

**FROM PARALYSIS IN RWANDA TO BOLD
MOVES IN LIBYA: EMERGENCE OF THE
“RESPONSIBILITY TO PROTECT” NORM
UNDER INTERNATIONAL LAW – IS THE
INTERNATIONAL COMMUNITY READY
FOR IT?**

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I. INTRODUCTION

The international community lacked neither the resources nor the capacity to prevent genocide in Rwanda in which approximately 800,000 men, women, and children were brutally slaughtered by fellow Rwandans in about 100 days from April through July 1994.¹ What happened can only be attributed to “a persistent lack of political will by Member States to act, or to act with enough assertiveness” which affected the decision-making and response by the United Nations Security Council and Secretariat.²

In its December 1999 report, a United Nations (UN) commission instructed then Secretary-General Kofi Annan to conduct an independent inquiry into the UN’s actions during the Rwandan genocide, ultimately finding “a failure by the United

1. U.N. Security Council, Letter Dated Dec. 15, 1999 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1999/1257 (Dec. 16, 1999) [hereinafter Independent Inquiry Report]; U.N. Secretary-General, Statement on Receiving the Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda (Dec. 16, 1999), http://www.un.org/News/ossg/sgsm_rwanda.htm [hereinafter Secretary-General’s Statement] (showing that the inquiry had full and unrestricted access to all UN records, including cables and internal documents). *See generally* UNITED NATIONS, THE UNITED NATIONS AND RWANDA, 1993–1996 (1996) (containing the Security Council and General Assembly resolutions and official correspondence among U.N. members, the Arusha participants, U.N. agencies and member states).

2. Independent Inquiry Report, *supra* note 1, at 3.

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Nations system as a whole.”³ On receiving the Commission’s report Kofi Annan said that what happened in Rwanda was indeed “genocide in its purest and most evil form.”⁴ A similar high-level commission comprising “Eminent Personalities” that was established by African Heads of States and Governments stated in its report: “Almost the entire world stood by and watched the genocide happen. Influential outsiders worked closely with the perpetrators. The victims were betrayed repeatedly by the international community, often for the most craven of reasons.”⁵

This essay discusses the soul-searching of the international community in the ensuing years and the lessons of the Rwanda tragedy. Part II briefly provides a context for the genocide in Rwanda and recounts the tragic events. Part II also documents the lack of effective action by the United Nations which led to the tragedy. Part III highlights the evolution of the Responsibility to Protect (R2P) concept from its early stages, when there was little enthusiasm for it, to its wider acceptance as an operating principle. Part IV discusses its invocation by the Security Council in Libya and, pursuant to the Council’s action, NATO’s use of force to protect citizens in Libya. Part V concludes with appraisal and recommendations.

II. THE GENOCIDE IN RWANDA AND THE LACK OF EFFECTIVE ACTION BY THE UNITED NATIONS

The initial inaction by the world community to prevent and subsequently to halt the genocide was examined by numerous studies and reports in the aftermath of the genocide.⁶ Two

3. *Id.* at 3–4.

4. Secretary-General’s Statement, *supra* note 1.

5. INTERNATIONAL PANEL OF EMINENT PERSONALITIES, RWANDA: THE PREVENTABLE GENOCIDE Annex A (2000) [hereinafter THE PREVENTABLE GENOCIDE], *available at* http://www.africaunion.org/official_documents/reports/Report_Rowanda_Genocide.pdf.

6. *See generally* ALISON DESFORGES, LEAVE NONE TO TELL THE STORY, GENOCIDE IN RWANDA (1999) (containing a comprehensive 789-page study based on Rwandan government records and diplomatic and court records), *available at* <http://www.grandslacs.net/doc/1317.pdf>; AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE (2nd ed. 1995); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (1995); SCOTT R. FEIL, PREVENTING GENOCIDE: HOW THE EARLY USE OF FORCE

reports are especially important: one by a commission established by the United Nations⁷ and the other by the Organization of African Unity (OAU).⁸ Because context is essential to fully understand and appreciate the tragic events of 1994, included here is a brief look at the preceding events, especially those beginning in 1990.

A. *Events Leading Up to the Genocide*

The OAU study traces the roots of the crisis to 1959 and details the history from 1959 on to the genocide.⁹ As the Hutu took over the government in Rwanda in the early 1960s, Tutsis became victims of pogroms.¹⁰ Hundreds of thousands of Rwandans fled and became refugees in neighboring countries, including Uganda.¹¹ The RPF members were mostly children of Tutsi refugees in Uganda who were not permitted by the Rwandan government to return and had suffered hardships in Uganda.¹² They had joined Ugandan rebel leader Yoweri Museveni's National Resistance Army and, after he came to power, they were serving in his army and were mostly well trained and well armed.¹³

The inflammation of the conflict and hatred was fanned by the media. Along with newspapers, Radio-Télévision Libre des Mille Collines (RTLNC) was instrumental in inciting the Hutu majority against the Tutsi minority, and the official Radio Rwanda also "moved steadily from neutral reporting to open brainwashing."¹⁴ The OAU report describes vividly the planning

MIGHT HAVE SUCCEEDED IN RWANDA 39–42 (1998) (referring to several additional studies), *available at* http://legacy.wilsoncenter.org/subsites/ccpdc/index.htm/pubs/rwanda/rwandafra_me.htm; Filip Reyntjens, *Rwanda: Genocide and Beyond*, 9 J. REFUGEE STUD. 240, 251 (1996) (referring to several additional studies).

7. Independent Inquiry Report, *supra* note 1, at 1.

8. THE PREVENTABLE GENOCIDE, *supra* note 5.

9. *Id.*

10. *Id.* ¶ 6.3.

11. *Id.*

12. *Id.*

13. *Id.* ¶ 6.5.

14. *Id.* ¶¶ 7.19–.26 (providing an account of anti-Tutsi propaganda by both the print and electronic media); DESFORGES, *supra* note 6, at 31–95.

for the genocide:

Beginning with the response to the 1990 RPF [the Tutsi Rwandan Patriotic Front] invasion, the violence had been government-initiated and provoked By the time it was finally unleashed, the violence was deliberate, planned, organized, sophisticated, and coordinated. It was motivated by that which distinguishes genocide from crimes against humanity or mass murder: A clique of Rwandan Hutu consciously intended to exterminate all Tutsi in the country, specifically including women and children so that no future generations would ever appear. If the rest of the world could not contemplate the possibility that they would go that far, it was certainly known that they were prepared to go to a great distance indeed.¹⁵

The RPF [the Tutsi Rwandan Patriotic Front] invasion, which began on October 1, 1990, arose from the decades of hate.¹⁶ The OAU study found

from October 1, 1990, Rwanda endured three and a half years of violent anti-Tutsi incidents, each of which in retrospect can easily be interpreted as a deliberate step in a vast conspiracy culminating in the shooting down of the President’s plane on April 6, 1994, and the subsequent unleashing of the genocide.¹⁷

With the 1990 invasion, Rwanda plunged into civil war that lasted until July when the RPF defeated the government forces

In the episodes of violence from 1990–1994, Habyarimana’s supporters perfected some of the tactics they would use during the genocide: how to choose the best sites to launch attacks, how to develop the violence—both in intensity and in extent — from small beginnings, how to mobilize people through fear, particularly fear aroused by “created” events, how to use barriers and bureaucratic regulations to keep a target group restricted to one place, and how to build cooperation between civilian, military, and militia leaders to produce the most effective attacks. Perhaps equally important, they had learned that this kind of slaughter would be tolerated by the international community.

Id. at 95.

15. THE PREVENTABLE GENOCIDE, *supra* note 5, ¶ 9.7.

16. See generally *id.*, *supra* note 5, ch. 6 (relying primarily on the OAU Report of Eminent Personalities and the Human Rights Watch reports).

17. *Id.* ¶ 7.4.

and took control of Rwanda.¹⁸ A series of negotiations and ceasefires took place during the next three years.¹⁹ As the Rwandan government was heavily dependent on foreign financial assistance for its functioning, under donors' pressures President General Juvénal Habyarimana agreed to negotiate with the RPF for a peaceful resolution of the conflict.²⁰ However, several Tutsi massacres took place after the invasion, which were precursors of the 1994 genocide.²¹ In its report of March 1993, the International Commission of Inquiry into Human Rights Abuse in Rwanda, established jointly by four international human rights organizations, including Human Rights Watch, stated that "President Habyarimana and his immediate entourage bear heavy responsibility for these massacres and other abuses against Tutsi and members of the political opposition."²²

The mounting concern with the deteriorating situation in Rwanda led the OAU to take initiative to resolve the conflict.²³ Several western states, including the U.S. and France, as well as the United Nations, also took an active part in the process.²⁴ The President of Tanzania facilitated the process and the outcome was the Arusha Peace Agreement on August 4, 1993.²⁵ Major provisions of the Arusha Accords included power-sharing by the Habyarimana with the RPF and integration of the two armies.²⁶ The United Nations and the OAU were involved in the implementation of the accords through the establishment of the Neutral International Force (NIF) with the United Nations and the OAU constituting that force.²⁷ On September 10, 1993, the UN Security Council issued a statement by the president on the

18. *Id.* ¶¶ 6.17–18.

19. DESFORGES, *supra* note 6, at 52, 123.

20. THE PREVENTABLE GENOCIDE, *supra* note 5, ¶ 6.7.

21. DESFORGES, *supra* note 6, at 87.

22. *Id.* at 93.

23. THE PREVENTABLE GENOCIDE, *supra* note 5, ¶ 8.1.

24. *Id.*

25. *See generally id.* ch. 8.

26. *Id.* ¶ 8.5.

27. Independent Inquiry Report, *supra* note 1, at 6.

establishment of a peacekeeping operation in Rwanda,²⁸ and two weeks later the Secretary General presented a report to the Security Council setting out a plan for deploying a peacekeeper force of 2,548 military personnel.²⁹ The Council subsequently established the United Nations Assistance Mission for Rwanda (UNAMIR) on October 5, 1993.³⁰

That same month, despite the establishment of new peacekeeping agreements, the newly-elected Hutu president in Burundi was assassinated by the Tutsi-dominated army, and a large number of Hutus were massacred or fled across the border into Rwanda.³¹ As the OAU report states, these events

offered final proof to the Hutu that power sharing between the Tutsi and the Hutu was forever doomed. The Tutsi could never be trusted. Hutu extremists saw only one sure way to guarantee that Rwanda's Tutsi could not carry out their historic aspiration to rule the country unilaterally and to wipe out as many Hutu as was necessary to accomplish this objective. The Hutu must act first. The final solution planned for the Tutsi was thereby justified as nothing more than self-defense on the part of the intended Hutu victims.³²

A January 1994 report on Rwanda by Human Rights Watch Arms Project voiced a clear warning:

The recent wave of violence in neighboring Burundi, which has left 10,000–50,000 dead and which also pits Tutsi against Hutu, does not bode well for Rwanda. Indeed, many observers believe that there is little chance that the peace accord, which calls for integration of the two armies, will be implemented. The killings in Burundi have again inflamed the hatred and mistrust of Tutsi and Hutu in Rwanda. The possibility of renewed fighting is very real.³³

28. Note by the President of the Security Council, U.N. Doc. S/26425 (Sept. 10, 1993).

29. U.N. Secretary-General, *Report of the Secretary-General on Rwanda*, ¶ 41, U.N. Doc. S/26488 (Sept. 24, 1993).

30. S.C. Res. 872, ¶ 2, U.N. Doc. S/RES/872 (Oct. 5, 1993).

31. THE PREVENTABLE GENOCIDE, *supra* note 5, ¶ 7.35.

32. *Id.* ¶ 7.37.

33. *Arming Rwanda: The Arms Trade and Human Rights Abuses in the Rwandan*

Other events served as ominous warning signs, including political deadlock, killings by the Hutu militia Inderahamwe, reports by the General Romeo A. Dallaire who was leading UNAMIR, and the Special Representative of the Secretary-General in Rwanda, Jacques-Roger Booh Booh, communicated to the Secretary-General about the deterioration in the security situation.³⁴ These events culminated in a stretch of political killings from November 1993 to April 6, 1994.³⁵

In the midst of assassinations and political killings, on January 11, 1994, Dallaire sent a cable to the military adviser to the UN Secretary-General about an informant, a top-level trainer in the Inderahamwe militia, who had provided him three important pieces of information, to wit: 1) a strategy was in place to provoke the killing of Belgian soldiers and eventually the withdrawal of UNAMIR's Belgian battalion from Rwanda; 2) the Inderahamwe had trained 700 men and he had been ordered to register all Tutsi in Kigali, which he suspected was for their extermination, and that his personnel were able to kill up to 1,000 in 20 minutes, and 3) there was a secret weapons cache whose location he was prepared to show UNAMIR provided his family was given protection.³⁶ Dallaire informed the Secretariat of UNAMIR's intention to take action within the next 36 hours.³⁷ He also sought protection for the informant and his evacuation.³⁸

The response to Dallaire was that his contemplated action went beyond the UNAMIR mandate, and he was not to take any action until he received clear guidance from UN Headquarters.³⁹ In another message from Headquarters Booh Booh and Dallaire were instructed to meet with the Rwandan president to apprise

War, HUMAN RIGHTS WATCH ARMS PROJECT, Jan. 1994, at 5, available at <http://www.hrw.org/sites/default/files/reports/RWANDA941.pdf>.

34. DESFORGES, *supra* note 6, at 146–52.

35. *See id.* at 143–75 (chronologically presenting a detailed study of these warnings).

36. Independent Inquiry Report, *supra* note 1, at 10.

37. *Id.*

38. *Id.*

39. *Id.* at 11.

him of the information, which they did.⁴⁰ Repeated requests from Dallaire and Booh Booh for a stronger mandate for UNAMIR went either unanswered or met with a reminder that UNAMIR’s mandate was rather limited and the rules of engagement were “not to fire until fired upon.”⁴¹

Other information from Dallaire regarding weapons distribution by armed militias, death squad target lists, and specific plots to kill political leaders also went unheeded.⁴² In his communication to President Habyarimana, the Secretary-General threatened to withdraw UNAMIR unless the Arusha accords were implemented, as the UN’s focus during this period was primarily on the implementation of the Arusha accords and on advancing the political process.⁴³ The dogged pursuit of this goal at the UN led to inaction in effectively responding to the warning signs, thus failing to prevent the genocide that followed.⁴⁴

In a statement to the media on the release of their report on July 7, 2000,⁴⁵ members of the International Panel of Eminent Personalities highlighted one of their major findings:

The United States had the influence within the UN Security Council to ensure the authorization of a military mission that could have prevented the genocide before it was launched. Even once the genocide began, a serious military mission could dramatically have reduced the magnitude of the slaughter. But the U.S. made sure that no such force would ever reach Rwanda, even after it was known beyond question that one of the

40. *Id.*

41. *See id.* at 10–16. This was the response from Assistant Secretary-General Iqbal Riza after Dallaire had called to inform him that UNAMIR might have to use force to save the Prime Minister who had taken refuge at the UN Volunteer Compound in Kigali.

42. *See generally id.* at 10–15 (overview of a general account of the events preceding the genocide); THE PREVENTABLE GENOCIDE, *supra* note 5, ch. 9: “*The Eve of the Genocide: What the World Knew.*”

43. Independent Inquiry Report, *supra* note 1, at 15.

44. *See id.* at 12–15.

45. *Rwanda: The Preventable Genocide: Statement by IPEP Members to the Media on the Release of Their Report*, THE PERSPECTIVE (July 7, 2000), <http://www.theperspective.org/rwanda.html>.

20th century's greatest tragedies was unfolding.⁴⁶

B. The Tragic Events Between April 6 and July 18, 1994

The massacres began barely twelve hours after the President's plane was shot down on April 6. The initial killings were a deliberate policy to eliminate those likely to criticize the genocide or the takeover of the government by extremists.⁴⁷ The first victims were Tutsi and moderate Hutu political leaders, including Prime Minister Agathe Uwilingiyimana.⁴⁸ The death of the Foreign Minister, the Minister of Labor and Social Affairs, the Chief Justice, and several other political leaders who were not in favor of the massacres soon followed.⁴⁹ The killers then moved on to eliminate Tutsi civilians.⁵⁰ Roadblocks were set up to identify Tutsi for elimination and to prevent UNAMIR from coming to their aid.⁵¹ Ten Belgian peacekeepers were provoked by Rwandan soldiers and brutally killed outside the Prime Minister's residence, which soon led to Belgium's withdrawal of its peacekeeping force, just as the informant had warned Dallaire.⁵² Subsequently Dallaire stated in his submission to the Belgian state inquiry that there was no military option to intervene.⁵³ In his words: "The UNAMIR mission was a peacekeeping operation. It was not equipped, trained or staffed to conduct intervention operations."⁵⁴

The UN Security Council warned the interim government of Rwanda on April 30 that an arms embargo might be imposed, as "the killings of civilians had 'especially' taken place in areas under the control of [their] members or supporters."⁵⁵ This led the interim government, primarily under the control of Hutu extremists, to again change strategy as it ordered the militias

46. *Id.* ¶ 4.

47. *Id.* ¶ 14.17.

48. *Id.* ¶¶ 14.17, 14.21–23.

49. *Id.* ¶¶ 14.17, 14.21–23.

50. *Id.* ¶¶ 14.17, 14.21–23.

51. *Id.* ¶¶ 14.7, 14.22.

52. *Id.* ¶¶ 14.39–41.

53. Independent Inquiry Report, *supra* note 1, at 17.

54. *Id.*

55. *Id.* at 22–23.

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and the “civilian self-defense forces” to track down the remaining Tutsis “and kill them in a more discreet and disciplined fashion [leaving no survivors] to tell the story.”⁵⁶

In the first five days of the genocide, 20,000 Tutsi and moderate Hutu were killed, after which the attacks focused on killing only Tutsi.⁵⁷ Large-scale massacres had begun as thousands sought sanctuary in public places such as schools, offices, hospitals, and churches; while others were ordered by Hutu administrators to gather in large public areas.⁵⁸ Thousands of Tutsi were killed every day for the remaining three weeks of April.⁵⁹ The killing finally ended on July 18, 1994 when the RPF declared a unilateral ceasefire after gaining control over the country.⁶⁰

The tragic events stretched just over a hundred days, and the accounts of which, while chilling, show discernible characteristics of the genocide:

- 1)efficiency in carrying out the planned extermination of the Tutsi;⁶¹
- 2)extreme brutality in the methods used;⁶² and
- 3)sophisticated use of the media and control of the message, both internally and externally.⁶³

The efficiency and brutality of the Tutsi extermination was meticulously planned. As to its precise execution, the OAU Commission report states:

For decades, Rwanda had been renowned for its efficiency, its administrative competence, its highly structured system of public administration, its top-down authority system, and its genius for imposing discipline and deference on its population. All of these attributes were brought to bear in organizing the

56. THE PREVENTABLE GENOCIDE, *supra* note 5, ¶ 14.31.

57. *Id.* ¶¶ 14.22–.23.

58. *Id.* ¶ 14.24.

59. *Id.*

60. Independent Inquiry Report, *supra* note 1, at 29, 74–75.

61. *See generally* THE PREVENTABLE GENOCIDE, *supra* note 5, ¶¶ 14.23–.28 (describing the methods used to commit large number of murders in few settings).

62. *Id.* ¶¶ 14.26–.27.

63. *See id.* ¶¶ 14.52–.56; DESFORGES, *supra* note 6, at 65–66.

genocide by a calculating elite who understood only too well how to operate this awesomely efficient machine.⁶⁴

Prime Minister Jean Kambande, who led the Rwandan government during the genocide and was later indicted and tried by the Rwanda War Crimes Tribunal, confessed that during the months of April to July

there was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi, the purpose of which was to exterminate them. Mass killings of hundreds of thousands . . . occurred in Rwanda, including women and children, old and young, who were pursued and killed at places where they sought refuge: prefectures, commune offices, schools, churches, and stadiums.⁶⁵

The brutality was unprecedented.⁶⁶ The OAU Commission report presents a grim picture, citing Physicians for Human Rights, which identified the following means of killing: “machetes, massues (clubs studded with nails), small axes, knives, grenades, guns, and fragmentation grenades.”⁶⁷ The report adds: “The genocidaires beat people to death, amputated limbs, buried victims alive, drowned, or raped and killed later. Many victims had both their Achilles tendons cut with machetes in order to immobilize them so they could be finished off at another time.”⁶⁸ The report continues:

Victims were treated with sadistic cruelty and suffered unimaginable agony. Tutsi were buried alive in graves they had dug themselves. Pregnant women had their wombs slashed open, so the fetuses could be killed. Internal organs were removed from living people. Family members were ordered to kill others in the family or be killed themselves. People were thrown alive into pit latrines. Those who hid in the attic had

64. *THE PREVENTABLE GENOCIDE*, *supra* note 5, ¶ 14.42.

65. *Id.* ¶ 14.4 (quoting Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, at 15 (Int’l Crim. Trib. for Rwanda Sept. 4, 1998)).

66. *See generally id.* ¶ 14.27 (describing in detail the different methods used to commit the murders).

67. *Id.* ¶ 14.26.

68. *Id.*

the house burned down around them. Children were forced to watch the hideous murders of their parents. Lucky victims were those who could bribe their killers to use a bullet for a quick death.⁶⁹

After the 1990 RPF attack, Tutsi were portrayed as the “enemy” by several newspapers and in radio broadcasts.⁷⁰ Lies, exaggeration, and ridicule were used to attack and inflame.⁷¹ People were mobilized through fear, giving the message that Tutsi were planning to take over the country and massacre Hutu.⁷² Events were “created” and accusations were made imputing to Tutsi what the genocidaires themselves were planning to do, for example, terrorism.⁷³ Propagandists effectively used the media to create intense hatred among Hutu, inciting more and more slaughter.⁷⁴

Simultaneously, the message to the outside world was that the interim government, national police, and militias were securing law and order.⁷⁵ Strategies and propaganda were implemented so that the outside world was placated.⁷⁶

III. INACTION BY THE INTERNATIONAL COMMUNITY

A. *The United Nations*

The UN Security Council and Secretariat did not take any effective action to prevent the genocide in the period leading to April 6, when the Presidential plane was shot down.⁷⁷ The UNAMIR had been established with only a limited mandate⁷⁸

69. *Id.* ¶ 14.27.

70. *See* DESFORGES, *supra* note 6, at 65–75.

71. *See generally id.* at 72–79 (describing information and techniques propagandists used to instill fear and resentment in the Hutu people and direct it against the Tutsi).

72. *See id.* at 78–79.

73. *See id.* at 66, 252–56.

74. *See id.* at 73–86.

75. *See id.* at 198, 284–85.

76. *See id.* at 283–88.

77. *See generally* Independent Inquiry Report, *supra* note 1, at 7–15 (describing numerous requests for a stronger, more expansive mandate for UNAMIR that were either rejected or ignored by Headquarters).

78. *See* S.C. Res. 872, *supra* note 30, ¶ 2.

and limited set of rules of engagement.⁷⁹ The implementation of the Arusha Peace Agreement was the main concern at the UN, and the Secretary-General and the Security Council sent repeated messages to the parties urging them to agree to and maintain a ceasefire and to implement the accords.⁸⁰ General Dallaire and Booh Booh continued pursuing those goals in their communications with President Habyarimana.⁸¹ The political stalemate and lack of progress in the implementation of the process forced the Secretary-General to threaten withdrawal of UNAMIR unless progress was achieved.⁸² On April 5, 1994, the Security Council decided to extend UNAMIR's mandate by nearly four months.⁸³

April was marked by the equally ineffective responses of the Security Council and Secretariat in preventing the genocide.⁸⁴ UNAMIR lacked adequate resources and the necessary strong mandate to protect politicians or civilians in Kigali.⁸⁵ The withdrawal of Belgian peacekeepers dealt a grave blow to UNAMIR's capacity to protect civilians.⁸⁶ In some instances the peacekeepers abandoned the civilians who had been gathered in public places, allowing them to be easily massacred by waiting militias.⁸⁷ Belgium, France, Italy, and the United States evacuated their expatriates.⁸⁸ As Dallaire informed the Headquarters about the arrival of French aircraft to evacuate the French nationals, a cable from Kofi Annan and signed by Iqbal Riza asked Dallaire to "cooperate with both the French and Belgian commanders to facilitate the evacuation of their nationals, and other foreign nationals requesting evacuation. . . . You should make every effort not to compromise your impartiality or to act beyond your mandate but may exercise

79. See Independent Inquiry Report, *supra* note 1, at 9.
80. *Id.* at 9–12.
81. *Id.* at 12.
82. *Id.* at 15.
83. S.C. Res. 909, ¶ 2, U.N. Doc. S/RES/909 (Apr. 5, 1994).
84. See *generally id.* at 16–19.
85. See *id.* at 18–19.
86. *Id.* at 19–20.
87. *Id.* at 19.
88. *Id.*

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your discretion to do should this be essential for the evacuation of foreign nationals. This should not, repeat not, extend to participating in possible combat, except in self-defence.”⁸⁹

What an irony that more than a week into the genocide the President of the Security Council made a Presidential statement without mentioning the ongoing massacres, as he said that the “immediate priority in Rwanda is the establishment of a ceasefire between the Government forces and the RPF,” and the Council action was to reaffirm the Arusha accords and to call upon the parties to return to the negotiating table and agree to an immediate ceasefire.⁹⁰

After the genocide began in April the deliberations in the Security Council were focused on whether there should be a total withdrawal of UNAMIR, a position the Belgians preferred,⁹¹ or to keep a small force as a minimum presence.⁹² The OAU preferred a stronger mandate and a larger presence of UNAMIR, but there was no political will for that position, and on April 21 the Council voted unanimously to reduce UNAMIR to about 270, while it further curtailed the mission’s mandate.⁹³

It was not until the end of April, only after hundreds of thousands of Tutsi had been slaughtered, that the Security Council issued a Presidential statement,⁹⁴ in which it referred to the imposition of an arms embargo, but amazingly it still did not agree on using the term “genocide.”⁹⁵ On May 6, Booh Booh sent a cable outlining the ongoing massacres of innocent civilians, in which he stated the priorities for UNAMIR: first to have the capacity to stop the killings, and second to continue efforts to reach a ceasefire.⁹⁶

Consultations between the Secretary-General and the Security Council continued, and following his formal report of

89. *Id.*

90. *Id.* at 21.

91. *Id.* at 20–22.

92. *Id.* at 21.

93. *Id.* at 22.

94. S.C. Pres. Statement 1994/21, U.N. Doc. S/PRST/1994/48 (Apr. 30, 1994).

95. *Id.*

96. Independent Inquiry Report, *supra* note 1, at 23.

May 13⁹⁷ the Council decided to expand UNAMIR to a maximum of 5,500 military personnel and their phased deployment, creating and mandating UNAMIR II as a Chapter VI peacekeeping operation for humanitarian purposes.⁹⁸ It also imposed an arms embargo on Rwanda.⁹⁹ However, more than two months after that resolution was adopted, UNAMIR still only had 550 troops, which clearly showed the lack of political will to stop the genocide.¹⁰⁰

The UN High Commissioner for Human Rights, José Ayala Lasso, visited Rwanda on May 11–12, 1994, and gave his report to the Commission on Human Rights a week later.¹⁰¹ He proposed the appointment of a Special Rapporteur on Human Rights in Rwanda, and the Commission accepted the recommendation appointing René Degni-Ségui.¹⁰² The UN Human Rights Commission also convened an emergency session on Rwanda on May 25, 1994,¹⁰³ which I attended as an observer and Vice-Chair of the Board for the World Federation of United Nations Associations. The final resolution of the Commission did not acknowledge that genocide had occurred, although it did name a special rapporteur to investigate whether genocide had actually taken place.¹⁰⁴

It was on May 31, 1994, almost eight weeks after the genocide was unleashed, that the Secretary-General finally called the massacres and killings “systematic,” using the word “genocide” in his report to the Security Council.¹⁰⁵ Eight days

97. U.N. Secretary-General, *The Situation in Rwanda*, ¶ 16, U.N. Doc. S/1994/565 (May 13, 1994).

98. S.C. Res. 918, ¶¶ 3–5, U.N. Doc. S/RES/918 (May 17, 1994).

99. *Id.* ¶ 13.

100. Independent Inquiry Report, *supra* note 1, at 25.

101. See United Nations, Econ. & Soc. Council, Report of the United Nations High Commissioner for Human Rights, Mr. Jose Ayala Lasso, on his mission to Rwanda 11–12 May 1994, U.N. Doc. E/CN.4/S-3/3 (1994).

102. Independent Inquiry Report, *supra* note 1, at 25; U.N. Secretary General, Letter dated July 25, 1994 from the Secretary-General addressed to the President of the Security Council, ¶ 55, U.N. Doc. S/1994/867 (July 25, 1994).

103. United Nations, Econ. & Soc. Council, Comm. On Human Rights, Note by the Secretariat, U.N. Doc. E/CN.4/S-3/1/Add.1.

104. *Id.* ¶ 11.

105. Independent Inquiry Report, *supra* note 1, at 26.

later, on June 8, the Security Council endorsed the Secretary-General’s proposals in its reports on the deployment of UNAMIR and extended its mandate until December 9, 1994.¹⁰⁶ The issues of money, transportation, and logistics were, however, the roadblocks in ensuring the effective functioning of UNAMIR II.¹⁰⁷ In June, France sent forces to Rwanda as “Opération Turquoise,” purportedly for humanitarian purposes.¹⁰⁸

More than five years later, the Secretary-General expressed his “deep remorse” and on behalf of the United Nations acknowledged the failure because UNAMIR “was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide.”¹⁰⁹ In his words, “[a]ll of us must bitterly regret that we did not do more to prevent it.”¹¹⁰

B. The Roles of the OAU, Belgium, France, and the United States

Although the OAU, just as the UN, did not use the term “genocide” throughout the period April to July 1994, it continued to call for a broader mandate for UNAMIR and more effective UN involvement in Rwanda.¹¹¹ However, it was reluctant to take sides in the conflict.¹¹² The OAU opposed Opération Turquoise, but the UN Security Council endorsed the mission and the French forces stayed in the country for several months.¹¹³ After the RPF victory the OAU established the Eminent Personalities Panel to understand the causes that had

^{105b} U.N. Secretary General, *Report of the Secretary-General on the Situation in Rwanda*, ¶¶ 6, 36, U.N. Doc. S/1994/640 (May 31, 1994).

106. U.N. Doc. S/RES/925, June 8, 1994.

107. Independent Inquiry Report, *supra* note 1, at 27; see U.N. Secretary-General, Letter dated June 20, 1994 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1994/728 (June 20, 1994).

¹⁰⁸ Independent Inquiry Report, *supra* note 1 at 27; S.C. Res. 929, ¶ 4, U.N. Doc. S/RES/929 (June 22, 1994).

109. Secretary-General’s Report, *supra* note 3.

110. *Id.*

111. THE PREVENTABLE GENOCIDE, *supra* note 5.

112. *Id.* ¶ 86.

113. *Id.* ¶ 95.

triggered the conflict.¹¹⁴

The analysis of Belgian policy must begin with the observation that the largest single western contingent of peacekeeping troops after the formation of UNAMIR in October 1993 was from Belgium.¹¹⁵ Belgium also sought a broadened mandate for UNAMIR, but after the murder of its ten soldiers it withdrew its forces.¹¹⁶ It then also sought the withdrawal of all UNAMIR troops and tried to persuade Security Council members that UNAMIR must be ended.¹¹⁷ But on April 6, 2000, during a ceremony in Kigali in commemoration of the sixth anniversary of the genocide, Belgian Prime Minister Guy Verhofstadt apologized as he assumed Belgium's "responsibility for what had transpired," and asked forgiveness on behalf of Belgium and the Belgian people.¹¹⁸

The French initially showed no willingness to take any action to halt the genocide.¹¹⁹ Along with the Belgians, France evacuated its nationals in April, but then announced in mid-June plans to send troops to Rwanda for "humanitarian reasons" through "Opération Turquoise."¹²⁰ Contrasting the "sudden availability" of thousands of troops for Opération Turquoise with the UN's inability to find troops for its peacekeeping operations, the Independent Inquiry reflected on "the varying levels of political will to commit personnel in Rwanda," and observed:

The Inquiry finds it unfortunate that the resources committed by France and other countries to Opération Turquoise could not instead have been put at the disposal of UNAMIR II.¹²¹

The French support of the interim government was well known and hence there was criticism, especially by the Organization of African Unity, of the French government's

114. *Id.* ¶ 96.

115. *See generally* DESFORGES, *supra* note 6, at 618–623; THE PREVENTABLE GENOCIDE, *supra* note 5, ¶ 42.

116. THE PREVENTABLE GENOCIDE, *supra* note 5, ¶¶ 15.44, 15.46.

117. *Id.* ¶ 15.49.

118. *Id.* ¶ 15.52.

119. *See generally id.* ¶¶ 15.53–15.85.

120. *Id.* ¶ 15.65.

121. Independent Inquiry Report, *supra* note 1, at 49 [italics in original].

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sending forces to Rwanda.¹²² In the course of their mission, the French forces reportedly saved some 10–15,000 Tutsi, but they also “facilitated the escape of much of the Hutu Power leadership into Zaire.”¹²³

The United States swiftly evacuated its nationals and supported the call for UNAMIR’s withdrawal after Belgium troops departed Rwanda.¹²⁴ As David Scheffer, then serving as senior adviser and counsel to U.S. Permanent Representative to the UN, Ambassador Madeleine K. Albright, states:

There were enough voices within the US government arguing that UNAMIR was inadequately mandated, trained, equipped, and staffed to respond effectively to the violence in Rwanda, that UN peacekeeping operations worldwide were already overloaded, and that UNAMIR could not satisfy new U.S. government criteria to guide UN peacekeeping deployments. The next step, key officials decided, was to support UNAMIR’s withdrawal and thus accomplish what they had assumed was the UN Secretariat’s genuine objective.¹²⁵

The U.S., however, did vote to maintain a reduced UNAMIR presence of about 270 personnel.¹²⁶ A new U.S. peacekeeping policy, known as the Presidential Decision Directive on Multilateral Peacekeeping Operations (PDD-25),¹²⁷ deeply influenced the country’s decision-making on UNAMIR.¹²⁸ The October 1993 events in Somalia, where U.S. peacekeepers were murdered and dragged through the streets of Mogadishu,

122. THE PREVENTABLE GENOCIDE, *supra* note 5, ¶¶ 15.64–.65, 15.68.

123. *Id.* ¶ 15.68.

124. *Id.* ¶ 15.49; Independent Inquiry Report, *supra* note 1, at 19.

125. David Scheffer, *Lessons from the Rwandan Genocide*, 5 GEO. J. INT’L AFF. 125, 128 (2004).

126. *Id.* at 129.

127. U.S. Department of State, BUREAU OF INTERNATIONAL ORGANIZATIONAL AFFAIRS, CLINTON ADMINISTRATION POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS (Presidential Decision Directive 25, May 1994), *available at* <http://www.fas.org/irp/offdocs/pdd/pdd-25.pdf>.

128. *Id.* at 129.

certainly had influenced the new U.S. policy.¹²⁹ It was, in Scheffer's words, "conservative interpretations of the document [which] had the perverse effect of straitjacketing policy-makers, leading them to deny justifiable interventions or prevention when hundreds of thousands of innocent lives were at stake."¹³⁰

Not only did the U.S. resist swift and decisive action, despite knowledge of ongoing genocide, it also would not permit the use of the term "genocide" by its representatives at the Security Council.¹³¹ However, when President Clinton visited Rwanda in March 1998, he acknowledged that "a policy aimed at the systematic destruction of a people" was responsible for the Rwandan tragedy, and added

The international community, together with nations in Africa, must bear its share of responsibilities for this tragedy, as well. We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe haven for the killers. We did not immediately call these crimes by their rightful name: genocide.¹³²

C. *Appraisal*¹³³

The genocide in Rwanda is a blot not only on the United Nations as an institution—including the Security Council, the Secretary-General, and the Secretariat—but also on those states not on the Security Council. The AU's Eminent Personalities' report is appropriately titled "The Preventable Genocide," because timely action could indeed have prevented it.¹³⁴ It was widely known that hate radios, newspapers, and government officials were inciting people to violence and plans were in place

129. Scheffer, *supra* note 125, at 131, "We were still reeling from the Somalia debacle, which heavily affected how U.S. policy-makers viewed foreign engagements."

130. *Id.* at 129.

131. *Id.* at 130.

132. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, REMARKS BY THE PRESIDENT TO GENOCIDE SURVIVORS, ASSISTANCE WORKERS, AND US AND RWANDA GOVERNMENT OFFICIALS, KIGALI, RWANDA. (March 25, 1998), *available at* <http://clinton4.nara.gov/Africa/19980325-16872.html>.

133. *See generally* Independent Inquiry Report, *supra* note 1, at 30–59 (detailing the UN Commission's conclusions and recommendations).

134. THE PREVENTABLE GENOCIDE, *supra* note 5, ¶ 2.1.

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to exterminate the enemy Tutsi who were labeled “cockroaches.”¹³⁵ Dallaire’s January 11 cable gave ample warning, which required serious consideration and effective response, and there instead was the order to do nothing.¹³⁶

Lack of sufficient resources and adequate logistics and a very weak UNAMIR mandate were primary contributors to the inability of the force to prevent genocide.¹³⁷ The confusion on rules of engagement must equally bear responsibility for the inaction.¹³⁸ Dallaire received no guidance from UN Headquarters when he sought approval for his draft rules of engagement.¹³⁹ There was no response to the request, and it was later revealed that “Headquarters did not have a procedure in place for the formal approval of draft Rules of Engagement.”¹⁴⁰ There were problems related to command and control, as well.¹⁴¹

Once the massacres began after the plane crash on April 6 and President Habyarimana’s death, UNAMIR failed to initially protect government officials and political leaders, and subsequently found itself incapable of protecting civilians.¹⁴² During the hundred days that atrocious crimes were being committed in Rwanda, the international community did nothing to halt those horrors, simply allowing heinous human right violations.¹⁴³ Because of the overwhelming focus both at the UN and with Dallaire and Booh Booh on achieving a ceasefire and on the implementation of the Arusha accords, too little attention was paid to the actual massacres.¹⁴⁴

According to the Independent Inquiry Report, a force of 2,500 would have been able to stop or at least limit the brutal massacres.¹⁴⁵ A 1998 report by thirteen experts to the Carnegie

135. *Id.* ¶ 7.20.

136. Independent Inquiry Report, *supra* note 1, at 3.

137. *Id.* at 30, 31.

138. *Id.* at 35.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 35–36.

143. *Id.* at 35–37.

144. *Id.* at 36–37.

145. *Id.* at 30.

Commission on Preventing Deadly Conflict, however, gave a different number, concluding that a force of 5,000 could have sufficed to prevent the killing, as a “window of opportunity . . . [existed from] about April 7 to April 21, 1994, when the political leaders of the violence were still susceptible to international influence.”¹⁴⁶ Writing a foreword to the report, Dallaire asserted that if there were the international will, the killings could have been prevented, and he called for swift and effective action by the international community in the future.¹⁴⁷

Among other contributing factors were the lack of adequate intelligence capability and lack of effective communication between Dallaire and UN Headquarters.¹⁴⁸ Also, the Secretary-General neither played a strong role in bringing the gravity of the situation to the attention of the Security Council so that effective preventive action could have been taken, nor did he play an effective role in resolving the conflict.¹⁴⁹

The French-led “Opération Turquoise,” which the Security Council authorized under Chapter VII, but which outside the scope of UN command, was also hard to justify: 1) the OAU opposed it because of France’s deep ties to the Hutu,¹⁵⁰ and 2) it was a Chapter VII operation, while UNAMIR was only a Chapter VI operation.¹⁵¹ As the Independent Inquiry Report observed, “[t]o have two operations present in the same conflict area with the authorization of the Security Council but with such diverging powers was problematic.”¹⁵²

In sum, history will record the genocide in Rwanda, along with the killing fields of Cambodia and the Holocaust, as failures of humanity.

146. See Feil, *supra* note 6, at 19.

147. *Id.* at 2.

148. Independent Inquiry Report, *supra* note 1, at 33.

149. *Id.*

150. See THE PREVENTABLE GENOCIDE, *supra* note 5, ¶¶ 15.60–65, 15.93–95.

151. *Id.* ¶ 15.64.

152. Independent Inquiry Report, *supra* note 1, at 49; THE PREVENTABLE GENOCIDE, *supra* note 5, ¶ 15.85 (“The consequences of French policy can hardly be overestimated. The escape of leaders into Zaire led, almost inevitably to a new, more complex stage in the Rwandan tragedy, expanding it into a conflict that soon engulfed all of central Africa.”).

IV. EVOLUTION OF THE RESPONSIBILITY TO PROTECT

A. 2005 World Summit’s Endorsement of Responsibility to Protect

In his message on the commemoration of the genocide in Rwanda on April 7, 2011, Secretary-General Ban Ki Moon said that the international community’s collective failure to prevent the tragedies of Rwanda and the Balkans led to the endorsement of the Responsibility to Protect principle by the UN World Summit in September in 2005.¹⁵³ A few years earlier, on the 10th anniversary of the genocide, in an address to the UN Commission on Human Rights, his predecessor, Kofi Annan, unveiled his five-point “Action Plan to Prevent Genocide,”¹⁵⁴ thereby implementing a recommendation made by members of the Independent Inquiry.¹⁵⁵ He focused the second plank of his plan on states’ responsibility to protect civilians from violence, and the fourth plank on the appointment of a UN Special Adviser for Genocide Prevention, with the function of information gathering and early warning, and making recommendations to the Security Council on actions to prevent or halt genocide.¹⁵⁶

The fifth plank of the Secretary-General’s plan was on the need for “swift and decisive” action to respond to genocide.¹⁵⁷ He referred to the “useful groundwork” done by the International Commission on Intervention and State Sovereignty (ICISS) in

153. The Secretary General, *Secretary General’s Message on the Commemoration of the Genocide in Rwanda*, U.N. Doc. SG/SM/12176, AFR/1832 (April 7, 2011). Eugene-Richard Gasana, Rwandan Ambassador to the United Nations, Speech at the Commemoration of Rwandan Genocide (April 7, 2011), available at <http://responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/3372-rwandan-ambassador-reflects-on-recent-progress-at-the-un-to-protect-populations-commends-security-council-on-cote-divoire-and-libya>.

154. Press Release, Geneva Convention on Human Rights, ‘Risk of Genocide Remains Frighteningly Real,’ Secretary-General Tells Human Rights Commission as he Launches Action Plan to Prevent Genocide, U.N. Doc. SG/SM/9245 (July 7, 2004).

155. Independent Inquiry Report, *supra* note 1, at 53–55.

156. Press Release, Geneva Convention on Human Rights, ‘Risk of Genocide Remains Frighteningly Real,’ Secretary-General Tells Human Rights Commission as he Launches Action Plan to Prevent Genocide, U.N. Doc. SG/SM/9245 (July 7, 2004).

157. *Id.*

its report, *Responsibility to Protect*.¹⁵⁸ The ICISS's report was the foundation for the Secretary-General's High-Level Panel on Threats, Challenges and Change.¹⁵⁹ In turn, it was the High-Level Panel's report that led to the endorsement by the UN World Summit in September 2005,¹⁶⁰ mentioned by Ban Ki Moon in his message.

Kofi Annan, on whose watch the tragedies both in Rwanda (1994) and Srebrenica (1995) had occurred, was keen to implement the recommendations of the Independent Inquiry Report on Rwanda and the report on the fall of Srebrenica.¹⁶¹ Both reports had shown unambiguously that the international community could have prevented those events but lacked the will to do so.¹⁶² In his address to the Stockholm International Forum on January 26, 2004, Annan acknowledged that "[i]n both cases, the gravest mistakes were made by Member States, particularly in the way decisions were taken in the Security Council."¹⁶³ He complimented the ICISS, who had "altered the terms of debate" on the dangers of inaction when massive violations of human rights occur.¹⁶⁴

The Secretary-General elaborated on this theme as he addressed the General Assembly while presenting his Annual Report in September 1999. He asserted that globalization and international cooperation are redefining state sovereignty in light of the enhanced focus on human rights as enshrined in the

158. See generally International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001), available at <http://iciss.ca/pdf/Commission-Report.pdf> [hereinafter ICISS Report].

159. U.N. High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 198–208, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter High-Level Panel Report].

160. 2005 World Summit Outcome, GA Res 60/1, U.N. Doc. A/RES/60/1, ¶¶ 138–40 (Oct. 24, 2005).

161. U.N. Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, ¶¶ 498–506, U.N. Doc. A/54/549 (Nov. 15, 1999).

162. See *Srebrenica Report*, *supra* note 161; see also Independent Inquiry Report, *supra* note 1.

163. Press Release, U.N. Secretary General, Genocide is a Threat to Peace Requiring Strong, United Action, Secretary-General Tells Stockholm International Forum, U.N. Press Release SG/SM/9126 (Jan. 26, 2004).

164. *Id.*

UN Charter.¹⁶⁵ He emphasized “the new commitment to intervention in the face of extreme suffering,”¹⁶⁶ and discussed the “developing international norm in favor of intervention to protect civilians from wholesale slaughter”¹⁶⁷

The next year, in his Millennium Report to the General Assembly in 2000, the Secretary-General responded to the critics’ concern that such intervention could “become a cover for gratuitous interference in the internal affairs of sovereign states.”¹⁶⁸ While acknowledging the dilemma of humanitarian intervention,¹⁶⁹ which he called “fraught with political difficulty,” he asked his critics if the concept of humanitarian intervention is unacceptable because of its assault on sovereignty, how should the international community respond to gross and persistent violations of human rights?¹⁷⁰

Eventually, in September 2005, the UN World Summit brought together heads of state and government, who adopted the World Summit Outcome Document,¹⁷¹ containing the core elements of the Responsibility to Protect (R2P) concept in

165. Press Release, U.N. Secretary General, United Nations, Secretary-General Presents His Annual Report to General Assembly, U.N. Doc. SG/SM/7136 (Sept. 20, 1999).

166. *Id.*

167. *Id.*; see also Secretary-General’s comments on the redefinition of sovereignty in Kofi A. Annan, *Two Concepts of Sovereignty*, *The Economist*, Sept. 8, 1999, available at www.un.org/News/ossg/sg/stories/kaecon.

168. U.N. Secretary-General, *Millennium Report: We the Peoples: Role of the United Nations in the Twentieth-First Century*, 47, U.N. Doc. A/54/2000 (Apr. 3, 2000).

169. On humanitarian intervention, see generally V.S. Mani *Humanitarian Intervention Today*, in RECUEIL DES COURS (2005); Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, in VOLUME 21, PROCEDURAL ASPECTS OF INTERNATIONAL LAW SERIES (1996); FERNANDO TÉSON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (2d ed. 1996); James A.R. Nafziger, *Humanitarian Intervention in a Community of Power*, 22 *DENV. J. INT’L L. & POL’Y* 219 (1994); Ved P. Nanda, Thomas F. Muther, Jr. & Amy E. Eckert, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention under International Law, Pt. II*, 26 *DENV. J. INT’L L. & POL’Y* 827 (1998); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 *EUR. J. INT’L L.* 3 (2000); Thomas G. Weiss, *The Sunset of Humanitarian Intervention? Responsibility to Protect in a Unipolar Era*, 35 *SECURITY DIALOGUE* 135 (2004).

170. *Millennium Report*, *supra* note 168.

171. World Summit Outcome, *supra* note 160.

paragraphs 138 and 139. The basic element of the concept is that the state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and their incitement.¹⁷² While accepting that responsibility, the leaders said that the international community is committed to assisting states so that they meet these obligations and to supporting the United Nations in establishing an early warning capability.¹⁷³

The world leaders acknowledged the international community's responsibility to use "diplomatic, humanitarian and other peaceful means" in accordance with the UN Charter, to help to protect people from these crimes,¹⁷⁴ and added that when peaceful means are inadequate and national authorities are "manifestly failing" to protect their populations from these crimes, they are prepared to act collectively "in a timely and decisive manner," through the Security Council, in accordance with the Charter on a case-by-case basis.¹⁷⁵ They stressed the need for the General Assembly to continue consideration of this concept.¹⁷⁶

The ICISS report, as mentioned earlier, provided the basis for the Summit Document through its endorsement by the Secretary-General's High-Level Panel.¹⁷⁷ In it, the Commission shifted the debate on humanitarian intervention from "right" to "responsibility"—the "right to intervene" to the "responsibility to

172. *Id.* ¶ 138.

173. *Id.*

174. *Id.* ¶ 139.

175. *Id.*

176. *Id.*

177. It should be especially noted that in the mid 1990s, Francis Deng and his colleagues at the Brookings Institution had been redefining the concept of "sovereignty as responsibility." FRANCIS M. DENG, ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996); see also Francis Deng, *Frontiers of Sovereignty*, 8 *LEIDEN J. INT'L L.* 249 (1995). Deng was then the Special Representative of the Secretary-General on Internally Displaced Persons and currently serves as the Secretary-General's Special Adviser on the Prevention of Genocide. *Senior Management Group: Francis Deng, Special Adviser for the Prevention of Genocide and Mass Atrocities*, UN.ORG, http://www.un.org/sg/senstaff_details.asp?smgID=137 (last visited Oct. 7, 2011).

protect.”¹⁷⁸ R2P was to comprise three distinct responsibilities—to prevent,¹⁷⁹ to react,¹⁸⁰ and to rebuild after military intervention.¹⁸¹ The Commission further explained that the primary responsibility to protect “rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.”¹⁸²

The Commission proposed a “just cause threshold” for such intervention to be “serious and irreparable harm” to human beings¹⁸³ and enumerated four precautionary principles for guidance on the use of force: right intention,¹⁸⁴ last resort,¹⁸⁵ proportional means,¹⁸⁶ and reasonable prospects of success in halting or averting the suffering, with the consequences of action not likely to be worse than the consequences of inaction.¹⁸⁷ The Commission identified the UN Security Council as the appropriate body to authorize military intervention.¹⁸⁸

Secretary-General Kofi Annan’s High-Level Panel endorsed in general the “emerging norm” of a collective international responsibility to protect, to be exercised by the Security Council authorizing military intervention as a last resort.¹⁸⁹ The Panel recommended that the Security Council and the General Assembly should embody these guidelines authorizing the use of force in declaratory resolutions.¹⁹⁰ The Secretary-General accepted the Panel’s recommendations in a March 2005

178. ICISS Report, *supra* note 158, ¶ 2.4.

179. *Id.* ¶¶ 3.1–3.43.

180. Which may include military intervention in extreme cases. *Id.* ¶¶ 4.1–4.43.

181. *Id.* ¶¶ 5.1–5.31.

182. *Id.* ¶ 2.29.

183. *Id.* ¶¶ 4.18–4.19.

184. *Id.* ¶ 4.33.

185. *Id.* ¶ 4.37.

186. *Id.* ¶ 4.39.

187. *Id.* ¶ 4.41.

188. *Id.* at xii.

189. High-Level Panel Report, *supra* note 159, ¶ 203.

190. *Id.* ¶ 208.

report.¹⁹¹ The General Assembly subsequently adopted the Summit Outcome by resolution in October 2005¹⁹² in the face of opposition by some states which argued that the concept violates sovereignty.¹⁹³ For example, Venezuela's President Hugo Chavez called R2P "very dangerous" because it "shapes imperialism [and] interventionism" in the attempt "to legalize the violation of national sovereignty."¹⁹⁴

B. R2P's Evolution and Development Since 2005

During the next year, the Security Council adopted two resolutions related to R2P. The first was Resolution 1674 on the protection of civilians in armed conflict in April 2006, in which the Council reaffirmed the provisions of paragraphs 138 and 139.¹⁹⁵ In the second resolution, on the deployment of UN peacekeepers in Darfur, the Security Council incorporated the doctrine by referring to the "responsibility of the Government of The Sudan, to protect civilians under threat of physical violence."¹⁹⁶

The concept, however, lay dormant without any UN deliberations or action until the General Assembly's adoption of the resolution, *The Responsibility to Protect*, in October 2009, in which it took note Secretary-General's 2009 report, *Implementing the Responsibility to Protect*, as well as the subsequent July deliberations of the General Assembly.¹⁹⁷ It seems that the U.S. invasion of Iraq had a chilling effect on the development of the concept, even though the U.S. had not invoked R2P to justify its invasion.¹⁹⁸ However, during this period, civil society and scholars, as well as the special adviser

191. U.N. Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 4, U.N. Doc. A/59/2005 (Mar. 24, 2005).

192. World Summit Outcome, *supra* note 160.

193. Hugo Chavez, President of Venezuela, Speech at 70th U.N. General Assembly (Sept. 15, 2005), *available at* www.embavenez-us.org/news.php?nid=1745.

194. *Id.*

195. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

196. S.C. Res. 1590, ¶ 16(i), U.N. Doc. S/RES/1590 (Mar. 24, 2005).

197. G.A. Res. 832, ¶ 2, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).

198. *Middle East, RESPONSIBILITYTOPROTECT.ORG*, <http://www.responsibilitytoprotect.org/index.php/middle-east> (last visited Nov. 11, 2011)

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to the Secretary-General on R2P, Edward Luck, were creating general awareness of the concept and actively promoting its implementation.¹⁹⁹

Kofi Annan’s successor, Secretary-General Ban Ki Moon, deserves credit for his efforts in moving the concept from rhetoric to reality. He defended and clarified it in his address in Berlin in July 2008, where he called it “one of the more powerful but less understood ideas of our times,” and distinguished it from both humanitarian intervention and human security.²⁰⁰ Subsequently, in January 2009, he provided both a conceptual and a practical framework for implementing the concept in a report to the General Assembly.²⁰¹ This was the first comprehensive UN document aimed at turning the concept into policy.

In his report, the Secretary-General highlighted the three pillars of R2P:

199. For example, the International Coalition for the Responsibility to Protect which integrated the Responsibility to Protect-Engaging Civil Society project, was founded in January 2009 by representatives of eight regional and national NGOs and the Global Centre for the Responsibility to Protect at the City University of New York has been active since February 2008. Int’l Coal. to Protect, *Learn About our Coalition*, RESPONSIBILITYTOPROTECT.ORG, <http://www.responsibilitytoprotect.org/index.php/about-coalition> (last visited Sept. 19, 2011); Simon Adams, *Welcome Message*, GLOBALR2P.ORG, <http://www.globalr2p.org/about/Welcome.php> (last visited Sept. 19, 2011). Among other active organizations is the Stanley Foundation. See 43rd Conference on the United Nations of the Next Decade, Évora, Port., June 20–25, 2008, *Actualizing the Responsibility to Protect*, at 2 (2008), available at <http://www.stanleyfoundation.org/publications/report/UNND808.pdf>. See, e.g., Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT’L AFFAIRS 143 (2006); Edward C. Luck, *The United Nations and the Responsibility to Protect*, POLICY ANALYSIS BRIEF (Stanley Foundation, Muscatine, Iowa), Aug. 2008, at 1–4, available at <http://www.stanleyfoundation.org/publications/pab/LuckPAB808.pdf>; Ved P. Nanda, *2006 Myres S. McDougal Distinguished Lecture: The Protection of Human Rights under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make a Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 355 (2007).

200. *Secretary-General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event on ‘Responsible Sovereignty: International Cooperation for a Changed World’*, UN.ORG, <http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm> (last visited Sept. 2, 2011).

201. See U.N. Secretary-General, *Implementing the Responsibility to Protect: Report of the Secretary-General, delivered to the General Assembly*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*].

- 1) the protection responsibilities of the state as the “bedrock” of the concept: states have the primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity;²⁰²
- 2) international assistance and capacity-building: the international community’s commitment to provide assistance to states in building capacity aimed at protecting their populations from these crimes and to assisting those which are “under stress before crises and conflicts break out”;²⁰³ and
- 3) timely and decisive response: on the international community’s responsibility to take “timely and decisive” action to prevent and halt these crimes when a state is “manifestly failing” to protect its populations.²⁰⁴ This pillar enumerates options for the use of an array of tools to protect citizens from mass atrocities, including collaboration with regional and sub-regional organizations under Chapter VIII of the UN Charter,²⁰⁵ and, with Security Council authorization, coercive measures under Chapter VII.²⁰⁶ The General Assembly may also play an active role as provided for in Charter Articles 10–14 and under the “Uniting for Peace” process.²⁰⁷

In each of the three pillars Secretary-General Ban provided recommendations for states. In pillar 3, he proposed a number of steps for the United Nations and/or regional organizations.²⁰⁸ In another section of the report, *The Way Forward*, the Secretary-General made specific recommendations for the General Assembly, urging the Assembly to begin consideration of the

202. *Id.* ¶¶ 13–27.

203. *Id.* ¶¶ 28–48.

204. *Id.* ¶¶ 49–66.

205. *Id.* ¶ 65.

206. *Id.* ¶¶ 49, 56.

207. U.N. Charter arts. 10–14; Uniting for Peace, G.A. Res. 377(V), U.N. Doc. A/RES/377 (Nov. 3, 1950).

208. *Implementing the Responsibility to Protect*, *supra* note 201, ¶¶ 49–66.

strategy for implementing the concept.²⁰⁹ He specially called upon the Member States not to revisit the prior negotiations that led to the adoption of paragraphs 138 and 139 of the Summit Outcome, since those provisions will save lives by preventing the most egregious mass violations of human rights.²¹⁰ The report emphasized the important role of early warning in implementing R2P, as well.²¹¹ Ban also noted that he would be submitting to the General Assembly a proposal for a joint office for the Special Adviser for the Prevention of Genocide and the Special Adviser on the Responsibility to Protect.²¹²

The report made a convincing case for the wider acceptance of R2P. After recounting the horrible tragedies of the 20th Century—the Holocaust, Cambodia, Rwanda, and Srebrenica—it called for the political will and capacity of the international community to do better in the 21st.²¹³ Asserting that the provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in conventional and customary international law principles, the Secretary-General emphasized that R2P reinforces Member States’ legal obligations to refrain from the use of force as the provisions of these paragraphs are to be undertaken only in conformity with the UN Charter.²¹⁴

The Secretary-General described the impressive developments in Africa in redefining sovereignty and especially referred to the Constitutive Act of the African Union, which provides for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity.”²¹⁵ It should also be noted that the African Commission on Human and Peoples’ Rights had adopted a resolution in November 2007 in which it reaffirmed “the call made in the September 2005 United Summit Declaration for

209. *Id.* ¶¶ 67–72.

210. *Id.* ¶¶ 67–71.

211. *Id.* annex ¶¶ 1–7.

212. *Id.* annex ¶ 7.

213. *Id.* ¶ 5.

214. *Id.* ¶ 3.

215. Organization of African Unity, *Constitutive Act of the African Union*, art. 4, ¶ h (July 1 2000), available at http://www.au2002.gov.za/docs/key_ou/au_act.htm.

Cooperation between the United Nations and Regional Organizations, to help populations from . . . grave threats” of genocide, war crimes, ethnic cleansing and crimes against humanity.²¹⁶

Calling R2P an ally of sovereignty, the Secretary-General clarified that the scope of the concept should be kept narrow, limited to the four specified crimes and violations mentioned in the Summit Outcome.²¹⁷ At the same time he called for a “deep response,” when needed, by utilizing the toolkit of all the prevention and protection measures and instruments available to the UN system, regional organizations, and civil society.²¹⁸

The General Assembly debated the R2P for three days in July 2009.²¹⁹ The Secretary-General addressed the Assembly on July 21, 2009, on the eve of its consideration of his report, *Implementing the Responsibility to Protect*.²²⁰ In presenting the report he asserted that prevention should be “job number one,” as it offers a balanced and nuanced approach that utilizes all the tools available to the UN, especially the involvement initially of the regional organizations.²²¹ He said that when prevention fails, the UN must pursue an “early and flexible response” on a

216. African Comm’n on Human and Peoples’ Rights, *Resolution on Strengthening the Responsibility to Protect Africa*, Res. 117, (Nov. 28, 2007), available at http://www.achpr.org/english/resolutions/resolution117_en.htm (adopted at the African Commission on Human and Peoples’ Rights meeting, held in Brazzaville, Republic of Congo, from Nov. 15–28, 2007).

217. *Implementing the Responsibility to Protect*, *supra* note 201, ¶ 10(a)–(c).

218. *Id.* ¶ 10(c).

219. See Press Release, General Assembly, Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate, U.N. Press Release GA/10850 (July 28, 2009) [hereinafter July 28 Debate]; Press Release, General Assembly, More than 40 Delegates Express Strong Skepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect, U.N. Press Release GA/10849 (July 24, 2009) [hereinafter July 24 Debate]; Press Release, General Assembly, Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly Holds Interactive Dialogue on Responsibility to Protect, U.N. Press Release GA/10847 (July 23, 2009) [hereinafter July 23 Debate].

220. U.N. Secretary-General, Secretary-General’s Remarks to the General Assembly on the Responsibility to Protect (July 21, 2009), <http://www.un.org/apps/sg/sgstats.asp?nid=3982>.

221. *Id.*

case-by-case basis and in accordance with the UN charter.²²² Military action, he added, “is a measure of last, not first, resort and should only be undertaken in accordance with the provisions of the Charter.”²²³ He urged Member States to “resist those who try to change the subject or turn our common effort to curb the worst atrocities in human history into a struggle over ideology, geography or economics.”²²⁴

He noted that, while there was convergence on the first two pillars of his strategy—state responsibility and international assistance—differences nonetheless persisted in the area of response.²²⁵ Thus he called upon Member States to keep the dialogue going, “building on what has been achieved and setting markers for the future.”²²⁶ Referring to the Rwandan genocide and the victims of mass atrocities in the 20th Century, he said: “Our publics judged us then, and found us wanting. They will be watching again this week, and they will—rightfully—judge us harshly if we treat these deliberations as politics as usual.”²²⁷

The General Assembly met over a period of three days and during the debate, which was “the most intense and extensive,” as noted by the President of the General Assembly, Miguel d’Escoto Brockmann (Nicaragua), 94 speakers expressed their opinions and concerns.²²⁸ The President, in a concept note he annexed to a letter to Member States, criticized R2P and, referring to the Charter provisions, he claimed that none of them “would cover responsibility to protect unless the situation is a threat to international peace and security The discretion given to the Security Council to decide a threat to international peace and security implies a variable commitment totally different from the consistent alleviation of suffering embodied in the responsibility to protect.”²²⁹

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. July 28 Debate, *supra* note 219; see July 24 Debate, *supra* note 219; July 23 Debate, *supra* note 219.

229. Letter to all Permanent Missions and Permanent Observer Missions to the

However, a large number of delegates showed strong support for the Secretary-General's "Three Pillars" approach and for continuing the dialogue.²³⁰ Several delegates showed an appreciation for the concept of "sovereignty as responsibility," and emphasized the importance of prevention.²³¹ Most delegates also emphasized the need for prevention and early warning mechanisms.²³² But concerns were also expressed about the composition of the Security Council and the need for reform,²³³ and several delegates stressed that the Council must not act selectively and the principle not be misused.²³⁴ The need for a threshold for the use of coercive measures and for the enhanced role of the General Assembly in implementing R2P was also expressed.²³⁵

Among those most critical, some equated R2P to the discredited humanitarian intervention and several questioning its legitimacy, included Cuba,²³⁶ Sudan,²³⁷ Pakistan,²³⁸ Venezuela,²³⁹ Nicaragua,²⁴⁰ and the Democratic People's Republic of Korea.²⁴¹ Notwithstanding their criticism and the vocal skepticism of a few others, the strong support for the R2P concept was eventually instrumental in the General Assembly's adoption of its resolution aimed at continuing the dialogue on R2P.²⁴²

U.N. (July 17, 2009), <http://www.un.org/ga/president/63/letters/ResponsibilitytoProtect170709.pdf>.

230. July 28 Debate, *supra* note 219; July 24 Debate, *supra* note 219; July 23 Debate, *supra* note 219.

231. July 24 Debate, *supra* note 219; July 28 Debate, *supra* note 219.

232. July 24 Debate, *supra* note 219; July 28 Debate, *supra* note 219.

233. July 24 Debate, *supra* note 219; July 28 Debate, *supra* note 219.

234. July 28 Debate, *supra* note 219; July 24 Debate, *supra* note 219; July 23 Debate, *supra* note 219.

235. July 24 Debate, *supra* note 219.

236. *Id.*

237. July 28 Debate, *supra* note 219.

238. July 24 Debate, *supra* note 219.

239. *Id.*

240. July 28 Debate, *supra* note 219.

241. *Id.*

242. See Secretary-General's Statement, *supra* note 1; G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Sept. 14, 2009); Press Release, U.N. Secretary-General, Secretary-General Welcomes Adoption of Text on Responsibility to Protect, U.N. Press Release

The General Assembly kept its promise of continuing to discuss R2P. The next focus of the Secretary-General was on early warning and assessment, areas in which the UN was found wanting in its performance related to the Rwandan genocide, and in 2010 the General Assembly held an informal interactive dialogue on the theme.²⁴³ In his report on these issues to the Assembly preceding the informal dialogue in July 2010, entitled *Early Warning, Assessment and the Responsibility to Protect*,²⁴⁴ the Secretary-General referred to the UN assessment reports on its inaction in both the Rwanda²⁴⁵ and Srebrenica tragedies.²⁴⁶ On both these occasions several gaps were identified, such as the UN's weakness in its analytical capacity, its insufficient focus on institutional resources for early warning and risk analysis, and the lack of sufficient information sharing.²⁴⁷

The Secretary-General noted that despite the UN's efforts over the past decade to address some of the specific issue areas in these gaps,²⁴⁸ three distinct gaps still remain in “providing the timely information and assessment needed to implement the Responsibility to Protect in a balanced, responsible, and vigorous manner:”

First, there is insufficient sharing of information and analysis. . . [s]econd, other than the exception of the early warning mechanism on the prevention of genocide, the existing mechanisms do not view the

GA/10855 (Sept. 14 2009).

243. See *Responsibility to Protect: Support Grows in the GA but Detractors Remain Implacable*, INT'L SERV. FOR HUMAN RIGHTS, <http://www.ishr.ch/archive-general-assembly/865-responsibility-to-protect-support-grows-but-detractors-remain-implacable> [hereinafter *GA 2010 Dialogue*] (giving a brief report on the dialogue); see also *GA Dialogue on Early Warning, Assessment, and the Responsibility to Protect*, INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT (Aug. 9, 2010), <http://www.responsibilitytoprotect.org/ICRtoP> Report of EW dialogue on 9 August 2010 FINAL.pdf (describing the proceedings of the dialogue that took place in July 2010).

244. U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 7, U.N. Doc. A/64/864 (July 14, 2010) [hereinafter *Early Warning Report*].

245. *Independent Inquiry Report*, *supra* note 1.

246. *Srebrenica Report*, *supra* note 161.

247. *Early Warning Report*, *supra* note 244, ¶ 7.

248. *Id.* ¶¶ 8–9.

information gathered and analyzed “through the lens of the responsibility to protect. . . [t]hird . . . demand [for] a continuous and candid process of assessment and reassessment that utilizes the full range of information on, and analysis of, a given situation available to the United Nations system.²⁴⁹

He stressed the need for the regular two-way flow of information between the UN and its regional partners on “early warning, assessment, and timely and decisive response,” as well as information sharing between governments and the United Nations.²⁵⁰

The Secretary-General highlighted the role of his special adviser on the Prevention of Genocide, Francis Deng, and his special adviser on the Responsibility to Protect, Edward Luck, and proposed that there be a joint office for these two functions.²⁵¹ Their task would be to gather information and assess situations that might lead to mass atrocity crimes, and advise the Secretary-General, and through him the Security Council and other relevant inter-government organizations.²⁵² Thus, he said, this joint office would primarily address the two major existing gaps in the UN system: a lack of sufficient sharing of information across the system and an inability to provide timely response and recommendations to the appropriate intergovernmental bodies.²⁵³ He also suggested that the Assembly discuss in its next interactive dialogue in 2010 the role of regional organizations in implementing the responsibility to protect.²⁵⁴

The General Assembly held its informal dialogue on August 9, 2010.²⁵⁵ The debate was preceded by a panel discussion in which both the special advisers participated.²⁵⁶ While several states supported the Secretary-General’s proposal for a joint

249. *Id.* ¶ 10.

250. *Id.* ¶¶ 11–12.

251. *Id.* ¶¶ 15–17.

252. *Id.* ¶¶ 17, 18.

253. *Id.* ¶ 17.

254. *Id.* ¶ 14.

255. *GA 2010 Dialogue*, *supra* note 243.

256. *Id.*

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office, concerns were raised, for example by India, arguing that the process “must be Member State driven.”²⁵⁷ There was overall support for the R2P, but a few states were critical in a similar vein as in the 2009 dialogue.²⁵⁸ The Secretary-General’s suggestion for the next interactive dialogue to be on the role of regional organizations in implementing R2P was welcomed by the General Assembly.²⁵⁹ Subsequently, in December 2010, the Fifth Committee of the General Assembly overwhelmingly accepted the Secretary-General’s proposal to create a joint office of the special advisers.²⁶⁰

The next informal interactive dialogue, on the role of regional arrangements in implementing R2P, took place on July 12, 2011,²⁶¹ and the Secretary-General issued a report on the subject on June 27, 2011.²⁶² The report focused on regional initiatives undertaken to support the Three Pillars of R2P.²⁶³

257. *Id.*

258. *Id.* (noting the criticisms of countries such as Cuba, Iran, and Venezuela that, *inter alia*, the Security Council lacked the competence to deal with the Responsibility to Protect); see also *Statement by First Secretary, Anet Pino Rivero, Representative of Cuba, at the Plenary Meeting of the General Assembly 63rd Session, Regarding the Report of the Secretary General A/63/677 “Implementing the Responsibility to Protect”*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT (July 23, 2009), http://responsibilitytoprotect.org/Cuba_ENG.pdf (arguing at the 2009 dialogue, that the Security Council lacked competence to implement the Responsibility to Protect).

259. *GA 2010 Dialogue*, *supra* note 243.

260. See *ACABQ and Fifth Committee Negotiations on the Joint Office*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, 6 (Jan. 2011), <http://www.responsibilitytoprotect.org/GCR2P%20Report%20--ACABQ%20and%20fifth%20Committee%20negotiations%20on%20the%20Joint%20Office.pdf> (describing budget negotiations for implementing the Responsibility to Protect, including the opposition from Cuba, Nicaragua, and Venezuela).

261. *Interactive Dialogue of the UN General Assembly on the Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, 1 (Aug. 2011), [http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGO%20GA%20dialogue%20on%20RtoP%20FINAL\(1\).pdf](http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGO%20GA%20dialogue%20on%20RtoP%20FINAL(1).pdf).

262. U.N. Secretary-General, *The Role of Regional and Subregional Arrangements in the Responsibility to Protect: Report of the Secretary-General*, U.N. Doc. A/65/877 S/2011/393 (June 28, 2011) [hereinafter *U.N. Regional Arrangements*]; see also *The Role of Regional and Subregional Arrangements in Strengthening the Responsibility to Protect*, STANLEY FOUNDATION (May 11, 2011), <http://www.stanleyfoundation.org/publications/report/RoleRegSbregArgmntsR2P.pdf>.

263. *U.N. Regional Arrangements*, *supra* note 262, ¶¶ 4, 9.

The Secretary-General highlighted the collaboration and partnership between the United Nations Secretariat and the Security Council on the one hand and the regional organizations on the other, and noted the ongoing contacts between his special advisers and regional groups on thematic issues as well as on specific country situations.²⁶⁴

The Secretary-General noted some of the relatively well-developed relationships, “such as with the High Commissioner for National Minorities of the OSCE, the African Union, the International Conference of the Great Lakes Region, and the European Union.”²⁶⁵ With others, “such as those with ASEAN, ECOWAS, the Inter-Governmental Authority for Development [IGAD], the Organization of American States [OAS] and the League of Arab States, [the relationships] are at an earlier stage of development . . . [and] broaden[ing] and deepen[ing] these relationships [was] a matter of high priority.”²⁶⁶ He suggested assessing “efforts to date to utilize all of the tools of Chapters VI, VII, and VIII [of the U.N. Charter] in implementing the third pillar of my strategy” as the focus for the following year’s dialogue.²⁶⁷

On July 12, the Secretary-General addressed the General Assembly, thanking the Assembly President for convening the dialogue.²⁶⁸ He noted that the R2P principle is being developed at the United Nations “conceptually, politically, and operationally through [several] reports and dialogues [and has now] become an operational reality,” as both the Security Council and the Human Rights Council have invoked R2P over the last year.²⁶⁹ He reminded the Assembly that the UN’s efforts to promote and protect human rights and the rule of law have been impressive because of the work on conflict prevention,

264. *Id.* ¶ 30.

265. *Id.* ¶ 40.

266. *Id.*

267. *Id.* ¶ 40.

268. Press Release, U.N. Secretary General, History of Atrocity Crimes Is Not One of Acting Too Boldly, But of Doing Too Little, Too Late, Secretary-General Tells General Assembly, U.N. Press Release SG/SM/13700 GA/11113 (July 12, 2011).

269. *Id.*

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mediation, peacekeeping, and peace-building.²⁷⁰ “Now we can do the same for atrocity prevention,” he exhorted.²⁷¹ He, however, acknowledged that the record is still mixed at every level—global, regional, sub-regional, and national—and anticipated the dialogue would “open a sustained cross-regional conversation on lessons learned and practical experiences.”²⁷²

V. THE RESPONSIBILITY TO PROTECT AND LIBYA

Following the uprisings in Egypt, Tunisia, and several other in the Middle East and North Africa, Libya also witnessed protests and demonstrations against the regime of Colonel Muammar Khadafi.²⁷³ The regime used brute force against civilians to crush the opposition.²⁷⁴ Khadafi told his supporters, “Come out of your homes. Attack [the opposition] in their dens,” calling the protesters “cockroaches” and “rats” who did not deserve to live.²⁷⁵ The Security Council, in its first ever invocation of R2P, adopted a resolution on February 26, 2011, imposing sanctions on Libya.²⁷⁶

The Council condemned the violence and use of force by the Libyan government against civilians and welcomed the earlier similar condemnation by the Arab League, the African Union, and the Secretary-General of the Organization of Islamic Conference.²⁷⁷ It also welcomed the Human Rights Council’s decision to appoint an independent international commission of inquiry to investigate alleged violations of international human rights law.²⁷⁸ It demanded an immediate end to the violence, urging the Libyan authorities to “[a]ct with the utmost restraint,

270. *Id.*

271. *Id.*

272. *Id.*

273. Roula Khalaf, *Libyans Pay the Price of Progress in Lurch to Civil War*, FINANCIAL TIMES (London), Mar. 8, 2011, at 13.

274. *Id.*

275. *Responsibility to Protect: The Lessons of Libya*, ECONOMIST, May 19, 2011, at 67, available at <http://www.economist.com/node/18709571>.

276. S.C. Res. 1970, U.N. Doc. S/RES/1970, at 2–6 (Feb. 26, 2011).

277. *Id.* at 1.

278. *Id.*

respect human rights and international humanitarian law.”²⁷⁹ It also decided to refer the situation to the International Criminal Court.²⁸⁰ The sanctions the Council imposed against Libya included an arms embargo, a travel ban against 16 named Libyan government officials, including Khadafi, his sons and daughter,²⁸¹ and freezing of assets belonging to the Khadafi family.²⁸² It also established a new sanctions committee.²⁸³ The Council expressed its readiness to consider taking appropriate measures, as necessary.²⁸⁴

As the Libyan situation worsened and Khadafi continued his brutal oppression in defiance of the Security Council’s earlier resolution, resulting in heavy civilian casualties,²⁸⁵ the Council adopted another resolution on March 17, 2011.²⁸⁶ Referring to the Arab League’s decision to call for the imposition of a no-fly zone on Libya, the Security Council authorized Member States “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack . . . while excluding a foreign occupation force of any form” on any part of Libya.²⁸⁷ It also established a no-fly zone²⁸⁸ and further strengthened the sanctions imposed in the earlier resolution—the arms embargo,²⁸⁹ ban on flying,²⁹⁰ and asset freeze.²⁹¹

Meanwhile, the UN Human Rights Council was also concerned with the Libyan situation. It adopted a resolution on February 25, 2011,²⁹² pursuant to which the President of the Council established the International Commission of Inquiry to

279. *Id.* ¶ 2.

280. *Id.* ¶¶ 4–8.

281. *Id.* ¶¶ 9, 15–16, annex I.

282. *Id.* ¶¶ 17–21, annex II.

283. *Id.* ¶¶ 24–25.

284. *Id.* ¶ 26.

285. S.C. Res. 1973, U.N. Doc. S/RES/1973, at 1 (Mar. 17, 2011).

286. *Id.*

287. *Id.* ¶ 4.

288. *Id.* ¶¶ 6–12.

289. *Id.* ¶¶ 13–16.

290. *Id.* ¶¶ 17–18, Annex I.

291. *Id.* ¶¶ 19–21, Annex II.

292. Human Rights Council Res. 15/1, Situation of Human Rights in the Libyan Arab Jamahiriya, Res. 15th Spec. Sess., Feb. 25, 2011, U.N. Soc. A/HRC/RES/S-15/1.

investigate alleged violations of international human rights law in Libya.²⁹³ The Commission, chaired by Professor Cherif Bassiouni, submitted its detailed report on June 1, 2011.²⁹⁴ A week later, in presenting the Commission report to the Human Rights Council meeting scheduled to consider it,²⁹⁵ Bassiouni said that the Commission found the government forces and their supporters to have committed acts constituting murder, unlawful imprisonment, and serious violations of international law, including torture, persecution, and enforced disappearance.²⁹⁶ These violations were part of widespread and systematic attacks against the civilian population and are within the meaning of “crimes against humanity” under customary international law and as defined in the International Criminal Court’s Statute, Article VII.²⁹⁷ Also, the report found that the government forces had committed serious violations of international humanitarian law which amounted to “war crimes.”²⁹⁸

Subsequently, on June 27, the International Criminal Court issued warrants of arrest for Khadafi, his son Saif Al-Islam Khadafi, and Libya’s Intelligence Chief, Abdulla Al-Senussi on charges of crimes against humanity (murder and persecution) committed through the state apparatus and security forces.²⁹⁹

293. *See id.* ¶ 11 (requesting the commission “to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible to identify those responsible . . . [to ensure] that those individuals responsible are held accountable. . .”).

294. Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights in the Libyan Arab Jamahiriya, Human Rights Council, 17th Sess., June 1, 2011, at 2, U.N. Doc. A/HRC/17/44 (2011).

295. *See* Human Rights Council, Council Holds Interactive Dialogue with Commission of Inquiry on Alleged Human Rights Violations in Libya (June 9, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11131&LANGID=E>.

296. *Id.*

297. *Id.*

298. *Id.*

299. Press Release, Int’l Crim. Ct., Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi, June 27, 2011, ICC-CPI-20110627-PR689 (June 27, 2011), <http://www.icc-cpi.int/Menus/Go?id=c550ff9f-c8b0-49-e6-898d-66a8ca547d24&lan=en-GB> [hereinafter ICC Arrest Warrants]; *see also* Ved Nanda, *Justice Will Find Khadafy*, DENV. POST, July

The ICC prosecutor had decided to open an investigation on March 3, 2011, and had requested the judges of the Court on May 16 to issue these warrants.³⁰⁰ It should be noted that since Libya is not a party to the Rome Statute that created the Court, it is subject to the ICC's jurisdiction through UN Security Council Resolution 1970, discussed above.³⁰¹

Pursuant to the call in Resolution 1973 authorizing Member States "to take all necessary measures . . . to protect civilians," the U.S. began an air campaign against Khadafi's forces, and NATO took command of the enforcement of the arms embargo and the no-fly zone.³⁰² The context was the imminent attack on Benghazi by Khadhafi's forces and the expected resulting massacre.³⁰³ President Barack Obama in his address to the nation on Libya on March 28 offered the rationale for using force:

Qaddafi declared he would show "no mercy" to his own people. He compared them to rats, and threatened to go door to door to inflict punishment. In the past, we have seen him hang civilians in the streets, and kill over a thousand people in a single day. Now we saw regime forces on the outskirts of the city. We knew that if we . . . waited one more day, Benghazi, a city nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world.³⁰⁴

10, 2011, at D5 (noting that "[s]ixty-five years after the Nuremberg Trials of Nazi war criminals, its successor tribunals . . . are sending a clear message to brutal dictators that they will be held accountable. The international community now has formally acknowledged the sovereign's primary responsibility to protect its people and will continue to act, as have NATO and the ICC, to enforce this responsibility as a last resort.").

300. ICC Arrest Warrants, *supra* note 299.

301. S.C. Res. 1970, *supra* note 276, ¶¶ 4–5.

302. President Barack Obama, Address to the Nation on Libya at National Defense University (Mar. 28, 2011), <http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya> [hereinafter Obama Address]; S.C. Res. 1973, *supra* note 285, ¶ 4.

303. Obama Address, *supra* note 302.

304. *Id.*; see also *Libya: Warrants Send Strong Message to Abusive Leaders*, HUMAN RIGHTS WATCH (June 27, 2011), <http://www.hrw.org/news/2011/06/27/libya-warrants-send-strong-message-abusive-leaders> (noting that "Human Rights Watch has

As the war dragged on, the U.S., along with many other countries recognized the Benghazi-based National Transitional Council (NTC) as the legitimate government representing Libya.³⁰⁵ Secretary of State Hillary Clinton said at an international meeting in Istanbul held to discuss the Libyan conflict, “We will help the TNC sustain its commitment to the sovereignty, independence, territorial integrity and national unity of Libya, and we will look to it to remain steadfast in its commitment to human rights and fundamental freedoms.”³⁰⁶ Because of the recognition by the United States, the rebels could claim the money the member states had earlier frozen pursuant to the Security Council resolution imposing sanctions.³⁰⁷ With the Ramadan holy days beginning on August 1, efforts continued to find a political solution to the Libyan crisis.³⁰⁸

In the absence of a negotiated political solution, military operations continued in Libya for seven months, eventually resulting in the overthrow of the Khadafi regime, the end of Khadafi’s 42-year rule, and ultimately his capture and death at the hands of rebels on October 20, 2011.³⁰⁹ A week later, the UN

documented serious and systematic violations of the laws of war by Libyan government forces, including repeated indiscriminate attacks in residential neighborhoods in Misrata and towns in the western Nafusa mountains”).

305. See Ian Black, *Rebels Gain Recognition as Country’s Leaders*, GUARDIAN, July 16, 2011, at 13; see also Nichols Watt, *Britain Recognises Libyan Rebels and Expels Gaddafi’s London Embassy Staff*, guardian.co.uk (July 27, 2011), <http://guardian.co.uk/world/2011/jul/27/libya-transitional-council-london-embassy-hague> (explaining that Britain made an exception to its usual policy of recognizing states as opposed to governments like the NTC, because of the NTC’s “increasing legitimacy, competence and success in reaching out to Libyans across the country”).

306. Sebnem Arsu & Steven Erlanger, *Libya Rebels Get Formal Backing, and \$30 Billion*, N.Y. TIMES, July 16, 2011, at A1.

307. *Id.*; see S.C. Res. 1970, *supra* note 276, ¶ 17.

308. See Ian Black, *Regime “Ready for Talks” on Transition of Power to Rebels*, GUARDIAN, July 13, 2011, at 12; Ian Black, *Turkey Asks Libya Summit to Back Peace Negotiations*, GUARDIAN, July 15, 2011, at 10; Jonathan Steele, *Libya’s Stalemate Shows It Is Time to Tempt Gaddafi Out, Not Blast Him Out*, GUARDIAN, July 27, 2011, at 22.

309. Peter Beaumont, *Death of a Dictator: Gaddafi Killed by Rebels in Wake of French Air Strike: Crowds Cheer as Body Paraded Through Misrata: NATO Prepares to Announce an End to Libyan Mission*, GUARDIAN (London), Oct. 21, 2011, at 1; Kareem Fahim, Anthony Shadid & Rick Gladstone, *Qaddafi, Seized by Force, Meets a Violent End*, N.Y. TIMES, Oct. 21, 2011, at 1; *Libya’s Liberation: The Colonel is Caught*, THE ECONOMIST, Oct. 22, 2011.

terminated its mandate authorizing military action in Libya.³¹⁰ On October 31, NATO announced the end of its military operation against Libya³¹¹ and the same day the Transitional National Council elected a dual U.S.-Libyan citizen, Abdurraheem el-Keib, to serve as Prime Minister.³¹² A month after his father's death, rebels captured Saif al-Islam Khadafi, who was under indictment by the International Criminal Court on charges of crimes against humanity.³¹³

While the situation in Libya escalated, in March 2011 the civilian population in Ivory Coast was also suffering from brutal suppression at the hands of the forces of incumbent President Laurent Gbagbo, who had lost the presidential election but refused to let the winner assume power.³¹⁴ This resulted in widespread violence.³¹⁵ In addressing the crisis, the Security Council used R2P by implication without explicitly invoking it, in its resolution 1975 on March 30, 2011.³¹⁶ In the preamble, the Security Council reiterated that "parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians and facilitate the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel."³¹⁷

The Security Council authorized UNOCI, the UN peacekeeping forces, "to use all necessary means to carry out its

310. Kim Sengupta, *Security Fears as UN Ends Libya Military Mandate: NTC Urges Continuation of NATO Operations to Secure Border and Counter Loyalist Attacks*, INDEPENDENT (London), Oct. 28, 2011, at 37.

311. Richard Norton-Taylor, *Nato Chief Hails End of Military Operation in Libya*, GUARDIAN (London), Nov. 1, 2011, at 21; Catrina Stewart, *NATO Chief Hails End of Mission in Libya*, INDEPENDENT (London), Nov. 1, 2011, at 4.

312. David D. Kirkpatrick, *Libya Names an Engineer as Premier*, N.Y. TIMES, Nov. 1, 2011, at 11; Mary Beth Sheridan, *U.S.-Educated Professor is Libya's New Prime Minister*, WASH. POST, Nov. 1, 2011, at A8.

313. Borzou Daraghi, *Capture of Gaddafi Son Turns Spotlight on Rule of Law*, FINANCIAL TIMES (London), Nov. 21, 2011, at 10; see also John B. Bellinger, III, *Fair Trials, But Done Libya's Way*, WASH. POST, Nov. 23, 2011, at A19.

314. See David Smith, *Gbagbo Enlists Thousands to Take Fight to Ivory Coast Rebels: Recruitment Drive Stokes Fears of Civil War*, GUARDIAN, Mar. 22, 2011, at 25.

315. See *id.*

316. See S.C. Res. 1975, ¶¶ 1, 4–7, U.N. Doc. S/RES/1975 (Mar. 30, 2011); see also World Summit Outcome, *supra* note 160, ¶¶ 138–39.

317. S.C. Res. 1975, *supra* note 316, pmb. at 2.

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mandate to protect civilians under imminent threat of political violence . . . , including to prevent the use of heavy weapons against the civilian population.”³¹⁸ It also imposed financial and travel sanctions against specified individuals.³¹⁹ The Secretary-General reported to the Security Council that pursuant to resolution 1975 he had “instructed the mission to take the necessary measures to prevent the use of heavy weapons against the civilian population with the support of the French forces pursuant to . . . Security Council resolution 1962 (2010),” and on April 4, UNOCI undertook a military operation to accomplish that objective.³²⁰

Critics have raised questions about the need for the use of force in Libya, especially as no such action was taken against Syria or in several other places, such as The Congo and Sudan.³²¹ It is argued, for example, that “[t]he R2P concept is, . . . abstract enough to cover, and legitimize, a range of military interventions.”³²² Another critic, David Rieff, asserts, “. . . as the Libyan case illustrates, R2P’s most immediate relevance is that it can be used quickly and effectively as a legal and moral justification for military intervention.”³²³

The answer to the critics, which will be further elaborated in the next part, is, in a nutshell, that the concept is still evolving and the Security Council must agree on standards to determine when the threshold for the use of force has been crossed. The

318. *Id.* ¶ 6.

319. *Id.* ¶ 12, Annex I.

320. Press Release, Secretary-General, As Côte D’Ivoire Plunges into Violence, Secretary-General Says United Nations Undertakes Military Operation to Prevent Heavy Weapons Use Against Civilians, U.N. Press Release SG/SM/13494 (Apr. 4, 2011), available at <http://www.un.org/News/Press/docs/2011/sgsm13494.doc>.

321. See Gary Younge, *Comment: Often There Are No Good Answers. But War Should Never Be the Default: Libya Shows Again that Successful Regime Change Can Only Be Brought About by Ordinary People, Not by Foreign Bombs*, GUARDIAN, May 9, 2011, at 25.

322. Gregg Carlstrom, *Responsibility to Protect or Right to Meddle? The Libya No-Fly Zone Is Either a Humanitarian Mission or an Excuse to Meddle, Depending on Who You Ask*, AL JAZEERA ENGLISH, <http://english.aljazeera.net/indepth/features/2011/03/2011324121253913547.html> (last modified Mar. 24, 2011).

323. David Rieff, *Saints Go Marching In*, NAT’L INT., July/Aug. 2011, at 6, 14 [hereinafter *Saints Go Marching In*].

ICISS had suggested the four precautionary principles for guidance on the use of force, which should be further considered.³²⁴ Under R2P the use of force remains a last resort with the primary focus on prevention and peaceful means of settling disputes, as contained in Chapters VI and VII of the UN Charter.³²⁵ In the final analysis it is a political question and hence it is apt to be unevenly applied, given the composition of the Security Council and the Charter's veto provision.³²⁶

VI. APPRAISAL AND RECOMMENDATIONS

Before I address the question posed in the title of this essay, whether the international community is ready for the emerging norm of R2P, it is necessary to consider three preliminary issues related to R2P's implementation: 1) the scope and function of this emerging norm; 2) institutional arrangements for its implementation; and 3) its current status. The inconsistent, selective application of R2P thus far needs to be discussed, as well.

A. *Scope and Function*

Secretary-General Ban explained the scope of the concept as limited to the four mass atrocity crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as their incitement,³²⁷ as discussed earlier. He also emphasized the depth of the concept as it embodies a whole range of peaceful means of settling disputes, including diplomatic efforts, the Chapter VI mechanisms, to wit, "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, . . . or other peaceful means,"³²⁸ Chapter VII Security Council

324. See ICISS Report, *supra* note 158; *supra* text accompanying notes 184–87.

325. See World Summit Outcome, *supra* note 160, ¶ 139; see U.N. Charter arts. 33–42.

326. See U.N. Charter art. 27; see generally World Summit Outcome, *supra* note 160, ¶ 139.

327. See *supra* notes 201–02 and accompanying text.

328. U.N. Charter art. 33, para. 1; see also Implementing the Responsibility to Protect, *supra* note 201, ¶¶ 49–51; see generally U.N. Charter arts. 34 and 36 (describing the pertinent measures for the Security Council's use).

recommendations and non-coercive measures,³²⁹ and Chapter VIII regional arrangements.³³⁰

As discussed earlier, R2P’s focus remains primarily on prevention and the international community’s assistance to states so that they can comply with their obligations to protect populations from the four crimes.³³¹ It is only when these methods do not work and a state is “manifestly failing” to protect its population that the international community is committed to taking “timely and decisive” action to prevent and halt these crimes.³³²

David Rieff contends that, but for the use of force, other elements of R2P, which constitute the primary focus of the concept—diplomacy, prevention, sanctions, etc.—depend for their effective application on whether states where mass atrocity crimes are possible can be identified because the list of such states is very long, and whether the resources exist to provide the needed assistance to those prevent atrocities. He concludes that the ability to identify such states and the resources necessary are simply not present.³³³

Rieff certainly has a valid argument about the lack of sufficient resources to provide a 21st Century Marshall Plan for all those countries in need.³³⁴ Similarly, his assertion is unassailable that the ability of the existing international mechanisms falls short of identifying all likely trouble spots where these crimes might happen. Nonetheless, what follows from these assertions is not the conclusion that the menu options available under the first two pillars named by Secretary-General Ban³³⁵ do not work and should be discarded. He, of course, does not say it in so many words, but he does imply that

329. See *Implementing the Responsibility to Protect*, *supra* note 201, ¶¶ 49–50; see generally U.N. Charter arts. 39–41.

330. See *Implementing the Responsibility to Protect*, *supra* note 201, ¶¶ 49, 51, 70; see generally U.N. Charter art. 52.

331. See *supra* notes 179–82, 202 and accompanying text.

332. World Summit Outcome, *supra* note 160, ¶ 139.

333. *Saints Go Marching In*, *supra* note 323, at 11.

334. See *id.* at 12 (arguing that poor country do not need a Marshall Plan, but even if they did, there are not enough resources to support it).

335. See *Implementing the Responsibility to Protect*, *supra* note 201, ¶¶ 13–48.

the R2P goals other than the use of force are simply irrelevant as there is no international capacity or commitment to accomplish them.³³⁶

As an illustration of the use of these R2P tools considered irrelevant by Rieff, Professor Bellamy discusses Kenya after the disputed December 2007 elections, where internationally brokered diplomatic efforts by the African Union under the leadership of Kofi Annan and supported by the UN Secretary-General, brought about a power-sharing agreement that prevented what otherwise might have led to mass atrocities.³³⁷ The President of the Security Council in a statement “urge[d] Kenya’s political leaders to foster reconciliation and to elaborate and implement the actions agreed to . . . without delay, including by meeting their responsibility to engage fully in finding a sustainable political solution and taking action to end immediately violence.”³³⁸

In the Ivory Coast in November 2004, another situation noted by Secretary-General Ban, then special adviser on the prevention of genocide, Juan Méndez, reminded the authorities there that they could be held criminally responsible for the consequences of xenophobic hate speech, which was exacerbating domestic tensions and had spurred further violence.³³⁹ Such messages did cease after his communication.³⁴⁰ And despite the lack of ample resources, those that can be marshaled and used internationally, regionally, or unilaterally, will permit at least some of those risky situations to be identified and paid appropriate attention. For even if available resources do not suffice to address all at-risk situations, does providing assistance and building capacity in as many situations as possible not serve the R2P goal of preventing and deterring mass atrocities?

Once the situation reaches the third pillar, the question, “who can take coercive action on behalf of the international

336. See *Saints Go Marching In*, *supra* note 323, at 11.

337. Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 *ETHICS & INT’L AFF.* 143, 154 (2010) [hereinafter *R2P—Five Years On*].

338. S.C. Pres. Statement 2008/4, U.N. Doc. S/PRST/2008/4 (Feb. 6, 2008).

339. See *Implementing the Responsibility to Protect*, *supra* note 201, ¶ 55.

340. *Id.*

community?” is unequivocally answered by identifying the UN Security Council. However, there is no guidance as to when the threshold for action is reached.³⁴¹ In the Libyan context, the debate continues whether R2P was wisely invoked by the Security Council to authorize coercive action.³⁴² As the events unfolded, given Khadafi’s prior record, combined with his threats to the rebels and with his armies swiftly closing in on Benghazi, a city of 700,000 people, the risk of potential massive atrocities was instrumental in the Security Council’s decision to respond quickly to the crisis that was moving much faster.³⁴³ There is, however, no adequate response to critics who might ask whether the first two pillars of R2P were applied; and if so, how effectively and if not, why not? As David Rieff cautioned, the Libyan case illustrates the ease of using R2P to justify military intervention.³⁴⁴

A related criticism of the Libyan intervention is that the limited mandate from the Security Council to use coercion to protect civilians was stretched, as evidenced by the calls from the United States and France, among other western countries, to remove Khadafi even prior to the NATO intervention, which left no doubt about their goal to bring about a regime change.³⁴⁵ Thus, the Libyan intervention, especially the perceived “mission creep” and the lingering crisis there, has indeed added further challenges to the operationalization of the concept.³⁴⁶ Also, military power, once unleashed, is by its nature imprecise in its application as it is likely to result in civilian deaths justified as

341. *Implementing the Responsibility to Protect*, *supra* note 201, ¶ 55.

342. See Irwin Cotler & Jared Genser, Op-Ed., *Libya and the Responsibility to Protect*, N. Y. TIMES, Feb. 28, 2011, available at <http://www.nytimes.com/2011/03/01/opinion/01iht-edcotler01.html>.

343. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (expressing “grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties”).

344. *Saints Go Marching In*, *supra* note 323, at 14.

345. See *NATO Stretching UN Libya Mandate: Evans*, THE SYDNEY MORNING HERALD, May 4, 2011, <http://news.smh.com.au/breaking-news-national/nato-stretching-un-libya-mandate-evans-20110504-1e7zj.html>; *NATO After Libya, A Troubling Victory*, THE ECONOMIST, Sept. 2, 2011, at 58, 58.

346. *Saints Go Marching In*, *supra* note 323, 14.

“collateral” damage.³⁴⁷ Unfortunately, the Libyan operation might have the unintended consequence of discrediting the concept and weakening its political support and acceptance, giving ammunition to those who might equate responsibility to protect with “humanitarian intervention wine in new bottles,”³⁴⁸ or “imperialism in disguise.”³⁴⁹

As to responsibility to protect’s functions, Professor Alex Bellamy considers one function to describe a political commitment to prevent and halt genocide and mass atrocities, “accompanied by a policy agenda in need of implementation.”³⁵⁰ The second responsibility to protect function he identifies is to generate a “speech act,” meaning specific communicative functions through words and sentences such as promises and warnings, so that R2P serves as a catalyst for action.³⁵¹ Regarding the first function, he argues that responsibility to protect is universal and enduring, and is widely accepted, although the policy agenda it generates needs further clarification for its implementation,³⁵² as the implementation has not yet begun in earnest. He appropriately considers this approach to be aimed at presenting

RtoP as a broad-based policy agenda focused on the “upstream” prevention of genocide and mass atrocities through capacity-building and international

347. *See id.* at 14–15.

348. This is how Rieff characterizes it. *Id.* at 15. *See also* Fabrice Weissman, *Not In Our Name: Why MSF [Medecins Sans Frontieres] Does Not Support the “Responsibility to Protect”*, DOCTORS WITHOUT BORDERS (Oct. 4, 2010), available at <http://www.doctorswithoutborders.org/publications/article.cfm?id=4778&cat=ideas-opinions>. “R2P is most controversial as a theory of ‘just war’—that is, as a rationale for warfare rather than, say, an appeal to states to use diplomatic means to contain violence against civilians.” Weissman, *supra* note 348. Weissman adds that, in addition to operational constraints on Doctors Without Borders/Médecins Sans Frontières for not supporting R2P, “there is a more philosophical reason for refusing the call to arms: if the purpose of humanitarian action is to limit the devastation of war, it cannot be used as a justification for new wars.” *Id.*

349. *See* Weissman, *supra* 348.

350. *R2P—Five Years On*, *supra* note 337, at 158.

351. *Id.* at 159 (quoting Eli Stamnes, ‘Speaking R2P’ and the Prevention of Mass Atrocities, 1 GLOBAL RESPONSIBILITY TO PROTECT 1, 77 (2009)); *see also* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1975).

352. *R2P—Five Years On*, *supra* note 337, at 158.

cooperation, and to focus attention on developing the institutions and capacities for effective response within the prevailing normative framework, while keeping in mind the need to martial “timely and decisive” responses to atrocities when needed.³⁵³

Bellamy finds these two functions incompatible and argues that this causes confusion regarding the way R2P is used.³⁵⁴ I concur with the response of Edward Luck, the Secretary-General’s special adviser on R2P, who contends that, while these two approaches cannot be simultaneously embraced as R2P’s primary function, they are not necessarily incompatible—and could even be mutually reinforcing—if a call to action is seen as not necessarily a call to coercive action.³⁵⁵

B. Institutional Arrangements

The Secretary-General’s 2009 Report, *Implementing the Responsibility to Protect*,³⁵⁶ and the General Assembly debate on the report³⁵⁷ set the stage for addressing institutional deficiencies pointed out by the UN commissions in their reports on Rwanda³⁵⁸ and Srebrenica,³⁵⁹ and for coordinating and strengthening institutional arrangements.³⁶⁰ The process was furthered in 2010 with the Secretary-General’s presentation of his report, entitled *Early Warning, Assessment, and the Responsibility to Protect*,³⁶¹ and subsequently the General Assembly’s dialogue discussing it.³⁶²

The Secretary-General outlined the institutional arrangements needed for the “effective, credible and sustainable

353. *Id.*

354. *Id.* at 160.

355. See generally Edward C. Luck, *The Responsibility to Protect: Growing Pains or Early Promise?*, 24 ETHICS & INT’L AFFAIRS 349 (2010) [hereinafter *R2P—Growing Pains*].

356. *Implementing the Responsibility to Protect*, *supra* note 201.

357. July 28 Debate, *supra* note 219.

358. *Independent Inquiry Report*, *supra* note 1.

359. *Srebrenica Report*, *supra* note 161.

360. *Implementing the Responsibility to Protect*, *supra* note 201, at 9.

361. *Early Warning Report*, *supra* note 244.

362. See generally *GA 2010 Dialogue*, *supra* note 243.

implementation” of R2P, which in turn calls for “early and flexible response tailored to the circumstances of each case.”³⁶³ To accomplish this goal, the Secretary-General proposed a joint office between his two special advisers that would institutionalize the collaboration between them and strengthen the existing institutional arrangements, “including for capacity-building and for the gathering and analysis of information from the field.”³⁶⁴ The General Assembly’s acceptance of the proposal has been a very promising development.

The Secretary-General’s 2011 report on the role of regional and sub regional arrangements in implementing R2P was the next step in furthering the process.³⁶⁵ There he highlighted the need for enhancing the cooperation between the UN Secretariat and the regional counterparts³⁶⁶ and between his special advisers and regional bodies.³⁶⁷

These developments show remarkable progress made in less than two short years since the General Assembly adopted its first resolution to continue the dialogue on the topic.³⁶⁸

C. *Current Status of the Responsibility to Protect*

Although discussions in the General Assembly have shown overwhelming support for R2P as a method to prevent and halt the four atrocity crimes, the baggage of history surrounding the abuse of “humanitarian intervention” by major powers cannot be ignored. I vividly recall my presentation on R2P at a special meeting convened by the Indian Society of International Law in New Delhi. Present were international law scholars and budding scholars as well. The widespread skepticism my presentation generated was palpable. Such skepticism is obviously not confined to New Delhi, but in varying degrees is shared by the global south.³⁶⁹

363. *Early Warning Report*, *supra* note 244, ¶ 19.

364. *Id.* ¶ 17.

365. *U.N. Regional Arrangements*, *supra* note 262.

366. *Id.* ¶ 39.

367. *Id.* ¶ 40.

368. G.A. Res. 63/308, *supra* note 197.

369. Mark Notaras & Vesselin Popovski, *The Responsibility to Protect*, UNITED NATIONS UNIVERSITY (April 05, 2011), <http://unu.edu/articles/peace-security-human->

Secretary-General Ban and both of his special advisers have been actively engaged in consulting with State officials and intergovernmental organizations, especially Chapter VIII regional bodies, in promoting and clarifying the concept, studying policy options, working on the gaps identified by the Secretary-General in his reports, and exploring the practical steps needed for its operationalization.³⁷⁰ Efforts to build a strong constituency of states to support the concept and consider means to operationalize R2P are a necessary first step for moving the concept beyond rhetoric. As states and the public grow more comfortable with the concept and as it gradually becomes part of popular culture, it no doubt will influence state behavior and conduct. States then will take appropriate measures to cooperate with the UN and regional organizations and operationalize R2P.

D. Inconsistent Application of R2P in Practice

In the brief history of its application, R2P has a mixed record, as shown by Professor Bellamy after his study of nine crises where the principle has been invoked and four others where one or more of the four R2P crimes were either committed or threatened without R2P being invoked.³⁷¹ In the case of Georgia (2008), Russia invoked the principle, but several governments rejected it and claimed there was no support for the Russian claims, as governments and analysts found no evidence of R2P crimes.³⁷² Similarly invoking R2P, the French Foreign Minister Bernard Kouchner called upon the UN Security Council to authorize humanitarian assistance without Myanmar's consent when on May 3, 2008, Cyclone Nargis caused 138,000 deaths and displaced 1.5 million people.³⁷³ The rationale for this invocation was that denial of such assistance

rights/responsibility-to-protect-and-the-protection-of-civilians.

370. Bruce Finley, *In Denver, U.N. Chief Calls for Human-Rights Protection, More R2P to Protect Civilians*, THE DENVER POST, Aug. 25, 2011, available at http://www.denverpost.com/news/ci_18752051.

371. *R2P—Five Years On*, *supra* note 337, at 148–57.

372. *See id.* at 150–51.

373. Asia-Pacific Centre for the Responsibility to Protect, *Cyclone Nargis and the Responsibility to Protect: Myanmar/Burma Briefing No. 2*, at 1 (May 16, 2008).

constituted a crime against humanity. Again, there was no support found for such invocation and the consensus opinion was, in the case of natural disasters, R2P is inappropriate.³⁷⁴

Other cases Bellamy studied in which R2P was invoked are Kenya (2007–2008), Sudan (Darfur, 2003–ongoing), Sri Lanka (2008–2009), the Myanmar government’s ongoing conflicts with ethnic minorities, the ongoing conflicts in the Democratic Republic of Congo, the ongoing problems in North Korea, and the Israeli use of force in Gaza (2009); and the cases studied where R2p was not invoked are Sudan (the north-south conflicts ongoing since 2008), Somalia (ongoing conflict since 2006), Iraq (ongoing conflicts since 2003), and Afghanistan (ongoing conflicts since 2001).³⁷⁵ Among these countries, Kenya was the only one where, under the auspices of the African Union and with the assistance of the UN Secretary-General, mediation efforts succeeded.³⁷⁶ No conclusive statement can yet be made about the situation in Libya, where for the first time the Security Council has applied the third pillar R2P in authorizing the use of force.³⁷⁷

Edward Luck, whose task is to study these crises, acknowledges that the application of policy measures in response to the crises remains “somewhat selective,” as politics and national preferences affect responses by the Security Council, the General Assembly, and the African Union, as well as any evaluations and appraisals by these bodies on the likelihood of success of their response.³⁷⁸

E. Is the International Community Ready to Embrace the Responsibility to Protect?

As mentioned earlier, R2P is accepted as a concept without any serious challenge by an overwhelming number of states.³⁷⁹ However, as the Secretary-General and Edward Luck have

374. *R2P—Five Years On*, *supra* note 337, at 151–52.

375. *Id.* at 149–50.

376. *Id.* at 153.

377. S.C. Res. 1973, *supra* note 285.

378. *R2P—Growing Pains*, *supra* note 355, at 353.

379. *R2P—Five Years On*, *supra* note 337, at 158.

repeatedly acknowledged, much more needs to be done to further clarify the concept and solve policy and institutional issues to eventually accomplish the goal of operationalization and implementation.

Based upon the study thus far, there is no clear answer on exactly how the Security Council is required to act “in a timely and decisive manner,” on a case-by-case basis, when peaceful means are inadequate and national authorities are “manifestly failing” to protect their populations from atrocity crimes, as mandated by world leaders in the 2005 Summit Outcome Document.³⁸⁰ Thus, the need for guidelines and criteria is evident. This critical issue is especially highlighted by the criticism arising from the Security Council’s authorization to protect citizens in Libya.

Because any decision taken by the Security Council and actions undertaken by governments or regional organizations invariably depend on the political considerations involved it is unrealistic to expect consistency. The next step in achieving consistent decisions would be for the Security Council and the General Assembly to discuss the criteria to determine 1) when a threshold for collective coercive action has been reached and 2) the nature of the coercive measures to be taken. The Secretary-General’s High-Level Panel had recommended the basic criteria: seriousness of threat, proper purpose, last resort, proper means, and balance of consequences.³⁸¹ If the General Assembly continues its discussion of R2P in 2012 on the topic suggested by the Secretary-General, assessing efforts in implementing the third pillar of his strategy, a serious discussion on the needed criteria will be helpful.

Professor Bellamy raises another serious question, whether the second and third pillars of the Secretary-General’s R2P strategy should even be considered norms, since demands imposed by these pillars are indeterminate and this weakens R2P’s “compliance-pull” as is evident by state practice in several recent crises.³⁸² Edward Luck considers this question to be a red

380. World Summit Outcome, *supra* note 160, ¶ 139.

381. High-Level Panel Report, *supra* note 159, ¶ 207a–e.

382. See generally *R2P—Five Years On*, *supra* note 337, at 160–62.

herring. In response he explains:

What R2P brings to the existing norms on genocide prevention, war crimes, ethnic cleansing, and crimes against humanity, in fact, is the nucleus of a multilateral compliance mechanism. . . . [T]he binding quality of its decisions makes the [Security] Council unique. It is not about to be bound by others or to be told how it must act.³⁸³

As an emerging norm, R2P is “soft law.” Every student of international law knows that it takes time for soft law to be transformed into either conventional law or customary international law. The Universal Declaration of Human Rights³⁸⁴ provides an apt illustration. At the time of its adoption by the General Assembly, Eleanor Roosevelt called it “a statement of principles . . . setting up a common standard of achievement for all peoples and all nations,”³⁸⁵ asserting further that the Declaration was “not a treaty or international agreement . . . imposing legal obligations.”³⁸⁶ Who can today dismiss or ignore the Declaration, whose provisions have come to influence state conduct much more effectively than many conventional laws?

In a nutshell, it is too early to tell how soon the international community will operationalize and implement the responsibility to protect, which simply reflects the tension between the age-old tradition of sovereignty and the contemporary aspirations of human rights. It will take time for the idea to take root that sovereignty and responsibility to protect are indeed compatible. But there is no question that the collective action envisaged by R2P to prevent and halt atrocities is a preferable alternative to the much discredited unilateral intervention.

383. *R2P—Growing Pains*, *supra* note 355, at 361–62.

384. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/818 (Dec. 10, 1948).

385. John Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, 39, 50 (Evan Luard ed., 1967).

386. *Id.*