



Third World Approaches to International Law: *The Responsibility to Protect and Regional Organisations: An Overview*

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ABSTRACT

The Responsibility to Protect is administered through the United Nations Security Council, which is often criticised for being ineffective, too selective and for using its power to veto to the detriment of States in mass atrocity. Third World States within the international arena are often at the mercy of the Security Council and are excluded from decision making processes which may impact them.

This research proposes that the Responsibility to Protect should be administered by regional organisations rather than the Security Council, owing to the comparative advantages regional organisations have to offer. For example, regional organisations who have proximity to conflict are likely to understand the culture and history of States and possess in-depth local knowledge. Neighbouring States within the region also have more at risk, such as bearing the burden of unwanted armed groups in their territory, disproportionate numbers of refugees and the impact conflict can have on the economy. Regional organisations are also best suited for addressing the structural and root causes of conflict. It will be argued that regional organisations could legally intervene within the parameters of their own region through ex post facto application of Article 53 of the Charter of the United Nations.

A Third World Approach to International Law (TWAIL) will be applied throughout this research. TWAIL operates on a philosophy of suspicion which enables it to adopt a critical stance on International Law by pushing boundaries to expose injustice. TWAIL will be particularly useful in considering the Responsibility to Protect as it will assist in identifying any colonial origins, rhetoric and imperialism that is in both policy and law in this area. Doctrinal legal analysis is the method which will be applied as it will centre its focus on a comprehensive overview of the key literature in this area. A qualitative method is also used as the research involves analytical interpretation and analysis and uses TWAIL's theoretical framework to provide legal reasoning.

It is likely that this research shall conclude that if we do not fix a system that is broken, then the international community is failing and will continue to fail in its responsibility to protect. The way to fix this is through restricting the Security Council's ability to exercise imperialism and to identify the colonialist structures surrounding the Responsibility to Protect. Therefore, regional organisations may offer a solution with their comparative advantages, lack of veto power and through including the voices of less developed States in the decision-making processes surrounding intervention.



INTRODUCTION

Following the human consequences of the 1994 Rwandan Genocide and the 1995 Srebrenica Massacre the international community observed that more was required to protect human life in situations of mass atrocity.¹ This sparked the move from the controversial use of Humanitarian Intervention to a Responsibility to Protect (R2P). However, since its inception R2P has been at the centre of international debate owing to criticisms over its effectiveness.² Additionally, decision-making surrounding intervention is often managed by the powerful States with permanent membership of the United Nations Security Council. Therefore, R2P excludes the voices of Third World States who are often at the mercy of decisions they have not made. The Third World as a category is a socioeconomic construct by the West³ and its reality is a product of colonialism which was allowed and facilitated by International Law.⁴

The aim of this research is to increase the effectiveness of R2P in responding to mass atrocity and to include the voices of Third World States in R2P decision-making processes. This will be considered through applying a Third World Approach to International Law (TWAIL) to ex-

pose the colonial origins of R2P and through proposing that regional organisations would be a more suitable choice of intervenor based on their comparative advantages and ability to include the Third World in decision-making.

The chronology of this paper is as follows: Part I will outline the methodology and theoretical framework of this research. Part II will provide an overview of TWAIL in considering the colonial origins of International Law, TWAIL's objectives and its two generations. Part III will address R2P creation and its criticisms, notably over its use resulting in regime change in Libya⁵ and its current inaction in Syria.⁶ Part IV will address the potential for regional organisations to act as intervenors in mass atrocity with their comparative advantages and the legal basis for this will be considered through *ex post facto*⁷ application of Article 53 of the Charter of the United Nations.⁸ Part V will conclude that if we do not fix a system which has been flawed from its inception, then R2P will always continue to fail in its overarching objective of protecting human life in mass atrocity.

1. The author would like to thank Dr. Alexandra Bohm for providing useful feedback and support with this paper.

2. Graham Melling, 'Beyond rhetoric? Evaluating the Responsibility to Protect as a norm of humanitarian intervention' (2018) *Journal on the Use of Force and International Law*, 5:1, 78-96. 78.

3. The term "Third World" was first used in 1952 by Alfred Sauvy in an article called "Trois mondes, une planète" see: Marcin Wojciech Solarz, "Third World": the 60th anniversary of a concept that changed history' (2012) 33(9) *Third World Quarterly*. 1561-1573.

4. Anthony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 4 *Soc. & Legal Stud.* 321.

5. Simon Adams, 'Libya and the Responsibility to Protect' (October 2012) 3 *Global Centre for the Responsibility to Protect Occasional Paper Series No. 3* < <http://www.globalr2p.org/media/files/libyaandr2poccasionalpaper-1.pdf> > accessed 12 March 2019.

6. Simon Adams, 'Failure to Protect: Syria and the UN Security Council' (March 2015) *Global Centre for the Responsibility to Protect, Occasional paper Series No. 5* < http://www.globalr2p.org/media/files/syriapaper_final.pdf > accessed 12 March 2019.

7. Translation: with retrospective action or force (out of the aftermath).

8. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119. Article 53.



METHODOLOGY

Cryer et al note that “method has empirical and sociological connotations”⁹ and that it means “the way in which the project is pursued”.¹⁰ Using this definition, the method of this research is doctrinal legal analysis as it will centre its focus on a comprehensive overview of the key literature in this area, including; journal articles, books, commentaries, case law, treaties, UN resolutions and recommendations. The method is also qualitative. As stated by Hutchinson and Duncan, qualitative method involves interpretation and analysis and is the analytical, legal reasoning aspect of the process.¹¹

Methodology is “something different from, although related to, ‘method’”¹² and it has theoretical connotations.¹³ Methodology means the justification for the chosen research method. Doctrinal legal analysis is the chosen method because it will permit in-depth understanding of the current literature to identify gaps. Doctrinal legal analysis will also assist in answering the overarching research question which is: Can TWAIL provide a comprehensive critique of R2P and if so, can it provide a viable solution to protecting human life in mass atrocity? Other methods available for this subject area, for example interviews or participant observation have not been selected as they would not add value to this specific research. Qualitative method is also

favoured over quantitative method here as it is the most logical and accessible within this research and will allow for greater analysis and interpretation of the law and will provide legal reasoning. The chosen theoretical framework of this research is TWAIL for its critical stance will be useful in identifying any colonial origins, rhetoric and imperialism that may reside in the law and policy in this area. An overview of TWAIL will be considered in the subsequent subsection.

A THIRD WORLD APPROACH TO INTERNATIONAL LAW

TWAIL is a multi-disciplinary, academic, social and political movement which seeks to expose the colonial foundations and imperialism residing within International Law.¹⁴ TWAIL operates on a philosophy of suspicion which allows it to adopt a critical stance on International Law.¹⁵ TWAIL asserts that International Law is imperial in nature and was created out of the colonial encounter.¹⁶ The colonial origins of International Law will now be explained.

Francisco de Vitoria (1483-1546) became a distinguished scholar within the field of International Law, notably for the use of *jus gentium*¹⁷ during the colonial encounter. Anghie writes extensively on how the very concept of *jus gentium* used by Vitoria justified colonialism and how this

9. Robert Cryer, Tamara Herve, Bal Sokhi-Bulley and Alexandra Bohm, *Research Methodologies in EU and International Law* (Hart Publishing, 2011). 5.

10. *ibid*, 5.

11. Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012)

12. Robert Cryer, Tamara Herve, Bal Sokhi-Bulley and Alexandra Bohm, *Research Methodologies in EU and International Law* (Hart Publishing, 2011). 5.

13. *ibid*, 5.

14. Michael Fakhri, ‘Introduction- Questioning TWAIL’s Agenda’ (2012) 14 (1) *Oregon Review of International Law*. 1,2.

15. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

16. Anthony Anghie, ‘Francisco de Vitoria and the Colonial Origins of International Law’ (1996) 4 *Soc. & Legal Stud.* 321.

17. Translation: *International Law*



colonial structure is reproduced through International Law.¹⁸ *Jus gentium* was used by Vitoria to resolve a jurisdictional gap which emerged between the Spanish conquistadors and the Natives during the conquest of America.¹⁹ Initially Law was only legitimate if sanctioned by the Pope, but Vitoria noted that the Natives were not believers in Christianity and could own property.²⁰ Therefore, Vitoria identified that the Pope was not the appropriate sovereign.²¹ Next Vitoria's analysis centred on the Spanish Emperor as the ruler over the Natives, but Vitoria notes this would not resolve jurisdictional issues as the Spanish Emperor had not previously ruled over the Natives and therefore any Law created by the Emperor could not bind those who were not previously ruled by it.²² To resolve this jurisdictional conundrum Vitoria then applies the concept of *jus gentium*, which would bind both the Spanish and Natives equally,²³ in theory. However, this was not equal in practice as the characterisation of *jus gentium* was inherently a Christian and Eurocentric creation which would exclude the Native voice in application.²⁴ Further, only those with Christian values were permitted to wage war which ensured that the Natives could only ever be the violators of *jus gentium* and would not share rights under *jus gentium* equally with the Spanish.²⁵ This established colonial structure is still very much alive in International Law and its European and Christian origins have led to TWAIL scholars critiquing International Law

for being an illegitimate regime.²⁶ TWAIL seeks to highlight the unfairness of such structures and to present new structures in areas of Law where colonialism reproduced.²⁷

TWAIL's desire to expose the unfair structures of International Law today is demonstrated through the three broad objectives of TWAIL scholarship as posited by Mutua.²⁸ Namely that TWAIL seeks:

“to understand, deconstruct and unpack the uses of International Law as a medium for the creation and perpetuation of a radicalised hierarchy of International norms and institutions (that subordinate non-Europeans to Europeans). TWAIL seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks, through scholarship, policy and politics to eradicate conditions of under-development in the Third World”.²⁹

This research will centre its focus around these objectives through seeking to understand and deconstruct how R2P acts as a medium for creating a hierarchy and intervention norms which subordinate non-Europeans to Europeans. Secondly, it will seek to construct an alternative form of R2P governance by limiting the role of the Security Council and by placing responsibility for intervention with regional organisations. Finally,

18. Anthony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 4 Soc. & Legal Stud. 321.

19. *ibid*, 321.

20. *ibid*, 323.

21. *ibid*, 323.

22. *ibid*, 324.

23. *ibid*, 326.

24. *ibid*, 326.

25. *ibid*, 330.

26. Makau Mutua, 'What is TWAIL?' (2000) 94 Am. Soc'y Int'l L. Proc. 31.

27. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 110.

28. Makau Mutua, 'What is TWAIL?' (2000) 94 Am. Soc'y Int'l L. Proc. 31.

29. *ibid*, 31.



this research aims to assist in eradicating conditions of under-development in the Third World through addressing root causes of conflict (poverty, unequal distribution of resources and political repression)³⁰ which are caused and facilitated by colonialism.

Central to TWAIL scholarship is explicit and unapologetic use of the term Third World, which can be criticised for being anachronistic.³¹ Yet the term must remain for it displays the political reality of the marginalised States who are united in their common history of colonialism and present struggles of underdevelopment.³² To deny that the category of Third World States exists is to deny the lived experiences of millions of humans. On this point TWAIL cannot concede, the term Third World must be used in its discourse. TWAIL scholarship is often split into two generations;³³ TWAIL I and TWAIL II.³⁴ TWAIL I was the original TWAIL movement and argues that International Law derived from the colonial encounter but that TWAIL can transform In-

ternational Law to account for the Third World voice.³⁵ TWAIL I also observed that sovereignty is essential to TWAIL discourse and that mere political independence is not enough.³⁶ TWAIL II largely follows the precedent of TWAIL I, but it offers an intersectional analysis through assessing problems inherent within the Third World itself such as barriers surrounding race, class and gender.³⁷ TWAIL II is in alliance with other critical theories such as Marxism, Feminism and Postcolonialism which allows for insightful analysis in ways TWAIL I is limited by. Furthermore, TWAIL II adopts a critical stance of TWAIL itself, and is curious over its own methodological parameters³⁸ asking questions such as “how do we identify what counts as acceptable scholarship in International Law”,³⁹ taking note that TWAIL is to be recognised as a discipline of the Global South and should not be Westernised.⁴⁰

TWAIL cannot afford to forfeit itself to other approaches in International Law⁴¹ for its critical analysis in practice has the potential alleviate

30. The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, December 2001) (ICISS) XI.

31. B.S. Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8(1) Int’l Comm. L. Rev. 3.

32. *ibid.*

33. TWAIL is often split into two generations although some literature has argued that a third generation of TWAIL exists. See (Madhav Khosla, ‘The TWAIL Discourse: The Emergence of a New Phase’ (2007) 9 Int’l Comm. L. Rev. 291.).

34. Antony Anghie and B.S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (2003) Chinese JIL 77-103.

35. *ibid.*

36. *ibid.*

37. *ibid.*

38. Antony Anghie and B.S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (2003) Chinese JIL 77-103.

39. *ibid.*

40. It is important to state that the author of this paper is a white European and is writing from an institution in the Global North, but recognises that her writing cannot speak for, or on behalf of TWAIL, nor is it appropriate for this author to set an agenda for TWAIL. The author would align herself as being an ally of TWAIL, with the aspiration to further the aims of TWAIL in examining its methodological practices and centring its analysis on a more comprehensive approach to understanding International Law, specifically within the context of intervention.

41. *ibid.*



some of the unfair conditions imposed on marginalised peoples of the Third World. Perhaps part of the attraction to TWAIL is its rebellious nature which does not fear pushing the boundaries of how we understand and engage with International Law and it is for such reasons TWAIL may be useful in approaching the topic of R2P.

THE RESPONSIBILITY TO PROTECT

Following failure in Rwanda (1994) and the massacre in Srebrenica (1995), the former United Nations Secretary General, Kofi Annan presented the following question:

“If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?”⁴²

It was clear that Humanitarian Intervention was no longer acceptable and shortly after the *International Commission on Intervention and State Sovereignty* compiled a report on the Responsibility to Protect in 2001⁴³ in response Annan’s

question. The report was the first of its kind to seriously consider sovereignty as a responsibility.⁴⁴ Following this, in 2004 the report of the *High-level Panel on Threats, Challenges and Changes*⁴⁵ which promoted R2P as a collective responsibility was published, followed by the 2005 *In Larger Freedom* report⁴⁶ which sought to “move from an era of legislation to an era of implementation”.⁴⁷ R2P was finally fully endorsed within paragraphs 138-140 of the *World Summit Outcome Document 2005*⁴⁸ and was subsequently reaffirmed by United Nations Security Council Resolutions 1674 (2006), 1895 (2006) and 2150 (2014).⁴⁹ In 2009 the *Implementing the responsibility to protect*⁵⁰ report was published, which developed the three pillar strategy of R2P. Pillar one focuses on the protection responsibilities of the State, pillar two focuses on international assistance and capacity building and pillar three focuses on providing a timely and decisive response.⁵¹ Pillar three is the most contentious element of R2P as it permits military intervention as a last resort.⁵² The creation and subsequent development of R2P was an international vow to never abandon humanity in situations of mass atrocity again.

42. Kofi Annan, Millennium Development Report to the 55th Session of the United Nations General Assembly. (5th September, UN DOC DP1/2083/Rev.1).

43. The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, December 2001) (ICISS) XI.

44. However, it should be noted here that the concept of sovereignty and responsibility was first coined by Deng et al in 1996. See: Francis Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press, 1996).

45. Kofi Annan, Report of the High-level Panel on Threats, Challenges and Changes, 59th Session of the United Nations General Assembly (2nd December 2004, UN DOC A/59/565).

46. United Nations General Assembly, ‘In larger freedom: towards development, security and human rights for all’ (21 March 2005) UN Doc A/59/2005.

47. *ibid.*

48. United Nations General Assembly ‘2005 World Summit Outcome Document’ (24 October 2005) UN Doc A/RES/60/1, para 138 and para 139.

49. Alex J. Bellamy ‘The Three Pillars of the Responsibility to Protect’ (2015) <<http://www.cries.org/wp-content/uploads/2015/09/006-bellamy.pdf>> accessed on 12 March 2019.

50. United Nations Secretary General, ‘Implementing the responsibility to protect’ (2009) United Nations General Assembly (63rd Session, A/63/677).

51. *ibid.*

52. *ibid.*



R2P provides that should a State be unable or unwilling to stop mass atrocity,⁵³ then the international community (with authorisation from the Security Council) bear a responsibility to intervene.⁵⁴ R2P was designed with a narrow scope in that intervention is only permissible in response to four specific crimes which are: genocide, crimes against humanity, war crimes and ethnic cleansing.⁵⁵ The humanistic side to R2P appears to be genuine *prima facie*,⁵⁶ however the intention behind it is host to something sinister which threatens to recolonise the Third World, particularly with the adaption to the traditional concept of sovereignty.

The Westphalian concept of sovereignty is that each State possess an inviolable right over their internal affairs, which is in accordance with Article 2(4) of the United Nations Charter, designed to protect the territorial integrity and political independence of States.⁵⁷ However, R2P limits the concept of absolute sovereignty as it recognises that where mass atrocity situations arise intervention may at times be necessary. R2P ensures that sovereignty is treated as a *respon-*

*sibility*⁵⁸ and not an absolute right. The concept of sovereignty has become “spatially boundless and normatively limitless”⁵⁹ which invokes suspicion for TWAIL, particularly as this attack on sovereignty arose shortly after decolonisation movements swept the globe.⁶⁰ Furthermore, TWAIL asserts that sovereignty is not in itself an equal concept and the Third World experience a distinctly different version of sovereignty;⁶¹ R2P being a prime example as we cannot reasonably expect intervention under R2P to be permitted in a developed State.⁶²

Addressing the structural and root causes of mass atrocity is also imperative for R2P to be successful.⁶³ Root causes include poverty, political repression and uneven distribution of resources;⁶⁴ all of which can be attributed to the colonial encounter. Yet, consistently where mass atrocity situations emerge the criticism is with respect to a lack of good governance or human rights records;⁶⁵ further, the emphasis on *responsibility* as Bohm argues allows the international community to blame the atrocity almost exclusively on the government of the State

53. United Nations General Assembly ‘2005 World Summit Outcome Document’ (24 October 2005) UN Doc A/RES/60/1, paras 138-140.

54. *ibid*, paras 138-140.

55. United Nations General Assembly ‘2005 World Summit Outcome Document’ (24 October 2005) UN Doc A/RES/60/1, para 138 and para 139.

56. Translation: based on the first impression (on face value).

57. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119. Article 2(4).

58. The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, December 2001) (ICISS) XI. 13.

59. Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish, 2007). 183.

60. *ibid*, 231.

61. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 117.

62. Edward Newman, ‘R2P: Implications for World Order’ (2013) *Global Responsibility to Protect* 5, 235-259.

63. The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, December 2001) (ICISS) XI. 22.

64. *ibid*, 22.

65. John D. Haskell, ‘TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law’ (2014) 27 *Can. J. L. & Jurisprudence* 383.



in which the crisis occurs.⁶⁶ The impacts of colonialism are not addressed as a root cause, yet they should be as the links between colonialism and mass atrocity are intertwined, as demonstrated through the 1994 Rwandan Genocide. Belgian colonial rule over Rwanda played a significant role in fuelling ethnic tensions leading to the genocide by placing Tutsi's in positions of power and higher status and limiting the activities and prospects of the Hutu's during the colonial era.⁶⁷ This ethnic tension resulted in the genocide with death toll estimates standing at around eight hundred thousand.⁶⁸ The Belgians created identification cards for Tutsi's during the colonial encounter and it was these very same identification cards which permitted the Hutu's to identify Tutsi targets during the genocide.⁶⁹ Therefore, TWAAIL is useful in identifying the impacts of colonialism on mass atrocity and as a root cause of conflict. The "failure to address underlying structural causes associated with

large scale human rights violations is a clear weakness of R2P",⁷⁰ this includes addressing the structural causes which were created and are facilitated by colonialism and which are reproduced in International Law today.

R2P has been controversial since its inception, particularly with respect to its "ideational value and effectiveness".⁷¹ Criticisms over R2P's effectiveness can be attributed to the power to veto and hegemonic interests in intervening; this will now be explained in the context of Syria and Libya. The veto is retained by the permanent five members of the Security Council⁷² and has been detrimental to the credibility of R2P; Syria being testament to this.⁷³ To date, the conflict in Syria has been on-going for eight years and has claimed the lives of and caused the disappearances of half a million people.⁷⁴ War crimes have been carried out in Syria, such as the use of chemical weapons⁷⁵ and barrel bombs,⁷⁶ the

66. Alexandra Bohm, 'Responding to Crises: The Problematic Relationship Between Security and Justice in the Responsibility to Protect' (2013) 4(3) *Global Policy*. 1.

67. Martin Meredith, *The State of Africa: A History of the Continent Since Independence* (1st edn, Simon & Schuster 2013).

68. *ibid*, 523.

69. Helen M. Hintjens, 'Explaining the 1994 Genocide in Rwanda' (1999) 37(2) *The Journal of Modern African Studies*. 241-286.

70. Garrett Wallace Brown and Alexandra Bohm, 'Introducing Jus ante Bellum as a cosmopolitan approach to humanitarian intervention' (2016) 22(4) *European Journal of International Relations*. 897-919. 902.

71. Graham Melling, 'Beyond rhetoric? Evaluating the Responsibility to Protect as a norm of humanitarian intervention' (2018) *Journal on the Use of Force and International Law*, 5:1, 78-96. 78.

72. The five permanent members being: The United Kingdom, The United States of America, China, Russia and France.

73. Simon Adams, 'Failure to Protect: Syria and the UN Security Council' (March 2015) *Global Centre for the Responsibility to Protect, Occasional paper Series No. 5* < http://www.globalr2p.org/media/files/syriapaper_final.pdf > accessed 12 March 2019.

74. Human Rights Watch, 'Syria: Events of 2018' Human Rights Watch (June 29, 2018) < <https://www.hrw.org/world-report/2019/country-chapters/syria> > accessed on 12 March 2019.

75. Yavuz Güçtürk, 'War Crimes and Crimes Against Humanity in Syria (2015) *Insight Turkey*, 17(1) 27, 37.

76. *ibid* 35.



targeting of civilians⁷⁷ and hospitals,⁷⁸ torture,⁷⁹ mass executions⁸⁰ and sexual slavery.⁸¹ Yet, intervention has been ineffective in Syria owing to the deadlock caused by Russia and China using their veto powers, with Russia casting twelve vetoes on Syria to date and China casting six.⁸² The lack of Third World voice in decision-making or holding veto power also submits to the view that it is only hegemonic States that are permitted to determine the fate of the international arena.

R2P came under fierce scrutiny following intervention in Libya (2011).⁸³ The Arab Spring was a series of anti-government rebellions and protests across the Middle East and North Africa, which erupted in Benghazi (2011).⁸⁴ Muammar al-Qaddafi had ruled Libya since 1969 and when the uprisings began Qaddafi vowed to employ lethal force on those opposing the government, including civilians.⁸⁵ This quickly escalated into a situation of mass atrocity whereby genocidal intent became apparent following Qaddafi's vow to "cleanse Libya house by house" of those opposing the regime.⁸⁶ The international community decided to intervene in Libya and even

those sceptical of intervention (including Russia and China) decided to abstain rather than veto intervention.⁸⁷ However, the outcome of the intervention in Libya was somewhat catastrophic for the legitimacy of R2P as it led to regime change following the toppling of Qaddafi's government.⁸⁸ Intent and motivation for regime change became more questionable following a statement by the United Kingdom, United States and France, in which it was stated that:

"it is impossible to imagine a future for Libya with Qaddafi in power. It is unthinkable that someone who has tried to massacre his own people can play a part in their future government".⁸⁹

R2P is purely for the purpose of protecting during situations of mass atrocity and not for reorganising or recreating governments through regime change, which was the result of the intervention in Libya.⁹⁰ The intervention in Libya has also facilitated the inaction in Syria as those who had abstained in Libya (China and Russia) then vetoed in Syria partly for fear of the same outcome as Libya⁹¹ which is evidenced by Rus-

77. *ibid* 34.

78. *ibid* 34.

79. *ibid* 28.

80. *ibid* 36.

81. *ibid* 36.

82. Security Council Report, 'The Security Council Veto' (February 2019) available at: <<https://www.security-councilreport.org/un-security-council-working-methods/the-veto.php>> accessed on 12 March 2019.

83. Simon Adams, 'Libya and the Responsibility to Protect' (October 2012) 3 Global Centre for the Responsibility to Protect Occasional Paper Series No. 3 <<http://www.globalr2p.org/media/files/libyaandr2poccasionalpaper-1.pdf>> accessed 12 March 2019.

84. *ibid*, 5.

85. *ibid*, 5.

86. *ibid*, 5.

87. *ibid*, 7.

88. *ibid*, 13.

89. *ibid*, 13.

90. *ibid*, 12.

91. Simon Adams, 'Failure to Protect: Syria and the UN Security Council' (March 2015) Global Centre for the Responsibility to Protect, Occasional paper Series No. 5 <http://www.globalr2p.org/media/files/syriapaper_final.pdf> accessed 12 March 2019.



sia and China's veto use increasing considerably since 2011.⁹²

Despite the flaws with the R2P doctrine, its potential to alleviate suffering from some of the gravest human rights violations and protecting human life in mass atrocity should not be disregarded. R2P effectiveness is hindered significantly by the Security Council, which is succinctly explained by Melling and Dennett:

“The Security Council, therefore, due in large part to the veto power, continues to reveal itself to be dysfunctional on important matters and increasingly, states are despairing at its lack of response to the gravest of situations”.⁹³

Keeping the ideology for promoting respect for human life in mass atrocity is fundamental, it is the ineffective Security Council role which must change. One solution could be to issue R2P through regional organisations. This will be considered in the subsequent subsection.

REGIONAL ORGANISATIONS

Regional organisations can be defined as:

“a union of States closely linked in territorial terms or an international organization based upon a collective treaty, whose primary focus is the maintenance of international peace and security within the framework of the United

Nations”.⁹⁴

Examples of regional organisations include (but are not limited to): The European Union, the African Union and the Arab League. Membership is usually composed of States within the confines of that specific geographical region (but not always).

Regional organisations as authorisers and intervenors rather than the Security Council could be permissible providing that the intervention is undertaken within that specific regional organisations defining boundaries.⁹⁵ This has been considered by Pattison who argues that it is possible for regional organisations to undertake intervention within the parameters of their own region and this could be done by amending the constitutional arrangements and treaty provisions of each specific regional organisation.⁹⁶ Therefore, a legal and legitimate basis for intervention to be undertaken by regional organisation may be possible. However, it must be noted that Article 24 of the Charter of the United Nations confers primary responsibility for international peace and security onto the Security Council⁹⁷ and Article 53 of the Charter prohibits enforcement action from being undertaken without authorisation from the Security Council.⁹⁸ Therefore, regional intervention without authorisation from the Security Council *could* raise issues of constitutionality as to act otherwise could undermine the basic intentions of the Charter.

92. Security Council Report, ‘The Security Council Veto’ (February 2019) available at: <<https://www.security-councilreport.org/un-security-council-working-methods/the-veto.php>> accessed on 12 March 2019.

93. Graham Melling and Anne Dennett, ‘The Security Council Veto and Syria: responding to mass atrocities through the “Uniting for Peace” resolution (2017) 57(3-4) Indian Journal of International Law. 285-307. 287.

94. Kiho Cha, ‘Humanitarian Intervention by Regional organisations Under the Charter of the United Nations’ (2002) 3(2) Seton Hall. J. Dipl. & Int’l Rel. 134, 135.

95. The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, December 2001) (ICISS) XI. 53.

96. James Pattison, Humanitarian Intervention & the Responsibility to Protect (1st edn, Oxford University Press 2012) 238.

97. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119. Article 24.

98. *ibid*, Article 53.



With respect to the above, it may be possible to circumvent submitting regional intervention to the Security Council *prior* to undertaking the intervention. Although Article 53 of the Charter would require regional organisations to seek authority from the Security Council, there is nothing in the present Charter which determines that this authorisation must be sought *prior* to intervention.⁹⁹ Therefore, it may be possible to avoid regional intervention being subjected to the veto through *ex post facto* application of Article 53 of the Charter. Effectively, this would enable regional organisations to intervene and then seek authorisation from the Security Council *after* the intervention has occurred meaning that even if the Security Council object, the civilian lives in mass atrocity have been protected. This would not be a direct violation of the Charter as it is an interpretation within the given framework, and it upholds respect for human rights which is a cornerstone principle of the Charter. Indeed, seeking authorisation following an intervention will inevitably face criticism in that such application of Article 53 may prove to be untenable and unsustainable.¹⁰⁰ Yet, if this is one of the limited options available to ensure that regional organisations can intervene without being subjected to the veto, then it is a legal avenue which must be fully explored.

Regional organisations are the chosen intervenor for their specific TWAIL advantages and their more general comparative advantages. With respect to specific TWAIL advantages, re-

gional organisations would not be as subjected to the interests of far-away hegemonic powers residing within the Security Council, if the Security Council role is limited. Regional intervention also has the potential to include the Third World voice and to better address the cultural ties to the land through local knowledge and historical awareness¹⁰¹ which may assist in identifying root causes of conflict. Regional organisations are also chosen for their comparative advantages as they are often located within close proximity to conflict and will therefore have a greater interest in resolving it promptly.¹⁰² Neighbouring States are the most likely to bear the burden of having unwanted armed groups traveling through their territory as well as having disproportionate refugee numbers.¹⁰³ Regional organisations are also usually best situated geographically, meaning they are likely to detect conflict in neighbouring States at its early stages¹⁰⁴ and can therefore respond quickly.

If regional organisations are to be tasked with undertaking intervention, then they will require mechanisms to make this possible. This research will develop these mechanisms at a later stage, but they will include financial arrangements, voting structure (with no veto power) and identifying the resources required. These mechanisms could also assist regional organisations which currently have a provision for intervention in their constitution such as Article 4(h) of the African Union,¹⁰⁵ but which are somewhat hindered from maximising its potential. For exam-

99. *ibid*, Article 53.

100. Kiho Cha, 'Humanitarian Intervention by Regional organisations Under the Charter of the United Nations' (2002) 3(2) *Seton Hall. J. Dipl. & Int'l Rel.* 134, 138.

101. United Nations General Assembly- Security Council, 'The role of regional and sub-regional arrangements in implementing the responsibility to protect' (27 June 2011) UN Doc A/65/877-S/2011/393, 6.

102. David Carment and Martin Fischer, 'R2P and the Role of Regional organisations in Ethnic Conflict Management, Prevention and Resolution: The Unfinished Agenda' (2009) 1(3) *Global Resp. Protect* 261, 268.

103. *ibid*, 268.

104. United Nations General Assembly- Security Council, 'The role of regional and sub-regional arrangements in implementing the responsibility to protect' (27 June 2011) UN Doc A/65/877-S/2011/393, 6.

105. Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc. CAB/LEG/23.15, art 4(h).



ple, the African Standby Force is to be used in situations of mass atrocity, but it is not effective enough owing to a severe lack of training and funding for military resources.¹⁰⁶ A financial arrangement which may assist here is the memorandum of understanding proposed between the United Nations and regional organisations under which the United Nations highlighted that they were willing to amend their peacekeeping budget to finance regional organisation operations.¹⁰⁷ Strong mechanisms will assist with effective regional intervention.

CONCLUSIONS

R2P is a worthy ideology. Even the most critical of TWAIL scholars are likely to find moral difficulty in critiquing the value of protecting human life during mass atrocity. However, the imperialist structures of R2P (particularly with respect to the Security Council veto power) have been catastrophic for R2P credibility and evidences issues with the Security Council in exercising its primary function of maintaining international peace and security.¹⁰⁸ An innovative solution is required which would benefit those in mass atrocity but specifically Third World States who are usually directly affected yet intentionally excluded from decision-making processes in this area. One solution presented here is to encourage *ex post facto* application of Article 53 of the Charter of the United Nations to permit regional organisations to legitimately intervene within the parameters of their own region. The comparative advantages and cultural knowledge regional organisations possess may be more beneficial in situations of mass atrocity than decisions made

by States sitting around a table in New York. This research will later develop the mechanisms which would be required to ensure successful regional interventions, including but not limited to financial arrangements, voting structure and identifying the resources required. Ultimately, it is concluded that if we do not fix a system which has been flawed since its inception yet continue to rely on it in times of mass atrocity, then imperialist interests will always be permitted to abandon humanity in times of mass atrocity. We must fix a system which is broken so that in the future there is hopefully some sincerity around the meaningless slogan of “*never again*”¹⁰⁹ which has characterised and continues to characterise mass atrocity.

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