RESPONSIBILITY TO PROTECT (R2P) COMES OF AGE? A SCEPTIC’S VIEW

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I. INTRODUCTION AND BACKGROUND

As a young attorney in the Office of the Legal Adviser of the United States (U.S.) Department of State during the 1960s, I had the privilege and the pleasure of working with Don McHenry, then a young foreign service reserve officer and later U.S. Ambassador and Permanent Representative to the United Nations (U.N.). His work dealt with legal issues arising from the actions of a white minority government in Southern Rhodesia—about six percent of the population—that exhibited little willingness to share power with the black majority and that imposed a number of restraints on their economic, social, educational, and legal rights. In particular, on November 11, 1965, Southern Rhodesia issued a Unilateral Declaration of Independence (UDI) from the United Kingdom, which had residual administrative responsibility over Southern Rhodesia, which was classified under the U.N. Charter as a non-self-governing territory rather than a British colony.1 The United Nations Security Council, after taking a variety of preliminary steps, ultimately determined that the situation in Southern Rhodesia had become a threat to the peace and authorized the United Kingdom to use force, if necessary, to prevent oil from reaching Rhodesia.2 The Council next decided to adopt limited economic sanctions under

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1. For detailed discussion, see JOHN F. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE 139-42 (1982).

Article 41 of the U.N. Charter, and then, in its Resolution 253 of May 29, 1968, the Council adopted more detailed and specific sanctions.

Criticism of the Security Council's resolutions was intense. No less a personage than Dean Acheson, Secretary of State under President Harry Truman and head of a leading Washington, D.C. law firm, focused his primary attack on the Council's finding that the situation in Southern Rhodesia constituted a threat to international peace and security. In his view, actions taken by the Southern Rhodesian regime entirely within its own territory could not constitute a threat to international peace and security. Rather, the threat to international peace and security, if any, came from black African states that threatened to intervene militarily. Hence, Acheson argued, if any sanctions were called for, they should be directed against these black African states and not against Southern Rhodesia. He also argued strenuously that the Security Council's action constituted a clear violation of Article 2(7) of the U.N. Charter, which prohibits the United Nations from intervening in "matters which are essentially within the domestic jurisdiction of any state. . . ." In response, defenders of the Council's sanctions, including the U.S. Government, contended that, under Chapter VII of the U.N. Charter, a threat to the peace could consist of a situation, as well as "the threat or use of force against the territorial integrity or political independence of any state" prohibited by Article 2(4) of the U.N. Charter. The situation in Southern Rhodesia, the argument continued, threatened the peace in two ways. First, the threat of internal violence in Southern Rhodesia was so great that any outbreak of violence

3. U.N. Charter art. 41 provides that:
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.


6. U.N. Charter art. 2, para. 7, provides:
Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.

7. Id. ¶ 4; Myres S. McDougal & W. Michael Reisman, Rhodesia and the United Nations: The Lawfulness of International Concern, 62 AM. J. INT'L L. 1, 1-19 (1968) (discussing this point and several other arguments in support of the sanctions).
was likely to be of such intensity and magnitude that it would spill over to the territory of adjoining states. Second, the “racist” actions of the white minority had so inflamed passions in neighboring black African states that indirect support of guerrillas and even direct military intervention was likely. It was also noted that the UDI represented an illegal rebellion against British authority and that nearly all member states of the United Nations regarded the regime as illegal and in flagrant violation of fundamental international human rights norms. Finally, the defenders of the sanctions pointed out that Southern Rhodesia was not a state but a territory, and thus Article 2(7) was inapplicable by its terms.

It is worth noting that, in sharp contrast to the cases of Libya and the Ivory Coast, the use of armed force against Southern Rhodesia was never contemplated by the Security Council. It is also worth noting, however, that although the proposition is debatable, it appears that on the whole, economic sanctions had relatively little effect on Southern Rhodesia and that guerrilla activity played a much more substantial role in inducing the Southern Rhodesian regime to agree ultimately to a peaceful transition of power—despite the claim of Ian Smith, the leader of the Southern Rhodesian regime, that “not in a thousand years would blacks govern Rhodesia.”

Despicable as apartheid was, the Security Council, consistently with its actions regarding Southern Rhodesia, never seriously contemplated authorizing the use of armed force. Indeed, western powers, including the United States, resisted efforts in the Council to impose a Rhodesia-style embargo against South Africa, only agreeing in 1977 to the Council imposing a mandatory embargo on arm sales to South Africa.

During the cold war years, there were a number of horrific human rights atrocities that exceeded in significant measure those committed under apartheid. But as noted by Gareth Evans, in his superb study, “[t]he dynamics of the cold war constituted a third factor [standing in the way of

8. The United States Government especially emphasized Southern Rhodesia’s illegal rebellion against British authority in order to distinguish the situation in Southern Rhodesia from that in South Africa, whose apartheid policy was an even more severe example of discrimination on the basis of race than were Southern Rhodesia’s racially based policies. At the time of the UDI the United States Government was unwilling to apply mandatory economic sanctions under Chapter VII against South Africa.

9. See Murphy, supra note 1, at 142 (stating that on February 27, 1980, an election supervised by the British government with observers from the Commonwealth countries was held and resulted in a landslide victory for the party of Robert Mugabe, who along with Joshua Nkomo, had been the leader of the Patriotic Front, the guerrilla movement. Six months later, on August 25, Rhodesia, newly named Zimbabwe, became a member of the United Nations).

effective action to prevent or bring to an end such atrocities], dominating
the U.N. system almost from the start and hamstringing the organization
when it came to dealing with mass atrocities.”11 Both the United States and
the Soviet Union focused their attention on ensuring that their respective
alliance blocs were functioning and resisted placing any sanctions on
misbehaving partners.12 As a result, “although in the immediate aftermath
of the Holocaust the world had started to institutionalize its collective
conscience, during the cold war decades that followed cynicism trumped
conscience every time the major powers faced a serious choice.”13

The end of the cold war brought its own challenges. In particular, the
military interventions in the 1990s in Somalia, Rwanda, Bosnia, and
Kosovo posed major problems and together, as Evans suggested, threw
“into stark relief every one of the conceptual, operational, and political will
issues with which this book wrestles.”14

For its part, Somalia broke out into clan based civil war when
President Siad Barre was overthrown in January 1991 after losing, with the
end of the cold war, the protection he had enjoyed first from the Soviet
Union and then from the United States.15 Initially, a small United Nations’
peacekeeping force was dispatched to Somalia in April 1992 to support
relief operations. But six months later, the U.N. Secretary-General was
telling the Security Council that 1.5 million Somalis were immediately at
risk of death and many more threatened by starvation and disease and that a
fully empowered peace enforcement operation was required. The Council
responded promptly and effectively to the Secretary-General’s request, and

12. Id. at 21–22 (noting in this connection the “he-may-be-a-son-of-a-bitch-but -he’s-our-son-
of-a-bitch” syndrome).
13. Id. at 22. Among the situations where cynicism trumped conscience were the following
noted by Evans:
[The Indonesian massacres of up to 500,000 or more Communist Party members,
suspected sympathizers, and others caught up in the mayhem from 1965 to 1966;
the hunting down and killing of more than 100,000 Hutu in Burundi between
April and September 1972; tens of thousands of forced “disappearances” of
political dissenters during the “Dirty War” in Argentina of 1976-83 and Pinochet’s
Operation Condor during the mid-1970s; the massacre in Guatemala from 1981 to
1983 of some 150,000 Mayans and the destruction of over 400 villages in
government counterinsurgency operations; the series of mass murders perpetrated
in Zimbabwe’s Matabeleland from 1982 to 1987 (sic), believed to have killed
over 10,000 and as many as 30,000; and the poison gas attack by Saddam
Hussein’s Iraqi air force on the Kurdish town of Halabja in March 1988, in which
some 5,000 perished.
14. Id. at 26.
15. Id. at 27 (giving a summary of the situation in Somalia).
by the end of the year, 28,000 U.S.-led troops were on the ground. The Non-Aligned Movement fully supported the creation of this force and, surprisingly, even China cast its first affirmative vote for an enforcement resolution. The mission was basically successful in that assistance in one form or another did reach the entire population of five million, and less than 100,000 of those threatened actually died. Tragically, however, this successful endeavor was completely undermined by subsequent events. As summarized by Evans, these included:

[T]he misconceived attempt to wage war against militia leaders, followed by the “Black Hawk Down” debacle in Mogadishu in October 1993, in which 18 Americans died. Subsequently, U.S. troops were pulled out, and the U.N. mission was finally withdrawn in April 1995, with most of its objectives unachieved and a nasty taste in the mouths of a number of troop contributors about their humanitarian intervention experience.

The so-called “Mogadishu effect” caused the major powers, including especially the United States, to be reluctant to respond effectively to events unfolding in Rwanda in 1994.

Shortly after a plane carrying Rwandan president Juvenal Habyarimana was shot down on April 6, reports were received in United Nations’ headquarters and in Washington, D.C. about massive ethnic-based violence in Rwanda and the desperate need to mount a fully employed military enforcement operation to stop it. But no such enforcement operation was created. To the contrary, “Belgium withdrew its contingent entirely, and the Security Council actually drew down troops already on the ground.”

As a result, “some 800,000 Tutsis and moderate Hutus were slaughtered in less than four months, an unequivocal case of genocide in

16. EVANS, supra note 11, at 27.
17. Id.
18. Id.
19. Id. at 27–28 (giving a summary of the situation in Rwanda).
20. Id.
21. EVANS, supra note 11, at 28.

Canadian general Romeo Dallaire, who commanded the light peacekeeping mission established a year earlier to monitor recently signed peace accords, made heroic efforts to save those he could and argued strenuously that just 5,000 well-armed and trained troops—together with measures such as the external jamming of hate-radio frequencies—could stop hundreds of thousands of murders. But he was ignored. . . .
any lawyer's language and by far the worst since the Holocaust."\textsuperscript{22} President Bill Clinton later apologized for the United States' inaction.\textsuperscript{23}

Difficulties associated with the dissolution of the former Yugoslavia in 1991 have posed challenges to the international community that continue to this day. As I have previously noted in a different forum:

\[...\] In the wake of "the shock waves of a collapsed Soviet Union that reverberated throughout Central and Eastern Europe," on June 25, 1991, Slovenia and Croatia declared their independence. On June 27, armed forces controlled by Serbia attacked the provisional Slovenia militia, and by July had initiated hostilities in Croatia. The response of the Security Council, on September 25, was the unanimous adoption of a resolution that expressed support for the collective efforts of the European Community and the Conference on Security and Cooperation in Europe to resolve the conflict. By the same resolution, the Council decided under Chapter VII of the Charter to impose an embargo on all deliveries of weapons and military equipment. There was no suggestion in the resolution that an international act of aggression had taken place. By early 1992, however, most of the former Yugoslavian republics had attained international recognition, thus turning what had begun as an internal conflict into an international conflict.

In January 1992, special U.N. envoys had managed to secure a cease-fire in Croatia. The result, however, was to shift the locus of the fighting to the republic of Bosnia-Herzegovina, which contained a majority of Muslims in its population, but which also contained substantial Serbian and Croatian minorities. In 1992, those minorities were supplied with extensive military assistance for use against the Bosnian army. Serbia in particular was actively involved in providing the Bosnian Serbs with significant firepower. Perversely, the arms embargo imposed against the former Yugoslavia, as a whole, greatly undermined Bosnia's ability to obtain arms to defend itself. In April 1992, Serb forces launched an attack against Bosnia-Herzegovina from Serbia and commenced the "ethnic cleansing" and other atrocities that ultimately caused the Security Council to create the International Tribunal for the former Yugoslavia to prosecute the people responsible.

\textsuperscript{22} \textit{Id.}

In February 1992, the Security Council had authorized the creation of a U.N. Protection Force (UNPROFOR). Initially, it was envisioned that this force would be interposed, in classic peacekeeping fashion, between the Serbian and Croatian forces that had been fighting in Croatia, as one step to an overall settlement. UNPROFOR's mandate was later extended to Bosnia-Herzegovina. On December 11, 1992, the Security Council approved a deployment of 700 U.N. personnel to Macedonia, another former Yugoslavian republic—the first time U.N. peacekeepers had been deployed as an exercise of "preventive diplomacy."

In March 1993, the United States, in coordination with the United Nations, began supplying food and medicine by air to Muslim enclaves in Bosnia-Herzegovina that could not be reached by land. In April and May 1993, the Security Council established six of these enclaves as "safe areas" for Bosnian civilians. UNPROFOR was given a mandate to use force "to enable it to deter attacks against those areas, to occupy certain key points on the ground to this end, and to reply to bombardments against the safe areas." This mandate envisaged a use of force that went beyond that traditionally utilized by UN peacekeeping forces. To carry out this mandate, the Secretary-General estimated that UNPROFOR would need an additional 34,000 troops at a cost of $20 million for the first six months and $26 million per month thereafter. But no such additional troops were forthcoming. As a result, UNPROFOR was simply incapable of protecting the so-called safe areas in Bosnia. This was most tragically demonstrated on July 11, 1995, when Bosnian Serb forces overran the U.N.-designated safe area of Srebrenica, captured 430 Dutch members of UNPROFOR, and massacred Muslim civilians in such numbers that it was "said to be the worst atrocity in Europe since World War II."

It was only after the (NATO) finally decided to bomb heavily [. . .] Serb positions, coupled with the use of Croatian ground troops, that it became possible to enforce a peaceful settlement. The peacekeeping force was established to implement the peace agreement for Bosnia and Herzegovina, which was negotiated in Dayton, Ohio and signed on December 14, 1995 in Paris. The force operates under NATO auspices. By resolution, the Security Council authorized the NATO peacekeeping force to replace United Nations' peacekeepers in Bosnia and to take "such enforcement action . . . as may be necessary to ensure implementation" of the peace agreements. This new peacekeeping group, or Implementation Force IFOR, unlike the
hapless UNPROFOR, had the wherewithal (in the form of, e.g., 60,000 troops) to serve as an enforcement force.\textsuperscript{24}

NATO soon was faced with another challenge in the former Yugoslavia. In 1998, Serbian president Slobodan Milosevic began a campaign using police units to crush ethnic Albanian separatist sentiment in the Serbian province of Kosovo once and for all.\textsuperscript{25} There were many months of allegations and counter-allegations about Serb and Kosovo Liberation Army behavior, but Russia and China would not accept any Security Council resolution authorizing the use of force. After efforts to solve the problem through diplomatic means, the United States and its NATO allies decided to act on their own and commenced a campaign of air strikes against Serbia. As nicely noted by Evans, "[t]he seventy-eight days of destructive bombing produced a flood of refugees and internal displacements, and a surge of further killings—some thousands in all—by the Serbs, but a settlement was reached only when NATO finally threatened the insertion of ground troops."\textsuperscript{26}

II. EMERGENCE OF THE RESPONSIBILITY TO PROTECT

"The debate over the legality and morality of U.S. and NATO actions with respect to Kosovo has been fierce. Moreover, the writings on this subject have been legion."\textsuperscript{27} This is not the time nor the place to review these writings.\textsuperscript{28} For present purposes, it suffices that one of the issues raised by NATO actions with respect to Kosovo, and indeed by developments with respect to Somalia, Rwanda, and Bosnia, is the validity, or lack thereof, of the doctrine of humanitarian intervention. As he so often does with various issues, Evans highlights this issue in sharp perspective:

The 1990s was the decade in which every one of the central questions surrounding humanitarian intervention was, for the first time, exposed with real clarity. But it ended with absolutely no consensus on any of the answers. Every general discussion in the General Assembly and other international forums, and nearly every difficult individual case that arose, became a political


\textsuperscript{25} EVANS, supra note 11, at 29 (giving a summary of the situation in Kosovo).

\textsuperscript{26} Id.

\textsuperscript{27} See JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 154 (2004).

\textsuperscript{28} See id. at 154–61 (providing my own highly negative view on United States and NATO actions with respect to Kosovo).
battlefield with two warring armies. On the one side were those, mostly from the global North, who, in situations of catastrophic human rights violations, could not see beyond humanitarian intervention, “the right to intervene” with military force. On the other side were those, mostly from the global South, who were often prepared to concede that grave human rights violations were occurring but were resolutely determined to maintain the continued resonance, and indeed primacy, of the traditional nonintervention concept of national sovereignty. Battle lines were drawn, trenches were dug, and verbal missiles flew. The debate was intense and very bitter, and the twentieth century ended with it utterly unresolved in the U.N. or anywhere else.29

By way to transition to the concept of the R2P, Evans quotes a statement by Kofi Annan, in his 2000 Millennium Report of the Secretary-General of the United Nations: “If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”30 Annan’s challenge stimulated the Canadian government to take action.31 On the initiative of Foreign Minister Lloyd Axworthy, it appointed an international commission titled The International Commission on Intervention and State Sovereignty (ICISS), which began its work in September 2000 and published its report just over a year later, in December 2001.32 The Commission was co-chaired by Evans and the Algerian diplomat Mohamed Sahnoun.33

It is important to note that the R2P, as developed in great detail in the ICISS report, is different from the doctrine of humanitarian intervention. As José Alvarez has explained:

The Responsibility to protect concept was borne out of frustration with the international community’s repeated failure to intervene in cases of on-going mass atrocity, in particular in Rwanda and Kosovo. The concept sought to deflect attention from the controverted “right” of some states to intervene, to the

29. See Evans, supra note 11, at 30.
30. Id. at 31.
31. Id. at 38.
33. ICISS, supra note 32, at III.
Recognizing the pivotal role of the ICISS report, Alvarez further explains:

As that Commission conceived it, the virtue of R2P was that it would entice states to engage in humanitarian relief by shifting the emphasis from the politically unattractive right of state interveners to the less threatening idea of “responsibility.” R2P put the focus on the peoples at grave risk of harm rather than on the rights of states. It also stressed that responsibility was shared—as between the primary duty of states to protect their own populations and the secondary duty of the wider community.

According to the ICISS report, the R2P “embraces three specific responsibilities.” These include:

A) The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.

B) The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.

C) The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction, and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

The ICISS report emphasizes that “[p]revention is the single most important dimension of the responsibility to protect . . . “ and “[t]he exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.” Evans gives examples of means


35. Id.

36. ICISS, supra note 32, at XI.

37. Id.

38. Id.
Murphy
to carry out the responsibility to prevent: “building state capacity, remedying grievances, and ensuring the rule of law.”

Most of the scholarly literature on R2P has focused on the dimension of responsibility to protect, which involves military intervention in order to stop the commission of atrocities. In contrast, there has been relatively little consideration in the academy of the responsibility to prevent element of the R2P. At the same time, it is worth noting that there have been encouraging recent developments in sub-Saharan Africa that give hope in many African countries that violence and resulting atrocities will be less likely to break out. Such developments include, among others, positive economic growth rates—in per capita terms—since the late 1990s, a majority of African countries holding multi-party elections for the first time, an unprecedented improvement in the extent of civic and media freedom, and significant improvements in education.

But the focus of the panel on “R2P Comes of Age?,” at International Law Weekend on October 21, 2011, was not on the responsibility to prevent. Rather, the panel addressed the issue of whether R2P had come of age as result of the use of armed force authorized by the U.N. Security Council to bring to an end atrocities in Libya and in the Ivory Coast. My answer on the panel and in this essay was and is an emphatic “No!”

To begin a consideration of this issue, one should first take note of R2P as it was adopted by the U.N. General Assembly in its 2005 World Summit Outcome document. R2P appears in paragraphs 138 and 139 of the Outcome document, two relatively short paragraphs set forth in full below. Heads of state and government attending the 60th session of the U.N. General Assembly14-6 September 2005 agreed as follows:

Responsibility To Protect Populations From Genocide, War Crimes, Ethnic Cleansing, And Crimes Against Humanity
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

39. See EVANS, supra note 11, at 43.
40. It should be noted that Kish Vinayagamoorthy, who is serving as a Visiting Assistant Professor at the Villanova University School of Law, is working on a paper that seeks to fill this gap, with particular emphasis on the situation in Asia.
prevention of such crimes, including their incitement, through appropriate and necessary means. We accept the 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.

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 to 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 are manifestly failing 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 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.\footnote{43}

The World Summit Outcome document was adopted unanimously by the U.N. General Assembly, but the strength of support for R2P was not as substantial as this vote would seem to indicate. Evans reports that "a fierce rearguard action was fought almost to the last by a small group of developing countries, joined by Russia, who basically refused to concede any kind of limitation on the full and untrammeled exercise of state sovereignty, however irresponsible that exercise might be."\footnote{44} Evans further suggests that U.S. and British support for R2P "was not particularly helpful in allaying the familiar sovereignty concerns of the South, against the background of the deeply unpopular coalition invasion of Iraq in 2003."\footnote{45}

\footnote{43}{G.A. Res. 60/1, \textit{supra} note 42, \textit{pp} 138–39.}
\footnote{44}{EVANS, \textit{supra} note 11, at 49.}
\footnote{45}{\textit{Id.} at 50.}
For his part, Alvarez refers to the "strange bedfellows," namely, the controversial John Bolton, the U.S. Permanent Representative to the United Nations and the Non-Aligned Movement that endorsed the idea of R2P. He also suggests that:

[T]here must be something wrong as well as right with an idea that can be endorsed by such strange bedfellows, and there is. R2P's normative "legs" result from its not always consistent, various iterations as well as from the lack of clarity as to whether it is a legal or merely political concept. It means too many things to too many people.

Perhaps the most significant issue arising from the various iterations of R2P is whether, in the absence of Security Council authorization, individual states may invoke the doctrine of humanitarian intervention to protect populations in other states from the enumerated crimes. The report of the High-level Panel on Threats, Challenges and Change appears, although it is not absolutely clear, to require Security Council authorization for the use of armed force to protect persons from the enumerated crimes. There is little doubt that the International Commission on Intervention and State

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46. Alvarez, supra note 34, at 49.
48. Alvarez, supra note 34, at 49; See also Mehrdad Payandeh, With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking, 35 Yale J. Int’l L. 469 (2010) for an excellent and extensive Student Note that concludes that the responsibility to protect is not a legal concept but rather a political concept that nonetheless may have a significant impact on international legal processes. In the conclusion to his Note Payandeh states:

From a legal perspective, the normative content of the responsibility is... evolutionary rather than revolutionary. The responsibility to protect is construed primarily as a nonlegal concept. It is an attempt to establish a more concrete set of criteria and procedures to determine when the responsibility of the international community to intervene is triggered. Responsibility in this sense cannot be equated with a legal obligation or duty, but has to be understood as a political or moral responsibility. This assessment is not meant to diminish the significance of the concept. Political and moral implications may have a much greater impact on the conduct of international actors than legal norms. The responsibility to protect may encourage governments to act in the face of blatant violations of human rights.

Id. at 515.
49. See Report of the High-Level Panel, supra note 47; See also Stahn, supra note 42.
Sovereignty viewed the Security Council "as the only legal source of authority (self-defense aside) for the use of force..."\(^{50}\)

It is unclear, however, whether the World Summit Outcome document requires Security Council authorization for the use of armed force under R2P. Paragraph 79 of the Outcome document states "that the relevant provisions of the [U.N.] Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security."\(^{51}\) Interpreting this language, Frederic L. Kirgis has suggested that the:

[L]eaders appear to be saying that no Charter amendments are needed in order to enable the U.N. to deal with threats to the peace . . . that were not contemplated when the Charter was drawn up. Possibly, but not clearly, they were also saying that apart from uses of armed force expressly recognized in the Charter (Security Council authorization under Chapter VII or self-defense in case of an armed attack), coercive action to deal with a threat to the peace could not be justified under the Charter.\(^{52}\)

Similarly, elsewhere in his American Society of International Law (ASIL) Insight, Kirgis quotes paragraph 139 of the Outcome document, where the world leaders stated that they:

[A]re prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the U.N. Charter, including Chapter VII, on case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their 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.\(^{53}\)

He then notes that "[t]he legitimacy of humanitarian intervention without Security Council approval is controversial. Whether the world

\(^{50}\) EVANS, supra note 11, at 64.

\(^{51}\) G.A. Res. 60/1, supra note 42, \(138–39.\)


\(^{53}\) G.A. Res. 60/1, supra note 42, \(138–39.\)
leaders intended to address it in Paragraph 139 (or in Paragraph 79, discussed above) is unclear.\textsuperscript{54}

At the time of this writing, the issue addressed by Kirgis has not come up in practice, although the deteriorating situation in Syria may bring it to the fore.\textsuperscript{55} As we shall see below, in the cases of both Libya and the Ivory Coast, the Security Council authorized the use of force, although the extent of this authorization, especially in the case of Libya, was an issue.

\textbf{A. R2P, Libya, and the Ivory Coast}

Although it is by no means the first example of a revolution sparked by such social media as Facebook and texting by cell phones,\textsuperscript{56} the eruption of demonstrations and revolutionary fervor in early 2011 in the Middle East set off by a street vendor in Tunisia setting himself on fire in protest of harassment by Tunisian police is surely the most spectacular.\textsuperscript{57} In this so-called Arab Spring, text messages about and pictures of the street vendor's self-immolation spread rapidly throughout the Middle East and were part of several developments that led to the early removal of the leaders of Egypt and Tunisia, the outbreak of armed conflict in Libya, Yemen, and Syria, and demonstrations in Bahrain, Jordan, and elsewhere.\textsuperscript{58} They also led to the Security Council taking action with respect to Libya and the Ivory Coast.

\textsuperscript{54} Kirgis, supra note 52, at 4.

\textsuperscript{55} See, e.g., Nada Bakri, \textit{Arab League Warns Syria to Admit Foreign Monitors or Risk Sanctions}, \textit{N.Y. Times}, Nov. 25, 2011, at A10. In this article, the N.Y. Times reports that the Arab League called on Syria to agree by November 25, 2011 to admit a mission of 500 civilian and military observers to monitor the human rights situation and oversee efforts to carry out a peace plan that Syria agreed to on November 2 or face economic sanctions. Syrian state television reportedly stated that the government would reject the demands as an infringement on its sovereignty. In contrast to their stance on Libya, the Arab League has so far opposed any military intervention in Syria.

\textsuperscript{56} Clay Shirky, \textit{The Political Power of Social Media: Technology, the Public Sphere, and Political Change}, \textit{FOREIGN AFFAIRS}, (Jan./Feb. 2011), available at http://www.gpia.info/files/u1392/Shirky_Political_Poewr_of_Social_Media.pdf (last visited Feb. 17, 2012). According to Clay Shirky, the first time that social media had helped to force out a national leader was when Philippine President Joseph Estrada was removed from office in 2001. In response to a vote by the Philippine Congress during the impeachment trial of Estrada to set aside evidence against him, within two hours after the vote, thousands of Filipinos took to the streets in protest. Encouraged in part by close to seven million text messages during the week, the crowd grew in several days to over a million people, choking traffic in downtown Manila. The Philippine Congress reversed its vote and Estrada was gone.


\textsuperscript{58} See Shirky, supra note 56.
that constituted the first exercises of the R2P that involved the use of armed force. 59

B. Libya and R2P

Reacting quickly to the outbreak of armed conflict in Libya and reports of the use of force by the Libyan government against civilians, on February 26, 2011, the Security Council unanimously adopted Resolution 1970. 60 In its preamble, Resolution 1970 expressed grave concern at the situation in Libya, condemned the violence and use of force against civilians, considered that these attacks might amount to crimes against humanity, and recalled the Libyan authorities' responsibility to protect their population. 61 Then, acting under Chapter VII of the U.N. Charter, and taking measures under Article 41 of the Charter, 62 the Council, among other things, expressed the hope that those responsible for these crimes would be brought before the International Criminal Court (ICC) and referred to the ICC's Prosecutor. 63 It imposed sanctions against Colonel Al Gaddafi, members of his family and his accomplices. 64 Lastly, it imposed an embargo on arms destined for Libya. 65

It is perhaps surprising that the Security Council unanimously decided to refer the situation in Libya to the Prosecutor of the International Criminal Court, in light of the brouhaha that broke out in reaction to the Court's issuance of arrest warrants against Omar Hassan Al-Bashir, the president of the Sudan. 66 Indeed, Resolution 1970 is a bit schizophrenic on the referral because in its preamble the resolution recalls, "article 16 of the Rome Statute [the charter of the ICC] under which no investigation or prosecution

60. Id.
61. Id.
62. U.N. Charter art. 41 provides:
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.
64. Id.
65. Id.
may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect.\textsuperscript{67} There was an effort after the ICC issued its arrest warrants against Al-Bashir to get the Security Council to take action under Article 16 of the Rome Statute, but the threat of a U.S. and British veto blocked the adoption of any such action.\textsuperscript{68} Despite the ICC's difficulties with respect to the arrest warrants it issued against Al-Bashir, on June 27, 2011, the ICC's Pre-Trial Chamber I issued three arrest warrants for crimes against humanity—murder and persecution—allegedly committed in Libya, from February 15, 2011 until at least February 28, 2011, against Muammar Gaddafi, Seif al-Slam Gaddafi, his son, and Abdullah Senussi, the chief of military intelligence and Muammar Gaddafi's brother-in-law.\textsuperscript{69}

The sanctions against the Libyan government and the threat of prosecution by the ICC failed to halt its attacks on its population and led the Security Council to adopt, on March 17, 2011, Resolution 1973.\textsuperscript{70} In that resolution, the Council authorized the use of armed force against the Libyan government and thereby raised an issue regarding the operational viability of the responsibility to protect.\textsuperscript{71}

Before considering Resolution 1973 in more detail, it is important to note that prior to consideration of the resolution in draft form, the League of Arab States called on the Security Council in a resolution of its own on March 12, 2011 to establish a no-fly zone.\textsuperscript{72} It is also important to note that despite this unanimous request by the League of Arab States, Resolution 1973 was adopted by the narrowest of margins, with five members of the Council—Brazil, China, India, and the Russian Federation—abstaining in

\begin{footnotesize}
\begin{itemize}
  \item[68.] Murphy, supra note 66, at 1137.
  \item[69.] See Brue Zagaris, ICC Issues Three Arrest Warrants for Gaddafi and Two Others, 27 INT'L ENFORCEMENT L. REP. 888 (Sept. 2011).
  \item[71.] Id. ¶ 4.
\end{itemize}
\end{footnotesize}
the vote. In his statement before the vote, Alain Juppé, the French Minister of Foreign Affairs, highlighted the most important provisions of the then draft resolution:

The draft resolution provides the Council with the means to protect the civilian populations in Libya, first by establishing a no-fly zone and by authorizing the members of the Arab League and those Member States [of the United Nations] that so wish to take the measures necessary to implement its provisions. Furthermore, it authorized these same States to take all measures necessary, over and above the no-fly zone, to protect civilians and territories, including Benghazi, which are under the threat of attack by Colonel Al-Qadhafi’s forces. Lastly, it strengthens the sanctions that have been adopted against the regime, including implementing the arms embargo, freezing the assets of authorities in Tripoli and prohibiting flights by Libyan airlines.

All five of the member states of the Security Council who abstained in the vote on Resolution 1973 made statements in explanation of their abstentions. All of their statements indicated that the abstainers had problems with Resolution 1973’s authorization of the use of armed force to implement the no-fly zone and especially, perhaps, with the resolution’s authorization of “all measures necessary, over and above the no-fly zone, to protect civilians....”

The representative of the Russian Federation made an especially strong statement against the use of force. Favoring a peaceful settlement of the situation in Libya, the Russian representative noted that “the passion of some Council members for methods involving force prevailed. This is most unfortunate and regrettable. Responsibility for the inevitable humanitarian consequences of the excessive use of outside force in Libya will fall fair and square on the shoulders of those who might undertake such action.”

There was no peaceful settlement of the situation in Libya. On the contrary, it was a fight to the death, and with the death of Colonel Gaddafi

73. See id. at 3. The ten votes in favor of the resolution were one more than the nine votes, including the concurring votes of all the permanent members, required by Article 27 (3) of the U.N. Charter. Member states voting in favor were Bosnia and Herzegovina, Colombia, France, Gabon, Lebanon, Nigeria, Portugal, South Africa, United Kingdom, and the United States.

74. See id. at 3 (Statement of Alain Juppé).

75. See id. at 4–10.

76. See id.

on October 20, 2011, the fighting finally came to an end. The reports of how he was killed, however, indicate that he was beaten, tortured and then shot in the head and in both legs, after he was found hiding in a drain outside the Libyan city of Sirte, his home town, where he and others had taken shelter after their convoy was hit by a NATO airstrike as it attempted to escape. Gaddafi had the status of a prisoner of war when he was captured. His murder therefore constituted a war crime, but there is no evidence that those who committed this crime will ever be brought to justice. Moreover, the circumstances of Gaddafi’s death illustrate “the challenges that lie ahead: the balancing of vengeance against justice, impatience for jobs against the slow pace of economic recovery, fidelity to Islam against tolerance for minorities, and the need for stability against the drive to tear down of (sic) the pillars of old governments.”

It is impossible to predict at this point future developments in Libya, much less the fate of the so-called “Arab Spring,” but it is worthwhile to ponder how well or poorly the international community’s actions with respect to Libya have fared as an exercise of the responsibility to protect. In my view, not well. First, it is debatable whether the primary motivation behind the Security Council’s adoption of Resolution 1973 was to protect the citizens of Libya. As noted above, the five states who abstained on the resolution, especially China and the Russian Federation, both permanent members of the Security Council, were extremely uncomfortable with Resolution 1973’s authorization of a no-fly zone and of measures going beyond a no-fly zone if they were necessary to protect civilians and civilian-populated areas under threat of attack. It seems highly likely that China and the Russian Federation refrained from blocking the resolution only because the Arab League had unanimously called for a no-fly zone and neither state wished to offend the Arab states because of various important interests they have in the Middle East. At the same time, it should be noted that Resolution 1973 explicitly excludes “a foreign occupation force of any form on any part of Libyan territory,” and all agreed that no foreign ground troops would be put into Libya. The result was that NATO

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79. Id.


82. President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011).
engaged in seven months of bombing in heavily urban areas, and one may doubt that the effort to protect the civilians of Libya from attacks by Gaddafi's forces was successful. Indeed, there were numerous reports that NATO bombing itself resulted in excessive civilian casualties, and since NATO did not have any troops on the ground in Libya, there was no reliable method to verify the civilian casualty allegations. Noteworthy also is that nothing was done to protect civilians from rebel attacks, and there were reports of rebel forces committing numerous atrocities against civilians in areas they had taken that were previously under the control of Gaddafi forces.

Developments after the Security Council's action with respect to Libya regarding the situation in Syria may also cause one to question whether R2P has "come of age." There, in March 2011, an uprising in Syria against the government of President Bashar al-Assad began and resulted in more than 2700 people, as of early October, being killed by Assad's armed forces. In response, France, Germany, Portugal, and the United Kingdom introduced a draft resolution, which would have condemned Syria's crackdown of the uprising. The draft resolution received nine votes in favor, two votes against—China and the Russian Federation—and four abstentions—Brazil, India, Lebanon, and South Africa. The resolution therefore failed to be adopted because of the double veto by China and the Russian Federation. The double veto took place even though the resolution had been modified to eliminate "all but the most vague reference to sanctions as a future possibility."


88. Id. at 2. The states voting in favor were Bosnia and Herzegovina, Colombia, France, Gabon, Germany, Nigeria, Portugal, United Kingdom, and the United States.

89. See Neil MacFarquhar, With Rare Double U.N. Veto on Syria, Russia and China Try to Shield Friend Syria, N.Y. TIMES, Oct. 6, 2011, at A6.
In her statement following the vote, Susan Rice, the U.S. Permanent Representative to the United Nations, stated that the United States “is outraged that this Council has utterly failed to address an urgent moral challenge and a growing threat to regional peace and security. . . . Today two members have vetoed a vastly watered-down text that does not even mention sanctions.” For his part the representative of the Russian Federation was equally emphatic in his statement:

Of vital importance is the fact that at the heart of the Russian and Chinese draft was the logic of respect for the national sovereignty and territorial integrity of Syria as well as the principle of non-intervention, including military, in its affairs; the principle of the unity of the Syrian people; refraining from confrontation; and inviting all to an even-handed and comprehensive dialogue aimed at achieving civil peace and national agreement by reforming the socio-economic and political life of the country.

Today’s draft was based on a very different philosophy— the philosophy of confrontation. . . . Our proposals for wording on the non-acceptability of foreign military intervention were not taken into account, and based on the well known events in North Africa, that can only put us on our guard. Equally alarming is the weak wording in connection with the opposition and the lack of an appeal to them to distance themselves from extremists. . . . The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. . . . The demand for a quick ceasefire [in Libya] turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya, including a blockade of humanitarian goods. Today the tragedy of Benghazi has spread to other western Libyan towns—Sirte and Bani Walid. These types of models should be excluded from global practices once and for all.91

The representative from China urged “respect for the sovereignty of Syria and resolving the crisis there through political dialogue” and stated

91. Id. at 3-4.
China’s belief that “under the current circumstances, sanctions or the threat thereof does not help to resolve the question of Syria. . . .”\textsuperscript{92} Equally significant were the statements by the representatives of the states that abstained on the resolution—Brazil, India, Lebanon, and South Africa.\textsuperscript{93} The representative of India, for example, stated that the opposition forces in Syria should:

\begin{quote}
[G]ive up the path of armed insurrection and engage constructively with the authorities. We firmly believe that the actions of the international community should facilitate engagement of the Syrian Government and the opposition in a Syrian-led inclusive political process, and not complicate the situation by threats of sanctions, regime change, et cetera.\textsuperscript{94}
\end{quote}

Similar sentiments were expressed by the representatives of Lebanon,\textsuperscript{95} South Africa,\textsuperscript{96} and Brazil.\textsuperscript{97}

In short, with respect to the situation in Syria, not only China and Russia, but also the emerging powers of Brazil, India, and South Africa do not support the Security Council’s action against Libya as a precedent to be followed in future crises. Lebanon, to be sure, is a special case because of the heavy influence Syria has on its domestic and international policies.

The situation in the Ivory Coast was, of course, not part of the Arab Spring. It is, however, arguably the only other situation in which the Security Council took action as an exercise of the R2P.

\textbf{C. The Ivory Coast and R2P}

The background to the situation in the Ivory Coast is complex and multifaceted and has been set forth elsewhere.\textsuperscript{98} For present purposes, it suffices to highlight a few key developments. In particular, it should be noted that in an effort to end internal armed conflict, Ivorian political forces signed an agreement to that end on January 24, 2003. For its part, the Security Council created an international peacekeeping force to oversee the implementation of the agreement, the United Nations Operation in Cote

\textsuperscript{92} Id. at 5.
\textsuperscript{93} See generally U.N. Doc. S/PV.6627, supra note 87.
\textsuperscript{94} Id. at 6.
\textsuperscript{95} Id. at 9.
\textsuperscript{96} Id. at 10.
\textsuperscript{97} Id. at 11.
The mandate of UNOCI included the protection of "civilians under imminent threat of physical violence," and it was authorized to use "all necessary means to carry out its mandate, within its capabilities and its areas of deployment." Unfortunately, UNOCI proved to have insufficient capabilities to protect civilians, even though it was supported by several thousand French soldiers stationed in the Ivory Coast prior to the outbreak of armed conflict. The crucial phase of the conflict, however, arose after the principal parties disputed the results of the long-postponed presidential election of November 28, 2010. This resulted in renewed armed conflict between the supporters of the incumbent President Laurent Gbagbo and his challenger Alassane Ouattara. When "early election returns suggest[ed] an Ouattara victory, Gbagbo’s representatives prevented dissemination of the result. In the meantime, the Constitutional Council of the Ivory Coast declared that there had been massive vote-rigging in the north and cancelled 660,000 votes for Ouattara, thereby handing the election to Gbagbo." Based on a briefing from the Secretary-General’s Special Representative on the Ivory Coast, however, who insisted that Ouattara had won, the Security Council adopted a resolution formally supporting this view and urging the parties to accept this result.

The parties did not accept this result, however, and the situation deteriorated further with an increase in violence. In response, on March 30, 2011, the Security Council unanimously adopted Resolution 1975. The resolution recognized Ouattara as president, condemned Gbagbo’s refusal to negotiate a settlement, and authorized UNOCI to “use all necessary means” to protect civilians, including by “prevent[ing] the use of heavy weapons against the civilian population.”

Although Resolution 1975 was adopted unanimously, in statements following the voting, Council members presented sharply different interpretations of the text. For example, the representative of the United

100. Id. ¶ 6.
101. Id. ¶ 8.
102. See Bellamy & Williams, supra note 98, at 829.
103. Id.
104. Id. at 832.
107. See id. ¶ 6.
Kingdom noted that the resolution reaffirmed the “robust mandate” of UNOCI to use “all necessary means” to protect civilians and recognized the need to prevent “the use of heavy weapons against civilians.” By contrast, the representative of China stated that:

China always believes that United Nations peacekeeping operations should strictly abide by the principle of neutrality. We hope that the United Nations Operation in Cote d’Ivoire will fulfill its mandate in a strict and comprehensive manner, help to peacefully settle the crisis in Cote d’Ivoire and avoid becoming a party to the conflict.

India, for its part, contended that United Nations peacekeepers “cannot be made instruments of regime change.”

Despite these interpretations of Resolution 1975 by the Chinese and Indian representatives, UNOCI, aided by French forces, used military force to engage in regime change. In April 2011, the Gbagbo forces were defeated, and he was arrested by U.N. peacekeepers, no French forces having participated in the arrest.

As noted by Bellamy and Williams:

[The] use of force by U.N. peacekeepers and French troops blurred the lines between human protection and regime change and raised questions about the role of the U.N. in overriding Cote d’Ivoire’s Constitutional Council, about the proper interpretation of Resolution 1975, and about the place of neutrality and impartiality in U.N. peacekeeping.

The UNOCI and French operations were sharply criticized by Thabo Mbeki, the former president of South Africa, and by the Russian Federation.

There have been some interesting developments since the arrest of Gbagbo. In particular, on November 30, 2011, Gbagbo was unexpectedly handed over to international custody and flown overnight to The Hague,

109. See id. at 6.
110. Id. at 7.
111. Id. at 3.
113. See Bellamy & Williams, supra note 98, at 835.
114. Id.
where the prosecutor of the ICC accused him of crimes against humanity.\textsuperscript{115} Gbagbo was served with an arrest warrant from the court in the small northern town of Korogho, where he had been under house arrest for seven months.\textsuperscript{116} Additional arrest warrants are expected in connection with post-election violence in the Ivory Coast. The prosecutor of the ICC has opened investigations into the actions of other members of the Gbagbo government, as well as figures from Mr. Ouattara’s government.\textsuperscript{117} Forces supporting Mr. Ouattara also committed atrocities, according to prosecution evidence and reports from human rights groups.\textsuperscript{118}

By contrast, the National Transitional Council (NTC), which is currently ruling Libya, is reportedly resisting efforts by the prosecutor of the ICC to have Saif al-Islam Gaddafi, one of Colonel Gaddafi’s sons, and Abdullan Senussi, the intelligence chief for Colonel Gaddafi, handed over for trial before the ICC.\textsuperscript{119} Gaddafi and Senussi are both charged with crimes against humanity, and the NTC had promised to hand them over to the ICC to face trial in The Hague.\textsuperscript{120} The NTC now reportedly wants to try the two men in Libyan courts.\textsuperscript{121} A major stumbling block to such a trial is that the NTC wishes to preserve the death penalty for the trial, which is not available in a trial before the ICC and which is strongly opposed by many members of the international community.\textsuperscript{122} Another major problem is that Libya does not currently have the legal infrastructure and knowledge necessary to conduct a fair trial.\textsuperscript{123}

\textbf{III. A Few Concluding Observations}

As suggested earlier in this essay, much more attention needs to be addressed to fulfillment of the responsibility to prevent, which both ICISS and Evans have emphasized as the most important component of the R2P. For its part, the World Summit Outcome document shifts the focus from the prosecution of genocide, war crimes, ethnic cleansing, and crimes against

\begin{thebibliography}{99}
\bibitem{115} See Marlise Simons, \textit{Ex-President Of Ivory Coast to Face Court in the Hague}, N.Y. \textsc{Times}, Nov. 30, 2011, at A12.
\bibitem{116} Id.
\bibitem{117} Id.
\bibitem{118} Id.
\bibitem{120} Id.
\bibitem{121} Id.
\bibitem{122} Id.
\bibitem{123} Id.
\end{thebibliography}
humanity to their prevention.  

Sadly, however, most interventions come too late to prevent these crimes and end up being a reaction to an outbreak of violence. What is needed are more effective efforts to build state capacity, remedy grievances, and ensure the rule of law, especially efforts to build a rule of law perspective into local cultures.

Notably, the World Summit Outcome document contains no reference to the responsibility to rebuild. But this is the responsibility facing the international community in both Libya and the Ivory Coast. As Evans has cautioned, however, this is a difficult responsibility to fulfill.

As noted previously, one may be skeptical, especially with respect to Libya, but perhaps with respect to the Ivory Coast as well, about how successful the international community was in protecting civilians in these conflicts. At this juncture, prospects with respect to protection of civilians in Syria seem especially grim. One hopes that the situation in Syria can be resolved short of the bloody civil war that took place in Libya, but it is difficult to be optimistic.

The R2P, as developed by the ICISS and Evans in his treatise, has much to commend it. Sadly, however, when I think of the R2P, I am reminded of Mahatma Gandhi, who, when asked what he thought of western civilization, reportedly replied, "I think it would be a good idea."