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UN Security Council and Human Rights: An Inquiry into the Legal Foundations of the Responsibility to Protect in International Law

RESEARCH ARTICLE

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ABSTRACT

This article examines the legal basis for the concept of the responsibility to protect (R2P) in international law. Accordingly, the article attempts to determine the extent to which various elements of the concept have already been incorporated into existing international instruments as well as in customary international law. It also ascertains the extent to which the concept has been accepted as a binding norm of international law, particularly in view of the burgeoning activities and resolutions concerning its use. The study analyses the existing provisions of major international instruments concerning the responsibility to protect, such as the Genocide Convention and Geneva Conventions, as interpreted by the International Court of Justice in its opinions. Finally, as part of the conclusion, the article evaluates the scope and limitations of the concept of R2P under international law.

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I. INTRODUCTION

Most issues related to human rights, particularly their enforcement, were traditionally viewed as matters of domestic jurisdiction that were beyond the scope of intervention by other states or even international organisations.[1] This statement was supported by the express provisions of the International Covenant on Civil and Political Rights (ICCPR),[2] European Convention on Human Rights (ECHR),[3] the American Convention on Human Rights (ACHR),[4] and through latent provisions in other leading instruments.[5] Even the United Nations (UN) Charter, while laying down 'promoting and encouraging respect for human rights and for fundamental freedoms' as one of the main purposes for which the organisation was founded,[6] clarifies that 'nothing contained in the present Charter shall authorize the [UN] to intervene in matters which are essentially within the domestic jurisdiction of any state'.[7] In other words, while fostering respect for human rights is one of the purposes of the UN, notions of state sovereignty and non-intervention in domestic matters (and to a certain extent even in matters of human rights enforcement) are the UN's binding legal principles.

However, the principles of non-intervention and the prohibition of the use of force have their share of exceptions. The Charter also provides that the principle of non-intervention in internal matters 'shall not prejudice the application of enforcement measures under Chapter VII'.[8] Thus, while acting under Chapter VII, the UN Security Council is not prevented from dealing with a human rights situation even if that takes place within a particular state's territorial jurisdiction, and accordingly, no state can object on the basis that it is an intervention in the state's domestic affairs.[9]

Nonetheless, it is crucial to note that this power of armed intervention is conferred only upon the UN Security Council. Accordingly, the opponents of international intervention argue that if the unilateral use of force by an individual state or group of states, even for a 'morally justifiable' purpose such as the protection of human rights, was not authorised by the UN Security Council, such an action is illegal in international law.[10] In this regard, they also identify key provisions of the UN Charter, such as Article 2(4) ('all members shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the [UN]'), Article 42 (*only* 'Security Council may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security') and Article 51 ('even the exercise of self-defence by a state shall not prejudice the authority of the Security Council').[11]

Until now, the UN Security Council has only been able to intervene in a limited number of cases, namely Southern Rhodesia (now Zimbabwe and Zambia), South Africa, Somalia, Haiti, Rwanda, Democratic Republic of Congo (DRC), and Libya.[12] Moreover, the row over the Security Council's primacy in matters involving the use of force, even in cases of humanitarian intervention, has seriously paralysed the ability of the international community to respond to a situation similar to that of Rwanda or Srebrenica.[13] The UN reports on genocide in Rwanda and Bosnia have brought the Security Council's failure to address such mass atrocities to the fore.[14] In particular, the UN report on Rwanda characterised the Rwandan genocide as 'one of the most abhorrent events of the twentieth century' and admitted that it was the failure of the UN 'to prevent, and subsequently, to stop the genocide'.[15] It also considered the Rwandan genocide to be the 'failure of the [UN] system as a whole.'[16] The independent inquiry established by the UN Secretary-General in the aftermath of the Rwandan genocide called for the apportionment of responsibility amongst 'the Secretary-General, the Secretariat, the Security Council and the Member-states of the organization' while also calling for action 'to ensure that [such] catastrophes [...] never occur anywhere in the future'.[17] After the powerful call of, the then UN Secretary-General, Kofi Annan, such feelings reverberated across several public forums, both domestic and international.[18] Accordingly, many organisations were looking for new alternatives to humanitarian intervention.[19]

With this as the backdrop, the International Commission on Intervention and State Sovereignty (ICISS), established by the Canadian government, came up with the idea of 'responsibility to protect' (R2P) in 2001.[20] The central proposition put forth by the report is that 'sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape – from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states'.[21] The subsequent Report of the UN Secretary-General, *Implementing the Responsibility to Protect*, introduced this principle as a three-pillar structure.[22] While the first pillar affirmed the default responsibility of states to protect their own population from mass atrocities, the second pillar underlined the international community's responsibility to assist states in need to live up to their responsibility. The third pillar of international action is activated upon when states manifestly fail to protect their citizens.

This article addresses how far the concept of R2P is grounded in international law and builds on this three-pillar structure. Accordingly, it seeks to understand the extent to which the components of R2P are already absorbed in existing international instruments, customary international law, and other sources of international law, while accounting for its increasing use in invocations, declarations, and resolutions. This article follows the chronology of the concept and begins with the emergence of the R2P as proposed by the Canadian

Commission and as developed through the UN High-level Panel Report on Threats, Challenges and Change,[23] Report of the Secretary-General[24] and the World Summit Outcome Document.[25] This is followed by an analysis of the existing provisions of major international instruments concerning R2P, such as the Genocide Convention, Geneva Conventions, Rome Statute and the Constitutive Act of the African Union, as interpreted by the International Court of Justice (ICJ) in its leading opinions. The next section investigates the underpinnings of the concept in customary international law, along with other subsidiary sources of international law. Finally, as part of the conclusion, the study evaluates the scope and limitations of the concept of R2P under international law.

II. EMERGENCE OF THE 'RESPONSIBILITY TO PROTECT'

II.A. THE PROPOSAL OF THE ICISS

Referring to the interventions in Somalia, Bosnia, and Kosovo, as well as the failed one in Rwanda, ICISS elucidated the various problems in the existing model of 'intervention'. It recognised the public perception that the interventions that took place up until now can be characterised as either 'not intervening enough' or 'it is intervening too often'.[26] It has also noted that 'questions about the legality, process and the possible misuse of precedent loom larger'[27] as interventions are often viewed as the '[manipulation] of the rhetoric of humanitarianism and human rights [by the 'big powers'].[28]

ICISS also observed that the current debate on intervention, in light of its focus on the right of the intervening state, pays more 'attention to the claims, rights and prerogatives of the potentially intervening states much more so than to the urgent needs of the potential beneficiaries of the action'.[29] The debate is also 'not adequately tak[ing] into account the need for either prior preventive effort or subsequent follow-up assistance.'[30] Moreover, the very use of the term 'intervention' 'trumps sovereignty with intervention at the outset of debate: it loads the dice in favour of intervention before the argument has even begun, by tending to label and delegitimize dissent as anti-humanitarian.'[31] Likewise, ICISS was also conscious of the 'very strong opposition expressed by the humanitarian agencies, humanitarian organizations and humanitarian workers towards [the use of] of the word 'humanitarian'.[32] In addition, there were similar difficulties regarding the use of the word 'intervention' as the expression not only includes military action but also certain other 'non-consensual' acts such as the 'delivery of emergency relief assistance' to the disadvantaged sections of the population.[33]

Canvassing further, ICISS expressed its keenness of the new concept in keeping with the changing notions of sovereignty, human rights, and security. The traditional notion of sovereignty is that it is primarily supposed to reside in the state as nation-states are the only members of the international community. While this interpretation helped the state 'to make authoritative decisions regarding the people and resources within the territory of the state',[34] it was also misused by some national authorities to perpetrate 'crimes or atrocities' against its own population.[35] In other words, this restrictive concept of sovereignty was used as a shield to conceal any grave crimes that were committed by national authorities. However, ICISS rightly argued that under the new concept of 'responsibility to protect', sovereignty should be viewed as responsibility 'in both internal function and external duties'.[36]

In the sphere of human rights, 'what has been gradually emerging is a parallel transition from a culture of sovereign impunity to a culture of national and international accountability'.[37] For this purpose, ICISS cited the principle of universal jurisdiction as embodied in the Geneva Conventions and the Rome Statute of the International Criminal Court (ICC) under which persons accused of serious crimes could be tried by any state.[38] Relying upon the principle of complementarity in the ICC Statute, ICISS also argued that such a provision of universal jurisdiction has not replaced national laws on human rights enforcement, which continued to play a greater role in the promotion and protection of human rights.[39] Similarly, the traditional notion of security merely referred to national security or territorial integrity rather than the broader idea of human security encompassing 'security of *people* against threats to life, health, livelihood, personal safety and human dignity'.[40]

Accordingly, ICISS forged a novel approach based on the notion of human protection and believed that it should be appropriately referred to as the 'responsibility to protect'. The fundamental thesis of the report is that sovereignty should be viewed as a responsibility, and it implied the following three ideas: 'First[ly], it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.'[41]

While expanding on this, the report noted that:

> While the state whose people are directly affected has the default responsibility to protect, a residual responsibility also lies with the broader community of states. This fallback responsibility is activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or where people living outside a particular state are directly threatened by actions taking place

> there. This responsibility also requires that in some circumstances action must be taken by the broader community of states to support populations that are in jeopardy or under serious threat.[42]

Moreover, the concept has been conceived to include not only the 'responsibility to react to an actual or apprehended human catastrophe', but 'the responsibility to prevent it and the responsibility to rebuild after the event'.[43]

According to ICISS, the application of the R2P entails measures ranging from political, economic, and military sanctions to military action in extreme and extraordinary circumstances. However, the report proposed that military intervention should be a measure of last resort and should be considered only when there is a 'large scale loss of life, actual or apprehended, with genocidal intent or not, 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.'[44] In this light, ICISS not only referred to the context of genocide, crimes against humanity, ethnic cleansing and large-scale killing but also sought to apply military intervention in cases of 'overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope up or call for assistance and significant loss of life is occurring or threatened'.

Even though many would agree with ICISS's report, particularly regarding the need for new parameters of intervention to be developed, the proposal for the use of force in pursuit of R2P without being authorised by the UN Security Council turned out to be very controversial. Thus, it is pertinent to remember that the report, although conferring primacy upon the UN Security Council in the matter of the use of force, as it is legally empowered to deal with international peace and security, indicated that if there were a logjam in the Security Council's decision-making process, collective action could also be taken by the UN General Assembly, based on the "Uniting for Peace" resolution, by the concerned regional organisations, or by any coalition of states or *even individual states*.[45] Even though such a power is dependent upon the fulfilment of five criteria of legitimacy, it failed to clear the air regarding suspicions voiced by those opposed.[46]

II.B. UN HIGH-LEVEL PANEL REPORT

In 2003, the UN Secretary-General made an announcement of his intention to convene a high-level panel of experts to provide a new assessment of the security challenges faced by the international community and to suggest changes to address those challenges, including on the appropriate use of force.[47] The panel comprised sixteen eminent independent individuals who did not hold any position in their respective national governments.[48] The panel, as part of its work, explicitly recognised the concept of the R2P as an 'emerging norm'.[49] Consequently, the panel report became the first official document under the aegis of the UN to expressly endorse the concept of the R2P. The panel referred to the concept on a number of occasions and attempted to incorporate its main components.

Setting the tone for the official acceptance of the R2P, the report remarked that sovereignty should be not only viewed as a privilege but as a responsibility. It observed that 'states not only benefit from the privileges of sovereignty but also accept its responsibilities.' 'Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of state sovereignty, today it clearly carries with it the obligation of a state to protect the welfare of its own peoples and meets its obligations to the wider international community'.[50] Further, it stated that if states fail to protect populations from 'gross human rights abuses and genocide', that responsibility should be shared between the international community and international organisations.[51] In addition, it suggested that the responsibility shall apply to protect people from all man-made catastrophes, including 'mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease'.[52] Furthermore, when asked about the use of force to offer such protection, the panel opined that it should be the measure of last resort.[53]

However, it seems that the panel created some ambiguity regarding the 'use of force' by the international community without UN Security Council authorisation. This confusion is caused by two conflicting statements in the report. The panel recommended that 'there is a collective international responsibility to protect, *exercisable by the Security Council* authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent'.[54] But, it also observed: 'there is a growing acceptance that while sovereign governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the *wider international community*'.[55] Therefore, it is not clear if, in such cases, the 'wider international community' can initiate action only through the UN Security Council or whether it can initiate action involving the use of force on its own. In its reference to external threats, the report remarked: '*the task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has*'.[56] Thus, it can be reasoned that the report in its entirety does not intend to dilute the authority of the UN Security Council when implementing the R2P.

II.C. REPORT OF THE UN SECRETARY-GENERAL

In his report to the General Assembly, widely known as '*In Larger Freedom*', which was a follow-up to the Millennium Summit, the Secretary-General referred to the reports of the Canadian Commission and the subsequent High-level Panel and accorded express recognition to the concept of R2P.[57] He described R2P as an emerging norm of collective responsibility to protect and acknowledged its growing popularity. He explicitly supported the principle and called upon the heads of state and governments to accept it and act upon it whenever necessary. However, his outline of the principle shows this understanding to be vastly different from the proposal of the Canadian Commission. In particular, he did not visualise the possibility of any other body, state or group of states using force without the authorisation of the UN Security Council. In fact, his idea of R2P is that the use of force should only be resorted to in accordance with the provisions of the UN Charter. Another notable departure in the Secretary-General's report is that R2P was merely confined to be used in case of serious international crimes even though the foundational report also included several other conscience-shocking situations warranting the use of force.

II.D. WORLD SUMMIT OUTCOME DOCUMENT

However, when the UN General Assembly convened at the World Summit in 2005, R2P became a subject of debate amongst all of the members of the international community. During the summit, world leaders expressed their divergent views on the implications of the R2P. But, due to the accommodative language used, the Outcome Document[58] was unanimously adopted, paving the way for the successful recognition of the concept of R2P. The world leaders agreed that '[e]ach individual State has the responsibility to protect its populations' from serious crimes and that in case of failure they will take due collective action through the UN Security Council in accordance with the Charter and international law.[59] Thus, due to its endorsement by the UN General Assembly, R2P emerged as a concept in international politics despite the differing viewpoints with respect to its meaning and content, making it a contentious issue.[60]

The endorsement by the General Assembly has merely acted as the basis for R2P's continued evolution. It was followed by the creation of the Office of Special Adviser on the Responsibility to Protect in 2008, which is considered the single most important event in the further conceptual evolution of R2P.[61] The Special Adviser was mandated to build better consensus and contribute to the conceptual development of R2P. With the assistance of the Special Adviser, the Secretary-General has, to date, submitted eleven annual reports on the various aspects of R2P implementation.[62] Moreover, the Security Council also invoked and reaffirmed[63] the concept in a number of resolutions, including those passed under Chapter VII of the Charter. However, questions as to whether these developments have any legal significance in the process of norm consolidation and whether they add to the legal strength of R2P continue to exist. These are addressed in the upcoming section III.B, as part of the analysis of these measures in view of the requirements of customary international law.

III. R2P IN SOURCES OF INTERNATIONAL LAW

This section will attempt to examine to what extent the concept of the R2P is ingrained in existing international instruments as well as embodied in the prevailing customary rules of international law. For this purpose, the paper will take the sources of international law as outlined in Article 38 of the Statute of the ICJ as a tool for its analysis.[64]

III.A. TREATY FOUNDATIONS OF THE R2P

As already outlined, the concept of R2P found its origin in the Report of the Canadian Commission and thus, it is natural that it had not been expressly referred to in any of the earlier treaties or conventions. However, it is clear that the elements of the concept of R2P are discernible from some of the existing Conventions and treaties. Most notable among them is the 1948 Genocide Convention.[65]

III.A.1. R2P and Genocide Convention

According to the World Summit Outcome Document, genocide is one of the four serious crimes for which R2P can be invoked.[66] Article I of the Genocide Convention provides that genocide, whether committed in time of peace or war, is a crime under international law. It requires the state parties not only to criminalize and punish the crime of genocide but also to prevent it. The Convention stipulates that persons committing genocide, conspiring to, inciting, attempting or are complicit in this crime shall be punished, regardless of whether they are constitutionally responsible rulers, public officials or private individuals.[67] These provisions, in so far as the prevention and punishment of the crime of genocide are concerned, reflect of the first pillar of R2P, under which the primary responsibility rests with the national government and its officials.

Also, the ICJ, while interpreting the Genocide Convention in the case of *Bosnia and Herzegovina v Serbia and Montenegro*,[68] reiterated the above propositions. On the scope of the duty to 'prevent' genocide, the Court observed that:

> The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of

> that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the [UN], for them to take such action as they deem appropriate.[69]

Moreover, the Court denied the apparent contradiction in the language of the Convention regarding the responsibility of individuals and held that not only individuals but even state parties will be liable under the Genocide Convention. The Court has observed that:

> [T]he contracting parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and other acts enumerated in Article III. Thus, if an organ of the State or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.[70]

Against this backdrop, the crucial question to be considered regarding the implementation of the above provisions is that of the legal consequences stemming from a breach of the duty to prevent or punish genocide by the state parties. In such cases, the Convention provides for an option to resort to the '[ICJ] at the request of any of the parties to the dispute'.[71] However, this option faces a roadblock as the Statute of the ICJ mandates that 'only States may be parties in cases before the court'.[72] It becomes clear that even though both individuals and states are liable under the Convention, only states can bring issues before the court. This problem can be overcome by invoking the jurisdiction of the ICC, either by reference of state parties or by the Security Council acting under Chapter VII of the UN Charter.[73]

Moreover, the Court also made other observations which were reflective of the second pillar of the R2P. The World Court observed that 'the obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention *on any state party* which, in a given situation, has in its power to contribute to restraining in any degree the commission of genocide'.[74] It is significant to note that the concept of R2P draws the greatest support from the above observation of the Court. Going further, the Court clarified that such an obligation 'is one of conduct and not one of result, in the sense that a state cannot be under an obligation to succeed, whatever the circumstances in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible'.[75] In other words, a state will not be guilty of genocide if it fails to prevent genocide in any part of the globe. However, a state will be criminally liable if it has 'manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.'

Further, the Court also set out various considerations which must be kept in mind when determining if a state has really discharged its obligation to prevent genocide within the particular context and circumstances. According to the Court, the first and foremost consideration in this regard is the 'capacity to effectively influence the action of persons likely to commit, or already committing genocide'.[76] For this purpose, a state will be in a position of influence only if it has geographical proximity to the scene of the events and has strong political and/or other connections with the state committing genocide.[77] Moreover, 'the state's capacity to influence must also be assessed by legal criteria, since it is clear that every state may only act within the limits permitted by international law'.[78] The Court also stated that 'it is irrelevant whether the state whose responsibility in issue claims or even proves that, even if it [had] employed all means reasonably at its disposal they would not have sufficed to prevent the commission of genocide.'[79] The Court reasoned that even if every state contributed to prevention in limited measures, it should not be difficult to achieve the result.[80] However, on the question of attaching responsibility, the Court ruled that 'a state can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed'.[81]

The Court also ruled that under the obligation to prevent genocide states will not be allowed to hide behind the excuse that the matter is under consideration of the organs of the UN. It remarked that the obligation to prevent genocide 'has its own scope which extends beyond the particular case envisaged in Article VIII, namely, reference to the competent organs of the [UN]'.[82] It is clarified that 'even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the [UN] Charter and any decisions that may have been taken by its competent organs.'[83] It is submitted that this distinct character of the obligation to prevent genocide, running parallel to the obligations under the Charter, symbolizes the third pillar of R2P. However, as the Court only allowed states use of those means 'permitted by international law', it meant that states cannot use force as a means to prevent genocide if it is not authorized by the UN Security Council.

However, if we compare the judgment with the scope of the entire concept of R2P (as proposed by the Commission), the following limitations are discernible. While the concept of R2P sought to protect the population of the entire international community, the Court's interpretation of the Genocide Convention is

confined to the 152 states party to the Convention.[84] On the other hand, in terms of membership, the UN's international community is composed of 193 members.[85] It is pertinent to remember that the obligation to prevent genocide is an obligation stemming from the treaty and it is only applicable to states party to the Genocide Convention. However, if we consider the opinion provided by the ICJ in the case of *Reservations to the Convention on Genocide* that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on states even without any conventional obligation',[86] then it becomes clear that the duty to prevent genocide is also binding on non-states parties to the Convention.[87] Secondly, under R2P even international and regional organizations have the responsibility to protect when compared to the state and individual responsibilities based on the Genocide Convention. Thus, in the final analysis, it can be reasoned that although certain elements of the Genocide Convention are incorporated into the R2P concept, the scope of R2P is much broader and more comprehensive.

III.A.2. R2P and Geneva Conventions

Similar to the connection between the Genocide Convention and R2P, some common ground between the concept of R2P and the Geneva Conventions[88] can be found, as both attempt to reduce human suffering stemming from mass atrocities.[89] While international humanitarian law regulates the conduct of armed conflict for humanitarian purposes, R2P addresses protection of the population 'suffering serious harm, as a result of internal war, insurgency, repression, or state failure'[90] — and thus deals with the protection of civilians— offering a sort of legal basis for the origin and development of the concept of R2P.

Common Article I of the four Geneva Conventions declares that 'the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. This two-fold obligation of both 'to respect' and 'to ensure respect' can be considered synonymous with the R2P formulation of primary responsibility and international responsibility.[91] It is argued that though there is some divergence of legal opinion on the meaning of these expressions, relying on the customary and the universal character of these norms, Common Article 1 of the Geneva Conventions embodies the obligations of third states in protectioning civilians.

Moreover, several important principles of customary international law also support the strong connection between R2P and the Geneva Conventions. The principle of elementary considerations of humanity is one of the chief examples of the customary rules of international law reiterating the universal character of humanitarian norms.[92] The principle found its origin in the jurisprudence of the ICJ in the case of the *Corfu Channel*[93] and subsequently developed through the decisions in the *Nicaragua* case[94] and the *Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons*.[95] In the *Corfu Channel* case – though Albania was not a party to the Hague Convention of 1907 which obligated notification of a minefield's presence – the Court held that Albania was accountable for violations based on the customary origin of these rules. The Court noted that:

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[96]

In the '*Military and Paramilitary Activities in and Against Nicaragua*' decided by the ICJ, this principle was affirmed as 'fundamental general principles of humanitarian law'.[97] Despite the reservation of the United States (US) regarding the provisions of the Geneva Conventions of 1949, the Court held the US accountable as it held that '[the US] may be judged according to the fundamental general principles of humanitarian law'.[98] The Court also remarked that the judicial formulation of the 'fundamental general principles of humanitarian law' is nothing but a reflection of the 'elementary considerations of humanity' referred to by the Court in the *Corfu Channel* case.[99]

Again, in the case of '*Legality of Threat or Use of Nuclear Weapons*', the Court opined that 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity' which are 'to be observed by all states whether they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.[100] It further added that 'the extensive codification of humanitarian law and the extent of the accession to the rest of the treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a *corpus* of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles'.[101]

Finally, the Court establishes, in the above reasoning, that parties to the armed conflict, irrespective of whether it is classified as an international or non-international armed conflict, bear the 'primary responsibility' to ensure that civilians are protected. It can be argued that this obligation is similar to the responsibilities of R2Ps first pillar which mandates that the 'state authorities are responsible for the functions of protecting the safety and lives of citizens'. However, it may be noted that the crux of R2P lies in its second and third pillars, which refer to the situation in which a failure of the primary obligation of the state concerned occurs. In such a case, the question that arises is whether it is obligatory on the part of other states or the members of the international community to decide to collectively intervene, when there is a clear case of 'failure or unwillingness' on the part of a state to apply the rules of humanitarian considerations. Then, the opinion of the ICJ in the case of '*Construction of a Wall in the Occupied Palestinian Territory*'[102] becomes relevant.

In that case, the Court observed that in view of the language of Common Article 1 of the Geneva Conventions, it is clear that 'every state party to that Convention, whether or not it is a party to a specific conflict, is under an obligation *to ensure* that the requirements of the instruments in question are complied with.'[103] In fact, the Court advised 'all the States party to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the [UN] Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention'.[104] Though the Court addressed only the states party to the Geneva Convention, there is a legal possibility that some third states (who are not party to the convention) may utilize the above interpretation and invoke the right to intervene in appropriate circumstances.

III.A.3. Other instruments

Besides the two Conventions examined above, which contain crucial elements of R2P, the conceptual underpinnings of R2P can also be traced to other international and regional instruments, such as the Rome Statute of the ICC [105] and the Constitutive Act of the African Union.[106] In fact, there are a number of commonalities between the ICC system and the concept of R2P. They share the common goals of ending mass atrocities and protecting of the world's population from international crimes. Their scope extends to almost identical mass atrocities: genocide, crimes against humanity, and war crimes.[107] Moreover, the decision to narrow the scope of R2P only to mass atrocity crimes, compared to the broader scope of humanitarian intervention in general, further strengthened ICC's connections to R2P and its potential to contribute to R2P's implementation.[108] In fact, back in 2009, the then UN Secretary-General, Ban Ki-moon recognized this and stated that 'the International Criminal Court and the United Nation-assisted tribunals have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence.'[109]

The ICC's framework was considered to be similar to R2P's three pillars.[110] While the ICC's principle of complementarity proclaims that the Court 'shall be complementary to the national criminal jurisdictions,'[111] is similar to R2P's principle of international responsibility complementing the primary responsibility of the national governments, the possibility of a UN Security Council referral to the ICC is reminiscent of the third pillar of R2P.[112] It is for such reasons that the ICC is not only seen as 'a tool in the R2P toolbox',[113] but also as a means to implement R2P.[114]

Similarly, the provisions of the Constitutive Act of the African Union (2000) may also be cited as an example of the incorporation of certain crucial elements of the R2P concept. The Constitutive Act, through Article 4, expressly acknowledged the 'right of the Union to intervene in a Member-state pursuant to the decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity' as well as 'the right of the member-states to request intervention from the Union in order to restore peace and security'.[115] This provision, better known as the principle of non-indifference, forms a major deviation from the principle of non-intervention usually adopted in such instruments and allows member-states to scrutinize each other's compliance with the obligations arising from this instrument.[116] It is also a remarkable illustration of how an important dimension of R2P has been incorporated in the framework of a regional organization. However, it is interesting to note that the practice of the right of intervention by the African Union as set out in the right explained above points towards a different scenario, especially in view of the apparent conflict this provision has with the Act's other provisions affirming the prohibition of the use of force and the non-intervention in internal affairs.[117] Yet, in the context of R2P, it is submitted that the above provision's normative value cannot be underestimated.

III.B. CUSTOMARY DEVELOPMENT OF R2P

Given the fact that the concept of R2P came into being in 2001 in the form of a report of the Commission constituted by the Canadian government, one may inquire whether R2P had attained the status of a principle of customary international law within such short time span.[118] Considering its endorsement through the Report of the High Level Panel of Experts, the Report of the Secretary General, the UN General Assembly Resolutions, and the subsequent references by a great number of Security Council Resolutions including those under Chapter VII, the question regarding the customary nature of the R2P concept will be addressed below. Within this context,

the current section will analyze the above sources to understand the customary development of R2P.

III.B.1. R2P and the Legal Status of the World Summit Outcome Document (2005)

As already discussed, the World Summit Outcome Document, unanimously adopted by the UN General Assembly through a resolution, expressly incorporated the concept of R2P in paragraphs 138 and 139. However, in view of the provisions of Chapter IV of the UN Charter, the General Assembly only has the power to make *recommendations,* either to the members of the UN or to the Security Council or to both.[119] Although the General Assembly is popularly referred to as the legislative body of the UN, its resolutions do not have the status of the sources of international law in terms of article 38 of the ICJ Statute. Moreover, there is considerable divergence in the academic debate as to whether Assembly resolutions can be considered to be similar to treaty or customary international law, or as general principle of law recognized by civilized nations.[120] Some publicists contend that in practice,[121] none of the blocs in the international community, such as the developing countries, Western nations, or former Soviet countries goes so far as to attach binding effect to *all* the resolutions of the UN General Assembly.[122] However, that does not mean that the resolutions are void of any legal effect. Thus, it can be safely concluded that though UN General Assembly resolutions are not binding, they have some legal value.

It may also be observed that not all Assembly resolutions can be put in one class. While some resolutions may declare the existing custom, others may instigate a 'departure from established practice'.[123] It is stated that 'resolutions embodying declarations of customary international law will be more readily accepted and adhered to than those whose merit lies in their revolutionary character'.[124] Keeping these considerations in mind while evaluating the resolution adopting the World Summit Outcome Document, it is clear that the incorporation of the concept of R2P into the UN system faces at least two Charter-based roadblocks: one is the principle of non-intervention in domestic matters as outlined in article 2(7), and the other is the general prohibition of the use of force as referred to in article 2(4). Moreover, it is significant to note that the ICJ held that prohibition of the use of force is of *jus cogens* nature in *Nicaragua v United States*.[125] Furthermore, it is worth pointing out that the very reason for the formulation of the concept of R2P is the failure of the UN Security Council to come up with timely and effective solutions to end mass atrocities[126] and the remaining need to create a 'new approach' in place of the existing 'humanitarian intervention'.[127] Consequently, it may be noted that the degree of legal commitment required for R2P to have binding effect must be of a higher order, as the concept is a radical 'departure from the established practice' of state sovereignty and use of force.

Also, it is well-established that an international custom, usage or practice must meet at least two requirements:[128] a) it must have a constant and uniform practice, and b) it must fulfill the psychological element that it is binding in law, popularly known as the *opinio juris sive necessitatis*.[129] It is said that the elements of practice and *opinio juris* need not be of the same standard in all cases and it may vary depending on the circumstances.[130] For this purpose, evidence is usually derived from a number of sources, including treaty provisions, decisions of international or national forums, domestic legislations, diplomatic practices or practices of international organizations.[131] However, even a cursory examination of the statements and discussions of the member states with regard to R2P point out that the states' practices are not uniform.[132] Moreover, as acceptance of R2P implies a paradigm shift in the current understanding on state sovereignty, it is submitted that the *opinio juris* required to create a binding obligation should be of a higher 'quantity and intensity'.[133]

Furthermore, one other problem encountered in the recognition of UN General Assembly resolutions is that they 'must relate to a specific claim or dispute', if they are to be considered to create general principles.[134] However, as the nature of the World Summit Outcome Document is very general or at best 'aspirational,'[135] and as it is not pertaining to a specific claim or dispute, it is doubtful whether it would fall within the category of a resolution declaring general principles.

III.B.2. R2P and the Legal Status of the UN Security Council Resolutions

Since the concept of R2P was initially endorsed by the UN General Assembly, the UN Security Council frequently referred to it in various resolutions.[136] According to one estimate, the concept has been referred to, either directly or indirectly, in as many as 91 resolutions adopted by the UN Security Council.[137] This begs the question of whether such Security Council decisions and actions on R2P have contributed to the consolidation of customary international law to strengthen state practices or *opinio juris*.[138] However, an analysis of such resolutions dealing with R2P shows that most of the resolutions merely mention R2P rather than substantively apply it.

For instance, paragraph 4 of Resolution 1674 (2006) about protection of civilians in armed conflict merely 'reaffirms' 'the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity'.[139] Similarly, Resolution 1706 (2006) on the situation in Sudan, referred to the previous Resolution 1674 (2006) and cited the provisions of the World Summit Outcome Document.[140] In fact, a few subsequent resolutions on

Sudan also simply reaffirmed the 'relevant provisions of the World Summit Outcome Document'.[141]

Resolution 1894 (2009), adopted during the decadal anniversary of the initial consideration of the Protection of Civilians in Armed Conflict, elaborates upon the concept of R2P.[142] It notes that 'states bear the primary responsibility to respect and ensure the human rights of their citizens as well as individuals within their territory as provided for by relevant international law' and 'to take all feasible steps to ensure the protection of civilians'. Thus, it can be deduced that the Council merely uses the R2P concept to reiterate states' primary responsibility to protect populations from international crimes or other serious violations of international humanitarian law, a matter already present in the existing body of international law. However, the reference to the World Summit Outcome Document in these resolutions may also demonstrate that the Council wishes to retain its power to invoke the second and third pillars of R2P (that is, collective international responsibility and use of force) at an appropriate time in the future.

The decisions made by the UN Security Council on the situation in Libya brought the Council closer to the legal recognition of R2P. What started as anti-government protests inspired by the Arab Spring in the neighboring Egypt, rapidly swelled into a country-wide popular uprising against Muammar al-Qaddafi, who gained power through a military coup during the 1970s in Libya.[143] It was estimated that around 500 to 700 civilians were killed even prior to the outbreak of the civil war.[144] The Council, faced with an imminent threat of mass atrocities, cited the concept of the responsibility to protect the population and ordered an end to the violence. It also invoked its authority under Chapter VII of the Charter and referred the situation the ICC Prosecutor.[145] An arms embargo, travel bans, and an asset freeze on specific individuals were imposed. Subsequently, through another resolution, the Council also authorized certain countries 'to take all necessary measures' (including use of force), 'to protect civilians and civilian populated areas'.[146] It should be noted that the resolution became a reality thanks to the cooperation of the two permanent members of the Security Council, Russia, and China. They reached an understanding with the US that they will not exercise their vetoes on the passage of the resolution. Also, in view of the above, the resolution used the condition that 'all necessary means' will be used but only 'to protect the civilians and civilian populated areas'. Yet, in practice, it was alleged that the Council authorization was used to remove Muammar Qaddafi from power and to assassinate him. Later, this alleged 'misuse' of the resolution by the NATO members was believed to have caused dissensions in the unanimous support for R2P actions in later situations.

Though this clear, express, yet unanimous invocation of R2P signaled the possible arrival of R2P in international law, on a comparable situation in Syria, the UN Security Council could not reach any decision, due to the vetoes exercised by Russia and China. The draft resolution supported the Arab League's decision to facilitate a Syrian-led political transition and demanded that the 'Syrian government immediately put an end to all human rights violations and attacks against those exercising their rights to freedom of expression, peaceful assembly and association, protect its population, fully comply with its obligations under applicable international law and fully implement [the connected] Human Rights Council resolutions'.[147] Subsequently, in July 2012, the Security Council attempted to adopt another resolution under Chapter VII, threatening Syria with measures under Article 41.[148] Both resolutions could not succeed due to the vetoes of Russia and China. Explaining such veto, Russia contended that it is against the use of force and the imposition of sanctions against Syria and that Chapter VII should not be invoked to deal with the situation. The press statement issued by Russia read: 'The Russian Federation had explained [that] it could not accept a Chapter VII text to open the path to military intervention and sanctions. Yet, for some reason, those Council members had failed to exclude military intervention. Their calculation to use the Council and the UN to further their plans of putting their own pressures on sovereign States would not pass'.[149] Similarly, China emphasized/maintained that the crisis should be resolved by Syrian people themselves.[150]

It is pertinent to note that though the above official statements issued by Russia and China did not expressly link the present veto to the misuse of the Libyan resolution, news reports show a definite linkage between the two situations.[151] For instance, one report mentioned that 'Russia in particular has been vocal in proclaiming that it felt tricked by UNSC Resolution 1973 on Libya, which led to a sustained NATO bombing campaign in support of the uprising against Muammar Qaddafi'. Russia remarked that 'it expected armed action would only be taken to protect the civilian population, and that the armed and coordinated support from NATO for the rebels, who won their war, went far beyond the UN mandate'.[152] This supported the finding that the NATO-led military campaign went far beyond the UN Security Council's authorization and caused divisions in the unanimous support for the meritorious development of the doctrine. On the other hand, unlike the UN Security Council Resolution 1973, which was passed with five abstentions, the later draft resolution on Syria was supported by all the Security Council members, barring Russia and China, with no abstentions.[153] Moreover, it is notable that even the unsuccessful draft resolutions do not refer to the World Summit Outcome Document, either directly or indirectly, or even the concept of R2P in general.

The behavior of the states in adopting the resolutions and the level and the degree of support given by the member-states of the international community will add strength towards the customary nature of the R2P concept. As a result, it is opined that the explanations given by the members during the voting process are a significant consideration in the norm-building process. However, at the same time, it should not be forgotten that no credible conclusion can be reached only based on the states' voting behavior.[154]

Though the analysis above does point towards 'inconsistency' in state practice as a binding norm of international law, in the event of further resolutions by the UN Security Council, especially under Chapter VII, in the future on the 'Libyan model', R2P might be on its way to becoming an emerging norm of international law. The Council practice also supports a conclusion that though the states, including the permanent members of the Security Council, generally agree on the nature of R2P as a political concept, on the question of its application, they prefer to adopt a case-by-case approach and thereby negatively contribute to the emanation of the uniform pattern of conduct.

III.B.3. R2P as 'Instant' customary international law?

Some scholars opined that the development of the concept of R2P could be considered a potential 'Grotian moment' for the accelerated formation of customary international law, better known as the instant customary international law, advocated by Professor Bin Cheng.[155] In the context of the UN General Assembly resolution on Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, Professor Cheng argued that the evidence of sufficient state practice may not be necessary for the formation of instant customary international law, if the other requirement of *opinio juris* is fulfilled, particularly by vote on the UN General Assembly resolutions.[156] While explaining the rationale of such special law-making process, Michael Scharf observed that 'in periods of fundamental change— whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism— rapidly developing customary international law as crystallized in General Assembly resolutions may be necessary for international law to keep up with the pace of other developments'.[157] Bertrand Ramcharan also echoes this view and argues that some solemn parts of the UN Millennium Declaration made by the UN General Assembly might help to clarify the content of international law.[158]

Nevertheless, it is understood that the flexibility of customary international law may not be applied to the concept of 'R2P' for it may not be able to meet the *opinio juris* requirements necessary for the creation of instant customary international law. It is observed that a careful analysis of the relevant UN General Assembly and Security Council resolutions and the explanatory statements and speeches given by the various political executives of the UN members, proves that they were not intending to lay down a binding rule of conduct.[159] Moreover, in the absence of any acceptable definition of the 'responsibility to protect' especially for UN purposes, members had divergent views and opinions, making it difficult for a clear and cohesive expression of *opinio juris* to develop. Thus, the World Summit Outcome Document and the subsequent UN Security Council resolutions may not be giving rise to instant customary international law.

III.C. R2P AND OTHER SOURCES OF INTERNATIONAL LAW

This section examines the extent to which the elements of R2P are present in the International Law Commission's (ILC) Articles of State Responsibility for Internationally Wrongful Acts. It also broadly outlines the activities of international actors as a general reflection of the practice of states.

III.C.1. R2P and Progressive Development of International Law

Certain vital links to the concept of responsibility to protect can be found in the ILC Articles on State Responsibility for Internationally Wrongful Acts.[160] In this connection, should be remembered that the Commission was created by the UN General Assembly under Article 13 of the UN Charter with an express mandate to promote the codification and progressive development of international law.[161] Though the rules formulated by the Commission are not considered as independent sources of international law, in practice they act as an important source of authority for international courts and arbitral tribunals. Also, in the case of *Gabcikovo-Nagymaros* project, the ICJ applied the Draft Articles of State Responsibility (as it was then) and its rules on the exception of necessity as they were based on existing customary international law.[162] This indicates that the Commission's work can be relied upon as evidence of existing customary international law. Similar views may also reference other works of the Commission such as, the Vienna Convention on the Law of Treaties[163] and the Vienna Conventions on Diplomatic and Consular Relations.[164]

Among the Commission's various works, Article 41 of ILC's Articles of State Responsibility, provides for specific consequences for serious breaches of obligations under peremptory norms of general international law and is directly relevant to the concept of 'responsibility to protect'. At the outset, it should be noted that considerable overlap exists between the state responsibility regime and the scope of eligible crimes under the concept of responsibility to protect. In particular, the list of peremptory norms,[165] in the views of

the Commission, includes the prohibition of genocide,[166] alongside the possibility for inclusion in respect of crimes against humanity[167] and war crimes.[168]

The above provision also provides for three specific obligations with respect to serious breaches of peremptory norm of international law: (1) states shall cooperate to bring any serious breach to an end through lawful means, (2) no state shall recognize as lawful a situation created by such breach, and (3) no state shall render aid or assistance in maintaining that situation. These obligations are not cast upon any specific state but on all states.[169] However, practically speaking, there is a possibility that no state may come forward to lead the campaign to end the wrongful acts where every state is obligated to take certain measures.[170] In such cases, a problem might arise as to which state will lead the collective efforts on behalf of all other states. Article 41 of the ILC Articles does not provide an answer to this problem. Yet, this issue needs to be understood in light of the other provisions contained in Articles 42 and 48.[171] While Article 42 delineates what constitutes an injured state, Article 48 enumerates the circumstances in which the responsibility by a state other than an injured state can be invoked. Paragraph 1 of Article 48 provides that a state other than an injured state is entitled to invoke the responsibility of another state if a) the breached obligation is owed to a group of states in which that state is also a member and it is also established that it is for the collective interests of the group or b) the obligation is of an *erga omnes* character. Thus, it becomes clear that the obligations laid down in Article 41, in the circumstances mentioned under Article 48, can be invoked by any affected state, which is reminiscent of the international responsibility provided for in the second pillar of R2P.

Article 48 also prescribes the categories of claims which can be made by the affected state against the responsible state. While such state may not make a claim for reparation for itself, they may make a claim in the interests of an injured state or of the beneficiaries of the breached obligation for the cessation of the internationally wrongful act, assurances and guarantees of non-repetition, and performance of any reparation obligation. Extrapolated in the context of R2P, this would mean that under the Articles of State Responsibility, intervening states have the right to claim cessation of the wrongful act, to obtain the assurances and guarantees of non-repetition, and ensure that the obligation of reparation is fulfilled by the responsible state. However, it may be noted that while R2P is broader in scope and preventive in nature, the Articles of State Responsibility speaks of entrenched rights within the legal framework.

The ICJ had the opportunity to apply all the three obligations listed in Article 41 of the Articles of State Responsibility in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[172] The matter was brought before the Court by the UN General Assembly over the construction of wall built by Israel in and around East Jerusalem. In the context of the obligation of non-recognition, the Court observed that 'all States are under an obligation not to *recognize* the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem.'[173] On the issue of the obligation of non-assistance, it had stated that all states 'are also under an obligation not to render *aid or assistance* in maintaining the situation created by such construction.'[174] It had further remarked that:

> "It is also for all States, while respecting the [UN] Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, al1 the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the [UN] Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."[175]

Thus, in cases of serious breaches of peremptory norms of international law, the invocation of the international responsibility by third states became a reality in the *Wall* dispute. The above legal analysis also outlines the legal underpinnings of R2P in the progressive development of international law.

III.C.2. R2P and Acts of other international actors[176]

A number of officials and units of the UN, such as the Office of High Commissioner for Human Rights,[177] UN High Commissioner for Refugees,[178] Department of Peacekeeping Operations[179] the Special Adviser on the Prevention of Genocide,[180] Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator[181] and the Rule of Law Unit[182] took several measures which encouraged and assisted national governments to assume the responsibility to protect its own people.[183] In fact, the creation of the Office of the Special Adviser on the Responsibility to Protect, as a part of UN bureaucracy, itself was prompted by the need for norm development and norm consolidation Accordingly, the Office was mandated to continue the 'political dialogue with Member-states and other stakeholders on further steps toward implementation'.[184] Moreover, the rich body of human rights instruments, supported by their provisions for reporting and treaty-monitoring mechanisms also support the notion that gross and systematic violations of human rights can no longer be viewed as domestic issues.[185]

IV. CONCLUSION

It is incorrect to say that the concept of R2P is just a subject of international politics. Rather, it is significant to note that some of the foundational aspects of R2P are well-grounded in international law, building on the existing rules of the UN Charter, Genocide Convention, Geneva Conventions, Rome Statute of the ICC, ILC Articles of State Responsibility and customary international law. Further, it utilises leading judicial opinions of the ICJ and other judicial bodies. R2P strengthens the protection of human rights by the UN and its member-states and translates the opinions of the human rights treaty-monitoring bodies into reality.

In particular, the existing treaty law and customary international law recognise that all states have clear obligations *to prevent* and *to protect* their populations against the crimes of genocide, crimes against humanity and war crimes. Moreover, the Genocide Conventions, along with Common Article 1, read along the same lines as the ICJ decisions in the cases of '*Military and Paramilitary Activities in and against Nicaragua*', '*Legality of Threat or Use of Nuclear Weapons*' (Advisory Opinion), and the '*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*' (Advisory Opinion), it becomes clear that states have the obligation *to prevent* the commission of genocide, war crimes and crimes against humanity (excluding ethnic cleansing) even beyond the territorial jurisdiction of the state. In fact, the existing international legal obligations with respect to genocide are much stronger than the responsibility to protect.

The above findings not only highlight that certain elements of R2P have origins in international law, but also that they have the support of a great number of signatories. Accordingly, the reiteration of R2P's legal grounding will lead to wider acceptance of the concept by the international community of states. However, it is incorrect to contend that the entire concept of R2P is firmly established in international law. It should be noted that the various legal components of R2P are not found in one particular source of law, but rather, they are gathered from many sources. Therefore, at times, the linkages between these sources are quite weak.

The lacunae in R2P's legal foundations are highlighted by the fact that while it prescribes certain parameters for intervention, such as the capacity to influence the injuring state and geographical proximity to the scene of events, there are no definite answers in international law to the following questions: when, or at what stage, can interventions be made? Which state will lead the campaign? What should the target of intervention be? Does it include regime change, particularly when a specific regime in that country is responsible for the mass atrocities?

It is gratifying to note that the 'World Summit' version of R2P only refers to four grave international crimes—genocide, crimes against humanity, war crimes and ethnic cleansing—rather than the other broader categories suggested by the Canadian Commission such as 'large-scale killing' or 'overwhelming natural or environmental catastrophes'. This limitation will not only ensure that R2P is applied only in cases of mass atrocities but will make certain that the concept of R2P develops through close linkages with legal developments.

Further, political support for the concept of R2P has also brought certain tangible benefits in legal terms. The endorsement of the World Summit Outcome Document by political leaders at the UN General Assembly, despite their reservations and statements, can be considered strong support by the international political class for the enforcement of existing international legal obligations to their fullest extent. Even though the 'primary responsibility' (the first pillar of R2P) is a restatement of what has already been settled in international law, political mobilisation still carries extra pressure. By endorsing the concept of R2P, UN member-states have implicitly agreed to the UN Security Council's mandate to consider mass atrocities committed within the territorial jurisdiction of a state, even without any international dimension, as a threat to international peace and security for the purposes of Article 39 of the UN Charter.

The debate on R2P has also positively contributed to one of the most vexing issues in UN reform: the discretionary use of veto by the permanent members of the UN Security Council. The fact that the debate has already led to increased global attention on the exercise of veto by the big powers is undeniable. Accordingly, it is expected to contribute to reasoned decision-making and transparency in the voting process of the world's foremost decision-making body.

Finally, one needs to realise that the future of R2P lies only within the UN and not outside it. Finding an alternative to the UN Security Council or its veto is not going to materialise in the near future. It is then suggested that, while R2P should be allowed to grow with the growth of consensus amongst the UN members, the existing international instruments and institutions should also be strengthened.

NOTES

1 Generally, Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (Cambridge University Press 2016).; Francisco Forrest Martin and others, *International Human Rights and Humanitarian Law: Treaties, Cases and Analyses* (Cambridge University Press 2006).; Oliver De Schutter, *International Human Rights Law* (Cambridge University Press 2010).; Fons Coomans and Menno T Kamminga (eds), *Extra-territorial Application of Human Rights Treaties* (Intersentia 2004).; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

2 Article 2 (1) of the ICCPR provides that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant' (*emphasis added*).

3 Article 1 of the ECHR stipulates that the state parties shall 'secure to everyone within their jurisdiction' the rights and freedoms recognised in the Convention.

4 According to Article 1(1) of the ACHR, the state parties created obligations on themselves 'to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.'

5 For instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not have any provision similar to 'jurisdiction' or 'territory'. However, even this Covenant was held to be dealing with 'essentially territorial' rights. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion) [2004] ICJ Rep. 136, para 112.

6 Article 1(3) of the UN Charter.

7 Article 2(7) of the UN Charter. However, this early understanding of the term 'to intervene' has undergone radical change over the years, mainly because of the reduction of the sphere of domestic jurisdiction of state. See Bruno Simma and others (eds), *Charter of the United Nations: A Commentary*, (Volume I, 3rd Edition) (Oxford University Press 2012) 289.

8 ibid.

9 This provided impetus to the UN Security Council to view gross and systemic human rights violations as matters affecting international peace and security and thereby to assume jurisdiction in human rights matters. See Article 24(1) of the UN Charter. For a further detailed study on how intra-state human rights violations were treated as threats to international peace and security, see Christopher J Le Mon and Rachel S Taylor, 'Security Council Action in the Name of Human Rights: From Rhodesia to Congo'(2004) 10(2) UC Davis Journal of International Law and Policy, 197–228. Also see Brian D Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions*, (Pennsylvania State University Press 2003) 170–178.

10 Allen Buchanan, 'Reforming the Law of Humanitarian Intervention', in J L Holgrefe and Robert O Keohane, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press 2003) 130–135.

11 For detailed discussion on the questions of the legality of the use of force, see Christine D Gray, *International Law and the Use of Force* (Cambridge University Press, Cambridge, 2008).

12 In general, Bertrand G Ramcharan, *The Security Council and the Protection of Human Rights*, (Martinus Nijhoff 2002).; Philip Alston and Ryan Goodman, *International Human Rights: Text and Materials* (Oxford University Press 2013) 745–758.

13 United Nations General Assembly, *Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General*, UN Press Release GA/9595 (20 September 1999). Also see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, (2001), <https://www.idrc.ca/en/book/responsibility-protect-report-international-commission-intervention-and-state-sovereignty> accessed 5 January 2021.

14 United Nations Security Council, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN Doc. S/1999/1257, (16 December 1999).; United Nations General Assembly, *Report of the Secretary-General pursuant to General Assembly Resolution 53/35*: The Fall of Srebrenica, UN Doc. A/54/549, (15 November 1999).

15 *Independent Inquiry* (n 14) 1.

16 ibid.

17 ibid.

18 Human Rights Watch.. *Leave None to Tell the Story: Genocide in Rwanda*, (1999) <http://www.hrw.org/legacy/reports/1999/rwanda/rwanda0399.htm> accessed 5 January 2021. The section on 'Taking Responsibility' refers to the statement of the then UN Secretary General Mr. Boutros-Ghali, US President Bill Clinton, Archbishop of Canterbury, the Belgian Senate, and French National Assembly.

19 Kofi Annan's oft-repeated appeal to the international community ('if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?') galvanised support for such initiatives. United Nations Secretary General, *We the Peoples: The Role of the United Nations in the 21st Century*, Millennium Report of the Secretary-General, 48 (UN Doc. A/54/2000, 27 March 2000).

20 *International Commission* (n 13).

21 ibid VIII.

22 United Nations General Assembly, *Implementing the Responsibility to Protect:* Report of the UN Secretary-General, UN Doc. A/63/677, (12 January 2009).

23 United Nations Secretary General, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004), (2 December 2004).

24 United Nations Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc. A/59/2005 (2005), (21 March 2005).

25 United Nations General Assembly, 2005 World Summit Outcome Document, UN Doc. GA Res. A/RES/60/1, (24 October 2005).

26 *International Commission* (n 13) 1 and 2, para 1.6.

27 ibid VII.

28 ibid 2. For political and moral critique of imperialism in the area of humanitarian intervention, See Jean Bricmont, *Humanitarian Imperialism: Using Human Rights to Sell War* (Monthly Review Press 2006) 17.

29 ibid 16, para 2.28.

30 ibid

31 ibid. For a critical review of the concept of armed intervention, see Rajan Menon, *The Conceit of Humanitarian Intervention* (Oxford University Press 2016).

32 ibid 9, para 1.40.

33 ibid 8, para1.37.

34 ibid 12–13, para 2.7 and 2.14.

35 ibid 17, para 2.31.

36 ibid 13, para 2.14. Also see Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (University of Chicago Press 2013).

37 ibid 14, para 2.18.

38 ibid 14, para 2.19.

39 ibid 14, para 2.20. See *Andrea Birdsall, International Politics of Judicial Intervention: Creating a More Just Order*, 117 (Routledge 2009).

40 ibid 15, para 2.22. For linkages between human security and the responsibility to protect, see Malcolm McIntosh and Alan Hunter, *New Perspectives on Human Security* (Green Leaf Publications 2010).

41 ibid 13, para 2.15.

42 ibid 7, para 2.31.

43 ibid 17–18, para 2.32 for further treatment of responsibility to rebuild after the event, see Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016).

44 ibid 32, para 4.19.

45 ibid 3–55, para 6.28–6.40. While the UN General Assembly has the power to recommend peacekeeping operations in exercise of the 'Uniting for Peace' resolution, its implementation depends on the consent of the host-state. Such recommendations were usually known as 'Chapter VI ½ measures'. While the above procedure lends legitimacy to peacekeeping operations, R2P is a form of humanitarian intervention. For text of the 'Uniting for Peace' resolution, see UN Doc. A/RES/377(V), 3 November 1950; For detailed discussion on the relationship between the 'Uniting for Peace' resolution and R2P, see Gentian Zyberi, *An Institutional Approach to the Responsibility to Protect* (Cambridge University Press 2013) 112–113.; Andrew Carswell, 'Unblocking the UN Security Council: the *Uniting for Peace* Resolution'(2013) Journal of Conflict and Security Law, 1–28.

46 ibid 32–37, paras 4.18 and 4.32–4.48. The five criteria of

legitimacy mentioned in the report are: just cause, right intention, last resort, and proportionality of means and a reasonable prospect of success. In this regard, also see Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution 2008) 136–140.

47 *A More Secure World: Our Shared Responsibility* (n 23).

48 For further details, see Joachim Muller, *Reforming the United Nations: The Struggle for Legitimacy and Effectiveness* (Martinus Nijhoff 2006) 28.; Note by Secretary-General, General Assembly, fifty-ninth session, UN Doc. A/59/565 (2 December 2004).

49 *A More Secure World: Our Shared Responsibility* (n 23) 65–66, paras 201–203.

50 ibid 17, para 29.

51 ibid 17, para 30.; ibid 18, para 36.

52 ibid 65–66, para 201.

53 ibid 66, para 201.

54 ibid 66, para 203 (emphasis added). The panel also acknowledged that 'the Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all' (para 202).

55 ibid 66, para 201 (emphasis added).

56 ibid 65, para 198 (emphasis added).

57 *In Larger Freedom: Towards Development, Security and Human Rights for All* (n 24) 35, para 135.; ibid 59, Annex, Section III ('Freedom to live in Dignity'), para 7.

58 *2005 World Summit Outcome Document* (n 25).

59 ibid 21, paras 138–139.

60 See Christina Gabriela Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge 2011) 101–136.

61 Letter from the UN Secretary-General addressed to the President of the Security Council dated 31 August 2007, UN Doc. S/2007/721 (7 December 2007). Also see the website of the Special Adviser on the Prevention of Genocide, available at <https://www.un.org/en/genocideprevention/special-adviser-prevention-genocide.shtml> accessed 5 January 2021.

62 The UN Secretary-General submitted his first report on the Responsibility to Protect in January 2009, and since then, he has submitted eleven annual reports on the implementation of R2P. They are: Implementing the Responsibility to Protect, UN Doc. A/63/677, 12 January 2009; Early Warning, Assessment and the Responsibility to Protect, UN Doc. A/64/864, 14 July 2010; The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect, UN Doc. A/65/877-S/2011/393 (28 June 2011).; Responsibility to Protect: Timely and Decisive Response, UN Doc. A/66/874/-S/2012/578 (25 July 2012).; Responsibility to Protect: State Responsibility and Prevention, UN Doc. A/67/929-S/2013/399 (9 July 2013).; Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect, UN Doc. A/68/947/-S/2014/449 (11 July 2014).; A Vital and Enduring Commitment: Implementing the Responsibility to Protect, UN Doc. A69/981-S/2015/500 (13 July 2015).; Mobilizing Collective Action: the Next Decade of the Responsibility to Protect, UN Doc. A/70/999-S/2016/620 (22 July 2016).; Implementing the Responsibility to Protect: Accountability for Prevention. UN Doc. A/71/1016 – S/2017/556 (10 August 2017).; Responsibility to Protect: From Early Warning to Early Action, S/72/884 – S/2018/525 (1 June 2018).; Responsibility to Protect: Lessons Learned for Prevention, UN Doc. S/73/898 –S/2019/463 (10 June 2019).; Prioritizing Prevention and Strengthening Response: Women and the Responsibility to Protect, UN Doc. A/74/964 – S/2020/501 (23 July 2020).

63 See Section III.B.2 of this article.

64 Article 38 para 1 of the Statute of the International Court of Justice (ICJ) lists the authoritative sources of international law as 'a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states b) international custom, as evidence of a general practice accepted by law c) the general principles of law recognized by civilized nations and d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

65 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

66 *2005 World Summit Outcome Document* (n 25) paras 138 and 139. According to para 138, '[e]ach state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'

67 Article IV.

68 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Merits) [2007] ICJ Rep 2.

69 ibid 219, para 427.

70 ibid 79, para179.

71 Article IX.

72 Article 34.

73 Article 13, Rome Statute of the International Criminal Court, 2187 UNTS 90 ('Rome Statute').

74 *Bosnia and Herzegovina v Serbia and Montenegro* (n 68) 233, para 461 (emphasis added).

75 ibid 221, para 430.

76 ibid.

77 ibid.

78 ibid.

79 ibid.

80 ibid.

81 ibid 221, para 431.

82 ibid 219, para 427.

83 ibid.

84 United Nations, *List of Countries Which Have Ratified the Genocide Convention* <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en> accessed 5 January 2021.

85 United Nations, Growth in the Membership of the United Nations 1945-present, <https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> accessed 5 January 2021.

86 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep. 15, 23.

87 ibid.

88 For detailed enumeration of the Geneva Conventions, See Francisco Forrest Martin and others *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*, (Cambridge University Press 2006), 530.

89 Also see United Nations University, *Siblings, but not twins: POC and R2P*, <http://unu.edu/publications/articles/siblings-but-not-twins-poc-and-r2p.html>accessed 5 January 2021.

90 International Commission (n 13) XI. Geneva Convention Relative to the Protection of Civilian Persons in Time of War. 12 August 1949, 75 UNTS 287.

91 For detailed study on scope of Common Article I, See Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article I of Geneva Conventions Revisited: Protecting Collective Interests' (2000) International Review of the Red Cross, No. 837.

92 See Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) European Journal of International Law, 513–544.; Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34(3) Review of International Studies 445–458.

93 *Corfu Channel* (United Kingdom v Albania) (Merits) 1949 ICJ Rep 4 ('United Kingdom v Albania'). For further discussions, See Vincent Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law', (2003) 85.; International Review of Red Cross, 850.; *Zyberi* (n 45) 100.; Hanna Brollowski, 'The Responsibility to Protect and Common Article I of the 1949 Geneva Conventions and Obligations of Third States', in Julia Hoffman and Andre Nollkaemper, (eds) *The Responsibility to Protect: From Principle to Practice*, (Amsterdam University Press 2012) 93–110.

94 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14.

95 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 257.

96 *United Kingdom v Albania* (n 93) 22.

97 *Nicaragua v United States* (n 94)103–104, para 218.

98 ibid.

99 *United Kingdom v Albania* (n 93). The Court further remarked: 'Article 3 which is common to al1 four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel*, [1949] (Merits), ICJ Rep. 22; para. 215). The Court may therefore find them applicable to the present dispute and is thus not required to decide what role the [US] multilateral treaty reservation might otherwise play in regard to the treaties in question', para 218.

100 *Legality of the Threat or Use of Nuclear Weapons* (n 95) 35, para 79.

101 ibid. para 82.

102 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

103 ibid 199–200, para 158 (emphasis added).

104 ibid 200, para 159.

105 Rome Statute (n 73). For the relationship between the R2P and ICC, See, Carsten Stahn and Goran Sluiter, *The Emerging Practice of the International Criminal Court,* (Martinus Nijhoff 2009) 169–171.

106 Constitutive Act of the African Union, 2158 UNTS 3.; For detailed study of the human rights foundations of R2P, See Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 Global Responsibility to Protect, 442–477.

107 *Rome Statute* (n 73), Preamble and Article 5. In addition to the above list of crimes, the World Summit Outcome Document also specifies 'ethnic cleansing' as a ground for invocation of R2P, which is not criminalized as such under the Rome Statute. Yet, 'ethnic cleansing' can be considered as one of the other international crimes mentioned in the Statute. Similarly, the above conception of R2P does not list the 'crime of aggression' which is punishable by the ICC.

108 Maartje Weerdesteijn and Barbora Hola, 'Tool in the R2P Toolbox? Analysing the Role of the International Criminal Court in the Three Pillars of the Responsibility to Protect' (2020) Criminal Law Forum, 385.

109 United Nations General Assembly, *Implementing the Responsibility to Protect*: Report of the UN Secretary General, UN Doc A/36/677 (12 January 2009).

110 *Weerdesteijn and Hola* (n 108).

111 Rome Statute, Article 1.

112 ibid Article 13(b).

113 See Urmas Paet, 'The Complex Relationship Between R2P and ICC: Can it Succeed?' (Ministry of Foreign Affairs, Republic of Estonia, 2013) <http://www.vm.ee/et/node/29990> accessed 5 January 2021.

114 United Nations General Assembly, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect: Report of the UN Secretary General*, UN Doc. A/69/981 (13 July 2015).

115 Article 4 (h) and (j) of the Constitutive Act of the African Union (2002) http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=221 accessed 5 January 2021. For comprehensive analysis of all connected issues in this regard, See Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 852.; International Review of the Red Cross, 807–826. Also See George Klay Kieh Jr, 'The African Union, Responsibility to Protect and Conflict in Sudan's Darfur Region' (2013) 21(1) Michigan State International Law Review.

116 Krista Nadakavukaren Shefer and Thomas Cottier, 'Responsibility to Protect (R2P) and the Emerging Principle of Common Concern' in Peter Hilpold (ed), *The Responsibility to Protect (R2P): A New Paradigm of International Law*, (Brill 2014) 130.

117 Article 4 (f) and (g). For details on the practice of this provision, see *Zyberi* (n 45) 225 (referring to the Darfur situation in 2004).

118 John Murphy, 'Responsibility to Protect (R2P) Comes of Age? A Skeptics' (2011) 18(2) ILSA Journal of International and Comparative Law.

119 Article 10, Charter of the United Nations, 1 UNTS XVI (emphasis added).

120 Godefridus Hoof, *Rethinking the Sources of International Law*, (Kluwer 1983) 181–184.; Marko Divac Öberg, 'Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 European Journal of International Law, 904.

121 *Hoof* (n 120); ibid.

122 ibid 184 (emphasis added). It is also pertinent to note that the World Summit Outcome Document lists 178 paragraphs and touching upon a range of issues from development to security to health, to name a few and it is quite inconceivable that the entire document is binding upon the members of the UN.

123 Obed Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, (Martinus Nijhoff 1966) 228.

124 ibid.

125 *Nicaragua v United States* (n 94) 100–101, para 190.

126 *International Commission* (n 13) 1, para 1.5.

127 ibid 11.

128 While some authors led by Kelsen opine that the requirement of *opinio juris* may be dispensed with, other scholars opine that state practice is merely an evidence of customary international law rather than a source of international law. It is also explained that there might be non-legal reasons for the specific state practice. See Niels Petersen, 'Customary Law Without Custom? Rules, Principles and the Role of State Practice in International Norm Creation' (2007) 23(2) American University International Law Review,278.; Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, (Routledge 1997) 39.; Theresa Reinold, *Sovereignty and the Responsibility to Protect*, (Routledge 2013) 38 ('In customary international law, what counts is objectively verifiable conduct').

129 While determining the methodology on how to identify the rules of customary international law, the practice of States rather than the decisions of international courts and tribunals will play a crucial role as state sovereignty still remains fundamental to the international legal system. For a report on the work of the International Law Commission (ILC) and the ongoing debate in this regard, *See* Sienho Yee, 'A Reply to Sir Michael Wood's Response to AALCOIEG's Work and My Report on the ILC Project on Identification of Customary International Law' (2016) 15 Chinese Journal of International Law, 34.; Rossana Deplano, 'Assessing the Role of Resolutions in ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues', <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972639> accessed 5 January 2021.

130 David Harris, *Cases and Materials on International law*, (Sweet and Maxwell 2010) 53.

131 According to ILC, the evidence of *opinio juris* may take a wide variety of forms including 'public statements made on behalf of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.' ILC, Identification of Customary International Law, Text of the draft conclusions adopted by the Drafting Committee, 67th Session, UN Doc. A/CN.4/L.869 (14 July 2015).

132 Also, for detailed evolution and analysis of the position of leading countries on R2P, See W Andy Knight and Frazer Egerton (eds), *Routledge Handbook of Responsibility to Protect*, (Routledge 2012).

133 *David Harris* (n 130) 53.

134 Blaine Sloan, *United Nations General Assembly Resolutions in Our Changing World* (Brill, The Netherlands (1991) 72. See James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2008) 42.; Christopher C Joyner, '*U.N.* General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm Creation' (1981) 11 California Western International Law Journal 452.

135 Also See, Anthony Aust, *Handbook of International Law*, (Cambridge University Press 2010) 214.; Alex Bellamy,

Responsibility to Protect: The Global Effort to End Mass Atrocities, (Polity Press 2009) 149.

136 Anne Peters, 'The Security Council's Responsibility to Protect' (2011) 8(1) International Organizations Law Review, 115–154.; Susan Breau, *The Responsibility to Protect in International Law*, (Routledge 2016).

137 Global Centre for the Responsibility to Protect, *R2P References in United Nations Security Council resolutions and Presidential Statements* <https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/> accessed 5 January 2021.

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139 UN Security Council resolution, UN Doc. S/RES/1674 (28 April 2006).

140 UN Security Council resolution, UN Doc.S/RES/1706 (31 August 2006).

141 Global Centre for the Responsibility to Protect, *R2P References in United Nations Security Council resolutions and Presidential Statements* (n 137).

142 UN Security Council resolution, UN Doc. S/RES/1894 (11 November 2011).

143 Global Centre for the Responsibility to Protect, Libya and the Responsibility to Protect (2012), <https://reliefweb.int/sites/reliefweb.int/files/resources/libyaandr2poccasionalpaper-1.pdf?> accessed 24 January 2021.

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147 UN Security Council draft Resolution, UN Doc. S/2012/77, 4 February 2012, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2012%2077.pdf> accessed 5 January 2021.

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149 United Nations, 'Security Council Fails to Adopt Draft Resolution in Syria That Would Have Threatened Sanctions, Due to Negative Votes of China, Russian Federation', <https://www.un.org/press/en/2012/sc10714.doc.htm> accessed 5 January 2021.

150 ibid.

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152 Dan Murphy, 'After Massacre in Syria, Russia and China Veto UN Resolution', *Christian Science Monitor* <http://www.csmonitor.com/World/Backchannels/2012/0204/After-massacre-in-Syria-Russia-and-China-veto-UN-resolution> accessed 5 January 2021.

153 *UN Security Council draft Resolution* (n 147).

154 Michael Doyle, 'Ethics, Law and the Responsibility to Protect' in Gunther Hellmann (eds), *Justice and Peace: Interdisciplinary Perspectives on a Contested Relationship*, (Campus Verlag 2013) 18 ('voting can be purely political').

155 Michael Scharf, 'Seizing the "Grotian moment": Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 Cornell International Law Journal, 439,.; Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law', (1965) 5 Indian Journal of International Law, 23–112.

156 Bin Cheng (n 155) 35–36. Also see Niels Petersen (n 128) 124, 280. He points out the decreasing importance of state practice as a requirement of international custom by relying upon the decision of the ICJ in the Nicaragua case (*Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US) (Merits), [1986] ICJ Rep., 14. According to him, while the judgment reiterates the two conditions of customary international law, namely, state practice and *opinio juris*, analysis of the decision demonstrates that it had mostly confined to the examination of the psychological element.

157 *Scharf* (n 155) 450. Also See Michael Scharf, 'The "Grotian Concept"' (2011) 19(3) ILSA Quarterly, 18.

158 Bertrand Ramcharan, *The Law, Policy and Politics of UN Human Rights Council*, (Brill 2015) 14.; UN Millennium Declaration, UN GA Res 55/2 UN Doc, A/RES/55/2 (8 September 2000).

159 Global Centre for the Responsibility to Protect, *R2P References in United Nations Security Council resolutions and Presidential Statements*, (n 137).; Global Centre for the Responsibility to Protect, *What is R2P*, available at <https://www.globalr2p.org/what-is-r2p/> accessed 5 January 2021. On the question of admissibility of acts of government officials and explanation of votes as an evidence, see Malcolm Shaw, *International Law*, (Cambridge University Press 2012) 82.

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161 UN General Assembly Resolution 174 (II), UN Doc. A/RES/174 (II) (21 November 1947). ; R P Dhokalia, *The Codification of Public International Law*, (Manchester University Press 1970).

162 *Case Concerning Gabcikovo v Nagymaros Project* [1997], ICJ Rep.,7.; S R Subramanian, 'Too Similar or Too Different: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and Their Relationship' (2012) 9(1) Manchester Journal of International Economic Law, 70.

163 In fact, through a catena of decisions, the ICJ had expressed its opinion on the customary nature of the VCLT. For instance, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures) (n 68) 3 and 11; *Legality of the Threat or Use of Nuclear Weapons* (n 95) 226 and 264.

164 Vienna Convention on Diplomatic Relations, 500 UNTS 95; Vienna Convention on Consular Relations, 596 UNTS 261.

165 *Crawford* (n 160) 246–247, paras 4–5. The Report indicates a list of norms which has already attained the status of peremptory norms or which has the potential to attain that status in the opinion of the Commission. They are: aggression, slavery, slave trade, genocide, racial discrimination, apartheid and torture as well as the principle of self-determination and the intransgressible principles of international humanitarian law.

166 ibid.

167 M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (Kluwer Law International 1999) 210.

168 ibid. It is opined that some aspects of war crimes may be included in the list of peremptory norms as the report includes intransgressible principles of international humanitarian law, by relying upon the decision of ICJ in the case of Legality of Threat or use of Nuclear Weapons. ; *Crawford* (n 160) 247, para 79.

169 *Jorgensen* (n 160).

170 Generally, *Menon* (n 31).; Monica Hakimi, 'State Bystander Responsibility', (2010) 21(2) European Journal of International Law, 341–385.

171 *Jorgensen* (n 160). ; *Glanville* (n 160). ; *Breau* (n 43).

172 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (n 102).

173 ibid 200, para 159.

174 ibid 202, para 163 and 196, para 146.

175 ibid 200, para 159.

176 See United Nations General Assembly, *Implementing the Responsibility to Protect: Accountability for Prevention*, (Report of the UN Secretary General), UN Doc. A/71/1016 – S/2017/556 (10 August 2017). ; International Law Commission (ILC), Formation and Evidence of Customary International Law, Memorandum by the Secretariat, 65th Sess., UN Doc. A/CN.4/659 (14 March 2013) (It should be noted that the ILC Drafting Committee on Identification of Customary International Law recognized that the practice of international organizations may contribute to the formation of customary international law in certain circumstances. However, this was not without any opposition as some states contended that the practice of international organizations is 'only pertinent to the extent it reflected the practice of States.'); *See* also Stephen Mathias, 'The Work of the International Law Commission on Identification of Customary International Law: A View from the Perspective of the Office of Legal Affairs' (2016) 15(1) Chinese Journal International Law 25. For a strong critique of this approach, see Deplano, (n 1295).

177 Alex Bellamy, 'Mainstreaming the Responsibility to Protect in the United Nations System: Dilemmas, Challenges and Opportunities' (2013) 5. ; Global Resp. to Protect 175 ("The Office of High Commissioner for Human Rights has been an enthusiastic supporter of RtoP and successive High Commissioners have made extensive use of the principle").

178 Susan Martin, 'Forced Migration, the Refugee Regime and the Responsibility to Protect' (2010) 2 Global Resp. to Protect 38 ('protection was the hallmark of UNHCR's role in the international community'). It discusses on the expanding role of UNHCR in providing assistance and protection to a widening range of forced migrants; Erika Feller, *Towards a Culture of Protection*, Speech delivered at the 8th Annual Forum on Human Rights, Dublin, Ireland <http://www.unhcr.org/admin/dipstatements/44aba8d54/8th-annual-forum-human-rights-dublin-ireland-global-human-rights-protection.html> accessed 5 January 2021 ('complementary protection may be a practical way to address protection needs not covered by existing instruments').

179 United Nations Department of Peacekeeping Operations (DPKO), *Handbook on United Nations Multidimensional Peacekeeping Operations* (2003) 64 ('the mandate of a peacekeeping operation may include the need to protect vulnerable civilian populations from imminent attack'). For a critique of this function, See *Bellamy* (n 135) 162 ('UN has yet to develop clear guidelines for the way military peacekeepers should go about protecting civilians').

180 Touko Piiparinen, *Transformation of UN Conflict Management: Producing Images of Genocide from Rwanda to Darfur and Beyond*, (Routledge 2010) 94 ('The purpose of the Special Adviser is to monitor and collect data on potential conflicts that could evolve into genocide').

181 Jared Genser, 'United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement' (2018) Chicago Journal of International Law, 431.

182 Miodrag Jovanovic, 'Responsibility to Protect and the International Rule of Law', (2015) 14 Chinese Journal of International Law 767.; Michael Kirby, 'UN Special Procedures for Defending Universal Human Rights' in: Charles Sampford and Ramesh Thakur (eds), *Institutional Supports for the International Rule of Law*, (Routledge 2014) 2.

183 For e.g., During the General Debate on Technical Assistance and Capacity Building in the Human Rights Council, the Council referred to the role of Human Rights Council in the promotion of R2P. Accessible via <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20611&LangID=E> accessed 5 January 2021 ; United Nations General Assembly, 'Responsibility to Protect: Timely and Decisive Response', (Report of the Secretary General) UN Doc. A/66/874–S/2012/578 (25 July 2012). Also, for Role of Human Rights Council in Implementing the Responsibility to Protect, See Speech of Professor Gareth Evans, (19 June 2012) available at <http://www.gevans.org/speeches/speech473.html> accessed 5 January 2021. For details of encouragement of such activities by the officials of UN, See United Nations General Assembly, *Implementing the Responsibility to Protect*: Report of the Secretary-General (Paragraph 30), UN Doc. A/63/677 (12 January 2009), <http://www.un.org/ga/search/view_doc.asp?symbol=A/63/677> accessed 5 January 2021.

184 *Professor Jennifer Welsh appointed UN Special Adviser*, (Oxford University 6 August 2015) <https://www.some.ox.ac.uk/news/professor-jennifer-welsh-appointed-un-special-adviser/> accessed 5 January 2021. Also see Edward Luck, 'Getting There, Being There: The Dual Roles of the Special Adviser' in Alex Bellamy and Tim Dunne (eds), *Oxford Handbook of the Responsibility to Protect* (Routledge 2016) 288.

185 For human rights perspectives of R2P, especially, the due diligence obligation, see *Rosenberg* (n 106).

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COMPETING INTERESTS

The author has no competing interests to declare.

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