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R2P: PERFECT IMPERFECTION DEFEATED BY DEBATE

Major L.L.J. James

JCSP 40

Exercise Solo Flight

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SOLO FLIGHT

R2P: PERFECT IMPERFECTION DEFEATED BY DEBATE

By Major L.L.J. James

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INTRODUCTION

*... If a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom ... it is right ...*¹

- Immanuel Kant

In 1948 the international community said never again to atrocities such as genocide, crimes against humanity, war crimes and ethnic cleansing with the United Nations (UN) Genocide Convention of 1948² and subsequently the International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly in 1966.³ Yet, mass atrocities have persisted despite the legal prohibitions. The international community continues to wrestle with reconciling territorial sovereignty and ethical or legal obligations to intervene. The quote from Immanuel Kant perfectly summarizes the dilemma; acting may be illegal yet morally justified.

Canada took the lead in resolving the dilemma when Foreign Affairs Minister Lloyd Axworthy appointed the International Commission on Intervention and State Sovereignty (ICISS). Michael Ignatieff, a significant Canadian contributor to the ICISS, assisted in attempts to create a framework where intervention and state sovereignty could

¹ Mary Gregor, ed., *The Metaphysics of Morals by Immanuel Kant* (New York: Cambridge University Press, 1991), 6:232.

² United Nations, "Convention on the Prevention and Punishment of the Crime of Genocide," United Nations, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/260%28III%29 (accessed April 10, 2014).

³ Office of the High Commissioner for Human Rights, "International Covenant on Civil and Political Rights," Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed April 10, 2014).

be fused into an internationally accepted legal framework. After some refinement from the ICISS report of 2001, the UN doctrine of Responsibility to Protect (R2P) gained international support at the 2005 World Summit. Despite widespread support, R2P remains a source of debate.

To understand R2P, one must understand how the concept evolved. Therefore, the first section of this essay will summarize the evolution of R2P from the earlier norms and practices of humanitarian intervention. Second, analysis of the arguments surrounding R2P and state sovereignty as well as R2P's impact on normative change will follow. This analysis will argue R2P's effectiveness is limited by the search for consensus and legality; fuelling great power politics where *moral* and *social* action alone cannot overcome the *realpolitik* and larger calculation of state interests. Thus, universality and fairness in all cases is both *not* possible, nor to be expected. Third, the inequitable application of R2P does *not* diminish the moral import of the principal and by extension relevancy to the international community. The underlying conceptual framework rooted in the preservation of human lives is valid and should be applied whenever possible. The current battle between those who oppose R2P and those who promote it only serves to further constrain the potential lifesaving power of the concept which, in the end, both sides of the argument wish to promote. R2P is an important yet imperfect concept, optimized rather than applied to all cases in an equitable and systematic way. The key word here is *optimized*. Operationalization of R2P in theory and in practice can only be achieved when the international community recognizes it as an *imperfect duty* and not an all or nothing proposition. The objective of this paper is to explain and illustrate how viewing R2P as an imperfect duty both promotes a desirable normative shift and assists in

the operationalization of the concept within a moral yet pragmatically realistic framework.

FROM HUMANITARIAN INTERVENTION TO R2P

The post-Westphalian state system evolved from the mid-17th century and is premised upon the principles of sovereign equality and territorial sovereignty where “... states [were] legally equal to each other, not subject to the imposition of supranational authority, and above all, not intervening in each other’s internal affairs....”⁴ Sovereignty reigned supreme, states were responsible for their citizens but intervention was all but impossible.

The Armenian genocide took place in 1915 killing 1.5 million Armenians;⁵ Stalin killed millions of his citizens in the Holodomor of 1932.⁶ Citizens died in ever increasing numbers at the hands of the state. World recognition of these horrors provided the foundation for both a normative and legal shift. The international community began to recognize the importance of creating a mechanism to intervene. The norm of humanitarian intervention began to emerge, laying the foundation for a legal mechanism yet to materialize. The Holocaust of WW II forced the world to respond, in both the normative and legal sense, noting the depraved extent of man’s inhumanity to man. The systematic destruction of 6 million Jews galvanized world opinion into recognizing the

⁴ Gareth Evans, *The Responsibility to Protect : Ending Mass Atrocity Crimes Once and for All* (Washington D.C.: Brookings Institute, 2008), 16.

⁵ Samuel Totten and Paul Bartrop, eds., *The Genocide Studies Reader* (New York: Routledge, 2009), 138.

⁶ *Ibid.*, 139.

need to respect the rights of every human being. The United Nations was born, supported by the emerging superpower, the United States, determined to put an end to mass atrocities.

The UN Charter is clear on its stance with respect to intervention. Article 1.1 states the UN purpose is:

To maintain international peace and security... take effective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression ... to bring about by peaceful means, and in conformity with the principles of justice and international law ... situations that might lead to a breach of peace;⁷

Article 2.4 similarly states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN.⁸

And finally Article 2.7 states:

Nothing in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state ...⁹

The UN laid out avenues for maintaining peace and preserving human life while balancing sovereignty and national interests.

In 1948 the Genocide Convention was adopted by the UN General Assembly and then the ICCPR in 1966, enshrining the idea of human rights in the world's consciousness. Unfortunately the acknowledgement of human rights did not translate into

⁷ United Nations, "Charter of the United Nations," United Nations, <https://www.un.org/en/documents/charter/index.shtml> (accessed April 10, 2014).

⁸ *Ibid.*

⁹ *Ibid.*

action. The Cold War polarized the world into factions with little international recourse. Gareth Evans states, “The superpowers were largely indifferent, rhetoric aside, to what happened inside the other bloc and were incapable of doing much about atrocity crimes that might be perpetrated there because of the Security Council Veto.”¹⁰ Wars raged and genocides like Cambodia continued with little or no human rights based response from the superpowers.

With the end of the Cold War in 1989 a new era of power politics came into being. State alliances fused together by Cold War exigencies began to fracture and ethnic tensions were thrust once again into the public consciousness. Three events in particular highlight the structural weaknesses of the UN to stop mass atrocity; Bosnia, Rwanda and Kosovo.

In Bosnia, Rwanda and Kosovo the UN failed to react when atrocities were anticipated or known to be occurring, demonstrating a consistent structural weakness. Further, the means by which they reacted in each case led to either passive acceptance of the atrocity, such as in the cases of Bosnia and Rwanda, or an inability to achieve consensus resulting in NATO alliance action, as demonstrated in Kosovo.

In 1993 UNPROFOR’s mandate in Bosnia was:

... to ensure that the [United Nations Protected Areas] UNPAs are demilitarized, through the withdrawal or disbandment of all armed forces in them, and that all persons residing in them are protected from fear of armed attack. To this end, UNPROFOR is authorized to control access to the UNPAs, to ensure that the UNPAs remain demilitarized, and to

¹⁰ Evans, *The Responsibility to Protect : Ending Mass Atrocity Crimes Once and for All*, 22.

monitor the functioning of the local police there to help ensure non-discrimination and the protection of human rights....¹¹

Unfortunately, the mission failed in its mandate when General Ratko Mladić seized the UN safe havens of Srebrenica. After intimidating the UNPROFOR soldiers, General Mladić rounded up more than 7000 men and boys, drove them to a nearby field and executed them.¹² With peacekeepers in place, the world community looked on once again as a mass atrocity was committed. Calls for intervention became louder.

In 1994 Rwanda a similar situation occurred where the international community was unable to act to prevent tragedy. After the assassination of Rwandan President Juvénal Habyarimana, General Roméo Dallaire's UNAMIR troops were unable to prevent the killing of 800,000 Rwandans at the hands of their fellow citizens.¹³ UN action came too little and too late. Calls for a mechanism for intervention became even louder.

In 1998 Slobodan Milošević was determined to crush ethnic Albanian separatists using his military and police apparatus.¹⁴ This time the international community was ready. Negotiations between NATO and the UN ensued but were hopelessly deadlocked due to the veto powers of China and Russia. NATO chose to act unilaterally in what is widely considered to be an illegal yet legitimate war based on the need for humanitarian intervention.

At the end of the 20th century the international community was left with more questions about intervention than answers. In cases like Bosnia and Rwanda humanitarian

¹¹ United Nations, "Former Yugoslavia - UNPROFOR," United Nations Department of Public Information, http://www.un.org/en/peacekeeping/missions/past/unprof_b.htm (accessed April 10, 2014).

¹² Totten and Bartrop, *The Genocide Studies Reader*, 151.

¹³ Adam Jones, *Genocide: A Comprehensive Introduction* (London: Routledge, 2011), 352-360.

¹⁴ Totten and Bartrop, *The Genocide Studies Reader*, 152.

intervention was required yet did not come. In the case of Kosovo humanitarian intervention did come, but was ultimately illegal under international law.

Within the UN Charter, the preservation of sovereignty is a key component and guiding principle in balancing intervention.¹⁵ However, Chapter VII of the UN Charter recognizes state sovereignty as secondary to international peace and security. Articles 24.1 and 39 authorize the Security Council to employ non-military options by invoking Article 41 of Chapter VII if international peace and security are threatened. Further, Article 42 provides for kinetic options of intervention through security council approval where "... action by air, sea, or land forces as may be necessary to maintain or restore international peace and security...."¹⁶ The only other military option for intervention is through the self-defence clause of Article 51 where:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁷

However, even in the case of self-defence, the preeminence of Security Council authority is maintained. The Charter affirms the basis for any action must stem from Security

¹⁵ United Nations, *Charter of the United Nations*, 22.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

Council approval. Inherent in the writing is the assumption the Security Council is an effective body. Yet if defunct, the requirement for consensus on the Security Council does not allow for the legal application of force when it may be legitimate. Moreover, the self-defence clause can only be narrowly construed. Consensus is often unachievable due to power politics.

In 2001, Canadian Foreign minister Lloyd Axworthy established the ICISS. The final report was a culmination of human rights ideas and principles from previous work defining the rights of internally displaced persons, resulting in the state's Responsibility to Protect. The effort brought the idea of human security to the forefront of the discussion with respect to protecting against atrocities, linking international security to individual "... freedom from fear but also freedom from want"¹⁸ The ICISS delivered the following key principles: First, for a state to be sovereign it must protect its citizens. Second, where a state is unwilling or unable to protect its citizens, the responsibility to protect outweighs the principle of nonintervention. Third, where intervention is contemplated the international community has the responsibility to prevent, react and rebuild, with prevention being the overriding R2P principle.¹⁹ The ICISS suggested the authority to protect should remain with the Security Council and provided 6 criteria to guide the international community in its contemplation of intervention. These *jus ad bellum* – the “right to go to war” criteria developed from the teachings of Augustine and

¹⁸Pauline Kerr, “Human Security,” in *Contemporary Security Studies*, ed. Allan Collins, 3rd ed. (Oxford: Oxford University Press, 2013), 106.

¹⁹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, Canada: International Development Research Center,[2001]).

Thomas Aquinas, evolving into Just War Theory.²⁰ From a strong Catholic foundation, this theory justifies war, interlacing the moral abhorrence of warfare with the reality that it may sometimes be necessary. The ICISS panel used these important principles for guiding R2P intervention and noted that the R2P principle is not constrained to military options, but rather encompassed the full range of Diplomatic, Informational, Military and Economic aspects of power. The ICISS six guiding principles were: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.²¹

The December 2001 release of the ICISS report “*Responsibility to Protect*,” collided with the aftermath of the events of September 11, 2001. Shadowed by the war against terror, the R2P work would have been lost if it not for the UN Secretary General’s High-Level Panel on Threats, Challenges, and Change. This panel released a report entitled “*A More Secure World: Our Shared Responsibility*”²² in December of 2004 and acted as a segue to the UN’s Sixtieth Anniversary World Summit in September 2005. At the summit, more than 150 heads of state agreed to paragraphs 138 and 139 of the World Summit Outcome Document essentially supporting the key ICISS elements defining the relationship between sovereignty and R2P.²³ As Gareth Evans remarks, this was an

²⁰ Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province, Vol. 2 (Chicago, Illinois: Encyclopedia Britannica, Inc., 1952), 578-579.

²¹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* 32, 32.

²² High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations, [2004]).

²³ United Nations, *2005 World Summit Outcome* (New York: United Nations, [2005]).

enormous achievement where: “The Language of the relevant paragraphs, 138 and 139, of the Outcome Document differs little from the previous formulations in the ICISS ...”²⁴

Secretary General Ban Ki-moon implemented the final stage in the evolution of R2P. In his report, aptly entitled “*Implementing the Responsibility to Protect*,”²⁵ three fundamental R2P pillars emerged,

Pillar one is the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement....

Pillar two is the commitment of the international community to assist states in meeting those obligations....

Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection....

Following the presentation of the implementation document to the international community, R2P’s latest formulation was debated. The outcome was UN resolution 63/308 where the international community “... decides to continue its consideration of the responsibility to protect.”²⁶ Nothing significant has emerged in the practical application of R2P since resolution 63/308. While opponents point to inequitable use, erosion of sovereignty, and abuse of the principle; advocates hope through norm creation the R2P principle will be affirmed in the international community and become a new customary international law. Currently, R2P remains a principle which garners

²⁴ Evans, *The Responsibility to Protect : Ending Mass Atrocity Crimes Once and for All*, 47.

²⁵ Report of the Secretary General, *Implementing the Responsibility to Protect* (New York: United Nations,[2009]).

²⁶ United Nations, “63/308. the Responsibility to Protect,” United Nations, [http://responsibilitytoprotect.org/Resolution%20RtoP\(3\).pdf](http://responsibilitytoprotect.org/Resolution%20RtoP(3).pdf) (accessed April 10, 2014).

international consensus without legal obligation. It is to an examination of this aspect of R2P where the focus of the paper will now be directed.

THE DEBATE: R2P VERUS SOVERIEGNTY

*Throughout the nearly 400 years of more or less untrammelled operation of Westphalian sovereignty principles, it is hard to find examples where states looked beyond their own territorial and colonial borders, beyond their own immediate economic and security interests, to demonstrate – by acting to halt or avert new or continuing atrocity crimes ...*²⁷

Gareth Evans

Gareth Evans' views on sovereignty helped to shape the conclusions of the ICISS. A co-chair of the ICISS, and in many ways the architect and defender of the R2P concept today, Evans recognizes the Westphalian idea of sovereignty did not always serve the citizens of states well. His writing demonstrates he understands the importance of sovereignty, its history, and the need for R2P to incorporate sovereignty into its formulation. However, his criticism of sovereignty, and its ability to protect, is rooted in his historical review of state actions from Westphalia until the genocides of the 90s.²⁸ Understanding how moral imperatives are often juxtaposed with sovereignty, Evans embarks on an ambitious plan with ICISS, to work within a structure he knows will give R2P the best chance of success. Knowing sovereignty will always trump morality in the implementation of R2P, Evans attempts to define R2P as a necessary by-product of sovereignty and thereby strengthen R2P. In this way he is a realist, understanding that power politics will have a great bearing on the future of R2P. By incorporating

²⁷ Evans, *The Responsibility to Protect : Ending Mass Atrocity Crimes Once and for All*, 17.

²⁸ *Ibid.*

sovereignty into the R2P framework, Evans seeks to ensure its survival as a means to an end in the protection of civilians. Evans *actually* embraces an idea closer to human security.²⁹ Specifically, his praise for the idea of *individual sovereignty* presented by Kofi Annan in 1999, essentially an offshoot of human security, is an underlying theme throughout his work. In 2001, Evans presents his ICISS perspective as follows:

We sought to turn the whole weary – and increasingly ugly debate about the ‘right to intervene’ on its head and re-characterize it not as an argument about the ‘right of states to do anything but rather about their ‘responsibility’ – in this case, to protect people at grave risk. The relevant perspective, we argued, was not that of prospective interveners but of those needing support. If any ‘right’ was involved, it was of the victim of mass atrocity crimes to be protected....³⁰

Evans’ effort to present sovereignty as an R2P-inclusive concept is demonstrated. Yet, traditional sovereignty is entrenched in the 2005 world summit report and further solidified in the three pillars of the 2009 “*Implementing the Responsibility to Protect*” report.³¹ In comparison, the ideas of human security or individual sovereignty are minimized and watered down.

The link between sovereignty and R2P can be attacked by citing the 2003 invasion of Iraq as an example of where R2P was used as a form of neo-colonialism by powerful states. Both America and Britain were determined to intervene in Iraq yet the

²⁹ For definitions of Human Security see: United Nations Development Programme, “New Dimensions of Human Security,” in *Human Development Report 1994* (New York: Oxford University Press, 1994), 22-46.; Karen A. Mingst and Margaret P. Kearns, “Human Security: The Environment and Health,” in *The United Nations in the 21st Century*, 4th ed. (Philadelphia: Westview Press, 2012), 247-270.; Kerr, *Human Security*, 104-116.

³⁰ Evans, *The Responsibility to Protect : Ending Mass Atrocity Crimes Once and for All*, 39-40.

³¹ Report of the Secretary General, *Implementing the Responsibility to Protect*

two administrations offered very different reasons for their intervention. America acted in search of weapons of mass destruction (WMD), but Britain acted to protect the citizens of Iraq against a murderous regime. Ten years after the invasion, Tony Blair remains resolute in his opinion:

If we hadn't removed Saddam from power just think, for example, what would be happening if these Arab revolutions were continuing now and Saddam, who's probably 20 times as bad as Assad in Syria, was trying to suppress an uprising in Iraq? Think of the consequences of leaving that regime in power....³²

R2P was invoked with conflicting motives. Regardless, the impact of power politics becomes evident, diluting the importance of R2P. Uncertainty and a lack of consensus over state-based motivations for intervention erode the integrity of R2P and paralyze the debate, forcing R2P into a malleable weapon in today's cut-throat political atmosphere.

Aidan Hehir, Director of Security and International Relations at the University of Westminster, is an advocate of humanitarian intervention in the narrowly defined military sense but an opponent of R2P. He characterizes Gareth Evans' interpretation of the issue as a battle between "... two opposing views which in fact, both share a mistaken understanding of the meaning of sovereignty." Hehir proposes the sovereignty versus intervention battle does nothing for advancing the discourse and instead promotes dichotomies in International Relations (IR) theory.³³ Although Hehir's arguments are

³² Ned Simons, "Tony Blair Stands by Iraq War as 10th Anniversary Approaches," Huffington Post, http://www.huffingtonpost.co.uk/2013/03/19/tony-blair-iraq-war_n_2883513.html (accessed April 10, 2014).

³³ Aidan Hehir, *The Responsibility to Protect : Rhetoric, Reality and the Future of Humanitarian Intervention* (Basingstoke: Palgrave Macmillan, 2012), 180-181.

valid regarding the uselessness of polarizing the concept, Hehir offers little to advance the discussion.

In place of a dichotomy, Hehir's discourse argues that R2P and humanitarian intervention should be undertaken by the rule of law. He believes:

... The significance of R2P's lack of legal status and proposals for legal reform stems from the fact that without legal weight it is difficult to see what R2P actually contributes to the debate on humanitarian intervention ... the R2P we have today does not significantly reform the discredited system it was originally established to address...³⁴

With regard to sovereignty, Hehir believes the definition is fluid.³⁵ He suggests the debate between sovereignty and intervention need not exist. Sovereignty changes with time, and therefore the normative changes sovereignty undergoes will ultimately allow for the legal framework to evolve resulting in humanitarian intervention. When such a normative shift occurs, legal change follows. In summary he states:

... amendments to the law governing humanitarian intervention, derived from an inclusive process and with consent of all states, would certainly constitute an alteration of the status of sovereignty but would be based on general agreement rather than a unilateral initiative and thus potentially acceptable. The normative concept of sovereignty and its current legal status, do not, therefore, preclude collective intervention authorized by an internationally recognized body.³⁶

Hehir suggests a middle ground exists whereby sovereignty is mutable, becoming less important in the face of globalization where human security issues become more relevant. He prefers to wait for legal change following normative change. Hehir's argument essentially employs a wait and see strategy, ultimately offering nothing to individuals

³⁴ *Ibid.*, 85.

³⁵ *Ibid.*, 181.

³⁶ *Ibid.*, 207.

affected by atrocities today. Atrocities committed today cannot wait for a due course of normative change to redefine sovereignty tomorrow. Also, Hehir acknowledges the inefficiency of the UN Security Council earlier in his book,³⁷ while later putting his confidence in the process as a support to his argument. Hehir's concept of relative sovereignty further stagnates the debate.

Hehir tries to untangle sovereignty from the R2P debate while Evans attempts to incorporate it. Unfortunately, both approaches miss the mark. Viewing intervention only through the lens of sovereignty clouds the concept. It remains a necessary evil in considering intervention. Rather than the *source* of the debate, sovereignty needs to be reduced to a factor *in* the debate. Unilateral action occurred in Iraq in 2003 irrespective of the reasoning provided. Actions are therefore not always contingent on consensus. Sovereignty is not sacrosanct when compared to the intrinsic value of human life.

There is a danger that R2P can be perverted by power politics and result in further wars. R2P may be used as a means to an end. However, it is important to note that R2P cannot be enacted in a vacuum. A state cannot act without the awareness of the international community. Here, the moderating effect of the UN and the Security Council becomes invaluable. Even if the UN is unable to respond directly, the actions of the state intervening will be immediately assessed by the international community and condemnation will come when state actions are obviously contrary to R2P. Criticism of the 2003 invasion of Iraq and the current criticism surrounding Russia's annexation of Crimea in the Ukraine demonstrate the UN still holds some normative power. When states act unilaterally the international community judges the morality of the actions. In

³⁷ *Ibid.*, 57-58.

the case of the Ukraine the international community is striking back, albeit with non-military options in the form of economic sanctions. When weighing unilateral action in the prevention of atrocities, against consensus seeking that paralyzes R2P, it is preferable to bias on the side of allowing action. Let the international community judge accordingly, choosing to collectively admonish the intervener if required. Misuse of the principle does not invalidate its importance. The risk of preventing intervention is greater than the risk of perversion as the employment of R2P requires legitimacy, not consensus.

THE DEBATE: R2P NORMATIVE VERSUS LEGAL POWER

History has demonstrated that the only identifiable common interest shared by all states since the inception of the Westphalian system in 1648 is that of survival. If a shared sense of moral obligation exists that will now motivate states to act in the name of human security, where did it suddenly come from? Genocides, crimes against humanity, war crimes, and ethnic cleansing are not by any means new phenomena.³⁸

- Robert W. Murray

Robert Murray provokes a debate at the heart of R2P. Humanity has committed atrocities for centuries, yet the atrocities of the last generation have re-energized a discussion attempting to determine the international community's responsibility and/or obligation to intervene. Normative change through discussion is what R2P supporters rely upon to prevent further atrocities. As previously noted in the history of R2P, the concept of R2P has rapidly evolved from 2001 to 2009 in terms of acceptance in the international community. However, it has yet to be adopted in an independent, overarching legal

³⁸ Robert Murray, "The Challenges Facing R2P Implementation," in *The Routledge Handbook of the Responsibility to Protect*, eds. W. Knight and Frazer Egerton (New York: Routledge, 2012), 73.

framework. R2P in its current form encompasses the criminal acts of genocide, crimes against humanity, ethnic cleansing and war crimes, already codified in law and enforceable at the International Criminal Court. Further, the criminal acts translate into the domestic laws of many countries. Yet, in terms of a means to intervene, R2P has no legal force obligating states to act. Moreover with the degradation in focus on human security, omission of the 6 guiding principles of R2P rooted in just war theory, and subsequent reliance on the Security Council, R2P is losing rather than gaining momentum through normative change. Despite these limitations, the hope remains that normative change will transform R2P, creating new benchmarks for intervention.

Mathew Evangelista speaks to the power of normative change in his book "*Law, Ethic and the War on Terror*."³⁹ Citing examples of norm creation such as the abolition of state sponsored torture, the pursuit of international justice through the International Criminal Court (ICC) and the protection of civilians in combat, he demonstrates how norms are created.⁴⁰ Specifically, his analysis of the 1997 Ottawa Mine Ban reveals how pressure from a quorum of international states affects other states in the creation of a new norm. While the 1997 treaty did not include the signatories of the largest users of land mines, the treaty effected a negative connotation, altering our lexicon, reducing manufacturing and destroying millions of existing mines. The treaty demonstrates the effects of moral spillover within the international community when a practice is deemed

³⁹ Matthew Evangelista, *Law, Ethics, and the War on Terror* (Cambridge: Polity Press, 2008), 202.

⁴⁰ *Ibid.*, 6-22.

unacceptable. Compliance is not absolute but the baseline moves in a discernible direction.

Similarly, despite the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and Bacteriological Methods of Warfare⁴¹ it was widely feared chemical weaponry would again be employed in WWII. Yet a normative shift occurred preventing the use of chemical weapons even though development continued. Fear of retaliation and the ungentlemanly nature of the weapon resulted in an unofficial “first use” policy where no combatant employed the weapons on a large scale.⁴²

Evangelista also notes a critical issue with respect to norm creation and R2P.

... norm entrepreneurs were not trying to restrict an existing practice ... instead they sought to promote a new state practice ... Ironically, even when the activists thought they had won – as when states embraced the rhetoric of R2P – the victory was a pyrrhic one. High profile cases of genocide, such as in Darfur, generated concern, but little serious action on the part of major powers ...⁴³

In both the landmine and chemical weapon instances norm creation resulted from the prohibition of action. It is easier to enforce a norm through the prohibition of action rather than to compel action.

⁴¹ International Committee of the Red Cross, “Protocol for the Prohibition of the use of Asphyxiating, Poisonous Or Other Gases, and of Bacteriological Methods of Warfare.” International Committee of the Red Cross, <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=58A096110540867AC12563CD005187B9> (accessed 29 April, 2014).

⁴² Jonathan M. McComb, “Closing Pandora’s Box: The Threat of Terrorist use of Weapons of Mass Destruction,” *Global Security Studies* 4, no. 1 (Winter 2013), 73.

⁴³ Evangelista, *Law, Ethics, and the War on Terror*, 20-21.

Supporters of R2P as an emerging norm cite the 2011 intervention in Libya

where:

The crisis in Libya seized the attention of the international community and has been labeled a clear case for when timely and decisive response to uphold RtoP [R2P] in the face of an imminent threat of mass atrocities should occur....⁴⁴

This conclusion is substantiated by the fact that the Security Council unanimously invoked R2P in UN resolution 1973:

... [The UN] *Reiterat[es]* the responsibility of the Libyan authorities to protect the Libyan population and *reaffirming* that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians ... [and] *Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack ...⁴⁵

The resulting action by NATO was decisive.

Conversely, if a norm was created in the implementation of R2P in Libya, it should also have extended to operations in Syria. Critics of R2P's normative effect point to this inconsistency as evidence against the establishment of R2P as a norm. Robert Murray remains pessimistic about the future of R2P as a norm, stating:

Syria of course is not the only ongoing example of humanitarian crisis in the world that would fall under the proposed auspices of R2P. We can easily look to the Democratic Republic of the Congo, Sudan and many other nations ... what has become evident since 2001 is that states and

⁴⁴ International Coalition for the Responsibility to Protect, "The Crisis in Libya," International Coalition for the Responsibility to Protect, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya> (accessed April 10, 2014).

⁴⁵ United Nations, "Resolution 1973," United Nations, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011)) (accessed April 10, 2014).

international institutions do not see R2P as the framework through which to approach human security....⁴⁶

Debating the implications and usefulness of norm changes within R2P does not change the facts on the ground. As with sovereignty, the normative debate means nothing to those who are oppressed, marginalized and killed. It is the timely ability to act that is at the core of the R2P principle. When contemplating intervention in the preservation of human life against atrocities one must acknowledge R2P's in-equitable application, its existence beyond legal bounds where moral imperatives battle susceptibility to state interests compelling action or inaction. R2P in and of itself is contrary to normalized thinking. R2P exists in the grey, not the black and white. By polarizing the debate between supporters of R2P and detractors, or defining it in terms of whether it is a normative or legal process misses the point. At the heart of the concept is the prevention of atrocities, plain and simple. Overcomplicating the discussion renders the principle impotent. R2P, as a general principle, understood in its imperfection, is not diminished by humanity's ability to marginalize it, exploit it or prevent it. The principle remains perfect in its imperfection.

THE WAY FORWARD

It has been said that the world is divided among those who make things happen, those who watch things happen, and those who wonder what happened. Too often, when it comes to mass atrocity crimes, too many of us have been left wondering – how could this horror possibly have

⁴⁶ Robert Murray, "Conclusion: The Responsibility to Protect After Libya," in *Libya: The Responsibility to Protect and the Future of Humanitarian Intervention*, eds. Aidan Hehir and Robert Murray (Basingstoke: Palgrave Macmillan, 2013), 227.

*happened yet again when there were so many reasons and so much international capability to make it avoidable.*⁴⁷

- Gareth Evans

Analysis has shown thus far that the R2P concept remains contentious. The effort to fit what is essentially a moral concept into a legal framework breaks down.

Sovereignty and normative change generate disagreement among scholars, lawyers and politicians alike, limiting the scope of R2P to save lives. This paper proposes a way forward, delineating how R2P should be viewed in order to make it a more effective tool, a tool optimized for use with a full understanding of its limitations.

Going back to the philosophy of Immanuel Kant provides some clarity as to where R2P may exist along a spectrum of duties. Heather Roff's interpretation of Kant's "Taxonomy of Duties" is helpful: she categorizes Kant's ideas into three dimensions; *Right and Virtue*, *Perfect and Imperfect Duties*, and *Provisional Duties*.⁴⁸ Her analysis situates R2P as belonging to Kant's third dimension, a provisional duty.⁴⁹ This duty focuses on the *capacity* to act: "... a duty that permits exception on the basis of capacity."⁵⁰ This definition is too narrow since provisional duties "... are similar in terms of inclination to imperfect duties... [however] based first and foremost on the ability or capacity to act."⁵¹ Surely, capacity is a key component of R2P. An actor must be able to act. However, it is important to think in terms of the context of the international

⁴⁷ Evans, *The Responsibility to Protect : Ending Mass Atrocity Crimes Once and for All*, 241.

⁴⁸ Heather Roff, *Global Justice, Kant and the Responsibility to Protect* (New York: Routledge, 2013), 11.

⁴⁹ *Ibid.*, 20.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

community as well. If R2P is an international responsibility under the auspices of the UN as a collective body, then individual state capacity is not a pre-condition for invoking the principle of R2P. Thus, using Kant's Taxonomy of Duties, R2P should be classified as an imperfect duty. Essentially, under the UN system, which is charged specifically with the maintenance of international peace and security, R2P functions as an imperfect duty and should only move into the realm of a provisional duty if a state is acting unilaterally. Roff combines a number of sources and reformulates Kant's definition of an imperfect duty as;

... uncoercible; subject to internal legislation; ethical; solely concerned with 'ends'; judged by an agent's internal motivations; unable to produce a 'contradiction in willing'; ... specif[ies] no particular agent ... specif[ies] no particular content; not fully dischargeable; and not demanded by Recht [right or authority].⁵²

Noting the characteristics listed above, R2P qualifies. First, domestic politics subjects R2P to internal legislation. Second, the application of R2P has shown that although there is a moral component to the concept, it is primarily concerned with ends, especially when the ends involve the national interests of the stakeholders. Third, the difficulty in identifying the agent responsible for intervention is characteristic of R2P. Fourth, the content of the response is not necessarily the same from intervention to intervention. Lastly, R2P is not fully dischargeable, nor is it always constrained by who has the right or legal authority to act.

Michael Walzer brings the discussion full circle. Writing at the time when the concept of R2P was on the cusp of emergence, he captures the essence of the challenge in his article "Arguing for Humanitarian Intervention".⁵³ He never explicitly uses "R2P" in

⁵² *Ibid.*, 15.

his article and writes from a perspective prior to the much of the current debate surrounding the concept. Nevertheless, the simplicity of the argument is all the more compelling because the buzzwords and rhetoric are not involved. Walzer answers the question of when action should be taken, who should take the action and how the action should be taken. His argument is based upon delineating occasions, agents, means and ends of intervention. He asserts, action should be taken by the international community when, "... acts that shock the conscience of humankind ..." occur.⁵⁴ The knowledge of wrongdoing should be accompanied by "... sanctions [that] might be imposed by some free-form coalition of interested states..." yet when ethnic cleansing is concerned it is not "... possible to wait for a local response," action should be taken.⁵⁵ Walzer understands the reality of International Relations and posits the inequitable application of intervention is a foolish argument against R2P. Consistency is not an issue. He understands not all issues can be addressed in an identical fashion because power politics, resource availability, and practical state calculations of putting blood and treasure in harm's way will always influence decision-making. He states: "We need to ask what the costs of the intervention will be for the people being rescued, for the rescuers, and for everyone else. And then we can only do what we can do."⁵⁶ Walzer addresses the question of who should act by using a simplistic metaphor. He imagines a situation in a small town where a fire breaks out. Who should react? Of course there is no time for vetoes or discussion. Action should be taken immediately, by whoever can act, and more

⁵³ Michael Walzer, "Arguing for Humanitarian Intervention," in *The New Killing Fields*, eds. Nicolaus Mills and Kira Brunner (New York: Basic Books, 2002).

⁵⁴ *Ibid.*, 20.

⁵⁵ *Ibid.*, 21.

⁵⁶ *Ibid.*, 22.

importantly, by the neighbors if they are able. Extending this example to the world, an analogy is obvious; it is the neighbors who should intervene. Ideally, a united front from the UN should eventually manage the crisis, but as Walzer states:

Collective decisions to act may well exclude unilateral action, but collective decisions not to act don't have the same effect. In this sense, unilateralism is the dominant response when the common conscience is shocked. If there is no collective response, anyone can respond. If no one is acting, act.⁵⁷

Walzer's analysis puts aside legality, preferring to appeal to virtue and efficacy. He aligns R2P with the imperfect duty of Kant and slices through the debate of sovereignty and norms, getting to the heart of what it means to have a responsibility to protect. Put bluntly, if there is a neighborhood conflagration, it is the neighbors who should act, and quickly. Walzer is also not naïve in his assertions. He recognizes unilateralism may lead to ulterior motives present in intervention. He beautifully turns the question of consensus on its head:

... how would humanity be better served by multi-lateral decision making? Wouldn't each state involved in the decision process also act in its own interest? And then the outcome would be determined by bargaining amongst interested parties – and humanity obviously, would not be one of the parties....⁵⁸

By addressing the reality of power politics and the primacy of national interests, Walzer nullifies the criticism against R2P's penchant for unilateralism and lack of universality.

Walzer also deconstructs the means and the ends of intervention into simple yet potent expressions free from impediments. His means equate to what he calls a simple

⁵⁷ *Ibid.*, 24-25.

⁵⁸ *Ibid.*, 26.

truth: “from the standpoint of justice, you cannot invade a foreign country, with all the consequences that has for other people, while insisting your own soldiers can never be put at risk”.⁵⁹ Intervention is inherently risky and this is precisely why it is an *imperfect* duty. A country cannot always be compelled to act. It must weigh the responsibility to act with the impact upon its citizens and those it aims to protect. This is why R2P cannot exist in a strictly legal framework or a strictly normative framework, and why arguments to put the concept in one box or another ultimately fail. R2P belongs to both realism and liberalism, it must be optimized from both points of view separate from politics and legalities, with the central aim narrowly defined as using the resources available to stop human suffering.

Finally, R2P ends when “local legitimacy” is established. Walzer’s idea here is: “The intervening forces should aim at finding or establishing a form of authority that fits or at least accommodates the local political culture ...”⁶⁰ Here again one must remove preconditions in our analysis of R2P. Walzer rightly states, “The new regime doesn’t have to be democratic or liberal or pluralist or (even) capitalist. It doesn’t have to be anything, except non-murderous.”⁶¹ Too often the demands of the intervener exacerbate the fragility of the situation. Walzer once again removes the rhetoric to focus on preserving human life and dignity. This is not to say disputes surrounding R2P would

⁵⁹ *Ibid.*, 29. This aspect can also be seen in the change in risk calculus of states prior to the events of September 11th 2001 versus post September 11th 2001. There is a marked shift in state willingness to put their troops in harm’s way. Prior to September 11th 2001, interventions were from a distance using technology to engage the enemy. Post September 11th 2001, states were in general more willing to commit blood treasure to conflict as seen in the conflicts in Afghanistan and Iraq.

⁶⁰ *Ibid.*, 31.

⁶¹ *Ibid.*, 32.

cease. What one country determines to be a valid R2P situation may not be considered as such by another. The singular focus remains the prevention of atrocities. If the international community can stop *trying to be* right and instead *do* what is right, the R2P principle optimizes the saving of lives. Differing perspectives are expected, but attempts to normalize a concept rooted in integrity, dignity, and morality cannot be normalized. Debate should occur yet not restrict action. The neighborhood fireman should be free to put out the fire.

CONCLUSION

The Holocaust ushered in a new era of debate, with efforts to ensure atrocities would never again be committed. The Genocide Convention of 1948, the ICCPR of 1966, and foundational work on the rights of internally displaced persons became the basis of human rights. However, international consciousness against atrocities did not translate into actionable measures preventing populations from becoming victims of state violence. State sovereignty took precedence over intervention and not until the end of the Cold War, when underlying ethnic tensions proliferated, did the international community attempt to reassess humanitarian intervention principles. Bosnia, Kosovo and Rwanda served as catalysts, refocusing international priorities and thereby galvanizing support for the R2P concept to emerge. Efforts to entrench R2P since the convening of ICISS in 2001 can be lauded as a success in many ways. Yet, implementation continues to remain elusive. Moreover, the primacy of human security underlying R2P has been slowly eroded in favour of reinforcing state sovereignty and legality through the Security Council. Now a dichotomy exists. Fuelled by both scholars and politicians, the

dichotomy on how to implement R2P prevents states with the ability to act from doing so in favour of seeking consensus and legality. Unfortunately, when acts that shock the psyche of the international community are concerned, there is no time for debate.

Willingness to act and ability to act should be the determining factors in intervention. The international community needs to rethink the role of power politics in R2P implementation. The nature of power politics ensures R2P will always be an imperfect duty due to the opposing moral and national interest components. A state cannot be compelled to act nor will R2P ever be universally applied. Acknowledging R2P as imperfect optimizes its use, cutting through debate and allowing action. Socialization of R2P's imperfection and international acceptance will allow for implementation.

Walzer's metaphor of a house on fire is practical and simple, a fitting and relevant illustration that sidesteps rhetoric. A burning home requires a timely response. Debating rules, regulations and procedures to prevent further fires from occurring needs to happen *after* lives are saved. The nature of an emergency requires an efficient response, ideally from those closest, who are capable and willing to respond. Naturally, responses to emergencies will also be flawed. There will be the misapplication of resources, political infighting, heroes and perpetrators, those who take advantage and unfortunate victims. With respect to R2P, perfection is not possible. While the debate continues, questioning sovereignty and responsibility, action and motivation, legality and normative change, humanity must still be accountable for the treatment of other human beings. Efficiency in the protection of humanity is the goal to be achieved, *even* if the principle is unequally or improperly applied. Misapplication is better than the paralysis of a concept with

lifesaving, atrocity-preventing potential. R2P remains an imperfect duty, perfect in imperfection.

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