JUS COGENS, THE VETO AND THE RESPONSIBILITY TO PROTECT: A NEW PERSPECTIVE

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I. Introduction

The Responsibility to Protect ("R2P") doctrine has been hailed as a new approach to the problem of humanitarian crises since its inception in 2001. Its shifting of the humanitarian intervention debate from the *right* of the community of States to intervene in the face of a State's unwillingness or inability to take action to save its own people, to the *responsibility* of the community of States to do so, is commendable. Notwithstanding its promising beginnings however, R2P continues to be toothless because its efficacy as a viable answer to humanitarian crises has been hamstrung by the caveat of Security Council ("SC") authorisation of force and the veto powers of the permanent five. This article traces the decline of the R2P doctrine and argues that there is a need to recapture the impetus of its inception, where a move away from the strict parameters of the SC paradigm was envisaged in the face of SC paralysis, and to build on the potential of that idea by reformulating the debate through the lens of a *jus cogens*/R2P approach.

At the outset it is acknowledged that the status of R2P is a grey area in international law.[1] While this article will refer to R2P as a doctrine, the intention is not so much to argue that this is the case, but to envisage what the legal landscape might look like if it *were* unequivocally accepted as an international doctrine. Similarly, it may be going too far to affirm that, as a matter of law, there is currently a clear legal R2P obligation to react where there is genocide. This article recognises that, but seeks to explore how such an obligation would work if it did indeed exist and a *jus cogens*/R2P approach is adopted.

It is also acknowledged that any practical implementation of R2P and the *jus cogens*/R2P approach may well be hampered by the *realpolitik* of international relations. To aver that such perspectives do not merit consideration because they will never be in line with political realities would be short sighted however, and it is argued that there is room within the

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1 There is a rich body of scholarship debating the status of R2P at international law. See for example, C Stahn "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm" (2007) 101 Am J Int'l L 99; T Chataway "Towards Normative Consensus on Responsibility to Protect" (2007) 16 Griffith L Rev 193; M Mathews "Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur" (2008) 31 B C Int'l L & C L Rev 137.

discipline of international law for a viable middle ground between realism and idealism.[2] The seeming immutability of political realities should not preclude attempts to reconceptualise what is now the status quo.

With these points in mind, this article will follow a tripartite structure. In part I, the background to the inception of the R2P doctrine will be discussed to provide the reader with the international context that gave rise to R2P as a normative construct. The history of the R2P doctrine will then be traced via the key documents that contributed to its creation to showcase the potential of R2P at its outset and the regression to orthodoxy in its subsequent development in respect of the problematic issues of the potential use of unauthorised force, the restriction of the veto, and guidelines for R2P military intervention.

Part II of this article will argue that there is a need to salvage the R2P doctrine in light of the problematic issues that have dogged its subsequent development. The case of Darfur will be discussed as an example of the practical failure of the doctrine in application. The international discourse on the operational problems that R2P faces as well as any proposed solutions will then be analysed to show a surprising lacuna in the literature in this area, a dearth of proposals for reform, and a tendency to accept legitimacy without legality where unauthorised intervention is undertaken for bona fide humanitarian reasons.

Part III will propose a reframing of the R2P debate to assist in bridging the gap between the theory of R2P and its practice. Where *jus cogens* norms are in issue in a R2P case it is argued that the matter should no longer be considered purely as one of international peace and security under the SC's sole jurisdiction, but one where the use of veto by the permanent five to prevent intervention would be unlawful as a breach of *jus cogens*. In particular, this article argues that genocide is a clear example of an act which is prohibited by *jus cogens* and which invokes R2P, and that the permanent five must abide by a restriction of their power of veto under Article 27(3) of the Charter where genocide is occurring or where there is a prima facie case for suspecting its occurrence. The mechanics of taking this approach will be discussed, as well as the theoretical justifications for its adoption. It will be argued that the *jus cogens*/R2P approach provides both legitimacy and legality to situations where the international community acts in accordance with its R2P obligations where the SC paradigm has failed.

Finally, the article will conclude with a roadmap for R2P's future in so far as the *jus cogens*/R2P approach is concerned. Potential problems will be identified so they can be addressed such that this new perspective on R2P can provide answers to SC inaction or SC capriciousness and transform R2P from rhetoric into reality.

2 See generally, M Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (Re-issued, Cambridge University Press, Cambridge, 2005); M Koskenniemi "What is International Law For?" in Malcolm Evans (ed) *International Law* (Oxford University Press, Oxford, 2006) 57; G Simpson "On the Magic Mountain: Teaching Public International Law" (1999) 10 EJIL 70.

II. The Rise and Fall of the Responsibility to Protect

This section charts the history of the R2P doctrine through the key documents that created it,[3] from the groundbreaking 2001 ICISS report *The Responsibility to Protect* to the Secretary-General's 2009 report *Implementing the Responsibility to Protect*. As an analysis of these documents shows, the potential of the doctrine at its genesis was swiftly extinguished such that the force of the R2P doctrine unconfined by the SC paradigm never fully emerged. Given the highly political nature of the SC, it is hardly surprising that the power of veto remains an obstacle to R2P's efficacy.[4]

A. Background to the Inception of R2P

The post-1945 world order as established by the United Nations ("UN") Charter firmly upheld Westphalian notions of State sovereignty and the principle of non-intervention.[5] It prohibited the use of force except in self defence[6] or where authorised by the SC.[7] The twentieth century saw at least 170 million deaths as a result of internal state conflicts however[8] and increasing resort to humanitarian intervention in the face of SC inaction.

Cold War politics had a significant impact on the veto, and that era was marked by the SC's tepid or complete lack of response to several humanitarian crises and the resort to unilateral intervention by States to end such situations. Examples include the Pakistani government's brutal repression of the Bengali people and India's military intervention to secure Bangladesh's independence in 1971;[9] the killing fields of Cambodia and Vietnam's overthrow of Pol Pot in 1978;[10] and Tanzania's intervention in Uganda to overthrow Idi Amin's regime in 1979.[11]

3 As will be noted subsequently, these key documents are not cited as sources of international law as such, but because they provide useful tools for analysis in terms of the progressive development of R2P. They are significant because they undoubtedly added to the body of material contributing to R2P's conceptualisation.

4 Scholarship has identified a vast array of problematic areas for R2P's implementation ranging from the conceptual (eg ambiguities with regards to its scope) to the practical (eg lack of political will to intervene; the problem of indiscriminate use of the doctrine). See N Wheeler and F Egerton "The Responsibility to Protect: 'Precious Commitment' or a Promise Unfulfilled?" (2009) 1 GR2P 114 for a general overview. Again, such matters are beyond the scope of this article, which will concentrate solely on the problem of authorisation of force in the face of the veto and/or SC paralysis.

5 Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945), art 2(7) [Charter].

6 Ibid, art 51.

7 Ibid, arts 39-51.

8 C Joyner "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" (2006-2007) 47 Va J Int'l L 693 at 694.

9 N Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, New York, 2000) at 55-77.

10 Ibid, at 78-110.

11 Ibid, at 111-136.

Matters did not improve upon the conclusion of the Cold War, and by the 1990s, the UN's failure to intervene in the face of humanitarian crises caused by intrastate conflict had pushed the issue of whether the international community should do so to the forefront of global debate. The practical failure of the UN system was evidenced by the debacle of the US led international intervention in Somalia in 1993,[12] and then by the Rwandan genocide of 1994, which left 800,000 Tutsis and moderate Hutus dead in just 100 days.[13] The SC not only failed to intervene promptly in Rwanda but adopted a resolution to reduce the number of UN peacekeepers then on the ground from 2,500 to 270[14] despite calls from the commander of the UN peacekeeping force to extend the mandate to include the protection of civilians and to double troop numbers.[15] Although the SC eventually extended the mandate and increased troop numbers to 5,500[16] this did little to change the realities of the situation on the ground and it was not until October 1994 that authorised levels were reached.[17] Unsurprisingly, the Secretary-General commissioned Independent Inquiry into the matter concluded that the UN had "failed the people of Rwanda during the genocide in 1994".[18]

Following hard on the heels of the Rwandan genocide was the fall of Srebrenica in July 1995. In that debacle 7,500 Muslim boys and men were summarily executed by Bosnian Serbs in what was supposed to be a UN protected "safe area".[19] Once again, the inevitable conclusion was that the UN had "failed to do [its] part to help save the people of Srebrenica".[20]

If the UN's lack of intervention was viewed as being problematic, military action undertaken outside the UN system for humanitarian purposes raised equal if not greater international furore. When the North Atlantic Treaty Organisation ("NATO") undertook air strikes against the Former Republic of Yugoslavia to halt the ethnic cleansing of Kosovar Albanians without SC authorisation in 1999 in the face of threatened vetos from Russia and China,

12 See S Murphy "Nation-Building: A Look at Somalia" (1995) 3 Tul J Int'l & Comp L 19 at 24-33 and T Weiss *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect* (2nd ed, Rowman & Littlefield Publishers Inc, Lanham (MD), 2005) at 55-70.

13 A Bellamy *Responsibility to Protect: the Global Effort to End Mass Atrocities* (Polity Press, Cambridge, 2009) at 1. See generally, *Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda*, UN Doc S/1999/1257 (1999) [Rwanda Report].

14 SC Res 912, UN SCOR, 3368th mtg, UN Doc S/RES/912 (1994).

15 Weiss, above note 12, at 102; See also Roméo Dallaire's book *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Carroll & Graf, New York, 2003) where he argues that with 5000 troops and jamming of hate radio stations genocide could have been averted.

16 SC Res 918, S/RES/918 (1994).

17 Weiss, above n 12, at 102.

18 Rwanda Report, above n 13, at sect. III.19.

19 Bellamy, above n 13, at 1. See also *Report of the Secretary-General pursuant to General Assembly resolution 53/35: The Fall of Srebrenica* A/54/549 (1999) [Srebrenica Report].

20 Srebrenica Report, above n 19, at [503].

the legality of NATO's actions was hotly contested.[21] The Independent International Commission on Kosovo concluded that they were "legitimate, but not legal".[22]

Against the backdrop of growing concern over the practical implications of the tension between the right to intervene and the principle of non-intervention, former Secretary-General Kofi Annan issued a series of poignant challenges to the international community. In April 1999, he unequivocally stated that "[n]o government has the right to hide behind national sovereignty in order to violate the human rights and fundamental freedoms of its peoples"[23] and pleaded with the General Assembly in September 1999 to "find common ground in upholding the principles of the Charter, and acting in defence of our common humanity".[24] He repeated his challenge to the General Assembly in his millennial address:[25]

> … if humanitarian intervention is, indeed, an unacceptable assault on sovereignty how should we respond to Rwanda, to Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?

B. The Birth of R2P – The 2001 ICISS Report

In response to the Secretary-General's challenge, the Canadian government established the International Commission on Intervention and State Sovereignty ("ICISS") in September 2000 to wrestle with the legal, moral, operational, and political aspects of the humanitarian intervention debate.[26] The ICISS published their groundbreaking report *The Responsibility to Protect* in September 2001.[27] Drawing on the concept of sovereignty as

21 See, for example, B Simma "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 EJIL 1; A Cassese "*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 EJIL 23; A Cassese "A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*" (1999) 10 EJIL 791; K Tetzlaff "Humanitarian Intervention Post Kosovo: Does a Right to Humanitarian Intervention Exist in Customary International Law after Kosovo? If not, is there a Trend Towards the Creation of a Right to Humanitarian Intervention in Customary International Law?" NZ Postgraduate Law e-Journal, iss 4, 1. The Former Republic of Yugoslavia also brought proceedings against the NATO members in the ICJ. See *Legality of the Use of Force (Provisional Measures)* [1999] ICJ Rep.

22 Independent International Commission on Kosovo *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, Oxford, 2000) at 289.

23 Secretary-General Kofi Annan, "Standing up for Human Rights" (speech to the UN Commission on Human Rights, 7 April 1999).

24 Secretary-General Kofi Annan, "Two Concepts of Sovereignty" (1999) *The Economist* <http://www.un.org/News/ossg/sg/stories/articleFull.asp?TID=33&Type=Article>.

25 Secretary-General Kofi Annan *We the Peoples: The Role of the United Nations in the 21st Century* (United Nations Department of Public Information, New York, 2000) at 48.

26 International Commission on Intervention and State Sovereignty *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa, 2001) [ICISS Report] at vii.

27 Although the ICISS report is merely a state sponsored NGO outcome, and as such is not a source of international law per se, it is a useful tool of analysis and its significance lies in its being the first articulation of R2P and a framework for its application.

responsibility as expounded by Francis Deng,[28] the ICISS shifted the terms of the debate from the divisive *right* of the community of States to intervene to the *responsibility* of the community of States to do so.[29] Importantly, the R2P doctrine posits that "the responsibility to protect resides first and foremost with the state whose people are directly affected"[30] and "that it is only if the state is unable or unwilling to fulfil this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place".[31]

There are three elements to R2P as conceptualised by the ICISS: the responsibility to prevent;[32] the responsibility to react;[33] and the responsibility to rebuild.[34] Military intervention to uphold R2P is only to be resorted to in extreme cases,[35] and six criteria for such intervention are identified: just cause,[36] right intention,[37] last resort,[38] proportional means,[39] reasonable prospects,[40] and right authority.[41] Notably, these criteria are deemed to apply to "both the Security Council and [UN] member states".[42]

To warrant military intervention the "just cause" threshold must be met; that is, "there must be serious and irreparable harm occurring to human beings, or imminently likely to occur".[43] Where there is either actual or apprehended large scale loss of life or ethnic cleansing or both, the ICISS deems the "just cause" threshold to be satisfied.[44] In terms of the other precautionary criteria, "right intention" stipulates that "the primary purpose of the intervention must be to halt or avert human suffering"[45] whilst "last resort" requires that "[e]very diplomatic and non-military avenue for prevention or peaceful resolution ... must have been explored."[46] "Proportional means" stipulates that the "scale, duration, and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question"[47] and "reasonable prospects" means that intervention must stand "a reasonable

28 See for example, F Deng "Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action" in J Harbeson and D Rothschild (eds) *Africa in World Politics: Post-Cold War Challenges* (Westview Press, Boulder, 1995) at 295.
29 ICISS Report, above n 26, at [2.28]-[2.33].
30 Ibid, at [2.30].
31 Ibid, at [2.29].
32 Ibid, at 19-27.
33 Ibid, at 29-37.
34 Ibid, at 39-45.
35 Ibid, at [4.10]-[4.14].
36 Ibid, at [4.18]-[4.31].
37 Ibid, at [4.33]-[4.36].
38 Ibid, at [4.37]-[4.38].
39 Ibid, at [4.39]-[4.40].
40 Ibid, at [4.41]-[4.42].
41 Ibid, at chapter 6.
42 Ibid, at [4.32].
43 Ibid, at [4.18].
44 Ibid, at [4.19].
45 Ibid, at [4.33].
46 Ibid, at [4.37].
47 Ibid, at [4.39].

chance of ... halting or averting the atrocities or suffering that triggered the intervention", and must not be embarked upon where "actual protection cannot be achieved".[48] Where "the consequences of embarking upon intervention are likely to be worse than if there is no action at all" or where intervention would trigger a larger conflict, military intervention is not justified.[49]

The ICISS emphasised the importance of intervention being carried out by the "right authority". Although the inadequacies of the SC are acknowledged,[50] the ICISS affirms that "there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes", and that "[t]he task is not to find alternatives to the Security Council as a source of authority, but to make it work better than it has."[51] That said, the ICISS advocates that there should be a "code of conduct" imposed on the use of the veto with respect to R2P matters whereby "a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution".[52]

The ICISS also does not discount the possibility of alternative means of discharging the R2P obligation where the SC either expressly rejects a proposal to intervene or fails to deal with such a proposal. In such circumstances it is envisaged that support for military intervention can be sought from the General Assembly in an Emergency Special Session under the "Uniting for Peace" procedures. Although the General Assembly technically lacks the power to authorise military action, it is perceived that there will be a high degree of legitimacy attached to any such intervention if it is supported by an overwhelming majority of States.[53]

Another possibility identified by the ICISS is collective intervention by a regional or sub-regional organisation within its defining boundaries, though it is noted that such intervention is more controversial where it is undertaken against a State which is not a member of the organisation or when carried out outside of its area of membership.[54]

While the ICISS does not condone unauthorised unilateral action by ad hoc coalitions or individual States as a first port of call, it points out that a balancing assessment may need to be made as to whether such action is the lesser evil in the face of SC inaction in conscience-shocking situations:[55]

> It is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by.

48 Ibid, at [4.41].
49 Ibid.
50 For example, ibid, at [6.13]; [6.23].
51 Ibid, at [6.14]. See also [6.28].
52 Ibid, at [6.21].
53 Ibid, at [6.29]-[6.30].
54 Ibid, at [6.31]; [6.34].
55 Ibid, at [6.37].

In this regard the ICISS proffers two messages for the SC:[56]

> The first message is that if the Security Council fails to discharge its responsibilities in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations. ...
> The second message is that if, following the failure of the council to act, a military intervention is undertaken by an ad hoc coalition or individual state which does fully observe and respect all the criteria [the ICISS] have identified, and if that intervention is carried through successfully – and is seen by world public opinion to have been carried through successfully – then it may have enduringly serious consequences for the stature and credibility of the UN itself.

C. Tracing the Decline of the Responsibility to Protect

1. ICISS's 2001 Report: The Responsibility to Protect

As discussed in the previous section, the ICISS took a step in the right direction by acknowledging the possibility of military intervention outside the SC paradigm in *The Responsibility to Protect*. Though affirming the SC's primacy with regards to authorising the use of force, the ICISS was clearly willing to restrict the SC's powers by calling for the suspension of the veto in R2P situations where no vital interests are at stake, and to countenance other options in the face of SC inaction, such as General Assembly authorisation and action by regional and sub-regional organisations. The possible legitimacy of unilateral action is even hinted at where such action is the lesser of two evils and where the criteria for R2P intervention are met.

How far, exactly, does the ICISS report go? Admittedly there is some ambivalence in the ICISS report, which "avoided taking a final stance on the question of the legality/legitimacy of unauthorized intervention".[57] Carsten Stahn points, for example, to the unequivocal endorsement of SC authority in contrast to the omission to categorically exclude alternatives such as General Assembly and regional organisations from assuming ultimate responsibility, the ICISS's support for a balancing assessment as to where the greater harm lies in the face of SC inaction, and to the fact that the criteria of legitimacy stipulated were deemed to apply to all UN member states as well as to the SC.[58] He argues, however, that it is this avoidance of a final stance that has engendered broad support for the ICISS's report.[59]

Notwithstanding its equivocal nature, the ICISS report represents a significant shift in thinking and a move away from the orthodoxy of the SC as being the be all and end all on issues of international peace and security. Despite its positive beginnings however, the R2P doctrine once again became closely confined by the SC paradigm as it was further developed in subsequent reformulations.

56 Ibid, at [6.39]-[6.40].
57 Stahn, above n 1, at 104; See also Bellamy, above n 13, at 54.
58 Stahn, above n 1, at 104.
59 Ibid.

2. The High-Level Panel Report A More Secure World: Our Shared Responsibility December 2004

The next significant party to shape the R2P doctrine was the High-Level Panel on Threats, Challenges and Change ("the High-Level Panel"), which had been commissioned by the Secretary-General in November 2003 to examine challenges to international peace and security and to make recommendations on how the UN could address these more effectively. The High-Level Panel responded to these issues in its report *A More Secure World: Our Shared Responsibility*, which was released in December 2004.[60]

Further developing the doctrine, the High-Level Panel linked its vision of R2P with the collective security system, making it "part and parcel of the vocabulary of UN reform."[61] Although the High-Level Panel endorsed what it described as the "emerging norm that there is a responsibility to protect", it was quick to add that the ability to authorise military intervention as a last resort was only "exercisable by the Security Council".[62] Like the ICISS, the High-Level Panel stressed that "[t]he task is not to find alternatives to the Security Council as a source of authority but to make the council work better than it has."[63] To this end the High-Level Panel urged the permanent five "to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuse".[64] It also proposed the introduction of an indicative voting system whereby SC members could call for States to indicate their position on a proposed action publically prior to an actual binding vote.[65]

The High-Level Panel also set out a list of criteria for the legitimate use of military force mirroring those set out by the ICISS: seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences.[66] However, unlike the ICISS, which did not place restrictions on who could apply the criteria, the High-Level Panel specifically stipulated that the SC should be the body to do so.[67] If interpreted loosely, the High-Level Panel's comment that "it would be valuable if individual Member states,

60 High-Level Panel on Threats, Challenges and Changes *A More Secure World: Our Shared Responsibility* UN Doc A/59/565 (2004) [High-Level Panel Report]. Again, as with the ICISS report, the High-Level Panel Report is not a source of international law as such, being a report made to the Secretary-General by a committee commissioned by the Secretary-General. It does, however, provide a useful tool for analysis in terms of the progressive development of R2P and is significant because it undoubtedly added to the body of material contributing to its conceptualisation.

61 Stahn, above n 1, at 105.

62 High-Level Panel Report, above n 60, at [203].

63 Ibid, at [198].

64 Ibid, at [256]. Notably, the recommendations on the veto were not placed with the section on R2P but with what Bellamy has described as the High-Level Panel's "ill-fated package of proposed Security Council reform". See A Bellamy "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit" (2006) 20 Ethics and International Affairs 143 at 167.

65 High-Level Panel Report, above n 60, at [257].

66 Ibid, at [207].

67 Ibid, at [207].

whether or not they are members of the Security Council, subscribed to [the criteria]"[68] could be regarded as hinting at the option of broader application by States.[69] That appears unlikely however given that the High-Level Panel, unlike the ICISS, did not envisage that R2P intervention could potentially be authorised by the General Assembly under Uniting for Peace procedures or that it could be undertaken by regional and sub-regional organisations or individual States in the absence of SC authorisation.

3. Report of the Secretary-General: In Larger Freedom March 2005

The Secretary-General responded to the High-Level Panel's report and its affirmation of R2P by endorsing the doctrine in his own report *In Larger Freedom* in March 2005.[70] The main tenets of the doctrine – the primary responsibility of each individual State to protect its population, the responsibility of the international community to step into the breach where national authorities can not or will not, the SC's primacy as the arbiter of whether force is necessitated – were affirmed by the Secretary-General.[71] The criteria for the legitimate use of military force also remain unchanged: seriousness of threat, proper purpose, last resort, proportional means, and reasonable chance of success.[72] However, unlike the ICISS report and the Panel report, these criteria were directed exclusively at the SC in *In Larger Freedom*,[73] and the possibility of broader application of these criteria by non SC States was not even hinted at. Furthermore, no recommendations for the restriction of the veto or for its responsible use were put forward. The silence of the Secretary-General on alternative means of carrying out interventions for the purposes of humanitarian protection also "indicated a general reluctance to accept military action without the Security Council's authorisation".[74]

Commentators have argued that R2P underwent a significant mutation from its ICISS and Panel report origins in *In Larger Freedom* because the Secretary-General separated his endorsement of the R2P doctrine from the criteria governing the use of force,[75] situating the former in the section on the freedom to live in dignity and the latter in the section on the use of force by the SC.[76] The reasons for this amendment are not apparent, but

68 Ibid, at [209].
69 Stahn, above n 1, at 107.
70 Secretary-General Kofi Annan *In Larger Freedom: Towards Development, Security, and Human Rights for All* UN Doc A/59/2005 (2005) at [135] [*In Larger Freedom*]. Again, as with the ICISS report and the High-Level Panel Report, *In Larger Freedom* is not a source of international law as such, being the Secretary-General's pronouncements on, inter alia, R2P. It does, however, provide a useful tool for analysis in terms of the progressive development of R2P and is significant because it undoubtedly added to the body of material contributing to its conceptualisation.
71 Ibid, at [135]; [125]-[126].
72 Ibid, at [126].
73 Ibid.
74 Stahn, above n 1, at 108.
75 See for example E McClean "The Responsibility to Protect: The Role of International Human Rights Law" (2008) 13 J Conflict & Security L 123 at 132-133; Bellamy, above n 64, at 157.
76 *In Larger Freedom*, above n 70, at [133]-[135]; [122]-[126].

Carsten Stahn argues that it was done to "detach the idea of responsibility from an automatic equation to armed force".[77] Whatever the reasons, this apparently insignificant amendment was to have major ramifications as it led to further dilution of the R2P doctrine in respect of the guidelines for military intervention.[78] As Alex Bellamy notes, the separation of the concept and the criteria was retained at the drafting stages of the 2005 World Summit Outcome Document but commitment to the criteria was reduced to a commitment to continue discussing the criteria, and ultimately even this commitment was removed in the final version.[79] Emma McClean notes that "[i]t would appear that the initial separation of the responsibility to protect from the thorny issue of principles governing the use of force, and indeed from the equally intractable issue of SC reform by the SG enabled the commitment to the *principle* of the responsibility to protect in the Outcome Document."[80] However, she and other scholars have expressed reservations about the prospects of R2P in its diluted form sans guidelines for military intervention.[81]

4. General Assembly: The World Summit Outcome Document 2005, [138], [139]

In any event, *In Larger Freedom* paved the way for the unanimous recognition of R2P by the General Assembly under paragraphs 138 and 139 of the 2005 World Summit Outcome Document ("Summit Document").[82] These paragraphs read as follows:

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
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> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect

77 Stahn, above n 1, at 107; see also Bellamy, above n 13, at 76.

78 See McClean's discussion, above n 75, at 132-133.

79 Bellamy, above n 64, at 166. See also E Strauss *The Emperor's New Clothes? The United Nations and the Implementation of the Responsibility to Protect* (Nomos Verlagsgesellschaft, Germany, 2009) at 11-18 for a discussion of the drafting process of paragraphs 138 and 139 of World Summit Document.

80 McClean, above n 75, at 133.

81 Ibid; see also Bellamy, above n 64, at 146-169.

82 *2005 World Summit Outcome* GA Res 60/1, A/RES/60/1(2005) at [138], [139] [Summit Document].

> populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

As an analysis of the text of paragraphs 138 and 139 shows, the General Assembly were in fact affirming a version of R2P which differs substantially from that expressed and developed in earlier permutations.[83] Some central tenets of the doctrine remain unchanged, such as each individual State's primary responsibility to protect its own population,[84] but in other respects, the Summit Document reformulation was "the basic concept shorn of much of its substance".[85]

For example, the secondary responsibility of the international community is framed much more cautiously, and the responsibility to take collective action through the SC under Chapter VII operates under a "double qualifier".[86] First, the international community merely reaffirms that they "are prepared to take collective action"[87] and the language indicates a voluntary as opposed to a mandatory engagement.[88] Second, States pledge themselves to act only "on a case-by-case basis" through the SC,[89] which again contrasts with the assumption of a systematic duty.[90] As Stahn has noted:[91]

> this dual condition ... appears to reflect the view of those states that questioned the proposition that the Charter creates a legal obligation for Security Council members to support enforcement action in the case of mass atrocities.

The Summit Document also raised the threshold at which R2P was transferred from the host State to the international community while lowering the doctrine's prescriptive element.[92] Thus, instead of having R2P pass onto the international community where a host State is "unable or unwilling" to protect its people,[93] paragraph 139 provided that this responsibility only eventuated where the host State "manifestly fail[s]" to do so. The prescriptive nature of R2P as earlier envisaged (ie that R2P entailed obligations, particularly on the SC's part, to react where the R2P threshold was crossed)

83 Note that this view has been challenged by Gareth Evans who argued that "it does not vary from core R2P principles in any significant way". See G Evans T*he Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (The Brookings Institution, Washington DC, 2008) at 47.
84 Summit Document, above n 82, at [138].
85 Bellamy, above n 13, at 195. See also discussion in Bellamy, above n 64, at 165-169.
86 Phrase adopted from Stahn, above n 1, at 109.
87 Summit Document, above n 82, at [139].
88 Stahn, above n 1, at 109.
89 Summit Document, above n 82, at [139].
90 Stahn, above n1, at 109.
91 Ibid.
92 See discussion in Bellamy, above n 64, at 165-166.
93 As compared to the ICISS Report, above n 26, at xi; [2.29] and High-Level Panel Report, above n 60, at [135].

was diluted to a commitment to stand ready to act when necessary on a "case-by-case" basis in what Bellamy has described as "a deliberate attempt to water down the Security Council's responsibility to protect".[94]

Another conspicuous difference in the World Summit reformulation of R2P was that it no longer proposed any criteria to guide decisions for legitimate military intervention. This notable omission was to placate G-77 members and China and Russia in particular (who were strongly opposed to the having such criteria because they felt it to be too enabling of military intervention and too open to subjective interpretation) and the United States (who, conversely, felt that the criteria would prove to be too constraining on the use of force).[95] Although such a concession might have been necessary to ensure consensus on the inclusion of R2P in the Summit Document, it meant that the purpose of the criteria, that is, providing transparency to SC, and potentially, unauthorised military interventions, could not be realised.

Alongside the silence on criteria for force in the Summit Document was the removal of language calling on the permanent five to refrain from using the veto, which further weakened the potential efficacy of R2P.

The Summit Document also provided no guidelines on how to proceed in the event of SC paralysis. The implications of this omission are debatable. Stahn noted that the possibility of unauthorised military intervention is not excluded by the language of paragraph 139, which "leaves the door open to unilateral responses through its 'case-by-case' vision of collective security and a qualified commitment to act in cooperation with regional organizations ('as appropriate')".[96] Bellamy also notes that while not advancing the question of how to deal with unauthorised force, the Summit Document does not set it back either, and the specific mention of the SC standing ready to act "does not preclude the possibility of action outside the Council".[97] These interpretations appear problematic, however, given that paragraph 129 stipulates that collective R2P action is to be taken "through the Security Council, in accordance with the Charter", which implies that any military intervention must still be authorised by the SC as per the Charter's requirements. As in the Secretary-General's report, the silence on alternative legitimate means of carrying out military interventions sits more easily with an intent to exclude force outside the SC paradigm.

In light of the dilution of R2P in the Summit Document it is little wonder that Thomas Weiss, the research director of the ICISS, coined the term "R2P-lite" to describe the Summit Document reformulation.[98] Nonetheless, as Bellamy argues, the temptation to simply dismiss paragraphs 138 and 139

94 Bellamy, above n 13, at 96. See also Bellamy, above n 64, at 165-166.
95 Bellamy, above n 13, at 85; Bellamy, above n 64, at 165.
96 Stahn, above n 1, at 109.
97 Bellamy, above n 64, at 168.
98 T Weiss *Humanitarian Intervention* (Polity Press, Cambridge, 2007) at 117.

of the Summit Document should be resisted because they still represent the endorsement of R2P by the international community, and hence create a powerful mandate for reform.[99]

5. The Security Council and the Responsibility to Protect

(a) Security Council Resolution 1674

Following the endorsement of R2P at the World Summit, the next milestone for the doctrine was its recognition by the SC. This was by no means a straightforward process, and the first official SC endorsement of R2P in SC Resolution 1674 on 28 April 2006 was the result of six months of intensive debate.[100]

In the resulting resolution, the SC unanimously "reaffirm[ed] the provisions of paragraph 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[101] Thus there was no advance on the Summit Document reformulation, and the SC's endorsement of R2P is confined by the strict parameters of paragraphs 138 and 139. It also amounted to considerably less than what the ICISS wanted from the SC – that is, for the SC to pledge to deal promptly with requests for authority to intervene and for the permanent five to voluntarily relinquish their veto powers.[102] Regardless, SC Resolution 1674 was momentous in the sense that it was the first official recognition of the doctrine by the SC.

(b) Security Council Resolution 1706

The recognition of R2P in the abstract was followed by the SC's application of the doctrine to a specific context for the first time on 31 August 2006. In SC Resolution 1706 the SC authorised the deployment of 17,300 UN peacekeeping troops to Darfur after recalling SC resolution 1674 and its reaffirmation of paragraphs 138 and 139 of the Summit Document.[103]

Again, no advance was made on the position of the Summit Document, though SC Resolution 1706 showed that the SC was willing to cite the doctrine as support for intervention in a practical context. It is notable, however, that subsequent SC resolutions such as SC Resolution 1769, which authorised the deployment of a 26,000 strong joint UN-AU force for Darfur, make no mention of R2P.[104]

99 Bellamy, above n 13, at 196-197.
100 SC Res 1674, UN Doc S/RES/1674 (2006). See Bellamy, ibid, at 133-139 for a discussion of the debates and lead up to SCR 1674.
101 SC Res 1674 at [4], UN doc S/RES/1674 (2006).
102 See ICISS Report, above n 26, at [6.15]; [6.21].
103 SC Res 1706, UN Doc S/RES/1706 (2006).
104 SC Res 1769, UN Doc S/RES/1769 (2007).

6. A Cautious Step Towards Turning back the Tide? The Secretary-General's Report on Implementing the Responsibility to Protect 12 January 2009

The latest and most comprehensive UN document on R2P to date is Secretary-General Ban Ki-Moon's report *Implementing the Responsibility to Protect*, which was released on 12 January 2009.[105] The Summit Document had stressed the need for the General Assembly to continue consideration of R2P,[106] and *Implementing the Responsibility to Protect* was designed to facilitate this. Significantly, the report revisited many of the recommendations put forward by the ICISS and the High-Level Panel, though it repeatedly stressed that the conceptualisation of R2P as expressed in the Summit Document was not open for reinterpretation or renegotiation.[107] It also emphasised that any R2P action must be Charter-compliant and that "the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter".[108]

In *Implementing the Responsibility to Protect*, the Secretary-General adopted a three pillar strategy for advancing R2P, namely, (1) the protection responsibilities of the State;[109] (2) international assistance and capacity building;[110] and (3) timely and decisive response.[111] The third pillar is of particular interest as it corresponds to the responsibility to react. In this section the Secretary-General notes that the wording of paragraph 139 suggests the need for "an early and flexible response"[112] in the face of R2P situations and that:[113]

> … [i]n a rapidly unfolding emergency situation, the United Nations, regional, subregional and national decision makers must remain focused on saving lives through "timely and decisive" action … not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results.

That said, the Secretary-General was careful not to endorse any departure from SC authorisation where use of force to uphold R2P is contemplated. The report envisages that collective enforcement measures can be:[114]

> … authorized by the Security Council under Articles 41 or 42 of the Charter, or by the General Assembly under the "Uniting for Peace" procedure ... or by regional or sub-regional arrangements under Article 53, with the prior authorization of the Security Council.

105 *Implementing the Responsibility to Protect: Report of the Secretary-General* UN Doc A/63/677 (2009) [*Implementing*]. Again, although *Implementing* is not a source of international law as such, being a report of the Secretary-General, it provides a useful tool for analysis in terms of the progressive development of R2P and is significant because it undoubtedly added to the body of material contributing to R2P's conceptualisation.
106 Summit Document, above n 82, at [139].
107 See for example, *Implementing*, above n 105, at [2]; [67].
108 Ibid, at [3].
109 Ibid, at 10-14.
110 Ibid, at 15-22.
111 Ibid, at 22-28.
112 Ibid, at [49].
113 Ibid, at [50].
114 Ibid, at [56].

but is quick to state that any General Assembly resolution would not be legally binding, whether in the context of diplomatic sanctions[115] or where the SC has failed to exercise its primary responsibility with regards to international peace and security.[116] Despite this caveat, the reference to other alternatives to the SC (ie the General Assembly and regional or sub-regional organisations) appears to indicate a return to the recommendation of the ICISS report as an option.

The Secretary-General also reintroduces the notion of restricting the veto in R2P situations — a recommendation which had been absent since former Secretary-General Kofi Annan's report *In Larger Freedom* and which had been deliberately left out of paragraphs 138 and 139 of the Summit Document:[117]

> Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect.

This was not the only throwback to early formulations of R2P. The Secretary-General also recommended a return to guidelines for the use of force:[118]

> The credibility, authority and hence effectiveness of the United Nations in advancing the principles relating to the responsibility to protect depend, in large part, on the consistency with which they are applied. This is particularly true when military force is used to enforce them. In that regard, Member States may want to consider the principles, rules and doctrine that should guide the application of coercive force in extreme situations relating to the responsibility to protect.

The fact that such guidelines had been addressed in the ICISS report and by former Secretary-General Kofi Annan's report *In Larger Freedom* is also mentioned, but without further comment.[119]

In many respects, *Implementing the Responsibility to Protect* is an admirable step towards turning the tide of earlier formulations of R2P. However, it is equivocal at best. Kenneth Anderson pointed out, for example, that when the Secretary-General explicitly states that "non-coercive and non-violent" measures can be undertaken under Chapters VI and VIII without SC authorisation,[120] "[t]he implication, which the rest of the report supports, is that coercive and violent measures do indeed require Security Council authority."[121] The references to the possibility of the General Assembly acting under the "Uniting for Peace" procedure where the SC fails to fulfil its responsibilities must therefore be interpreted in light of this.

115 Ibid, at [57].
116 Ibid, at [63].
117 Ibid, at [61].
118 Ibid, at [62].
119 Ibid.
120 Ibid, at [51].
121 K Anderson "R2P RIP? Let's Hope Not" (2009) *Opinio Juris* <http://opiniojuris.org/2009/07/27/r2p-rip-lets-hope-not/>.

Furthermore, while the report rekindles debate about both the need to restrict the permanent five's veto and the troubling absence of principles to guide the use of force, there is clearly an element of Orwellian double-speak in that the report also stresses that the Summit Outcome formulation is not open for reinterpretation or renegotiation. It is thus important to note that the international consensus on R2P remains that which was agreed to at the Summit Outcome and that the points made by the Secretary-General on these issues remain recommendatory in nature.

III. The Need to Salvage the Responsibility to Protect

A. The Responsibility to Protect – Rhetoric vs Reality

As the above analysis shows, R2P requires salvaging. Though it is a groundbreaking exercise in rhetoric, in its current form, its effectiveness is questionable when faced with the reality of SC inaction. Too many factors weigh against R2P for it to be viable: the power of the veto to constrain its mandate; the lack of legitimate alternatives for military intervention in the face of such paralysis; and the prickly and as yet unresolved issue of the guidelines for the use of force, whether it be within or outside the SC paradigm. The failure of R2P in application is demonstrated in the case of Darfur, where the veto-wielding powers of the permanent five have effectively blocked action that would have been in line with the international community's R2P obligations.[122]

1. Darfur

The humanitarian situation in Darfur has been referred to as the "test case" for the international community's commitment to R2P,[123] but the universal verdict is that the world has failed the test[124] in what the UN has described as one of the world's worst ongoing humanitarian crises.[125]

122 Note that Secretary-General Ban Ki-Moon has identified Darfur as an R2P failure. See *Implementing*, above n 105, at [55] and [60].

123 See for example, I Khan, K Roth and G Evans "International NGOs Call for Strong Force in Darfur: Joint Letter to the UN Security Council" (2006) Human Rights Watch <http://hrw.org/english/docs/2006/05/25/sudan13462.htm>, which refers to the Darfur situation as a "key test of the SC's commitment to the concept of 'responsibility to protect'".

124 See, for example, C Badescu and L Bergolm "The Responsibility to Protect and the Conflict in Darfur: The Big Let-Down" (2009) 40 Security Dialogue 287 [Badescu and Bergolm], though Badescu and Bergolm caution against the assertion that global commitment to R2P failed on the sole ground that international forces were not rapidly deployed to Darfur, pointing first to unresolved tensions with the R2P principle and secondly, to the complexities of the political conflict in Darfur (see 304-306); M Mathews "Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur" (2008) 31 B C Int'l L & Comp L Rev 137 at 152.

125 UN News Service "Sudan: Humanitarian Situation in Darfur One of the Worst in the World – UN Officials" (2004) UN News Centre <http://www.un.org/apps/news/story.asp?NewsID=10615&Cr=sudan&Cr1=>.

To provide some context, the humanitarian crisis in Darfur has been ongoing since February 2003 with the Sudanese government and its proxy militia waging a brutal campaign against the people of Darfur.[126] The conflict grew out of military opposition to the Sudanese government by two rebel groups, the Sudan Liberation Army ("SLA") and the Justice and Equality Movement ("JEM"), because of perceived political marginalisation, socio-economic neglect and racial discrimination against African Dafurians by the Arab-ruled Sudanese government.[127] In retaliation, the Sudanese armed forces and a government sponsored militia called the Janjaweed attacked the civilian population, systematically targeting communities that shared the same ethnicity as the rebel groups. A wide range of tactics have been employed, including aerial bombings, heavy shelling, destruction of villages and water supplies, arrests and extrajudicial executions, torture, abducting, forcibly displacing, and widespread sexual violence against women and children.[128]

While estimates of casualties are notoriously hard to gauge before the conclusion of a crisis, UN figures are that an estimated 300,000 people have been killed, with a further 2.7 million others displaced.[129] Unsurprisingly, many commentators, including the US Government, have concluded that the violence against Darfur's people amounts to genocide,[130] despite the UN's finding that genocide is not occurring due to a lack of the requisite genocidal intent.[131]

What has been the SC's response to the Darfur crisis so far?

126 For a succinct summary of the facts see Mathews, above n 124, at 144-145; N Udombana "Where Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan" (2005) 27 Hum Rts Q 1149 at 1153-1156.

127 See *Situation of Human Rights in the Darfur Region of the Sudan, Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights* at [5], UN Doc E/CN.4/2005/3 (2004).

128 Udombana, above n 126, at 1154; Mathews, above n 124, at 144.

129 "Some Grounds for Hope in Darfur Conflict, UN Peacekeeping Official Says" UN Daily News (New York, United States, 11 February 2010) at 4, <http://www.un.org/news/dh/pdf/english/2010/11022010.pdf>.

130 See, for example, J Trahan "Why the Killing in Darfur is Genocide" (2008) 31 Fordham Int law J 990; J Mathew "Darfur Debate: Whether the ICC should Determine that the Atrocities in Darfur constitute Genocide" (2006) 18 Fla J Int'l L 517. Contrast, however, the perspective of Alex de Waal, who expresses some well founded reservations for applying the term genocide to the Darfur context. See A de Waal "Reflections on the Difficulties of Defining Darfur's Crisis as Genocide" (2007) 20 Harv Hum Rts J 25.

131 *Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004* at [518]-[519], UN Doc S/2005/60 (2005). See Schabas' insightful analysis on the Commission's findings: W Schabas "Genocide, Crimes against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide" (2005-2006) 27 Cardozo L Rev 1703. On a related note, David Laban has assessed the Commission's finding to be correct in terms of the legal analysis of genocide, but posits that the word genocide should be redefined as its existing legal definition is not in line with moral reality. See D Luban "Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report" (2006-2007) 7 Chi J Int'l L 303.

A SC presidential statement was issued on 2 April 2004 expressing concern regarding the "massive humanitarian crisis" in Darfur, calling upon parties to protect civilians, allow humanitarian access, and to reach a ceasefire.[132] This was followed by a second presidential statement on 25 May expressing "deep concern at the continuing reports of large-scale violations of human rights" and calling on the Sudanese government to disarm the Janjaweed.[133] Though not dealing specifically with Darfur, SC Resolution 1547 nevertheless called "upon parties to use their influence to bring an immediate halt to the fighting in the Darfur region".[134] The first comprehensive resolution on Darfur followed on 30 July 2004. SC Resolution 1556 classified the Sudan situation as constituting "a threat to international peace and security in the region" and pointed to the Sudanese government's "primary responsibility to respect human rights while maintaining law and order and protecting its population".[135] Although it endorsed the deployment of international monitors, the provision for sanctions in the draft resolution was taken out due to the reluctance of seven members of the SC to endorse these.[136] The first SC resolution, SC Resolution 1591, to take any direct action against the perpetrators of human rights abuse was not passed until 29 March 2005, some two years after the violence commenced.[137]

Other significant SC Resolutions with regard to Darfur include SC Resolution 1590, which established the UN Missions in Sudan ("UNMIS") to oversee UN military, humanitarian, and diplomatic activity in Sudan,[138] though notably, none of its military personnel operates in Darfur.[139] On 16 May 2006, a SC Resolution calling for an extension of UNMIS to include a robust military force to take over peacekeeping operations from the under resourced African Union Mission in Sudan ("AMIS") was made.[140] The SC unanimously adopted SCR 1769 on 31 July 2007. This resolution authorised an AU/UN hybrid force ("UNAMID") under Chapter VII to implement the Darfur Peace Agreement of 5 May 2006,[141] but the force did not provide meaningful protection for Darfur's people because transition to UNAMID peacekeeping was made contingent on the consent of the Sudanese government.[142] As at July 2008, the UNAMID force only comprised some 9,400 troops, consisting mainly of ex-AMIS forces, due in large part[143] to

132 Udombana, above n 126, at 1181.
133 *Statement by the President of the Security Council*, UN Doc S/PRST/2004/18 (2004).
134 SC Res 1547, UN Doc S/RES/1547 (2004).
135 SC Res 1556, UN Doc S/RES/1556 (2004).
136 Udombana, above n 126, at 1183.
137 SC Res 1591, UN Doc S/RES/1591 (2005).
138 SC Res 1590, UN Doc S/RES/1590 (2005).
139 Mathews, above n 124, at 145.
140 SC Res 1679, at [3], UN Doc S/RES/1679 (2006).
141 SC Res 1769, UN Doc S/RES/1769 (2007).
142 See ibid, preamble; [1] and [2]; SC Res 1706, at [1], UN Doc S/RES/1706 (2006).
143 Badescu and Bergolm, above n 124, at 300-301.

the obstructionary tactics of the government in Sudan.[144] Although the total strength of UNAMID had reached 15,444 by 30 November 2008, this was still a far cry from the actual authorised deployment of 26,000 troops.[145] Currently, lasting peace remains elusive for Darfur. Even though the first democratic elections in over two decades are scheduled to occur in April 2010, the fighting on the ground continues as peace talks fail to generate an end to the violence in the region.[146]

To shine the spotlight on permanent five members, it can be seen that China has consistently used its permanent five status to block measures that would have assisted the international community to fulfill its R2P obligations in Darfur. In 2006, it was instrumental in ensuring that the peacekeeping troops authorised by SC Resolution 1706 could only be deployed in Darfur with the consent of the Khartoum government.[147] In 2007, despite its support for a UN-AU deployment, China also blocked language that threatened sanctions against Khartoum for non-compliance and stripped away any language that would have authorised the use of force to seize illegal arms that were in violation of a prior SC arms embargo enforced by SC Resolution 1556.[148]

China's continued obstruction of an effective SC response to the ongoing humanitarian crisis in Sudan can be directly linked to its substantial economic ties to that country.[149] It is the largest arms supplier to Sudan, selling $83 million in arms to Sudan in 2005 alone,[150] and the SC Committee Panel of Experts created pursuant to SC Resolution 1591 actually established from their investigations that "[s]hell casings collected from various sites in Darfur suggest that most ammunition currently used by the parties in the conflict in Darfur is manufactured either in the Sudan or in China."[151] In addition to being Sudan's arms supplier, China is Sudan's closest trade partner, purchasing about two thirds of Sudan's exports and providing one fifth of its global imports.[152] China is also a leading developer of Sudan's oil industry and a major purchaser of that oil, having concluded lucrative production sharing deals with the Sudanese government to develop Sudan's

144 N Dastoor "The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect" (2009) 22 Harv Hum Rights J 25 at 38 n 64.

145 Badescu and Bergolm, above n 124, at 301.

146 A Boswell "Fighting Flares in Darfur as Peace Talks Stall" (2010) Voice of America News <http://www1.voanews.com/english/news/africa/Fighting-Flares-Darfur-Peace-Talks-Stall--84499447.html>.

147 Dastoor, above n 144, at 38.

148 Ibid; SC Res 1556, UN Doc S/RES/1556 (2004).

149 See A Bellamy and P Williams "The Responsibility to Protect and the Crisis in Darfur" (2005) 36 Security Dialogue 27 at 32.

150 Dastoor, above n 144, at 38.

151 *Letter dated 30 January 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1591 (2005) Concerning the Sudan addressed to the President of the Security Council* at [125], UN Doc S/2006/65.

152 "China in Sudan: Having it Both Ways" (2007) Save Darfur Coalition at 3 <http://darfur.3cdn.net/2573d6e338d592b4a0_csm6beuk7.pdf>.

offshore oil blocks.[153] It is therefore apparent that China's interests in Sudan are significant, and this is reflected in its pattern of behaviour on the SC. To a lesser extent, Russia has also opposed stronger measures in Darfur in light of its economic interests. As of 2005, Russia had sold approximately $150 million worth of arms to Sudan, and some commentators have speculated that it opposed economic sanctions on the Sudanese government because it feared that there would be defaults on payments owing to it.[154]

Darfur therefore showcases the failure of R2P in action. Although the veto has not been explicitly wielded in resolutions relating to Darfur to date, the spectre of its power is a palpable presence. It could hardly be otherwise, given that both China and Russia have used their powers as permanent members to successfully block meaningful action in the region.

B. The Current International Discourse: Legitimacy Versus Legality

Before attempting to forge a solution to the problems faced in implementing R2P with respect to the SC and the veto, an examination of the existing international discourse in this area is instructive. Recent scholarship on R2P reflects a disturbing lacuna on the implications of SC paralysis – veto induced or otherwise – on the responsibility to react. Many scholars identify the problem as being the notion of the use of force outside the SC authorisation paradigm,[155] but few attempts have been made to forge solutions to the conundrum of SC paralysis and the legality and legitimacy problems entailed by authorisation of force by alternative means. In the main, scholars who do grapple with the issue have maintained that only the SC can legitimately authorise the use of force outside the parameters of legitimate self defence, and that any resort to alternative authorisation can only be weighed in terms of its legitimacy from a moral, and not a legal, perspective.

One of the first to take this approach was Thomas Franck, a leading commentator on use of force issues. Franck argued that unauthorised use of force was undoubtedly illegal whatever the context, but that where such force was used for legitimate humanitarian reasons, this should be akin to a plea of mitigation in criminal law. He points to the common elements of the defence as guidelines: the actor has acted to avoid a great harm; there are no adequate legal means to avoid the harm; the harm is imminent; and the harm sought to be avoided is greater than that committed.[156] Furthering this analogy,

153 Ibid.

154 Dastoor, above n 144, at 38; Bellamy and Williams, above n 149, at 32-33.

155 See for example, Wheeler and Egerton, above n 4; R Goodman "Humanitarian Intervention and Pretexts for War" (2006) 100 Am J Int'l L 107; G Sulyok "The Legality of Unilateral Humanitarian Intervention Re-examined" (2003) 44 Acta Juridica Hungaria 199; R Hamilton "The Responsibility to Protect: From Document to Doctrine – But What of Implementation?" (2006) 19 Harv Hum Rts J 289.

156 T Franck "Interpretation and Change in the Law of Humanitarian Intervention" in J Holzgrefe and R Keohane (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) at 212-214.

Franck contends that the UN's organs operate as the "global jury",[157] which, when asked to judge an unauthorised act of force undertaken to prevent bona fide humanitarian crises, responds "benevolently [through] either specific consent or silent acquiescence",[158] using the concept of mitigation to excuse any infringement on international law.[159] Thus in some ways, Franck takes an approach that echoes the "legitimate, but not legal" assessment that was given to NATO.[160]

Michael Byers and Simon Chesterman adopt the same answer to the legitimacy versus legality issue, arguing that an acknowledgment of illegality combined with a claim that it occurred in exceptional and defensible circumstances suffices because it will not disturb the legal status quo of the SC paradigm nor give license to powerful international actors to break international laws:[161]

> If the intervening state admits that it is violating international law, the intervention itself will not undermine the existing rules while the admission of illegality may in fact serve to strengthen them … Indeed the greatest threat to an international law rule lies not in the occasional breach of that law – laws are frequently broken in all legal systems, sometimes for the best of reasons – but in attempts to mould that law to the shifting practices of the powerful.

Similarly, Gareth Evans, who was the Co-Chair of the ICISS and remains an ardent advocate of the R2P doctrine, does not see any way past the observations originally made in the ICISS report on the legitimacy versus legality issue where unauthorised force is concerned. On the possibility of the General Assembly as an alternative means of authorising force where the SC fails to act, Evans notes that it would give a "high degree of legitimacy for military intervention … but it would not ensure formal legality".[162] Speaking of the ICISS's conclusions on the matter, he clarifies that "their … response to this dilemma was not to try and establish some alternative basis for the legality of intervention but to opt instead for a very clear political message".[163] While conceding the "weaknesses of this essentially political response", Evans bluntly concludes that "there are not many ways of squaring the circle here".[164] Echoing Byers and Chesterman, Evans articulates this in the following way:[165]

157 T Franck *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, Cambridge, 2002) at 186.

158 T Franck "When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?" (2001) 5 Wash U J L & Pol'y 51 at 64.

159 Franck, above n 157, at 184 and 194.

160 See above n 22.

161 M Byers and S Chesterman "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law" in J Holzgrefe and R Keohane (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 198 at 203.

162 G Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington DC, 2008) at 136.

163 Ibid, at 146.

164 Ibid, at 146-147.

165 Ibid, at 147.

> Any concession that as a matter of law (as distinct from morality or principle) there are some circumstances that justify the Security Council being bypassed is one that seriously undermines the whole concept of a rules based international order. That order depends upon the Security Council, in the absence of a credible self-defense argument, being the *only* source of legal authority for non consensual military interventions.

Like Franck, Byers and Chesterman, Evans adopts the "plea in mitigation" approach as well,[166] and with a strong sense of accepting the inevitable, he concludes on this issue that:[167]

> We must simply hope that over time there emerges some greater convergence between the legal and political order, that the Security Council *will* work better than it has done, and that fewer cases will arise out of manifest tension between legality and legitimacy.

Nicholas Wheeler also deals with the difficult question of where authority should be located for the use of force in operationalising the responsibility to protect.[168] He views the heart of the debate as "the question of whether the UN Security Council should be the only body that can authorize the use of force for humanitarian purposes".[169] In his report, Wheeler identifies seven models of authority, which span from the consensual to the non-consensual. These are (1) consent freely given;[170] (2) coerced and induced consent;[171] (3) SC authorisation;[172] (4) the SC as a global jury;[173] (5) General Assembly authorisation;[174] (6) regional arrangements;[175] and (7) coalitions of the willing.[176] In terms of the General Assembly as a source of authorisation, Wheeler remarks that "there is no constitutional basis in the UN Charter for [it] to override the right of veto" and that the General Assembly can only legitimise, but not legalise, military intervention.[177] The advantages of doing so are acknowledged, these being that collective security would still be occurring within the bounds of the UN system as required by paragraph 139 of the Summit Document, and the significant measure of international legitimacy that a two-thirds majority would give to any intervention.[178]

In terms of restriction of the veto, Wheeler holds that it would not resolve differences between the permanent five where genuine differences of opinion exist over whether intervention is necessary.[179] Like the commentators already discussed, Wheeler too submits that the international equivalent to mitigation

166 Ibid, at 146-147.
167 Ibid, at 147.
168 See N Wheeler "Operationalising the Responsibility to Protect: The Continuing Debate over where Authority should be Located for the Use of Force" NUPIReport [No.3-2008] (2008).
169 Ibid, at 5.
170 Ibid, at 11-12.
171 Ibid, at 12-15.
172 Ibid, at 16-18.
173 Ibid, at 18-20.
174 Ibid, at 20-21.
175 Ibid, at 22-24.
176 Ibid, at 24-26.
177 Ibid, at 20.
178 Ibid.
179 Ibid, at 6.

should be adopted, with the SC's global jury treatment of the NATO action as the "best precedent for how the international community should cope with future cases of this kind".[180]

Discussion of the existing scholarship has highlighted a common concession to the benefits of legitimacy and the inevitability of illegality, without concrete suggestions for reform. Though Neville Dastoor adheres to the plea in mitigation-type arguments, he is an exception to the general trend of viewing the problem in the abstract as he does attempt to forge a solution to the SC paradigm conundrum.[181] Dastoor criticises the fact that "beyond a cursory plea for P5 veto restraint, the [R2P doctrine] fails to address the activation issue."[182] He argues that the way forward is to create a committee within the SC itself – to be called the R2P-SCC or R2P Security Council Committee – which is to be "tasked with monitoring and analyzing situations world-wide where the application of R2P might be appropriate."[183] This R2P-SCC would be able to issue recommendations to the SC regarding the most appropriate courses of action to undertake for flagged situations, and would comprise relevant experts from member states, and representatives of all regions and all economic, political, and military strengths.[184] Importantly, all members would have equal power on the committee and there would be no veto within it.[185]

Developing on earlier formulations about the notion of the SC as a global jury, Dastoor contends that having a R2P-SCC as a "global grand jury"[186] would "substantially dull the self-interested considerations that affected past potential responses", "galvanize support for action from previously resistant states" and "broach the response question earlier, more consistently, and more comprehensively than in the past".[187] Dastoor also argues that any R2P-SCC recommendation for intervention would "legitimize unilateral action in the event that the Security Council did not authorize collective action".[188] He is quick to note that the SC remains the only source of legality, and the R2P-SCC would be no exception to this rule, but that "the designation of [unauthorised] action as 'illegal' should not carry the same normative force as it does in the domestic context".[189]

The final part of his paper is used to troubleshoot potential counter-arguments to his proposal. Dastoor identifies these as being that an R2P-SCC may bring no new results;[190] it may be too similar to the General Assembly;[191]

180 Ibid, at 7.
181 See Dastoor, above n 144, at 21-62.
182 Ibid, at 30.
183 Ibid, at 32; 49-50.
184 Ibid.
185 Ibid.
186 See ibid, at 48-49; 51.
187 Ibid, at 32.
188 Ibid.
189 Ibid, at 52.
190 Ibid, at 56-58.
191 Ibid, at 58-59.

and that it may be an unrealistic proposal because it must be created *by* the SC to exert pressure *on* the SC.[192] He responds to the first counter-argument by averring that it misses the distinction between the self-interests of the permanent five as compared to the non-aligned States, and that the R2P-SCC would alter the self-interest calculus of the non-aligned states by placating their fears as to impure interventions, thereby isolating the permanent five's self interest as the only reasons for inaction. Dastoor posits the theory that the permanent five will bow under the weight of collective international agreement on intervention as represented by the R2P-SCC, or that at any rate there will be greater legitimacy attached to any intervention.[193]

On the counter-argument that the R2P-SCC will be too similar to the General Assembly, Dastoor responds by pointing out that it will not be a 192-member committee and that committee members will not be representative of their particular countries, but of mass atrocity victims as a whole.[194] He also points out that the R2P-SCC's mandate will be different to that of the General Assembly in that it will be solely focused on R2P situations, and perceives that its recommendations will hold greater influence over the SC than that associated with General Assembly edicts.[195] On the last counter-argument of an R2P-SCC being an unrealistic proposal, Dastoor contends that there is a realistic chance of success as such a proposal would be agreeable to governments that would be elevated to active participants instead of being observers or recipients of inconsistent SC responses.[196] He also contends that the R2P-SCC approach is one that does not seek massive reform such as a change in the veto system or membership of the SC's permanent members, and thus has a greater chance of success.[197]

While Dastoor's response to anticipated counter-arguments shows the advantages of having an R2P-SCC, his assumption that the self interests of non-aligned States differ lacks weight because the same domestic and economic factors taken into account by the permanent five would be equally given weight to by non-aligned States. There is therefore weight in the counter-argument that the R2P-SCC will just add further bureaucracy to an already overly bureaucratized system. Dastoor's assumption that the committee members will not act for national interests but for the interests of the international community to ensure the responsibility to protect also appears unrealistic in the realm of *realpolitik*. Given the potential weight of any R2P-SCC recommendations it is imaginable that States will carefully screen candidates to represent their national interests, regardless of the rhetoric of representation beyond State boundaries. The contention that the recommendations of the R2P-SCC would have greater weight than

192 Ibid, at 59-60.
193 Ibid, at 57.
194 Ibid, at 58.
195 Ibid, 58-59.
196 Ibid, at 60.
197 Ibid.

resolutions of the General Assembly also cannot be sustained, given the legitimacy accorded to majority resolutions of the Assembly, which "occupies a central position as the chief deliberative, policymaking and representative organ of the United Nations".[198]

Furthermore, whatever the perceived benefits of an R2P-SCC, Dastoor (and all the commentators before him) are providing a wholly unsatisfactory answer to the problem in their acceptance of the status quo that force outside the SC paradigm is necessarily illegal even if legitimate. The argument of mitigation may reflect political realities, but it does not assuage the demands of international law. One only has to look at the international furor raised over NATO's intervention in Kosovo to see that illegality, however justifiable, sits uncomfortably with the international community.[199]

The aim of this article will therefore be to reach an acceptable legal solution to authorisation of force in the face of SC paralysis that combines legitimacy with legality at international law.

IV. Salvaging the Responsibility to Protect

A. Reframing the Debate: Jus Cogens and R2P

In light of the problems that R2P currently faces, this article proposes a reframing of the debate. Presently, the issue is couched as a dilemma in which an international actor must choose between respecting the absolute primacy of the SC in matters of peace and security (notwithstanding any capricious wielding of the veto by the permanent five) or illegally acting in defiance of the SC paradigm in order to fulfill its responsibility to protect. Under this schema, bona fide reasons for forceful intervention to fulfill R2P obligations can only be given weight as a mitigating factor in what is a legitimate but undoubtedly illegal intervention. This, however, is not the only way of viewing the matter.

It is trite law that *jus cogens* norms bind international actors,[200] and the SC is no exception.[201] Accordingly, this article argues that where there is an R2P situation involving the breach of a *jus cogens* norm, the veto cannot be used in a manner that facilitates this breach because such usage would be a violation of a non-derogable norm of international law. Specifically, this article proposes that the prohibition against genocide is a clear-cut example of a *jus cogens* norm that also invokes R2P when it is breached, and that the

198 See "Functions and Powers of the General Assembly" United Nations Website <http://www.un.org/ga/about/background.shtml>.

199 See above n 21.

200 See Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980), art 53 [VCLT]; I Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 510-512; A Cassese *International Law* (2nd ed, Oxford University Press, Oxford, 2005) at 205-208.

201 E Duckwitz "The Doctrine of *Jus Cogens* as a Limit on the Power of the United Nations' Security Council" (Masters Thesis, University of Auckland, 2009).

permanent five must, without exception, relinquish their veto powers under Article 27(3) of the Charter where genocide is occurring or where there is a prima facie case for suspecting its occurrence. A failure to restrict use of the veto, or SC paralysis, is to be interpreted as the SC acting outside of its mandate to exercise its functions in accordance with the Charter's Purposes and Principles, such that General Assembly deference under Article 12 no longer applies. This article will call this methodology the *jus cogens*/R2P approach.

The mechanics of following the *jus cogens*/R2P approach and the theoretical justifications for adopting it will now be set out.

1. The Mechanics

The following steps should be adopted by the international community to facilitate the *jus cogens*/R2P approach in the face of genocide or suspected genocide:

i) Notification of the SC that there is a prima facie case of genocide;
ii) Investigation of whether genocide, or a prima facie case of genocide can be established and whether the use of force is warranted;
iii) Relinquishment of the veto by the permanent five where genocide or a prima facie case of genocide is established;
iv) In the event of SC refusal to relinquish the veto in such circumstances, any such veto will be *ultra vires* as a breach of *jus cogens* and R2P. General Assembly authorisation using the "Uniting for Peace" procedure should then be sought. Where necessary, regional and sub-regional organisations and/or unilateral States should act under such authorisation to fulfill the international community's responsibility to protect.

These steps will be discussed in greater detail below.

(a) Step 1: Notification of the Security Council

Where genocide is occurring or imminent or where there is a prima facie case for holding this to be the case, the SC should be notified so that it can convene in urgency to debate the matter. Many international actors can put the motions in place for an SC meeting. The President of the SC can call a meeting "at any time he deems necessary" under rule 1 of the Provisional Rules of Procedure of the SC.[202] Rules 2 and 3 also state that the President "shall" call a meeting:

i) At the request of any member of the SC,[203] or

202 Provisional Rules of Procedure of the Security Council S/96/Rev 7, r 1, 4 [Provisional Rules]. Note that there is some uncertainty as to whether Rule 1 empowers the President to call a SC meeting at any time he sees fit or only where he deems one of the criteria in Rules 2 and/or 3 to be met. See S Bailey and S Daws *The Procedure of the UN Security Council* (3rd ed, Oxford University Press, Oxford, 2005) at 24.

203 Provisional Rules, ibid, r 2.

ii) If a dispute or situation is brought to the attention of the SC under Article 35 or Article 11(3) of the Charter,[204] or
iii) If the General Assembly makes recommendations or refers any question to the SC under Article 11(2),[205] or
iv) If the Secretary-General brings any matter to the SC's attention under Article 99.[206]

Notably, the Convention on the Prevention and Punishment of the Crime of Genocide states that any contracting party to it "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide",[207] which means that a contracting party to the Convention could potentially call upon the SC to convene for such purposes.

Once the SC is notified and has had a chance to convene, it is to be hoped that the SC will authorise the use of such force where it is necessary to halt or prevent impending genocide.

(b) Step 2: Necessary Investigations: Is There a Prima Facie Case of Genocide?

In the event that the SC is undecided as to whether there is a prima facie case of genocide occurring, the second step should be to set the investigative powers of the UN into motion. The Special Adviser on the Prevention of Genocide and Mass Atrocities can undertake a fact-finding mission and make recommendations to the SC through the Secretary-General as to the situation on the ground.[208] There is also scope for the Special Adviser on R2P to work in collaboration with the Special Adviser on the Prevention of Genocide and Mass Atrocities in this regard.[209]

This is in keeping with the R2P doctrine. In the Summit Document, the international community pledged to "fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide" directly after their affirmation of R2P,[210] and the Special Adviser on R2P was specially created at the behest of the Secretary-General to assist with the conceptual development and consensus building for R2P in close consultation with the Special Adviser of the Secretary-General on the Prevention of Genocide.[211]

204 Ibid, r 3.
205 Ibid.
206 Ibid.
207 Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 31 December 1949, entered into force 12 January 1951), art 8 [CPPCG].
208 *Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council* UN Doc S/2004/567 (2004) <http://www.un.org/preventgenocide/adviser/mandate.shtml>.
209 Note the Secretary-General's comment that the advisers are to work in collaboration: *Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council* UN Doc S/2007/721 <http://www.un.org/apps/news/story.asp?NewsID=25702&Cr=ki-moon&Cr1>.
210 Summit Document, above n 82, at [140].
211 See above n 209 for a description of the Special Adviser on R2P's mandate.

The investigations of other NGO bodies, such as Human Rights Watch, should also be accorded weight where they confirm the existence of genocide or a prima facie case of genocide.

(c) Step 3: Relinquishment of the Veto by the Permanent Five

Where genocide or a prima facie case of genocide has been established, the permanent five should restrict the use of their veto powers. Notably, the current stipulation for a restriction of the veto is total in such circumstances, applying without the "national interests" reservations envisaged by the ICISS.[212] As Dastoor has argued, the ICISS's recommendations would likely have proved ineffective even if they were accepted by the permanent five because a permanent five member would be less inclined to exercise its veto in the first place where its national interests are not at stake, thus rendering the code of conduct "an agreement on conduct that already occurs".[213] Any related argument that the ICISS approach would disallow the veto to be used for the interests of a permanent member's allies[214] will likely meet up with definitional wrangling as to the legitimate scope of a State's "vital national interests".[215]

It should also be noted that the suspension of Article 27(3) veto powers does not mean that the permanent five cannot vote to negate any subsequent proposed resolutions on the situation that they regard as counter to their mandate to maintain peace and security. This right to vote against any resolution remains with the SC as a form of checks and balances against the restriction of the veto.

(d) Step 4: Invalidation of any Veto Cast in Face of Prima Facie Case of Genocide and Authorisation by the General Assembly

Should any of the permanent five cast a veto regardless, such a veto should be deemed void and null. The international community should not be bound by any such purported veto as it breaches *jus cogens* and the SC's good faith commitment to R2P. Thus, if there is a majority vote authorising action, the resulting resolution should be considered a binding one under Article 25 of the Charter.

Where the SC feels hampered by a threatened use of an illegal veto and fail to vote on a proposed resolution, or where an illegal veto is cast, this should not hinder the fulfilling of the responsibility to protect. In such circumstances, the General Assembly should be approached to convene an emergency special session under the "Uniting for Peace" procedure to

212 The ICISS suggested that the permanent five should agree not to veto a majority resolution addressing a significant humanitarian crisis where their vital interests are not involved. See ICISS Report, above n 26, at 51.

213 Dastoor, above n 144, at 45.

214 For example, see T Franck "Collective Security and UN Reform: Between the Necessary and the Possible" (2006) 6 Chi J Int'l L 597 at 609.

215 Dastoor, above n 144, at 45.

authorise the requisite force.[216] A majority vote in the General Assembly in favour of such a resolution should be regarded as providing sufficient legitimacy for the use of force to fulfill the international community's responsibility to protect from genocide.

At this point it should also be stressed that regional and sub-regional organisations utilising force or the unilateral use of force by a State, with the sanction of the General Assembly, should not be dismissed as options to discharge the responsibility to protect.

2. The Theory: Justifying the *Jus Cogens*/R2P Approach

The next section of this article will discuss the theoretical justifications for taking the *jus cogens*/R2P approach previously outlined. In summary, these justifications are that *jus cogens* are peremptory norms from which international law allows no derogation; that genocide is a breach of *jus cogens*; and that the SC itself is bound by *jus cogens* such that any use of the veto (or threatened use of the veto) in a manner inconsistent with *jus cogens* renders that action or omission a breach of international law as well as a breach of the responsibility to protect. As such, the international community need not be hamstrung by SC paralysis and can seek alternative authorisation for the use of force outside the SC paradigm where necessary.

(a) Jus Cogens Norms are Peremptory Norms from Which There can be no Derogation

The doctrine of *jus cogens*[217] was first codified in the context of treaty law[218] and the Vienna Convention on the Law of Treaties ("VCLT")[219] recognises its status at general international law. In the VCLT, a peremptory norm is defined as one "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[220] There was widespread support for the concept of *jus cogens* in Vienna, with only France expressly opposing its inclusion in the VCLT.[221]

216 *Uniting for Peace Resolution* GA Res 377A(V), UN Doc A/RES/377A(V) (1950) [*Uniting for Peace*].

217 *Jus cogens* are "very strong rule[s] of customary international law". See A D'Amato *The Concept of Custom in International Law* (Cornell University Press, Ithaca, 1971) at 132, n 73. See also K Parker and L Neylon "*Jus Cogens*: Compelling the Law of Human Rights" (1989) 12 Hastings Int'l & Comp L Rev 411 at 417.

218 E de Wet *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford, 2004) at 187; R Nieto-Navia "International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law" in L Vohrah and others (eds) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, The Hague, 2003) 595 at 599.

219 VCLT, above n 200.

220 Ibid, art 53.

221 A Bianchi "Human Rights and the Magic of *Jus Cogens*" (2008) 19 EJIL 491 at 492, n 6.

While the doctrine of *jus cogens* may have been first codified in treaty law, it is important to note that the reach of *jus cogens* extends beyond this.[222] Its relevance in all areas of international obligation is evidenced, for example, by the inclusion of peremptory norms as an integral component of the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts*.[223]

International jurisprudence also recognises the concept of *jus cogens* and its status in the international law hierarchy. Though references to *jus cogens* in the International Court of Justice ("ICJ") prior to 2006 appeared only in separate or dissenting opinions or where the Court was quoting other sources,[224] the ICJ unequivocally affirmed its recognition of the doctrine in the *Armed Activities in the Territory of the Congo* case in 2006.[225] In that case it held the peremptory character of a norm (in this instance the prohibition against genocide) could not provide a basis of jurisdiction for the ICJ as this is always based on the consent of the parties.[226] In declaring that the prohibition against torture had evolved into a peremptory norm or *jus cogens*, the International Tribunal of Yugoslavia also actively utilised the doctrine in judicial decision making.[227]

The European Courts have given judicial recognition to the doctrine of *jus cogens* as well. In the recent *Kadi* and *Barakaat* cases,[228] the Court of First Instance defined jus cogens as being "a body of higher rules of public

222 See A Orakhelashvili *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2006) at 205; A Orakhelashvili "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" (2005) 16 EJIL 59 at 63. Contrast this with the view of Martenczuk, who points to absence of authority like the VCLT (which refers to *jus cogens* in relation to treaties) as indication that *jus cogens* does not apply to non-treaty acts: B Martenczuk "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie" (1999) 10 EJIL 517 at 546.

223 *Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Committee on the Work of its Fifty-third Session*, UN Doc A/56/10 (2001), 43; art 46; Chapter III. See also D Shelton "Normative Hierarchy in International Law" (2006) 100 AJIL 291 at 308.

224 Shelton, ibid, at 305; Duckwitz, above n 201, at 11. For example, *Right of Passage over Indian Territory (Portugal v India) (Merits) (Judgment)* [1960] ICJ Rep 6 at 135 (Fernandes J dissenting); *South West Africa, Second Phase (Ethiopia v South Africa; Liberia v South Africa) (Judgment)* [1966] ICJ Rep 6 at 298 (Tanaka J dissenting); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Provisional Measures)* [1993] ICJ Rep 325 at 440 (Sep Op Lauterpacht) [*Bosnia Genocide Convention* Case].

225 See *Armed Activities on the Territory of the Congo (New Application) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility) (Judgment)* [2006] 6, <http://www.icj-cij.org/docket/files/126/10435.pdf> [*Congo* Case] at [64]; [125]. See also commentary in Shelton, above n 223, at 306.

226 Ibid, at [64].

227 Case IT-95-17/1-T *Prosecutor v Furundzija (Judgment) (Trial Chamber)* [1998] 121 ILR 213, where the ICTY held (at [153]) that "[b]ecause of the importance of the values it protects, [the prohibition against torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."

228 Case T-315/01 *Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-03649 [*Kadi* CFI Case]; Case T-306/01*Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2005] ECR II-03533 [*Barakaat* CFI Case].

international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible" and were prepared to countenance indirect review of the SC where a breach of *jus cogens* was in issue.[229] Whilst the European Court of Justice ("ECJ") overturned the decision of the Court of First Instance, it is clear that it accepts *jus cogens* as a doctrine, as evidenced by its references to the doctrine in its discussion of the Court of First Instance's judgment.[230]

Domestic courts have given similar recognition to the doctrine of *jus cogens*. In its 2010 decision in *HM Treasury v Ahmed*,[231] the UK Supreme Court referred to *jus cogens* in general terms[232] and in quoting the *Al Jedda*[233] and *Kadi* and *Barakaat* cases.[234] The Canadian courts have also gave consideration to arguments based on the doctrine of *jus cogens* both at the Court of Appeal in *Bouzari v Islamic Republic of Iran*,[235] and in the Supreme Court in *Suresh v Canada (Minister of Citizenship and Immigration)*.[236] In some domestic cases, *jus cogens* has even been the *ratio decidendi* for the purposes of limiting the application of otherwise binding treaty provisions. For example, the Swiss Supreme Court (*Tribunal Fédéral*) in the *Bufano et al* case held that the peremptory rule against torture imposed the non-fulfilment of a binding extradition treaty.[237] The same Court also made explicit references to *jus cogens* norms in subsequent cases, citing the *Bufano et al* case as relying upon a peremptory norm of international law from which there could be no derogation either at the international or national level.[238] Notably, *jus cogens* was enshrined in the Swiss Constitution in 1999.[239]

The doctrine of *jus cogens* is therefore clearly part of general international law, as recognised by conventions, customary international law, and judicial writings.[240]

229 *Kadi* CFI Case, at [226]; *Barakaat* CFI Case, at [277].

230 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&jurcdj=jurcdj&jurtpi=jurtpi&numaff=&nomusuel=kadi%20&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher> [*Kadi* and *Barakaat* ECJ Case], at [90]; [280]; [287]; [329].

231 *HM Treasury v Ahmed* [2010] UKSC 2 (HL) [*Ahmed*].

232 Ibid, at [151].

233 *R (Al Jedda) v Secretary of State for Defence* [2008] AC 332 (HL).

234 *Ahmed* above n 231, at [72] and [102].

235 *Bouzari v Islamic Republic of Iran* 243 DLR (4th) 406, (CA), at [84]-[95].

236 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (SC), at [61]; [64]-[65].

237 *Bufano et al* Switzerland, Tribunal Fédéral Suisse, (1986) Arrêts du Tribunal Fédéral Suisse, Recueil Officiel vol 112, I, 222, 412. This case is discussed in Cassese, above n 200, at 210 -211.

238 See the cases mentioned by Cassese in above n 200, at 211 n 17.

239 Federal Constitution of the Swiss Confederation of 18 April 1999, The Federal Authorities of the Swiss Confederacies, arts 139.2; 193(4) and 194(2). For access to an English translation which is not authoritative, go to <http://www.admin.ch/ch/e/rs/101/index.html>.

240 Statute of the International Court of Justice, 18 April 1946, art 38(1) [ICJ Statute].

(b) Genocide is a Breach of Jus Cogens

Scholars have indicated the difficulty of defining the precise content of *jus cogens* norms,[241] but this is not in issue in this article as the prohibition against genocide is universally recognised as being a *jus cogens* norm.

As early as 1946 in the UN's history, the General Assembly had adopted a unanimous resolution affirming genocide as "a crime under international law which the civilized world condemns".[242] This position was further reinforced in the Convention on the Prevention and Punishment of the Crime of Genocide ("CPPCG"),[243] which unequivocally reaffirmed genocide to be "a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world".[244]

Genocide was defined in the CPPCG as follows:[245]

> … [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

In keeping with the *jus cogens* nature of the prohibition against genocide the CPPCG also declared there to be no immunity from prosecution for those who had committed genocide,[246] and that genocide was not to be considered a political crime for the purposes of extradition.[247] Articles 1 and 2 of the CPPCG have long been considered peremptory in nature.[248]

241 See, for example, Brownlie, above n 200, at 512; Shelton, above n 223, at 302; M Ragazzi *The Concept of International Obligations Erga Omnes* (Clarendon Press, Oxford, 1997) at 48; C Ford "Adjudicating *Jus Cogens*" (1994-1995) 13 Wis Int'l L J 145 at 165.

242 *The Crime of Genocide* GA Res 96 (I) UN GAOR, 1st sess, 55th plen mtg (1946).

243 CPPCG, above n 207.

244 Ibid, preamble. See also art I.

245 Ibid, art 2. Note that the definition of genocide adopted by statutes of tribunals for Yugoslavia and Rwanda and Rome Statute of the International Criminal Court use the same definition for genocide. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991, Un Doc S/25704 at 36, annex (1993) and S/25704/Add 1(1993), adopted by the Security Council on 25 May 1993, UN Doc S/RES/827 (1993), art 4; Statute of the International Tribunal for Rwanda, adopted by SC Res 955, UN Doc S/RES/955 (1994), art 2 ; Rome Statute of the International Criminal Court (opened for signature, entered into force 1 July 2002), art 6.

246 CPPCG, above n 207, art 4.

247 Ibid, art 7.

248 This is reflected by the fact that articles 1 and 2 are the only provisions without reservation. See also Nieto-Navia, above n 218, at 639 though compare the view of Gill, who holds that only article 2 has *jus cogens* status: T Gill "Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter" (1995) 26 Netherlands Yearbook of International Law 33 at 79.

The principles underlying the CPPCG have been consistently reaffirmed by the ICJ,[249] as has the *erga omnes* nature of the rights and obligations underpinning it.[250] Furthermore, the ICJ unequivocally confirmed that it is "assuredly the case" that the norm prohibiting genocide is peremptory in nature in the *Armed Activities in the Territory of the Congo* case,[251] which, Schabas notes, is "the first time [the ICJ] has ever made such a declaration about any legal rule".[252] In the *Bosnia and Herzegovina v Serbia and Montenegro* judgment, the ICJ also identified the duty to prevent genocide to be "normative and compelling".[253]

Elsewhere, the prohibition against genocide has consistently been cited as one of the clear examples of a *jus cogens* norm, for example in the discussions and commentaries of the Vienna Conference on the Law of Treaties[254] and the International Law Commission.[255] The Institut de Droit International's "Resolution on Obligations *erga omnes* in International Law" also acknowledged that there is a wide consensus internationally that the prohibition of genocide is amongst the "obligations that bind all subjects of international law for the purposes of maintaining the fundamental values of the international community".[256] As the ICJ held in the *Barcelona Traction* case, all States have a legal interest in the protection of the prohibition against genocide because it is an obligation *erga omnes*.[257]

Because the norm against genocide is *jus cogens*, it is argued that a breach of this norm creates a legal obligation to enact, or at least to refrain from preventing, an R2P response.[258] This argument will be developed in the subsequent sections.

249 See, for example, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15 at 23; *Congo* case, above n 225, at [64].

250 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections) Judgment* [1996] ICJ Rep 616 at [31]; *Congo* case, above n 225, at [64].

251 *Congo* case, above n 225, at [64].

252 W Schabas *Genocide in International Law: The Crime of Crimes* (2nd ed, Cambridge University Press, Cambridge, 2009) at 4.

253 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] <http://www.icj-cij.org/docket/files/91/13685.pdf> at [427].

254 Shelton, above n 223, at 302.

255 Commentary on what has become article 53 to the effect that the obvious and best settled rules of *jus cogens* includes genocide: (1966) 2 YBIL 248.

256 See preamble to Institut de Droit International "Resolution on Obligations *erga omnes* in International Law" 5th Com (2005).

257 *Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase) (Judgment)* [1970] ICJ Rep 3 at [32].

258 It is acknowledged that this view is an emerging rather than an accepted one, especially in light of the ICJ's decision in the Congo case, which held that the *jus cogens* norm against genocide could not form the basis for jurisdiction in the ICJ and therefore in that context at least, could not disturb procedural positive law (see text accompanying n 226). However, the logical consequence of accepting that a norm is *jus cogens* would seem to be that a breach of

(c) The Security Council is Bound by Jus Cogens

Whilst the SC's powers under Chapter VII are broad, it is nevertheless bound by *jus cogens* norms. The existing literature on this area mostly asserts this to be the case without providing further detailed evidence in support,[259] but the justifications for this proposition can be split into two camps. This is because the SC is subject to legal limits from two sources, one being the UN Charter from which it derives its powers; the other being the rules of general international law that bind all international actors.[260]

(i) Charter-based Legal Constraints on the Security Council

The SC is not a sovereign body[261] and its powers are conferred to it by the members of the UN through the medium of its constituent treaty, the UN Charter.[262] It follows that as a creation of the UN, the SC's powers are not unfettered and that it must operate within the parameters of UN Charter norms.[263]

There is considerable support for this proposition in jurisprudence. The Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia ("ICTY") expressed its agreement with this view in the *Tadić* case as follows:[264]

> The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

such a norm should have legal consequences, whether this be the creation of a legal obligation to act, or to refrain from preventing action to rectify such a breach. The article proceeds on this basis.

259 See for example, D Akande "The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations ?" (1997) 46 Int'l & Comp L Q 309 at 322; M Bedjaoui *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff Publishers, London, 1994) at 119; G Watson "Constitutionalism, Judicial Review, and the World Court" (1993) 34 Harv Int'l L J 1 at 38; S Lamb "Legal Limits to United Nations Security Council Powers" in G Goodwin-Gill and S Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford, 1999) at 372; E de Wit, above n 218, at 187.

260 D Schweigman *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Kluwer Law International, The Hague, 2001) at 165-203. Note that while the distinction between Charter based constraints and non-Charter based constraints to the SC's powers can be made, the distinction is not a black and white one: there is room for blurring of the lines.

261 Akande, above n 259, at 315.

262 Charter, above n 5, art 24(1); Akande, above n 259, at 315.

263 Schweigman, above n 260, at 165; Lamb, above n 259, at 365; Martenczuk, above n 222, at 534.

264 Case IT-94-1-AR72 *Prosecutor v Tadic (Jurisdiction) (Appeals Chamber)* [1995] 105 ILR 419 at [28].

The fact that the UNC simultaneously bequeaths powers to the SC as well as limits to those powers has also been acknowledged time and time again by the ICJ. In the 1948 *Admission of a State to United Nations Membership* case, the Court stated that:[265]

> The political character of an organ cannot release it from the observance of treaty provisions established by the Charter when they constitute limitations on its powers and criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of the constitution.

This theme was revisited in the *Namibia* case, where the ICJ specified that the SC's broad powers under Article 24 are limited by the fundamental principles and purposes found in Chapter I of the Charter.[266] In his dissenting judgment in the *Lockerbie* case Judge Jennings also affirmed that the SC was subject to legal constraints, and in particular, to those generated by the Charter:[267]

> The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows from the law. It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above the law.
>
> That this is true of the Security Council is clear from the terms of Article 24, paragraph 2, of the Charter ...

It therefore does not make legal sense for the SC to have the power of international law, but not be bound by it, and for there to be no legal limit to the SC's powers even in matters of international peace and security.[268] What constraints, then, does the Charter place on the SC?

As Article 24(2) of the Charter makes clear, the main legal limitations on the SC's powers are imposed by the Purposes and Principles of the UN set out in Articles 1 and 2 because the SC must act in accordance with them.[269] As expressed in Article 1 of the Charter, the Purposes that are of relevance to *jus cogens* norms are the maintaining of international peace and security,[270] and the promotion and encouragement of respect for human rights and fundamental freedoms.[271]

There is some debate as to whether all of the Principles articulated in Article 2 bind the SC or whether only those that specifically mention the Organisation do. This is because the introductory statement in Article 2

265 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57 at 64.

266 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 at [110].

267 *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Preliminary Objections) (Judgment)* [1998] ICJ Rep 9 at 110 (dissenting).

268 Akande, above n 259, at 314-315; Duckwitz, above n 201, at 19.

269 Gill, above n 248, at 41; Akande, above n 259, at 316; de Wet, above n 218, at 191.

270 Charter, above n 5, art 1(1).

271 Ibid, art 1(3).

differentiates between the Organisation and its Members,[272] which has led some commentators to argue that only the Principles that specifically mention the Organisation and/or its organs apply to the SC (ie the Principles propounded in paragraphs 2(1), 2(6), and 2(7)).[273] It is arguable, however, that the differentiation between the Organisation and its Member States was done to reflect the separate legal personality that the UN and its organs have as distinct from that of the UN's Member States,[274] and the introductory statement's explicit reference to the Organisation and its members can be seen as supporting the interpretation that all of the Principles in Article 2 extend to the organs of the UN as well.[275] Albrecht Randelzhoffer supports this approach, arguing that all the Principles in Article 2 apply to the SC, with the paragraphs that mention the Organisation (ie Paragraphs 2(1), 2(6), and 2(7)) having particular importance, whilst the remaining articles apply, albeit in a more limited manner.[276]

In view of the explicit inclusion of both the Organisation and its members in the introductory sentence, it is the author's view that all the Principles contained in Article 2 apply to the SC. As David Schweigman has noted, the Charter is a constituent, multilateral convention which should be accorded a teleological interpretation,[277] and it would be contrary to the spirit of the Charter if an overly zealous adherence to the letter of the Charter is adopted such that the SC escapes being bound by the Principles enunciated in paragraphs 2(2), 2(3), 2(4), and 2(5). Thus, the Principles of the Charter which are of relevance to *jus cogens* obligations and which bind the SC are the obligation to act in good faith with regards to their obligations under the Charter,[278] and to act in accordance with general international law.[279]

Although the obligation to abide by the Purposes and Principles of the Charter does not explicitly make observation of *jus cogens* mandatory, compliance with these is nevertheless consistent with being bound by *jus cogens* norms and the *erga omnes* obligations they inevitably entail. For example, to ignore R2P where genocide is occurring is a failure to maintain international peace and security in contravention of Article 1 as well as a failure to uphold the *jus cogens* prohibition against genocide. Likewise, R2P intervention where genocide is occurring would be consistent with respect for

272 Article 2 begins with the following words: "[t]he *Organization and its Members*, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles …" (emphasis added).

273 This view is advocated by Gabriel H Oosthuizen: G Oosthuizen "Playing the Devil´s Advocate: The United Nations Security Council is Unbound by Law" (1999) 12 LJIL 549 at 560.

274 A Randelzhoffer "Article 2" in B Simma (ed) *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 2002) at 64.

275 Ibid; Brownlie, above n 200, at 95; de Wet, above n 218, at 195; Schweigman, above n 260, at 173.

276 Randelzhoffer, above n 274, at 64.

277 Schweigman, above n 260, at 10-11.

278 Charter, above n 5, art 2(2).

279 Ibid, art 1(1).

human rights given that the right to life and the prohibition against genocide are both fundamental human rights which are non-derogable even in times of emergency under the International Convention on Civil and Political Rights.[280] The converse is also true. As Dapo Akande has remarked, it would be anachronistic if the SC were empowered to violate human rights where the Charter's purpose is to protect such rights as is noted in the preamble, Article 1(3), and Article 55 of the Charter.[281]

Upholding the responsibility to protect in situations of genocide would also be in keeping with the SC's obligations to act in good faith in discharging their mandate to maintain international peace and security as required by Article 2(2) of the Charter. Once again, it would be detrimental to the collective security system established by the Charter if the SC's powers were not bound by good faith. As the ICTY put it in the *Tadić* case:[282]

> It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose [i.e. without good faith] it would be acting outside the purview of the powers delegated to it in the Charter.

A related concept to acting in good faith is the abuse of powers principle, which also binds the SC.[283] Judge Morelli expressed this in the *Certain Expenses* case as follows:[284]

> It is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. Examples might be a resolution which had not obtained the required majority, or a resolution vitiated by manifest *excès pouvoir* (abuse of rights) such as, in particular, a resolution the subject of which has nothing to do with the purposes of the Organization.

In the R2P context, it is arguable that the use of the veto in a case of genocide in which intervention is clearly warranted and would otherwise have been authorised would be just such an abuse of powers, in contravention of the Charter's Purposes and Principles, and thus unenforceable against member states. Article 25 states that "Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter", and it is arguable that this provision implies that Member States would not be bound by a SC decision that is not made in accordance with the Charter's Purposes and Principles.[285]

This view finds support in Judge Lauterpacht's reasoning in his separate opinion in the *Bosnian Genocide Convention* case where he held that "genocide is *jus cogens* and that a resolution which becomes violative of *jus cogens* must

280 International Convention on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976), art 4(2).

281 Akande, above n 259, at 323.

282 Case No. IT-94-1-T *Prosecutor v Tadić (Decision on the Defence Motion on Jurisdiction) (Trial Chamber)* <http://www.un.org/icty/tadic/trialc2/decision-/100895.htm> at 8.

283 V Gowlland-Debbas "The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case" (1994) 88 AJIL 643 at 663.

284 *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151 at 223.

285 Gowlland-Debbas, above n 283, at 662.

then become void and legally ineffective".[286] The context of that case was the Bosnia-Herzegovina war, during which the SC had instituted an arms embargo to try to end the internal conflict occurring in the Former Republic of Yugoslavia.[287] As a result of this arms embargo the Bosnians did not have access to arms for self defence purposes against the Serbs, who did have internal access to arms. The *Bosnian Genocide* case was therefore brought before the ICJ to challenge the legality of the arms embargo imposed by SC Resolution 713, with Bosnia arguing that application of the embargo to Bosnia amounted to assistance in the commission of genocide against its peoples.[288] While the resolution had been passed for the legitimate purpose of ending conflict, Judge Lauterpacht held that insofar as the embargo had become contrary to *jus cogens* (here the prohibition against genocide) the part of the resolution implementing it ceased to be binding on Member States and they became free to disregard it.[289]

More recently, the European Court of First Instance also expressed agreement with this approach in the *Barakaat* and *Kadi* cases in affirming that *jus cogens* norms are unconditionally binding on the SC:[290]

> International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that might be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

Given that the principle of good faith applies to the SC, and in light of the fact that many of the Purposes and Principles of the Charter overlap with *jus cogens* norms, and in particular, with the prohibition against genocide, it can be stated that the Charter provides justification for the proposition that the SC is indeed bound by *jus cogens* norms or at the very least, is bound by the prohibition against genocide. This is still the case even though no specific prohibition against contravening peremptory norms is contained in the Charter.

(ii) Legal Constraints on the Security Council Outside the Charter

Constraints on the SC's powers outside the Charter also exist and *jus cogens* norms can operate as a direct and autonomous legal limit on the SC, as distinct from applying through the Charter or treaty interpretation.[291] The reasoning of Judge Lauterpacht in the *Bosnian Genocide Convention* case referred to earlier[292] supports this view of the autonomous effect of *jus cogens*,

286 *Bosnia Genocide Convention* case, above n 224, at [104].
287 See SC Res 713, UN Doc S/RES/731 (1992).
288 *Bosnia Genocide Convention* case, above n 224.
289 Ibid, at [102]-[103]. de Wit also agrees with this reasoning: see de Wit, above n 218, at 188.
290 *Kadi* CFI Case, above n 228, at [230]; *Barakaat* CFI Case, above n 228, at [281].
291 Orakhelashvili, above n 222, at 69.
292 See text with n 286.

as the Judge did not link the voiding of any resolution in contravention of *jus cogens* with observations regarding either compliance with the Charter or the intention of the Charter's drafters.[293] Judge Lauterpacht clarified that:[294]

> The relief which Article 103 … may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*.

In doing so, the Judge was confirming that "the effect of *jus cogens* derives from its normative superiority, rather than from empirical ways of construction".[295]

Under this perspective, the SC's acts are subject to *jus cogens* in the same way the acts of any other international actor would be[296] and Alexander Orakhelashvili has argued that the fact that international organisations are bound by *jus cogens* in respect of the validity of treaties[297] invites the argument that peremptory norms also apply to their unilateral acts.[298] On the face of it, there does not appear to be any reason to suggest otherwise merely because the SC is an international organisation, subject to different constraints from States. By analogy, the ILC and the Vienna Conference both extended the applicability of *jus cogens* to international organisations in terms of coercively imposed treaties and treaties *contra juris cogentis*.[299]

August Reinisch and Eike Duckwitz have argued that a further justification for *jus cogens* being a direct and autonomous legal limit on the SC comes from the fact that the SC, despite its wide powers, has only those powers that have been conferred on it by the UN's Member States.[300] The SC is a creation of the UN, created by the UN's Member States, all of whom are bound by *jus cogens* norms. It follows then that the SC, as a creation of the UN, is also bound by *jus cogens* norms because an international creature cannot acquire more powers than its creator – *nemo plus iuris transferre potest quam ipse habet*.[301] The corollary of this is that States cannot collectively "opt out" of being bound by *jus cogens* by creating an organisation that is not bound by these obligations, because this would theoretically allow States to use international organisations to bypass their *jus cogens* obligations.[302]

293 *Bosnia Genocide Convention* case, above n 224, at [100]-[104].
294 Ibid, at 440.
295 Orakhelashvili, above n 222, at 69.
296 Ibid.
297 VCLT, above n 200, art 53 and art 64.
298 Orakhelashvili, above n 222, at 69-70.
299 Ibid, at 70.
300 A Reinisch "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions" (2001) 95 AJIL 851 at 858 ; Duckwitz, above n 201, at 28-30.
301 Ibid.
302 Duckwitz, above n 201, at 29.

Another related way of viewing the matter is that the UN has a legal personality as unequivocally confirmed by the *Reparations* case,[303] and that the SC is "subject to" international law because it is a creation of the UN, which is itself a "subject of" international law.[304] Thus, because the UN is bound by *jus cogens* norms, and because in carrying out its duties to maintain international peace and security the SC is acting on behalf of the UN's Member States,[305] the SC is similarly constrained by these norms.

(iii) Analysis

An analysis of the legal constraints on the SC both within the Charter and outside of its provisions gives support to the proposition that the SC is bound by *jus cogens*, whether through the Purposes and Principles of the Charter, the direct and autonomous effect of *jus cogens*, or by virtue of the fact that the SC as an organ of the UN cannot acquire greater powers than its creator.

Given that there can be no serious question that the prohibition against genocide is *jus cogens*, it therefore follows that the SC is bound by this peremptory norm and must ensure that its actions do not interfere with it.[306] The restriction of the veto in cases of genocide or suspected genocide would be in keeping with this, as well as with the SC's responsibility to protect.

(d) The Security Council has Expressed its Willingness to Adhere to R2P

Furthermore, the SC has itself expressed its willingness to be bound by R2P, and implicitly, by *jus cogens*, because R2P is invoked where genocide is occurring. This provides additional justification for adopting the *jus cogens*/R2P approach. As has been previously discussed, the SC has officially recognised the R2P doctrine as articulated in the Summit Outcome Document and its affirmation of the responsibility to protect populations from, *inter alia*, genocide, both in the abstract in SC Resolution 1674, and in a specific context in SC Resolution 1706.[307] In light of the SC's repeated affirmation of the R2P doctrine, there is a strong argument that the permanent five should restrict their powers of veto in cases of genocide or suspected genocide so that the SC is acting in good faith towards the international community, in accordance with the Principles of the Charter.[308]

303 See *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 179.

304 On this point, the statement of the ICJ in *Interpretation of the Agreement of 25 March 1951 between the WTO and Egypt (Advisory Opinion)* is instructive: "International organizations are subject to international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[1980] ICJ Rep 73 at 89-90. See also the dissenting opinion of Judge Fitzmaurice in the Namibia case, above n 266, at 294, on the topic of territorial sovereignty: "This is a principle of international law that is well-established as any there can be, – and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual Member States are."

305 See Charter, above n 5, art 24(1).

306 Schweigman, above n 260, at 199.

307 See Part I, C, 5 (a) and (b) of this article.

308 See Part III, A, 2 (c)(i) of this article for good faith arguments.

(e) The Security Council Retains Primacy Over Maintaining International Peace and Security

The proposal to adopt the *jus cogens*/R2P approach with regards to the veto may perhaps draw criticisms from some quarters as being counter to the SC's primary responsibility for the maintenance of international peace and security. Any disquiet regarding this can be dismissed, however, because adopting the *jus cogens*/R2P approach does not undermine the SC's primacy in this area.

It is true that the permanent five's powers will be restricted by the *jus cogens*/R2P approach. In saying that, it must be noted that the limitation would be a reasonable one considering the gravity of what is at stake for international peace and security if genocide is in issue and given the *jus cogens* status of the prohibition against genocide. The restriction of the veto would also, prima facie, be consistent with the SC's obligations to maintain international peace and security.

A potential criticism of the *jus cogens*/R2P approach is that its restriction of the veto does not cater for genuine differences of opinion amongst the permanent five as to whether the use of force is warranted.[309] In response to this, it must be noted that the permanent five will still retain their right to vote against (or for) any resolution as they see fit, as will the other members of the SC, such that the checks and balances of the SC system remain firmly in place. The *jus cogens*/R2P approach therefore does not take away the decision making powers of the SC; it merely suspends the privilege of the veto. Given the traditional justifications for the veto, as reflective of the permanent five's place in the international community[310] and, presumably, the level of resources contributed by the permanent five to the upkeep of international security, it can be convincingly argued that the responsibility to protect should trump these in cases of a *jus cogens* breach such as genocide.

Another way of looking at it is that the permanent five have been given the special privilege of veto powers, and that this privilege in turn places special responsibility on them to relinquish these powers where intervention in the face of genocide is at stake. An insistence on their veto privileges in such circumstances would be completely counter to the obligation to maintain international peace and security. It should also be noted in any event that the permanent five's veto powers are not completely unfettered: the veto does not apply to resolutions on procedural matters,[311] the election of judges for the ICJ, or for the appointment of members of conferences dealing with filling seats in the ICJ.[312] The former indicates practicality as a consideration, whilst the latter demonstrates that the power of veto is subject to the independence of the ICJ bench, a value deemed important enough to justify restriction of the

309 Wheeler, above n 168, at 6.
310 Cassese, above n 200, at 41.
311 Charter, above n 5, art 27(2).
312 ICJ Statute, above n 240, art 10(2).

permanent five's veto powers. Likewise, the weight that should be accorded to the *jus cogens* norm prohibiting genocide and the SC's obligation to fulfil R2P should be deemed to be sufficient justification for relinquishment of the veto.

In adopting the *jus cogens*/R2P approach, a necessary concession is that it ignores the specific text of Article 27(3), which holds that:

> Decisions of the Security Council on all … matters [other than procedural ones] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members …

For this provision to remain accurate where a *jus cogens*/R2P approach is being used, the words "with the exception of cases involving genocide or where there is a prima facie case of genocide occurring" would need to be added to or implied into the existing provision. It is arguable, however, that such an addition can be justified because the Charter is a "living document",[313] which "must continue to generate further development, both in the law and practice of collective security".[314]

By way of analogy, the issue of permanent five abstentions provides a useful example. In the *Namibia* case, the South African government contended that the ICJ was not competent to deliver an opinion on the matter. One of the grounds was that SC Resolution 284 was invalid because two permanent members of the SC had abstained during the vote, meaning that the nine affirmative votes required by Article 27(3) of the Charter were not acquired.[315] The ICJ rejected this argument, holding that the voluntary abstention of a permanent member from a vote does not constitute a bar to the adoption of resolutions by the SC, and that "in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has … to cast a negative vote".[316] Thus, the words "concurring" have effectively been interpreted as "not opposing" such that SC resolutions will only fail for veto purposes where a permanent member casts an affirmative negative vote. This is despite the clear wording of Article 27(3), and is illustrative of the "living document" nature of the Charter, which can be purposefully interpreted to prevent the veto from paralysing the operations of the SC.

313 Former Secretary-General Kofi Annan referred to the Charter as a "living document" in his address to the General Assembly on 20 September 1999:

> "The Charter is a living document, whose high principles still define the aspirations of peoples everywhere for lives of peace, dignity and development. Nothing in the Charter precludes a recognition that there are rights beyond borders.
>
> Indeed, its very letter and spirit are an affirmation of those fundamental human rights. In short, it is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era; an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms."

Kofi Annan, Secretary-General of the United Nations "Secretary-General Address to the United Nations General Assembly" (New York, 20 September 1999) UNIS/SG/2381 (1999).

314 A Abass *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart Publishing, Oxford, 2004) at 210.

315 *Namibia* case, above n 266, at [21].

316 Ibid, at [22].

In the same way, the reading in of a restriction of the veto in *jus cogens*/R2P situations would be a pragmatic and purposive interpretation of the Charter that would ensure that the key UN purpose of maintaining international peace and security is realised.

(f) Recourse to Other Measures Remains a Last Resort

An additional justification for adopting the *jus cogens*/R2P approach is that recourse to other measures such as General Assembly authorisation of force and/or regional and sub-regional action remains a last resort. Such alternatives only become options where the SC has abdicated its duty to preserve international peace and security and is acting in contravention of *jus cogens* norms. The *jus cogens*/R2P approach therefore does not displace the primacy of the SC in such matters.

Indeed, the practical import of according legitimacy and legality to alternatives for authorising force is that it may well galvanise the SC to take a more active role. As the ICISS report has cautioned, SC inaction in conscience-shocking situations can undermine the credibility and stature of the UN,[317] which has a direct impact on the authority of the SC.

There is also room for a Charter-based argument for alternative methods for authorising force in light of SC paralysis. Whilst the SC may have *primary* responsibility for maintaining international peace and security under Article 24, it does not have *exclusive* responsibility. The General Assembly also has a role in this, as is apparent from an examination of Chapter IV of the Charter.[318] While it is true that the language of Article 12 means that the General Assembly must defer to the SC if both want to consider the same issue, the SC must be exercising its functions for this deference to apply.[319] There is therefore leeway in Article 12 for the General Assembly's powers to be explored. The Uniting for Peace Procedure[320] was such an exploration, occurring in the context of potential SC paralysis in the Cold War period. Whilst the SC had managed to successfully authorise military intervention in Korea in 1950,[321] it was obvious that the USSR would have utilised its veto powers to block the SC's decision if it had not been abstaining from the SC in protest at the representation of China in the UN by the Taiwan government.[322] The Uniting for Peace Resolution adopted by the General Assembly was therefore a way for it to tilt the balance in favour of authorisation in the event that the SC found itself restricted from authorising force on account of the Soviet bloc's veto.

317 ICISS report, above n 26, at [6.39]-[6.40].

318 See in particular, arts 10-15 of the Charter.

319 Article 12 (1) states: "While the Security Council is *exercising in respect of any dispute or situation the functions assigned to it in the present Charter*, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." (Emphasis added.)

320 *Uniting for Peace*, above n 216.

321 C Gray *International Law and the Use of Force* (3rd ed, Oxford University Press, Oxford, 2008) at 258-259.

322 Ibid, at 258.

Amongst other things, this Resolution confirmed that the SC's primary responsibility is not an exclusive one in the area of maintaining peace and security, and that under the Charter, the General Assembly has a responsibility in this regard also. The Resolution therefore resolved that:[323]

> [I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary.

Under this procedure, the General Assembly could also convene an emergency session within 24 hours of its being requested.[324]

Although the Uniting for Peace procedure has not been frequently used, it was acted upon during the Korean War when the USSR returned to the SC to use its veto.[325] It has also been considered by the ICJ in the *Certain Expenses* case.[326] In that case, the General Assembly had exercised a use of force resolution through the Uniting for Peace Procedure and Article 12 for military intervention in the Congo, and had then billed each Member State according to the budget provisions of the Charter. General Assembly members who had not voted in favour of the resolution objected to this on the basis that the General Assembly had illegally authorised the action and refused to pay. The question before the ICJ was whether the expenses incurred for the operations in the Congo constituted "expenses of the Organization" within the meaning of Article 17(2) of the Charter.[327]

In its decision, the ICJ reiterated that the SC's responsibility in the area of maintaining peace and security is primary and not exclusive,[328] and that the expenditures were valid, constituting "expenses of the Organization" *inter alia* because the "operations were undertaken to fulfil a prime purpose of the United Nations, that is, to promote and to maintain peaceful settlement of the situation".[329]

It can therefore be seen that the primacy of the SC gives way to the secondary responsibility of the General Assembly where the SC abdicates its responsibilities and the Uniting for Peace procedure becomes necessary. To apply this to the context of this article, where the permanent five purports to use the veto in a *jus cogens*/R2P case or where it refuses to act despite a *jus cogens*/R2P situation, the SC is not in fact exercising its functions under the Charter, and Article 12 deference ceases to apply. This means that the General Assembly would be a legitimate and legal alternative source of authority for

323 *Uniting for Peace*, above n 216, at [1].
324 Ibid.
325 Cassese, above n 200, at 351.
326 *Certain Expenses* case, above n 284.
327 Ibid, at 152.
328 Ibid, at 163.
329 Ibid, at 171-172.

authorising force in keeping with its secondary responsibility to maintain international peace and security under the Charter. Any disquiet regarding primacy issues can be disregarded because resort to the General Assembly as an alternative source of authority would only occur where steps one to three as outlined in Part IV(A)(1) of this article have failed because the SC has abdicated from its responsibility to protect in a case of genocide.

V. Conclusion

This article has proposed a new way of conceptualising the international community's responsibility to protect via the lens of the *jus cogens*/R2P approach. As with any proposals for reform, there will be many challenges ahead. It is beyond the scope of this article to deal with these in depth, but they are worth bearing in mind.

First, it must be acknowledged that the *jus cogens*/R2P approach is really something of a misnomer. What has been advocated is an approach that allows the international community a legal basis for bona fide humanitarian intervention in the *specific* circumstances of genocide where the world is faced with the spectre of the veto and/or SC inaction. Genocide was chosen for a reason. It is arguably the most heinous crime that can be perpetrated on a population. Further, the prohibition against it is unequivocally a *jus cogens* norm. As it stands however, the *jus cogens*/R2P approach is only of practical use where there is genocide or a prima facie case for it.

There are problems with this. One is that genocide itself is notoriously hard to prove, as Darfur demonstrates. To make the *jus cogens*/R2P approach feasible, the definition of genocide will need to be revisited to ensure less room for equivocation.[330] This will require resources and political will to bring about. Another problem is that realising the potential of the nomenclature of the *jus cogens*/R2P approach means that the uncertainties of *jus cogens* need to be defined, and this is a chore that the international community has put off since the Vienna Convention. Yet, confining the *jus cogens*/R2P approach to cases of genocide or a prima facie case of its occurrence limits its utility for populations in need of protection outside the genocide context. There is also no reason to restrict the approach to genocide so long as the *jus cogens* threshold is met. The question of hierarchy between conflicting peremptory norms has to be addressed as well in order for the *jus cogens*/R2P approach to work.

Most importantly, the permanent five will need to be convinced that they must restrict their veto powers when a *jus cogens*/R2P situation warrants such restraint. The international community also needs to adhere to the proposed approach to ensure that it does not remain mere rhetoric. The efficacy of the

330 This will no doubt involve reform of the CPPCG to strengthen that legal framework. Addressing this and the areas where a *jus cogens*/R2P approach could be strengthened can be done in tandem as there is no reason to view the CPPCG framework and the *jus cogens*/R2P approach as being mutually exclusive.

jus cogens/R2P approach depends on the self regulation of Member States and the willingness of the SC to respect *jus cogens* norms and their R2P obligations. Without this willingness, any new proposals will merely be given lip-service in favour of maintaining national interests. It should also be borne in mind that R2P has three limbs, and that equal if not greater weight should be accorded to the other limbs of preventing and rebuilding.

Clearly, there is still scope to tinker with the *jus cogens*/R2P approach. However, these potential problems are not insurmountable and the reframing of the debate proposed by this article is a significant step forward for R2P. The *jus cogens*/R2P approach called for does not merely accord *legitimacy* to a morally justifiable intervention or add a factor in mitigation. It accords *legal* weight to any such bona fide intervention where the criteria for taking the approach have been met. Alternative sources of authorisation for force such as the General Assembly will no longer be illegal because they will be a legal last resort in situations where the SC is in breach of *jus cogens* and has abdicated from its primary responsibility to protect such that deference to its primacy in maintaining international peace and security no longer applies. There is definitely something positive to be said for action that is both legitimate and legal. When utilised properly, the *jus cogens*/R2P approach has the potential to stop future Rwandas. It can also ensure that the international community abides by its responsibility to protect.