

## REPLACING THE RESPONSIBILITY TO PROTECT: THE EQUITABLE THEORY OF HUMANITARIAN INTERVENTION

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### Introduction

“It is only a matter of time before reports emerge again from somewhere of massacres, mass starvation, rape, and ethnic cleansing... this time around the international community must have the answers”.<sup>1</sup>

The above citation epitomises the prevalent sentiment towards humanitarian intervention at the turn of the 21st century. NATO’s 1999 Kosovo intervention, which had failed to attract the backing of the UN Security Council, and which was therefore, *de lege lata* illegal, had nonetheless ‘pricked the conscience’ of many international lawyers. The chasm between the illegality of NATO’s action and its ‘legitimacy’, defended by many, disquieted many. Clearly, long-term, lawbreaking could not be encouraged. However, the fact that the law precluded the possibility of remedial action against gross human rights abuses left a sour taste in the mouth. The use of the term ‘legitimate’ to describe such actions could dangerously blur the space between law and morality. Such approaches, clearly “diminish the power of law”.<sup>2</sup>

As Nicholas J. Wheeler has noted, “humanitarian intervention exposes the conflict between order and justice at its starkest”.<sup>3</sup> The order in question is the United Nations Charter, and in particular its provisions governing the use of force. Article 2(4) consecrates a general interdiction upon force, with two exceptions, namely the ‘inherent’ right of self-defence, and enforcement action sanctioned by the UN Security Council under Chapter VII of when a threat to international peace and security is determined. However, no provision is made for the usage of military might as a remedial action against gross human rights abuses. “International peace and security” is clearly not synonymous with “human rights”, and therefore such action theoretically falls outside the mandate of the Security Council. Further, when the Security Council is deadlocked due to the use of the veto by one of the permanent five members (P5), what then?

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<sup>1</sup> G. Evans & M. Sahnoun, ‘The Responsibility to Protect’, *Foreign Affairs*, (81) 2002-6, p. 100.

<sup>2</sup> M.E. O’Connell, ‘Taking Opinio Juris Seriously, A Classical Approach to International Law on the Use of Force’, in: E. Cannizzaro & P. Palchetti, *Customary International Law on the Use of Force: A Methodological Approach*, Leiden: Koninklijke Brill 2005, p. 10.

<sup>3</sup> N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford: Oxford University Press 2000, p. 11.

It was in the above context that the Canadian government established an independent authority, the International Commission on Intervention and State Sovereignty (ICISS) which it charged with the task of shaping a framework for permissible humanitarian intervention. It is their report, the Responsibility to Protect Report (also styled as the ‘R2P’), which consecrated this framework.

However, eight years after the R2P Report’s publication, little headway has been made. In this article, I shall forego detailing the R2P’s chief tenets, which has been done elsewhere. Instead, I argue that many of the R2P’s ideas were misconceived, and its threshold criteria are faulty at best. Further, I shall argue that selfish state interests and subsequent events prevented its ideas from ever taking root. Nonetheless, it is my contention that all is not lost, and that a better alternative to the R2P initiative may indeed exist, based strongly upon the sources of international law. This is what I term equitable humanitarian intervention, which I shall address in the second half of this paper.

## **I. The Responsibility to Protect: A Frank Legal Assessment**

In this section, I shall first offer a critique of the shortcomings of the R2P Report itself, before moving on to assess the problems with its implementation. Finally, I shall evaluate the effects of the Iraq war and the ‘war on terror’ on the R2P concept, inquiring as to whether the idea has a future.

### **I.1 The Responsibility to Protect: A Flawed Concept**

#### **i. A High Bar**

The R2P while superficially attractive is, in my opinion, an inherently flawed concept, serving not to create a framework for permissible humanitarian intervention while guarding against abuse, but instead clouding the debate in this area and in fact creating criteria which may easily be turned to other less altruistic ends. Thomas G. Weiss, in an article in *Security Dialogue* makes reference to the fact that the six criteria set the bar very high for humanitarian intervention, and that two other “obvious” causal factors for intervention have been omitted from “just cause”, namely:

- Overthrow of democratically-elected regimes, and
- Massive abuses of Human rights.<sup>4</sup>

Furthermore, Weiss notes that the fact the thresholds do not include systematic racial discrimination and gross human rights abuses indicates an

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<sup>4</sup> T.G. Weiss, ‘The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era’, *Security Dialogue*, (35) 2004-2, p.139.

aversion toward international law in general on the part of the ICISS, as these represent *jus cogens* principles to most international lawyers.<sup>5</sup>

## ii. Terminology

The ICISS attached great importance to changing the terminology of the humanitarian intervention debate from ‘intervention’ to ‘protection’. I fail to see how opting for an alternative nomenclature changes the issues at hand. Using different names cannot and will not affect the legitimacy, legality, or justifiability of the act in question. The debate remains constant, and it is better to tackle the issues head on and call a spade a spade. Furthermore, it is worth noting that the Report, once published, is out of the Commission’s control. The Report’s ultimate content is indeterminate, as the interpretation of its provisions is left to the states which may use (and/or abuse) it as they choose.

This view is supported by Alex Bellamy, who notes that in the case of the Security Council debates regarding Darfur, the R2P acquires “allowed traditional opponents of intervention to replace largely discredited ‘sovereignty-as-absolute’-type arguments against intervention in supreme humanitarian emergencies with arguments about who had the primary responsibility to protect Darfur’s civilians.”<sup>6</sup> Thus, the novel language of the Report renders it a tool which can constrain as well as enable intervention.

## iii. Good International Citizenship

The R2P discourse advances dubious claims. The idea of ‘good international citizenship’, affirming that it is in the interest of every state to intervene anywhere in the world when serious crises emerge, due to the interdependence of the world community, and that this may counterbalance fears of opportunistic interventions, is fanciful at best. As Martti Koskenniemi highlights, “it is never Algeria that will intervene in France, or Finland in Chechnya”.<sup>7</sup> This simple fact, further, makes the idea that the ‘P5’ not exercise their veto unless a matter concerns them directly in cases of humanitarian crisis effectively worthless. It is almost always powerful states which intervene, and therefore, almost every crisis worldwide is of interest to them. “The Commission argues that their perspective is not based on power or Realpolitik but morality. The ‘Responsibility to Protect’ implies a duty on the state to act as a moral agent.”<sup>8</sup>

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<sup>5</sup> *Idem*, pp.139-140.

<sup>6</sup> A.J. Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq’, *Ethics and International Affairs* Summer 2005), p. 52.

<sup>7</sup> M. Koskenniemi, ‘The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law’, *Modern Law Review*, (65), 2002-2, p. 172.

<sup>8</sup> ICISS, *Research, Bibliography, Background (to the R2P Report) 2001*, p.136.

In the above affirmation, the Commission reveals a worrying bias in favour of a Liberal, quasi-utopian view of a world of interdependent states, each of which has an interest in every conflict, at every time, due to the universal desire for a stable world environment. This vision is roundly refuted by Realists, who point to the fact that unless states' vital interests are at stake, they will not intervene if this risks soldiers' lives or incurs serious costs. "Thus the best we can hope for is a happy coincidence where the promotion of national security also defends human rights. The strength of this position is that it recognises the reality of state interests and power; its weakness is that it makes humanitarianism dependent upon shifting geopolitical and strategic considerations."<sup>9</sup> It is due to their recognition of this reality that some alternative formulae for permissible intervention do not posit primacy of humanitarian motives as a *sine qua non* of intervention.<sup>10</sup>

The above problems are admitted by the ICISS, which candidly concedes that "if the risks and costs of intervention are high and interests are not involved, it is unlikely that states will enter the fray or stay the course."<sup>11</sup> Nonetheless, the Report fails to adequately address such concerns, attributing too much weight to 'good international citizenship' and paying little heed to the inherent conflict arising from the fact that while, by the ICISS' own admission, states are unlikely to intervene unless selfish interests are involved, the primacy of humanitarian motives is the crux of the precautionary principle of 'right intention', one of the six threshold criteria for intervention.

#### **iv. Expansion of the R2P discourse – A Duty to Prevent**

It is worth underlining the youth of the R2P concept. Thus, the direction of the associated discourse is uncertain. One may already observe the inherent dangers of R2P terminology in the writings of Fenstein and Slaughter, who have used the doctrine to develop a corollary – the 'Duty to Prevent' acquisition of Weapons of Mass Destruction by states without internal checks on their power – which can plainly be used as a pretext for American neo-imperialist designs. Per Fenstein and Slaughter, this "Duty to Prevent" "extrapolates from recent developments in the law of intervention for humanitarian purposes", namely the R2P.<sup>12</sup>

Fenstein & Slaughter's contention is that the international community has a duty to prevent security disasters as well as humanitarian ones, even if this violates sovereignty. "Like the responsibility to protect, the duty to prevent begins from the premise that the rules now governing the use of force

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<sup>9</sup> N.J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford: Oxford University Press 2000, p. 30.

<sup>10</sup> *Idem*, p.33-34.

<sup>11</sup> ICISS 2001, *supra* note 8, p.140.

<sup>12</sup> L. Fenstein & M.A. Slaughter, 'A Duty to Prevent', *Foreign Affairs* 83(1) (Jan/Feb 2004), p.149.

devised in 1945...are inadequate.”<sup>13</sup> The Duty to Prevent – like the R2P - lifts the veil of sovereignty and examines the internal workings of the state machinery.

Fenstein and Slaughter’s model is worth examining more closely, as it makes many of the same base-line assumptions as that of the ICISS, but enunciates them more explicitly and takes them further. The idea that a state without internal checks on its power must be prevented from supplying terrorists with weapons implies that the same duty to prevent does not weigh on the international community with regard to states with a proper system of checks and balances. Why is this value judgment made? The contention that states with internal checks on their power are highly unlikely to supply arms to terrorist movements is clearly falsified by the Irish experience, where collusion between the Irish government and the IRA, and the Northern Irish administration and the loyalist paramilitaries was widespread. Fenstein and Slaughter justify this separation, affirming that “the behaviour of open societies... is subject to scrutiny, criticism and countermeasures by opponents”.<sup>14</sup> However, ‘checks on internal power’ and ‘terrorism’ remain undefined, leaving many questions to be answered. Other matters are also puzzling, not least where the legal basis of the ‘Duty’ lies. In fact, the doctrine varies between a statement of a positive duty and an aspirational framework for future law reform based around a condemnation of the law ‘as is’ with a strong pro-American bias:

“Just as effective gun control in the United States requires both outlawing the most dangerous weapons and ammunition and applying more stringent controls on citizens with criminal records and other risk factors, an effective international non-proliferation campaign must target both WMD and international actors with suspect intentions”<sup>15</sup>

However, the inherent bias is unable to abide by its own flawed logic. Identifying dangerous states by ‘risk factors’ and by past criminal activity as is done at domestic level is all very well, but it is worth asking the question whether the USA or North Korea has been involved in more illegal military operations in the last 20 years.

The malleable structure of the R2P and the attempts to expand upon its premises are regrettable, insofar as they may damage any goodwill the Report had engendered. It also shows the dangerous consequences of any departure from positive international law.

#### **v. The R2P: A Bastard Son**

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<sup>13</sup> *Idem*, p.138. This would suggest that the entire international legal regime on the use of force is contained in the UN Charter, which represents a fundamental misunderstanding, notably, of the rule on self-defence.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

I turn now to perhaps the most important criticism of the R2P, the fact that it is rooted in legal nothingness. Neither state practice, nor major treaties have included affirmative references to the concept, and while UN Security Council Resolution 1674 (April 28<sup>th</sup>, 2006) “Reaffirm[ed] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”, this did not entail legal incorporation of the R2P, nor is it to serve as any sort of future guideline for Security Council activities.

Clearly, the ICISS was attempting to engage with the cleavage between popular sentiment and international law’s position on humanitarian intervention. However, in doing so, it has strayed too far from the law. The question must be posed as to why this is the case. Perhaps the fact that the general prohibition on the use of force represents a norm of *jus cogens* meant that the ICISS were unwilling to challenge it, as any normative framework built in contravention of this general prohibition would surely founder. However, if this was the case, it was surely worth noting that many of the most basic human rights norms are also popularly accorded *jus cogens* status<sup>16</sup>, and that the (exclusive) means of effecting change upon a peremptory norm is by use of another peremptory norm. Perhaps the ICISS ‘missed a trick’ here.

In fact, the flight from traditional terminology and traditional international law, so that states’ prerogatives may not be asserted as overriding human rights is only half the story. The rhetoric employed is inherently Janus-faced: “While the traditional terminology of ‘rights’ is removed from the debate... ‘rights’ are smuggled back in and given to the individuals who have the ‘right to protection’...the Report overtly argues that individual human rights ‘trump’ the rights of sovereignty...”<sup>17</sup>

Further, as Francesco Francioni has noted, theories which favour a right of intervention outside the law underestimate the fact that the international rule of law is a value in and of itself, and there is no doubt that the rule governing the use of force in international relations remains a fundamental principle of the international legal system.<sup>18</sup>

The R2P, while attempting to herald a new departure in the international use of force, may thus be described as a bastard son, insofar as it deliberately

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<sup>16</sup> O. Quirico, *A Formal Prescriptive Approach to General Principles of (International) Law*, European University Institute Working Papers: Law 2007/19 (Florence, 2007), p. 20.

<sup>17</sup> D. Chandler, *The Responsibility to Protect? Imposing the Liberal Peace: A Critique*, Paper presented to the British International Studies Association annual conference at the London School of Economics, 16-18 December 2002 (amended version) pp.9,15.

<sup>18</sup> F. Francioni, ‘Balancing the Prohibition of Force with the Need to Protect Human Rights: A Methodological Approach’, in: E. Cannizzaro & P. Palchetti, *Customary International Law on the Use of Force: A Methodological Approach*, Leiden; Koninklijke Brill 2005, pp. 276-277.

disassociates itself from the legal regime, rather than using its *acquis* to argue for law reform or a broader interpretation of the existing rules.<sup>19</sup> Rooted in legal nothingness, until it is formally embraced by the international community, and in particular the Security Council, it will remain ‘pie in the sky’ – a theory, but nothing more.

I shall now assess whether the attempts to put theory into practice, and thus overcome to some degree the above criticism.

## **I.2 R2P in Action: A Failing Initiative**

The virtually contemporary occurrence of the terrorist attacks in the United States with the publication of the ICISS Report was to prove a major drag factor on the R2P’s impact. Within weeks, the world political climate changed significantly as the Bush administration announced its ‘war on terror’ and invaded Afghanistan. However, even before this, there was recognition on the part of the Report’s drafters that political will would be an important obstacle to be overcome before the R2P could garner universal acceptance. Nonetheless, Gareth Evans and Mohamed Sahnoun struck a positive tone, noting that “[t]oo often, more time is spent lamenting the absence of political will than on analysing its ingredients and how to mobilise them...”<sup>20</sup>

The means employed to mobilise opinion amongst state leaders and to further the moral concerns underlying the R2P Report were, however, questionable, and one might even argue, counterproductive. In attempting to forge a consensus at the 2005 World Summit, the R2P’s supporters showed a willingness to compromise which ultimately led to a significant dilution of its original aims, to say the least. This was undertaken, in the main, to accommodate the USA, taking cognisance of the stark reality of US military hegemony and the need to have their active participation in any solution.<sup>21</sup> The ICISS took the view that some progress under a banner of consensus is better than none.

However, as E.H. Carr astutely observed, theories of international legitimacy, particularly those which obtain normative force are always “the product of dominant nations or groups of nations”, and therefore “supposedly absolute and universal principles... [are] not principles at all, but the unconscious reflections of national policy based on a particular interpretation of national interest at a particular time.”<sup>22</sup> In essence, this meant that if any conception

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<sup>19</sup> It is perhaps hardly worth noting that the R2P principles have no precedent in state practice.

<sup>20</sup> Evans & Sahnoun 2001, *supra* note 1, p.99; p.109.

<sup>21</sup> S.N. MacFarlane, C.J. Thielking, & T.G. Weiss, ‘The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?’ *Third World Quarterly*, (25) 2004-5, p.983.

<sup>22</sup> E.H. Carr, *The Twenty Years Crisis 1919-1939*, London: MacMillan 1939, p. 111.

of the R2P was to gain normative force, it would need to suit the agenda of each of the most powerful states.

It was clear from the outset that the P5 “were unwilling to give up the practice of case-by-case decision-making about whether to intervene for humanitarian or any other reasons.”<sup>23</sup> Hence the ICISS resigned themselves to the effective removal of the ‘unreasonable veto’ component from the R2P package. Furthermore, the paragraphs eventually adopted awarded the role of final arbiter conclusively to the Security Council. This was a massive blow, as it effectively rendered a ‘future Kosovo’ both illegal and illegitimate under the R2P framework to be adopted.

Despite some optimistic rhetoric emerging from R2P proponents in the wake of the 2005 World Summit Outcome Document and UN Security Council Resolution 1674 of 2006, the fact is that both of these texts endorsed a version of the doctrine scarcely recognisable when compared with that in the 2001 Report. Alex Bellamy notes that “[p]erhaps the most worrying development is that in attempting to forge a consensus, the ICISS and its supporters sacrificed almost all of the key elements....”<sup>24</sup>

In addition, the legal effect of the World Summit Outcome Document is dubious, with much of its rhetoric striking an aspirational note, and no provision for meaningful commitments by states. Resolution 1674 is little better, as it lacks the ‘teeth’ to impact upon the Security Council’s unfettered discretion to decide upon issues concerning the use of force in any way whatsoever.

### **I.3 Effects of the ‘War on Terror’ and the Iraq War on the R2P**

A recurrent theme in any debate on shaping criteria for justifiable humanitarian intervention is the question of abuse. Such criteria, it is felt, must be copper-fastened to humanitarian, and only humanitarian, missions. Otherwise, they may become a ‘Trojan horse’, as it were, a *casus belli* for interventions which are anything but humanitarian.

In 2004, Thomas G. Weiss was wont to dismiss such concerns about the R2P, arguing that the purported danger of the concept being used as an excuse for non-humanitarian interventions is fundamentally incorrect, and rather that intervention by the USA in its pre-emptive or preventive war mode is *the* pressing concern.<sup>25</sup> However, after the failure to find the much-vaunted WMDs in Iraq, humanitarian rationales, borrowing language strikingly similar to that of the R2P, were retrospectively advanced by the

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<sup>23</sup> MacFarlane, Thielking & Weiss 2004, *supra* note 21, p.985.

<sup>24</sup> A.J. Bellamy, ‘Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’, *Ethics and International Affairs*, (20), 2006-2, p.169.

<sup>25</sup> Weiss, 2004, *supra* note 4, p.137.



alliance as having been essential in the decision to act against Saddam Hussein's regime.

The consequences of this avowal have proven to be far-reaching because, quite simply, the explanation was not believed. Bellamy notes that if "a norm is undermined by the perceptions that [unscrupulous states] have abused it or raised it for primarily self-serving purposes, the process of normative change is likely to be slowed or reversed".<sup>26</sup> Perhaps this explains why in studies of past examples of humanitarian intervention, Hitler's 'intervention' in the Sudetenland is rarely discussed.

Ostensibly, the US-UK action in Iraq has fundamentally undermined their standing as norm carriers.<sup>27</sup> As David Chandler pointed out, it was "apparent that the arguments developed by the Commission in support of the liberal peace thesis appear to have been fully appropriated by the Conservative 'hawks' in the Washington establishment who are seen to be guided by the principles of Realpolitik and US power rather than any desire to 'refocus the discussion on the victims'..."<sup>28</sup>

The above conclusion does not augur well for the future. It is true, for example that Security Council debates on the crisis in Darfur have been peppered with the R2P terminology. The meaning attributed to such language, however, has been hotly contested. Such defiance and disbelief leads credence to the thesis that the US/UK usage of R2P language to justify their actions in the past has damaged not only their status as norm carriers, but also the concept's prospects for the future. *Bundeskanzler* Gerhard Schröder – a prominent R2P proponent – reportedly rejected a UK communiqué supporting the idea that the R2P ought to override state sovereignty in supreme humanitarian emergencies because he feared that it would be used by the US and the UK to justify the Iraq war.<sup>29</sup>

Concerns surrounding the potential hijacking of altruistic humanitarianism as a front for Anglo-American foreign policy designs extends beyond the Iraq war, however. The 'Bush doctrine' of pre-emptive or even preventive self-defence is viewed by many states as a genuine threat to the current international order. This has led to calls for a renewed commitment to the non-intervention rule. As a result, according to some commentators, "there is likely to be more pressure to return to classic Westphalian notions of sovereignty that underpin international society than to pursue vigorously criteria that justify humanitarian intervention."<sup>30</sup>

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<sup>26</sup> Bellamy, 2005, *supra* note 6, p.33.

<sup>27</sup> *Idem*, p.32.

<sup>28</sup> Chandler, 2002, *supra* note 17., pp. 22, 24.

<sup>29</sup> Bellamy, 2005, *supra* note 6, p.39.

<sup>30</sup> MacFarlane, Thielking & Weiss 2004, *supra* note 21, p.985.

The Darfur experience, and the lack of appetite amongst western states for real and effective action to save lives, suggests that concerns about increased interventionism in the wake of Kosovo and 9/11 are misplaced. The changes wrought on the (potential) normative status of humanitarian intervention and particularly the R2P criteria are more subtle. Two trends in particular may be identified:

- The UK and the USA appeared to recognise the fact that their diminished credibility as norm carriers would make it harder for them in building a Security Council consensus on action – just when they were too overstretched militarily to contemplate unilateralism.
- Darfur supports the contention that the R2P criteria could constrain as well as enable intervention.<sup>31</sup>

#### I.4 If not this, then what?

Even absent 9/11 and subsequent events, it is hard to convince one's self of the R2P's merits. Clearly, the Canadian initiative was undertaken with the best intentions, but, as I have outlined above, the doctrine which emerged from it leaves a great deal to be desired *qua* theory. The twin dangers of (continued) abuse of the doctrine and the damage it could do to the credibility of international law - in addition to the problems outlined above both in its substantive theory and its *mise en oeuvre* - mean that that the R2P is ill-suited to accomplish the delicate task of allowing for forcible protection against the worst human rights abuses.

What I shall attempt to achieve in the second half of this discussion is to posit the genome of an alternative theory rooted in the sources of international law and not outside it, which can allow not merely legitimate, but even legal (unauthorised) humanitarian intervention. This is the theory of equitable humanitarian intervention

## II. Equitable Humanitarian Intervention

### II.1 International Legal Rigidity

The humanitarian intervention debate's foundation may be surmised in the following form:

- **The rigidity of the statutory instrument** (the UN Charter, governing the use of force by states, and the *Jus Cogens* nature of the norms involved)
- **and the factual likelihood that it will not soon be reformed** (due to the interests of powerful states in preserving the status quo)

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<sup>31</sup> Bellamy, 2005, *supra* note 6 pp. 50-52.

- **result in a situation where a recognisably unjust result** (gross human rights violations)
- **may be achieved without the possibility of an effective solution** (humanitarian intervention) **being legally achievable.**

Clearly, the kernel of the problem rests in the inflexibility and stagnation of the statutory instrument. This is not a new problem. It has been dealt with in the past in various domestic legal systems. What surprises me is that the answers proposed - including the R2P - did not touch upon a solution which had proved effective in a variety of disparate legal regimes across the world in resolving problems wrought by legal rigidity impinging upon the achievement of justice. The solution to which I refer is equity.

## II.2 Equity as a Panacea: A History Lesson

In 16<sup>th</sup> century England, a process began to solve a problem which had long beset the English judiciary. In order to undertake legal proceedings, plaintiffs were required to submit a “writ”. Writs were only available for certain offences, while for other wrongs, none were procurable. A common practice of lawyers was to attempt to ‘shoehorn’ wrongs committed into standard writs, but since the writs proscribed the elements necessary only for certain wrongs, such actions were usually defeated, resulting in disappointed parties who were unable to recover any compensation for suffering. This was in addition to the fact that the monetary damages which were generally payable as compensation were often insufficient (as such damages would be determined by statute), or completely unsuitable (when the owner would have preferred the return of a stolen object etc). The legislative and executive were indisposed toward legal reform, thus the system of writs persisted. In essence:

- **The rigidity of the statutory instrument** (the laws of England)
- **and the factual likelihood that it would not soon be reformed** (due to the interests of the crown in preserving the status quo)
- **resulted in a situation where a recognisably unjust result** (uncompensated damage)
- **could be achieved without the possibility of an effective solution** (specific performance or restitution to remedy the wrong committed) **being legally achievable.**

In the end, the solution came from within the system itself. There had long existed the possibility of a special appeal to the King via an individual

petition in the wake of a manifestly unjust result at common law. The King would then decide on the basis of justice, whether to entertain the submission of the plaintiff, and what remedy to impose. The remedy awarded by the King would not be limited by statute and could also take the form of restitution or specific performance, and not merely the payment of monetary damages, as was the case with the regular courts.

Due to the Common Law's failure to meet the needs of an increasingly commercial economy, dissatisfaction with justice at Common Law increased, and resort to individual appeals to the monarch grew in popularity exponentially. Since such activities were encroaching too severely upon the King's time, he delegated the responsibility for dealing with such pleas to the Lord Chancellor. In time, this also became too much work for the Lord Chancellor, and a separate system of 'courts of conscience' was created. They functioned separately as an alternative to Common Law courts for three centuries, until the Union of Judicature (Acts), 1873 & 1875, combined the two jurisdictions. The central tenet of the acts was that, in conflicts between equity and the law, equity would prevail. Ever since, equity has functioned as a "softening" influence on legal rigidity, both in England and other Common Law jurisdictions.

### II.3 Equity as an international phenomenon

The above represents the quintessential example of the development of equity. However, other examples of equity in the domestic legal history of various nations abound. Nor is equity a modern concept by any means, it has its roots in ancient philosophy.

#### i. *Epieikea* & *Aequitas*

*Epieikea* was addressed by both Plato and Aristotle. Aristotle described equity as "better than that error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of the law where it is defective owing to its universality".<sup>32</sup>

In other words, qua Aristotle, rigid statutes could not account for every eventuality. No stipulation could provide justice in every set of circumstances. Therefore, equity could 'step in', as it were, where the law failed to produce substantive justice, and was therefore defective, and correct it.

*Aequitas* represented the transposition of the notion of *Epieikea* into the Roman legal system. Cicero describes *Aequitas* as the spirit of justice which moulds the law according to right reason.<sup>33</sup>

<sup>32</sup> Aristotle, *Nicomachean Ethics*, London: Philosophical Library Series, Joe Sachs translation, 2004,,Book V, Chapter 10.

<sup>33</sup> Cicero, *de Legibus*, New York: Loeb, 19777, I. XV. p. 42

## ii. A Source of International Law?

The above principles have been seen to permeate into western legal systems to a significant degree.<sup>34</sup> Furthermore, Grotius and Pufendorf included an important place for equity in inter-state relations<sup>35</sup> including its capacity to correct legal rigidity. Both indicated their concerns that the employment of equity in the face of the law ought not be abused, and therefore stipulated that equity might only be applied with some circumspection.<sup>36</sup> This reflects a natural unease amongst legal scholars at allowing the operation of a principle which seems to repose upon a broad, inherently subjective notion of “conscience”.

These concerns were reflected in the lengthy discussions at The Hague in 1920 by a panel of renowned jurists who had been selected by the League of Nations to advise upon the creation, composition, and statute of a Permanent Court of International Justice. Another *Kulturkampf* was visibly emerging here, as in many civil law systems the “separate stream” of jurisdiction which equity represented at Common Law was abhorred as a model. Instead, the continental preference for codification tended strongly against this, although certain “general clauses” were inserted into codes to ensure equitable application of statutory provisions.<sup>37</sup>

Due to wrangling over the content of this “extra” law, it was eventually encapsulated as “general principles of law recognised by civilised nations”. This provision is identical to that in Article 38(I) c. of the statute of the ICJ. Although the majority of the Advisory Committee was ready to concede that equity would play a role in judicial decisions, they would not admit to its being affirmed as a separate free-standing source, given its different connotations in different legal systems.<sup>38</sup> Therefore, despite the fact that some, such as Hagerup and de Lapradelle would have favoured an express reference to ‘equity’, there was concern it was too vague a concept. Lord Philimore approved specifically of the expression ‘maxims of equity’, but preferred not to see equity itself employed in its broadest sense as this would

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<sup>34</sup> Justice M. White, *Equity – A General Principle of Law Recognised by Civilised Nations?*, *Queensland Law Journal* (4) 2003-1, pp. 103-107.

<sup>35</sup> *Idem*, p. 106.

<sup>36</sup> H. de Groot (Grotius), *Of the Rights of War and Peace, In Which are Explained the Laws and Claims of Nature and Nations, and the Principle Points that Relate either to Publick Government or the Conduct of Private Life* (1715); Grotius, *De Jure Belli ac Pacis, libri tres* (1735); S. von Pufendorf, *The Law of Nature and Nations, or, a General System of the Most Important Principles of Morality, Jurisprudence and Politics. To which is prefix'd M. Barbeyrac's prefatory discourse containing an historical and critical account of the science of morality* (Basil Kennett translation, 1749).

<sup>37</sup> W.G. Friedman, *Legal Theory*, London: Stevens 1967, pp. 543-545.

<sup>38</sup> P. Van Dijk, ‘Equity: A Recognised Manifestation of International Law?’, in: M. Bos, & W. Heere, (eds.), *International Law and its Sources*, The Netherlands: Kluwer Law and Taxation, 1989, p. 1; 11.

confer too much discretion upon the judiciary, unless the technical meaning it bore in England were adopted.<sup>39</sup>

According to the analysis of Justice Margaret White, while equity itself was understood too disparately across the world to gain universal acceptance, certain equitable principles might indeed play a role as ‘general principles of law’. What the framers sought to exclude was ‘pure’ equity which could conceivably play a role against clear law.

#### II.4 Equity in Action: Case Law

Although certainly not co-terminus with its role in any national jurisdiction<sup>40</sup>, equity had thus been somewhat consecrated as a composite element of one of the sources of international law. This was shown to be no hollow sop to Common Lawyers, when in the following years the PCIJ/ICJ developed an interpretation of the conception of equity to be applied in concrete cases.

In the *Diversion of Water from the River Meuse* case<sup>41</sup> Judge Manley Hudson affirmed that “under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply”.

It is clear, however, that equity is not a catch-all concept which will work to correct a decision every time the law’s operation results in an unsatisfactory result. A principle of equity may only come into consideration when recognised by the laws of “civilised nations”. In the *Frontier Dispute* case<sup>42</sup>, the ICJ affirmed that it would be unjustified in altering a frontier directly inherited from former colonial powers, even if this was unfair in some way. Equity as a legal concept was held by the court to constitute a direct emanation of the idea of justice – not simply an arbitrary concept of ‘fairness’ which could be imposed at the whim of a court or tribunal.

Since ‘justice’ and ‘fairness’ may be held to be at least relatively synonymous, the distinction which the court was attempting to demonstrate in the *Frontier Dispute* case may be difficult to grasp at first. However, the Court’s opinion would tend to suggest that a broad conception of equity was unlikely to be preferred, but that rather specific principles would be applied in shaping the Court’s conception of its equitable mandate. This adoption of a list of specific principles, or ‘maxims’ bears a striking similarity to the development of dicta which solidified into the famous ‘maxims of equity’ in England<sup>43</sup>.

<sup>39</sup> PCIJ Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, 1920, pp. 332-337.

<sup>40</sup> S. Rosenne, ‘The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law’, in: A. Bloed & P. van Dijk (eds.), *Forty Years of the International Court of Justice* Saarbrücken: Europa-Instituut 1988, p. 85.

<sup>41</sup> *Netherlands v Belgium* (1937) PCIJ (ser A/B) No.70, p4.

<sup>42</sup> *Mali v Upper Volta* (1986) ICJ Rep 554.

<sup>43</sup> White, 2003, *supra note 34*, p.111.

The preference expressed by Lord Philimore at during the *Procès-Verbaux* of the Advisory Committee seemed to be being followed. It is, perhaps, germane therefore, to examine these maxims of equity for guidance as to what a restricted, principled conception of equity may entail. Further, I shall explore, after having briefly capitulated the contents of said principles, whether these maxims have indeed found favour amongst the judges of the PCIJ and ICJ, finally going on to examine whether the transposition of such principles into international law may have effects regarding the acceptability and/or legality of humanitarian intervention.

## II.5 Maxims of Equity and the World Court

The maxims of equity which have developed over time in Common Law jurisdictions represent an effort to ‘rein in’ equity’s excesses. Due to arguments fuelled by Selden’s famous contention that the extent of the Chancellor’s conscience – and therefore the extent of equitable relief that would be granted – varied “with the length of the Chancellor’s foot” (i.e. arbitrarily), certain guiding ‘maxims’ were put in place over time to establish a sort of quasi-precedent on which future equitable decisions might be based. A maxim is described as “...a conclusion of reason; a proposition to be of all men confessed and granted without proof, argument or discourse”.<sup>44</sup>

Once understood that the function of maxims is to furnish general guidelines as points of departure and not to encapsulate solutions to specific problems *per se*, their inherent worth reveals itself. Few have survived across all Common Law jurisdictions, but those which have are those which have acclimatised and survived in ‘mixed’ legal systems and which have survived transplantations of law.<sup>45</sup> This suggests their compatibility with other legal systems and their possible qualification as general principles of law recognised by civilised nations<sup>46</sup>.

It remains to determine whether in the international context such maxims are purely of academic interest, or whether indeed their wisdom may be transferred to the international legal arena to some degree or another. While I have already shown that the PCIJ/ICJ has seen fit to incorporate some conception of equity into their case-law, it rests to discover whether Lord Philimore’s preference for a rough transposition of Common Law maxims may be shown to have taken place.

In the majority of cases, in order to demonstrate that a norm has gained recognition and acceptance in international law, reference to custom or the existence of international treaties enunciating such a norm would be the usual course of action. However, as regards equitable principles, few treaties exist which make explicit reference to their normative value. Equally,

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<sup>44</sup> E. Coke in *Black’s Law Dictionary*, St. Paul: West Publishing Co. 1933.

<sup>45</sup> H.L. Oleck, ‘Maxims of Equity Reappraised’, *Rutgers Law Review* (6) 1952-3, pp. 528-533.

<sup>46</sup> White, 2003, *supra note 34*, pp. 115-116.

evaluating state practice for evidence of the operation of equity in state actions is a difficult activity, insofar as it is not always immediately clear whether equitable considerations formed part of states' reasoning in deciding upon a given course of action. Subtle principles such as these underlying the *opinio juris* are rarely enunciated, whether they exist or not. In any case, equity is, as mentioned above, primarily a gap-filling source, which adjusts the law. In England it is not normal to have explicit references to equity in legislation either. However, just as in England, examining the case-law of the World Court, we may observe that the International Court of Justice has readily and repeatedly affirmed the legal worth of several equitable maxims. It is on this process that I wish now to focus, it being the most visible way in which equitable maxims have known transposition to the international sphere.

In her article "*Equity - A General Principle of Law Recognised by Civilised Nations?*" Justice Margaret White of the Supreme Court of Queensland presents a conception of equity distinctly contiguous to that of the Common Law, and charts its continuing evolution in the case-law of the PCIJ/ICJ. White draws attention to several cases before the World Court which have drawn specific attention to equitable issues. It is my contention that many cases cited by White, and others besides, affirm a conception of equity with a distinctly Common Law feel. It is certainly indisputable that in many of their decisions, the PCIJ and ICJ have applied equitable maxims directly deriving from the Common Law.

I shall now use case-law to demonstrate how and which equitable maxims have found favour amongst the judges of the PCIJ and ICJ.

#### *i. Ubi ius, ubi remedium*

In the *Barcelona Traction* case<sup>47</sup>, the ICJ referred inferentially to the principle that equity will not suffer a wrong to be without a remedy, saying that for reasons of equity, a state should be able to set aside certain provisions of diplomatic formalism, in order to exercise diplomatic protection over its nationals. However, in declining *locus standi* to Belgium, the ICJ outlined the practical difficulties in this particular case, showing that here, the minor equitable maxim of **(ii.) *Aequitas sequitur legem*** ought to apply. As at Common Law, equitable considerations are difficult to bring into play against settled laws, and here, the application of *ubi ius, ubi remedium* would have "opened the door to legal anarchy".<sup>48</sup> This is a reflection of judicial pragmatism very much in tune with equitable considerations, particularly the maxim that **(iii.) Equity will not decree a vain thing**. The goal of equity is to do more good than harm, and if this cannot be so, equity will not operate.

#### **iv. Equity looks to the substance rather than the form**

<sup>47</sup> *Belgium v Spain* (1970) ICJ Rep. 3.

<sup>48</sup> Rosenne 1988, *supra* note 40, p. 102.



The *Barcelona Traction* case and the *Diversion of Water from the River Meuse* case (discussed below) both demonstrate, albeit implicitly, the willingness of the World Court to be unconstrained by the formal requirements of statutes and treaties if justice is at the stake and if certain criteria are fulfilled. In the *Diversion of Water from the River Meuse* case, the PCIJ was prepared to excuse Belgium's infidelity to the terms of a treaty on the basis that the Netherlands had not kept its side of the bargain either. In *Barcelona Traction*, the Court admitted that in certain circumstances the rigidity of formalism could not stand in the way of a state which wished to extend diplomatic protection over its citizens, and while in the facts before the court it refused *locus standi* to Belgium, this was because it feared the anarchy which might result from such an approach, and not because it felt itself constrained by formalist scruples.

**v. *Vigilantibus et non dormientibus aequitas subvenit* (and estoppel)**

In the *Serbian Loans* case<sup>49</sup>, the application of the principle of estoppel appears. The PCIJ applied the principle of estoppel in an identical manner to that employed at Common Law. However, it was held that this was not a case of estoppel, as there had been no clear and unequivocal representation. Furthermore, there had been "no change of position on the part of the debtor state".<sup>50</sup>

A case of "sleeping on ones rights" is to be found in the *Fisberies*<sup>51</sup> litigation. The ICJ considered it significant that Norway had applied its method of coastal delimitation across the mouth of fjords for a considerable period of time and that this was known by the UK. The UK had abstained from complaining during this long period (had slept on its rights, in effect) and would therefore not receive any relief.

In the 1962 *Temple of Preah Vihear* case<sup>52</sup>, the ICJ applied again a conception of estoppel and acquiescence. The 1908 acceptance as accurate by Thailand of a map, and 50 years of accepting the benefits of a stable frontier that came as a direct result of a treaty concluded using this map, constituted an abstention from protest, an acquiescence. The Thai royal family had even visited the temple with the French flag flying (Cambodia was then a French colony). To then, 50 years later, begin to dispute the status quo, was impermissible.

In the separate, concurring, opinion of Vice-President Weeramantry in the *Gabcikovo-Nagymaros* case<sup>53</sup>, a further, express reference to estoppel was made. Here, Hungary and Czechoslovakia had entered a treaty in 1977. Neither party performed its obligations under the treaty, but Vice-President

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<sup>49</sup> *Serbian Loans*, (1929) PCIJ (ser A) Nos. 20/21, p. 5.

<sup>50</sup> *Idem.* pp. 38-39.

<sup>51</sup> *United Kingdom v Norway*, (1951) ICJ Rep pp. 116-124.

<sup>52</sup> *Thailand v Cambodia* (1962) ICJ Rep p. 6.

<sup>53</sup> *Hungary v Slovakia* (1997) ICJ Rep p. 7.

Weeramantry found that Hungary's conduct precluded their asserting that their obligations were no longer binding. Hungary had allowed Czechoslovakia, and later Slovakia, to believe that it was the intent of the Hungarian administration to fulfil the terms of the treaty.

#### **vi. He who comes to equity must come with clean hands**

An example of the application of this equitable maxim is to be found in the judgment of the Permanent Court of International Justice in the *Diversion of Water from the River Meuse* case<sup>54</sup>. This is a comparatively rare express example of judges applying equitable maxims as general principles of international law. The Netherlands complained that Belgium, in its erection of a lock on the River Meuse had violated an agreement *inter partes* that they would only take water from the river under certain conditions. However, the Netherlands had also constructed and operated for a period of time a similarly unlawful lock. Judge Hudson affirmed that one unlawful lock could not be treated differently from the next:

“It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the Anglo-American law. Some of these maxims are, ‘equality is equity, ‘he who seeks equity must do equity’. ...a very similar principle was received into Roman Law”.

Judge Hudson therefore denied the relief sought by the Netherlands due to the fact that it was itself guilty of the same breaches which were alleged against Belgium. This case is further notable as it also affirms the operation of **(vii.) He who seeks equity must do equity** and **(viii.) Equity delights in equality** in the international legal sphere.

#### **viii. Equity delights in equality**

A different tack was taken by the ICJ in the *North Sea Continental Shelf* cases<sup>55</sup> in 1969. Here, the court noted that there existed two basic legal notions which reflected *opinio juris* in this area, one being that delimitation must be the subject of inter-state agreement (contract theory), but the second being that agreement must be arrived at in accordance with equitable principles<sup>56</sup>. This suggests that in relation to maritime boundaries, the notion of equitable delimitation had to be accepted by states as a rule of customary international

<sup>54</sup> *Netherlands v Belgium* (1937) PCIJ (ser A/B) No.70, p. 4.

<sup>55</sup> *Denmark v Germany, Netherlands v Germany*, (1969) ICJ Rep. 3.

<sup>56</sup> *Idem*, p. 85.

law. Further, this serves as a good example of how litigation concerning more than two parties may be resolved via equitable principles, and how the solution achieved – equality, not in the strictest sense, but rather a sort of equitable equality equivalent – may reveal the operation of an equitable maxim.

### **ix. Equity will not stoop to pick up pins**

I would perhaps venture to include one more minor maxim, the operability of which is difficult to demonstrate in the international context *in concreto*. In international cases, equivalents to peppercorn rents and ten-dollar lawsuits are difficult to find, specifically because international law's ambit is necessarily restricted to matters around which there exists common concern, by virtue of which a certain *gravitas* must exist. The very fact that states are prepared to engage in long, drawn-out and often difficult negotiations<sup>57</sup> in relation to international law matters, suggests such matters are of utmost importance to them. Equity has no need to deal with trifles at international level, in the main, since trifles do not often materialise.

Given the above case-law, it is difficult to argue that the maxims of equity have not made considerable inroads into the hub of international legal sources employed by the ICJ, which also constitutes the effective international law source “code” for states.<sup>58</sup> This is certainly a remarkable achievement, given the lack of concord amongst the Advisory Committee visible in their Procés-Verbaux. However, in leaving to the judiciary of the PCIJ/ICJ the interpretation of the phrase “the general principles of law recognised by civilized nations”, they afforded them discretion regarding how far and in what way equitable considerations ought to be incorporated into this source. It seems that maxims reminiscent of the Common Law have come to be seen as, in the main, amenable to the task at hand by the ICJ bench. It remains, having laid the theoretical groundwork, to ask the question as to whether this source of international law may be of use in legalising or legitimising humanitarian intervention.

## **II.6 Humanitarian Intervention and Equity**

It is as well not to become over-enthusiastic about the extent of the reception of the Common Law equity maxims into the international legal sphere. There are of course stark differences between court judgments and actual diplomatic procedure. The ICJ tends to judge events *post facto* to see who was right or wrong, or to decide on substantive issues between state parties. State practice, while being based upon the same body of international law, may manifest itself in a different manner entirely.

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<sup>57</sup> The UN Convention on the Law of the Sea of 1982, for example, was preceded by nine full years of negotiation.

<sup>58</sup> ICJ Statute, Article 38(1)

In order to present a concise argument, one must not exaggerate. Therefore, I shall limit my discussion of the import of such principles in dealing with humanitarian intervention to dealing solely with the eight maxims for which I have found at least some concrete case-law evidence of their importation into international law via the ICJ, venturing only to additionally observe that equity is highly unlikely to concern itself with trifles at international level.

It is on the basis, then, of these nine maxims alone, that our discussion shall proceed.

#### i. *Aequitas sequitur legem*

Humanitarian intervention, as noted above, represents a use of force by states outside of the two exceptions to the general prohibition of Article 2(4). However, due to the research furnished by various esteemed legal and political scholars, the textual interpretation of the specific provisions at hand is far from completely settled. Firstly, one must take into account that the use of force is prohibited, some would argue solely, against the political independence of a state. Others would disagree, arguing that Article 2(4) represents a blanket ban. This is not the place to recapitulate arguments explained elsewhere, but it is wise, further, to be aware of the inherent incompatibility of the Human rights norms, whether enshrined in multilateral treaties or as part of customary international law, with a legal regime which treats the protection of state sovereignty as paramount and consecrates a principle of non-intervention.

Taking the above into account, it is clear that the principle *Aequitas sequitur legem*, which Howard Oleck describes as “minor” in nature, cannot be held to apply. Such a principle, while evocable in *Barcelona Traction*, where one is dealing with a sound, settled rule of law which is clearly stated and which is not disputed by significant state or scholarly opinion, or contradicted by state practice, cannot be held to apply concerning humanitarian intervention. One must be aware of the fact that this restrictive maxim may only be applied in cases where there is no real debate over the import of legal provisions. In *Barcelona Traction*, one was dealing with a sound, settled rule of law. Happily though, a vibrant debate surrounds the prohibition on humanitarian intervention. Therefore, stating that equity follows the law in this instance would be to misconstrue the applicability of this maxim. The fact that at the very least a debate surrounds the manner of this legal regime’s operability precludes this minor maxim from taking precedence over the more fundamental maxim below.

#### ii. *Ubi ius, ubi remedium*

The import of this maxim is easily explained, though nonetheless of imperative importance in this debate. The logic runs thus: human rights norms have, particularly since the end of the Second World War, attained an

importance in international law and equally in international ethics, that is not to be underestimated. While treaties such as the European Convention on Human rights and the American Convention on Human rights are not universally ratified, many human rights norms have been incorporated into customary international law<sup>59</sup>, while particular conventions banning specific human rights abuses abound<sup>60</sup>. Some such norms have even been suggested to have attained the status of *Jus Cogens*.<sup>61</sup>

In light of this considerable framework, it remains to examine what effective protection is provided for in order to guard against abuses of such norms, and above all, to ensure that when such abuses do occur, that an adequate remedy is forthcoming. *Ubi ius, ubi remedium*, after all. The problem is that within the stipulations of the UN Charter, which predates much of the human rights *acquis* we know today, there exists a lacuna. State sovereignty and the principle of non-interference in the affairs of other states reign supreme. A limited right of self-defence is provided for under Article 51. Outside of this, the UN Security Council may embark upon a course which, under Chapter VII of the Charter, will involve the authorisation to certain states or regional organisations to engage in armed force in order to assure the protection international peace and security, which is the Council's mandate. At the most cursory examination, this ought to go a long way toward preventing human rights abuses, since it is within the context of international strife that the most horrific human rights abuses often occur<sup>62</sup>. However, in reality, the effectiveness of the Security Council's mandate is constrained by three factors:

- The subjectivity of the Council's judgment;
- The veto; and
- The fact that "international peace and security" is not equal to "Human rights".

The first two points above are relatively simple and have been discussed. It is important to re-emphasise the third, however. International peace and security may be secured in a region where states enjoy friendly relations, but where within individual states, torture and genocide are rampant. The non-identical nature of "human rights" and "international peace and security" means that protecting the latter may theoretically be accomplished effectively without unduly concerning oneself concerning the former.

From the above, one may reasonably conclude that no (effective) protection against human rights abuses, particularly a gross scale, exists. However, if and when there exists a wrong without a remedy, equity will step

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<sup>59</sup> The prohibition on slavery, genocide and crimes against humanity may be examples.

<sup>60</sup> For example, the *Convention on the Prevention and Punishment of the Crime of Genocide* adopted by the United Nations assembly in 1948, and *en vigueur* since 1951.

<sup>61</sup> M. Janis, & J. Noyes, *International Law: Cases and Commentary*, St. Paul: WestGroup, 2006, p. 148.

<sup>62</sup> M. Walzer, 'The Argument about Humanitarian Intervention', *Dissent* Winter 2002, pp. 29-39.

in. Equity's preference in such situation is to "fill the gaps" in law, and in an effective manner. Therefore, if it becomes apparent that a programme of gross abuses of human rights, in contravention of international law, is taking place, which may only be remedied by an armed intervention to quell the situation, then equity shall permit this intervention.

### **iii. Equity will not decree a vain thing**

Equity is designed to ensure that the parties achieve justice and access to their rights. This explains why it opposed the formalistic writs system at Common Law. Therefore, equity will search for the solution which contributes in the most effective manner to solving the problems and righting the wrongs, whatever its form may be. If this solution indeed transpires to be humanitarian intervention, then this shall be the medium of preference. Equity will not choose another solution more in keeping with the letter of the law simply for formal reasons if this will not make an equally substantive contribution towards achieving an equitable result.

### **iv. Equity looks to the substance rather than the form**

Equity's aforementioned abhorrence for formalism and its stipulation that a statute or contract may never be used as a shield for illicit purposes combine to qualify the prohibition on the use of force in Article 2(4). If and when such an interdiction is being used to allow states to commit gross human rights abuses within their own borders without fear of recourse to force by other states, and where, further, such recourse to force is the only effective manner in which these abuses may be ended, equity shall look at the substance of the UN Charter, rather than its form.

Even the briefest review of the Charter and particularly of its provisions concerning the use of force makes it clear that the substance of the regime is the prevention of armed conflict. The purpose on the ban on the use of force is clearly a measure intended to limit such conflicts and thus protect people. The purpose is not, however, to ensure an all-encompassing notion of state sovereignty which allows people to be tortured and murdered at the whim of a bellicose dictator. Such conduct is intended to give rise to action by the Security Council in its role as protector of international peace and security. However, if and when this proves impossible, equity allows recourse to a more teleological interpretation of the Charter, in the light of its purpose., and the purpose of all international law<sup>63</sup> This broader interpretative faculty conferred by equity allows an action like humanitarian intervention to be permissible if it provides a practical solution which may be read as a gap-filling panacea to cure lacunae in the relevant legal provisions.

### **v. *Vigilantibus et non dormientibus aequitas subvenit* (and Estoppel)**

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<sup>63</sup> I think particularly here of Human rights treaties, the Genocide Convention et cetera.

Delay defeating equity is a relatively self-explanatory principle, while estoppel relies on the tripartite condition of assurance, reliance and detriment. The relevance of delay defeating equity may come into play where states refrain for many years from protesting and taking action against a given regime. If states do not offer diplomatic protests regarding human rights abuses, and if they do not search for means to put an end to the situation, instead standing aloof for years on end, they may be precluded from acting in the future by the fact that they accepted this situation for an extended period of time. This is in accordance with the position of the ICJ in the *Fisheries* decision, discussed above.

Concerning the doctrine of estoppel, in order to view its utility and potential applicability, it had needs be applied in tandem with the maxim *ubi ius, ubi remedium*:

- An assurance is furnished by any state which ratifies human rights treaties, or which refrains from protesting regarding the reception of human rights norms into customary international law. This assurance extends in international law to other states, and in national law to its citizens, that those persons resident on its territory will be guaranteed a certain level of protection.
- Reliance upon said assurance is visible from the citizens of the state, who conduct their daily lives free from fear. A further reliance upon this assurance from the other states constituting the international community may also be held to exist. The state in question has promised to respect certain norms, a promise upon which other states rely in their dealings with the state. For example, the European Union has continuously delayed Turkey's consideration as a possible accession state due to Human rights abuses. Turkey's possible admission to the Union would only be on foot of specific assurances that Human rights were to be respected.
- A detriment is clearly incurred, both by the citizens – whose rights are infringed – and by the other states in the international community – who have changed their position and policy towards the abusive state on foot of the given assurances and who are unable now to rely on such assurances – in the case where a state engages in gross Human rights abuses in contravention of international law. In addition, it is accepted that certain human rights protection obligations are owed *erga omnes*, and therefore, every state is entitled to feel detriment when such obligations are not fulfilled.

The three prerequisite elements for estoppel being present, the transgressor state may be held to be estopped from denying the original assurance. In ideal circumstances, this would be ordered by an injunction of the ICJ, as discussed in the *Serbian Loans* case. However, the jurisdiction of the ICJ

makes this extremely unlikely. Therefore, the fact that an estoppel arises but is unenforceable requires further recourse to the maxim *ubi ius, ubi remedium*. The unlikelihood and unenforceability of an action to end such abuses before the ICJ means that an effective remedy must be found. If the Security Council is unwilling or unable to take appropriate measures to enforce an injunction to secure this estoppel, then equity may permit a state or group of states to intervene, where appropriate, to enforce such an injunction by whatever means are required in the circumstances. This may include armed force.

#### **vi. He who comes to equity must come with clean hands**

‘Clean Hands’ constitutes a considerable equitable maxim, and may be of inherent importance in assessing the possibility of humanitarian intervention being used in a given situation. The intervening power, in order to maintain the right in equity to intervene, must itself be free of iniquity. This will necessarily preclude the involvement of states in operations to end gross human rights abuses which themselves engage in similar practices.

The ‘Clean Hands’ requirement presents a highly desirable constraint on the faculty of involving one’s state in humanitarian intervention operations which infringe upon the territory of other states. It holds that only a state with a decent human rights record may interfere in another state’s internal affairs for reason of the second state’s participation in gross human rights abuses. This check creates an incentive for states to keep their hands clean, thereby allowing them freer choice in foreign policy decisions.

#### **vii. He who seeks equity must do equity**

The necessary corollary of the above maxim is that if one resorts to equity, one must be prepared to act equitably, and not derive undue profit from equity’s operation. It represents the prospective equivalent of the retrospective principle before. This maxim may be of inherent importance in the conduct of humanitarian intervention operations. It is not the purpose of this discourse to embark upon a detailed analysis of what humanitarian intervention ought to entail in order to find itself in accord with this principle, but sufficeth to postulate that if the operation is undertaken, as it must necessarily be, to protect human rights (and human security) and to prevent further abuses from occurring, then human rights and human security must be paramount in the minds of those who direct the operation.

What this entails, *in concreto*, is a new approach to such operations. Humanitarian interventions must not be equated with wars or other types of armed conflict. The idea here is to end gross human rights abuses, employing the most effective means possible. However, this cannot and must not, involve impinging upon human rights beyond what is necessary in the course of the operation. Of course, what this principle entails is already broadly set



down within the texts of the Geneva Conventions and their Additional Protocols, but the spirit of these texts was not followed when NATO warplanes flew high over Kosovo. If International Humanitarian Law alone cannot constrain intervening states to act humanely and with caution and respect for the lives of civilians, then perhaps the maxims of equity may lend fresh perspective on the need to avoid hypocrisy – purporting to save civilians while killing civilians – in the conduct of such operations.

### **viii. Equity delights in equality**

This maxim is generally applied at national level where there are more than two parties to a transaction, and where justice is generally held to be done via the *pro rata* distribution of assets, et cetera. Regarding humanitarian intervention, this principle may be used to prevent states from being selective about where to intervene where similar abuses are being contemporaneously committed in neighbouring states in a region. Justice must be done in the region as a whole, not just in one state.

### **ix. Equity will not stoop to pick up pins**

The applicability of this principle is self-evident at international level, as discussed above. However, regarding humanitarian intervention operations, this maxim furnishes a further precondition. In order for equity to intervene, set aside the letter of the law and impose a solution which involves considerable cost to all involved, the matter at hand must be more than a mere trifle. The human rights violations must be both serious and verifiable. They must, in short, occur on a scale grand enough to ‘prick the conscience of mankind’. This is in accordance with common definitions of humanitarian intervention, but it is as well to be clear on the matter.

### **Conclusion: An Equitable Framework for Humanitarian Intervention?**

Based upon the applicability of the nine maxims discussed above, a model for humanitarian intervention which may be held to be legal by virtue of equity, as a general principle of international law, emerges. Its tenets are as follows:

- A series of gross human rights violations must be committed;
- By a state which has either signed human rights treaties or which has not consistently objected to the inclusion of human rights as part of customary international law;
- The unavailability of a peaceable means of stopping these violations;
- The unavailability of a means within the statutory instruments, i.e. under the UN Charter, of stopping these violations;
- The reasonable determination that the only remaining means of putting an end to such abuses is by armed intervention;

- Intervention is only permitted where it may be an effective solution and is not undertaken in vain.

However, importantly, the equitable legal permissibility of humanitarian intervention is further predicated upon a code of conduct for intervening states, namely:

- No state which itself engages in gross human rights violations may intervene ('Clean Hands');
- States must intervene with the sole purpose of ending such violations and may not profit unduly as a result of doing so. They must act equitably in enforcing equity and must refrain from unnecessary loss of civilian life and unnecessary suffering in attempting to accomplish the operation – i.e. to protect human life and end suffering;
- Neighbouring states engaged in identical violations must be treated in an identical manner;
- Intervening states may not sleep on their rights to intervene, ignoring abuses for years before deciding to intervene because of these abuses.

The above represents equity's formula for humanitarian intervention. Its two-part nature sets it apart from that of most commentators, and makes it unique. In particular, its attention to the duties owed by the intervening power creates a series of safeguards against an abusive interpretation of the doctrine. The utility of these safeguards must not be underestimated. If states wish to intervene, they must themselves boast a respectable human rights record, and must conduct the operation with the highest regard for the lives of those civilians whom they are supposed to be protecting. In addition, the obligation to act in parallel against one transgressor as against another prevents invocation of the formula against unfriendly states, while smiling amicably upon the abuses committed by one's friends. Further, the fact that states may not sleep on their rights, and that doing so may debar them from intervening later, creates impetus to intervene immediately when the abuses begin, in the knowledge that their hands may be tied in the event of later intervention.

The formulation which I have thus presented shares some common elements with the formula advanced by the ICISS. However, the superiority of the equitable solution must immediately be obvious, insofar as it is rooted in the law, not merely in ethics, politics, or philosophy.

The equity model allows states the right to humanitarian intervention without resort to illegality. In return for this right, however, they must present clean hands, and comport themselves equitably in the execution of the operation.

Many problems remain with the above formulation. Its enforceability for one thing, and whether it will ever find favour with state practice. However, perhaps it is not too far-fetched to speculate that states may consent to

constraints imposed by a solution which creates a completely legal basis for exceptional intervention without Security Council authorisation. If this is the case, equity may provide the basis for saving many strangers in the future.

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