# CHRISTIAN PERSPECTIVES ON THE 'RESPONSIBLITY TO PROTECT' IN INTERNATIONAL LAW

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**Abstract**

This paper examines the emerging international law norm known as 'the responsibility to protect' (commonly referred to as 'R2P'), with a focus on Christian perspectives. The aims of this paper are, firstly to see how R2P has been influenced by Christian scholarship on war and peace, and secondly, to test the theological coherence of R2P from the point of view of Christian ethics.

## I Introduction

From its earliest days, international law has been intertwined with religion. In an age and society that tends to encourage a strict severance between religion and the law, few people today immediately recognise how interconnected the two disciplines actually are, at least within the context of international law. The modern bodies of law regulating armed conflict and the use of force have a particularly interesting history that can be traced back through the ethical codes of various ancient religions. Whilst equally rich histories can be recounted from the point of view of all the major religions, the scope of this paper will be limited to the Christian tradition.

The relationship of influence between Christianity and international law is not confined to history. In modern times many denominations actively pursue campaigns that shape the decisions of world leaders and impact on the outcomes of international forums. Aside from governmental lobbying on the world stage by religious personalities, such as Pope John Paul, or Archbishop Desmond Tutu, many ecumenical institutions, such as the World Council of Churches, are actively pursuing programs for the progressive development and implementation of international law.[1] Past

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1 See for eg, World Council of Churches, *Commission of the Churches on International Affairs* (2011) World Council of Churches <http://www.oikoumene.org/en/who-are-we/organization-structure/consultative-bodies/international-affairs.html>.

examples include the strong role played by the United Methodist Church during the Third Conference of the United Nations on the Law of the Sea (1973-82), and the role played by the Church of England in response to South African racism (1970s).[2] Recently, the religious coalition behind the 'Save Darfur' campaigns exerted significant pressure on the US Congress to act to enforce the international legal prohibition against genocide.[3]

In short, to fully understand the development of international law, it is important to be aware of the Christian perspectives. It is also important to be able to identify when an argument based on religious premises is theologically coherent within itself, and when religion is merely being used to mask an altogether separate agenda.

This paper analyses Christian perspectives on the emerging international law doctrine called the 'responsibility to protect' (commonly referred to as 'R2P'). It focuses on the relationship between the R2P and two broad streams of Christian ethics. It aims to explore the *pacifist* and the *just war* views that exist within the Christian Church regarding the laws of humanitarian intervention. It is argued that it can be theologically coherent for certain denominations of Christianity to support forcible humanitarian intervention. Nothing in this paper, however, attempts to justify the place of religion in law, politics or foreign policy; secularism is not in question.

## II What is the 'Responsibility to Protect'?

By the end of the 20th century the prevalence of internal conflicts around the world far outweighed that of inter-state conflicts, and civilians made up the vast majority of casualties of war.[4] There emerged an ugly pattern of conflicts in which state organs were perpetrating large-scale and systematic violence against innocent civilian populations. This phenomenon demanded a strengthened international legal framework regarding state obligations to protect civilian populations. The genocides in Cambodia, Rwanda and Bosnia, as well as crimes against humanity in Kosovo, East Timor and Darfur demonstrated massive failures by the international community to prevent atrocities.

As a result of these failures of the international system to prevent the most serious of human rights abuses (namely, genocide, war crimes and crimes

2 See, Mark W Janis (ed), *The Influence of Religion on the Development of International* Law (Martinus Nijhoff Publishers, 1988) 154.

3 See, Save Darfur Coalition, *Save Darfur* (2011) Save Darfur <www.savedarfur.org>.

4 See CC Joyner, 'The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention' in Charlotte Ku and Paul F Diehl (eds) *International Law: Classic and Contemporary Readings* (Lynne Rienner Publishers, 3rd ed, 2009) 319.

against humanity), the idea of a positive moral duty of humanitarian intervention in certain circumstances – a 'responsibility to protect' – began to emerge. The idea is carving out an increasingly significant place as a doctrine of 'soft' international law.[5] That is, the principle is now increasingly being recognised as a desirable norm in the international system. Nothing to date suggests that the United Nations ('UN') Security Council, or any UN member state, believes there is a positive *legal* duty of intervention – the idea of a legal duty usually entails the threat of sanction for breach – but there is certainly widespread agreement that international law should acknowledge the moral obligation that states owe to foreign populations suffering mass atrocities.[6] It is therefore perhaps most accurate to describe the idea, as it currently stands, as a recently emerged political norm that is gradually becoming 'legally operative'. The doctrine comprises 'three pillars':[7]

- **Pillar One**
  The protection responsibilities of the state
- **Pillar Two**
  International assistance and capacity-building
- **Pillar Three**
  Timely and decisive response

The first pillar establishes that the primary responsibility for the protection of populations lies with the state. This is recognition that sovereignty includes not just rights, but responsibilities.

The second pillar recognises that when governments are unable or unwilling to protect their own populations from genocide, war crimes, crimes against humanity, and ethnic cleansing, the international community has a responsibility to take action through international assistance and capacity-building.

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5 The major international law textbooks with editions published since 2006 have all devoted significant attention to the analysis of the 'responsibility to protect': David J Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 7th ed, 2010) 787-788; Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 1155-1158; Henry J Steiner, Phillip Alston and Ryan Goodman *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 3rd ed, 2007) 835-843; Charlotte Ku and Paul F Diehl (eds) *International Law: Classic and Contemporary Readings* (Lynne Reinner Publishers, 3rd ed, 2009) 319-337.

6 See, text of *2005 World Summit Outcome* , GA Res 60/1, UN GAOR, UN Doc A/RES/60/1 (24 October 2005), especially paras 138 and 139; *Implementing the Responsibility to Protect–Report of the Secretary General* UN Doc A/63/677 (12 January 2009); Alex J Bellamy, Sara Ellen Davies and Luke Glanville (eds) *The Responsibility to Protect and International Law* (Martinus Nijhoff Publishers, 2011).

7 See, *Implementing the Responsibility to Protect*: *Report of the Secretary General*, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009).

The third pillar proposes that the international community's responsibility is a continuum of measures including prevention, reaction to violence, if necessary, and rebuilding shattered societies. In certain urgent circumstances the international community, through the Security Council, will need to implement a timely and decisive response. This response should be the exercise of first peaceful, and then, if necessary, coercive, including forceful, steps to protect civilians.[8]

In his addresses to the General Assembly of the UN in 1999 and 2000, former UN Secretary-General Kofi Annan challenged member states to resolve the conflict between the principles of non-interference regarding state sovereignty and the responsibility of the international community to respond to massive human rights violations and ethnic cleansing.[9] The government of Canada responded by forming a panel of international experts, called the International Commission on Intervention and State Sovereignty ('ICISS'), which issued its report, entitled *The Responsibility to Protect* ('*the ICISS Report*'),[10] in 2001. The panel was co-chaired by former Australian Foreign Minister, Gareth Evans.

Two key UN documents in 2004 and 2005 then endorsed the recommendations of that report,[11] leading to the 2005 summit of heads of state, and a Summit Declaration that included a commitment to the 'responsibility to protect'.[12] In 2006, the UN Security Council made its historic first official reference to the 'responsibility to protect' in Resolution 1674[13] on the Protection of Civilians in Armed Conflict. It then again made explicit reference reaffirming the 'responsibility to protect' in Resolution 1706[14] calling for the rapid deployment of UN Peacekeepers in Sudan, where there was thought to be an imminent ethnic genocide. In January 2009, UN Secretary-General Ban Ki-moon presented a report to the UN General Assembly advising member states on a UN strategy to implement the 'responsibility to protect'.

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8 Ibid.

9 Relevant excerpts of K Annan's speech are cited in Steiner, Alston and Goodman, above n 5, 838-839.

10 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), (Report of the International Commission on Intervention and State Sovereignty) <http://responsibilitytoprotect.org/ICISS%20Report.pdf> ('*the ICISS Report*').

11 *A More Secure World: Our Shared Responsibility – Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, UN Doc A/59/565 (2 December 2004); *In Larger Freedom: Towards Security, Development and Human Rights for All – Report of the Secretary-General*, UN Doc A/59/2005 (21 March 2005).

12 *2005 World Summit Outcome,* GA Res 60/1, UN GAOR, UN Doc A/RES/60/1 (24 October 2005).

13 SC Res 1674, UN SCOR, 5430th mtg, UN Doc S/RES/1674 (28 April 2006).

14 SC Res 1706, UN SCOR, 5519th mtg, UN Doc S/RES/1706 (31 August 2006).

Most recently, in 2011, the UN Security Council has referred to the 'responsibility to protect'- in Resolution 1975 regarding the situation in Côte d'Ivoire, in Resolution 1970 regarding peace and security in Africa, and in Resolution 1973 authorising the use of force to protect civilians in Libya.[15]

## III The Christian Pacifist View

Certain Christian denominations – for example, the Quakers, the Mennonites, and the Shakers – have accorded a central role to global peace, as a goal of their contemporary mission. The Quakers, in particular, were instrumental in the establishment of the modern peace movement.[16] This denomination of Christianity takes Christ's call for non-violence most seriously:

> You have heard that it was said, 'An eye for an eye, and a tooth for a tooth.' But I tell you, do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also [Matthew 5:38-39, NIV].

Pacifists, like the Quakers, take the original teachings of Christ as requiring a total protest against violence, and therefore against all policies based on force or the threat of force in any form.[17] The words of Christ to Peter in the Garden of Gethsemane, 'He who takes the sword shall perish by the sword' [Matthew 26:52], are often quoted to enliven this world view, as are Christ's calls to his followers to 'love your enemies, and do good to them which hate you' [Luke 6:27-31].

What would this sect of Christian think about the 'responsibility to protect'? Here we must distinguish between the various sub-principles entailed within the 'responsibility to protect' doctrine. Its first proposition is relatively uncontroversial. The responsibility of a government to protect its own people has been understood to be implied in the notion of state sovereignty ever since the 17th century, when the modern international system was born through the Westphalia Treaty, and Hobbes and Locke wrote the two great modern treatises on government. Only the extreme pacifist, who denies the legitimacy of the state and its coercive powers altogether, would object to the first pillar. The second pillar is more controversial, because the measures available to the international community can be placed on a continuum: some completely non-violent, some coercive (such as sanctions), and some forcible. The third pillar,

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15 SC Res 1975, UN SCOR, 6508th mtg, UN Doc S/RES/ 1975 (30 March 2011); SC Res 1970, UN SCOR, 6491th mtg, UN Doc S/RES/ 1970 (26 February 2011); SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/ 1973 (17 March 2011).

16 Janis (ed), see above n 2, 153.

17 Stanley Windass, *Christianity Versus Violence: A Social and Historical Study of War and Christianity* (Sheed and Ward, 1979) 128.

however, is the most overtly coercive, and in the author's opinion, must be entirely rejected by the strict pacifist. *Politics of Jesus* – a classic reference for Christian pacifism – presents three basic theses:

> (1) that the New Testament consistently testifies that Jesus renounced violence and coercive power;
> (2) that the example of Jesus is directly relevant and normatively binding for the Christian community; and
> (3) that faithfulness to the example of Jesus is a political choice and not a withdrawal from the realm of politics.[18]

It follows that it is not possible to be a strict pacifist, that is, to deny the legitimacy of bearing arms under any circumstance, and to also endorse those aspects of the 'responsibility to protect' doctrine which would condone the use of force.

In spite of the inherent moral attractiveness of the pacifist position, there are some aspects of this attitude of protest, which seem incongruous with the modern realities of globalised civilisation. The problem was aptly summarised from a Christian point of view:

> [T]he concern to liberate, defend or preserve the neighbour from oppression, evil and death – using the sword if necessary – out of love for the neighbour, renders pacifism difficult for non-pacifist Christians.[19]

In today's interconnected world citizens cannot claim ignorance when it comes to the suffering of the oppressed. After witnessing Srebrenica and Rwanda, Somalia and Cambodia, mankind has discovered the massive scale of atrocity that they are capable of. In light of this knowledge, pacifists who reject any type of military action, regardless of whether it is legally sanctioned or not, risk holding an intolerably *passive* position. While the pacifist's moral and theological commitment to *absolute* non-violence is still generally admirable, it has however been proven simply inadequate when it comes to some particular cases— such as those of imminent genocide for example. That is not to say that this non-violent interpretation of Christ's call for active, transforming initiatives to make peace is destined to fail in all cases. There is no shortage of examples where non-violent movements have been successful in overthrowing oppressors. The protests that removed Milosevic from power in Serbia is one example. However, the massacres of the 20th century have shown that such popular uprisings are not always enough to prevent atrocities, and in such circumstances strict pacifism seems to amount to a dereliction of responsibility.

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18 John H Yoder, *Politics of Jesus* (Wm B Eerdmans Publishing, 1994). See also, Semegnish Asfaw et al, *The Responsibility to Protect: Ethical and Theological Reflections* (World Council of Churches, 2005) 33.

19 See, Asfaw et al, above n 18, 31.

takedown regime. The manner in which the notice and takedown provisions have been used seems to suggest certain outcomes which were not anticipated by the legislature. What is thus required is a clarification of the application and a refinement of the structure of the regime. As pointed out:

> 'Whether the procedural protections provided … are sufficient to address concerns, however, has thus far been unclear. Additionally, whether the planned benefits … have come to fruition is a question that has been unanswered.'[30]

Appraisal of the efficacy and controversies of the notice and takedown regime can essentially be examined under the following three heads - legal issues, procedural issues and its interface with business and commercial agendas. These three heads are not necessarily exhaustive and do not observe strict demarcations.

### A *Legal Issues*

The legal implications of the notice and takedown regime are immense. The issues arise not only by virtue of the drafting of the legislature but also by its regular application and attempted exploitation. Concerns have been raised in the arena of due process, fair use, subject matter coverage, knowledge attribution and subjectivity of the guidelines.

#### 1 *Due Process*

> [T]here was one issue which the industry agreement did not address – the protections that need to be given to users of the Internet. The agreement that the OSPs [online service providers] entered into would have protected the interests of copyright owners, but it provided little or no protection for an Internet user wrongfully accused of violating copyright laws. I made sure that the industry compromise respected the rights of typical Internet users, ordinary people, by offering an amendment that provided a protection included in the original bill I had offered - an idea referred to as the notice and put back provision.[31]

Due process as to user rights was one of the concerns which were addressed belatedly and slightly reluctantly in the DMCA discussions. Furthermore, barring the limited procedural protection of the counter-notification procedure, little was done to curtail the blatantly perceptible grim effects of lack of due process.

Given the nature of the internet, a regime is required where there is efficient removal of the infringing materials, swiftly, fairly and with little need of involvement of the judiciary. The takedown regime was

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policyreports/WillFairUseSurvive.pdf>.

30 Urban and Quilter, above n 27, 636.

31 144 US *Congressional Record* S4884-01, 4889 (May 14, 1998) (Statement of Sen Ashcroft partially paraphrased).

structured to answer this call. It is true that the copyholder's rights need to be protected, and given the nature of the internet, possibilities of infringement are manifold. However, analogously, the user's rights should not be relegated to a lower order. The internet is a medium where the user has equal stake as the copyright holder in intellectual property, as compared to the physical medium.

Procedurally, in its initial phase the takedown procedure is comparable to a preliminary injunction. However, the essential difference here is that the entire procedure is extra-judicial, with none of the protections accorded in analogous physical world situations:

> [T]he issuance of a preliminary injunction is discretionary with the court ... In the context of preliminary injunctions, when liability has not yet been proven, the enumeration is ... 1) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 2) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; 3) whether the plaintiff has at least a reasonable likelihood of success on the merits; and 4) whether the granting of a preliminary injunction will disserve [sic] the public interest.[32]

The takedown notice procedure does not require any such adjudication on the part of either the service provider or the complainant. In fact, the service provider is required to follow a mechanically prescribed procedure. Upon receipt of a notification, regardless of whether the material is actually infringing, and with no independent examination required, a service provider must comply and remove the allegedly infringing material. The notice and takedown procedure allows the service provider 'to deal with complaints according to the letter of the procedure without exercising human judgment as to the merits of an alleged infringement - and still avoid liability.'[33] The onus of burden of proof has been completely shifted from the plaintiff to prove infringement, to defendant to prove innocence, at least as far as the takedown procedure is concerned in its preliminary phase.

These issues, coupled with the nature of the balance struck by the regime, create several ripples in the copyright scheme as applied to the internet. The nature of the takedown regime is such that as far as the service provider is concerned it is both convenient and safe to take down the alleged infringing material than to risk losing the safe harbour. As Zarins points out:

> [I]If a service provider knows that a compliant notification will be proof of knowledge in a subsequent case regarding contributory infringement claims, that

32 Melville B Nimmer and David Nimmer, 4-14 Nimmer on Copyright § 14.06 (2009).

33 Victoria McEvedy, 'The DMCA and The Ecommerce Directive' (2002) 24(2) *European Intellectual Property Review* 65, 69.

> service provider is almost undoubtedly going to take down the content without taking time to investigate. The incentive to take down content increases beyond what the plain words in the statute induce.[34]

The safeguards against exploitation of the procedure are encompassed in the counter-notification procedure and bad faith action for 'knowing material misrepresentation'. However, even after the alleged infringer issues a challenge to the allegations through the counter-notification procedure this 'situation remains in effect as long as the copyright owner is willing to sue within the 10-14 days and regardless of the likelihood of success on the merits.'[35]

Worse case scenarios have surfaced where besides infringing material, entire websites have been pulled down.[36] This involves significant property right issues in the website. The US Committee on the Judiciary has commented that '[i]n the case of the relatively new concept of Internet access, the service provider contract, rather than any common law property interest, would appear to be the yardstick of the Internet user's property interest in continued access.'[37] This statement is debatable especially as the internet has come across as a stronger place for conducting business.

Such due process concerns need to be addressed. A number of takedown notices are sent by rightholders themselves. This immediately brings in subjectivity, instead of an objective questioning as to both the substantive question of the subsisting copyright and the procedural aspect. Lack of judicial training of the rightholder advances this flaw and this is furthered by a lack of any judicial assessment on the part of the service provider as to the merit of the notice. An opportunity to respond to the claims of a copyright owner before takedown and a preliminary adjudication on the merits of the copyright claim itself is advisable.

### 2 *Fair Use*

Several of the notices raise serious issues concerning substantive legal questions relating to the underlying copyright claim. Some notices

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34 Zarins, above n 26, 293.

35 Urban and Quilter, above n 27, 639.

36 See, for eg, Joe Wilcox, *Microsoft Speaks, Site Goes Dark* (10 March 2003) <http://www.news.com/2100-1025-991624.html> (A Windows news site was taken offline for nearly 24 hours after Microsoft accused the site of infringing its copyrights. Microsoft's internet investigator sent a takedown notice, alleging the site was infringing the company's copyrights relating to its recently released Windows XP Peer-to-Peer Software Development Kit (SDK), apparently due to a message posted by a reader in an online feedback forum. The provider responded by pulling the entire site offline).

37 US Congressional Senate Rep No 105-190, 21 (1998).

involve areas which are arguably fair use,[38] public domain materials,[39] or involve copyright ownership issues,[40] fall in the arena of thin copyright[41] or are completely non-copyrightable subject matter,[42] 'such as recipes, pricing information, forms and methods.'[43]

In recent times, increasing fair use issues have cropped up especially in the context of user generated content ('UGC') on websites such as, YouTube and blogs. When such fair use content is the subject of takedown notices, it 'may lead to situations where UGC creators find themselves in a David-versus-Goliath battle against media conglomerates, which are most often the copyright holders that have the resources to file such takedown notices.'[44] In *Lenz v Universal Music Corp*,[45] a home video uploaded on YouTube by Lenz of her son dancing to music, was the subject of a takedown notice by Universal for infringement of copyright in the song being played. Lenz had the video reinstated following the counter-notification procedure. Lenz sued Universal for misrepresentation and sought a declaration from the court that her use of the copyrighted song was non-infringing fair use. Universal argued that the copyright owners could not be required to evaluate fair use at all prior to sending a takedown notice, as fair use was an excused infringement, rather than a use authorized by the copyright owner or by law. Alternately, even if a fair use analysis was required, it should follow the receipt of a counter-notice and not precede the sending of the takedown notice. Universal also posited that copyright owners may lose the ability to respond rapidly to potential infringements if they are required to evaluate fair use prior to issuing takedown notices. Rejecting Universal's arguments, the court stated that the purpose of section 512(f) (which provides a cause of action to users where the copyright owner knowingly makes material misrepresentations during the notice and takedown/putback process) is to prevent the abuse of takedown notices and that if copyright owners

38 See, for eg, Eric Bangeman, *Viacom: We Goofed on Colbert Parody Takedown Notice; Case Dismissed* <http://arstechnica.com/news.ars/post/20070423-viacom-we-goofed-on-colbert-parody-takedown-notice-case-dismissed.html>.

39 See, for eg, Takedown Notice on Chilling Effects website, *Universal Studios Stumbles on Internet Archive's Public Domain Films* <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=595>.

40 See, for eg, Takedown Notice on Chilling Effects website, *Azalea Web Design Company Asks Google to Delist Client* <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=1256>.

41 See, for eg, Takedown Notice on Chilling Effects website, *Better Packages Requests Delisting From Google's Froogle (#1)* <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=1265>.

42 See, for eg, Takedown Notice on Chilling Effects website, *Google's Caching Becomes Recipe for a C+D* <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=1327>.

43 Urban and Quilter, above n 27, 668.

44 Chuang, above n 8,165.

45 572 F Supp 2d 1150 (ND Cal 2008).

are immune from liability by virtue of ownership alone, then to a large extent section 512(f) would be superfluous.

Professor Katyal has summed up the situation thus:

> Given the reach of piracy surveillance strategies, there is also a significant risk that internet intermediaries, particularly service providers, will increasingly be asked to play visible and powerful roles as 'proxy censors,' as Seth Kreimer has termed their new role. However, enabling a copyright owner to determine what counts as fair use raises the important question of whether the DMCA should be delegating such a delicate responsibility to the party who may have a powerful motivation to censor the material. After all, copyright owners have the strongest incentives to claim copyright infringement, particularly in cases where they might prefer to censor or silence threatening or critical speech.[46]

Furthermore, the internet is a major platform for dissemination of speech and discussion of ideas in all areas of human activity. However, the same process which denies due process also leads to issues of suppression of speech. In *Online Policy Group v Diebold Inc*[47] at issue was the instance where the copyright holders sent takedown notices alleging copyright infringement regarding posting of copies of the company's private internal emails on websites, discussing their electronic voting machines' flaws. This was a clear case where fair use factors were ignored in order to prevent public debate. Diebold was held liable for misrepresenting a copyright infringement claim for purposes of suppressing embarrassing details which were not protected under copyright law.

Additionally, material removed due to a takedown notice takes 10-14 days for reinstatement. Such a delay can greatly diminish the value of ephemeral information which has instant impact value. These provisions give copyright holders an opportunity to 'silence communication and remove material which is not infringing copyright'.[48] In *Lenz v Universal Music Corp*[49] the court supported Lenz's argument that unnecessary removal of non-infringing material causes significant injury to the public where time-sensitive or controversial subjects are involved and the counter-notification remedy does not sufficiently address these harms. The concern is aptly encapsulated by Kurt Opsahl who states that it is

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46 Sonia K Katyal, 'Filtering, Piracy Surveillance and Disobedience' (2009) 32 *Columbia Journal of Law and Arts* 401, 415.

47 337 F Supp 2d 1195 (ND Cal 2004).

48 YiJun Tian, 'Wipo Treaties, Free Trade Agreement and Implications for ISP Safe Harbour Provisions (The Role of ISP in Australian Copyright Law)' (2004) 16 (1) *Bond Law Review* <http://epublications.bond.edu.au/blr/vol16/iss1/7> citing Bryan Mercurio, 'Internet Service Provider Liability for Copyright Infringements of Subscribers: A Comparison of the American and Australian Efforts to Combat the Uncertainty' (2002) 9(4) *Murdoch University Electronic Journal of Law,* [34], [36] <http://www.murdoch.edu.au/elaw/issues/v9n4/mercurio94nf.html#n33>.

49 572 F Supp 2d 1150 (ND Cal 2008).

'impermissible and irresponsible for copyright holders to use the DMCA as a pretext to squelch criticism'.[50]

### 3 *Subject Matter Overreach*

Even where a genuine dispute is related to copyright infringement, it sometimes includes complications involving multiple claims describing multiple works, multiple alleged infringements, and often multiple target sites.[51]

Similarly, 'anti-circumvention' devices or links to them too have been a target of software owners.[52] These anti-circumvention takedown notices are likely not proper subject matter for takedown notices. In *Universal City Studios Inc v Reimerdes*[53] the court specified that section 512(c) provided protection only from liability for copyright infringement and that the plaintiffs here sought to hold defendants liable not for copyright infringement, but for a violation of section 1201(a) (2) which applied only to circumvention products and technologies.

Several notices raise questions which do not fall within the purview of copyright at all and deal with other areas such as international law, trade secrecy law, trademark law[54] and privacy concerns.[55]

### 4 *Attribution of Knowledge*

The safe harbours enact a passive reaction scheme where knowledge is deemed absent until active notification compliance occurs. However, courts have interpreted the notification requirement to be of dynamic application. Some courts have merged the knowledge requirement for infringement and notice requirement for safe harbour ineligibility, thus allowing one determination to influence the other. If there is imperfect notice, or worse no notice at all, even then the service provider may still be subject to wilful ignorance and may fall outside the protection of the

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50 *Malkin Fights Back Against Copyright Law Misuse by Universal Music Group* (9 May 2007) <https://www.eff.org/deeplinks/2007/05/malkin-fights-back-against-copyright-law-misuse-universal-music-group>. Kurt Opsahl is senior staff attorney of Electronic Frontier Foundation.

51 See, Urban and Quilter, above n 27.

52 See, for eg, Takedown Notice on Chilling Effects website, *Microsoft Complains of Cracks in SalamSossis Blog* <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=1562>.

53 82 F Supp 2d 211 (SDNY 2000).

54 See, for eg, Takedown Notice on Chilling Effects website, *Yahoo's C&D Breaks the Template* <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=2085>.

55 See, for eg, Takedown Notice on Chilling Effects website, *Brazilian complains of unauthorized photograph* <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=2199>.

safe harbours. Comparatively, other courts have successfully been able to delineate between the two parameters. Zarins rightly brings out the difference regarding the application of the two concepts:

> Notification is just one way to lose eligibility for the safe harbour protections. The other is to acquire actual or constructive knowledge. Therefore the notification requirement must satisfy some independent meaning from actual or constructive knowledge, unless Congress has enacted surplusage. Furthermore, that independent meaning must be something less than what comprises actual or constructive knowledge. Otherwise, the notification provision would be subsumed into the knowledge provision. 56

In *ALS Scan Inc v RemarQ Communities Inc*,[57] although the defendant was put on notice of infringing activities on its system by imperfect notice, the court held that the holder of copyright substantially complied with the infringement notice requirement, so the defendant was not afforded the protection of the safe harbour provision. However, if the copyright owner is not able to overcome the threshold of notification compliance to trigger an investigation by the service provider, the service provider is protected within the ambit of the safe harbour, unless independent actual or constructive knowledge of infringement could be established. The court stated:

> This immunity … is not presumptive, but granted only to "innocent" service providers who can prove they do not have actual or constructive knowledge of the infringement … protection of an innocent service provider disappears at the moment … it becomes aware that a third party is using its system to infringe.[58]

*Hendrickson v eBay Inc*[59] found invalid certain notices which did not contain a statement of good faith and did not identify which copies of a movie were infringing. Although the copyright holder later verbally clarified to eBay that all copies of the movie were infringing, this notification was held invalid because it was not written. In spite of the noncompliant warning, it instilled enough suspicion in eBay to trigger an investigation on its own onus, thus showcasing how constructive knowledge can occur. Nimmer rightly summarizes the situation thus:

> [T]he statute requires parties to be only 'substantially' in compliance. By contrast, solely as to the requirement of written communication provided to the designated agent of a service provider, there is no such leeway. The conclusion follows that that last requirement is categorical - no matter how much compliance is achieved with the balance of the criteria, a notification that is not in writing fails.[60]

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56 Zarins, above n 26, 291.

57 239 F 3d 619 (4th Cir 2001).

58 Ibid 625.

59 165 F Supp 2d 1082 (CD Cal 2001).

60 Melville B Nimmer and David Nimmer, 3-12B Nimmer on Copyright § 12B.04 (2002).

However, in *Perfect 10 Inc v Cybernet Ventures Inc*[61] the court forgave Perfect 10's failure to notify Cybernet of alleged infringement before filing suit, because third parties had already notified the defendant. Cybernet's policies were found to undermine the notification procedures considerably, when it refused to allow representative lists and displayed no proactive inclination to cooperate with the complainant. The court stated that 'Cybernet's prior invective undercuts its claims to be honestly working to address potential problems with its affiliated sites.'[62] Thus, the indication seems to be that even failure of notification may be excused if constructive knowledge can be attributed.

This clearly goes against the letter of the law, though it may comply with the spirit of the law. However, the essential problem of subjectivity arises where compliance with the spirit of the law occurs and not the letter of the law. Zarins rightly summarizes:

> The conflation of the knowledge requirement with notification compliance, in both *Perfect 10* and *MP3Board*, cancels out the benefit of the safe harbor provisions of the DMCA. Neither case fulfills Congress's intent to protect service providers initially from the dangers of direct liability in the digital environment via carefully crafted notice-and-takedown provisions.[63]

The notification procedure is meant to inform the service provider of the possibility of an infringement. It provides the service provider an option to investigate whether infringement has happened and whether it is excused by any exceptions in copyright law. Blending the knowledge requirement for infringement with that of the notification, without giving sufficient opportunity to investigate dilutes the essence of the notification purpose. '[N]o analysis of knowledge in the contributory infringement context should be tainted by a previous determination of a service provider's safe harbour ineligibility based on a notification, nor vice versa.'[64]

### 5 *Subjective Standards*

Certain terminologies, such as, 'good faith,' 'knowing, material misrepresentations' and 'expeditiously' by their very nature are fraught with subjectivity. Dithering judicial stance has interpreted the subjectivity in varied manner, thus not clearly delineating set parameters to measure the leeway allowed to the subjective stance.

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61 213 F Supp 2d 1146 (CD Cal 2002).
62 Ibid 1169.
63 Zarins, above n 26, 281.
64 Zarins, above n 26, 289.

*(a) Good Faith and Knowing, Material Misrepresentation*

The takedown regime requires the complainant to act in 'good faith.' The criterion has always been subject to subjective evaluation. In *Rossi v Motion Picture Association of America Inc*[65] it was held that the Association representing motion picture copyright owners had 'good faith belief' that the website was infringing copyrights, even though it did not attempt to download any movies being advertised. Rossi on the other hand argued that 'in order to have "a good faith belief" of infringement, the copyright owner is required to conduct a reasonable investigation.'[66] The court rejected Rossi's argument and held that 'interpretive case law and the statutory structure … support the conclusion that the "good faith belief" requirement … encompasses a subjective, rather than objective, standard.'[67]

In *Lenz v Universal Music Corp*,[68] Universal argued that the takedown scheme did 'not even mention fair use, let alone require a good faith belief that a given use of copyrighted material is not fair use.'[69] Rejecting Universal's argument, the court supported Lenz's assertion that 'copyright owners cannot represent in good faith that material infringes a copyright without considering all authorized uses of the material, including fair use.' The court stated that '[a]lthough there may be cases in which such considerations will arise, there are likely to be few in which a copyright owner's determination that a particular use is not fair use will meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation'.[70]

The *Rossi* decision when read in conjunction with the *Lenz* decision seem to cause a degree of friction. While both support a subjective test, the *Rossi* standard if applied to the *Lenz* case would imply that there was only a need to do a cursory fair use analysis and not an in-depth one. Hence, despite the court's holding, an objective standard might work out better. Although the content provider, in its complaint to the service provider, 'must be specific and clear about what is being infringed, the statute only requires a 'good faith belief' that an infringement exists. A 'good faith belief' falls short of solid evidence of infringement, therefore the ISP is forced to remove material whenever they receive a complaint or lose its safe harbours.'[71] Since the service provider is 'largely immunized from acting on a notice in good faith but not from failing to act on a notice in

65 391 F 3d 1000 (9th Cir 2004).
66 Ibid 1003.
67 Ibid 1004.
68 572 F Supp 2d 1150 (ND Cal 2008).
69 Ibid 1154.
70 Ibid 1155.
71 Mercurio, above n 48, [34].

good faith, the [service provider] … is likely to always err on the side of caution and on the side of the complaining copyright holder.'[72]

Chuang too proposes the objective good faith standard to be the measuring standard for the takedown regime:

> An objective good faith standard would complement the fair use doctrine already established in common law and codified in the Copyright Act. When a copyright holder alleges an infringement, courts have applied the fair use doctrine as a guideline to decide what kinds of uses to permit. Likewise, the DMCA can incorporate a similar analysis and require those alleging infringement to establish sufficient ground for filing a takedown notice based on the facts of the individual case. Such a framework would curb the number of frivolous takedown notices and protect of UGC creators. [73]

'Knowing material misrepresentation' is a dynamic term comprised of two subjective expressions - knowing and material. *Online Policy Group v Diebold Inc*[74] attempted to strike some balance and lay the parameters defining this aspect of takedown notices. It found the copyright holders to be guilty of knowing material misrepresentation in sending takedown notices alleging copyright infringement, when it was a clear case of fair use. The court held that a 'requirement that a party have an objectively measured "likelihood of success on the merits" in order to assert claims of copyright infringement would impermissibly chill the rights of copyright owners.'[75] The court further defined the two parameters thus:

> A party is liable if it 'knowingly' and 'materially' misrepresents that copyright infringement has occurred. 'Knowingly' means that a party actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations … 'Material' means that the misrepresentation affected the ISP's response to a DMCA letter.[76]

In *Arista Records Inc v MP3Board Inc*[77] the court found that inadequate notice would not constitute a 'material misrepresentation', even if it threatened litigation.

Remedies for bad faith action are contingent on the term 'knowing, material misrepresentations'; the remedies are thus dependent on an amalgamation of two dynamic expressions. Given the complexity of both the terms - 'good faith' and 'knowing, material representation,' the parties are left with no resort but to submit to the subjectivity of judicial decisions, likely applicable on an individual case basis. *Rossi v Motion*

72 Urban and Quilter, above n 27, 638.
73 Chuang, above n 8, 182.
74 337 F Supp 2d 1195 (ND Cal 2004).
75 Ibid 1204.
76 Ibid.
77 2002 WL 1997918 (SDNY Aug 29, 2002).

*Picture Association of America Inc*[78] described their interplay thus:

> Juxtaposing the 'good faith' proviso … with the 'knowing misrepresentation' provision … reveals an apparent statutory structure that predicated the imposition of liability upon copyright owners only for knowing misrepresentations regarding allegedly infringing websites. Measuring compliance with a lesser "objective reasonableness" standard would be inconsistent with Congress's apparent intent that the statute protect potential violators from subjectively improper actions by copyright owners.[79]

### *(b) Expeditiously*

Service providers are required to 'expeditiously' remove complained of infringing materials. However, the definition of 'expeditiously' is quite dynamic and has already been the cause of judicial clarification. Trading its qualitative criteria for quantitative terms or strictures to reduce its dynamism might address the issue to a certain extent, but the subjectivity would still be retained.

In *Hendrickson v eBay Inc*[80] it was held that when both authorized and pirated versions of a movie were available, it was inadequate to simply provide eBay with the movie's title, without specifying the eBay item numbers' listings. The court did recognize that there 'may be instances where a copyright holder need not provide eBay with specific item numbers to satisfy the identification requirement. For example, if a movie studio advised eBay that all listings offering to sell a new movie … that has not yet been released in VHS or DVD format are unlawful, eBay could easily search its website using the title … and identify the offensive listings.'[81] The court applied this reasoning in *Hendrickson v Amazon.Com Inc*[82] where, the plaintiff's notification that all copies of a movie offered for sale were unlawful was deemed adequate to locate expeditiously the infringing material. The court further clarified:

> If the infringing material is on the website at the time the ISP receives the notice, then the information … can be adequate to find the infringing material expeditiously. However, if at the time the notice is received, the infringing material is not posted, the notice does not enable the service provider to locate infringing material that is not there, let alone do it expeditiously.[83]

## *B Procedural Issues*

The guidelines of the takedown regime create ripples on their transition

78 391 F 3d 1000 (9th Cir 2004).
79 Ibid 1005.
80 165 F Supp 2d 1082 (CD Cal 2001).
81 Ibid 1090.
82 298 F Supp 2d 914 (CD Cal 2003).
83 Ibid 917.

to practice. The dynamic and ever evolving nature of the internet makes the situation even more complex. Coupling of law, practical application and technology creates several practical interface problems.

Several corporate copyright holders use monitoring technologies comprising of 'bots' or 'spiders' to scan the internet for keywords and links resembling the copyrighted works. They have largely automated procedures for sending takedown notices for any material found to be even faintly infringing. However, this leaves margin for error. For example, the Business Software Alliance incorrectly targeted a company that used OpenOffice software, notifying the company that it was making unauthorised copies of Microsoft Office available, simply because its 'bot' detected the use of the word 'office' in the program.[84] Again, Recording Industry Association of America ('RIAA') sent a takedown notice to Pennsylvania State's Department of Astronomy and Astrophysics regarding distribution of songs by the musician, Usher. It emerged that RIAA had mistakenly identified the combination of the word 'Usher' (faculty member) with an a cappella song performed by astronomers about the Swift gamma ray satellite. Apologizing, RIAA stated that its temporary employee had made an error. RIAA admitted that it does not require its internet copyright enforcers to listen to the complete song that is allegedly infringing.[85]

Professor J Hughes, speaking at a symposium, emphasised that the DMCA requires more of a 'measured response' than is actually being done regarding the over-zealous application of technology:

> Something is happening about the notice and takedown provision that no one has figured out, and it is as follows. The notice and takedown provision requires a signature or an electronic signature on the notification to the ISP. The major copyright industries are generating the notices with spiders by the thousands and thousands. I can tell you that I am not alone in thinking this because the U.S. Copyright Office General Counsel and I both agreed that no one knows if all these notifications are just wrong. They're just null because they do not have a signature of a person or an electronic signature of a person. And if they had an electronic signature of a person who verified everything in the notification, it would be much more measured.[86]

The takedown process is intended to target only that content which is infringing. In practice, however, users sometimes cite a high-level Uniform Resource Locator ('URL'), or a URL that covers a broad range

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84 See Katyal, above n 46, 415.

85 See Declan McCullagh, *RIAA Apologizes for Threatening Letter* (12 May 2003) <http://news.cnet.com/2100-1025_3-1001095.html>.

86 Symposium, 'Public Appropriation of Private Rights: Pursuing Internet Copyright Violators' (2004) 14 Fordham Intellectual Property, Media and Entertainment Law Journal, 893, 949.

of material, causing, for instance, an entire website to be taken down or delisted, instead of solely the infringing content.[87] Likewise, a single web page that includes a wide variety of content could be removed, just to get at one incorporated file.[88]

Post takedown, a service provider is required to notify its consumer of the removal where the material is residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider.[89] However, this does not contemplate network errors, email delivery errors, imperfect or incorrect delivery or confirmation of delivery. Katyal summarized the situation thus:

> It is true that some major content providers are careful to use a variety of means to protect fair use, including: (1) manual review of potential takedown targets; (2) training of reviewers to understand what may constitute fair use; and (3) claiming to avoid takedown notices for works that are 'creative, newsworthy or transformative' or limited excerpts. But as the examples ... establish, no system of filters is ever foolproof, and the risk of chilling legitimate expression is highly pronounced in such a system of piracy detection that relies so heavily on automation.[90]

### C *Business and Commercial Agenda*

The commercial aspect has always been a major feature of copyright law. In their intent to further their commercial-corporate interest, business enterprises have employed takedown notices to achieve intents quite separate from those within the purview of copyright law. The takedown procedure, simple, inexpensive and almost always successful, is certainly too irresistible not to be used. Defences and remedies for misuse are not sufficiently robust to forestall actual misuses.

Notwithstanding that the takedown notice was implemented to provide an easy tool for immediate takedown of any copyright infringing material found on the internet, it has been misused as a leveraging tool to enforce commercial settlements. Instances of misuse have involved the following: the blatant employment of the takedown notice by search engine optimizers to increase search engine rank and traffic to a particular website as against a competitor's website,[91] the targeting of lobbyists, critics and educational users;[92] the negotiation or renegotiation

87 See generally, Urban and Quilter, above n 27.

88 See, for eg, Takedown Notice on Chilling Effects website, *Kelly Complains of Amish Image Copying* <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=433>.

89 17 USC § 512(g)(2)(a).

90 Katyal, above n 46, 415.

91 See Urban and Quilter, above n 27.

92 Ibid.

of licensing deals and restrictions;[93] the settlement of commercial agreements concerning revenues;[94] and leveraging attempts to achieve corporate consolidation.[95]

## IV Progressing Towards a Balanced Approach

In the discussion on the bill leading to the DMCA, Mr Hatch from the Committee on the Judiciary stated:

> Although the copyright infringement liability of on-line and Internet service providers ... is not expressly addressed in the actual provisions of the WIPO treaties, the Committee is sympathetic to the desire of such service providers to see the law clarified in this area. There have been several cases relevant to service provider liability for copyright infringement. Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers. A service provider which qualifies for a safe harbor, receives the benefit of limited liability.[96]

Clearly, the legislature had anticipated that the balance sought to be achieved between copyright holders, users and service providers might require a readjustment with time. The method in which the takedown and notice regime has developed certainly indicates that such readjustment is now required. Already, several citizen led initiatives, industry led initiatives and legislative alternates have been promulgated or are in the pipeline.

### A *Chilling Effects Project*

Public initiatives have been made to ensure that the takedown regime is properly implemented. For example, 'Chilling Effects', a joint project of

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93 See, Renegade Knight, *Buzz Out Loud Lounge Forum: Copyright Takedown Abuse?* (2 May 2007) <http://forums.cnet.com/7723-7813_102-245819.html>; Techdirt, *Veoh Sick Of Waiting For Lawsuit; Pre-emptively Sues Universal Music* <http://www.techdirt.com/articles/20070809/193059.shtml>.

94 See *Viacom Orders Google to Remove 100,000 YouTube Videos* (2 February 2007) <http://googlewatch.eweek.com/content/youtube/viacom_orders_google_to_remove_100000_youtube_videos.html>; Nate Anderson, *Viacom v. YouTube: The weekend war of words* <http://arstechnica.com/old/content/2007/02/8768.ars> ("YouTube and Google retain all of the revenue generated from this practice, without extending fair compensation to the people who have expended all of the effort and cost to create it," Viacom said first); Michael D. Scott, *Playing Chicken With The DMCA* (2007) <http://singularitylaw.com/technology-law/internet-e-commerce-law/playing-chicken-with-the-dmca>.

95 See *Microsoft Sends Lindows.com Takedown Notice for MSfreePC.com* <http://www.linux.com/feature/31714>; Also See, *Lindows.com responds to Microsoft's takedown notice of MSfreePC.com* <http://www.linux.com/articles/31740>.

96 US Congressional Senate Rep No 105-190, 19 (1998).

the Electronic Frontier Foundation ('EFF') and several law school clinics, informs people of their online rights, maintains a collection of takedown notices received and assists people in fighting wrongful takedown. Its aim is to encourage 'respect for intellectual property law, while frowning on its misuse to "chill" legitimate activity.'[97]

### B *Content Identification Policies*

Most industry giants are in the process of developing content identification systems, which would entail a filtering technology as regards the copyright in user generated content and would involve building a digital database based on the uploaded content. This would prevent or ensure instant removal of any copyrighted work uploaded by an unauthorized person.

#### 1 *Principles for User Generated Content Services*

In 2007 several internet and media companies, such as Disney, Fox, Sony and Microsoft, announced the Principles for User Generated Content Services ('UGC Principles') aimed at eliminating infringement, encouraging original works, and respecting fair use and privacy rights.[98] The founding companies pledged their joint support for a set of collaborative principles that would enable the continued growth and development of user-generated content online and respect for the intellectual property of content owners.[99]

The UGC pact aims to initiate a filtering technology termed 'Identification Technology' that would block users from uploading copyrighted material without permission.[100] The UGC Principles are not a legal but an industry led governance tool. They attempt to create another layer of governance above the safe harbours for the service providers. They mandate from the copyright holder that if a 'UGC Service adheres to all of these Principles in good faith, the Copyright Owner should not assert a claim of copyright infringement against such UGC Service with respect to infringing user-uploaded content that might remain on the UGC Service despite such adherence to these Principles.'[101]

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97 See, <http://www.chillingeffects.org/>.

98 See, *Principles for User Generated Content Services* <http://www.ugcprinciples.com/>.

99 See, *Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights* (18 October 2007) <http://www.ugcprinciples.com/press_release.html>.

100 See, Principle 3, *Principles for User Generated Content Services* <http://www.ugcprinciples.com/>.

101 See, Principle 14, *Principles for User Generated Content Services* <http://www.ugcprinciples.com/>.

### 2 *YouTube Video Identification*

Google did not participate in the UGC Principles pact and instead formulated its own content identification policy called the 'YouTube Video Identification.'[102] With similar aims as the UGC Principles, the Google policy is aimed to assist 'copyright holders identify their works on YouTube, and choose what they want done with their videos: whether to block, promote, or even - if a copyright holder chooses to license their content to appear on the site - monetize their videos.'[103]

### 3 *Fair Use Principles for User-Generated Video Content*

While the content identification policies structured by both the UGC Principles and the Google-YouTube Policy emphasize fair use, neither of them explicitly defines the parameters which would govern fair use. Considering the dynamic nature of fair use this cannot be held against the said companies. However, what should be specified is the determinative criteria for fair use. As Chuang points out:[104]

> [T]he Principles do not state how fair use should be evaluated. There is no mention of whether copyright owners should evaluate fair use based on a subjective or objective reasonableness standard. Thus, the Principles fail to address the dispute regarding what standard is more equitable in balancing the rights of copyright holders and consumer-participants.

Shortly after the content identification policies, the EFF posited their 'Fair Use Principles for User-Generated Video Content.'[105] The Fair Use Principles set forth detailed steps that content owners and video hosting services can take to make good on the promise to accommodate fair use of user-generated content. Meyers concludes that this alternative set of guidelines might be feasible if properly implemented:

> Overall, the EFF Fair Use Principles provide an alternative set of guidelines for regulating user-generated content and practical guidelines for balancing the interests of copyright owners, OSPs, and creators of user-generated content. If implemented and utilized correctly, a combination of the DMCA, UGC Principles/ Video Identification technology, and the EFF's Fair Use Principles would allow, or at least act as a launching pad, for a stable system of user-generated content where creators, copyright owners, and OSPs can exist in harmony. [106]

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102 See, *YouTube Video Identification Beta* <http://www.youtube.com/t/video_id_about>.

103 See, David King, *Latest content ID tool for YouTube* (2007) <http://googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html>.

104 Chuang, above n 8, 189.

105 See, Electronic Frontier Foundation, *Fair Use Principles for User Generated Video Content* <http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen>.

106 Brette G Meyers, 'Filtering Systems or Fair Use? A Comparative Analysis of Proposed Regulations for User-Generated Content' (2009) 26 *Cardozo Arts and Entertainment Law Journal* 935, 955.

German theologian, Dietrich Bonhoeffer, regarded by many pacifists as a champion of their cause, he recognised that some situations are so abhorrent that they call for active coercive intervention. A commitment to non-violence was indeed central to Bonhoeffer's idea of the Christian way of life.[20] However, he also realised the limits of this commitment. Bonhoeffer was one of the inner circle of those who planned the attempted assassination of Hitler. In his essay, *After Ten Years*, (referring to Hitler's reign), which Bonhoeffer circulated to his co-conspirators, he gave a theological reflection on the responsibility he felt to intervene and bring Hitler's Nazi project to an end.[21] Bonhoeffer's courageous deed illustrates that, in the most egregious circumstances, there can be a moral imperative to override the pacifist's position. That is, for those who seek to live out faith in the name of 'the prince of peace', it may be that some circumstances call for the use of force.

## IV Catholicism, The Just War and International Law

### A *Just War Theory*

Among the most important contributions of religious thinking to international law was the just war writings of Saint Augustine (4th century), and later, Saint Thomas Aquinas (13th century). The ongoing interest that surrounds just war theory to this day is testimony to the impact of these early ideas. The Vatican, and many contemporary Catholic scholars, still regard the works of Saint Augustine and Saint Aquinas as authoritative theological texts. Most recently, with the emergence of the 'responsibility to protect' in international law, just war theory is experiencing a prominent rebirth. Pope Benedict, in 2008, on the occasion of an address to the United Nations General Assembly, endorsed the existence of a positive duty in the international community to protect the oppressed, stating that it was human dignity, which was the foundation and goal of the 'responsibility to protect'.[22]

Catholic just war theory, in effect, splits from the pacifist teachings of the earliest Church, and recognises the inevitability of violence in human affairs. One scholar observes of just war theory:

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20 Ibid 32.

21 See, Martin Rumscheidt, 'Theological Position Paper for the "Crisis in Darfur" Roundtable' (Paper presented at Crisis in Darfur Roundtable, Ottawa, 28 October 2004 <http:www.ploughshares.ca/libraries/Reduce/InterventionPaperRumscheidt.htm>.

22 Pope Benedict XVI, *Meeting with the Members of the General Assembly of the United Nations Organisation: Address of His Holiness Benedict XVI* (18 April 2008) <http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html>

> [I]t is a remarkable blend of different elements; it took the two perfectly contradictory Christian impulses, one towards pacifism and the other toward crusades, and partly blended them, partly restrained them both.[23]

Just war theory asserts that the use of force can be just if it satisfies two sets of criteria. First, the resort to force must meet the *jus ad bellum* criteria (regarding the just recourse *to* war). Second, the means and methods of armed conflict must accord to the rules of *jus in bello* (regarding just conduct *in* war).

The *jus in bello* rules are now widely accepted to be both legally and morally binding on parties to an armed conflict, through the framework of international humanitarian law contained in the four Geneva Conventions of 1949 and their Additional Protocols. It is the first question, regarding *jus ad bellum*, which is contentious.[24] According to just war theory, whether lethal force may be used is governed by the following necessary criteria: *just cause*; *legitimate authority*; *right intention*; *probability of success*; *proportionality*; and *last resort*.[25]

How do these *jus ad bellum* criteria fit with current international law? And how does the 'responsibility to protect' propose to affect the current law? These questions are discussed below.

### B *Legitimate Authority*

In the contemporary international system, the *legitimate authority* criterion is of particular importance. International law clearly defines when and how the use of armed force against a sovereign state may be legitimately used. If the use of armed force does not fit under the Article 51 'self-defence' provision of the UN Charter, then the only way to legally use armed force in or against another sovereign state is to have it expressly authorised by the UN Security Council. Chapter VII of the UN Charter enables the UN Security Council to make binding resolutions on member states, including resolutions authorising the use of armed force. The UN General Assembly may authorise peacekeeping missions, but only with the consent of the host state.[26] The General Assembly

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23 Stanley Hoffmann, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse University Press, 1981) 48.

24 For a good overview of contemporary international law regarding the use of force, see Harris, above n 5, ch 11.

25 Brian Orend, 'War' in Edward Zalta (ed) *The Stanford Encyclopaedia of Philosophy (*Stanford University, 2000).

26 In the *Certain Expenses of UN* case, the International Court of Justice held that the UN General Assembly could validly establish peacekeeping forces provided that they were not used for 'enforcement' action: *Certain expenses of the United Nations* (Advisory Opinion of 20 July 1962) [1962] ICJ Rep 151, 164-165.

power has been used on a number of occasions, but overall, 'as a reserve mechanism for the preservation or restoration of international peace, it has not proved very successful'.[27]

To enliven Chapter VII, the Security Council must, under Article 39, establish the 'the existence of any threat to the peace, breach of the peace or act of aggression'. Once this is established, the Security Council, under Chapter VII, can authorise military action to maintain or restore international peace. In interpreting what constitutes a 'breach of international peace and security' the Security Council appears to have free reign, since the International Court of Justice has demonstrated a reluctance to review questions regarding the validity of Chapter VII resolutions.[28] Although humanitarian intervention is nowhere explicitly authorised in the UN, the Security Council has established that domestic conflicts such as those in Yugoslavia, Somalia, Liberia and Rwanda can constitute 'a threat to international peace and security' for the purposes of Article 39.[29] This development significantly modifies the traditional limitation of non-intervention in domestic jurisdictions. But it does not guarantee an end to genocides and mass atrocities.

The Security Council has already stretched the meaning of 'breach of international peace' to entail internal conflict. One might therefore argue that there is no need to further widen the Security Council's scope of authority to incorporate a 'responsibility to protect'. It is true that the Security Council is able, if it wishes, to give 'legitimate authority' to a military humanitarian intervention. But this is not a valid argument against the development of the 'responsibility to protect' doctrine. Crucially, the powers of the Security Council, as they stood prior to *the ICISS Report*, *permitted* intervention. There was no notion of an *obligation* or *responsibility* (even if only a moral/political obligation expressed through the language of international law) to intervene in the most egregious human rights abuses. The 'responsibility to protect' proposes a *positive* international *responsibility* to intervene. It would provide a clearer source of *legitimate authority* in international law to do so.

For the 'responsibility to protect' doctrine to become fully established as an international law norm, it would require crystallisation either through treaty, or through continued and prolonged state practice at the Security

27 Shaw, above n 5, 1273.

28 See, Ioana Petculescue, 'The Review of the United Nations Security Council Decisions by the International Court of Justice' (2005) 52 *Netherlands International Law Review* 167, 169.

29 See, Shaw, above n 5, 1237. See also W M Reisman, 'Hollow Victory: Humanitarian Intervention and Protection of Minorities' (1997) 91 *Proceedings of the American Society of International Law* 431.

Council level.[30] Until recently, the super-norm of state sovereignty has been interpreted as an impassable barrier to interference in the affairs of another state.[31] Recognition in international law of a positive moral duty to intervene would not weaken the current requirement for the UN Security Council to authorise the use of force. On the contrary, it would strengthen it, by providing a clear 'head of power' under which the UN Security Council could legitimately authorise the use of armed force.

### C *Just Cause, Right Intention, Probability of Success, Proportionality and Last Resort*

When the ICISS handed down its final report, *the ICISS Report*, in 2001, a modern day incarnation of ancient just war theory became manifest. The report draws heavily on just war concepts, and applies them to the existing international legal framework. It outlines a 'just cause threshold', a set of 'precautionary principles', and criteria for 'right authority', all of which it recommends should apply to a new legal framework for humanitarian intervention.[32] The 'just cause' criteria are tied to objective indicators that identify the extreme and exceptional cases to which military intervention should be restricted. Specifically, military intervention is warranted only when serious and irreparable harm to human beings, such as massive loss of life or large scale ethnic cleansing is occurring or immediately likely to occur.[33] The Commission's 'precautionary principles' demand that the primary purpose of the intervention is to halt human suffering ('right intention'), that the intervention is a measure of 'last resort', that it employs proportional means, and that it holds reasonable prospects of success.[34] As mentioned, 'proportionality' is also a well-established customary principle in international humanitarian law, binding on all parties to any armed conflict in any case.[35]

The Commission also identifies the Security Council as the most appropriate body for decisions on military action for humanitarian purposes.[36]

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30 See, S Hall, *International Law* (LexisNexis Butterworths, 2nd ed, 2006) 28-70 on the sources of international law.

31 See for eg, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, GA Res 2131(XX), UN GAOR, (21 December 1965).

32 *The ICISS Report*, above n 10, 19-31. Of course, whilst these principles were advanced in this report, they must be distinguished from the commitment to R2P that states actually made in 2005.

33 Ibid, XII, 32.

34 Ibid XII, 35-37.

35 See Rule 14 in ICRC publication, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law: Volume 1 Rules* (Cambridge University Press, 2005) 46-50.

36 *The ICISS Report*, above n10, XII, 47-55.

## V Protestant Perspectives on the law of Intervention: Grotius and Pufendorf

Hugo Grotius, the 17th century Dutch Protestant jurist, inspired by earlier Christian teachings about the ethics of war, became one of the founders of international law when he wrote *The Law of War and Peace*.[37] His theory of intervention incorporated many of the concerns the international community faces today.[38] His conclusions on the matter find a broad right to intervention.[39]

> But tho' there were no other obligations, it is enough that we are allied by common humanity. For every man ought to interest himself in what regards other men.[40]

> But if the injustice be visible, as if a Busiris, a Phalaris, or a Thracian Diomedes exercise tyrannies over subjects, as no good man living can approve of, the right of human society shall not be therefore excluded.[41]

Grotius, however, does not go so far as to consider an *obligation* of humanitarian intervention. It is unlikely that he would have accepted such an idea.[42] He may, however, have changed his mind, had he been privy to the horrors of 20th century history, which far surpassed the scale of any war of his time.

The intellectual tradition in which Grotius, and his successor Pufendorf, are found–variously called modern, secular, or Protestant–put forward an approach which rejected the rigidity of Catholic doctrine, and which sought epistemological rigour in morals and politics.[43] Pufendorf, who built upon Grotius's thinking about natural law, the state, war, and intervention, perhaps provides an even stronger link to the current thinking about 'sovereignty as responsibility'.[44] Pufendorf favoured a conception of sovereignty, which was not absolute - in other words, a system of government in which sovereignty is conditional upon certain

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37 Hugo Grotius, *On the Law of War and Peace* (Kessinger Publishing, 2004 reprint).

38 See, Nicholas Troester, 'Hugo Grotius on Intervention in the International System' (Paper presented at Midwestern Political Science Association Annual Meeting, Chicago, 3 April 2008) 2.

39 Ibid 3.

40 Ibid 5, citing Grotius, above n 37.

41 Ibid.

42 See, Jutta Brunnee and Stephen J Toope, 'Slouching Towards New 'Just' Wars: International Law and the Use of Force after September 11th' (2004) 51(3) *Netherlands International Law Review* 363.

43 See, Micheal Seidler, 'Pufendorf's Moral and Political Philosophy' in Edward Zalta (ed) *The Stanford Encyclopaedia of Philosophy (*Stanford University, 2010).

44 See, Luke Glanville, 'The Antecedents of "Sovereignty as Responsibility"' (2011) 17(2) *European Journal of International Relations* 233; Richard Devetak, 'Between Kant and Pufendorf: Humanitarian Intervention, Statist Anti-Cosmopolitanism and Critical International Theory' (2007) 33 *Review of International Studies* 151.

fundamental laws. If the sovereign violates these laws, then its rein is illegitimate and the subjects may rightly deny it obedience.[45]

Pufendorf's theory of how church relates to state helps overcome a significant incoherence in the just war theory examined above, as it relates to the developing 'responsibility to protect' norm. The problem with the just war theory described above is that it is hard to understand why any conventional Catholic would accept the UN Security Council as the *legitimate authority*. What about the 'higher authority'?

Pufendorf placed the state above religion. Although the soul of the state, according to Pufendorf, is sovereignty, and sovereignty comes from God (as the author of the natural law), it is only so indirectly and through the instrumentality of reasoning human beings.[46] In Pufendorf's theory, it is always required that sovereignty be supreme in the sense that there be no superior or equivalent powers within the state. Also, sovereignty cannot be divided, since that would fragment the unity of will that makes the state an effective authority. Accordingly, all government functions, including legislative, judicial, and war-related powers must ultimately reside in the same sovereign. Otherwise (as in the Holy Roman Empire) the state would have two or more hands and would invite its own destruction, returning humanity to the pre-civil condition.[47] The state must therefore control all sub-state collectives, including religion. Although Pufendorf recognised religion was a matter between deity and individual, he also recognised that that relationship was mediated by church entities which may stray to interfere in the functions of the state. Pufendorf therefore argued, by reference to the history of Catholicism and the papacy's role in European affairs, that the state has an obligation to regulate religious organisations, though only to insure compatibility with political order.[48]

Applying this thinking to the contemporary context, we can see how the Protestant perspective builds a bridge between the theological and the legal ideas of justified forcible intervention. This Protestant perspective can reasonably be adapted to support the assertion that the Security Council (which in the contemporary context represents the collective of states known as the United Nations) can properly be called the supreme legitimate authority, and the only entity capable of authorising a derogation from the norm of state sovereignty for the legitimate purpose of preventing massive suffering.

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45 See, Seidler, above n 43.
46 Ibid.
47 Ibid.
48 Ibid.

## VI Anglicanism and the Thematic Approach to Intervention

The Anglican Church has also displayed a willingness to engage in contemporary debate about global justice. Free from the sometimes limiting super-structure of doctrine that binds Roman Catholics, modern Anglican thinkers have tended to adopt a more thematic approach to Christian ethics. When it comes to the topic of humanitarian intervention, the themes of *Samaritanism*, *vulnerability*, and *sovereignty* are recurring and persuasive in Anglican ethics.[49]

In short, the theological view, developed around these notions of Samaritanism and vulnerability, sees human vulnerability in the modern world not as the opposite of security, but as a precondition for ethical behavior. 'Vulnerability is not only an inescapable fact of human life; more importantly, it is also what makes it possible for us to relate responsibly, ethically … to other human beings.'[50] This 'Good Samaritan' view of how modern nation-states should behave provides a theological grounding for a positive duty for humanitarian intervention: 'vulnerability should not be removed for the sake of security; vulnerability is what should be protected.'[51]

In keeping with this 'theology of vulnerability', the recommendations of *the ICISS Report* have been welcomed by some Christian commentators as a much needed 'reconceptualisation of sovereignty'.[52] The *ICISS's Report* discusses the concept of sovereignty as moving from being seen as a matter of control (ie, control of arms, people, territory) to a matter of responsibility:

> There is no transfer or dilution of state sovereignty. But there is necessary recharacterisation involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties[53] ...
>
> Sovereignty implies a dual responsibility, externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.[54]

This shift, in theological terms, has been seen as a shift from the primary concern with state security to human security, or even from sovereignty of nations to what could be seen as sovereignty of the vulnerable human person.[55]

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49 See for eg, Bishop Frame's discussion on the warranted use of force: Thomas R Frame, *Living by the Sword? The Ethics of Armed Intervention* (UNSW Press, 2004) 172.

50 Asfaw *et al,* above n 18, 53.

51 Ibid.

52 Ibid 51.

53 *The ICISS Report*, above n 10, para 2.14.

54 Ibid, para 1.34.

55 Asfaw, above n 18, 52.

## VII Clarification

It must be stressed, that the recharacterisation of sovereignty does not mean its dilution. To illustrate, let us consider the case of the Iraq War as an example of when the 'responsibility to protect' cannot be used.

In discussing the relationship between sovereignty, religion, and the international laws of intervention, the Iraq invasion of 2003 cannot be ignored. Although the question of the invasion's legality is highly contested, many international law commentators conclude that the war was illegal, and that the actions of the Coalition nations cannot derive legality from previous resolutions of the Security Council (such as 678, 687, 688, 1441).[56] While it was these resolutions that formed the legal basis for the Coalition's invasion, publicly, the invasion was often characterised as a humanitarian mission to 'free the Iraqi people' (especially once it became clear that Weapons of Mass destruction were not going to be found).[57] Furthermore, President Bush was not shy of invoking God during his speeches, rallying the American people to support this war of liberation. A religious demographic – let us call them the 'patriotic evangelicals' of the USA – played an integral role in executing this war. As one of the most important bases of support for the US Republican party during the Bush era, the political momentum that sustained this period of US military expansionism can largely be attributed to that demographic. As such, it needs to be emphasised that the 2003 invasion of Iraq is not a situation in which the 'responsibility to protect' can properly be invoked. According to many legal commentators, it was a unilateral action, and not sanctioned by the UN it was therefore most likely *illegal* under international law.[58] Not least of all, the mass killing of the Kurds by Saddam Hussein's regime had ceased, and *post-facto* invocation of the 'responsibility to protect' principle is illegitimate.

## VIII Conclusion

The *ICISS Report* represented a new conceptual framework for dealing with the difficult political, ethical, and legal questions of humanitarian intervention. This framework has eventually become regarded as an emerging norm at international law, as the member states of the UN move to gradually adopt it as policy. It has been recommended for endorsement by the highest levels of the UN, including by the present

56 See for eg, Harris, above n 5, 819-823.

57 See for eg, 'Bush renews vow to free Iraqi people', *The New York Times*, 3 April 2003 <http://www.nytimes.com/2003/04/01/news/01iht-bush_ed3_.html>.

58 See for eg, Harris, above n 5, 819-823.

Secretary-General Ban Ki-moon, and previous Secretary-General Kofi Annan.[59]

What is the Christian perspective on this development?

Many Christians try to connect the legal order of their society with their belief in an ultimate transcendental reality, using the life of Jesus Christ as an authoritative example. It is not within the scope of this paper to discuss whether this is a morally acceptable basis for reasoning about legal issues in pluralistic liberal societies.[60] However, if the views of Christian institutions are going to be of any utility at all in the future development of international law (as they have been in the past), they must be internally coherent, and clear about their theological basis. Christian ethics however, is not one unified body of thought. As we have seen, from different interpretations of the life of Christ, there have arisen many strands of thought about how Christians should regard the use of force. This essay has advanced the argument that, under some interpretations of Christian belief, and in light of the massive abuses of humanity that we have witnessed since the beginning of the 20th century, it could be seen as permissible, and perhaps even required, for states to take forcible action to intervene.

Nevertheless, this analysis comes with a warning. The implementation of the 'responsibility to protect' should be tempered by a keen watchfulness to ensure it is not misapplied by overreaching governments. The step from a norm of state sovereignty, to a positive responsibility to intervene, is undeniably fraught with danger and temptations. While having argued that the position taken by *the ICISS Report* can be coherently theologically endorsed on certain interpretations of Christianity, this is clearly not intended as a carte blanche for Christians to support military interventions in every case. The doctrine must not be morphed into a legal veil for imperialist whims. The doctrine should not ever be applied outside the UN framework. The possibility, suggested by some commentators, that the 'responsibility to protect' principle may be able

59 See, *A More Secure World: Our Shared Responsibility – Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, UN Doc A/59/565 (2 December 2004). Relevant excerpts of Kofi Annan's 1999 speech and the *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change* are cited in Steiner, Alston and Goodman, above n 5, 838-840. See also, *Implementing the Responsibility to Protect–Report of the Secretary General* UN Doc A/63/677 (12 January 2009).

60 For the author's opinion on this question, see Raphael de Vietri 'Religion and Public Reason: An Epistemological Interpretation' (2009) 22(1) *Australian Religion Studies Review* 64.

to justify anticipatory military action, should be absolutely rejected. And, there should be a code of conduct regarding the use of veto votes, agreed upon by the members of the UN Security Council. If such precautions are adhered to, let us hope that history will not judge this period of development in international law to be a step backwards, but a brave new step towards global justice and an end to genocide.