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TRACKING THE EMERGENCE OF A NEW INTERNATIONAL NORM: THE RESPONSIBILITY TO PROTECT AND THE CRISIS IN DARFUR

MAX W. MATTHEWS*

Abstract: Since 2005, both the U.N. General Assembly and the Security Council have expressed for the first time a clear acceptance of the existence of a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Though scholars have since debated the legal status of this responsibility, commonly referred to as R2P, it is most accurately described as a declaratory principle rather than a binding rule of international law. Still, recent resolutions by the Security Council, particularly those in reaction to the ongoing atrocities in Darfur, Sudan, explicitly invoke R2P while calling for protective actions in accordance with the principle. If the Security Council continues to implement R2P, the principle may crystallize into a binding norm of international law in the foreseeable future.

INTRODUCTION

In the Outcome Document of the 2005 World Summit of the United Nations General Assembly, the international community expressed for the first time a clear acceptance of the existence of a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.¹ The Outcome Document includes in this responsibility taking prompt and decisive collective action, diplomatically if possible, but militarily if peaceful means prove inadequate and national authorities manifestly fail to protect their populations from such crimes.² The inclusion of the principle, coined

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¹ See 2005 World Summit Outcome Document, G.A. Res. 60/1, ¶¶ 138–139, U.N. GAOR, 60th sess., U.N. Doc. A/Res/60/1 (Oct. 24, 2006) [hereinafter Outcome Document].

² See *id.*

among international legal scholars as the “responsibility to protect,” or “R2P,” was due in large part to a seminal report entitled *The Responsibility to Protect (R2P Report)*, published by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS) in 2001,³ and two United Nations (U.N.) reports on reform produced before the 2005 World Summit.⁴ In April 2006, the principle was reaffirmed in a resolution by the U.N. Security Council.⁵

Proponents of R2P acknowledge that major challenges remain in implementing and actualizing the responsibility to protect.⁶ In particular, the current humanitarian crisis in Darfur, Sudan has been cited as a test case for the U.N.’s commitment to the concept, and demonstrates the many hurdles still standing in the way of effective intervention to protect civilians caught up in armed conflict.⁷

Part I of this Note begins with a short history of the international legal discourse and doctrinal basis that resulted in the formulation of R2P. This section also describes the R2P framework, positing R2P within the ongoing debate regarding moral and legal justifications for humanitarian intervention, and its ultimate adoption by the U.N. This part concludes with a summary of the humanitarian crisis in Darfur and the international community’s reactions to that crisis. Part II discusses responses to the R2P Report and its subsequent adoption by the U.N., and then addresses competing arguments weighing the current legal status of R2P. Finally, Part III contains a prediction of future codification and implementation of the principle, using the Security Coun-

³ See Int’l Comm’n on Intervention & State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), available at www.iciss.ca/pdf/Commission-Report.pdf [hereinafter *ICISS Report*]. The Commission members were Gareth Evans (Aust.), Mohamed Sahnoun (Alg.), Gisèle Côté-Harper (Can.), Lee Hamilton (U.S.), Michael Ignatieff (Can.), Vladimir Lukin (Russ.), Klaus Naumann (F.R.G.), Cyril Ramaphosa (S. Afr.), Fidel V. Ramos (Phil.), Cornelio Summarga (Switz.), Eduardo Stein Barillus (Guat.), and Ramesh Thakur (India). *Id.* at 77–79.

⁴ See The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*]; The Secretary General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 201–203, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

⁵ S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

⁶ See, e.g., S. Neil MacFarlane et al., *The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?*, 25 *THIRD WORLD Q.* 977, 980–81 (2004).

⁷ See Irene Khan, Kenneth Roth & Gareth Evans, Joint Letter to the U.N. Security Council, May 25, 2006, available at <http://hrw.org/english/docs/2006/05/25/sudan13462.htm>.

cil's reactions to the genocide in Darfur as a basis for predicting the potential crystallization⁸ of an international norm.

I. BACKGROUND

A. *Before the International Commission on Intervention and State Sovereignty and the Birth of R2P*

The notion of R2P arose from a perceived need to establish international guidance for dealing with imminent or ongoing incidents of ethnic cleansing and genocide.⁹ "Humanitarian intervention' has been controversial both when it happens, and when it has failed to happen."¹⁰ The international community's failure to prevent or halt either the 100-day genocidal slaughter of 800,000 Rwandan Tutsis in 1994 or the mass-murder of over 8,000 Bosnians by an ethnic Serbian militia in 1995 laid bare the horror of inaction.¹¹ Whereas in 1999, the North Atlantic Treaty Organization's war against Serbian forces to halt the ethnic cleansing of Kosovar Albanians raised serious questions about the legitimacy of humanitarian intervention.¹² These three cases occurred at a time of heightened expectations for effective collective action following the end of the Cold War.¹³

The beginning of the R2P Report identifies the entrenched front-lines of the contemporary policy debate surrounding these interventions:

For some, the international community is not intervening enough; for others it is intervening much too often. For some, the only real issue is in ensuring that coercive interventions are effective; for others, questions about legality, process and the possible misuse of precedent loom much larger. For some, the new interventions herald a new world in which human

⁸ See *Continental Shelf (Tunis. v. Libyan Arab Jamahiriya)*, 1969 I.C.J. 3, 38 (Feb. 20); IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4–11 (4th ed. 1990). "Crystallization" refers to the process by which a nonbinding principle transforms into a binding rule of international law, for instance, through the evolution of state practice or codification within an international treaty. See *Continental Shelf*, 1969 I.C.J. at 38; BROWNIE, *supra*.

⁹ *ICISS Report*, *supra* note 3, at vii.

¹⁰ *Id.* at vii, 1.

¹¹ See *id.* at 1; *Bosnian Muslim Guilty but Freed*, BBC NEWS, June 30, 2006, available at <http://news.bbc.co.uk/2/hi/europe/5132684.stm>; *Rwanda: How the Genocide Happened*, BBC NEWS, Apr. 1, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/1288230.stm>.

¹² *ICISS Report*, *supra* note 3, at 1.

¹³ *Id.*

rights trumps state sovereignty; for others, it ushers in a world in which big powers ride roughshod over the smaller ones, manipulating the rhetoric of humanitarianism and human rights.¹⁴

This seemingly irreconcilable controversy prompted U.N. Secretary-General Kofi Annan to challenge the international community to “find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.”¹⁵ In response, the Canadian government sponsored the independent ICISS with the purpose of exploring the whole range of legal, moral, operational and political questions rolled up in this debate, in order to consult with the widest possible range of opinion around the world, and to generate a report that would help the Secretary-General and other concerned parties find some new common ground.¹⁶

B. *The R2P Framework*

After about a year of deliberation, the ICISS published the R2P Report, which was widely praised for moving the debate beyond the impasse while preserving the integrity of the principle of state sovereignty.¹⁷ The Report reconfigured the terms of the debate, focusing affirmatively on the *responsibilities* of sovereignty, including each state’s “primary responsibility for the protection of its people,”¹⁸ rather than focusing on the *right* of one or more states to intervene in the affairs of another.¹⁹ Where the individual state is unable or unwilling to carry out this primary responsibility to protect, the Report affirms the responsibility of the international community to ensure protection of populations at risk.²⁰

The R2P Report sets forth three responsibilities: to prevent, react, and rebuild.²¹ The Report highlights the priority of *prevention* of crimes

¹⁴ *Id.* at 1–2.

¹⁵ *Id.* at 2 (citing Kofi Annan, U.N. Secretary-General, Address to the 54th Session of the U.N. General Assembly).

¹⁶ *Id.* at vii.

¹⁷ See, e.g., Jennifer Welsh et al., *The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty*, 57 INT’L J. 489, 492–94 (2002).

¹⁸ *ICISS Report*, *supra* note 3, at xi, 16.

¹⁹ See generally T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1 (2002) (discussing the *right* to intervene for humanitarian purposes).

²⁰ *ICISS Report*, *supra* note 3, at xi.

²¹ *Id.*

against humanity, and the need for an “early warning system.”²² Once prevention fails, and crimes against humanity are taking place, states have a responsibility to *react*.²³ After the crimes have been brought to a stop, the international community has a responsibility to *rebuild* by assisting in reconstruction and reconciliation, helping to build a durable peace, and promoting good governance and sustainable development.²⁴

Additionally, the R2P Report affirms the need for a range of escalating non-coercive and coercive measures to prevent or halt crimes against humanity.²⁵ The ultimate coercive measure—military intervention—is reserved as a remedy of last resort.²⁶ The Report establishes specific criteria for military intervention to be justified and specific standards governing how such actions should be conducted.²⁷ These criteria include “just cause,” “right authority,” “right intention,” “last resort,” “proportional means,” and “reasonable prospects.”²⁸ The only *just cause* for military intervention is to halt or revert “large scale loss of life” or “large scale ‘ethnic cleansing.’”²⁹ The primary purpose, or *right intention*, of the intervention must be to halt or avert human suffering, regardless of intervening states’ other motives.³⁰ The scale, duration, and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question, and the means employed must be *proportional* to the ends sought.³¹ There must be *reasonable prospects* for success in halting or averting the suffering, with the consequences of action not likely to be worse than those of inaction.³² Finally, the intervention may only proceed with the *right authority*; Security Council authorization should in all cases be sought prior to any military action.³³ If the Council rejects a proposal or fails to deal with it in a reasonable time, alternative options include consideration of the matter by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure, and action by regional

²² *Id.* at 19–27.

²³ *Id.* at 29–37.

²⁴ *Id.* at 39–45.

²⁵ *ICISS Report, supra* note 3, at 29–31.

²⁶ *Id.* at 36–37.

²⁷ *Id.* at 31–37.

²⁸ *Id.* at xii–xiii, 32–37.

²⁹ *Id.* at xii, 32.

³⁰ *ICISS Report, supra* note 3, at xii, 35.

³¹ *Id.* at xii, 37.

³² *Id.* at 37.

³³ *Id.* at xii, 50.

or sub-regional organizations, subject to their seeking subsequent authorization from the Security Council.³⁴

Without opining on proposals for future Security Council reform, the Report sought to eliminate Security Council gridlock by proposing a “code of conduct” for the use of the veto with respect to actions that are needed to stop or avert a humanitarian crisis.³⁵ In matters where its “vital national interests were not claimed to be involved,” a permanent member would not use its veto to obstruct the passage of what would otherwise be a majority resolution—a “constructive abstention.”³⁶

C. *United Nations Adoption of R2P*

The formation of the ICISS and drafting of the R2P Report coincided with increased interest among the international community, the Security Council, and the Secretary-General about the development of international doctrine addressing the protection of civilians.³⁷ Between 2001 and 2005, the Secretary-General submitted two reports at the request of the Security Council regarding the protection of civilians.³⁸ In particular, the ideas and principles in the R2P Report were endorsed by the Secretary-General’s High-level Panel on Threats, Challenges and Change, which reported to Kofi Annan in December 2004.³⁹ The only major divergence between the R2P Report and the High-level Panel Report is that the latter omitted any discussion of a “constructive abstention” by the Permanent Five.⁴⁰ Mr. Annan warmly received the High-level Panel Report by incorporating all its proposals relating to the responsibility to protect and the use of force into his own report, *In Larger Freedom*.⁴¹ Mr. Annan’s report was distributed in the spring of 2005 for discussion within the General Assembly in preparation for the Summit the following September.⁴²

³⁴ *Id.* at xiii, 53–54.

³⁵ *ICISS Report*, *supra* note 3, at xiii, 51.

³⁶ *Id.*

³⁷ *See, e.g.*, The Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, delivered to the Security Council*, U.N. Doc. S/2001/331 (Mar. 30, 2001) [hereinafter *2001 Protection of Civilians Report*].

³⁸ The Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict, delivered to the Security Council*, U.N. Doc. S/2005/740 (Nov. 28, 2005); *2001 Protection of Civilians Report*, *supra* note 37.

³⁹ *See generally* *A More Secure World*, *supra* note 4.

⁴⁰ *See* Nicholas J. Wheeler, *A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit*, 2 J. INT’L L. & INT’L REL. 95, 96 (2005).

⁴¹ *In Larger Freedom*, *supra* note 4, ¶ 135; *see also* Wheeler, *supra* note 40, at 99 (describing endorsement of R2P within successive U.N. reports).

⁴² *In Larger Freedom*, *supra* note 4, ¶ 3; Wheeler, *supra* note 40, at 99.

After much debate at the 2005 World Summit, it was agreed that the Outcome Document would contain two paragraphs under the heading “Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁴³ The first paragraph affirmed that each state has the responsibility to protect its populations from genocide, war crimes, and crimes against humanity, while highlighting that such a responsibility entails the prevention of such crimes by appropriate means.⁴⁴ Additionally, this paragraph acknowledged that the international community should encourage and help states to exercise this responsibility and should support the U.N. in establishing an early warning capability.⁴⁵

The second paragraph affirmed that the international community, through the U.N., “[H]as the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁴⁶ If peaceful means are inadequate and national authorities are manifestly failing to protect their populations from such crimes, the international community declared that it is prepared to take collective military action through the Security Council in a timely and decisive manner.⁴⁷ Finally, the General Assembly stressed the need for it to “continue consideration of the responsibility to protect . . . and its implications, bearing in mind the principles of the [U.N.] Charter and international law.”⁴⁸

Official endorsement of R2P culminated when the Security Council passed Resolution 1674 on April 28, 2006.⁴⁹ This resolution “*Reaffirms* the provisions . . . of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁵⁰

⁴³ Outcome Document, *supra* note 1, ¶¶ 138–139; U.N. Non-Governmental Liaison Serv., *2005 World Summit: An Era of Peril and Promise*, NGLS ROUNDUP, Oct. 2005, at 1.

⁴⁴ Outcome Document, *supra* note 1, ¶ 138.

⁴⁵ *Id.* An early warning mechanism was subsequently created in 2004 when the Secretary-General established the Office of the Special Adviser on the Prevention of Genocide. See Office of the Special Adviser on the Prevention of Genocide, http://www.un.org/Depts/dpa/prev_genocide/index.htm (last visited Jan 25, 2008).

⁴⁶ Outcome Document, *supra* note 1, ¶ 139.

⁴⁷ *See id.*

⁴⁸ *Id.*

⁴⁹ See S.C. Res. 1674, *supra* note 5, ¶ 4.

⁵⁰ *Id.*

D. *The Humanitarian Crisis in Darfur and the International Community's Reactions*

The current humanitarian crisis in Darfur has been cited by several commentators as a test case for the international community's commitment to R2P.⁵¹ The U.N. considers the Darfur conflict to be one of the world's worst ongoing humanitarian crises.⁵² Since 2003, the Sudanese government and its proxy militia have waged a brutal campaign against the people of Darfur, a region in Western Sudan about the size of Texas.⁵³ Several hundred thousand people have been killed or badly injured.⁵⁴ The conflict has displaced more than two million people, who now live in displaced-persons camps in Sudan or in refugee camps in Chad, and more than 3.5 million people are reliant on international aid for survival.⁵⁵

The Darfur conflict stems from long-term disputes over resources between the region's farmers and herders.⁵⁶ "This conflict grew out of opposition to the Sudanese government by two rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), which primarily draw their support from the Fur, Masalit and Zaghawa ethnic groups."⁵⁷ The SLA and JEM aim to compel the government of Sudan to address underdevelopment and the political marginalization of non-Arabs in Darfur.⁵⁸ In response, the Sudanese armed forces and a government-backed militia known as the Janjaweed—largely composed of fighters of Arab background—have attacked civilian populations suspected of supporting the rebels.⁵⁹ The Janjaweed and Sudanese military, paramilitary, and police have employed a wide range of tactics against civilians, including aerial bombings, heavy shelling, ground attacks, bulldozing and burning of villages, arrests and extrajudicial execution, kidnapping, torture, and rape.⁶⁰ The violence against Darfur's civilian population has been

⁵¹ See Khan et al., *supra* note 7.

⁵² U.N. Mission in Sudan, Darfur and the Peacebuilding, <http://www.unmis.org/english/darfur.htm> (last visited Jan. 25, 2008) [hereinafter *Darfur and the Peacebuilding*].

⁵³ Human Rights First, About the Crisis, http://www.humanrightsfirst.org/international_justice/darfur/about/background.asp (last visited Jan. 25, 2008).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Human Rights First—About the Crisis, *supra* note 53.

⁵⁹ *Id.*

⁶⁰ *Id.*

widely recognized as genocide.⁶¹ Unfortunately, despite the signing of a series of ceasefire and peace agreements, there has been increased violence including credible allegations of torture and attacks on civilians by signatories and non-signatories alike.⁶² This violence makes it dangerous, if not impossible, for most of the millions of displaced persons to return home.⁶³

In 2004, the African Union established the African Union Mission in Sudan (AMIS) with the primary mission of performing peacekeeping operations related to the Darfur conflict.⁶⁴ A series of U.N. Security Council resolutions in 2004 and 2005 established the United Nations Mission in Sudan (UNMIS), and since then the crisis has remained on the Council's agenda.⁶⁵ UNMIS oversees all U.N. military, humanitarian, and diplomatic activity in Sudan and works with AMIS in its efforts to establish peace and stability in Darfur, though none of its military personnel operate in Darfur.⁶⁶ Due to limited human and financial resources, AMIS has been unable to either secure effective implementation of the most recent peace agreement or even stem the escalating violence.⁶⁷ In 2006, Security Council resolutions called for an extension of UNMIS to include a robust military force to take over peacekeeping operations from AMIS.⁶⁸ A transition, however, was made contingent on the Sudanese government's consent, which was adamantly withheld until a year of threats and negotiations led to its acceptance of an "AU/UN Hybrid operation in Darfur" (UNAMID) consisting predominantly of African troops, which should be operating by the end of 2007.⁶⁹

⁶¹ See, e.g., Darfur Peace and Accountability Act of 2006, § 3, Pub. L. No. 109-344, 120 Stat. 1869 (recognition, by the U.S. Congress, that the violence in Darfur is genocide).

⁶² Human Rights First—About the Crisis, *supra* note 53.

⁶³ *Id.*

⁶⁴ See African Union Mission in Sudan, Mandate, <http://www.amis-sudan.org/amismandate.html> (last visited Jan. 25, 2008).

⁶⁵ See U.N. Mission in Sudan, Mission Background, <http://www.unmis.org/english/background.htm> (last visited Jan. 25, 2008); Darfur and the Peacebuilding, *supra* note 52.

⁶⁶ See Darfur and the Peacebuilding, *supra* note 52; U.N. Mission in Sudan, Military Component, <http://www.unmis.org/english/military.htm> (last visited Jan. 25, 2008); U.N. Mission in Sudan, UNMIS Questions & Answers, <http://www.unmis.org/english/Q-A.htm> (last visited Jan. 25, 2008).

⁶⁷ See Khan et al., *supra* note 7.

⁶⁸ S.C. Res. 1679, ¶ 3, U.N. Doc. S/RES/1679 (May 16, 2006).

⁶⁹ See S.C. Res. 1769, pmbl., ¶¶ 1-2, U.N. Doc. S/RES/1769 (July 31, 2007); S.C. Res. 1706, ¶ 1, U.N. Doc. S/RES/1706 (Aug. 31, 2006); Simon Apiku, *Sudan Bowed to Pressure on Darfur Force—Opposition*, REUTERS, June 19, 2007, available at <http://www.reuters.com/article/worldNews/idUSL1973884020070619>.

II. DISCUSSION

A. *Responses to the R2P Report and Its Subsequent Adoption by the U.N.*

Among scholars, responses to the R2P Report have varied widely.⁷⁰ Many scholars view R2P as the most comprehensive framework for approaching humanitarian intervention ever put forth.⁷¹ Some commentators are skeptical of the R2P Report and consider it dangerously disrespectful of current international law.⁷² Others claim that it merely legitimizes the status quo by relying on the Security Council as the primary authorizing body.⁷³

Much of the criticism of the R2P Report mirrors that which underlies the preexisting debate about humanitarian intervention.⁷⁴ Some argue that a simple change in language from “humanitarian intervention” to the “responsibility to protect” does not circumvent the necessity of resolving the debates that have always existed regarding intervention.⁷⁵

There are also significant fears that R2P principles are simply a “cover for legitimating the neo-colonialist tendencies of major powers.”⁷⁶ Some scholars maintain that “such proposals have no impact on the *realpolitik* driving actual decision making.”⁷⁷ In particular, a fundamental problem is that no matter what criteria are established for a justifiable intervention, the decisive factors will always be “authority, political will, and operational capacity . . .”⁷⁸ Nonetheless, within just five years after its publication, the R2P Report gained enough significance that its framing of the issues and its language infiltrated discussions of humanitarian crises to such an extent that both the General

⁷⁰ Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine—But What of Implementation?*, 19 HARV. HUM. RTS. J. 289, 291 (2006).

⁷¹ *Id.* at 292 (citing David M. Malone, *Recent Books on International Law*, 97 AM. J. INT’L 999, 1001 (2003) and Joelle Tanguy, *Redefining Sovereignty and Intervention*, ETHICS & INT’L AFF., Spring 2003, at 141–42).

⁷² See, e.g., Mary Ellen O’Connell, *Taking Opinio Juris Seriously, A Classical Approach to International Law on the Use of Force*, in CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE 9, 28–29 (Enzo Cannizzaro & Paolo Palchetti eds., 2005).

⁷³ See, e.g., Jeremy I. Levitt, *The Responsibility to Protect: A Beaver Without a Dam?*, 25 MICH. J. INT’L L. 153, 176 (2003) (reviewing the ICISS Report).

⁷⁴ See Welsh et al., *supra* note 17, at 500.

⁷⁵ See *id.*

⁷⁶ Hamilton, *supra* note 70, at 292 (citing Mohammed Ayooob, *Third World Perspectives on Humanitarian Intervention and International Administration*, 10 GLOBAL GOVERNANCE 99, 115 (2004)).

⁷⁷ *Id.* at 291.

⁷⁸ See MacFarlane et al., *supra* note 6, at 980.

Assembly and Security Council have affirmed the international responsibility to protect.⁷⁹

U.N. adoption was met with criticism because of aspects of the R2P framework it failed to include.⁸⁰ For example, the two paragraphs of the Outcome Document make no mention of a Security Council “constructive abstention.”⁸¹ Additionally, it does not refer explicitly to a responsibility to use military force; it merely expresses that the international community is *prepared* to use military force when appropriate.⁸²

B. *The Legal Status of R2P*

At the time of the publication of the R2P Report, experts on the Commission were clear: the international obligations of R2P are *not* part of what is considered “binding” international law.⁸³ Rather, R2P was described specifically as “the emerging guiding principle . . . grounded in a miscellany of legal foundations (human rights treaty provisions, the Genocide Convention, Geneva Conventions, International Criminal Court statute and the like), growing state practice—and the Security Council’s own practice.”⁸⁴ The Commission noted, however, that if the Security Council continues to give further credence to R2P and its doctrinal basis, that “it may eventually be that a new rule of customary international law to this effect comes to be recognized”⁸⁵

Since publication of the R2P Report, the General Assembly and Security Council resolutions described above have undoubtedly enhanced the force of R2P, moving the principle further along the continuum toward binding law.⁸⁶ Security Council resolutions sometimes have the force of binding international law, so one could argue that the Council’s formal adoption has crystallized a new norm of binding in-

⁷⁹ See Outcome Document, *supra* note 1, ¶¶ 138–139; S.C. Res. 1674, *supra* note 5, ¶ 4; Hamilton, *supra* note 70, at 293.

⁸⁰ See Wheeler, *supra* note 40, at 96, 102.

⁸¹ See Outcome Document, *supra* note 1, ¶¶ 138–139; see also *ICISS Report*, *supra* note 3, at 51 (proposing a “constructive abstention”); Wheeler, *supra* note 40, at 96 (criticizing the Outcome Document for not discussing what should occur if the Security Council was unable or unwilling to act).

⁸² See Outcome Document, *supra* note 1, ¶ 139.

⁸³ See *ICISS Report*, *supra* note 3, at 15, 50.

⁸⁴ *Id.* at 50.

⁸⁵ *Id.*

⁸⁶ See Outcome Document, *supra* note 1, ¶¶ 138–139; S.C. Res. 1674, *supra* note 5, ¶ 4; *ICISS Report*, *supra* note 3, at 50.

ternational law.⁸⁷ Such a view, however, is uncorroborated when considered in light of the clear language of the authors of the R2P Report: “we have already acknowledged it would be quite premature to make any claim about the existence now of such a rule.”⁸⁸ Implicitly, further codification or implementation of R2P would be necessary before the principle crystallizes into “binding” international law.⁸⁹

III. ANALYSIS

Two key questions must be addressed to discern whether international reactions to the Darfur crisis foretell crystallization of R2P.⁹⁰ First, to what extent have international reactions to the crisis demonstrated implementation of R2P?⁹¹ Second, and more specifically, was the Security Council’s attempt to secure the Sudanese government’s consent before deploying international troops consistent with the R2P framework?⁹²

A. Security Council Implementation of R2P

As described above, the international community has been actively involved in Darfur.⁹³ In this context, there are several indications that the Security Council is implementing the R2P framework.⁹⁴ For example, the same day the Security Council reaffirmed R2P, it passed Resolution 1672, placing sanctions on individual Sudanese officials responsible for crimes against humanity in Darfur.⁹⁵ Sanctions on individuals are one of the reactive measures included within R2P short of military force.⁹⁶

⁸⁷ See U.N. Charter art. 25.

⁸⁸ See *ICISS Report*, *supra* note 3, at 50.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See generally Darfur and the Peacebuilding, *supra* note 52 (discussing U.N. involvement in Darfur).

⁹² See William G. O’Neill, Op-Ed., *The Responsibility to Protect Darfur: The UN Should Send a Peacekeeping Force to Darfur—Even Without Sudan’s Consent*, CHRISTIAN SCI. MONITOR, Sept. 28, 2006, at 9.

⁹³ See generally Darfur and the Peacebuilding, *supra* note 52 (discussing U.N. involvement in Darfur).

⁹⁴ See S.C. Res. 1706, *supra* note 69; S.C. Res. 1679, *supra* note 68; S.C. Res. 1672, U.N. Doc. S/RES/1672 (Apr. 25, 2006).

⁹⁵ S.C. Res. 1672, *supra* note 94, ¶ 1 (implementing sanctions specified by S.C. Res. 1591, ¶ 3, U.N. Doc. S/RES/1591 (Mar. 29, 2005) (against additional Sudanese officials)).

⁹⁶ See *ICISS Report*, *supra* note 3, at 30–31.

Prior to the adoption of R2P, the U.N. had been in Darfur for several years without the Security Council calling for an international military force to intervene, but almost immediately after affirming R2P in Resolution 1674, it called for such a force.⁹⁷ On May 16, 2006, less than a month after Resolution 1674, the Security Council passed Resolution 1679 calling for the transition of military operations in Darfur from AMIS to UNMIS and for an assessment team to visit the region to prepare for this transition.⁹⁸

The preamble of Resolution 1679 explicitly *recalls* Resolution 1674 on the protection of civilians in armed conflict.⁹⁹ Thus, this is the first example of the Security Council invoking its responsibility to protect civilians from crimes against humanity while simultaneously acting in accordance with that responsibility.¹⁰⁰ Such consistency was repeated on August 31, 2006, when the Security Council passed Resolution 1706, further specifying the nature of the U.N. force which will replace AMIS.¹⁰¹ Resolution 1706 *recalls* Resolution 1674 on the protection of civilians in armed conflict with the exact same language employed in Resolution 1679, therefore constituting a second example of the Security Council directly invoking R2P while calling for actions within the principle's framework.¹⁰²

While gradually increasing pressure on Sudan to accept a U.N. deployment, the Security Council reaffirmed R2P in a resolution on April 30, 2007 that extended the mandate of UNMIS.¹⁰³ As soon as Sudan succumbed to international will and consented to a hybrid force, the Security Council invoked R2P on July 31, 2007 in the resolution authorizing that force.¹⁰⁴ Resolution 1769 signifies an even greater endorsement of R2P than the previous three resolutions by further *emphasizing* the need to focus on finalizing "preparations for reconstruction and development."¹⁰⁵ This illustrates the Security Council's endorsement of its responsibility to protect civilians, while

⁹⁷ See S.C. Res. 1679, *supra* note 68, ¶ 3. See generally U.N. Mission in Sudan, <http://www.unmis.org/english/en-main.htm> (last visited Jan. 25, 2008) (describing U.N. involvement in Darfur since the beginning of the conflict).

⁹⁸ See S.C. Res. 1679, *supra* note 68, ¶ 3.

⁹⁹ See *id.* pmb. l.

¹⁰⁰ *Id.*, pmb. l., ¶ 3.

¹⁰¹ See S.C. Res. 1706, *supra* note 69, ¶ 3.

¹⁰² See *id.*, pmb. l., ¶¶ 1–6.

¹⁰³ S.C. Res. 1755, pmb. l., ¶ 1, U.N. Doc. S/RES/1755 (Apr. 30, 2007).

¹⁰⁴ See S.C. Res. 1769, *supra* note 69, pmb. l., ¶ 3.

¹⁰⁵ See *id.*, pmb. l., ¶ 20.

calling for measures that coincide with multiple principles in the R2P framework: to *react* and, then, *rebuild*.¹⁰⁶

Despite much preparation, a robust international force has not yet been sent to Darfur, while violence continues to escalate.¹⁰⁷ Critics emphasize that the crisis is a textbook case of a government being unwilling or unable to fulfill its responsibility and that the international community's failure to end the genocide signifies this R2P test case's failure.¹⁰⁸ Such an assertion, however, overlooks the complex framework of R2P.¹⁰⁹ Though the Security Council has yet to end the crisis in Darfur, its resolutions discussed above demonstrate support of the R2P framework.¹¹⁰ While it is perhaps too early to call these resolutions a trend, the references to R2P suggest that the Security Council may be taking its responsibility to protect seriously and will continue to act accordingly.¹¹¹ Proponents of R2P, even those who regret that the Security Council has not taken a more aggressive stance, should be reassured that R2P is showing—in the case of Darfur—such immediate signs of implementation.¹¹²

B. *The Issue of Consent*

Advocates of U.N. intervention in Darfur have criticized the Security Council for leaving deployment dependent on the consent of the government of Sudan.¹¹³ Requiring consent before deployment may represent a half-hearted adoption of R2P, making the test case of Darfur indicative of a less than favorable future for the principle's legal status.¹¹⁴

Contrarily, there is nothing inherently adverse to the R2P framework about seeking government consent prior to sending an inter-

¹⁰⁶ See *id.*; *ICISS Report*, *supra* note 3, at xi, 29–45.

¹⁰⁷ See Apiku, *supra* note 69.

¹⁰⁸ See Symposium, *The Collective International Responsibility to Protect: The Case of Darfur*, 4 *Nw. U. J. INT'L HUM. RTS.* 118, 120 (2005).

¹⁰⁹ See *ICISS Report*, *supra* note 3, at 29–37 (discussing wide range of reactive measures and precautionary criteria).

¹¹⁰ See S.C. Res. 1706, *supra* note 69, pmbl., ¶¶ 1–6; S.C. Res. 1679, *supra* note 68, pmbl., ¶ 3; *ICISS Report*, *supra* note 3.

¹¹¹ See S.C. Res. 1706, *supra* note 69, pmbl., ¶¶ 1–6; S.C. Res. 1679, *supra* note 68, pmbl., ¶ 3; *ICISS Report*, *supra* note 3.

¹¹² See S.C. Res. 1706, *supra* note 69, pmbl., ¶¶ 1–6; S.C. Res. 1679, *supra* note 68, pmbl., ¶ 3; *ICISS Report*, *supra* note 3.

¹¹³ See Elvir Camdzic & John Weiss, Op-Ed., *Darfur: Where Is the Will?*, *S.F. CHRON.*, Sept. 20, 2006, at B-9.

¹¹⁴ See *id.*

ventionist force.¹¹⁵ In fact, much of the R2P framework suggests that the international community should, as much as possible, *work with* the governments of states in which crimes against humanity are taking place (or are about to occur), in an effort to stop the violence.¹¹⁶ This aspect of R2P shows that the State has the primary responsibility to protect and is in the best position to fulfill that responsibility.¹¹⁷ Implicitly, the U.N. will be most successful in fulfilling its responsibility to protect when it has secured cooperation of the state's government.¹¹⁸

Viewing the current political, military, and diplomatic situation involving Darfur in light of the R2P framework, government consent before deployment is arguably more in line with R2P than immediate intervention.¹¹⁹ The conflict in Darfur is complicated, involving fighting amongst numerous armed groups, several of whom are perpetrating crimes against humanity.¹²⁰ The situation is such that a U.N.-backed force would probably be necessary to stop the violence, even if the government honored the ceasefire.¹²¹ Securing the Sudanese government's consent before deploying an international force in Darfur avoids the potentially catastrophic prospect of blue helmets engaged in combat with the Sudanese Armed Forces.¹²² Accordingly, securing the consent of the government will allow the peacekeeping force to carry out its mandate more effectively.¹²³ Finally, seeking consent before deployment is consistent with the "reasonable prospects" and "proportional means" criteria for R2P interventions, since an intervention in Darfur is more likely to be successful and of a lower intensity if the Sudanese Army is not obstructing the U.N. force.¹²⁴

Providing a modest glimmer of hope for the people of Darfur (and certainly some relief to diplomats and humanitarians), the government of Sudan recently consented to the hybrid deployment au-

¹¹⁵ See *ICISS Report*, *supra* note 3.

¹¹⁶ See Outcome Document, *supra* note 1, ¶¶ 138–139; *ICISS Report*, *supra* note 3, at 17, 27, 29, 31, 37.

¹¹⁷ See *ICISS Report*, *supra* note 3, at 17.

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 17, 37.

¹²⁰ Human Rights First—About the Crisis, *supra* note 53.

¹²¹ See *id.* (stating that Janjaweed militia, and not only Sudanese government, are perpetrating crimes against humanity in Darfur).

¹²² See *Sudan Security Chief Rejects UN Force, Calls for Martyrdom*, SUDAN TRIB., June 30, 2006, available at http://www.sudantribune.com/article.php3?id_article=16445 (warning that Sudanese officials would prefer martyrdom to international troops in Darfur).

¹²³ See *id.*

¹²⁴ See *ICISS Report*, *supra* note 3, at 37.

thorized by the Security Council.¹²⁵ This, however, raises the crucial question of whether the Security Council would be willing to authorize the use of force if the government of Sudan retracts and withholds its consent.¹²⁶ This currently cannot be predicted with any certainty.¹²⁷

CONCLUSION

Future implementation of the Responsibility to Protect will not save the hundreds of thousands already killed in Darfur; for them, the international community has already failed. It is now crucial that this does not lead to the collapse of R2P.

The fact that the international community has not yet stopped the violence against civilians in Darfur is evidence that *realpolitik* considerations, lack of political will, and limited military capacity may continue to be the most substantial obstacles facing further implementation and enhancement of R2P. Nonetheless, Security Council resolutions show that the U.N. is implementing R2P to a certain extent. By calling for an international military force to end the violence in Darfur in resolutions that explicitly invoke R2P, the Security Council is adding further credence to the principle's legal weight. If a trend develops, either in the case of Darfur or generally, then a new rule of "binding" international law to this effect may eventually come to fruition. Because the spirit and letter of R2P require that the U.N. work with state governments toward its implementation, seeking Sudan's consent does not represent a shirking of the U.N.'s responsibility to protect. With consent given, the biggest test will be whether UNAMID becomes operational and fulfills its mandate.

The international reaction to Darfur may be too little too late, justifying much of the abundant criticism. Nonetheless, this should not blind scholars to the slow but discernable emergence of an international endorsement of a responsibility to protect populations from the world's worst crimes.

¹²⁵ See Apiku, *supra* note 69.

¹²⁶ See O'Neill, *supra* note 92, at 9.

¹²⁷ See, e.g., *id.* (advocating that the Security Council send international troops to Darfur even without the Sudanese government's consent, implying that the likelihood is uncertain).