UNDERSTANDING THE CONCEPT OF THE RESPONSIBILITY TO PROTECT FROM THE HUMANITARIAN MILITARY PERSPECTIVE

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Table of Contents

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DISSERTATION DECLARATION FORM

I hereby declare that the work titled "Understanding the concept of the responsibility to protect from the humanitarian military perspective" is my original work. To the best of my knowledge, this dissertation does not comprise of any works set in print or penned by another person without suitable reference or acknowledgement being accorded to them.

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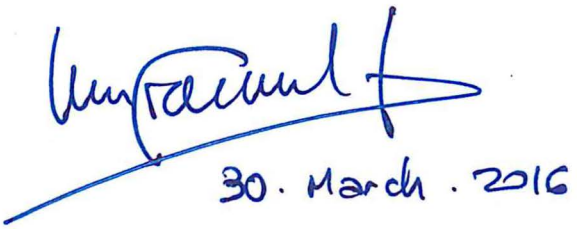

ABSTRACT

The aim of the research is to seek to show the contribution the concept of R2P has brought about in the stoppage of magnitude acts of violence and the need to safeguard the rights of the human populations that are susceptible to human rights violations.

This research postulates an overview of the concept of R2P elucidating the reason as to why the notion was devised, what are the core issues in which the notion of R2P seeks to tackle along with demarcating the principles of the conception. It also stipulates the evolution of the concept of R2P as of the ICISS Report of 2001 to its support at the UN World Summit in 2005 and in the UN Reports. Moreover, the study provides some background context on some of the prevailing theoretical foundations. The research looks into the current status of R2P as an international legal concept by looking further at case studies of some of its most recent applications or evocations in Kenya and Libya preceded by an examination of humanitarian intervention in Rwanda and Kosovo in 1999 before the concept bore fruition. Essentially, it marks out what the research has contributed to the international sphere.

The research predominantly employed a comparative research methodology as depicted in chapter 3 centring on analysis of the concept of R2P, the rhetoric of distinguished scholars in the field of international law, the UN documents that are available on the internet, as well as other relevant articles.

The research concluded that what the R2P is trying to achieve is not to provide a mechanism to intervene in humanitarian situations but rather intervention in those cases in which there is a failure of the State to protect against the four mass atrocity crimes irrespective of how that failure has arisen. The doctrine of R2P stresses that a given situation where the state does not or "fails to protect" the rights of the citizens of the state, the international community is entitled to intervene and afford protection on these populations by invoking the concept of R2P in carrying out a humanitarian intervention.

The main recommendation is to establish a global consensus. This is key for the efficacy of the conception in practice. What's in store for this conception rests in achieving grander consensus.

List of abbreviations

AU	- African Union
GA	- General Assembly
ICISS	- International Commission on Intervention and State Sovereignty
ICC	- International Criminal Court
ICJ	- International Court of Justice
IICK	- Independent International Commission on Kosovo
JEEAR	- Joint Evaluation of Emergency Assistance to Rwanda
KLA	- Kosovo Liberation Army
NATO	- North Atlantic Treaty Organization
P5	- Permanent Five members
R2P	- Responsibility to Protect
RGA	- Rwandan Government Army
RPF	- Rwandan Patriotic Front
SC	- Security Council
SG	- Secretary-General
UN Charter	- Charter of the United Nations
UNAMIR	- UN Mission for Rwanda
UNGA	- UN General Assembly
UNSMIL	- UN Support Mission in Libya

List of cases

Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Serbia and Montenegro](2007)

Armed Activities on the territory of the Congo [Democratic Republic of Congo v Uganda](2005)

Corfu Channel Case [United Kingdom v Albania](1949)

Case Concerning Military and Paramilitary Activities In and Against Nicaragua [Nicaragua v United States](1986)

The S.S "Lotus" case [France v Turkey](1927)

Chapter 1 – The fruition of the concept of R2P

This chapter postulates an overview of the conception of "Responsibility to Protect" (R2P)elucidating the reason as to why the notion was devised, what the core issues that the notion of R2P seeks to tackle as well as demarcating the principles of the concept. It also stipulates evolution of the concept of R2P as of the ICISS Report of 2001 to its support at the UN World Summit in 2005 and in the UN Reports. This preliminary chapter is meant to provide a foundation within the field of international relations upon which it fosters the deeper understanding of the issues integral in the espousal of R2P.

BACKGROUND

In the 1990s,there was an upsurge of crises touching on humanitarian issues. The crises included the mass displacement of people, genocide, and ethnic cleansing. Essentially, the world was thronged with humanitarian catastrophes. In cases of Somalia, the military intervention was authorised by the UN in order to afford protection on the vulnerable human populations. In Kosovo, intervention that was not authorised took place and in Rwanda there was no intervention until later on. Therefore, what lies beneath the discourse analysis on humanitarian intervention is an apparent rigidity between the pre-eminence of the concepts of international law of sovereignty, and non-intervention and ensuring respect and protection of fundamental human rights.

Intervention that takes the fashion of a "threat or use of force" is in direct clash with Article 2 (4) of the UN Charter which requires that member states desist *"from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the UN"*.[1] The international community recognizes that threat can be just as coercive as the use of actual force. The prohibition of use of force was depicted in the Corfu Channel Case (1949) and the Case Concerning Military and Paramilitary Activities In and Against Nicaragua (1986) thus it's ruminated to be a *jus cogens* rule. However, there are exceptions to this: the right under Article 51 of the UN Charter of a state to enforce the use of self-defence, and SC's right governed under Article 42 to consent to the use of force *"to maintain or restore international peace and security"*.

[1] Charter of the United Nations, 1945 <http://www.un.org/en/sections/un-charter/chapter-i/index.html> on 18 December 2015.

The traditional Westphalian concept of sovereignty point towards not interfering in the state affairs of a state by another state as encapsulated in Article 2(7) of the UN Charter which postulates that *"Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdictions of any state or shall require the Members to submit to such matters to settlement under the present Charter...."*[2]Under modern international law, sovereignty connotes "the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law."[3]Quintessentially, sovereignty infers that states do not identify a superior power. The principle that all states are equally sovereign irrespective of proportional size or wealth is a foundation stone of the UN Charter.[4]

The doctrine of non-intervention is outlined as "the determination by a nation to refrain from interfering in the affairs of other nations or those of its own political subdivisions". In the Nicaragua case, ICJ held, "the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference..."[5] In the Democratic Republic of Congo v Uganda, the court observed that Nicaragua "had made it clear that the principle of non-intervention prohibits a state to intervene directly or indirectly, with or without armed force, in support of the internal opposition within a state".[6]

At first instance, states were hesitant to allude to human rights protection as a justification for intervening in another state. There are instances of hesitance even when there was repression within the target state, and subsequent massive flow of refugees that would have seemed to provide a ready-made justification for doing so. First, the Indian invasion of East Pakistan in 1971 which resulted to the birth of Bangladesh; second, the Vietnamese invasion of Cambodia in December 1978; and third, the Tanzania invasion of Uganda in 1979. In each of these cases, the intervening state felt that a claim to be acting on the basis of self-defence as spelt out

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[2] UN Charter, <http://www.un.org/en/sections/un-charter/chapter-i/index.html> on 18 December 2015.

[3]Steinberger H, 'Sovereignty', Max Planck Institute for Comparative Public Law and International Law, Encyclopaedia for Public International Law, vol 10, 1987 in Pelizzon A, Sovereignty Guidelines.

[4]Article 2(1), UN Charter <http://www.un.org/en/sections/un-charter/chapter-i/index.html> on 18 December 2015.

[5] ICJ Reports 1986, 106, para.202.

[6] ICJ Reports 2005, para. 164.

in Article 51 was an easier and better defence in regards to the UN Charter; "and there was probably also a thought that to sanctify a doctrine of humanitarian intervention would be to store up trouble for themselves or their 'friends'."

Intervention thus takes place "when a state interferes in the relations of other states without the concerns of one or both of them, or when it interferes in the domestic affairs of another state irrespective of the will of the latter for the purpose of maintaining or altering the actual condition of things within it". Intervention is deemed to infringe upon the sovereignty of a state whilst dogging for "humanitarian objectives". The question that crops up is whether collective humanitarian intervention is an invasion of sovereignty or it's a preservation of human rights. The growth and advancement of international human rights and international humanitarian law is considered to have bespoken the 'old-fashioned' sovereignty conception. This is because it is proposed that the rights of human beings are not reflected on as a solely national affair anymore thus the conception of sovereignty can't be operated by states to screen themselves from delineating themselves from the responsibility of protecting the rights of the vulnerable populations. As a consequence, when "sovereignty comes into conflict with human rights, the latter must prevail".

In 2011, there was an intervention in Libya as a subsequent of the 1973 Resolution of the UNSC. This was the first adoption of the R2P doctrine in a humanitarian military intervention. There were a number of criticisms that the intervention faced especially from the Western powers contending that "NATO overstretched its UNSC mandate by orchestrating regime change for the sake of their own national interests".[7]This was preceded by the non-intervention in Syria; Rwanda where the UNSC intervened too late and 800,000 were slaughtered and in Srebenica-Bosnia where thousands of lives were lost due to the failure by the UN to protect those lives at the UN "safe areas"; Kosovo where a UNSC resolution had not been passed but NATO had intervened anyway; this released a contentious discussion as to whether the intervention undermined the UNSC and whether the intervention could be justified. This has resulted to the cropping up of questions such as "when, how, whether and

[7] China, Russia, India and Brazil are among the most vocal critics of the Libya intervention: 'A Canadian Perspective' <http://ccr2p.org/?p=616>on 22 October 2015.

under whose authority the international community should intervene to prevent or stop large scale humanitarian crises".

After the NATO intervention in Kosovo, the former SG, Kofi Annan ruminated on the catch-22 situation on humanitarian intervention. *"On the one hand,''* he asked, *"Is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?"*[8] Annan challenged the international society to avoid *"future Kosovos"* and *"future Rwandas"*.

The events in Kosovo set off a debate about how to deal with humanitarian crisis in the future and thus humanitarian intervention evolved into a redefinition of "sovereignty as responsibility" and the "Responsibility to Protect".

ICISS' report on Responsibility to Protect

In 1999 and 2000 at the UNGA, Annan was dissatisfied about the answers to questions in regards to humanitarian intervention and appealed for *"the international community to try to find, once and for all, a new consensus on how to approach these issues."*

In an attempt to address the aforementioned questions, the Canadian government instituted the ICISS in 2000. The commission co-chaired by Gareth Evans and Mohammed Sahnoun, was assigned 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 opinion around the world, to bring back a report that would help the Secretary-General and everyone else find some new common ground"*[9]

The commission posited that states have a duty to afford protection toits citizens.This stems "on its interpretation of what state sovereignty is and what rights, privileges and responsibilities it comes with". The commission set in print the report *The Responsibility to Protect* (R2P) in 2001. It was an endeavour to "set out a framework

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[8]Annan K, 'Two Concepts of Sovereignty', 1999, 49 in Bellamy A, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit'.

[9]http://www.iss.europa.eu/publications/detail/article/syria-the-brics-must-help-enact-the-responsibility-to-protect/ on 22 October 2015, ICISS, The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, 2001, at VII.

for when, how and whether the international community can intervene in another state for human protection purposes in order to generate greater consensus and unity on these extremely nay saying issues".[10]ICISS' report state that sovereignty of a state necessitates a "dual responsibility", that is, the duty to afford protection of the fundamental rights of its populations and protect the latter from mass killings[11], and the international community also has the responsibility to ensure that the state protects its citizens from "suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, or is in fact the perpetrator..." if the state does not, "...the principle of non-intervention yields to the international responsibility to protect"[12]

As tersely stated by Badescu and Bergholm,

> *The central normative tenet of R2P is that state sovereignty entails responsibility and, therefore, each state has a responsibility to protect its citizens from mass killings and other gross violations of their rights. However, if a state is unable or unwilling to carry out that function, the state abrogates its sovereignty, and the responsibility to protect devolves onto international actors.*[13]

The ICISS report stipulated that there should be a threshold for the international community to afford protection on the populations of another state employing the channels of military intervention. This should be:-

> *"Large scale loss of life, actual or apprehended, ...which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape."*[14]

The report outlines three responsibilities in the R2P conception:-

1. **Responsibility to Prevent**

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[10] ICISS, The Responsibility to Protect, 2001, at XI.
[11] ICISS, The Responsibility to Protect, 2001, at XI.
[12] ICISS, The Responsibility to Protect, 2001 , at XI.
[13] Badescu C and Linnea B, 'The Responsibility To Protect and the Conflict in Darfur: The Big Let-Down', 288, 2009 in Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses, Paper 2532, 2014.
[14] ICISS, The Responsibility to Protect, 2001, at XII.

It comprises the duty to "address both the root causes and the direct causes of internal conflict and other man-made crises putting populations at risk."[15]

2. Responsibility to react

When there is failure of deterrence "to resolve or contain the situation, and when a state is unable or unwilling to redress to situation, then interventionary measures by other members of the broader community of states may be required."[16] This includes forcible channels that are not military in nature such as "political, economic and judicial sanctions"; military action should be contemplated as the last resort. However, there must be exclusions to the concept of non-intervention in severe situations, for example "violence which so genuinely shock the conscience of mankind, or which present such a clear and present danger to international security, that they require coercive military intervention."[17]

3. Responsibility to rebuild

It involves a post intervention strategy that is deemed as being of vital importance. Rebuilding measures vary on a case to case basis but generally inclusive of "peace building and/or state-building efforts".[18]

The report also proposes a six-criteria. These conditions have been tailored from the "Just War Theory", especially the theory's conception of *jus ad bellum*. The Commission isn't stipulating that there should be a generally consented list in the international scene, however, to a certain extent the criteria could try to link the "rhetoric and the reality". They include[19]:-

i. Just cause

If an intervention needs to be considered reasonable, it should be a reaction levelled at stopping "large scale loss of life" or "large scale ethnic cleansing" – "actual or apprehended".

ii. Right intention

[15] ICISS, The Responsibility to Protect, 2001, at XI.
[16] ICISS, The Responsibility to Protect, 2001, at 19.
[17] ICISS, The Responsibility to Protect, 2001, at 31.
[18] ICISS, The Responsibility to Protect, 2001, at 39.
[19] ICISS, The Responsibility to Protect, 2001, at 32.

The intervention's principal rationale should be to "halt or avert human suffering" as well as to afford protection to the target state's citizens who were the main reason for intervening in the state in the first place.

iii. Last resort

Every methods employed which are not military in nature to stop the magnitude acts of violence should have been looked into markedly. It should be judicious for trusting that the other channels that could be employed will be inadequate.[20]

iv. Proportional means

"The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question."[21]

v. Right authority

The commission underscores that the UNSC should each time be the chief source of approval or power to authorize for both a military and non-military intervention when the international community is faced with a humanitarian crisis. The commission also outlines two other possible sources in situations where the UNSC cannot come into consensus; they include: the UNGA and "regional organizations" such as NATO and the AU. The UNGA's 'United for Peace' procedure of 1950 was set up to tackle cases where the UNSC, due to an impasse amongst the members of the permanent five (P5) is unsuccessful to "exercise its primary responsibility for the maintenance of international peace and security."[22]This necessitates" a two-thirds majority" in the GA and, if invoked, would be a source of authority for conducting an intervention even though the P5 failed to reach an agreement.

vi. Reasonable prospects for success

It implies that if there is no definite protection, or if the aftermath of the intervention prevails over the advantages, that is, if the intervention has a higher probability to create more negative effects than non-intervention, it is not reasonable thus should not be supported.

The purpose of the commission by laying down the conditions is to:-

[20]ICISS, The Responsibility to Protect, 2001, at 36.
[21]ICISS, The Responsibility to Protect, 2001, at 37.
[22]ICISS, The Responsibility to Protect, 2001, at 53.

> "...strengthen the order of the states by providing for clear guidelines to guide concerted international action in those exceptional circumstances when violence within a state menaces all peoples, it is not to license aggression with fine words, or to provide strong states with new rationales for doubtful strategic designs."[23]

The Report concluded by encouraging the international community to welcome the notion of R2P as a basic element in the code of global citizenship and it continued:

> "Meeting this challenge is more than a matter of aspiration. It is a vital necessity. Nothing has done more harm to our shared ideal that we are all equal in worth and dignity, and that the earth is our common home, than the inability of the community of states to prevent genocide, massacre and ethnic cleansing. If we believe that all human beings are equally entitled to be protected from acts that shock the conscience of us all, then we must match rhetoric with reality, principle with practice. We cannot be content with reports and declarations. We must be prepared to act. We won't be able to live with ourselves if we do not."

The principal mission of the report by the ICISS to create "global and international consensus" has yet to happen. This is vital for the legality and validity therefore the efficacy of the conception in practice. The key to the future of this conception lies in ensuring and creating grander consensus.

The 2005 World Summit Outcome Document

From the time when the ICISS made available the report to the public, R2P has been "widely cited, endorsed, criticised, and amended". As both Pattison[24]and Hehir[25]draw attention to, there are certain principal dissimilarities between the ICISS report and the Outcome Document at the 2005 World Summit in New York. Firstly, while the ICISS doctrine postulates that R2Ptakes a shift "from the state to the international community" in events where the state is "unable or unwilling" to afford protection to its populations, the Outcome Document changed it to situations where

[23]ICISS, The Responsibility to Protect, 2001, at 35.
[24]Pattison J, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?*, Oxford University Press, Oxford, 2010, 14, in Heinze E, 'Humanitarian Intervention, the Responsibility to Protect, and Confused Legitimacy'.
[25]Hehir A, *Humanitarian Intervention: An Introduction*, Palgrave Macmillan, New York, 2010, 118-119, in Heinze A 'Humanitarian Intervention, the Responsibility to Protect, and Confused Legitimacy'.

the target state is "manifestly failing" thus setting an advanced level for intervening in the state. Secondly, the ICISS' R2P conception postulates that intervention that is military in nature will meet the "just cause threshold" in cases of "serious and irreparable harm occurring to human beings, or imminently likely to occur," which is inclusive of "large-scale loss of life" or "large-scale ethnic cleansing," while the Outcome Document limits this to events of genocide, war crimes, ethnic cleansing, and crimes against humanity. Thirdly, the ICISS' R2Pconceptionposits that the international community has a responsibility to intervene in situations where there is failure by the state in question, while the Outcome Document posits that the international community requires to "be prepared" to intervene on a "case-by-case basis". Finally, the ICISS' R2Pconceptiontakes into consideration that intervention without the authorization by the SC (unilateral intervention) is allowed in severe situations, while the Outcome Document calls for the involvement of the authorization by the SC (collective intervention) before undertaking to employany act of coercion. The sense of P5 members not employing their veto power in such cases was done away with.

The *Outcome Document* was inclusive of two paragraphs; 138 and 139 which cogently endorsed the concept of R2P. The paragraph 139 postulate that the only source of authorization comes from the UNSC and obligates the international community to "capacity-building measures" to assist those States "which are under stress before crises and conflicts break out" and Paragraph 138 implies sovereignty not only has a right but also a responsibility. The international community should help states exercise this responsibility and support the UN in establishing an early warning capacity. Both paragraphs stipulates the "mass killings" and "large scale loss of lives" to four "mass atrocity crimes".[26]

The UN Reports

[26]UN General Assembly, World Summit 2005, *Outcome Document*, para. 138 and 139

The R2P as expressed in the *Outcome Document was* further restated in 2009 at the GA debate and in the UNSC in 2006 and 2009. It is safe to assume that the concept of R2P is in principal consensus as it shows in the *Outcome Document.*

Annan and his Special Adviser on the Responsibility to Protect, Edward Luck, also expanded the concept of R2P in the report *UN Implementing the Responsibility to Protect*, 2009. In this report, R2P concept was split into three pillars:-

- Pillar one is the "enduring responsibility of the state to protect its populations…from genocide, war crimes, ethnic cleansing and crimes against humanity, and from the incitements."[27]
- Pillar two is the duty of the international community to aid the states to meet their responsibilities.
- Pillar three is the "responsibility of member states to respond collectively in a timely and decisive manner when state is manifestly failing to provide such protection."[28]

Moreover, UN SG, Ban Ki-moon has enthusiastically endorsed R2P by setting in print a number of reports inclusive of 'Implementing the Responsibility to Protect, 2009', 'Early Warning, Assessment and the Responsibility to Protect, 2010' which suggested methods to enhance the capability of the UN to utilise on hand "early warning information" efficiently and also to enhance responses where there was the possibility of the occurrence of the four mass atrocities, and 'The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect, 2011'.

R2P as a norm in International Law

R2P is not a legitimate conception; it does not generate any legal modifications as it is entrenched in the current international legal order. R2P is best understood as a reaffirmation and codification of already existing norms. Norms can be comprehended as "collective understandings of the proper behaviour of actors."[29] Norms involve a characteristic of "oughtness", thus infringing legitimized norms that

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[27] *UN Implementing the Responsibility to protect*, 2009: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/63/677 on 22 October 2015

[28] *UN Implementing the Responsibility to protect*, 9

[29] Morris J, 'Libya and Syria: R2P and the Spectre of the Swinging Pendulum, International Affairs', 2013, at 1266

have been collectively agreed upon can bring about "counteraction that will make it costly or ineffective" to do so.[30]

R2P is also a political concept having political effects. R2P has "significantly changed the grammar of political discourse with regard to the prevention and reaction to human rights violations" changing the political dialogue from the justification of interventions to halt or avert atrocities, to probing "why there has been no intervention". This provides for legitimate intervention for humanitarian cases via the UN therefore making it difficult for UNSC members to provide for justification of the use of veto.[31]

The point that R2P doesn't involve obligations or requirements that are legal in nature for states to react to the mass atrocities has resulted to criticisms that R2P is nothing more than a "high-sounding rhetoric", resounding what Otto von Bismarck said: "When a man says he approves of something in principle, it means he hasn't the slightest intention of carrying it out in practice."

To make R2P more operative, there should be a slow process in building consensus on a global and international scale. The non-existence of an ingrained international norm of intervention is therefore a hurdle to the international community taking action in due time to the humanitarian crises.

STATEMENT OF PROBLEM

This research critically deals with the concept of R2P as a justification for intervention. This is in view of the fact that there have arisen issues in this sector leading to an upsurge of considerable controversy in international legal discourse on the disregard of the international principles of sovereignty, non-intervention and self-determination.

A literature review is conducted to show the practical and conceptual issues inherent in the framework of the R2P. The norm is then applied to the cases of Rwanda, Kosovo, Kenya, and Libya to assess its effect in practice and determine its origins. The analysis of these case studies leads to a number of conclusions regarding its effectiveness and future application.

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[30] Morris J, 'Libya and Syria: R2P and the Spectre of the Swinging Pendulum, International Affairs', 1266

[31] Payandeh, M. 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking' Yale Journal of International Law(2010), 471.

PURPOSE OF THE RESEARCH

The research seeks to provide an understanding of the concept of R2P from the humanitarian military perspective.

STATEMENT OF OBJECTIVE

To show the contribution that the concept of R2P has made to preventing the occurrence of mass atrocities and affording protection to the fundamental rights of the citizens of the state in question.

RESEARCH QUESTION

What contribution has the concept of R2P made to preventing the occurrence of mass atrocities and affording protection to the fundamental rights of the citizens of the state in question?

LITERATURE REVIEW

Sovereignty is not an absolute term. As Luis Franceschi points out, Maritain clarified the etymological construction of sovereignty, Maritain says:

> "Just as words 'civitas' are oftern translated by state (through the most appropriate name is commonwealth or body politic, not state). So the words 'principatus' and 'suprem potestas' are often translated by 'sovereignty', the words 'princeps' (ruler) by 'sovereign'. This is a misleading translation, which muddles the issue from the start. 'Principatus' (principality) and 'suprema potestas' (supreme power) simply means the highest ruling authority, not 'sovereignty' as has been conceived since the moment when this word made its first appearance in the vocabulary of political theory. Conversely, 'sovereignty' was rendered at that moment by 'majestas' in Latin..." Sovereignty, therefore, means: "First, a right to supreme independence and supreme power. Second, a right to an independence and a power which in their proper sphere are supreme 'absolutely' or 'transcedently', not 'comparatively' or as a 'topmost part' in the whole"[32]

Franceschi adds, "the 'Political Society' has a right to autonomy. It confers the right upon the State so that it may be exercised in an orderly and consistent manner. This autonomy allows the organs of the State to function without internal or external interference, which means that the State governs itself with relative supreme

[32] Maritain J, 'The concept of sovereignty', 51

independence[33] However, the State is not and has never been really 'sovereign' in the strict meaning of this word. This was the mistaken fiction maneuvered by Rousseau of transposing the absolute and transcendent power of the medieval king as God's agent on to the so called *Volonte Generale*, a myth that would seem to gather the people into one separate, absolute and transcendent power, a power over themselves, as a multitude of individuals."[34]

Maritain concludes that: "Rousseau, who was not a democrat,[35] injected in nascent modern democracies a notion of Sovereignty which was destructive of democracy, and pointed toward the totalitarian State; because, instead of getting clear of the separate and transcendent power of the absolute kings, he carried, on the contrary, that spurious power of the absolute kings to the point of an un-heard of absolutism, in order to make a present of it to the people." So it is necessary [according to Rousseau] that "each citizen should be perfect independence of the others, and excessively dependent on the State...for it is only the power of the State which makes the freedom of its members".[36]

Ever since, sovereignty continues to be mistranslated as *suma potestas* or *imperio.* On a public hearing conducted by the ICJ on March 9th, 2009, the counsel for Costa Rica, Prof Crawford, stated that

> "The right of free navigation appears as a qualification of the sovereignty of Nicaragua and is introducd by the term 'pero' (but). Thus a particular right of Costa Rica is presented as a qualification of the general grant of rights (in the form title (dominio) and sovereignty ('sumo imperio') to Nicaragua." [37]

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[33]We refer to it as "relative' vis-à-vis 'absolute", the State is subject to the political society and to other international bodies as may be agreed for the proper dispensation of justice or the guarantee of certain rights.

[34]Franceschi L, 'The African human rights judicial system: A proposal for streamlining structures and domestication mechanisms viewed from the foreign affairs power perspective' Doctoral Thesis, University of Navarre, 2012, 37 & 38

[35]Rousseau J, *The Social Contract*, Book III, chapter IV, 160, In fact, Rousseau wrote that "if there were a nation of gods, it would be governed democratically. So perfect a government is unsuited to men." Cited by Maritain, J, 'The Concept of Sovereignty', in Stankiewicz J (ed), *In Defense of Sovereignty*, OUP, New York, 1969, 57.

[36]Maritain J, 'The concept of sovereignty' 57

[37]ICJ, case concerning *the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua*), Public sitting held on Monday 9 March 2009, at 10 a.m., at the Peace Palce, presided by Justice Owada, at 9. (Verbatim Record) cited by Franceschi, L., xxxxxxxx

Alex Bellamy appeals to Hobbes' argument to demonstrate that this sovereignty concept isn't anything new; Hobbes averred that if the state could not carry out its duty of protecting its citizens that it was authorised to do, then it doesn't meet the condition for it to be known as a sovereign thus is not "owed obedience".[38] This is extraordinarily comparable to the notion that the failure by the state in question to afford protection to its populations is a failure in the exercise of sovereignty. However, the "Lotus Principle" posits cogently that "sovereignty is not absolute; states have the right to only do anything which is not prohibited by international law".[39]

The duties of sovereignty were drawn out towards protecting the citizens as governed under the UN Charter in Articles 1(3) and 55, which Annan contends that the Charter was not "a licence for governments to trample on human rights and human dignity".[40]Furthermore, R2P as articulated at the World Summit applies to the four crimes which include genocide, ethnic cleansing, war crimes and crimes against humanity,[41] which are all not allowed in accordance to the international law and are *jus cogens* norms.[42]

One of the first champions of non-intervention was John Stuart Mill, who penned in his 1859 essay *A Few Words on Non-Intervention*:

> "There seems to be no little need that the whole doctrine of the non-interference with foreign nations should be reconsidered, if it can be said to have as yet been considered as a really moral question at all...To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory or revenue; for it is as little justifiable to force our ideas on other people, as to compel them to submit to our will in any other respect. But there assuredly are cases in which it is allowable to go to war, without having been ourselves attacked, or threatened with attack; and it is very important that nations should make up their minds in time, as to what these cases

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[38] Bellamy A and Drummond C, 181, and Hobbes T,'Leviathan' *Cambridge University Press, Cambridge,*(1991).

[39] *The Case of the S.S "Lotus"*, Judgement No 9, PCIJ (1927), ser A, no 10, para. 18 – 19.

[40] Stahn C, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?',*American Journal of International Law* (2007), 111.

[41] World Summit Outcome Document, para. 139.

[42] Bassiouni M,*International Criminal Law: Volume III, International Enforcement*, Martinus Nijhoff Publishers, Brill, 2008, 14.

> are...To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error..."[43]

JS Mill argues that it is not justifiable for a foreign state to intervene in the domestic issues of a domestic state because it involves forcing foreign policies on the intervened states. He further states that there are situations in which foreign states must intervene. He argues that not all states are civilized. Thus, the alike international customs and rules of international morality cannot be applied in a 'civilized nation' and 'barbarians'.[44]Today, Mill's most contentious case is "benign colonialism". The principles of non-intervention that he puts across are only applied amid "civilized" nations. "Uncivilized" persons, amid whom Mill categorizes Africa, Asia and Latin America, aren't suitable for the principle of non-intervention. Vitoria posited that it was the responsibility of "civilized states" to interfere in "backward states" to put a stop to callous customs, for instance, "cannibalism and human sacrifice", and focus on spreading Christianity. Groitius adjoined to Vitoria's benchmarks "the suppression of idolatry, atheism and sexual immorality". Mill's principles, therefore, can be said to be discriminatory to the so-called 'non-civilized' nations. This is because a state is said to have sovereignty if it has been recognized by other UN member states and there is equal sovereignty among all states.

Mill brooms over the situation of intervention, saying "government which needs foreign support to enforce obedience from its own citizens, is one which ought not to exist."

> "When the contest is only with native rulers, and with such native strength as those rulers can enlist in their defense, the answer I should give to the question of the legitimacy of intervention is, as a general rule, No. the reason is, that there can seldom be anything approaching to assurance that intervention, even if successful, would be for the good of the people themselves. The only test possessing any real value, of a people's having become fit for popular institutions, is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labour and danger for their liberation. I know all that may be said, I know it may be urged that the virtues

[43] Mill J, 'A Few Words on Non-Intervention', Libertarian Alliance, 1859, 4.
[44] Mill J, 'A Few Words on Non-Intervention', 4.

> of freemen cannot be learnt in the school of slavery, and that if a people are not fit for freedom, to have any chance of becoming so they must first be free. And this would be conclusive, if the intervention recommended would really give them freedom. But the evil is, that if they have not sufficient love of liberty to be able to wrest if from merely domestic oppressors, the liberty which is bestowed on them by other hands than their own, will have nothing real, nothing permanent. No people ever was and remained free, but because it was determined to be so..."[45]

Michael Walzer concedes that sovereignty and intervention eventually reset on consent. In situations where the populations either embrace intervention, or decline to oppose, "something less than, aggression has occurred".[46] Fernando Tesón gives a humanitarian intervention definition which excludes the subject of consent, portraying it as "proportionate help, including forcible help, provided by governments (individually or in alliances) to individuals in another state who are victims of severe tyranny (denial of human rights by their own government) or anarchy (denial of human rights by collapse of social order)."

Walzer further states "domestic revolutions need to be left to domestic citizens". Interventions that aim to realise "domestic revolutions" are probably in the passage of time will proof to be unsuccessful thus trigger "more harm than they eliminate".[47]However, Walzer contends that humanitarian intervention is considered to be reasonable in times of reacting to "acts that shock the conscience of mankind"[48]. John Vincent, as did Walzer, in an essay published in the year of his death was in agreement with Walzer when he postulated:

> "Offences against human rights are a matter of international concern, but they do not trigger intervention except perhaps when outrageous conduct shocks the conscience of mankind"

Kenneth Roth also provides a definition, "military intervention without the consent of the government whose territory is being invaded" is not justifiable, however, h

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[45] Mill J, 'A Few Words on Non-Intervention', 6.
[46]Walzer M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2nd ed), Basic Books, New York, 1985.
[47] Walzer M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations.*
[48] Walzer M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd ed), Basic Books, New York, 1992, 107.

elimits this by positing that "the imperative of stopping ongoing or imminent mass slaughter might justify the risk to life."

The trepidation of this is that intervention could raise an impossible task to sovereignty that would prevent people from deciding "their own political destiny".[49]

Sean Murphy contends that the SC has a legitimate justification to intervene or authorize intervention in a state to afford protection to the populations from pervasive lack of "internationally recognized human rights".[50]

Based on the above sentiments by the scholars, humanitarian intervention can be said to be justified when the human rights are violated by the state or government. Human rights lie at the epicentre of international law thus these rights ought to be protected. Where the state fails to do so, the international community has a duty and a right to intervene.

However, there are those who are not for the idea such as Ero and Long[51] who contend that there has not been any agreement either in scholarly opinion" or state practice on a legitimate entitlement to intervene; only that the UN has shown itself willing to take enforcement action in the last resort to assist victims of a humanitarian emergency where there is no existing government or when the existing government refused to consent to UN action despite the scale of emergency. However, one can argue that intervention which is military in nature and based on humanitarian purposes authorised by the UN throughout the recent years indicate that the international community is starting to agree to such interventions because the acknowledgement of fundamental rights of human beings is currently an issue of international concern. Moreover, the former SG of the UN has suggested that where crimes against humanity are being committed and the employment of peaceful

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[49] Walzer M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 86-90.

[50] Murphy S, *Humanitarian Intervention: The United Nations in an Evolving World Order*, University of Pennsylvania Press, Philadelphia, 1996, 287-288.

[51] Ero, Comfort and Long S, *Humanitarian Intervention : A new role for the United Nations?*, International Peacekeeping 2, 1995, 153, in Simons P, 'Humanitarian Intervention: A Review of Literature' available at http://ploughshares.ca/pl_publications/humanitarian-intervention-a-review-of-literature/ on 5 January, 2016.

methods to discourage them are expended, the SC has the responsibility based on morality to step in on behalf of the international community.[52]

The roots of the concept of humanitarian intervention by other states in state is tracked down to Hugo Grotius' essay in the 16th Century.[53] Grotius averred that other foreign states could intervene in a "target state" where the latter is involved in "repression of its citizens", and who offering "resistance to such repression".[54]

Roth and Tesón agree on certain principles of humanitarian intervention that justify legitimate humanitarian intervention. Roth categorizes such guidelines into five that determine whether intervention from the military perspective can be pigeonholed as humanitarian. First, resorting to the employment of military channels should be "the last reasonable option."[55] Second, the key drive of the intervention should "necessarily be humanitarian".[56] Third, the intervention should be done by way of utmost "respect for international humanitarian law and human rights". Fourth, it should "not cause more harm than good", and finally, the intervention "should ideally, though not necessarily be endorsed by the UNSC or another body with significant multilateral authority."[57] Tesón conversely also stipulates five guidelines; firstly, ending lawlessness or oppression should be the objective in which justifiable intervention is aimed at.[58] Secondly, the "doctrine of double effect" – "the permissibility of causing serious harm as a side effect of promoting some good end, coupled with an adequate theory of costs and benefits"[59]– presides over humanitarian intervention. Thirdly, it is only the grave situations of oppression that necessitate the need for humanitarian intervention.[60] Fourthly, the intervention should be accepted by the vulnerable populates as earlier mentioned,[61] and finally, "humanitarian intervention should preferably receive the approval or support of the community of

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[52] 'Annan K: We The Peoples: The Role of the United Nations in the 21st Century', Millenium Report of the Secretary-General of the United Nations, 2000, para. 219, http://www.un.org/millennium/sg/report/ on 5 January, 2016

[53] Quinn D, 'The Responsibility to Protect' M.A. thesis, Canadian Forces College, 2007, 6.

[54] Quinn D, 'The Responsibility to Protect' M.A. thesis, Canadian Forces College, 2007, 6.

[55] Roth K, 'Was the War in Iraq a Humanitarian Intervention?'*Journal of Military Ethics 5* (2006), 85.

[56] Roth K, 'Was the War in Iraq a Humanitarian Intervention?', 85.

[57] Roth K, 'Was the War in Iraq a Humanitarian Intervention?', 85-86.

[58] Tesón, Fernando R. 'Ending Tyranny in Iraq'*Ethics and International Affairs 19* (2005), 2.

[59] Tesón, Fernando R. 'Ending Tyranny in Iraq' , 2-3

[60]Tesón, Fernando R. 'Ending Tyranny in Iraq',3

[61]Tesón, Fernando R. 'Ending Tyranny in Iraq,3

democratic states."[62]The two writers hold opposing views on the specific guidelines to justify humanitarian intervention. Therefore, it will be difficult to unearth a comparable meaning of humanitarian intervention, this is because the principles guiding it will probably coincide.

The concept of R2P attempts to give a criteria in which to intervene in another state. The criteria is set to act as a threshold in carrying out humanitarian intervention. However, since the introduction of the doctrine of R2P, it has faced a lot of scepticism. Numerous academics posit R2P of being just another watch word exercised by Western states to "justify self-interested interventions in their continued bid to propagate liberal ideals and maintain the international status quo".[63]

The evaluation of R2P necessitates a dialogue of how norms develop in international law from a theoretical and practical perspective. Some of the most significant milestones for analyzing the growth of R2P as a norm are Rwanda as a case study, NATO in Kosovo, the ICISS Document, and the Summit Outcome Document in 2005. The ultimate object of a norm in international law is to regulate state behaviour[64]. The objective here is to evaluate the extent to which, if at all, R2P regulates state behaviour and in what way.

Alex Bellamy terms a norm as "shared expectations of appropriate behaviour for actors with a given identity"[65]. In the R2P context, the shared expectation is that states should take the responsibility to protect the populations from gross violations of human right abuses and if not, the international community will come in and fulfil this responsibility. The actors with a given identity are member-states of the United Nations by definition.

Bellamy further states the indeterminate nature of the second and third pillars of R2P subside its "compliance-pull," thereby shared expectations (governments and

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[62]Tesón, Fernando R. 'Ending Tyranny in Iraq', 3

[63] 'Chomsky N, Statement by Professor Noam Chomsky to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect', 2009 http://www.un.org/ga/president/63/interactive/ on 5, January 2016, Murray R & Hehir A, 'Intervention in the Emerging Multipolar System: Why the R2P will miss the Unipolar Moment', 2011.

[64] Vranes E, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006)

[65] Bellamy A and Reike R, 'The Responsibility to Protect and International Law', 2010, in Bellamy A, Davies S and Glanville L(eds),*The Responsibility to Protect and International Law*, Martinus Nijhoff Publishers, The Hague, 160, in Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses, Paper 2532, 2014.

international organizations will exercise this responsibility; they recognize a duty and right to do so; and that failure to act will attract criticism from the society of states).[66]There are no rules for the execution of the second and third pillars, thus making enforcement vague, effectively clouding the determination of its normative power to influence behaviour.

Brunneé and Toope[67]state that norms are accepted through social practice, shared understandings, obedience to certain conditions of legitimacy, and the ability of the norm to meet legal requirements.[68]In essence, legal norms arise when shared normative understandings evolve to meet the criteria of legality, and become embedded in the practice of legality. Brunneé and Toope direct their analysis towards the R2P and ultimately conclude that the norm falls short on the legality criteria of "generality, clarity, consistency, and constancy over time," and "inconsistent practice"[69]. This conclusion ricochets Bellamy's assertion that the second and third pillars of R2P suffer from the problem of indeterminacy.

In his study of the assumed legal nature of R2P, Ekkehard Strauss writes, "no new collective legal obligation has been created by R2P. Instead, the responsibility offers an opportunity to improve the implementation of existing legal norms"[70] Strauss states that while R2P may not be asserting a new international norm it may provide a mechanism by which we may more effectively carry out and enforce the existing norms. However, the Commission believes they have found a norm – that is, the norm that states are not allowed to do whatever they please to and with their

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[66]Bellamy A and Reike R, 'The Responsibility to Protect and International Law', in Bellamy, Davies and Glanville,'The Responsibility to Protect and International Law', 161 in Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses. Paper 2532, 2014.

[67] Brunnée, Jutta and Toope S, 'The Responsibility to Protect and the Use of Force: Building Legality?', 2010, inin Bellamy, Davies and Glanville, 'The Responsibility to Protect and International Law', in Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses. Paper 2532, 2014.

[68]Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses. Paper 2532, 2014.

[69] Brunnée, Jutta and Toope S, 'The Responsibility to Protect and the Use of Force: Building Legality?' inBellamy, Davies and Glanville, 'The Responsibility to Protect and International Law', 79,inBlackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses. Paper 2532, 2014.

[70] Strauss E, 'A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect', 2010, in Bellamy, Davies and Glanville, 'The Responsibility to Protect and International Law', 25, in Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses. Paper 2532, 2014.

populations whilst hiding behind the shield of sovereignty. This norm is evidenced by the various Conventions and Protocols that certain acts when perpetrated by states trigger certain *erga omnes* obligations. William Blackford is in disagreement when he states that the Commission has merely offered suggestions and opinions; and further states that their assertion of the normative status of this responsibility is premature. This is because the international community has shown some hesitation in accepting the R2P as an international legal norm which is reflected in the language of Resolutions and manner of discussion surrounding military actions and humanitarian interventions worldwide.[71]

There are portions of the ICISS report that have found a measure of widespread acceptance, such as the concept that sovereignty does not entail absolute power to do as one wishes. How R2P is applied in present and future cases, and how it develops in the UN will go a long way towards revealing this development over time. The UN has a legitimating influence on policies and norms. Barnett and Finnemore claim, "[UN action] can legitimate policies [...] create and diffuse international norms, policies, and models of political organization around the globe"[72].

The R2P clause in the Outcome Document has also gotten varied responses amongst observers. Some, for instance, Todd Lindberg, regarded it as a "revolution in consciousness in international affairs", thus departing in the relationship between sovereignty and human rights.[73]In accordance to Lindberg, there was a replacement of the state with individual persons as the focus of protection by offering states a duty to advocate and defend fundamental rights of human beings. Others, such as Michael Byers contended that the World Summit insipid the R2P concept to a degree that it wouldn't, in actual fact, protect vulnerable populations and could even restrain the SC's capability to react resolutely to "man-made humanitarian disasters".[74]

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[71]Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses. Paper 2532, 2014.

[72] 'Barnett, Michael and Finnemore M, *Political Approaches*, in The Oxford Handbook on the United Nations, Daws S and Weiss T (eds.), Oxford University Press, 2009, 2 http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199560103.001.0001/oxfordhb-9780199560103-e-003 on December 15, 2015.

[73] 'Lindberg T, 'Protect the People', in Bellamy A ' Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit'.

[74] Byers M, *High Ground Lost on UN's Responsibility to Protect,* Winnipeg Free Press, September 18, 2005, B3, in Bellamy A 'Whitherthe Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit'.

Chapter Two

Before going further into the discussion of the concept of R2P, it is necessary to provide some background context on some of the prevailing theoretical foundations. This exposition will help ground the proceeding examination and analysis in Chapter 3. This chapter is meant to provide a brief but as comprehensive as possible overview of the logic central to some theories in order to give context to the R2P discussion.

THEORETICAL FRAMEWORK

Thomas Aquinas developed the just war ethic theory which "restrains, directs and guides the use of armed force in international relations". This normative theory developed in the Middle Ages by Aquinas, Hugo Groitus, Francisco Suarez, Samuel Pufendorf, Christian Wollf, Emerich de Vattel and Francisco de Vitoria was intended to manage "the ethic of war".[75] The Just War theory was originally developed to restrain the devastation of strife between two conflicting forces by "enabling moral judgment in wartime"[76], and was infrequently used on interventions done on humanitarian grounds. However, because John Stuart Mill and Hugo Grotius questioned "the unchallenged norm of non-intervention among post-Westphalian states"[77], interventions, purportedly in reaction to gross infringements of human rights by sovereign states against their populations, have become a recurren tepisode, particularly since the conclusion of the Cold War.

The three-set criteria set out by Aquinas should be employed jointly. Aquinas contended that "three things are necessary" for a war to be deemed just:[78]

The first is "authority of the sovereign, by whose command the war is to be waged." The 'authority of the sovereign' means that decisions to wage war are upon those who are legally authorized to do so, since, as Aquinas put it,"...the care of the common weal is committed to those who are in authority."[79] Therefore, it is "their business to watch over the common weal of the city, kingdom, or province subject to

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[75] Viotti P and Kauppi M, 'International Relations Theory: Realism, Pluralism, Globalism, and Beyond' (3rd ed), Allyn and Bacon, Boston, 1999, 400-401.

[76] Orend B, *A Sweeping History of Just War Theory, in The Morality of War*, Peterbrough, Broadview, 2006, 10, in 'Wise L, 'Was NATO's Intervention in Kosovo in 1999 'Just'?' http://www.e-ir.info/2013/06/21/was-natos-intervention-in-kosovo-in-1999-just/ on December 15, 2015.

[77] Wheeler N, *Saving Strangers*, Oxford University Press, Oxford, 2000, 45, in 'Wise L, 'Was NATO's Intervention in Kosovo in 1999 'Just'?' http://www.e-ir.info/2013/06/21/was-natos-intervention-in-kosovo-in-1999-just/ on December 15, 2015.

[78] Aquinas T, *Summa Theologiae*, II-II, Question 40, of War.

[79] Aquinas T, *Summa Theologiae*, II-II, Question 40, of War.

them", and thus, "it is lawful for them to have recourse to the sword of war in defending that common weal against internal disturbances, when they punish evil doers..., so too, it is their business to have recourse to the sword of the war in defending the common weal against external enemies".[80]It's encapsulated in the sovereignty and non-intervention principles. He continued to cite Augustine, asserting "The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority"[81]In accordance to Aquinas, this power arose eventually from God, who provided legitimacy and moral sanction for its execution.[82] Today, the ultimate authority of those in superior positions, lies in particular institutions and persons, and that legitimacy is no longer derived from God's will, it is subject to both national and international laws that manifest the people's will, and states respectively. The SC, is the one provided with the primary responsibility for the maintenance of international peace and security[83]; it has the legitimate authority to make war decisions on behalf of the states.[84]

However, the SC can't claim the legitimate authority to make war decisions whilst staying within Aquinas' just war doctrine, as the necessity of the legitimate authority restrains the entitlement to make such decisions to sovereign, political entities namely, states.[85] This is conflict with, both international law reality and moral prudence that command that UN war decisions in the mode of authorization by the SC under Chapter VII of the Charter are highly desirable, if not necessary, for that it provides war with legitimacy and moral sanction for its execution.[86]Where there is the non-existence of the authorization of the SC, any war waged excluding that of self-defence is to be rendered illegal and unjust, which could be claimed on the basis of Aquinas' theoretical standpoint, notwithstanding.

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[80] Aquinas T, *Summa Theologiae*, II-II, Question 40, of War.
[81] Aquinas T, *Summa Theologiae*, II-II, Question 40, of War.
[82]Tooke J, *The Just War in Aquinas and Grotius*, S.P.C.K, London, 1965, 21-22.
[83]Article 24 (1), Charter of the United Nations.
[84]Johnson J, 'The Just War Idea and the Ethics of Intervention' in Ficarotta J (ed), *The Leader's Imperative:Ethics, Integrity, and Responsibility*, Purdue University Press, West Lafayette:, 2001, 111-119
[85]Johnson, 'The Just-War Idea and the Ethics of Intervention', 117
[86]Barry J, *The Sword of Justice: Ethics and Coercion in International Politics*, Praeger Publishers, Westport, 1998, 15.

Second, a "just cause" is vital, that is, "those who attacked should be attacked because they deserve it on account of some fault".[87]The neccesity of the "just cause "might include "defense of other states against acts of aggression as well as interventions to assist secessionist movements".

The third is, "right intention "which is indispensable to "promoting good or avoiding evil". Aquinas categorises this prerequisite in two circumstances - negatively and positively.[88] From the negative point of view, he rules out evil intentions expressed in Augustine's list from *Contra Faustum*: What is evil in war?, and from the positive perspective, right intention is the purpose of establishing or restoring a disordered peace.

One of the suppositions of neoclassical realism, as Hans J. Morgenthau contends is that "all human beings inherently seek to increase their power".[89] This brings about an event where statesmen struggle for power over other states. Morgenthau argues, "Politics is a struggle for power over men…the modes of acquiring, maintaining, and demonstrating it determine the technique of political action."[90] For the states to uphold their interests, intervention might be a possibility. Morgenthau further contends:

> "Intervene we must where our national interest requires it and where our power gives us a chance to succeed. The choice of these occasions will be determined…by a careful calculation of the interests involved and the power available."[91]

Neorealism centres on an antediluvian international structure that has no predominant authority that manages international politics. Kenneth Waltzcontends that in a self-help international system, the state's foreign policy is determined based on its national interests.[92] States try "to preserve their interests" and to warrant their

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[87] Aquinas T, *Summa Theologiae*, II-II, Question 40, of War

[88] 'Johnson J, 'Just War, As It Was and Is' http://www.firstthings.com/article/2005/01/just-waras-it-was-and-is on 6 January, 2016.

[89]Jackson R and Sørensen G, *Introduction to International Relations: Theories &Approaches*, 4th ed, Oxford University Press, New York, 2010, 66.

[90]Jackson R and Sørensen G, *Introduction to International Relations: Theories &Approaches*,66.

[91]Morgenthau H, *To Intervene or Not to Intervene*, Foreign Affairs, 1967, 103.

[92]Lonergan J, 'Neo-Realism and Humanitarian Action: From Cold War to Our Days' *Journal of Humanitarian Assistance* (2011).

existence since in the self-help system, "no one can be relied on to do it for them."[93] Tucker contends that "states' interests expand as they gain more power in international politics".[94]

R2P require the international community to step in to afford protection to the populations of a state if the latter fails to bring to fruition their duty. Furthermore, the use of force as the final possible resort to stop or prevent violations of human rights can be justified. This resounds with the case of contemporary liberal internationalism.

While the realists centres on a state as the key player, liberalism accentuates on individual persons and in protecting their rights. Classical liberals contend that human persons have "fundamental natural rights to liberty consisting in the right to do whatever they think fit to preserve themselves, provided they do not violate the equal liberty of others unless their own preservation is threatened."[95]Human beings also possess the right "to be treated and a duty to treat others as ethical subjects and not as objects or means only."[96]Liberals believe that each individual or state seeks personal gain, these shared interests of individuals could create domestic and international cooperation.[97]Thus, the surfacing of international organizations, for instance, the UN.

Michael Walzer contends that humanitarian intervention from a military perspective could be acceptable as a last resort and as a method of protecting the vulnerable populations from violations of basic human rights. However, he posits that such intervention must not be carried without the authorization of the UNSC, rather multilaterally with the UNSC authorization because liberal internationalists believe

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[93]Waltz K, *Theory of International Politics*, Waveland Press, Inc, Illinois, 1979, 109.
[94]Telbami S, 'Kenneth Waltz, Neorealism, and Foreign Policy', Foreign Policy, Security Studies 11.3 (2012), 161.
[95]Charvet J and Kaczynska-Nay E, *The Liberal Project and Human Rights: Theory and Practice of a New World Order*,Cambridge University Press, London, 2008, 3.
[96]Doyle M and Recchia S, *Liberalism in International Relations*, International Encyclopaedia of Political Science, 2011, 1434.
[97] Jackson, Robert and Sørensen G,*Introduction to International Relations: Theories & Approaches*, 66, in 'Yoshida Y, 'A Theoretical Assessment of Humanitarian Intervention and R2P' http://www.e-ir.info/2013/01/16/from-kosovo-to-libya-theoretical-assessment-of-humanitarian-intervention-and-the-responsibility-to-protect/#_ftn2 on 27 October 2015.

that multilateralism prevents great powers from pursuing national interests rather than humanitarian objectives in intervention.[98]

On a utilitarian point of view, intervention is considered reasonable since it often saves more people than what the non-intervention will cost. For instance, the US spent the 1990s perceiving Afghanistan as a humanitarian disaster zone, but failed to intervene yet the former was quickly developing into "a national security nightmare, as a training ground of terror".[99]

RESEARCH METHODOLOGY

The research predominantly employed a comparative research methodology as depicted in chapter 3 centring on analysis of the concept of R2P, the rhetoric of distinguished scholars in the field of international law, the UN documents that are available on the internet, as well as other relevant articles.

[98] 'Yoshida Y, 'A Theoretical Assessment of Humanitarian Intervention and R2P' http://www.e-ir.info/2013/01/16/from-kosovo-to-libya-theoretical-assessment-of-humanitarian-intervention-and-the-responsibility-to-protect/#_ftn2 on 27 October 2015.

[99] Rashid A, 'Is Humanitarian Intervention Ever Morally Justified?' http://www.e-ir.info/2012/03/13/is-humanitarian-intervention-ever-morally-justified/ on December 15, 2015.

Chapter Three

Chapter three of the research looks into the current status of R2P as an international legal concept by looking at case studies of some of its most recent applications or evocations in Kenya and Libya preceded by an examination of humanitarian intervention in Rwanda and Kosovo.

PRE-R2P

Rwanda and the failure to act

Background

Over 800,000 people were slain in the genocide that occurred in Rwanda whilst the international community did nothing about it. In 1988, the RPF was created that comprised of Hutus who were in opposition and Tutsis who were in exile. The RPF was a military and political group whose objective was to create a state government and returne migrants to Rwanda. However, conflict which was characterised by the use of arms between the RPF and the RGA(which was dominated by Hutus) arose. On 4 August 1993, the state government and the RPF signed the Arusha Accords and called for a UN peacekeeping force to aid with carrying out the peace agreement negotiated upon.

The SC Resolution 872[100], established the UNAMIR, a peacekeeping force under Chapter VI of the UN Charter. UNAMIR had the responsibilities to:-

- *establish a secure environment for a transitional government and planned elections;*
- *monitor compliance with the Arusha Accords; and*
- *co-ordinate humanitarian activities; inter alia.*

However, it was beleaguered by problems –lack of resources; lack of collaboration from the partakers, markedly in the struggle to create "a transitional government".

On 6 April 1994, a day following the SC's decision to extend the mandate of UNAMIR[101], the then Presidents of Rwanda and Burundi were assassinated. As a consequence, Tutsis and the opposition were killed by the RGA and Interahamwe. Armed conflicts continued between the RPF and RGA.

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[100] UNSC S/RES/872 (1993) The humanitarian crisis in Rwanda, 2.

[101] http://www.un.org/en/peacekeeping/missions/past/unamirFT.htm

UN Response

The first response of the SC was to trim down the size of UNAMIR in late April 1994.[102]As circumstances became increasingly grave, the SC acted, establishing UNAMIR II and, afterward, permitting the French-led Operation Turquoise[103]. Humanitarian affairs became the concern thus was a justification for international intervention. Boutros-Ghali concluded this humanitarian catastrophe is rightly a matter of growing anguish in Africa and the rest of the world and demands urgent action by the international community.[104]

The SG provided an exigency plan for UNAMIR II, on 13 May 1994; this was in reaction to the SC request to provide an effective plan which involved the UN. However, the international response to the request for military personnel was underwhelming, that is, no major powers came forward to support the operation and none of 19 governments that had troop standby arrangements with the UN agreed to participate. The SG suggested to the SC that it takes the proposal from France to set out instantly troops under Chapter VII to deal with the humanitarian crisis until a handover could be affected with UNAMIR II. The SC reacted bypassing resolution 929[105]. Its semantics was subject to humanitarian concerns. In authorizing Operation Turquoise, the SC was allowing a military intervention based upon humanitarian grounds.

Why the lack of action?

- The UN did not understand or least understood the nature of the conflict in Rwanda;
- UN was badly formed to gather and communicate information onthe violations of basic human rights;
- JEEAR report: Apart from France, the major powers on the SC were uninterested in a small country that was marginal to their economic or political concerns.

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[102] http://www.un.org/en/peacekeeping/missions/past/unamirFT.htm
[103] https://en.m.wikipedia.org/wiki/Operation_Turquoise
[104] Ludlow D, 'Humanitarian Intervention and the Rwanda Genocide' http://journals.lib.unb.ca/index.php/jcs/article/view/4378/5055
[105] UNSC S/RES/929 (1994) The establishment of a temporary multinational operation for humanitarian purposes in Rwanda.

- After Somalia, there was no enthusiasm among the SC members to jeopardize their troops in yet another civil war.

The reluctance of the international community to consign troops to aid in Rwanda due to the lack of cogent national interests shows how far there is to go in establishing a general principle or practice of humanitarian intervention. This case study emphasised the prerequisite of intervention. The statement made by Special Advisor to the UN SG, Edward Luck, *"standing by in the face of unfolding mass atrocities"* is not *"morally or politically acceptable"*. Annan posed the question- *"but: if, in those dark days and hours leading up to the genocide [in Rwanda], a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?"*

This case study focuses on the conflicting nature of international lawthus, a legal framework for states, regional bodies, and international organisations on the concept of R2P should be formed.

NATO Intervention in Kosovo

NATO who intervened in 1999 without the UNSC authorization in Kosovo was nit-picked by developing nations, who claimed that NATO intervened to pursue its own interests rather than humanitarian objectives. This reopened the debate on humanitarian intervention. This intervention elucidates why the concept of realism is more suitable in explaining their driving force.

Background

In 1989, the then President of Serbia, Slobodan Milosevic refused to recognize the sovereignty of Kosovo, which had been recognized under Yugoslavia's 1974 constitution.[106] As a consequence, Kosovar-Albanians created their own government and also operated a sequence of non-violent protests against the Serbian government. However, their efforts did not bear any fruit as the KLA carried out organized attacks against Yugoslav police in 1997. Later on, the conducted ethnic cleansing against Kosovar-Albanians. The UNSC was unsuccessful in authorizing the use of force to

[106]Bellamy A and Williams P, *Understanding Peacekeeping*, 2nd ed, Polity Press,Massachusetts, 2010, 267 http://www.e-ir.info/2013/01/16/from-kosovo-to-libya-theoretical-assessment-of-humanitarian-intervention-and-the-responsibility-to-protect/.

halt ethnic cleansing since Russia was against that idea.[107]In 1998, although the Council in Resolution 1199[108]requested a cease-fire and withdrawal of Yugoslav forces, the Serbs continued on. In consequential, in October, NATO threatened Serbia with air strikes thus forcing Milosevic to agree to permit the return of refugees. On March 18, further peace talks in Paris failed following the Serbian delegation refusing to sign a deal requesting for Kosovo autonomy and the deployment of NATO troops to implement the agreement. On March 24, NATO air were launched on the Serbian forces.

Intervention – Justified?

- NATO was not only unsuccessful in stopping ethnic cleansing, but also pushed Milosevic to intensify the scale of ethnic cleansing.[109]
- About 500-1,000 civilians died due to the bombings by NATO.
- "NATO destroyed socioeconomic infrastructure in Serbia including bridges, factories, television stations, media facilities, power plant sites, and even some historic monuments. Moreover, NATO destroyed water facilities as well as military targets".
- There was an increment in the Kosovar Serb refugees.[110]Therefore, the NATO air campaign created more harm than good.
- "Russia, India and China opposed the bombing on the grounds that NATO breached core UN Charter principles of sovereignty, non-intervention and the non-use of force."
- The act of attacking without the UNSC authorization is not right since it may set dangerous precedents for future interventions without a clear criterion.

Analysis

In accordance to Alex Bellamy and Nicholas Wheeler, NATO had as a minimum the following reasons for the intervention:[111]

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[107]Evans G, 'From Humanitarian Intervention to the Responsibility to Protect', *Wisconsin International Law Journal 24.3*, 2006, 706 http://www.e-ir.info/2013/01/16/from-kosovo-to-libya-theoretical-assessment-of-humanitarian-intervention-and-the-responsibility-to-protect/.

[108] UNSC S/RES/1199 (1998) The observance of ceasefire by the Albanian and Yugoslav parties in Kosovo.

[109]Stegner G, *American Humanitarian Intervention: How National Interests, Domestic and International Factors*, and *Historical Milieu' Shape U.S. Intervention Policy*," Macalester College, 2008, 88 <http://digitalcommons.macalester.edu/poli_honors/17>

[110]Wolfson A, *Humanitarian Hawks? Why Kosovo but not Kuwait*, Policy Review 98, 2000, 32.

(1) a fear that the armies of the Federal Republic of Yugoslavia would repeat atrocities that had taken place in Bosnia some years prior;

(2) that a continued conflict in the Balkans would establish trans-boundary effects, and

(3) that the conflict could spread in the region.

Despite the lack of authorization of the UNSC, members of the NATO-led coalition wanted to provide justification for the intervention on reference to relevant UNSC resolutions. For instance, France believed that the use of force had been subliminally approved by resolutions[112]due to the occurrence of some breaches postulated in those resolutions. However, I concur that the UNSC did not authorize the use of force as well as not condemn it.[113]

Therefore, even though the Kosovo intervention may be seen as successful from an operational point of view, it was not successful from a humanitarian point of view. The IICK declared the NATO bombings "illegal but legitimate."[114]

The IICK finish off their chapter on International Law and Humanitarian Intervention by delineating a number of threshold principles for the use of force without the UNSC authorization. They state that there are two valid triggers, "severe violations of international human rights or humanitarian law on a sustained basis," and "the subjection of a civilian society to great suffering and risk due to the failure of their state to protect them".[115]They also stipulate that the key objective of a humanitarian intervention should be, "direct protection of the victimized population," and that the operation must have reasonable chances of success, i.e. the operation must contribute directly to ending the crisis and be able to do so without incurring further unnecessary harm to civilian populations[116]. The Commission goes on to state a number of contextual principles that include serious attempts at solutions falling short of military intervention, strict adherence to the laws of war, *inter alia*. In short,

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[111] Bellamy A and Wheeler N, 'Humanitarian Intervention in World Politics', 516 in Zimmerman D, 'Why is the Practice of Humanitarian Intervention so Controversial?', 2014.

[112]In particular UNSC S/RES/1199 (1998), SCOR 53rd Year 13 and UNSC S/RES/1203 (1998) SCOR 53rd Year 15.

[113]Lowe V and Tzanakopoulos A, 'Humanitarian Intervention', para. 19.

[114] Independent International Commission on Kosovo (IICK), Kosovo Report, Oxford University Press, Oxford, 2000.

[115] IICK, Kosovo Report Oxford University Press, Oxford, 2000, 193.

[116] IICK, Kosovo Report Oxford University Press, Oxford, 2000, 194.

the Commission outlines most of the principles that end up comprising the content of the R2P.

The NATO intervention, exposed the limitations of the modern international law on the balance between the rights of individual persons and the autonomy of the nations.[117] The evolution of R2P is an attempt to respond to and address these problems.

POST-R2P

Adoption of R2P in Kenya

Background

As a result of the presidential elections in December 2007 in Kenya, there was an eruption of widespread violence which resulted to the death of 1500 people and the displacement of 300,000. The Report from the Office of the High Commissioner for Human Rights Fact-finding Mission found the violence to be spontaneous, organised and retaliatory and which it was suggested would give rise to major humanitarian needs.[118]At an SC meeting in February 2008, the then president of Kenya, Mwai Kibaki welcomed the political power-sharing agreement that had been reached to resolve the crisis and requested those responsible for the acts "to be brought to justice".

In November 2009, the then ICC Prosecutor, Oreno Ocampo requested authorisation to investigate into the post-election violence in 2007 and 2008 as governed under Article 15(3) of the Rome Statute (an own initiative investigation) and in March 2010, the ICC's Pre-trial Chamber II authorised such an investigation spanning the period June 2005, when Kenya became party to the Rome Statute, to November 2009, when the prosecutor filed his request.[119] The investigation would examine whether crimes against humanity had been committed during this period.

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[117] IICK, Kosovo Report Oxford University Press, Oxford, 2000, 297.

[118] United Nations Document S/PV.5845. S/PRST/2008/4

[119] ICC-01/09, http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf on 10 December 2015, The names of the individuals had been forwarded to the ICC as a result of a domestic Commission set up to examine the post-election violence (known as the Waki Commission after its chair) and the failed attempts by the Kenyan authorities to establish a special domestic tribunal to prosecute the crimes

Analysis

For the persons or school of thoughts who presumed R2P to only govern an intervention that is military in nature, Kenya proved that the employment of"]non-coercive tools, such as mediation could aid in halting mass atrocities when invoked before hand, with sufficient resources and support from the international community. Annan noted that he

> *"saw the crisis in the R2P prism with a Kenyan government unable to contain the situation or protect its people. I knew that if the international community did not intervene, things would go hopelessly wrong. The problem is when we say 'intervention', people think military, when in fact that's the last resort. Kenya is a successful example of R2P at work"*[120]

NATO Intervention in Libya

This case study is the NATO military intervention in Libya in 2011. It looks into certain interests of intervening states and shows once again that the theory of realism is preferable to the liberalist theory. It also observes whether there have been modifications since Kosovo, and finishes off by showing that the influence of R2P is restrained.

Background

In February 2011, civilians carried out political protests challenging the Libyan leader Muammar Gaddafi's 41-year reign. As a result, the civilians were the focus of mass atrocities at the hands of government armed forces. The international community and regional organizations responded to afford protection to the citizens through a range of economic, political, and military measures.

Following attacks against the civilians, the UNSC, in the same year, unanimously employed the resolution 1970[121], making due reference to R2P concept. Abhorring what it termed as "the gross and systematic violation of human rights", the SC insisted on an end to the atrocities being committed by the Libyan government, recalling the Libyan authorities' the duty to afford protection to its citizens,

committed. The report is available at http://kenyastockholm.files.wordpress.com/2008/10/the-waki-report.pdf on 10December 2015.

[120] Bellamy A, 'The Responsibility to Protect – Five Years On', 154.

[121] UNSC S/RES/1970 (2011) The condemnation of use of lethal force in Libya.

furthermore, it also invoked a series of international sanctions. The Council referred the case to the ICC.

In resolution 1973[122], adopted also in the same year, the SC ordered an instant "ceasefire" which was inclusive of ending attacks against the populations that may comprise of "crimes against humanity." The Council gave power to state members to take "all necessary measures" to afford protection on its populations.

Thus it is cogent that the employment of the two resolutions was in accordance with R2P. Moreover, when it came to preventing acts of violence it was a success, with Ban Ki-Moon postulating in his 2012 report that "tens of thousands of lives were saved".

The international community is enforcing the Responsibility to Rebuild via the UNSMIL which is tasked to give the Libyan authorities strategic support and technical advice to help its transition into a liberal democracy. UNSMIL has had an impact, as the representative of Libya to the UN labelling its advice as indispensable to rebuilding Libya. These positive thoughts are echoed in the SG's report on UNSMIL[123], which demonstrate that it has been advocating for the Libyan Ministry of Justice "to ensure that all detainees are held within the legal framework and are given a fair trial, and giving technical support for reactivating Libya's judiciary".[124]In addition, UNSMIL has aided Libya in attracting investors and has been working in conjunction with the Ministry of Planning to enhance Libya's infrastructure.[125]

Background

Libya represented the first military intervention under R2P and its application was a success as it made the UNSC act in a decisive manner and hastily putting in consideration the requirements of the concept of R2P. Moreover the use of R2P has established positive consequences as many citizens were salvaged.

Alex Bellamy is one who cites the Libyan intervention as a positive example of R2P enforcement. He writes, "the signs from Libya suggest that the establishment of

[122] UNSC S/RES/1973 (2011) The legal basis of military intervention in Libya.
[123] S/2012/675 (2012).
[124] S/2012/675, 5-6.
[125] S/2012/675, 10-11.

modest early-warning, assessment, and convening capacities can have a positive effect on policy planning and decision-making"[126]. Bellamy's assessment of the Libyan intervention shows what R2P is potentially capable of achieving in a positive way. Bin Halal and Schwarz[127]note that the decisively multilateral character of the intervention made it very successful with respect to the development of the R2P norm. Thomas Weiss believes that R2P in Libya has the opportunity to strengthen the norm, and that since 2005 normative trends on the invocation of R2P and humanitarian intervention seem to be growing in favour of those norms or policies.[128] Libya represents a case wherein humanitarian catastrophe was foreseen and averted, or at the very least rapidly stopped, by direct, multilateral action through the UN. The operation was carried out swiftly and with purpose.

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[126] Bellamy A, *Libya and the Responsibility to Protect: The Exception and the Norm*, Ethics and International Affairs 25, 2011, no. 3 at 264, in Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses, Paper 2532, 2014.

[127]Talal B, Hassan and Schwarz R, 'The Responsibility to Protect and the Arab World: An Emerging International Norm?', 2013, Brown C, 1992. International relations theory: new normative approaches, Columbia University Press, New York, in Blackford W, 'The Responsibility to Protect and International Law: Moral, Legal and Practical Perspectives on Kosovo, Libya, and Syria' Dissertations and Theses, Paper 2532, 2014.

[128]' Weiss T, Thakur R, O'Connell M, Hehir A, Bellamy A, Chandler D, Shanahan R, Gerber R, Williams A, and Evans G, 'The Responsibility to Protect: challenges and opportunities in light of the Libyan intervention, 2011, http://www.e-ir.info/wpcontent/uploads/R2P.pdf ON 15 December 2015.

Chapter 4

This chapter attempts to review the findings in the wider context of the literature and the theoretical foundations. Basically, it shows what the research has contributed to the international sphere. Moreover, it also shows the appreciation of the limitation of the study and how it could affect the validity or usefulness of the findings.

DISCUSSION

As aforementioned in chapter one, what lies beneath the humanitarian intervention dialogue is a perceptible rigidity between safeguarding the basic human rights and the pre-eminence of the concepts of sovereignty and non-intervention that are painstakingly essential elements in the preservation of peace and security.

The principle of sovereignty traditionally entailed the ultimate authority held by an institution from which there is no appeal. Scholars such as Rousseau, Hobbes and Bellamy believed that sovereignty is supreme authority or power held by the state and another state could not infringe on that because it would be violating the principle. They believed that the rights of the populations came from the state having authority. If the state did not have authority then it should not be considered a state thus no obedience is owed to it. This brought forth obstacles to the possibility of activating humanitarian means, including military operations to prevent human rights catastrophes. However, since the birth of the concept of R2P, the concept of sovereignty shifted to that entailing the primacy of rights of individual persons. The respect for rights of human beings is the core of international law. Certain primary achievements in this trajectory have been the "Universal Declaration of Human Rights; the four Geneva Conventions and the two Additional Protocols on International Humanitarian Law in armed conflict; the 1948 Convention on the Prevention and the Punishment of the Crime of Genocide; the two1966 Covenants relating to civil, political, social, economic and cultural rights; and the adoption in 1998 of the Rome Statute for the establishment of an ICC".

The shift of the concept of sovereignty brought on a debate as to whether a foreign state should intervene or not. John Mill, a liberal scholar and a proponent of non-intervention argues that it is not "justifiable to force our ideas on other people". He states that forcing a state(s) to submit to the will of a foreign state is not right. However, there are exceptions to this. In addition, one should note that Mill's argument does not apply to what he terms as the 'barbaric' or 'non-civilised' states.

He states that "the international customs and rules of international morality" applied to the 'civilised' states cannot be applied to the 'barbarians'. He furthers states that the governments which need assistance from foreign states to enforce obedience from its populations need not be in existence. This is because he believes that liberty granted by a foreign state on the target state is not permanent. Mill stipulated that people given freedom by another state wouldn't be able to hold on to it. He was in support of the principle of non-intervention because intervention undermined the authenticity of domestic struggles for liberty.

Walzer is in concurrence with Mill when he states that "domestic revolutions "should be given to the domestic citizens; because if foreign states intervene, it would prove to be ineffective and more harm than good will come out of it. Walzer further states that sovereignty and intervention should be dependent upon consent by the majority of the population. If the citizens allow for an intervention to take place, then "it would be odd to accuse them [the interveners] of any crime at all".[129] However, he positions that consent will not be considered as a factor where the acts committed upon the vulnerable populations "shock the moral conscience of mankind".

The concept of intervention dates back to Grotius in the 6th Century where he stated that a foreign state(s) could be allowed to intervene where "a target state is engaged in repression of its citizens, who are in turn engaged in legitimate resistance to such repression". There are two theories that are motivated by the works of Hugo Groitus. The first theory avers that "natural law authorizes all states to punish violations of the law of nations, irrespective where or whom the violations occur, to preserve the integrity of international law". The second theory posits that "states may intervene as temporary legal guardians for peoples who have suffered intolerable cruelties in the hands of their own state".[130]The doctrine of humanitarian intervention has developed overtime having faced a number of humanitarian crisis especially during the 1990s. Thus, it has led to the development of R2P as a norm. However, there is a debate amongst scholars as to whether the concept is a norm. Some argue that for it to be considered a norm it should meet certain criteria and in this case, it is considered not to have while others argue that they have found a norm – that is, the norm that states

[129] Walzer M, 'The Moral Standing States', in Beitz C, et al, eds, *International Ethics*, Princeton university Press, Princeton, 1985, 221.

[130] 'Criddle E, 'Three Groatian Theories of Humanitarian Intervention', Theoretical Inquiries in Law, vol 16(2), 2015, 473' http://ssrn.com/abstract=2630280 on 6 January, 2016.

are not allowed to do whatever they please to and with their populations whilst hiding behind the shield of sovereignty. This norm is evidenced by the various Conventions and Protocols that certain acts when perpetrated by states trigger certain *erga omnes* obligations. There also others who believe that R2P is not a novel norm; it is just an improvement of the implementation of existing legal norms.

Thomas Aquinas who developed the 'Just War Ethic' Theory advocates that there should be a threshold in meeting the criteria for humanitarian intervention. It posits that interventions which are justifiable might not infringe upon the "principles of proportionality and last resort".

From the realist scholars' point of view, the international community do not have any legal jurisdiction over the populations of another state or states. The focus is on the state as the key actor. The realism protagonists deem that moral concepts should neither prescribe nor circumscribe a state's behaviour; emphasis should be placed on state security and self-interest. However, Mill dismissed some of these arguments in favour of intervention to support territory or revenue in order to enhance national power, prestige, or profits. He argues that they lack moral significance.

From a liberal perspective, liberals were divided into two: cosmopolitans – postulate the rights of "cosmopolitan freedom" are valued for everyone and thus humans have a duty based on morality to endsevere "violations of human rights and inhumane treatment of innocent people"; and communitarians (Walzer and Mill)–"limit the cases that justify intervention".[131]For the communitarians, non-intervention offered protection to human dignity. This is because citizens were allowed to go about their lives devoid of external interference.

From a utilitarian perspective, intervention is justified since it reduces the death toll in comparison to non-intervention. The proponents of utilitarianism state that when intervention occurs, it will lead to the halting of the human rights violations, than non-intervention which allows the continuation of these violations thus leading to an upsurge in the death toll of the populations.

[131] Doyle M, 'A Few Words on Mill, Walzer, and Nonintervention' Ethics & International Affairs, 351

In accordance to Gareth Evans, R2P concept has made four principal contributions to the humanitarian intervention debate[132]:-

1. Turning the focus of the debate from humanitarian intervention to a responsibility to protect people trapped in conflict situations;
2. Developing a new understanding of sovereignty where the state does not control but primarily protects its citizens;
3. Setting up clear criteria of what the R2P, in practice, should mean, clarifying that it consists of much more than just military intervention; and
4. Mandating that if coercive action is seen as necessary, it must be legal and legitimate."

LIMITATIONS OF STUDY

Although this research was carefully prepared and had attained its objective, I am still aware of its limitations and shortcomings:

- ✓ Time constraint thus impeding the author in attempting to deliver a more in-depth research. The time to investigate a research problem was pretty much constrained
- ✓ Lack of reading sources in the library in regards to the topic in question. Most of the sources have been adopted from the internet.

[132]Evans G, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Brookings Institution Press, Washington, DC, 2008, 41–43.

Chapter 5

The final chapter draws some conclusions from the preceding analysis and suggests some important areas of focus for the development of R2P. Furthermore, it seeks to give recommendations to the issue in question.

CONCLUSION

Having reviewed the emergence of R2P since the ICISS Report in 2001 through the UN Reports to the World Summit Outcome in 2005 and the application of R2P in specific case studies, it is time to attempt to answer the questions which began this contribution. As for why there is a need of R2P and who it's there for, the paragraph 138 of the World Summit Outcome document made it clear that the population of each State is being protected from four specific crimes and incitement to commit those crimes. R2P is limited to four crimes – genocide, war crimes, ethnic cleansing and crimes against humanity. What the R2P is trying to achieve is not providing a mechanism to intervene in humanitarian situations but rather intervention in those cases in which there is a failure of the State to protect against these four crimes irrespective of how that failure has arisen. The doctrine of R2P avers that in situations where a state fails to protect the basic rights of its populations, the international community has a duty to afford protection to these vulnerable populations.

However, there are some key difficulties in shifting"R2P from theory to practice".[133] Firstly, the issue of conceptualization. This guarantees that the latitude of the concept inclusive of its limitations are well understood so that there are no arisen misconstructions or misconceptions in the international realm; such as R2P is only about military intervention, and that in the cropping up of new cases, there is the broader consensus. This could be achieved if the norm is institutionalized. This is because if these interventions are to be considered legitimate in the international sphere then they should be done within an internationally agreed framework.

Alex Bellamy[134]concludes that the R2P norm requires more advocacy and adoption as an official policy, which will not only reduce the likelihood of future atrocities, but also make potential future atrocities easier to stop if they do begin because states

[133]"About the responsibility to protect" 2008 parliamentary hearing at the United Nations, New York, 20-21 November.

[134] Bellamy A and Reike R, 'The Responsibility to Protect and International Law', 2010.

will have built up institutional and diplomatic frameworks for dealing with the situations. In Bellamy's view R2P will ultimately be more effective if viewed as a policy agenda as opposed to some kind of "red flag" meant to generate political will on the fly. He claims, "R2P is best employed as a diplomatic tool, or prism, to guide efforts to stem the tide of mass atrocities, and that it has little utility in terms of generating additional international political will in response to such episodes".[135]The assessment highlights the need for and potential success of a robust institutional framework for R2P.

Secondly, is the challenge of institutionalism. If this difficulty is sorted then it will ensure that governments and intergovernmental bodies have on hand all the capability, be it diplomatic or military, required to ensure effective early warning and early action.

Thirdly is the political issue; this ensures that in the events where there is an occurrence of acts of violence, there will be effective mobilization by the SC, governments and civil society. The lack of political will was evidenced in Rwanda where the SC could have prevented the crisis but failed to do so. The UN Special Advisor on the Responsibility to Protect held that "ultimately, of course, it is all about political will"[136]

In addition, to the abovementioned challenges, the absence of financial and military resources of the UN can also be seen as a challenge. This will require support from the international sphere in provision of the resources.

Recommendations

1. Institutionalization of the norm

A State ensures the protection of its civilian population by ensuring that the abovementioned crimes, and incitement to commit these crimes, are part and parcel of the national legal system with suitable measures being taken to ensure their implementation. The aim is transformative – to create a situation in which

[135] Bellamy A and Reike R, 'The Responsibility to Protect and International Law', 2010, 166.
[136] Luck E, 'The Responsibility to protect: Growing Pains or Early Promise?', Ethics and International Affairs, vol 24, number 4, 2010, 363 in Hao R, 'Rhetoric of Responsibility: R2P's Harmful Application in Humanitarian Practice' http.//www.e-ir.info/2015/02/15/rhetoric-of-responsibility-r2ps-harmful-application-in-humanitarian-practice, on 5 January, 2016.

respect for international humanitarian law and human rights are seen as aspects of the national legal system.[137]

2. Role of regional organizations

Paragraph 138 of the Outcome document proposes that in situations where a nation cannot meet its duty in this sphere, then it should ask for assistance which does not constitute a significant infringement of state sovereignty. It should not only provide the assistance requested but it must also be in a position to know which States are failing to meet their responsibilities, hence the SG's 2010 report on an early warning system. Reports from the Offices of the United Nations High Commissioner for Human Rights, the Special Adviser for the Prevention of Genocide and the Special Adviser for R2P and fact-finding missions have provided important early warnings of State failure. It is the failure of the State to exercise its R2P that activates the responsibility of the international community. What has stood out in such situations has been the involvement of regional organisations that have not only provided assistance for capacity-building but also have contributed, for example through offers of good offices, to the peaceful resolution of crisis situations. Such efforts were acknowledged as a possibility in paragraph 139 of the Outcome document in the allusion to Chapter VIII of the UN Charter and have usually been acknowledged by the Security Council in their discussion of each crisis situation.[138]

From the ICISS Document, Chapter VIII acknowledges the existence and security role of regional and sub-regional organizations, but expressly states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council", and It has long been acknowledged that neighbouring states acting within the framework of regional or sub-regional organizations are often (but not always) better placed to act than

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[137] *Report of the Secretary-General "Uniting our strengths: Enhancing United Nations support for the rule of law"*, UN Doc S/2006/980.

[138] Para. 93 of the World Summit Outcome had called for "forging predictable partnerships and arrangements between the United Nations and regional organizations." See for example, Haugevik, K "Regionalising the Responsibility to Protect Possibilities, Capabilities and Actualities" NUPI Report 02-2008 http://www.nupi.no/Publikasjoner/Boeker-Rapporter/2008/Regionalising-the-Responsibility-to-Protect-Possibilities-Capabilities-and-Actualities on 10December 2015 and Wouters J and P de Man 'The Responsibility to Protect and Regional Organisations' KU Leuven - Leuven Centre for Global Governance Studies Working Paper No. 101 (2013) http://papers.ssrn.com/abstract_id=2274738 on 10December 2015.

the UN, and Article 52 of the Charter has been interpreted as giving them considerable flexibility in this respect.

The analyses conducted by Glanville, Bellamy and others of the relatively effective execution of an R2P intervention in Libya posit that the influence of regional organizations like the League of Arab States was instrumental to amassing the political will to act. Glanville writes, "in the absence of sovereign consent, this regional consent was crucial in convincing skeptical states to acquiesce and in generating the will among other states to push for the authorization of military intervention to protect civilians".[139]Bellamy and Williams refer to these regional organizations as "gatekeepers" that frame the issues and define the "range of feasible international action".[140]

Another reason why the regional option is promising is that it aids to tackle the issues mentioned earlier that can be associated with attempting to assert universal moral values through cosmopolitan ideals. In regards to a report released in 2011 by Ban Ki-Moon, Glanville notes, "The Secretary-General recognized that the implementation of R2P 'should respect institutional and cultural differences from region to region,' and he accepted that each region will operationalize the principle 'at its own pace and in its own way,'" and "different regions interpret different norms and values in different ways". The SG's 2011 report shows that the UN as an international body believes that respect for the values of states and regions is an important part of implementing any policy, especially one as potentially invasive as R2P. This approach may help to implement R2P in a way that is more sensitive to the needs and values of different communities.

3. An ethos of prevention

An ethos of prevention is cogently emerging as part of R2P as part of the diplomatic, humanitarian and other peaceful means to resolve situations of crisis. As to whether or not there is a legal obligation to take preventative measures that is questionable. Using the decision of the ICJ in *Bosnia and Herzegovina* v *Serbia and Montenegro*, Arbour contended that R2P imposes a legally enforceable duty on States to intervene in situations where the state fails to fulfil

[139] Glanville L, In *Defense of the Responsibility to Protect,* 2013, 336.
[140] Bellamy A, *Libya and the Responsibility to Protect: The Exception and the Norm*, 841.

its duty to afford protection to its citizens.[141]Carvin has criticised Arbour's reasoning arguing that "Attempts to create a legal entrapment for states out of a hodgepodge of international treaties and newly emerging norms do not actually advance the cause of R2P."[142] So, there is no legal responsibility for other States to act in cases where the state fails to meet its legal commitment to R2P; this is implied in paragraph 139 of the World Summit Outcome document in its reference to collective action by the Security Council and to decisions being taken on a "case-by-case basis." For the international community, this means that the responsibility to protect is in reality a choice to protect.

As for whether the experience of R2P indicates the emergence of customary international law there has been no consistency of action – compare and contrast the responses of the SC to the aforementioned case studies. Given the impact of these episodes on the future of R2P, there is a clear need to establish the principles for a military intervention and a mechanism to ensure respect for those principles to ensure long-term future of R2P.

The international community replied to the question posed by Annan in his Millennium Report and the responsibility to protect represents the new mechanism being created to balance sovereignty with international human rights. Perhaps the final words should belong to the same report which having asked the question continued:[143]

> *We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict. Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers.*

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[141]The Responsibility to Protect as a Duty of Care in International Law and Practice, 34 Review of International Affairs 445, 2008. This duty was based on para. 431 of the ICJ judgment which noted: If the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent, it is under a duty to make use of these means as the circumstances permit http://www.icj-cij.org/docket/files/91/13685.pdf on10December, 2015.

[142]*A Responsibility to Reality: A reply to Louise Arbour*, 36 Review of International Studies (Special Issue), 2010, 47, 48 in McMahon J, 'The Responsibility to Protect – Questions and Answers?', UCD School of Law.

[143]Millennium Report of United Nations Secretary-General, We the Peoples: The role of the UN in the 21st century, United Nations, New York, 2000, at 48.

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