to meet the new and evolving challenges, and to strengthen the United Nations, Secy. Gen. Kofi Annan created the High Level Panel on Threats, Challenges and Change on 3rd November 2003. The mandate of the panel was to assess current threats to international peace and security, to evaluate how well the existing policies and institutions have done in addressing those threats, and to recommend ways of strengthening the United Nations to provide collective security for the 21st century. After a year long effort, the panel officially delivered a 141 page report titled "A More Secured World: Our Shared Responsibility" on 2nd December 2004. The panel's report was far more wide-ranging in scope than the ICISS report. It followed a human security approach that linked together poverty, disease, and environmental degradation with conflict both within and between states, terrorism, proliferation of weapons of mass destruction, and transnational organized crime. Thus, it had more substance, coherence, and surpassed expectations.[34]

With respect to Responsibility to Protect the panel said, "The Panel endorses the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent."[35] The panel further recommended the five basic criteria of legitimacy for the use of force, drawing very directly from the language in the ICISS report. The panel also highlighted in its recommendation that the "task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has."[36]

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[34] See Id at pg 44

[35] See High Level Panel Report, A More Secured World, Our Shared Responsibility, United Nations, 2004, available at http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop documents?module=uploads&func=download&fileId=102

[36] Id.

C. In Larger Freedom; Towards Development, Security and Human Rights for All, 2005

In 2005, in his report the Secy. Gen. Kofi Annan obliged states saying that, "While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it.**"**[37] In his statement to the General Assembly the Secy. Gen. asked the international community to "embrace the principle of the Responsibility to Protect, as a basis for collective action against genocide, ethnic cleansing and crimes against humanity – recognising that this responsibility lies first and foremost with each individual state, but also that, if national authorities are unable or unwilling to protect their citizens, the responsibility then shifts to the international community; and that, in the last resort, the United Nations Security Council may take enforcement action according to the Charter."[38]

D. World Summit 2005

The World Summit was convened to commemorate the sixtieth anniversary of the UN in September 2005 and was attended by the heads of the states of more than 150 states. Many propositions were put forward for consideration, R2P being one. Not all but R2P proposal survived in the summit outcome. The whole Summit proved to be a major disappointment to all those who hoped that it would result in a major overhaul of the UN system and global policy. But, remarkably the Secy. Gen's R2P recommendation (although not his proposals for agreed criteria to govern the use of force) survived almost unscathed, with the final summit outcome document devoting special section to it.[39] The Summit adopted the following three paragraphs with respect to responsibility to protect:[40]

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and

[37]Report of the Secretary General, In Larger Freedom: Towards, Development, Security and Human Rights For All, General Assembly 59th Session, A/59/2005, March 21, 2005 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement

[38] Id.

[39] Supra note 33, Gareth Evans at pg 47

[40] See generally, the World Summit Outcome document, UN GA Resolution 60/1available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement

crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

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

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

Thus, the heads of the states unanimously adopted this doctrine and further recognized the special role of the office of the Special Adviser of the Secy. Gen. on the prevention of Genocide and gave a new boost to all those who were eagerly waiting for a new world order. Even though

all the recommendations were not adopted the adoption of R2P was momentous.

E. Security Council Resolutions:

i. The UNSC Resolution 1674 (2006)

On 28th April 2006, the Security Council through a thematic resolution on the protection of civilians in armed conflict, "reaffirmed" paragraphs 138 and 139 of the world summit document. Para 4 of the document states, "Reaffirms the provisions of the paragraphs 138 and 139 of the 2005 world summit document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[41]

ii. The UNSC Resolution 1706 (2006)

On 31st August 2006, calling for the deployment of UN peacekeepers to Darfur, the Security Council applied the R2P principle to a particular context for the first time. It said, "Recalling also its previous resolutions and 1674 on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of the paragraphs 138 and 139 of the 2005, UN World Summit Document."[42]

F. Implementing Responsibility to Protect, 2009

Ban Ki Moon, on 12th Jan 2009, in his report entitled "Implementing Responsibility to Protect" said that, "Based on the existing International law, agreed at the highest level and endorsed by both General Assembly and the Security Council, the provisions of paragraphs 138 and 139 of the Summit Outcome define the authoritative framework within which member states, regional arrangements and the United Nations system and its partners can seek to give a doctrinal, policy and institutional life to responsibility to protect.[43] The task ahead, he said, is not

[41]See Security Council 1674, S/RES/1674(2006) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement

[42]See Security Council Resolution 1706, S/RES/1706(2006) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/484/64/PDF/N0648464.pdf?OpenElement

[43] Secy. Gen. Ban Ki Moon's Report, Implementing The Responsibility to Protect, UN Doc. A/63/677 available at http://globalr2p.org/pdf/SGR2PEng.pdf

to interpret or renegotiate the conclusions of the world summit but to find ways of implementing its decisions in a fully faithful and consistent manner.[44] The Secy. Gen. outlined a three pillar strategy for advancing the agenda. Pillar one is the enduring responsibility of the state to protect its populations, pillar two is the commitment of the international community to assist states in meeting those obligations and 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.[45] The Secy. Gen. urged that unless all three pillars are strong the edifice could implode and collapse.[46] He stated that all three must be ready to be utilized at any point, as there is no set sequence for moving from one to another, especially in a strategy of early and flexible response.[47]

G. Resolution 63/308, Adopted 25th September, 2009

The resolution reaffirmed the member states respect for the principles and purposes of the Charter of the United Nations. It recalled the 2005 World Summit Outcome, especially, paragraphs 138 and 139. It took note of the report of the Secy. Gen. and of the timely and productive debate organized by the President of the General Assembly on the Responsibility to Protect, held on 21, 23, 24 and 28 July 2009, with full participation of the member states and decided to continue its consideration of the responsibility to protect.[48]

H. Conclusion

These developments clearly show that the world is concerned about it. The adoption of Responsibility to Protect has been considered a historic achievement for human rights, where states pledged together to take action against human rights violations against reluctant states. The R2P would definitely bring in a new order. R2P hopes to encourage the Security Council by showing a confidence in it in order to maintain the international system instead of meeting the

[44] Id.
[45] Id.
[46] Id.
[47] Id.
[48] See GA Resolution 63/ 308 adopted on 25th September, 2009 available at http://daccessdds.un.org/doc/UNDOC/GEN/N09/513/38/PDF/N0951338.pdf?OpenElement

old fate that League of Nations met before it collapsed. R2P documents clearly state that the Security Council is a key player. The permanent five members (P5) have the power and resources to use to protect human rights across the world. The Security Council is the only institution that we have today that can legitimately advance the cause of human rights. The member states are willing to accept Security Council resolutions provided its motivations are clear and uniform. Security Council should bring back the picture that it gave to the world in 1945 as the principal protector of international peace and security. In this respect it is very important to conceptualize the doctrine and understand its scope and application.

CONCEPTUALIZING RESPONSIBILITY TO PROTECT

I. Scope and Application

It has been five years, since, the adoption of R2P. The nature, scope, tools and emerging state practice of R2P are still debated in civil society and among member states.[49] The concept of R2P is relatively new and, despite its endorsement at the 2005 world summit it is still fragile.[50] The R2P debate tends to focus on sovereignty as the R2P is not exclusively about the relation between the states it is also about individuals and their place in international order.[51] Today, the individual is considered a subject of international law.[52] The new R2P terminology means that the emphasis is on those who are suffering and in need of support and on the duty of others to protect such victims.[53] According to the ICISS report, it reflects two main priorities, First, "Prevention is the single most important dimension of the responsibility to protect; second it is important that less intrusive and coercive measures be considered before more coercive and intrusive ones."[54]

R2P is founded on three pillars: 1) the responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitements; 2) the commitment of the international community to assist states in meeting these obligations; and 3) the responsibility of the member states to respond in a timely and decisive manner when a state is manifestly failing to provide such protection.[55] As Edward C. Luck observes, "the UN members are united in their support for the goals of R2P but less so on how to

[49] See Edward C. Luck, The United Nations and the Responsibility to Protect, The Stanley Foundation, Policy analysis brief, August 2008 at pg 5

[50] See Responsibility to Protect, Address by Patricia O'Brien, Under Secretary General for Legal Affairs, The Legal Counsel, United Nations Torino Retreat 2008

[51] Id.

[52] See Rein A. Mullerson, Human Rights and Individual as a Subject of International Law, 1 EJIL (1990) 33, "the individual is appearing more frequently with an active role in the implementation and enforcement of human rights standards rather than a passive beneficiary of rights and freedoms guaranteed by states in accordance with international norms."

[53] See Thomas G. Weiss, Chapter 10, The Responsibility to Protect: Costs, benefits and Quandaries, in The Military- Civilian Interactions: Humanitarian Crises and the Responsibility to Protect, 2nd Ed, Rowman & Littlefield Publications Inc. Oxford, 2005 pg 200

[54] Id. Also See Supra note 25 ICISS report

[55] Supra note 49, Edward C. Luck

achieve them."[56]

Today, R2P faces interpretation problems. More problems relate to the scope of its application. There are attempts to invoke R2P to new crimes and situations beyond what the states agreed during the 2005 world summit. Many others do not understand the concept and thus apply it even to problems like HIV/AIDS or other natural disasters. The idea of forced intervention in Myanmar to protect the population from the effects of a natural disaster is one such difficult case. Critics of R2P relate it to legitimizing military interventions in the world. Idealists say a more accurate name for the concept would be Right to intervene.[57] The recent appeals to R2P in connection to the Georgia conflict and Cylone Nargis have highlighted the problem of interpreting R2P too widely. Such application might weaken the concept. Eli Stemmes says, "By invoking the principle in contexts that are well beyond those outlined in the World Summit outcome document, false expectations as well as false fears may be created, and the popular and political support of the principle may well in turn be challenged."[58] She further observes that, "In addition to the political force stemming from its affirmation by the world's state leaders in 2005, the assumed exclusivity of the R2P principle is its greatest asset."[59] The fact that it is to be applied in connection to the extreme and extraordinary cases is what gives it added value compared to already existing international legal obligations and instruments and if R2P is to be applied to everything then the R2P label could become meaningless.[60] Therefore, the scope should remain narrow and be tied to the four crimes.

Some developing and emerging countries raised two main concerns: the "Trojans" feared that R2P is a Trojan horse, or the divisive humanitarian interventions of the 1990's in disguise, opening the door for interest driven interventions by imperial or neo -colonial powers. Leading countries especially, in the global south such as Egypt, Iran, Cuba, Pakistan, Venezuela and China raised concerns over the potential to abuse R2P to legitimize interventions. The

[56] Id.
[57] See The Idea Whose Time has Come -and Gone? The Economist available at www.economist.com/displyStory.efm?story_id=14087788
[58] See Eli Stemmes, Operationalising the Preventive Aspects of the Responsibility to Protect, NUPI Report, No.1 -2008
[59] Id.
[60] Id.

westaphalians raised more fundamental concerns over the weakening of sovereignty and the structure of the world order.[61]

R2P offers a conceptual framework that could bring the individual and human rights at the heart of UN's work as an active defender of human rights. R2P is a model with prevention as its basis. If properly understood and applied, it may assist in breaking a cycle of human rights violations and conflict. This it does by placing on both the state and international community. The foundations of R2P are firmly placed in existing international law- international humanitarian law, human rights law, international criminal law and the UN Charter itself.[62]

J. Sovereignty as Responsibility

Sovereignty,[63] is a nation's right to exercise its highest authority over its territory, is the corner stone of international relations. It gives the state to make authoritative decisions regarding the people and resources within its territorial boundaries. The United Nations is based on the principle of sovereign equality of its members[64] and precludes any intervention in matters essentially within the domestic jurisdiction of a state.[65] The only exceptions being an action by the Security Council or a state acts in self defense. Sovereignty is a cherished norm treasured by every nation either self made or born out of independence struggles from their colonizers. It nevertheless, raises many important legal, political and ethical dilemmas.[66] The Kosovo conflict

[61] See Marc Saxer, The Politics of Responsibility to Protect, Dialogue on Globalization, FES Briefing Paper 2 | April 2008, available at http://library.fes.de/pdf-files/iez/global/05313-20080414.pdf at pg 3

[62] Supra note 50, Address by Patricia O'Brien

[63] There are four kinds as identified by Stephen D. Krasner, domestic sovereignty, referring to the organization of public authority within a state and to the level of effective control exercised by those holding authority; interdependence sovereignty, referring to the ability of public authorities to control transborder movements; international legal sovereignty, referring to the mutual recognition of states or other entities; and westaphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations. Stephen D. Krasner, Sovereignty: Organized Hypocrisy, Princeton University Press, New Jersey, 1999 pg 9

[64] See Article 2(1) of the UN Charter, "The Organization is based on the principle of the sovereign equality of all its Members"

[65] See Article 2(7) of the UN Charter, "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; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."

[66] See Preface to International Intervention Sovereignty vs Responsibility, Ed. Micheal Keren and Donald A.Sylva, Franck Cass, London, 2002, "National Sovereignty, defined as a nation's right to exercise its own law and practice over its territory, is a cherished norm in the modern era, and yet it raises legal, political and ethical

and the war on Iraq have prompted a debate of worldwide importance. Central to the discussion is the question: Are nations justified in violating sovereignty by intervening in other nation's affairs in the name of responsibility for the protection of persecuted minorities?[67] Sovereignty poses many problems and challenges. One such problem as Bruce Conin identified, "how to balance the interdependence of the states with the norms of coexistence and the standards of behavior accepted by the collectivity of states?"[68]

Dealing with the vexed issue, the ICISS did a great job by changing the terminology from humanitarian intervention to state responsibility. The Commission, by changing the terminology, intelligibly moved from the obscure debate about humanitarian intervention to sovereign responsibility. Evans and Sahnoun observe, "Talking about the Responsibility to Protect rather than the right to intervene has three other big advantages; firstly, it implies evaluating the issues from the point of view of those needing support, rather than those who may be considering intervention. Secondly, this formulation implies that the primary responsibility rests with the state concerned. Thirdly, 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."[69] The Commission in a way responded to traditional westaphalians who have consistently argued against humanitarian interventions as violating a state's sovereignty and clearly stated that sovereignty entails responsibility and if this responsibility is not fulfilled then its shifts to international community. Thus, R2P reinforces the essence of sovereignty. Sovereignty traditionally would entail control over people while the debate steered it towards responsibility.

Gareth Evans clearly articulated that sovereignty does not give a license to a state to kill its own people.[70] Sovereignty implies a dual responsibility: internally to respect the dignity and

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dilemmas."

[67] See Arine Nadler, When is Intervention Likely? Chapter 3 in International Intervention Sovereignty vs Responsibility, Ed. Micheal Keren and Donald A.Sylva, 2002, Frank Cass & Co. Ltd, London at pg 40

[68] See Bruce Conin, Multilateral Intervention and the International Community, Chapter 9 in International Intervention Sovereignty vs Responsibility, Ed. Micheal Keren and Donald A.Sylva, 2002, Frank Cass & Co. Ltd, London, at pg 148

[69] See Gareth Evans and Mohamed Sahnoun, The Responsibility to Protect, Foreign Affiars, Vol. 81, No.6 pp 99-110

[70] See Gareth Evans, The Limits of State Sovereignty, Responsibility to Protect in 21st century, Eighth Neelam Tiruchelvam Memorial Lecture, International Centre for Ethnic Studies (ICES), Colombo, 29 July 2007 available at

basic rights of all people within the state and externally to the larger international community acting through the Security Council. In international human rights covenants, in UN practice and in state practice itself, sovereignty is now understood as embracing this dual responsibility and now it become the minimum content of good international citizenship.[71] The relationship between sovereignty and intervention is thus increasingly viewed as complimentary rather than contradictory.[72] Today, sovereignty is conceived as a conditional right dependent upon respect for a minimum standard of human rights and upon each state's honoring its obligation to protect its citizens.[73] Sovereignty and intervention should be seen as complementary. Appreciating the Commission on R2P David Chandler states, that, "Rather than delegitimizing state sovereignty the Commission asserts that the primary responsibility rests with the state concerned." [74]

K. Humanitarian Intervention and R2P

Humanitarian intervention is one of the most contested terms of this century. Since 1990's the world has witnessed a proliferation in humanitarian interventions. The main debate raged between right to intervene and state sovereignty.[75] Literal meaning of the term suggests intervention based on humanitarian motives. It is defined as "coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants."[76] Abuse of humanitarian intervention by the powerful has led many to fear it as a means for the powerful to interfere in the internal affairs of the state. Critics of R2P argue that R2P is another name for humanitarian intervention.

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http://www.crisisgroup.org/home/index.cfm?id=4967

[71] See Supra note 69, Gareth Evans and Mohamed Sahnoun,

[72] See Neil Macfarlane, Carolin J. Thielking, Thomas G. Weiss, The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention? Third World Quarterly, Vol. 25 No 5 (2004) pp 977-992

[73] Id. at 978

[74] See David Chandler, The Responsibility to Protect? Imposing the Liberal Peace, International Peacekeeping, Vol. 11, No.1, Spring 2004, pp.59-81 at 65

[75] See Gareth Evans, The Responsibility to Protect, An Idea Whose Time Has Come and Gone? International Relations, 2008

[76] See Adam Roberts, The So –Called 'Right' of Humanitarian Intervention, in Yearbook of International Humanitarian Law 2000. Vol. 3 (The Hague: T.M.C. Asser, 2002) cited in Thomas G. Weiss, Humanitarian Intervention: Ideas in Action, Polity, Cambridge, 2007, at pg 1

Kofi Annan described the world's failure to prevent or halt the Rwandan Genocide as a "sin of omission".[77] British Prime Minister Tony Blair promised that "If Rwanda happens again we would not walk away as the outside has done many time before," and he insisted that the international community had a moral duty to provide military and humanitarian assistance.[78] It is widely accepted that the Security Council has legal right to authorize humanitarian intervention under Chapter VII of the UN Charter.

Throughout the 1990's the Security Council expanded its interpretation of international peace and security, authorizing interventions to protect civilians. However, NATO's intervention in Kosovo was a turning point in this regard. The Kosovo Commission found NATO's intervention to be illegal but legitimate,[79] meaning that while it did not satisfy international society's legal rules, it was sanctioned by its compelling moral purpose.[80] David Chandler observes that, "Although the military intervention led by NATO lacked formal legal authority in the absence of a UN Security Council mandate, the advocates of intervention claimed that the intervention was humanitarian and thereby had a moral legitimacy and reflected the rise of new international norms, not accounted for in the UN Charter."[81] NATO did not have an explicit Security Council authorization and this by-passing of SC authority led many to question the authority of the Security Council, its legitimacy and credibility? Supporters of humanitarian intervention asked what should be done when the Security Council is in a deadlock? Do we stand by and just watch?

It is interesting to observe that Article 4(h) of the AU's constitutive Act, signed on July 11, 2000, awarded the new organization "the right to intervene in a member state pursuant to a decision by the Assembly in respect of grave circumstances, namely: war, crimes, genocides and

[77]See UN Chiefs Regret, BBC News World Edition, March 26, 2004; available at http://news.bbc.co.uk/2/hi/africa/3573229.stm cited in Alex J. Bellamy, Responsibility to Protect or Trojan Hose? The Crisis in Darfur and Humanitarian Intervention after Iraq, Ethics and International Affairs, Vol. 19 (2) pp 31-54

[78] Id. Also see Tony Blair, Speech given to the Labor Party Conference, Brighton, U.K., October 2, 2001,

[79] See Kosovo Commission report available at http://www.reliefweb.int/library/documents/thekosovoreport.htm

[80] See Alex J. bellamy, R2P or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, Ethics and International Affairs, Vol. 19 (2) pp 31-54

[81]Supra note 74, David Chandler

crimes against humanity."[82] In 2001, Kofi Annan in his Nobel lecture argued, "Sovereignty of states must no longer be used as a shield for gross violations of human rights."[83] Nevertheless, the so-called right of humanitarian intervention been rejected many times by its opponents. It is at the heart of those who strongly support sovereignty. David Chandler states, "Opponents of intervention, mainly non-Western states, have been skeptical of the grounds for privileging a moral justification for interventionist practices and have expressed concern that this shift could undermine their rights of sovereignty and possibly usher in a more coercive, Western-dominated, international order."[84]

R2P, as stated earlier, seeks to preserve the sanctity of the concept sovereignty, no longer as a right but as a responsibility. There is a need to look at humanitarian intervention through new lens--the R2P lens. David Chandler argues that humanitarian intervention discourse should be refocused in three ways. First, that the concept of 'humanitarian intervention' should be dropped to appease humanitarian organizations who argue that military action is incompatible with humanitarian aid aimed at saving lives in the short term. Second, that rather than posing debate in the confrontational terms of human rights 'trumping' sovereignty or 'the right of intervention' undermining 'the right of state sovereignty', intervention should be seen as compatible with the concept of sovereignty. Third, he argues that intervention should not be seen as undermining the centrality of the UN Security Council; rather than seeking to find alternative authorization, the aim is to strengthen the Security Council and make it work better.[85]

R2P makes it clear that not every situation merits intervention. It is focused on crimes related to genocide, crimes against humanity, and war crimes. R2P legitimizes intervention but gives it restricted power. R2P, adopted in the summit, further, rules out unilateral action and points at the Security Council as the first port of call. It must be clearly understood that no country would intervene if it did not have any interest in the country concerned. It is a moral duty to save and

[82]See Article 4(h) of the African Union, available at http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm#Article4

[83]See Kofi Annan, Nobel Lecture, Oslo, December 10, 2001 available at http://nobelprize.org/nobel_prizes/peace/laureates/2001/annan-lecture.html

[84] Supra note 74, David Chandler

[85] Id.

help strangers from brutality in the hands of some merciless rulers. If interpreted positively, R2P places obligations on the international community rightly to prevent those crimes that affect our moral conscience only when a state is imminently failing to prevent such mass atrocities. On one hand, R2P reduces the likelihood of humanitarian justifications from being abused. On the other hand, R2P is susceptible to be interpreted the other way around resulting in limited action. The language of Responsibility to Protect may also be used to inhibit the emergence of consensus about action in genuine humanitarian emergencies.[86] What is the threshold criterion to intervene is not clear under R2P? However, R2P is clear on one aspect that is military option should be used a last resort. It makes it clear that the humanitarian motives should be clear and the authority rests solely under the Security Council. It places the shame and blame game on the SC. R2P is a sensitive issue and thus, should be dealt with much care.

L. R2P in the International Legal System

International law consists of rules, norms and principles that apply to nations in their dealings with other nations. Section 102 of the Restatement states that a rule of international law is one that has been accepted as such by the international community of the states in the form of customary law, by international agreements and by derivation of general principles common to the major legal systems of the world.[87] At the international level we have International Human Rights Law and International Humanitarian Law which are applicable both at times of peace and war. As Manfred Nowak observes, International Human Rights law is a set of rules well established by conventions or customs and codified in international treaties.[88] These have consistently addressed the position of the individual and the responsibility of the state with respect to individuals. Today, the treatment by a state of its own individuals has now become a matter of international concern. International human rights law is the vehicle for expression of that concern.[89]

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[86] Supra note 78, Alex J. Bellamy

[87] See Section 102 of the Restatement, http://www.kentlaw.edu/faculty/bbrown/classes/IntlLawFall2007/CourseDocs/RestatementSources.doc

[88] See Manfred Nowak, Introduction to the International Human Rights Regime, Leiden, Martin Nijhoff, 2003

[89] See Barry E. Carter, Philip R. Tremble , Allen S. Weiner, International Law, New York, Aspen Publishers, 2007 pg 777

The UN Charter as well as the Universal declaration of Human Rights (UDHR) has served as a point of departure for further elaboration of the international human rights system. The International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture (CAT), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRD), the convention on the Elimination of Discrimination Against Women, all form together a basis for a strong international human rights law. Today, a number of norms mentioned in the UDHR have attained the status of customary international law. In addition to the prohibition of torture, they include they include the prohibition against arbitrary detention, summary execution or murder, causing disappearances of individuals, cruel, inhuman or degrading treatment or genocide.[90] Thus, the states are seen to possess more responsibility. As Dorota Gierycz observes, "the human rights system has been based on the responsibility of states as actors in the international arena and bearers of human rights obligations under international law."[91]

As Steiner, Alston and Goodman write, "Customary law refers to conduct or the conscious abstention from certain conduct of states that becomes in some measure a part of international legal order."[92] They write that, customary international law results from a general and consistent practice of states followed by them from a sense of obligation.[93] The consistent practice has evolved after the Nazi atrocities. States through their practice have observed genocide as a peremptory norm of international law and as a universal crime. The jus cogens or peremptory norms are said to be so fundamental that they bind all states, and no nation may derogate from or agree to contravene them. Jus cogens have been defined under Article 53 of the Vienna Convention on the Law of the treaties. [94] The prohibition of genocide, slavery and torture have been said to be a part of jus cogens[95] and hence, no derogation is possible.

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[90] Id. at pg 798

[91] Dorota Giercyz, The Responsibility to Protect: A legal and Rights-based Perspective, NUPI Report, No.5, 2008

[92] Henry J. Steiner, Philip Alston, Ryan Goodman International Human Rights in Context, Law, Politics, Morals, Text and Materials, Third Ed. Oxford University Press 2008

[93] Id.

[94] Jus Cogens is defined as, "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"

[95] Supra note 92, Henry J. Steiner

International Law is well established in this regard and R2P enforces the responsibilities and obligation cast on the national and international community. Dorota Giercyz rightly observes that, "the obligations reflected in the clause stem from well established rules and principles of customary and treaty international human rights law and international humanitarian law and these are universally biding."[96] R2P prescribes protection from genocide, war crimes, ethnic cleansing and crimes against humanity. Deeply rooted in the existing international legal systems R2P recognizes the failure of the international community to fulfill their obligations and gives them one more opportunity to effectively protect human rights. It casts a more important responsibility on the sovereign himself and thus evades with the concept of sovereignty as authority. R2P thus reminds us and cautions us of our strong beliefs and faith in international legal system for a more perfect world.

M. R2P as an Emerging Norm

The High level panel on Threats, Challenges and Change endorsed R2P as an emerging norm. Kofi Annan in his report, In Larger Freedom, embraced this norm. However, scholars lately have questioned if R2P is an emerging norm at all instead of soft law or a political principle. Even considering that R2P may gradually replace our notions on sovereignty and humanitarian intervention in this century, it still needs to gain support and confidence. Some consider R2P a 'Political catchword'.[97] Suggestions such as further tuning and commitment by all states have been suggested in order for R2P to develop into an organizing principle.[98] Some argue that many of the elements of R2P are not novel, but rooted in a broader ideological or legal tradition. They further advance the argument that state responsibility may be used to constrain, rather than enable Council involvement.[99]

Indeed, R2P is based on existing international legal system. However, it does include novel

[96] Supra note 91, Dorota Giercyz
[97] See Carsten Stahn, Political Rhetoric or Emerging Legal Norm, The American Journal of International Law, Vol. 101, No. 1 (Jan., 2007), pp. 99-120
[98] Id.
[99] Id.

concepts. By rewriting the very definition of sovereignty as responsibility, it has cautioned states that sovereignty does not give them a ticket to do whatever they want to. It presses upon the states to responsibly respect the rights and dignity of their citizens. It stresses that if a state fails to fulfill this responsibility then it shifts this responsibility to greater international community. Thus, R2P cautions states to respect and abide by the international norms that they signed up for and the need for good international citizenship. Thus it is not the responsibility of the states alone, but also of the international community to protect people when a state is imminently failing to do so. R2P for the first time in the history of international law used the word 'caution', which is not done even in the UN Charter.

The idea of intervention might have well existed in the international system, but this system never laid down any ground rules. UN Charter provides for a UN SC action for the use of military force. However, the rules of use of force have been violated either by unilateral action or through a multilateral organization resulting in heavy consequences. R2P curtails such unilateral actions and puts Security Council as first port of call and as the final authority. R2P seeks for a better and uniform world with a protectionist attitude. It lays down prevention, protection and rebuilding as the main themes.

R2P calls for action. It is a call for prevention, intervention and post conflict reconstruction.[100] Developing countries should realize that R2P offers better protection through agreed and negotiated rules and roadmaps for when outside intervention is justified and how it may be done under the UN authority rather than unilaterally.[101] Recent developments show that R2P is being widely accepted and is seen to provide impetus to the Security Council to act. Thus, it restores confidence in the legitimacy and credibility of the SC. However, the acts in Georgia and the continuing failure to act in Darfur demonstrate the difficulty to realize R2P in operational terms. Understanding R2P could rightly help in operationalizing it. As Andy Knight states, R2P is currently in an evolving from, a norm that initially clashed with the state sovereignty/non-

[100] See R. Thakur and T.G. Weiss, R2P: From Idea to Norm—and Action? Global Responsibility to Protect 1 (2009) 22–53 at pg 45

[101] Id. at 47

intervention norm to one that essentially fits into normative developments that have occurred in the international system and global community over the past 58 years or so.[102]

N. Conclusion

In traditional international relations and international law, the term humanitarian intervention had simply referred to military interventions. As Micheal Newman observes, "R2P therefore constituted a real conceptual change both because it incorporated peaceful as well as coercive actions by international forces and accepted that there was a relationship between wider development and human security issues and the kinds of crisis that could conceivably precipitate military intervention as a last resort."[103] R2P therefore, is an emerging norm, prescribed in our existing international legal system; it reinforces sovereignty with responsibility and places humanitarian intervention in its rightful place. R2P should serve to strengthen efforts to protect women, children, minorities, internally displaced persons and refugees. As suggested by Edward C. Luck, the international community should co-operate to bring the breach of peremptory norms of international law to an end by using lawful means.[104] The main challenges that lie in front of R2P alongwith with conceptual challenges are building capacities to strengthen the Security Council in its actions.

[102] See W. Andy Knight, The Responsibility to Protect as an Evolving International Norm, Notes for Canadian Peacebuilding Coordinating Committee Meeting, September 22, 2003, Ottawa Conference Centre

[103] See Micheal Newman, Revisiting the 'Responsibility to Protect', The Political Quarterly, Vol. 80. No.1. January- March 2009

[104] Supra note 49 See Edward C. Luck

THE ROLE OF THE SECURITY COUNCIL

Security Council is the most powerful and, yet the most, complicated body in the whole United Nations system created under the United Nations Charter in 1945. The Council is composed of the five most powerful permanent members; USA, UK, France, USSR and China, who are endowed with the power to veto[105] any issue. In addition, there are ten other non permanent members elected by the General Assembly who serve for a two years term.[106] The Security Council is mainly entrusted with the primary responsibility to maintain international peace and security and the members agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[107] Pursuant to its duties, the Council dispatches military operations, imposes sanctions, mandates arms inspections, deploys election monitors[108] and performs broad police like functions.[109] The Council has been largely inactive during the Cold War period, but since 1990 and the thawing of the global political climate, it has been very active.[110] Much of the recent literature has focused on the role of the Security Council, its powers and functions and its successes and failures.

With the passage of time the SC has become more involved with human rights protection and more recently protection of the rights of women and children. Events such as genocides, crimes against humanity, terrorism have taken the debate to a new level, challenging the legitimacy and credibility of the UNSC. The debates mainly involved the failure of the SC to respond in a timely manner to meets its core obligations/responsibilities, threat to its legitimacy when its authority is by-passed by some countries and regional organizations. Furthermore, the Security Council has been charged to be undemocratic, and ineffective.[111] Misuse of the veto power to further self interests of the P5 has furthered the concerns of many. These discussions

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[105] See Article 27 (3) UN Charter, provides the super five a concurring vote in the voting procedure

[106] See Article 23 of the UN Charter for the composition of the Security Council available at http://www.un.org/en/documents/charter/chapter5.shtml

[107] Id. See Article 24 of the UN Charter

[108] See UN Security Council available at http://www.globalpolicy.org/security-council.html

[109] See Aristotle Constantinides, An Overview of Legal Restraints on Security Council Chapter VII Action With A Focus on Post Conflict Iraq, available at http://www.esil-sedi.eu/fichiers/en/Constantinides_782.pdf

[110] See Professor Dan Sarooshi, Security Council, available at http://www.globalpolicy.org/security-council/32932.html

[111] See Céline Nahory, The Hidden Veto, Global Policy Reforms, May 2004 available at http://www.globalpolicy.org/component/content/article/196/42656.html

have high-lightened the inherent tensions in the global power systems.

Edward C. Luck observes that, "Debates over the composition of the Council, as well as over the veto power of the permanent five, reflect the inherent tension between the founding goal of assuring the leadership and collaboration of the nations most capable of enforcing Council's will and the norms of universality and representatives espoused by a growing and increasingly diverse membership."[112] Along with these tensions, the Council is devoid of unity among its members over many issues. Deliberations about a possible Security Council reform and expansion have also taken place among scholars, NGO's, think tanks and some even at UN level. Kofi Annan said, "Unless the Security Council can unite around the aim of confronting massive human rights violations and crimes against humanity…then we will betray the very ideals that inspired the founding of the United Nations."[113]

History shows that the SC has failed to keep its promise. Ingvar Carlsson's report found that the UN ignored evidence that genocide was planned and had refused to act once it began. The report is critical about the SC's April 21, 1994 decision to reduce the strength of the United Nations Mission for Rwanda.[114] Similarly, the SC failed to act in Kosovo. However, an action without a proper SC authorization threatens the international security system. The Council remained standstill when burning issues were lying on its table. Blame not only the Council, but also the geo-politics. The world summit clearly laid out that the SC should be the first port of call whenever it comes to intervention.

The need of the hour is not to drag the discussion about SC's failures to act but to find ways that will enable the decision making process at the UNSC. Building institutional capacity is one of the keys for successful implementation of R2P. The institutions should be developed for all three core goals: responsibility to prevent, react and rebuild.[115] UN has got the necessary

[112]See Edward C. Luck, UN Security Council Practice and Promise, Routledge, 2006 at pg 20

[113]See Carlsson's Report on Rwanda available at http://www.preventgenocide.org/prevent/UNdocs/#carlsson

[114] Id.

[115] See Claire Applegarth and Andrew Block, Acting against Atrocities: A Strategy for Supporters of the Responsibility to Protect, Discussion paper #09-03, Belfer Center, John F. Kennedy School of Government, Harvard University, March 2009

institutional capacities. We need a framework built upon these institutions that will help the SC to act promptly and swiftly.

O. Duties and Powers of the Security Council:

The UN Charter imposes general duties upon both the Security Council and UN Member states. Under Article 24 (1) of the Charter, "Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the SC acts on their behalf.[116] In carrying out these powers the SC shall act in accordance with the Purposes and Principles of the UN. Under Article 25, members in turn "agree to accept and carry out the decisions of the SC."[117] The broad powers of the Security Council are provided in Chapters VI, VII and VIII of the UN Charter. The powers could be divided in different parts namely; powers for pacific settlement of disputes, powers to determine the existence of threat to peace, breaches of peace and acts of aggression, and powers to decide what measures to be taken to restore international peace and security.

i. Powers for Pacific Settlement of Disputes

Article 33 of the Charter provides that: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[118] Clause 2 of Article 33 provides, "The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."[119] Article 34 provides that, "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation

[116] See Article 24 (1) of the UN Charter
[117] See Article 25 of the UN Charter
[118] See Chapter VI Pacific Settlement of Disputes, UN Charter available at http://www.un.org/en/documents/charter/chapter6.shtml
[119] See Pacific Settlement of Disputes, Chapter VI Un Charter, available at http://www.un.org/en/documents/charter/chapter6.shtml

is likely to endanger the maintenance of international peace and security."[120] The Charter thus, clearly lays emphasis on peaceful resolution of threats against international peace and security as the primary means.

ii. Powers to Determine Threats to the Peace, Breaches of the peace and Acts of Aggression

It is only within the powers of the SC to determine if a situation is a threat to peace and security. The SC has complete discretion in this regard. When peaceful means are not sufficient the Charter entrusts the SC to use forceful means against the violating states. These powers are enumerated under Chapter VII of the Charter. The Chapter affords extensive powers to the Council in carrying out its responsibility to maintain international peace and security. Article 39 of the Charter provides: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[121]

Article 41 provides that, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[122] Article 42 provides that, "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[123]

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[120] Id.
[121] See Chapter VII: Action with Respect to Threats to the Peace, Breaches to the Peace and Acts of Aggression available at http://www.un.org/en/documents/charter/chapter7.shtml
[122] Id.
[123] Id.

In addition, Article 51 lays down the inherent right of individual or collective self defense if an armed attack occurs against a UN member state, but only until the SC has taken measures necessary to maintain international peace and security. It further provides, such self defense measures shall be immediately reported to the SC and shall not in any way affect the authority and responsibility of the SC under the present Charter to take at any time such action as it deems necessary.[124] Article 53 further states no enforcement action shall be taken under regional arrangements or by the regional agencies without the prior authorization of the SC.[125]

Thus, the Charter provided the Council with broad powers. The Charter makes it very clear that the Security Council could legitimately use force to restore international peace and security but, only after exhaustion of the non military measures. Furthermore, the above mentioned rules clearly demonstrate that the founding fathers of the UN have reserved a pivotal role for the SC in the UN system for the maintenance of international peace and security.[126] Furthermore, the Charter also vests the Council with the powers to authorize regional arrangements or agencies for enforcement action under its authority.[127]

P. Limitations on the Powers of the Security Council

David Schweigman observes that, "once a Chapter VII situation arises, the SC is of the opinion that it can take any and all of the measures that it considers useful and suitable for dealing with the situation or any of its consequences, whether those actions are of a military, administrative, regulatory or even primarily judicial nature."[128] These set of options to the SC has opened a debate on the limits of its power. The limitations can briefly be summed up as 1) as the Security Council derives its powers from the Charter, it must abide by it. The Appeals chamber of the ICTY said, "Neither the text nor the spirit of the Charter conceives of the

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[124] Id.

[125] See Regional Arrangements, Chapter VIII, UN Charter available at http://www.un.org/en/documents/charter/chapter8.shtml

[126] See Niels Blokker, Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by Coalitions of the Able and Willing, EJIL Vol. 11 No.3, (2000), 541-568

[127] Id.

[128] See David Schweigman, The Authority of SC under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice, Kluwer Law International, The Hague, Netherlands, 2001 at pg 165

Security Council as legibus solutes (unbound by law)[129], 2) it must act in accordance with the object and purpose of the UN,[130] 3) it should give respect to sovereign equality[131] and may not violate a state's political independence and territorial integrity, 4) it must evaluate the impact of its decisions on the human rights of the people affected by those decisions,[132] 5) it shall not take any enforcement action under Chapter VII without making a prior determination, 6) the determination shall be made by the Security Council only in the light and scope of the purposes, principles and object under the UN and, 7) finally, the Council is obligated to act in good faith.

Q. Security Council and Human Rights: An Era of Resolutions

Over the years, the Security Council has not exercised its power against states that have engaged in gross and persistent violations of human rights of their own citizens. For the first time, the Council invoked Article 39 against South Rhodesia holding that a state's violations of human rights constitute a threat to the peace and adopted mandatory economic sanctions in 1966 against South Rhodesia.[133] Sydney Bailey identified two phases in the Council's treatment for human rights: the first from 1946 to 1989 and the second from 1989 to 1994. In the first phase Bailey found the Council acted in a cautious, empirical and haphazard way while in the second period, he said, the Council began to venture forth in the area of human rights.[134] Cold War mainly precluded the Council from acting. Brian Urquhart says, "The unanticipated Cold War and the forty year standoff between the Soviet Union and the West was the first obstacle to the realization of the UN Charter's dream of a collective security system run by the UN Security Council and based in the military strength of its five permanent members."[135]

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[129] See Id. David Schweigman, also See Appeals Chamber Decision on the Tadic Jurisdictional Motion, Prosecutor V. Dusko Tadic a/k/ "Dule", Case no IT-94-1-AR72, 2 Oct. 1995, para. 28.

[130] Article 24 (2) of the UN Charter

[131] Article 2(1)of the UN Charter

[132] Article 1(3) of the UN Charter

[133] See UN Security Council Resolution 232 of 1966 on Sothern Rhodesia, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/227/55/IMG/NR022755.pdf?OpenElement

[134] See Sydney Dawson Bailey, UN Security Council and Human Rights, New York, N.Y. : St. Martin's Press, 1994 cited in B.G. Ramacharan, The Security Council and the Protection of Human Rights, The Hague, Nijhoff , 2002 at pg 15

[135] See Brian Urquhart, Limits on the Use of Force, in Leashing the Dogs of War: Conflict Management in a Divided World / edited by Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, Washington, D.C. : United States Institute of Peace Press, 2007 at pg 265

However, it is not only the Cold War, as Niels Blokker observes, the UNSC lacked teeth as it did not have a standing UN force at its disposal.[136] The power to veto further excluded the Council from playing the crucial role even though time and place demanded. Veto has become a vexed issue. Recently, there have been debates on veto reform, restricting the use of veto or completely dropping the power to veto or expanding the SC and giving the new members a right to veto. Furthermore, the end of cold war did not end conflicts in the world rather increased the complexity of wars. The nature of wars changed from wars between two states to wars within the states.[137] Nevertheless, the end of cold war brought much activity in the Council. Since the 1990 the UNSC has adopted many resolutions and has frequently resorted to Chapter VII. The recent developments could be summarized as Niels Blokker states, "A widening interpretation of the notion threat to the peace has evolved; the second and even third generation of UN peacekeeping has been established; discussions concerning the creation of a UN standing force have taken place and so on."[138]

The first active resolution was taken when Iraq invaded Kuwait. Resolution 660 condemned the invasion of Kuwait by Iraq and determined that there exists a threat to international peace and security. The resolution demanded the immediate unconditional withdrawal of the Iraqi forces.[139] Resolution 678 reaffirmed Resolution 660 which determined that Iraq had committed a breach of the peace and authorized member states "to use all necessary means to uphold and implement Resolution 660 and all subsequent resolutions and to restore international peace and security in the area.[140] The resolution expressed concern that Iraq's actions had led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region.[141] Resolution 660, Kelly Kate Pease and David P. Forsythe observed that, "The Security Council for the first time in its history stated a clear and explicit linkage between human rights violations

[136] Supra note 126 Niels Blokker,

[137] See Jeffrey Sluka, On Common Ground: Justice, Human Rights and Survival, Chapter 10, Justice As a Basic Human Need Edited by Antony James Williams Taylor, Nova Science Publishers, NY, 2006, at pg 124

[138] Supra note 126 Niels Blokker,

[139] http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/575/10/IMG/NR057510.pdf?OpenElement

[140] http://www.fas.org/news/un/iraq/sres/sres0678.htm

[141] See Richard B. Lillich, The Role of the UN Security Council in Protecting Human Rights In Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World, 3 Tul. J. Int'l & Comp. L. 1 1995

materially within a state (although there were indeed international repercussions) and a threat to international security."[142] They argued that, "since 1945 the UN Security Council apparently has had the authority to authorize the use of force to correct human rights violations, as well as authorize non-forcible measures."[143]

Thus, began an era of SC resolutions i.e. SC activism for the protection of human rights. The Security Council through its Resolution 794 of December 3 1992, authorized the use of force to restore peace, stability and law and order in Somalia. In its resolution it determined that, "the magnitude of the human rights tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constituted a threat to international peace and security."[144] The Security widened its interpretation of what constitutes threat to international peace and security by considering human rights violations in Somalia. The international community, as observed by Richard Lillich, "is taking an important step in developing a strategy for dealing with the potential disorder and conflicts of the post cold war world."[145] Through its various resolutions the SC is of the opinion that the internal situation in and of itself warrants action.

In 1994, the Security Council adopted Resolution 940, which arguably, is considered the purest UN humanitarian intervention to date.[146] Through the resolution the Security Council expressed its grave concern caused by the "significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties,"[147] and determined that "the situation in Haiti continues to constitute a threat to peace and security in the region."[148] The Council authorized the formation of a multinational force under unified command and control to restore the legitimately elected

[142] See Kelly Kate Pease and David P. Forsythe, Human Rights, Humanitarian Intervention, and World Politics, Human Rights Quarterly, Vol. 15, No. 2 (May, 1993), pp. 290-314

[143] Id. Kelly and David

[144] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/772/11/PDF/N9277211.pdf?OpenElement

[145] Supra note 141

[146] See Robert Cryer, The Security Council and Article 39: A threat to Coherence? 1 J. Armed Conflict L. 180 1996 at pg 180

[147] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/312/22/PDF/N9431222.pdf?OpenElement

[148] Id. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/312/22/PDF/N9431222.pdf?OpenElement

President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti.[149] The Security Council through its resolution 1031 of 1995 on the implementation of the peace agreement for Bosnia and Herzegovina determined that the situation in the region constitutes threat to peace and security.[150] Resolution 1244 of 1999 expressed its concern on humanitarian crisis in Kosovo and determined that the situation in the region constituted a threat to peace and security.[151]

Resolution 748 adopted with respect to Libya the Security Council stated that, "suppression of acts of international terrorism, including those in which states are directly or indirectly involved, is essential to maintain international peace and security.[152] Under Resolution 1373 the Security Council reaffirmed that, "such acts, like any act of international terrorism," constitute a threat to international peace and security."[153] It called for states to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism.[154]

Under Resolution 1540 the Security Council, "Affirmed its resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery, in conformity with its primary responsibilities, as provided for in the United Nations Charter."[155] The resolution was not directed at a particular terrorist act but to all future terrorist acts and in this regard the Council is seen as a global law maker.[156] On October 31 2000, Security Council adopted a landmark Resolution 1325 specifically addressing the impact of war on women, and women's contribution to conflict resolution and sustainable peace.[157] UNSC Resolution 1820 adopted in 2008, states unequivocally, that "rape and other forms of sexual violence can

[149] Id. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/312/22/PDF/N9431222.pdf?OpenElement
[150] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/405/26/PDF/N9540526.pdf?OpenElement
[151] http://www.nato.int/Kosovo/docu/u990610a.htm
[152] http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/07/IMG/NR001107.pdf?OpenElement
[153] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement
[154] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement
[155] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement
[156] Eric Rosand, The Security Council As "Global Legislator": Ultra Vires or Ultra Innovative, 28 Fordham Int'l L.J. 542, 2004-2005
[157] http://www.un.org/events/res_1325e.pdf also see, http://www.peacewomen.org/un/sc/1325.html

constitute war crimes, crimes against humanity or a constitutive act with respect to genocide" and noted that, "the states and the parties to the conflict bear the primary responsibility to ensure the protection of affected civilians."[158]

Thus, as B.G. Ramacharan states, "the practice of the Security Council suggests that it could become more actively engaged in human rights situations such as following: those which entail threats to, or breaches of, international peace and security; those which involve a breakdown of governmental authority in the country concerned, those which entail a flouting of the authority of the United Nations, those which involve a high magnitude of human suffering or crimes against humanity, where the government requests so, where the conscience of the international community is shocked."[159] Nevertheless, the SC did not act in all situations alike. There has been no consistency in the Council's actions. It decides and acts however it likes. This shows the reality that SC acts only when the situation affects anyone of the permanent members.

R. The Dilemnas:

i. Political

The Council's activism generated ample controversies. It was perceived by many in the south that the Council is being used as a means by the super five to fulfill their own self interests. UN was the only place where the countries from the south could put forward their concerns and countries doubted when they saw inconsistency in the SC's actions. Richard B. Lillich reminds us that embracing the doctrine of UN sanctioned humanitarian intervention, it should not be overlooked that the Council, as the key player in this area, does not necessarily reflect the views of many UN members.[160] For example, The Zimbabwe minister pointed out that, "great care has to be taken to see that these domestic conflicts are not used as a pretext for the intervention of big powers in the legitimate domestic affairs of small states, or that human rights issues are not

[158] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement
[159] B.G. Ramacharan, The Security Council and the Protection of Human Rights, The Hague, Nijhoff , 2002 at pg 211
[160] Supra note 141, Richard B. Lillich

used for totally different purposes of destabilizing other governments."[161] He suggested for a, "need to strike a delicate balance between the rights of the States, as enshrined in the Charter, and the right of individuals, as enshrined in the Universal Declaration of Human Rights."[162]

SC authorizations have become a major practice, asking countries concerned to take all measures necessary including the use of force against the offending country. Concerns grew more after the SC Resolution 678 on Iraq. Columbia expressed its concern saying that, "the SC is delegating authority without specifying to whom. Nor do we know where that authority is to be exercised or who receives it. Indeed, whoever does receive it is not accountable to anyone."[163] Yemen referred to, SC resolution 678, as a classic example of authority without accountability.[164] Malaysia noted that when UNSC provides the authorization for countries to use force, these countries are fully accountable for actions to the Council through a clear system of reporting and accountability, which is not adequately covered in Res 678.[165]

Such authorizations have enabled scholars to ask questions such as what is the role of the Security Council? Are there any Charter conditions which these resolutions must satisfy or is the Council free to give the member states in question carte blanche? Are there any conditions outside the UN Charter?

ii. Legal Dilemnas

Dilemmas always remained to questions such as; who would have a say when the Security Council acts ultra vires? If judicial review of it's resolution is possible? If it is within the authority of the Security Council to establish tribunals such as; ICTY and ICTR? Thomas Franck precisely puts the questions and states, "Is there any conceivable point beyond which a legal issue may properly arise as to the competence of the SC to produce such overriding results?

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[161] http://www.un.org/en/sc/repertoire/89-92/89-92_12.pdf, S/PV.3046 130-131, http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N92/601/98/PDF/N9260198.pdf?OpenElement

[162] Id.

[163] See UN Doc S/PV.2938, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SPV%202938.pdf at 22-25

[164] Id at 76

[165] Id

If there are any limits, what are those limits and what body, if other than the SC, is competent to say what those limits are?"[166] Such questions came in front when Libya challenged the SC resolutions in a case before the International Court of Justice as ultra vires.

S. SC and ICJ

In 1992, before the ICJ, Libya challenged SC resolution 748, based upon the threat to the peace rationale, ordering it to surrender two of its nationals accused of bombing Pan Am flight 103 as Ultra Vires.[167] In Libya v U.S. Judge Weeramantry succinctly put forward the question: "does…the SC discharge its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which the responsibilities are to be discharged?"[168] The brief majority opinion appears to find that both Libya and the US, as members of the UN, are obliged to accept and carry out decisions of the SC in accordance with article 25 of the Charter, including the obligations imposed by SC res 748.[169] The majority further concluded that the obligations of the parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention. This conclusion the majority reaches by an interpretation of the effect of Charter Article 103.[170]

However, several judges in this case opined, that, under certain circumstances, a decision by the SC might be viewed as invalid. It is seemingly difficult to locate substantive limitations on the Council's actions taken under Chap VII as the Charter provides wide discretion to the Council.[171] Nevertheless, the Council is an organ of the UN and it's acts should be in accordance to the Charter. As Thomas Franck observes, "The legality of actions by any UN organ must be judged by reference to the Charter as a "constitution" of delegated powers. In extreme cases, the court may have to be the last-resort defender of the system's legitimacy if the UN is to continue

[166] See Thomas Franck, The "Powers of Appreciation": Who is The Ultimate Guardian of UN Legality?, The American Journal of International Law, Vol. 86, No.3 (Jul., 1992), pp. 519-523
[167] http://www.icj-cij.org/docket/files/88/7207.pdf
[168] Dissenting opinion, Judge Weeramantry, available at http://www.icj-cij.org/docket/files/88/7101.pdf at pg 61
[169] Libya vs. U.S., request for the Indication of Provisional Measures, General List no. 89 (order of Apr.14) available at http://www.icj-cij.org/docket/files/89/7213.pdf
[170] Supra note 166, Thomas Franck
[171] Supra note 126, Niels Blokker

to enjoy the adherence of its members."[172]

There were also questions raised as to whether the SC had the powers to authorize resolutions. Resolutions are the means through which the SC acts and authorizes. Without such powers to authorize the Council will be left impotent if it is necessary to take military enforcement measures. The SC has both explicit and implicit power to take military enforcement actions to perform its functions. Without UN forces, and without coalitions of the able and willing authorized by the SC, no other instrument is available to the UN. The whole UN system would be rendered ineffective. The Council is indispensable. As Niels Blokker observes, if the Council were not entitled to use authorization instrument, the UN could not have acted in most or all of the cases in which it has now played role.[173]

T. Credibility of the SC

As it has been observed the Security Council invited much controversy after the use of force against Iraq. The debate over the Council's credibility shifted from the question of democratic representation within the Security Council to whether the unsurpassable U.S power be constrained. As Thomas Weiss observes, "The obstacle to the Security Council credibility go beyond issues of process – exclusive permanent membership and the right to veto- to include unparalleled US military might."[174] Many perceive that somehow America's military, economic and political often reflects the American attitude that it is the sole superpower in the world and that it can do whatever it wants. The US National Security Strategy Document of September 2002- stated that the US will not hesitate to act alone, if necessary, to exercise our right of self defense by acting pre-emptively.[175] This clearly puts the American position that it can act alone.

Thus, as Mats Berdal observes, "The only option that the Security Council seems to have is to endorse US action otherwise it would only complicate and fetter its leadership in the

[172] Supra note 158, Thomas Franck
[173] Supra note 126, Niels Blokker
[174] See Thomas Weiss, The Illusion of UN Security Council Reform, The Washington Quarterly - Volume 26, Number 4, Autumn 2003, pp. 147-161
[175] See Mats Berdal, The UN Security Council: Ineffective but Indispensable, Survival, Vol. 45, no.2, Summer 2003, pp 7-30 at pg 18

international system."[176] In September 2002, President Bush warned that he would act alone if the UN failed to cooperate. It was with the rise in American unipolarity – not Iraqi crisis – that, along with cultural clashes and different attitudes toward the use of force, gradually eroded the Council's credibility.[177] Doctrine of preemption directly contradicts the basic percepts of the UN Charter. American policy bases itself on the premise that Americans cannot let our enemies strike first.[178] Therefore if necessary, act preemptively.

Furthermore, along with these controversies surrounding the might of US, there is another steep problem in the UN that reflects an ideological difference between countries from north and south. UN is divided on the very question- when an armed intervention is appropriate? The rules on the use of force has almost debacled the UN system. This is further evidence by the power struggle in our international relations. There is major power struggle in the UN and especially within the Security Council. Micheal J. Glennon observes that, "The old power structure gave the Soviet Union an incentive to deadlock the Council; the current power structure encourages the US to bypass it."[179] He further states, "approve an American attack, and it would have seemed to rubber stamp what it could not stop. Express disapproval of a war, and the US would have vetoed the attempt. Disagreement over Iraq did not doom the Council; geopolitical reality did."[180] The UN's members have an obligation under the Charter to comply with SC's decisions. They therefore have a right to expect the Council to render its decisions clearly.

It would however be wrong to negate the Security Council's or for the matter UN's functioning even though they prove to fail often at times of great stress. The Security Council itself hobbled along during the Cold War, underwent a brief resurgence in the 1990's, and then flamed out with Kosovo and Iraq.[181] Nevertheless, the SC will still prove to be useful at times for it is the only authority that has the power and resources to act when it is most needed.

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[176] Id.
[177] See Michael J. Glennon, Why the Security Council Failed? 82 Foreign Affairs, 2003, at 16
[178] Id.
[179] Id.
[180] Id.
[181] Id.

The Iraqi crisis thus raised questions regarding the Council's authorizations. It questioned 1) Whether SC has authorized the use of force 2) What are the determinants of such authorization and 3) Whether the authorization has terminated.[182] The UN is underpinned by two fundamental rules, namely, use of peaceful means to resolve the disputes and the Security Council as the sole authority to use force to maintain peace and security. As Jules and Ratner argue, 'To ensure that UN authorized uses of force comport with those two intertwined values, three rules can be derived from Article 2(4) of the Charter: 1. Explicit and not implicit SC authorization is necessary before a nation may use force that does not derive from the right to self defense under Article 51 2. Authorizations should clearly articulate and limit the objectives for which force may be employed and ambiguous authorizations should be narrowly construed and 3. The authorization to use force should cease with the establishment of a permanent ceasefire unless explicitly extended by the SC."[183]

U. SC, Darfur and R2P

Darfur, cannot be left in any discussion on humanitarian crisis and on national and international responsibility. It is described as the world's worst humanitarian crisis.[184] The United Kingdom International Development Committee Report (2005) on Darfur estimated that, " 2.4 million people are directly affected by the crisis and are in need of humanitarian assistance. Of these, 1.84 million people have been driven out of their homes but remain in Darfur. Another 200,000 people have fled across the border to Chad."[185] The Committee said, in its view the crimes committed are no less serious and heinous than genocide.[186] It also said that, "The government of the Sudan bears the primary responsibility for the suffering of the people of Darfur. But when a government commits atrocities against its own citizens, then the international community has a responsibility to protect those people."[187]

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[182] Jules Lobel and Michael Ratner, Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime, The American Journal of International Law, Vol. 93, No. 1 pp 14-154

[183] Id.

[184] http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/3840427.stm

[185] http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67i.pdf

[186] Id.

[187] Id.

The current conflict in Darfur began in 2003, when black African rebel groups rose up against Sudan's Arab-dominated central government, demanding an end to the social, economic and political marginalization of their region.[188] Struggle for resources has historically, been the major source of conflict within Darfur ever since it got independence in 1956. Darfur has been subjected to extreme social, political and economical exploitation by the colonial powers and later by the central government after Sudan's independence in 1956.[189] The Sudanese government and its proxy militia, known as the janjaweed, were responsible for a large-scale campaign of death and destruction in western Sudan.[190]

The UN Security Council, the European Union and a variety of NGOs all acknowledged that the government of Sudan was complicit in large scale crimes against humanity and ethnic cleansing in Darfur. The government of Sudan has denied all accusations.[191] NGOs, such as physicians for human rights[192] and Justice Africa,[193] went further, calling the crisis a genocide. Speaking at the United Nations Human Rights Commission on the tenth anniversary of the Rwandan genocide, Kofi Annan said that events in Darfur left him with a deep sense of foreboding.[194] On 9 September 2004, Secretary of State Colin Powell, in the US Congress, announced to the Senate Foreign Relations Committee that, "We concluded- I concluded- genocide had been committed in Darfur."[195] However, even after such labeling there has been a very low response. As Williams and Bellamy observe, "Alongside the usual array of NGO activities, international society's responses to Darfur's crisis have come primarily in the form of humanitarian assistance through the UN and its specialized programmes and agencies, the USA

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[188] http://www.pbs.org/wnet/wideangle/episodes/heart-of-darfur/guide-to-factions-and-forces/299/

[189] Thu Thi Quach, The Crisis in Darfur: An Analysis of its Origins and Storylines http://scholar.lib.vt.edu/theses/available/etd-12242004-143603/unrestricted/tquachmajorpaper.pdf at pg 3

[190] Sean Brooks, When Killers Become Victims: Darfur in Context, SAIS Review vol. XXIX no.2 at pg 133

[191] http://www.panapress.com/newslatf.asp?code=eng094245&dte=27/09/2005

[192] See http://physiciansforhumanrights.org/library/news-2010-02-03.html, PHR in its report, alleged that the Government of Sudan and its proxy militias carried out a "systematic campaign of destruction against specific populations" obliterating thousands of villages, killing, pillaging, plundering, and forcing men, women and children to flee into a "no man's land" which amounted to an "all out assault on the very survival of a population."

[193] http://justiceafricasudan.net/site2/index.php?option=com_docman&task=cat_view&Itemid=94&gid=38&orderby=dmdate_published&lang=en

[194] http://www.sudan.net/news/press/postedr/291.shtml

[195] http://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html

and the EU. In political terms the responses have been slow, tepid and divided."[196]

The first SC resolution mentioning Darfur was Resolution 1547 on 11 June 2004. The Resolution welcomed the signature of the Declaration on 5 June 2004 in Nairobi, Kenya, in which the parties confirmed their agreement to the six protocols signed between the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A), and reconfirmed their commitment to completing the remaining stages of negotiations.[197] On 30 July, acting under Chapter VII of the UN Charter, the Council authorized Resolution 1556, which determined that the situation in Sudan constitutes a threat of international peace and security and imposed an arms embargo on the region, supported the deployment of the African Union (AU) protection force and demanded the Sudanese government to disarm the janjaweed or face sanctions.[198] Through the SC Resolution 1574 the Council declared its strong support for the efforts of the Government of Sudan and the Sudan People's Liberation Movement/Army to reach a Comprehensive Peace Agreement.[199] Irrespective of such resolutions and peace agreement the government is complicit in many crimes. Recently the UN Security Council through it's Resolution 1769 authorized the United Nations-African Union Mission in Darfur (UNAMID), a peacekeeping mission under Chapter VII of the UN Charter.[200]

The crisis is Darfur is political and truly is a test case as well. For some the sanctions went too far: China and Pakistan explained their abstentions in the SC vote by rejecting the need for mandatory measures against Sudan.[201] Russia's opposition to intervention is arguably connected to concerns about Chechnya, but it also has substantial commercial interests in the region, especially since it has sold around 150 Million USD worth of military equipment to Sudan, and in 2002, signed a $200 million oil deal with the Sudanese government.[202] It is obvious that Russia might fear that Sudan might default its payments. The Sudanese government is failing to

[196] Paul D. Williams and Alex J. Bellamy, The Responsibility To Protect and the Crisis in Darfur, Security Dialogue 2005; 36; 27
[197] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/386/26/PDF/N0438626.pdf?OpenElement
[198] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement
[199] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/616/89/PDF/N0461689.pdf?OpenElement
[200] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/445/52/PDF/N0744552.pdf?OpenElement
[201] Supra note 80, Alex J. Bellamy
[202] http://www.globalpolicy.org/component/content/article/198/40304.html

meet its responsibility and geopolitics let the international community fail in its obligations. In this sense, what does R2P mean to Darfur? Khartoum does whatever it pleases and claims its sovereign right. The government has launched numerous major offensives against civilians after the Darfur Peace Agreement (DPA) was signed in May 2006, and has repeatedly detailed plans for a UN peacekeeping force in Darfur. It expelled the special representative of the Secy. Gen. Jan Pronk from Sudan in October 2006.[203] As some scholar has observed, "The international community's failure to solve the Darfur crisis is rooted in the age old dilemma that plagues international law and, by consequence, the R2P doctrine: How do you ensure that renegade states follow the rules?"[204]

In this regard regional organizations are better placed to play an active role. African Union has a major role to play. AU has been commended for facilitating the N'djamena Humanitarian Ceasefire Agreement signed on 8 April 2004. AU has been playing an active interventionist role, which is a fundamental shift from its policy of non interference in the internal affairs of the member states. Article 4(h) of the AU Constitutive act clearly stipulates "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity."[205]

Former UN Secy. Gen Kofi Annan stressed time and again that the principle of state sovereignty cannot be used as a shield for human rights abuses. With respect to the dilemma of R2P application to the Darfur case one anonymous writer said, "As legally correct and morally compelling as humanitarian intervention is under the R2P doctrine, the ongoing crisis in Darfur demonstrates that state sovereignty can still trump human rights."[206] The same scholar further said, "A test of R2P reveals that the responsibility to protect remain an embryonic doctrine that is by no means self executing and, at present, lacks the dexterity to overcome real world politics."[207] Looking at the time line from 2003-2010, the world community should be ashamed

[203] http://www.sudanreeves.org/Article131.html
[204] Anonymous, Ensuring a responsibility to protect, available at http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=432
[205] http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm#Article4
[206] Supra note 204, Anoymous
[207] Id.

of its failure to constructively act in Darfur. Strategic interests should be kept aside and help should reach out to those in need. As Micheal Glennon writes, "If judged by the suffering of non combatants, the use of force can often be more humane than economic sanctions, which starve more children than soldiers."[208]

RECOMMENDATIONS

V. Establishing a Security Council Sub-Committee on R2P

The ICISS in its report stated, "if international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that the central role of the Security Council will have to be at the heart of that consensus. 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."[209] At the apex of the world's collective security machinery, the Security Council is, in theory, equipped to captain collective responses to mass atrocities.[210] The Council has discharged its functions in numerous ways through various resolutions. These resolutions bind every nation in the world. In order to efficiently discharge its responsibilities the Council has established various subsidiary bodies. For example in order to bring the persons responsible for war crimes and Genocide the Council has established the ICTY and ICTR. It has working group on children and armed conflict, a working group on documentation, a UN compensation Commission, 1540 committee, counter-terrorism committee, sanctions committee and a peace-building Commission.[211] These subsidiary bodies function according to their mandates as outlined in the respective SC Resolution.

One body that seems to be very much in close with the ideals of the R2P is the Peace Building Commission. In 2005 the General Assembly through its Resolution A/60/180 and the Security Council Resolution 1645 established the UN Peace Building Commission (PBC).[212] The

[208] Supra note 177 Micheal J. Glennon
[209] Supra note 25 ICISS report
[210] Neville F. Dastoor, The Responsibility to Refine: The need for a Security Council Committee on the Responsibility to Protect, 22 Harv. Hum. Rts. J. 25 2009
[211] www.un.org/sc
[212] See http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/498/40/PDF/N0549840.pdf?OpenElement,

mandate of the Commission include: marshalling resources and to advice on and propose integrated strategies for post-conflict peace building and recovery.[213] The PBC focuses attention on reconstruction, institution-building and sustainable development, in countries emerging from conflicts. It is specifically mandated to:[214]

- Propose integrated strategies for post-conflict peacebuilding and recovery;
- Help to ensure predictable financing for early recovery activities and sustained financial investment over the medium- to longer-term;
- Extend the period of attention the international community gives to post-conflict recovery;
- Develop best practices on issues that require extensive collaboration among political, security, humanitarian and development actors.

However, the Commission focuses specifically on post conflict rebuilding. There is a need for a more effective body that could work together with the other UN mechanisms and bring in more information to the SC in order to help it arrive to a decision as to whether a situation merits to invoke the R2P principle. That body should be able to connect the bridges in the flow of information within the UN bodies and help in analyzing preventive strategies.

R2P's main focus is to develop preventive measures. One good solution could be – creating a Security Council Sub-Committee on R2P, suggests Dastoor.[215] The sub-committee would be tasked with monitoring and analyzing situations worldwide where the application of R2P might be appropriate.[216] This hypothetical sub-committee could help bridge all the institutional mechanisms in the UN to the Security Council. The committee would consist of experts in the field who would work in collaboration of the Secy. Gen., the office of the special adviser on the prevention of genocide, and mass atrocities, the special adviser to Secy. Gen. on Responsibility to protect and the UN Peace Building Commission. The sub-committee would help in building a framework for prevention, for reaction including using of force and rebuilding. The Security

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http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/654/17/PDF/N0565417.pdf?OpenElement

[213] http://www.un.org/peace/peacebuilding/qanda.shtml

[214] Id.

[215] Supra note 210, Neville F. Dastoor,

[216] Id.

Council should accept the findings of the committee and should not use veto power otherwise, it would undermine the whole UN system. Such a committee would also avoid the risk of unilateral intervention and ensure a consistent application of R2P.

W. Refraining from the threat and use of Veto

Interestingly the Security Council has become increasingly interested in human rights since 1990. It has declared that human rights violations are a threat to international peace and security. The UN resolution on R2P provided that the Security Council should be the first port of call. However, Security Council is sometimes not in a position to act or is deadlocked. This happens because of the use of the veto by any one of the permanent five members. UN reform has been in debates for a while now. One of the many reforms proposed is the reform of the Security Council. Developing countries have demanded for an expansion of the permanent members which represents the world's most powerful five. They say that the composition of the Security Council is undemocratic and underrepresented.[217] The veto power of the P5 has been described as the "bane" of the Security Council and a tool of inaction that limits its effectiveness and causes dysfunction.[218] On the other hand, some P5 members believe that the veto represents the sustaining force of the system of collective security.[219]

The International Commission on Intervention and State Sovereignty has called for the permanent five to refrain from the use of veto when situations such as mass atrocities are on the floor. This power of veto was given to the powerful five in 1945 by the members of the United Nations.[220] The permanent members will never agree to any proposition that will deprive them of this privilege. Scholars such as Thomas G. Weiss suggest us not to waste our energies in mindless call for equity and eliminating veto, and say that there exists no consensus about the exact shape of the SC or the elimination of veto.[221] He says a Security Council of 21 or 25 would

[217] http://news.bbc.co.uk/2/hi/talking_point/2788763.stm

[218] The Responsibility to Protect (R2P): Moving the Campaign Forward, UC Berkely: Human Rights Center, 2007, available at http://www.escholarship.org/uc/item/7ch761zb

[219] Id.

[220] One could argue the countries had no other option than accept veto

[221] Supra note 174 Thomas G. Weiss,

hardly improve effectiveness.[222] Even though there is no clear understanding about reform, the Security Council when it comes to matters related to mass atrocities, or human rights violations must refrain itself from using veto. Creating a Sub- Committee for the SC on R2P could to a large extent ease veto problem. It would assist the SC in coming to a decision based on its independent and fair evaluation and assessment arrived after analyzing the information available from other UN bodies.

X. Strengthening UN Early warning and Preventive Diplomacy mechanisms

Early warning mechanism essentially involves collecting information, making risk assessment, detailed monitoring and analysis of selected situations of concern and then dissemination of information to those who could take preventive steps.[223] The early warning function could be defined as the collection, analysis and communication of information about escalatory developments in situations that could potentially lead to genocide, crimes against humanity or massive and serious war crimes far enough in advance for relevant UN organs to take timely and effective preventive measures.[224] Former Secy. Gen Kofi Annan made early warning a major part of his proposals and initiatives regarding the prevention of genocide and made early warning as a central part of the mandate of the Special Adviser on the prevention of genocide.[225] The Carnegie Commission on Preventing Deadly Conflict said, "Early warning and early response is one of the measures to avoid imminent violence."[226] It said, "The capacity to anticipate and analyze possible conflicts is a pre requisite for prudent decision making and effective action and should be constantly updated contingency plans for preventive action."[227] The early warning mechanism is based on the study and analysis of the relevant information in a conflict zone. It helps us understand the conflict, the degree of its intensity; the stake holders involved and direct us to take prudent decision. Collection and dissemination of information is

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[222] Id.

[223] Lawrence Woocher, Developing a Strategy, Methods and Tools for Genocide Early warning, 2006, available at http://www.un.org/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf "The early warning function entails three main components namely; Periodic global risk assessment, ongoing situation monitoring and communication of early warning information"

[224] Id.

[225] Id.

[226] Preface and executive summary, Carnegie Commission on Preventing Deadly Conflict Final Report, Carnegie Corporation of New York, 1997

[227] Id.

vital to build an effective early warning mechanism. Information should be collected on every element of the crime of genocide such as; intent, hate speech, intent to exterminate one entire group. Early warning is included in the mandate of the Special Adviser on the Prevention of Genocide and Mass Atrocities; it should rather have been kept outside his mandate. May be the office of the High Commissioner on Human Rights should create a body to collect information. The special adviser should be the focal point.

UN has great sources from which it could receive valuable information. NGO, intergovernmental agencies and various UN bodies play vital role and have information that could be used to make an early assessment of a conflict situation and chalk out a plan for early action. The need is to filtering and interpreting the information.[228] It becomes problematic when the information received is not reliable or when there is a lack of political will to act. Nevertheless, the politics and bureaucracy within UN could grossly affect the early warning mechanism. One of the major problems of early warning is, "not a lack of warning but the fact that governments often ignore an incipient crisis or take a passive attitude towards it until it escalates into a deadly struggle or a major catastrophe."[229] Governments should assist in the flow of information to the Special Adviser as he is the focal point.

Early warning mechanisms should help us in early recognition of a conflict and take early action. The motive behind is prevention is better than cure. Early warning capacities will enhance the chances of better implementation of R2P.[230] The world summit also provides that the member countries should help in building early warning mechanisms.

Y. Establishing UN Military

UN is dependent on its member countries for military personnel. Every time the Security Council votes to deploy peacekeepers the UN has to appeal for troops and equipments from

[228] Ted Robert Gurr in Gavan Duffy et al., An Early Warning System for the United Nations: Internet of Not? Mershon International Studies Review, 39 (2), 1995 Cited in Supra note 204

[229] George Cited in Fen Osler Hampson, Preventive Diplomacy at the UN and Beyond, in Hampson & Malone, 2002a (139-158)

[230] Edward C. Luck, Remarks To The General Assembly, On the Responsibility to Protect, United Nations 23 July 2009

scratch.[231] As Rachman observes, “Creating a permanent UN capability would mean that the UN could intervene much more quickly. It would also make it more likely that forces assigned to the UN follow the same military doctrines. It would also help address chronic shortages of equipment.”[232] Brian Urquhart proposed for an UN volunteer military force. He said "a timely intervention by a relatively small but highly trained force, willing and authorized to take combat risks and representing the will of the international community, could make a decisive difference in the early stages of the crisis."[233] He further said, “such an international force would be under the exclusive authority of the Security Council and under the day-to-day direction of the secretary-general."[234] However, establishing the military force could be a difficult task. It could meet operational difficulties such as financial constraints. The question also arises as to what kind of situations merit deployment of UN force. Every country would not accept every situation to justify UN intervention and furthermore the vexing issue of strengthening the credibility of the Security Council needs to be addressed. Nevertheless, one major advantage of having a standing UN military force is that the UN can immediately deploy troops instead of waiting for troops from member countries. This would save time and money and ensure effectiveness.

Z. Office of the Special Adviser on the Prevention of Genocide and Mass Atrocities and Office of the Special Adviser on Responsibility to Protect

The office of the Special Adviser on the Prevention of Genocide and Mass Atrocities plays a pivotal role. The Office was first established by the former Secy. Gen. Kofi Annan as a response to the recent failures of the United Nations to take effective preventive action against genocide.[235] The Special Adviser acts as a bridging link between massive and systematic violations of human rights and threats to international peace and security.[236] In 2005 the heads of

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[231] Gideon Rachman, Why the World Needs a United Nations Army, available at http://www.ft.com/cms/s/0/325b3c42-7558-11de-9ed5-00144feabdc0.html?catid=134&SID=google

[232] Id.

[233] See Brian Urquhart, A UN Volunteer Military Force: Four Views, The New York Review of Books, Vol. 40 No. 12 (1993) available at http://www.nybooks.com/articles/2521

[234] Id.

[235] See Payan Akhavan, Review of OSAPG, 2005, In operating paragraph 5 of resolution 1366, the Security Council: expresses its willingness to give prompt consideration to early warning or prevention cases brought to its attention by Secy. Gen and in this regard, encourages the secy. Gen. available at http://www.un.org/preventgenocide/adviser/pdf/Payan%20Akhavan,%20Review%20of%20OSAPG,%20Nov%202005.pdf

[236] Id.

the governments endorsed the mandate of the Special Adviser.[237] Special Advisor's appointment is viewed as an opportunity to enhance the effectiveness of the United Nations in preventing genocide and similar crimes.[238] The Special Adviser is instructed to "act as a mechanism of early warning to the Secy. Gen., and through him to the Security Council, by bringing to their attention potential situations that could result in genocide."[239]

The Special Adviser's Mandate includes the following:[240]

- To collect existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide;
- To act as a mechanism of early warning to the Secretary-General, and through him to the Security Council, by bringing to their attention situations that could potentially result in genocide;
- To make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide;
- To liaise with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations' capacity to analyze and manage information regarding genocide or related crimes.
- To seek and receive information relevant to the protection of genocide from all UN bodies, in particular early-warning information, and act as a catalyst within the UN system, making recommendations for effective prevention responses by the Secretary-General, the Security Council, and other UN partners in a comprehensive system-wide process, and supporting these partners in undertaking preventive action in accordance with their mandates and responsibilities.

The Special Adviser on the Prevention of Genocide should be the focal point. Juan Mendez was the first Special Adviser. Presently, Francis Deng was appointed as the Special Adviser to

[237]Supra note 19 World Summit Outcome Document para140
[238] See Supra note 235, Pakhvan
[239]http://www.un.org/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf
[240] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/424/63/PDF/N0442463.pdf?OpenElement

the Secy. Gen., Ban Ki Moon. With much controversy his mandate has been increased from genocide alone and included mass atrocities. In order to implement his mandate, the Special Adviser works with an internal UN consultative group comprising of OCHA, UNDP, UNIFEM, DPKO, DPA, UNHCR, WFP, WHO, and UNICEF.[241] Deliberating his mandate, the Special Adviser has developed an Analysis Framework. The Analysis Framework comprises eight categories of factors that the OSAPG uses to determine whether there may be a risk of genocide in a given situation. The factors include: Inter group relations, including record of discrimination and/or other human rights violations committed against a group, Circumstances that affect the capacity to prevent genocide, Presence of arms and armed elements, Motivation of leading actors in the State/region; acts which serve to encourage divisions between national, racial, ethnic, and religious groups, Circumstances that facilitate the perpetration of genocide, Genocidal Acts, Evident to destroy in whole or in part, Triggering factors.[242]

The need is that the different offices within the UN should cooperate with the Special Adviser. The Security Council should especially cooperate with him. Furthermore, if a UNSC Sub-Committee on R2P is created then that office should work in close collaboration with the office of the Special Adviser.

The Secy. Gen. Ban Ki Moon appointed Edward C. Luck as the Special Adviser on Responsibility to Protect. His role primarily includes conceptual development and consensus building, to assist general assembly to continue consideration on this crucial issue.[243] This clearly points out to the fact that the Special Adviser is more like an ambassador of R2P. He should adopt means to convince to adopt R2P at regional and national levels. He should participate in political dialogues at all levels. He shares equal burden along with the Special Adviser on the Prevention of Genocide. He is the spokesperson of the Secy. Gen. on this issue. He should help countries understand the concept and build consensus on R2P and further lobby with the Security Council and respective governments to put R2P in to practice. His goal is to breed a culture of

[241] See the Mandate of the Special Adviser, available at http://www.un.org/preventgenocide/adviser/mandate.shtml

[242] http://www.un.org/preventgenocide/adviser/pdf/OSAPG%20AnalysisFrameworkExternalVersion.pdf

[243] See SG/A/1120, http://www.un.org/News/Press/docs/2008/sga1120.doc.htm

responsibility among states and among other members of the UN and build the required political will.

The whole machinery could work this way: The Office of the High Commissioner establishes an office for early warning mechanism, a preliminary analysis is done and the information is sent to the Special Adviser on Prevention of Genocide, and to the Special Adviser on Responsibility to Protect. Both these office conclude their findings through their expert knowledge if the situation merits application of R2P. The information is then sent to the hypothetical Security Council Sub Committee on R2P. Once the information is sent to the hypothetical committee, the two Special Advisers should take proactive role in informing the public and governments about the developing conflict. Assuming that the Sub Committee agrees with the analysis provided, the SC should invoke R2P and give respective directions.

CONCLUSION

R2P as stated earlier in this thesis is a novel concept. If invoked rightfully it could help us prevent genocides, mass atrocities and crimes against humanity. As Dorota Giercyz observes, "Genocides and crimes against humanity are considered crimes under all circumstances, whether in time of peace or war; neither immunities nor status of limitations apply; they fall under universal jurisdiction with an obligation of local trial or extradition; they involve increased international obligations on states to cooperate; and are not subject to amnesty."[244]

The concept of sovereignty is gradually being redefined and the R2P doctrine has made considerable contribution in this regard. As Kofi Annan notes, "State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa."[245] Sovereignty entails responsibility. The R2P doctrine is a major achievement for human rights and should not be seen as a failure. Like much of contemporary international law it needs time to evolve to achieve its maximum potential.[246] As an anonymous scholar has observed, "R2P reflects the ongoing transformation of traditional international law norms by enabling international law to address a moral imperative regardless of international borders. International Law is increasingly placing a greater responsibility on states with respect to the rights of citizens and even those outside a state's territory and control."[247]

The beauty in R2P lies in the fact it does not negate humanitarian intervention but maintains that it should be used as a last resort. Many scholars have opined that, howsoever it might be rejected, armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished. NATO's action though considered illegal was determined to be legitimate. Protection of the human rights of the people

[244] Supra note 90 Dorota Giercyz
[245] Kofi Anna, Two Concepts of Sovereignty", The Economist, 18 September 1999, available at http://www.un.org/News/ossg/sg/stories/kaecon.html
[246] Supra note 204
[247] Id.

overpowered all other principles. Honoring Human Rights attained supreme primacy. Kofi Annan did not condemn NATO airstrikes outright. He rather posed an important challenge to the world community and the world summit in 2005 seems to have clarified the doubt. The countries have agreed that they have a *sovereign responsibility*. They once again agreed there is a watchdog called SC that can invoke the R2P principle and intervene in the state. R2P principle also works as blame and shame thing. When R2P is invoked it makes it clear that the offending country is indulging in serious human rights violations.

It might seem that countries have matured enough to understand their rights and obligations. However, politics could be dirty business. R2P calls for an action against these dirty politics. It urges countries to unite together to curd these gross human rights violations. Adopting R2P, recognizing a nation's sovereignty as responsibility, agreeing to the fact that with authority comes responsibility is in itself a great achievement. R2P must live and it must live long. There are efforts to kill this novel doctrine and we need to protect it by invoking in a rightful manner and by applying it to the crimes provided in the doctrine.

One of the best ways to do this is that the Security Council with its vast powers and influence should actively adopt the measure of Preventive Diplomacy. Diplomacy helps and saves time, money and resources. The Council should also make it a point to use force as a last resort. The permanent members need to understand the major responsibility they shoulder. However, at the same time, they often do not wish to use their resources in countries that do not matter to them. This must not be the case. The Council should act in a uniform manner keeping the strategic interests of the permanent members aside. This could be a difficult goal but this is the only way. The Council should have complete analysis of the information and decide on the situation on a case by case basis. It should function as global police.

Another option is to get a grip of its resolutions. The problem, as many have seen, is that after it authorizes a resolution, the Council leaves it to the countries or regional forces concerned for action. The need is for the Security Council to be completely involved without losing a grip

of the situation. The Council should make its objective precise and clear during authorization, it should also limit the duration of such authorization in order to avoid the abuse of its resolutions. It should require the member states concerned to report more extensively and more frequently on how the authorized operation is carried out. Once it gets a clear signal from the UN bodies and the hypothetical sub-committee, the Council should take effective preventive measures by facilitating dialogue between the concerned parties. The Council should make itself more clear.

The Council should cooperate and work in coalition with the Secy. General, the Special Adviser on the Prevention of Genocide and Mass atrocities, the Special Adviser on Responsibility to Protect, and the Commissioner on Human Rights. The Council is expected to play a pivotal and more proactive role. The Council also needs to work in a transparent manner. In the current world order there is no alternative but to make the Council more efficient. If the Council does not work at most pressing times, a critical evaluation of the Council's work should be undertaken.

However, events unfolding in Darfur confirm that geo-politics play an important role. Countries are concerned about their own material and strategic interests and political power, even though millions might be losing their lives. History proves that superpowers are more likely to react when there is a direct threat to their interests, but if the situation does not threaten them, they might act but at a snail's pace. There is an urgent need to help many people in places like Darfur where many women and young girls are being targeted and raped, and the state is clearly guilty of being complicit in such crimes. R2P provides the international community a powerful compelling argument for proactive involvement.

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