FACULTY OF LAW
Lund University

Kajsa Lindersköld

The responsibility to protect

- A foundation for making exceptions to the general prohibition on the use of force?

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Contents

Summary

In 2001, the *International Commission on Intervention and State Sovereignty* (ICISS) published a report on the so called doctrine of the responsibility to protect (R2P). According to the ICISS, the R2P implies a subsidiary responsibility on the international community through the United Nations (UN) to protect populations from gross human rights violations if states responsible for those populations fails to protect them by themselves. The proposal of the ICISS is that in situations of mass atrocities, if necessary, the international community should be able to resort to the use of military force. The ICISS suggests that the R2P could be the solution to the seemingly unresolvable problem of gross human rights violations occurring within territorial borders without the international community being able to intervene. A few years later, the General Assembly of the United Nations (UNGA) adopted a resolution in which the R2P is acknowledged. Since then the R2P has remained in the spotlight in the debate on intervention for humanitarian protection purposes.

The point of departure is that the future of the R2P is not given. There are both those in favour of the R2P as an emerging source of international law as well as those who are more hesitant and doubtful. To some, the doctrine is part of a more or less viable solution to bridge the gap between on the one hand the prohibition of the use of force and state sovereignty, and on the other the protection and realization of fundamental human rights. To others, the R2P is based on 'legal nothingness'.

The thesis examines the legal relationship between the use of force-regulation and the R2P for the purpose of finding an answer to the question if the R2P, as of today, has the ability to evoke an exception to the prohibition of use of force in events of gross human rights violations. The various arguments that this examination raises are both legally as well as strictly morally founded.

Sammanfattning

År 2001 publicerade den *Internationella Kommission för Intervention och Statssuveränitet* (ICISS) en rapport om den så kallade doktrinen om skyldigheten att skydda (responsibility to protect, R2P). Enligt kommissionen innebär doktrinen att det internationella samfundet genom FN har en skyldighet att ingripa i situationer då människor utsätts för grova brott mot mänskliga rättigheter. Skyldigheten är subsidiär och infaller först då staten som har ansvar för att dessa människors mänskliga rättigheter respekteras misslyckas med att ingripa. Kommissionen menar att doktrinen på så sätt kan vara en lösning på de situationer då människor utsätts för grova brott inom en stats gränser där det internationella samfundet vanligtvis inte har tillåtelse att intervenera. Några år efter att rapporten publicerades antog FN:s generalförsamling en resolution som innehöll ett antagande av doktrinen. Sedan dess har doktrinen diskuterats ihärdigt i samband med debatten om våldsanvändning inom ramen för humanitär intervention.

Framtiden för doktrinen inom internationell rätt är inte självklar. Bland kritikerna finns såväl förespråkare som motståndare. Förespråkarna ser doktrinen som en lovande internationell rättskälla under utveckling, medan motståndarna ifrågasätter de legala grunderna som doktrinen sägs vila på.

Den här uppsatsen undersöker det rättsliga förhållandet mellan våldsregleringen i internationell rätt och doktrinen i syfte att finna ett svar på frågan om doktrinen kan innebär att undantag från det generella våldsförbudet i situationer då grova brott mot mänskliga rättigheter äger rum. Argumenten som framförs är grundade i såväl juridik som moral.

Abbreviations

A/RES/60/1	United Nations General Assembly Resolution A/RES/60/1 (2005)
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
NATO	North Atlantic Treaty Organization
R2P	Responsibility to Protect
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
UN	United Nations
UN Charter	United Nations Charter
UNGA	General Assembly of the United Nations
UNSC	Security Council of the United Nations
UNSG	United Nations Secretary-General

1 INTRODUCTION

1.1 Background

One of the most controversial areas of international law is the use of force. Ever since the early days of the United Nations (UN) there have been widespread lack of consensus as to the content of the law.[1] One specific part of the use of force-debate is the use of force to protect civilians from serious harm. In 1994 the Security Council of the United Nations (UNSC) failed to authorize military action in the Rwandan genocide where between 500,000 and a million people were killed in three months by supporters of the Rwandan government.[2] Since then, the pressure on UN peacekeeping operations to protect civilians under threat of violence has been increasing.[3]

As of today, the international community is still struggling with the compliance of commitments on human protection. The general prohibition of the use of force constitutes an obstacle for potential interveners willing to apply armed measures in the pursuit of protecting people in need.[4] The consequences are seen all around the world where civilians become victims to gross human rights violations.[5] There are however proposed solutions on how to tackle mass atrocities. One of them is the doctrine of the Responsibility to Protect (R2P).[6]

1 Gray (2018) p. 9-10.
2 Ibid, p. 298.
3 Ibid, p. 8.
4 Article 2(4) of the UN Charter.
5 Jacob and Mennecke (2020) p. 1.
6 The International Commission on Intervention and State Sovereignty (from hereon ICISS) (2001); UN General Assembly Resolution, A/RES/60/1 (2005) (from hereon A/RES/60/1).

1.2 Purpose and research questions

The purpose of this thesis is to clarify the legal status of the R2P within international law in order to determine if the doctrine constitutes, or should constitute, a foundation for making exceptions to the prohibition of the use of force in the United Nations Charter (UN Charter).

The following research questions are posed:

1. Does the R2P imply a legal obligation upon the UNSC to authorize exceptions to the prohibition of the use of force in Article 2(4) of the UN Charter?

2. If the first question is met with a negative answer: Should the UNSC have such an obligation?

1.3 Material, method and perspective

The general focus of the examination is placed on the central provisions in international law governing the use of force and the main parts of the R2P regulating intervention through the use of armed force in events of gross human rights violations. The R2P is not yet ultimately defined in international law and there are several texts written on the subject, both by proponents and critics. Therefore, the material used in this thesis is a selection of scholarly literature and articles chosen carefully with the intent to illustrate the diversity of opinions on the matter, without claiming to be exhaustive. Alongside literature and articles, international legal sources have been used to describe the use of force-regulation as well as the legal implications for the R2P. The international legal sources are both primary and secondary, and have been chosen with the intent of illuminating the most relevant part of the law for the purpose of this thesis. The international legal sources are mainly UN

documents such as the UN Charter, different resolutions and reports. Another international legal source that has been central to this thesis is an ICISS report.

The methods used in the thesis are threefold. In order to answer the first research question, it has been necessary to describe established law on the subject through examination of conventional legal sources. Therefore, in this part of the thesis the doctrinal research method has been used.[7] In order to answer the second research question, however, a legal analytical method has been applied to this part of the thesis. The legal analytical method can be described as perceiving argumentation within law as more open and free in comparison to the doctrinal research method.[8] Finally, a legal political argumentation has been used alongside the legal analytical method in order to answer the second research question. The legal political argumentation was applied because it enabled a moral argumentation on the need for a change of the use of force-regulation.[9]

Throughout the thesis a perspective of legislative development as well as a critical perspective have been applied. The reason for applying these perspectives is the fulfilment of the purpose and the examination of especially the second research question. Both of the applied perspectives have been connected to the international fulfilment of fundamental human rights.

1.4 Disposition

The disposition of the thesis is as follows. First, established law is presented beginning with the use of force-regulation in international law followed by an introduction of the R2P and its international reception with main focus on the future of the doctrine within international law. Second, a presentation of the

[7] Sandgren (2018), p. 49.
[8] Ibid, p. 51.
[9] Ibid, p. 52.

fundamental human rights embedded in the R2P is made. Third, a discussion follows on the findings of the examination. The discussion includes moral judgements of a subjective character. Last, a couple of conclusive notes are presented.

1.5 Delimitations

Although the research questions are already relatively limited, it is important to note a couple of delimitations.

When referring to the R2P it is a reference to a general idea of a responsibility to protect that builds upon the resolution text adopted by the General Assembly of the United Nations (UNGA) as well as the report of the ICISS. However, it is neither the authentic ICISS text nor the authentic UNGA resolution text that is alluded to when referencing the doctrine, but instead an independent form of R2P.

Furthermore, when referring to the R2P the focus is put solely on a responsibility to protect *through military force*.

The thesis will not examine *how* the R2P could or should be implemented. What this essay will deal with is rather the examination of potential legal and moral foundations for the proposition that the R2P should imply a legal obligation upon the UNSC to authorize the use of force to protect people suffering from gross human rights violations when no other option seem to be accessible.

2 THE USE OF FORCE REGULATION

2.1 The use of force

2.1.1 The prohibition of the use of force

The prohibition of the use of force in international law is stated in Article 2(4) of the UN Charter. It provides as follows:

'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

The notion 'force' in Article 2(4) is not a matter of 'war' or 'actions of war'. Instead it is to be understood as *military force*, or differently phrased, *armed measures*. The force used can be both direct and indirect but it is a requirement that the force relates to *international relations*, i.e. civil war does not fit in the description.[10]

In the case *Armed Activities on the Territory of Congo* the International Court of Justice (ICJ) declared that the prohibition in Article 2(4) is a cornerstone of the UN Charter.[11] Both states and commentators generally support the idea that the prohibition of the use of force constitutes both a treaty obligation as well as customary international law (i.e. creating a prohibition upon non-member states of the UN as well). Furthermore, the prohibition belongs to the category of peremptory norms, also known as jus cogens norms.[12] Article 53

[10] Linderfalk (2013), p. 203-204; Henriksen (2019), p. 256.
[11] ICJ Reports (2005) 168, para 148.
[12] ICJ Reports (1986) 14, para 190.

of the Vienna Convention on the Law of Treaties defines the attribute of jus cogens as follows:

> *'[A jus cogens norm] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'*

A provision possessing the status as a jus cogens norm implies that it is absolutely compulsory.[13]

2.1.2 UNSC authorization as an exception to the prohibition of the use of force

Although, as mentioned above, the prohibition of the use of force is considered as jus cogens it is possible to legally override it. As of today there are two explicit exceptions to the prohibition of the use of force in international law - both placed under Chapter VII of the UN Charter. In addition to the right to self-defence provided for in Article 51, Articles 39 and 42 state that the UNSC has the authority to call for the use of force in situations that threaten the international peace and security. Article 39 stipulates as follows:

'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

The notion 'peace' in Article 39 is supposed to be understood as *international* peace. Over the past few decades, however, the UNSC has found that, inter alia, internal conflicts and humanitarian crises falls within the concept of a

[13] Linderfalk (2013), p. 36.

threat to the peace under Article 39.[14] The UNSC has judged that such events may become threats to the international peace and security because they might bring consequences, such as the risk of conflicts spreading internationally or exoduses of refugees fleeing the afflicted areas.[15]

The difference between Articles 41 and 42 of the UN Charter lies partly in the measures that the UNSC may decide upon. While the former contains measures not involving the use of armed force, the latter stipulates as follows:

'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

Although the UN Charter text stipulates that the authorization of the use of force is subsidiary to the measures provided for in Article 41, this has not been reflected in practice. If the UNSC determines that measures under Article 41 will be inadequate, the use of force through Article 42 can be authorized straight away.

The UNSC consists of 15 UN member states of which five are 'permanent members'. These permanent members are the five most powerful states that remained after the Second World War: France, the United Kingdoms, Russia[16], China and the United States of America. To authorize the use of force the UNSC has to vote in favour of it by a minimum of nine votes. Furthermore, it is a requirement for the authorization of the use of force that none of the permanent members votes against it, i.e. uses its veto power.[17] If the UNSC legally determines to authorize the use of force, all member states

[14] Henriksen (2019), p. 260.
[15] Linderfalk (2013), p. 211.
[16] At that time, the U.S.S.R.
[17] Henriksen (2019), p. 76 and 259.

of the UN receive a *right* - not a duty (cf. Article 41) - to undertake military measures. However, if no authorization is given by the UNSC, any use of force is to be regarded as a breach of international law.[18]

2.2 The responsibility to protect

Although there is both a written prohibition and exception, the use of force is an area of international law clouded with controversy, not least regarding forceful intervention for humanitarian protection purposes. For example, the disagreements about the legality of the intervention by the North Atlantic Treaty Organization (NATO) in Kosovo in 1999 contained arguments that the action by NATO was a striking breach of the prohibition of the use of force of the UN Charter as well as claims that a new right to humanitarian intervention was emerging.[19] As of today, a *right* to humanitarian intervention - constituting an exception to the use of force-regulation in international law - has little, if any, legal support.[20] Instead, the debate has increasingly switched focused to the so-called doctrine of the *Responsibility to Protect* (R2P).

2.2.1 The ICISS report on the responsibility to protect

In 2000, then UN Secretary-General (UNSG) Kofi A. Annan posed a question to the UNGA in his Millennium Report. Annan asked: '... 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 affect every precept of our common humanity?'.[21]

[18] See, for example, Linderfalk (2013), p. 212.
[19] Gray (2018), p. 37; Evans (ed.) (2014), p. 513–514.
[20] See, inter alia, Henriksen (2019), p. 256 and 274–275.
[21] Annan, Kofi A. (2000), p. 48.

One suggested development of international law and, inter alia, its provisions on the use of force for human protection purposes is expressed in the R2P. The R2P as we know of it today originate in a report from 2001 by an international panel of experts called *the International Commission on Intervention and State Sovereignty* (ICISS).[22] The ICISS's work was initiated as a response to Annan's question to the UNGA.[23] In the report the ICISS stressed the need for a changed direction in the international discussion on the protection of fundamental human rights.[24]

The R2P is essentially a proposal of a solution to bridge the gap between on the one hand the responsibility of the international community to protect human beings from massive human rights violations, and on the other hand the principle of state sovereignty[25] and the principle of non-intervention,[26] in extreme situations where these aspects of international law appear to be incompatible.[27] *State sovereignty* is generally known to imply that a state has explicit authority over its territory. This authority entails, inter alia, that a state at the outset has the power to decide who is and who is not allowed to enter the territory as well as what policy etc. the state is going to be governed by, i.e. political independence.[28] The authority over its territory and its internal matters corresponds with a duty to respect all other states' identical authorities over theirs. This corresponding duty goes by the designation *the non-intervention principle*.[29]

However, even though state sovereignty constitutes a cornerstone of the UN Charter, the ICISS pointed out the universally acknowledged fact that no state possesses the boundless power 'to do what it wants to its own people'.

22 ICISS (2001). The ICISS was established by the Government of Canada together with a group of major foundations, see p. VII and 77ff of the report.
23 ICISS (2001), p. VII.
24 ICISS (2001), p. XII and 17.
25 State sovereignty is enshrined in Article 2(1) of the UN Charter.
26 The principle of non-intervention is reflected in Article 2(7) of the UN Charter.
27 See, for example, ICISS (2001) p. 17.
28 Linderfalk (2013) p. 16-17 and 20.
29 Ibid, p. 21.

Instead, the sovereignty of every single state implies the responsibility to not only respect other states and their sovereignty but also to respect the dignity and basic rights of all the people within the state.[30] It is the belief of the ICISS that the R2P implies the following: 'Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, *and the state in question is unwilling or unable to halt or avert it*[31], the principle of non-intervention yields to the international responsibility to protect'.[32]

According to the ICISS, the R2P consists of three different forms of responsibilities of which one - the responsibility to *react* - is of special interest in the discussion on the use of force. To cite the report, the responsibility to *react* embraces the responsibility 'to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctioned international prosecution, *and in extreme cases military intervention*.'[33] Throughout the report the ICISS stresses that the UNSC continues to be the most appropriate organ for the authorization of the use of force, even for human protection purposes. However, the ICISS stated that it was its aim 'to make the UNSC work better than it has'.[34]

2.2.2 General Assembly resolution on the responsibility to protect

At the World Summit in 2005 the UNGA adopted a resolution in which it acknowledged the R2P and stated that it will act in accordance with it, though it did not acknowledge it in full as it was presented in the ICISS report.[35] Instead, the resolution stipulates as follows:

30 ICISS (2001) p. 7-8. The ICISS also finds support for its statement in international human rights covenants, in UN practice, as well as in state practice, see p. 8.
31 My italicization.
32 ICISS (2001) p. XI.
33 Ibid, p. XI, 17 and 29. My italicization.
34 ICISS p. XII.
35 See, for example, Evans (ed.) (2014) p. 519.

'138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. [...]

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, [...] through the Security Council, in accordance with the Charter, including Chapter VII, [...] 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. [...]'[36]

The final text is a compromise between on the one hand states that strongly argued in favour of the international community's responsibility to intervene, even through military force, in the face of gross human rights violations and on the other hand states that maintained the view that the non-intervention principle puts a legal prohibition on the UNSC to authorize the use of force against sovereign states in relation to matters that occur within their borders.[37] Evans observes both that the very fact that the R2P has been agreed to by the UNGA represents a substantial success, as well as the fact that the resolution text is weaker than that which had been proposed in the report of the ICISS. He also notes that an analysis of the resolution text leads us to the conclusion that there remains extensive room for argument as to its meaning, standing and exercise.[38]

The resolution-recognized R2P belongs to the family of so called soft law, i.e. not legally binding law (as in contrast to hard law, which constitutes the legally binding sources). UNGA resolutions such as this one constitute

36 A/RES/60/1, p. 30.
37 Evans (ed.) (2014) p. 518.
38 Ibid, p. 519-520.

recommendations to the UN, and as the word 'recommendation' suggests these resolutions are neither binding upon the member states, nor upon the UNSC. Nevertheless, UNGA resolutions can be considered as morally and politically binding since they embody the outcome of often comprehensive and intensive negotiations, and thus the world opinion.[39] Furthermore, since the World Summit in 2005 the UNSC has mandated the use of military force in the light of the R2P in some of its resolutions. According to Linderfalk, it looks like the UNSC through the adoptions of these resolutions has asserted that during certain circumstances it is necessary to judge that even a seemingly and purely national event poses a threat to the international peace and security. Linderfalk notes that the UNSC appears to have found that such circumstances may exist when a population is suffering from gross human rights violations, given that the government in such a state is manifestly failing to protect them. Linderfalk expressly notes that in such a context 'the idea of *a responsibility to protect* probably plays a central role…'.[40] This, however, does not constitute enough support for the assumption that the R2P has crystallized into customary international law.[41]

2.2.3 Comments on the use of force and responsibility to protect

Regarding the R2P - its significance and applicability - the opinions are as mentioned divided. There are those who speak in favour of the R2P as an important step towards a more consummate recognition of international human rights and a more positive approach towards forceful intervention for humanitarian protection purposes. At the same time, there are those who argue that the concept does not have any real significance in the matter. There are also those who argue that the R2P, would it be recognized as legal, embodies a serious threat to the international legal regime in general, inter

39 Henriksen (2019) p. 36-38.

40 Linderfalk (2013) p. 211-212; UN Doc. S/Res/1528, 27 February 2004 (Côte d'Ivoire) and UN Doc. S/Res/1973, 17 March 2011 (Libya).

41 See, for example, Breau (2016) ch. 8.

alia because it would disrupt the system of sovereign states creating international order and stability.[42]

In connection to the question that Kofi A. Annan posed to UNGA in 2000, he also stressed the following:

'We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict. [...]. But surely no legal principle—not even sovereignty—can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community[…] Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.'[43]

As mentioned above, the ICISS responded to the challenge illuminated by Annan. In its report the ICISS states that 'there is no better or more appropriate body than the [UNSC] to deal with military interventions for humanitarian purposes'[44]. However, the ICISS also stresses that the UNSC should be aware, in all its deliberations, of the risk that 'if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation - and that the stature and credibility of the UN may suffer thereby'.[45]

After the adoption of the World Summit Outcome Document in 2005, then UNSG Ban Ki-Moon produced a couple of reports on the R2P doctrine. In the first report he set out three pillars of the R2P built upon the idea that the

42 See, for example, Burke (2013) p. 77.
43 Annan, Kofi A. (2000) p. 48.
44 ICISS (2001) p. 49.
45 Ibid, p. XI.

international community has a subsidiary responsibility to protect.[46] The third pillar, given the caption *Timely and decisive response*, is the one including the potential use of force by the international community through the UN in cases of need for collective response to mass atrocities occurring in a state. While elaborating on this third pillar, the UNSG expressed the following:

'[...]Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect […].[47]

Amongst the more negative reviewers of the R2P is Burke, who has criticized the doctrine with, inter alia, the argument that 'the idea of a 'responsibility to protect' has yet to develop proper normative roots'. With that statement he referred to the ethical arguments in favour of intervention for humanitarian protection purposes highlighted by some opponents.[48] Burke also states that the concept put forward by the ICISS is flawed and he even goes so far as to call the R2P 'a bastard son', arguing that the report is rooted in 'legal nothingness'.[49]

On a similar note as Burke, albeit not as critical, is Evans. He writes that it is apparent that the words of the UN Charter 'does not readily embrace either humanitarian intervention or a responsibility to protect.'[50] Concerning the R2P, Evans argues that the most compelling development on the matter was the recognition of it by the UNSC in a couple of resolutions, amongst them Resolution 1674 in which the UNSC 'reaffirmed the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the

46 Ki-Moon, Ban (2009) *Implementing the Responsibility to Protect*, UN Doc. A/63/677 (from hereon UN Doc. A/63/677).
47 UN Doc. A/63/677, para. 61.
48 Burke (2013) p. 53.
49 Ibid, p. 71.
50 Evans (ed.) (2014) p. 510ff.

responsibility to protect populations' from, inter alia, genocide.[51] Evans notes that this was the first time the UNSC expressly acknowledged that the role of the council 'may extend [...] to the cessation of mass atrocities taking place within State borders.'[52] Nevertheless, Evans concludes that the R2P is neither embodied in any treaty nor is it part of customary international law, which is also firmly noted by Burke.[53] As for the future, Evans adds that 'in my view' the best that can be said 'is that R2P is a political doctrine that at most constitutes but a fledgling rule of international customary law. It has quite some considerable way to go before it can be regarded as having been adopted in practice and obtained the requisite international acceptance to be considered as fully formed'. He also states, while elaborating on UNSC practice, that 'the promise of eventual legal recognition remains but, for the moment, that hope rests on fragile and uncertain foundations.'[54]

Amongst the more positive commentators of the R2P is Breau. In her own words, the R2P constitutes 'a rapidly emerging guiding general principle in international relations.'[55] Breau does not suggest that the R2P at the moment has the legal support for constituting an obligation for the international community to forcefully intervene in another state. Instead, she argues that it could be asserted 'that the evolution of legal obligations constituting responsibilities of states towards other states and their populations' in a number of areas of international law 'point to an evolution towards international responsibility that might at some point crystallize into international law obligations to protect peoples.' She also notes that crimes covered by the R2P, inter alia genocide, are well-established in international law and that both treaties and customary international law creates obligations to prevent and punish them.[56] Unlike Burke, Breau argues that in an

51 SC Res 1674 (28 April 2006).
52 Evans (ed.) (2014) p. 520.
53 Burke (2013) p. 71ff.
54 Evans (ed.) (2014) p. 529-531.
55 Breau (2016).
56 Ibid, p. 2.

international society ‘which places human protection at the forefront’ the R2P constitutes an essential obligation.[57]

Another example of advocates of a more positive view of the R2P is Jacob and Mennecke. They highlight that ever since the ICISS report ‘the international community has made significant progress in defining and consolidating the international R2P.’ However, they also note that the international community still finds it difficult to put words into action when it comes to the realisation of human rights and protection of people suffering from gross atrocities.[58] On the same note, one of the co-chairs of the ICISS in 2001, states that ‘... achieving the complete implementation of R2P in all its necessary dimensions - the effective prevention of the occurrence, continuation, and recurrence of mass atrocity crimes - is still manifestly a work in progress. The task of the next generation of policymakers, and those who seek to influence them, is above all to turn largely accepted principles into consistently applied practice.’[59]

2.3 The fundamental human rights embedded in the responsibility to protect and the UN

Ever since the Second World War the protection of individuals from gross assaults by their own governments has become an international concern. Respect for universal human rights can be found in different forms, in a vast number of instruments of international law. One example of such an instrument is the UN Charter which in Article 1(3) states that one of the purposes of the UN is ‘to achieve international co-operation in [...] promoting and encouraging respect for human rights and for fundamental freedoms

57 Ibid, p. 7.
58 Jacob and Mennecke (2020) p. 1.
59 Jacob and Mennecke (2020) p. XX.

…'.[60] Already in 1950, Lauterpacht asserted that a legal duty to respect fundamental human rights was put upon all member states of the UN and that it constituted a violation of the UN Charter if that respect was not fulfilled by each and every one of them.[61] In 2013 Linderfalk wrote that the violation of human rights is a common concern for all.[62]

As presented, the R2P revolves around certain violations of fundamental human rights: genocide, war crimes, ethnic cleansing and crimes against humanity. War crimes and ethnic cleansing are not yet as formally refined in international law as genocide and crimes against humanity. Nevertheless, the rules on war crimes - not to be found in one single document of international law but instead in different international instruments[63] - are perceived as part of customary international law and as possessing the jus cogens status meaning, as stated above, that no derogation from the rules governing the crime is allowed, no matter what. Ethnic cleansing has been referred to in resolutions of the UNSC and UNGA as well as in judgements and indictments of the International Criminal Tribunal for the former Yugoslavia. Crimes against humanity, although not yet codified in a treaty of international law, has over time evolved under customary international law and through the jurisdiction of international courts, inter alia the International Criminal Court. Furthermore, the prohibition of crimes against humanity is also considered to possess the status of a jus cogens norm.[64]

The most formally regulated of the four crimes in the R2P is the crime of genocide. The prevention of the crime of genocide is enshrined in the 'Convention on the Prevention and Punishment of the Crime of Genocide' (the Genocide Convention), adopted by UNGA in 1948. Article I of the Genocide Convention stipulates that the contracting parties 'undertake to

60 Linderfalk (2013) p. 168.

61 Lauterpacht (1950) p. 34-35.

62 Linderfalk (2013) p. 174.

63 Lists of war crimes can be found in international humanitarian law as well as in international criminal law treaties.

64 United Nations Office on Genocide Prevention and The Responsibility to Protect, 'Definitions'; Linderfalk (2013) p. 35.

prevent and to punish' the crime of genocide. In 2008 Amnéus noted that although this article does not explicitly 'prohibit states from committing genocide themselves' the ICJ has stated that 'such a prohibition follows [both] from the fact that genocide is a crime under international law [as well as] from 'the obligation to prevent and punish' the commission of the crime of genocide.'[65]

The adoption of the Genocide Convention represented the international community's commitment from thereon to 'never again' tolerate the kind of atrocities that was committed during the Second World War.[66] The ICJ has stated both that 'the principles underlying the Genocide Convention are principles which are recognized by civilized nations as binding on States even without any conventional obligation',[67] and that the prohibition of the crime of genocide has achieved the status of jus cogens.[68]

When it comes to the event of genocide occurring on the territory of a state and a potential other state is willing to intervene by military force, that state has to comply with the general rules on the use of force in international law.[69] Article VIII of the Genocide Convention regulates the role of the UN in the prevention and suppression of the crime of genocide. The article provides as follows:

'Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide …'

65 Amnéus (2008) p. 277; ICJ Report (2007) 63, para. 166.
66 United Nations Office on Genocide Prevention and The Responsibility to Protect, 'Definitions'.
67 ICJ Reports (1951) 23.
68 ICJ Reports (2006) 6.
69 Milanovic (2007) p. 687; ICJ Reports (2007) 63, para. 430.

As presented above, the UN through the UNSC has the authority to mandate the use of force, even military, in compliance with Article 39 and 42 of the UN Charter. Article VIII of the Genocide Convention does not precede this regulation.[70] Instead, it basically
reinforces the authority of the UNSC to determine upon actions that might be called upon in the pursuit of maintaining international peace and security.[71]

Generally, the prevailing view is that the use of force to protect people from gross human rights violations such as the ones mentioned here has to be authorized by the UNSC to be legal. As of today, there seems to be no other evident option available.

70 Schabas (2009) p. 491.
71 Amnéus (2008) p. 280.

3 DISCUSSION AND CONCLUSION

3.1 Research question one

It does not take much of an analysis of the material presented in this thesis to establish that the answer to the first research question arguably is *no*. From a de lege lata perspective there is not sufficient legal support for a potential claim that the R2P places an obligation upon the UNSC to authorize the use of force in the event of genocide, war crimes, ethnic cleansing or crimes against humanity. This conclusion is fairly easy to reach. First of all, there is a general prohibition of jus cogens character - Article 2(4) of the UN Charter - and only one exception that is of relevance to this thesis - Article 39 combined with Article 42 of the UN Charter. The prohibition stipulates that all states have to abstain from the use of force, whether direct or indirect, in international relations. The exception provides that the UNSC has the authority to mandate the use of force if it deems it necessary to maintain or restore the international peace and security. Both of these provisions constitute hard law in contrast to the R2P and its normative character of soft law (at least as of today), representing the superiority of the general use of force-instrument. It is of some value for the R2P advocates to emphasise that three out of four of the fundamental human rights crimes embedded in the R2P also possess the status of jus cogens norms as well as the fact that the UNSC itself has found that humanitarian crises can constitute threats to the international peace and security actualizing the authorization of the use of force. Though, to claim that these norms and that finding amount to a *duty* upon the UNSC to authorize the use of force in cases of gross human rights violations is, as of today, a far-fetched argument that not even the proponents of the R2P assert.

3.2 Research question two

In contrast to the outcome of the examination of the first research question, it is not evident what the answer to the second research question is. There is considerable evidence that the current regulation of the relationship between human rights protection and the prohibition of the use of force is unsatisfactory. Should this insufficiency be resolved by putting an obligation upon the UNSC to authorize the use of force in the face of gross human rights violations? Because of the normative nature of the question it is possible to argue that, besides legal arguments, also moral arguments should be awarded consideration. Here it is important not to neglect the myriad of different opinions claiming to be morally correct, making it complicated to define what is the ultimate moral right and thus finding a moral common ground to build law upon. It also complicates the finding of convincing support for one's own arguments. Nevertheless, the following analysis will be affected by moral understandings.

Amongst the counter arguments to the second research question is the statement that the R2P rests on inadequate legal foundations. To start with is the assessment that at most the R2P constitutes soft law. Furthermore the doctrine is not founded in any international treaty or customary international law. There is also the argument that the R2P does not confer with the UN Charter text and that in any way, as of today the doctrine is too immature to gain legal recognition. Furthermore, opponents to the R2P could base their arguments on the notion of state sovereignty and the non-intervention principle as well as the fact that the international community of today is built with sovereign states as the main actors. It is a viable argument against the R2P that this system of sovereign states creates stability and order in the international arena. Unless the UNSC judges that an event happening inside a state's territorial borders threats the international peace and security - and there are those who strongly oppose that this is even possible - currently there is no viable way around the general prohibition, not even for humanitarian protection purposes.

In response to the counter arguments is, inter alia, the assessment that the R2P constitutes 'a rapidly emerging guiding general principle in international relations' and that the human rights embedded in it are well-established in international law. It is also emphasized by proponents of the doctrine that it has the potential to become a much needed international norm as well as the fact that it has already been acknowledged at high levels within the UN. Although the doctrine has not received the status of hard law, it could be argued that the resolution in which it was included symbolized a manifestation of a changing world opinion. However, these arguments in favour of the R2P are arguably not enough to successfully suggest that there should be an obligation put upon the UNSC to authorize the use force in the light of the doctrine.

Therefore, in the quest of promoting the R2P other arguments need to be presented. Such an argument could be that state sovereignty, as stated, implies a responsibility upon every single state to respect the human rights of their populations. If this responsibility is unfulfilled, it is suggested that the international community bears a subsidiary responsibility to make sure that populations suffering from maltreatment are being protected. This argument finds support in the UNGA resolution which acknowledged the R2P, stating that if necessary, even the use of force may become an applicable solution. Another argument could be that although the prohibition of the use of force possesses the status of jus cogens there is an established exception to it. It could be argued that this is not completely logical since the implication of the jus cogens status is that no derogation from the provision possessing the status is allowed. This inconsistency however speaks in favour of the suggestion that it is possible for yet another exception to legally crystallize in the future. An example of such an exception could be the legal duty to authorize the use of force in the pursuit of protecting fundamental human rights of which some also possess the jus cogens status. On this note it is of relevance to reminisce on the fact that the UNSC has made the assessment that humanitarian crises falls within the scope of threats to the international peace and security in

Article 2(4) of the UN Charter. It is possible to argue that this testifies that the UNSC is already prepared, be that on an early stage, to adjust the regulation on the use of force.

Both the prohibition of the use of force and the protection of fundamental human rights are clearly crucial to the international environment that we live in today. The solution of the problem does not have to be a complete switch of positions but instead an affair of compromise. It is arguably possible to compromise in a way that does not result in a total disruption, neither of the use of force-regulation nor the international peace and security. It should be possible to strengthen the protection of and compliance with fundamental human rights through another "exception" at the same time as a general prohibition of the use of force remains existing. The proposal could be that in the event of gross human rights violations, the use of force - *when it has the capacity to halt or end the suffering and as a last resort* - should be lawfully authorized by the UNSC. Should be, as in an obligation upon the UNSC to authorize it.

Assume that the UNSC continues to play an important role. However, instead of being a question of *if* the use of force should be authorized, it could be a question of *who* the UNSC mandates to intervene for humanitarian protection purposes. While exercising this authority the UNSC should secure that the right intentions, in as much as that can be clarified, form the purpose of the intervention. There might always be a risk that other motives than humanitarian protection will be involved in the intervention, which of course is a defect in this matter. On the other hand it could just as well be the case that other motives than the maintenance of international peace and security lay behind the decision of the UNSC to not authorize the use of force.

To summarize, these are the conclusions of the thesis. First, as of today, the proposal that the R2P has achieved the legal status of a norm obligating the UNSC to authorize the use of force for the protection of people suffering from the crimes embedded in the R2P does not find authoritative legal support.

Therefore, the answer to the first research question is no. Second, as stated, it is safe to say that there is no evident prevailing "right" answer in general to the proposal that the UNSC *should have* such an obligation put upon it. However, from a human rights perspective, in the light of lacking compliance with protection of existing human rights as well as explicit aims of the UN for the protection of fundamental human rights, it is possible to arrive at an affirmative conclusion regarding the second research question. Based on the findings in this thesis the belief is both that it could be, and should be a duty upon the UNSC. This conclusion is not reached without knowing that it might be far-fetched. However, that does not make it wrong.

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