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**The United Nation's Responsibility to Protect Civilians
from Massive Human Rights Violations in Light of the
Intervention in the Libyan Crisis in 2011**

**By
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from Massive Human Rights Violations in Light of the
Intervention in the Libyan Crisis in 2011**

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of Addis Ababa University in Partial Fulfillment of the
Requirements for the Masters of Law (LL.M) in
Human Rights Law**

Declaration

Nuruye Beyan, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

Acknowledgment

In the first place, I would like to thank Allah, the Almighty, for giving me the patience, strength and health to do this study from its inception until it done.

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Acronyms

AU	Africa Union
EU	European Union
HRC	Human Rights Council
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
NATO	North Atlantic Treaty Organization
NTC	Transitional National Council
OAU	Organization of Africa Union
PSC	Peace and Security Council
R2P	Responsibility to Protect
UN	United Nations
UNSC	United Nations Security Council

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Abstract

The international community was criticized when it decided to intervene, as in Somalia, Bosnia and Kosovo, and when it did not intervene as in Rwanda. It was against this background that Kofi Annan argued, in September 1999, in the defense of the individual sovereignty over state sovereignty. He asked, ‘if humanitarian intervention is an unacceptable attack on sovereignty, how can we respond to cases as Rwanda or Srebrenica?’ In this sense, with the recovery of Francis Deng’s 1996 “sovereignty as responsibility” concept, it would be possible to abrogate the categorical imperative of traditional sovereignty, allowing the international community to intervene when the state fails in its responsibility to protect its people against genocide, ethnic cleansing, crimes of war and against humanity.

The study looks at the creation, development and eventual adoption of the ‘responsibility to protect’ (R2P) norm, from an idea promulgated in the 1990s to the development of the norm, and to the eventual adoption of a heavily restricted yet poignant principle at the 2005 World Summit. There is considerable debate over the status and scope of the Responsibility to Protect. On balance, most observers and states believe that it remains a political commitment and has not yet acquired legal force.

The purpose of this study is to critically examine the UN’s responsibility to protect civilians in light of the intervention in the 2011 Libyan crisis. The responsibility to protect has been central in the discussion of how to deal with the Arab spring revolts that gave rise to civil war in Libya. In Libya, with the help of an UN authorized NATO intervention, the Gaddafi authoritarian regime ended and the former rebel forces are now leading the transitional process. Taking in to account the events in Libya, many have questioned whether the concept of R2P was used not only to protect civilians, but also to fulfill a desire, from the beginning of the mission, for regime change.

However, the study argued that it was very difficult to enforce the very intents and objectives of Resolution 1973, because it was obvious enough that Gaddafi was prepared to

continue to slaughter his people in a civil war to retain power. Thus, even if some argued that the NATO intervention in Libya acted beyond Resolution 1973, nevertheless, the study strongly argued that the intervening forces have indeed stopped Gaddafi from marching on Benghazi and saved thousands of lives.

Keywords: Libya, UN Resolution, Civilians, the Responsibility to Protect.

CHAPTER ONE

RESEARCH PROPOSAL OF THE STUDY

1.1. INTRODUCTION

1.1.1. Background of the Study

At the dawn of the 21st century, the former Secretary-General of the United Nations, Kofi Annan, at the United Nations General Assembly in 1999 and again in 2000 issued a challenge to the international community, “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond...to gross and systemic violations of human rights that affect every precept of our common humanity?”¹. The Canadian Government took up this challenge and supported the creation of the International Commission on Intervention and State Sovereignty (ICISS).

In December 2001, after considerable consultation around the world, the ICISS published a report entitled *The Responsibility to Protect* (R2P).² The core tenant of the R2P is that sovereignty entails responsibility. It recognizes the responsibility to protect population on the part of both national governments and the global community. This drew on existing thinking in the 1948 International Convention against Genocide, in which the United Nations and its members recognized that there were times when sovereignty should be disregarded to prevent crimes against humanity. It went further; however, in arguing that a vital part of sovereignty was the responsibility of the state to protect its people, and that if a government was either deliberately targeting part of its population, or failing through inaction to protect them from serious harm, then it forfeited this sovereignty. The ICISS then argued that if human rights were truly universal, then the responsibility to protect population against massive human rights violations did not stop at state borders, but that the international community was obliged to intervene to uphold these rights in particular

¹ K. Annan, the Secretary-General of the United Nations, We the Peoples: The Role of the United Nations in the Twenty-First Century, (known as the Millennium Report) Ch. 4, at 48, delivered to the General Assembly, U.N. Doc. No. A/54/2000 (Apr. 3,

²See, Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect (December 2001) (Hereinafter the ICISS Report).

cases.³ The idea of R2P gained widespread international acceptance when world leaders unanimously agreed at the United Nations 2005 World Summit and adopted it.⁴ Here, the international human rights standards are the foundation of R2P.⁵ States have an obligation to protect their populations from massive human rights violations on the basis of international human rights precepts.⁶ Basic human rights principles were adopted in the UN Charter and the Universal Declaration of Human Rights, and there is a substantial body of international human rights laws. In addition, the protection of civilians during armed conflict is well established in international humanitarian law. However, with the advent of R2P, the international community accepted for the first time the collective responsibility to act should states fail to protect population from genocide, ethnic cleansing, war crimes, or crimes against humanity.⁷

The Libya situation in 2011 has become the most famous instance of R2P being operationalised.⁸ On 26 February, the UN Security Council adopted Resolution 1970, which determined that “the widespread and systematic attacks ... against the civilian population may amount to crimes against humanity”; recalled “the Libyan authorities’ responsibility to protect its population”; imposed a variety of sanctions such as an arms embargo, travel ban and assets freeze; and referred the situation in Libya to the International Criminal Court.

³ Ibid

⁴ See, the 2005 World Summit Outcome document, General Assembly Resolution 60/1, UN GAOR, 60th Sess., UN Doc A/60/L.1 (15 September 2005)

⁵ R. Cohen, The responsibility to protect: The Human rights and humanitarian dimensions P.1

⁶ Ibid

⁷ These crimes are defined with varying degrees of precision in international human rights law. Genocide is the subject of the 1948 Convention on Prevention and Punishment of the Crime of Genocide, which outlaws actions taken “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” “War crimes” the founding statute of the International Criminal Court lists fifty such acts, including torture, hostage-taking, mistreating prisoners of war, targeting civilians, pillaging, rape and sexual slavery, and the intentional use of starvation. The doctrine applies to such crimes when they are committed in the course of civil war or other internal conflict. “Crimes against humanity” include, according to the ICC statute, extermination, enslavement, deportation, torture, rape, extreme forms of discrimination and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The term “ethnic cleansing” has more recently come into general usage and is the least clearly defined of the four categories. It is understood to describe forced removal or displacement of populations, whether by physical expulsion, or by intimidation through killing, acts of terror, rape and the like: it is essentially one particular class of crimes against humanity.

⁸ M. Emerson, The Responsibility to Protect and Regime Change; (December, 2011)

Gaddafi's lack of compliance with Resolution 1970, and his further attacks on civilians, then led to Resolution 1973 (of 17 March 2011),⁹ which authorized Member States "to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack". In the Preamble to Resolution 1973, the following determination was added: "Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians".

This thesis attempts to examine the UNSC Resolution 1973 on Libya in 2011, which authorized the implementation of the R2P civilians from gross human rights violations. It also looks the parameters of the concept, legal status and scope of the responsibility to protect, and the responses of regional and international arrangements on Libyan crisis.

1.1.2. Research Questions

The Responsibility to Protect entails three distinct yet related commitments: *a responsibility to prevent, to react and to re-build*.¹⁰ The most controversial element is the idea that the international community, authorized by the UN Security Council, could mount a military intervention in order to protect civilians from mass atrocity crimes. Thus, the thesis analyzes the intervention in Libya through the UNSC Resolution 1973. Consequently, in this regard I would like discuss the following questions; which is the main research questions.

- ❖ How the responsibility to protect begin and developed
- ❖ What does the responsibility to protect entail?
- ❖ When is that responsibility acquired?
- ❖ Who, precisely, has a responsibility to protect?

⁹ See, U.N. Security Council Resolution 1973, on Libya, U.N. Doc S/RES/1973 (February 7, 2011). The resolution was adopted by a vote of ten to none, with five abstentions: Brazil, China, Germany, India, and Russia.

¹⁰ See, the ICISS Report, cited above at note 2

- ❖ How the responsibility to protect reconcile, the protection of human rights, on the one hand, and the principles of the UN charter such as; state sovereignty, non-intervention and non-use of force, on the other.
- ❖ Does the responsibility to protect mean a new name for humanitarian intervention?
- ❖ What are the initial responses of regional and international community to the Libyan crisis?
- ❖ How crucial the UNSC intervention in Libya for the implementation of the responsibility to protect through SC Resolution 1973?
- ❖ What does the recent experience of the responsibility to protect in Libya signify in the development of R2P?
- ❖ What does the experience of Libya imply about the relationship between responsibility to protect and regime change?
- ❖ Is the UN Security Council applying double standard for delivering on R2P? Particularly in Syrian crisis?

1.1.3. Research Methodology

This thesis employs desk-based research method only. It will involve literature review by way of referring to books on international law and politics, legal materials, scholarly articles on journals, laws and other publicans as well as official documents. In the analysis of official documents, closer scrutiny of regional and sub-regional organization decisions in the Libyan crisis, the UNSC Resolutions in Libya and the various reports in relation to the concept of the responsibility to protect takes the lions share. To understand recent and current information that is relevant to the issue, on line (internet) sources will also be employed.

1.1.4. Objective of the Study

The main objective of this thesis is to examine the UN's responsibility to protect civilians from massive human rights violations, particularly in light of the recent intervention in

Libya crisis through UNSC Resolution 1973. The research discusses the origins and evolution of the concept of R2P, and investigates the UNSC Resolution 1973.

1.1.5. Limitation and Scope of the Study

The Responsibility to Protect is an emerging concept designed to provide an international framework of protection for civilians facing massive human rights violations. It was developed officially by an independent panel of experts named the International Commission on Intervention and State Sovereignty in 2001 and later endorsed by world leaders at a UN Summit in 2005. Therefore, the concept is most recent that, there are no sufficient written materials and documents to be referred, apart from numerous reports. On top of it, since the intervention in Libya was in recent times (2011); it will be difficult to have books and other printed material on the situation.

Therefore, the scope of the study is limited to examine the newly emerging concept the responsibility to protect, and it particularly examines the implementation of the R2P in Libya crisis through UNSC Resolution 1973.

1.1.6. Significance of the Study

The UN Security Council Resolution 1973, in the case of Libya, mentioned R2P, not humanitarian intervention, as the principle that guided the intervention. Unlike humanitarian intervention, R2P aspires to ground national and international action in law and institutions. Rather than compromising sovereignty, it harnesses the notion of sovereignty as responsibility. Therefore, this thesis tries to show the parameters of the concept of R2P to the academic community and practitioners involved in the subject area, particularly by examining the UNSC Resolution 1973 which authorized intervention in Libya crisis. Here, it is worth noting that, the experience of application R2P in Libya will help the United Nations Security Council for future efforts to invoke R2P as grounds for intervention and a reliable framework for future international diplomacy and protection of civilians from massive human rights violations.

1.1.7. Literature Review

Weiss and Groves in their separate studies note that the responsibility to protect initiated by the United Nations allowing military intervention into a State for humanitarian purposes has long been a controversial topic yet the principle outlines the conditions under which such intervention would be justified; one, that any military intervention must be for a just cause; two, that the intervention should be authorized by the United Nations Security Council (UNSC); three, that interventions should be carried out with the right intention through multilateral rather than unilateral means; and finally, that the intervention must be conducted by proportional means.¹¹

Deqiang, Seybolt and Stahn provide that the responsibility to protect reverses and modifies humanitarian intervention with; one, the responsibility to protect implies an evaluation of issues from the point of view of those seeking or needing support, rather than those who may be considering intervention; two, it acknowledges the fact that the primary responsibility rests with the state concerned that is only if the state is unable or unwilling to fulfill this responsibility, or it is itself the perpetrator that it becomes the responsibility of the interventional community to act in its place. Three, it means not just the responsibility to react”, but as well the “responsibility to prevent”. The responsibility to prevent entails efforts to build a better early warning system, root cause prevention and economic, legal and threatened sanctions.¹² The responsibility to react applies to the situations where preventive measures fails or the state concerned is unable or unwilling to redress the situation, wherever possible, coercive measures short of military intervention ought first to be examined and generally preferable.¹³

¹¹ T. Weiss, Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect, (New York: Rowman and Littlefield 2005); S. Groves “Obama Wrongly Adopts UN Responsibility to Protect to Justify Libya Intervention” (2011), March 31.

¹² G. Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All, (Washington D.C: Brookings Institution Press 2008).

¹³C. Dequiang “Humanitarian Intervention in International Law”, Wuhan University Journal of Philosophy and Social Sciences 59 (2) (2006);, T. Seybolt Humanitarian Military Intervention: The Conditions for Success and Failure, (New York: Oxford University Press 2007); C. Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?” The American Journal of International Law 2007 101

Thus, Deqiang, for instance, states that military intervention when applied in extreme and exceptional cases should be conducted under six threshold criteria; right authority, right intention, last resort, proportional means, just cause and reasonable prospects. The responsibility to rebuild means that if military intervention action is taken, there should be a genuine commitment to help build a durable peace, and promoting good governance and sustainable development. The three pillars of the principle of responsibility to protect therefore include the first pillar which stresses that the state have primary responsibility to protect, the second pillar addresses the commitment of the international community to provide assistance to states in building capacity to protect; and the third pillar focuses on the responsibility on the international community to take timely and decisive action to prevent or halt genocide, ethnic cleansing, war crimes and crimes against humanity when a state is evidently or manifestly failing to protect its populations.

Holzgrefe defines “humanitarian intervention as the threat or use of force across state borders by a state or a group of states aimed at preventing or ending widespread and grave violations of fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied”.¹⁴ In this definition, non-forcible interventions such as the threat or use of economic, diplomatic or other sanctions; and forcible interventions aimed at protecting or rescuing the intervening state’s citizens are clearly underscored. According to Deqiang “humanitarian intervention is the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivation of internationally recognized human rights. Implicit in this definition is unilateral intervention and multilateral intervention. Unilateral intervention refers to the use of force or intervention exercised by a state or a group of states without authorization of the UN Security Council, while multilateral humanitarian intervention is the use of force authorized by UN Security Council. Western and Goldstein notes that humanitarian intervention has benefited from the evolution of international norms about violence

¹⁴ J. Holzgrefe and, R. Keohane, Humanitarian Intervention, Ethical, Legal and Political Dilemmas, (Cambridge University Press 2003).

especially with the emergence of “the responsibility to protect”, which holds the international community has a special set of responsibilities to protect civilians by force, if necessary, from war crimes, crimes against humanity, ethnic cleansing, and genocide when national governments fail to do so.¹⁵

The NATO’s implementation of no-fly Zone and humanitarian intervention beginning with its first air strike in Libya was thrown into controversy. Not long after the UN Security Council authorized international forces to protect civilians and establish a no-fly zone, NATO seemed to go beyond its mandate as several of its members explicitly demanded that Libyan leader Muammar Gaddafi should step down. Despite the initial setbacks in Libya, NATO’s success in protecting civilians and helping rebel forces remove a corrupt leader is commendable. NATO’s intervention in Libya reflects how the world has become more committed to the protection of civilians.¹⁶ Western and Goldstein argue that despite this, the humanitarian intervention has accomplished the primary objective of Resolution 1973. It saved civilian lives by halting an imminent slaughter in Benghazi, breaking the siege of Misratah, and forcing Gaddafi’s tank and artillery units to take cover rather than commit atrocities. Despite the initial military setbacks and some frustrations over the length and cost of the operation, intervention contributed to the end of the civil war between Gaddafi and the rebels which otherwise might have been much longer and more violent.

The UNSC Resolution 1973, thus, constitutes an unexpectedly broad authorization for the use of force in Libya. For example, the mandate does not allude to a time limit nor is it substantially restrained. In respect of admissible measures, only occupation forces are explicitly excluded, which means that the deployment of ground troops was generally allowed as long as they did not seize effective control over parts of Libyan territory. Although the authorization has a humanitarian mandate, it was not explicitly aimed at regime change. The explicit and the declared objective of the resolution, that is, the

¹⁵ J. Western and J. Goldstein “Humanitarian Intervention Comes of Age: Lessons from Somalia to Libya”, (Foreign Affairs 90 (6): 48-59, 2011).

¹⁶ Ibid

protection of civilians and civilian populated area, allowed the military measures that facilitated and advanced the overthrowing of the Gaddafi regime while protecting human rights.¹⁷ The violent reaction of the Libyan regime against the protests has been condemned globally by international and regional organizations as well as by states and NGOs. In other words, there was a general consensus that the regime's reaction was intolerable and constituted an evident and massive violation of human rights. With the imminent threat of Gaddafi recapturing Benghazi and the rising fears that this would result in massive civilian casualties, the international community support for no-fly zone and the authorization of measures which includes military actions for the protection of civilians was overwhelming.

1.1.8. Conceptual Clarification

The responsibility to protect (R2P); Describes an evolving concept about the duties of governments to prevent and end unconscionable acts of violence against the people of the world. Unlike humanitarian intervention R2P is much broader concept, and approaches the issue of state sovereignty in a very different way. The idea is that if a particular State were unwilling or unable to carry out its responsibility to prevent human rights abuses, the responsibility would have to be transferred to the international community, which would then solve problems primarily via peaceful means (such as diplomatic pressure, dialogue, sanctions) or, as a last resort, through the use of military force.

Mass atrocities; The four types of human rights abuse enumerated in the 2005 World Summit Outcome Document are captured by the shorthand, "mass atrocity" or "mass atrocity crime." These are genocide, war crimes, ethnic cleansing, and crimes against humanity. These crimes are defined with varying degrees of precision in international human rights law.

¹⁷ M. Payandeh "The United Nations, Military Intervention and Regime Change in Libya", Virginia Journal of International Law 52 (2): 2012.

1.1.9. Overview of the Chapters

The study consists of five chapters. Chapter one will set out the content and it highlights the basis and arrangement of the study. The second chapter will look into how the concept of the responsibility to protect articulated and progressively refined beginning mainly from the triggering events the International Commission on Intervention and State Sovereignty (ICISS) report to the 2005 UN World Summit Outcome Document. The third chapter will discuss humanitarian intervention and the use of force under international law, particularly within the UN Charter framework in light of the responsibility to protect. The fourth chapter will discuss the international community, regional and sub-regional bodies' responses to the Libya crisis at early stage and it examines the UNSC Resolution 1973 on Libya, which authorized the implementation of the R2P civilians from gross human rights violations. Under the final chapter, which is chapter five, the study ends by concluding the whole discussion and by providing some recommendations.

CHAPTER TWO

THE ORIGINS, EVOLUTION AND ADOPTION OF THE ‘RESPONSIBILITY TO PROTECT’

2.1. Introduction

Over the last many decades, mass human rights violations committed against civilian populations remain both a pervasive reality of global politics, and a fundamental threat to international peace and security.¹⁸ In recent years, however, the international community has found common ground in the conviction that all States have a responsibility to protect their populations from mass human rights violations, and also the international community must support States in meeting their responsibilities and, if the State manifestly fails, take appropriate measures to protect vulnerable populations.¹⁹

Beginning from the work of Francis Deng and other contributors²⁰ and subsequent development such as the International Commission on Intervention and State sovereignty (ICISS) report entitled; *the Responsibility to Protect*,²¹ the High-Level Panel on Threats, Challenges and Change, report entitled: *A more secure world: Our shared responsibility*,²² the report of the then Secretary-General, Kofi Annan, entitled *‘In Larger Freedom: Towards Development, Security and Human Rights for All*,²³ and the 2005 World Summit Outcome Document²⁴ and other official documents are the most significant for conceptualizing the basic idea of the responsibility to protect. Therefore,

¹⁸ _____, Atrocity Prevention and US National Security: Implementing the Responsibility to Protect. (http://www.stanleyfoundation.org/.../AtrocityPreventionPDB1_11.pdf) last visited on February 7, 2012

¹⁹ _____, Asia-Pacific Centre for the Responsibility to Protect, The Responsibility to Protect in Southeast Asia, January 2009, p.6-7 (http://www.responsibilitytoprotect.org/files/R2P_in_Southeast_Asia%5B1%5D.pdf) last visited on February 8, 2012

²⁰ F. Deng et al., Sovereignty as Responsibility: Conflict Management in Africa (Washington, D.C.: Brookings Institution Press, 1996)

²¹ See, the ICISS Report, cited above at note 2

²² See, Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, December 2004, (Hereinafter the High-Level Panel Report)

²³ See, Report of the Secretary General, In Larger Freedom: Towards Development, Security and Human Rights for All, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) (Hereinafter the Secretary-General Report)

²⁴ See, the Outcome Document, cited above at note 4

the following chapter focuses on the various discussion of the genesis and development of the concept of the responsibility to protect.

2.2. Background and Genesis of the Responsibility to Protect

The failure of the international community to protect victims of mass human rights violations and to respond in a timely and effective manner to the horrific genocides such as, in Rwanda in 1994 and in Cambodia two decades earlier, as well as to the mass murder in Srebrenica in 1995, had raised disturbing questions both about political will and about UN capacity to intervene.²⁵ Consequently, thinking about the nature of sovereignty and the duties of States began to shift in both academic and policy communities.²⁶ For instance, the then UN Secretary-General Boutros Boutros-Ghali in his reports; *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, wrote;

*“...the time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world...”*²⁷

Subsequently, the work of Francis M. Deng and other contributors, the 1996 publication of *Sovereignty as Responsibility: Conflict Management in Africa*,²⁸ had provided an explicit platform for the origins and evolution of the concept of the responsibility to protect.²⁹ The authors assert that sovereignty can no longer be seen as a protection against interference, but as a charge of responsibility where the state is accountable to both domestic and external civilian populations.³⁰ The book shows how that responsibility can

²⁵ E. Luck, *The United Nations and the Responsibility to Protect*, August 2008

²⁶ W. Burke-White, *Adoption of the Responsibility to Protect* University of Pennsylvania

²⁷ See, B. Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping* A/47/277 - S/24111, 17 June 1992, Para. 17 (<http://www.un.org/docs/SG/agpeace.html>) last visited on February 12, 2012

²⁸ F. Deng, cited above at note 20

²⁹ See, R. Williamson, *Sudan and the Implications for Responsibility to Protect*, October 2009, P.1

³⁰ F. Deng, cited above at note 20, 1 review

be exercised by States over their own population and by other states in assistance to their fellow sovereigns.³¹ Sovereignty as Responsibility presents a framework that should guide both national governments and the international community in discharging their respective responsibilities.³² In other words, the book reframes the concept of sovereignty as responsibility rather than right, and requires along with the benefits that attach to sovereignty, States should bear responsibilities toward their own citizens and the international community.

In 1999, the then UN Secretary-General Kofi Annan posed, in a series of persuasive speeches made the case about, the stark choice between standing by when violating human rights were unfolding or intervening militarily even if Security Council authorization was blocked,³³ which also had a great contribution for the overall development of the concept of the responsibility to protect. Predominantly, the influential report in 2000 of the Independent International Commission on Kosovo,³⁴ concluded that “the North Atlantic Treaty Organization (NATO) intervention was legitimate, but not legal,”³⁵ and recommended that the General Assembly adopt a “principled framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes.”³⁶ In September 2000, the Government of Canada, together with a group of major foundations, mainly concerned with re-conceptualizing humanitarian intervention in the wake of the Kosovo crisis and the Secretary-General’s challenge to resolve the tension between sovereignty and fundamental human rights, announced at the General Assembly the establishment of the International Commission on Intervention and State Sovereignty (ICISS).³⁷

³¹ Ibid

³² Ibid

³³ See, the Question of Intervention: Statements by the then Secretary-General Kofi Annan, United Nations New York December, 1999. “Two Concepts of Sovereignty.” Address to the 54th Session of the UN General Assembly, September 20, 1999.

³⁴ See, the Independent International Commission on Kosovo, the Kosovo Report: Conflict, International Response, Lessons Learned (2000).

³⁵ Id, P. 289

³⁶ Id, P. 10

³⁷ See, the ICISS Report, cited above at note 2, P. VII the

In December 2001, the ICISS presented a report entitled *The Responsibility to Protect*³⁸ to the UN Secretary- General (hereinafter the ICISS Report). The aim of the ICISS Report, in general, was to shed new light on the long-standing controversy around the so-called “right of humanitarian intervention”: the question of when, if ever, it is appropriate for States to take coercive and in particular military action, against another State for the purpose of protecting people at risk.³⁹

Significantly, the concept of the responsibility to protect besides the ICISS Report, far-reaching and further treated differently, mainly in the three documents associated with its evolution and progress, namely, the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*; *In Larger Freedom: Towards Development, Security and Human Rights for All*; and the Outcome Document of the 2005 World Summit. However, the concept of the responsibility to protect used by these different documents vary extensively with respect to scope, prerequisites and means of responsibility. Therefore, in order to have a better understanding of the development of the concept, the next sections will discuss each of these essential documents.

2.2.1. The Report of ICISS, *The Responsibility to Protect*

The Responsibility to Protect, the 2001 report of the ICISS, attempted to resolve the tension between the competing claims of sovereignty and human rights by building a new consensus around the principles that should govern the protection of endangered peoples.⁴⁰ The Report formulated an alternative principle of “the responsibility to protect,” focusing not on the “rights” of outsiders to intervene but on the “duty” of all States to protect people at risk.⁴¹ In other words, the R2P reframes the debate surrounding intervention from rights to intervene to suggest that the international community has a responsibility to intervene in humanitarian catastrophes to protect civilian people. The

³⁸ Ibid

³⁹ Ibid

⁴⁰ A. Bellamy and N. Wheeler, Humanitarian Intervention in World Politics

⁴¹ Ibid

ICISS Report essentially developed the concept of responsibility to protect to solve the legal and policy dilemmas of humanitarian interventions.⁴²

2.1.1.1. The Approach of the ICISS Report on State Sovereignty

Here, before looking at the ICISS new way of understanding State sovereignty, the thesis will discuss briefly about sovereignty. The general perception of the concept of sovereignty as it is thought of today, particularly as to its core of a monopoly of power for the highest authority of what evolved as the “Nation-State,” began with the 1648 Treaty of Westphalia.⁴³ The study found persuasive the definition of sovereignty and its problems given by one United States government official;

Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of

⁴² C. Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?” The American Journal of International Law, Vol. 101, No. 1 (Jan. 2007) P. 99-120

⁴³ The “Treaty of Westphalia” is the Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies, Oct. 24, 1648. See, K. Gordon, the Origins of Westphalian_Sovereignty. A Westphalian nation-state has two main characteristics: a specific area of land which is considered part of the nation, called territoriality, and a ruling structure that has the ultimate power to rule over the nation without yielding to any external agency. The latter provision is especially important; to be a sovereign nation, authority cannot come from outside the state. Conversely, the authority of a Westphalian nation-state is limited to the boundaries that define the nation’s territory. This concept is called territorial integrity, and is an important aspect of relations between two Westphalian nation-states. As time passed, this developed into notions of the absolute right of the sovereign, and what we call “Westphalian sovereignty.” last visited on February 18, 2012

*these components— internal authority, border control, policy autonomy, and non-intervention—is being challenged in unprecedented ways.*⁴⁴

Thus, the concept is normally used to encompass all matters in which each State is permitted by international law to decide and act without intrusions from other sovereign States.⁴⁵ These matters include the legal identity of a State, the choice of political, economic, social, and cultural systems and the formulation of foreign policy, and the scope of the freedom of choice of States in these matters is not unlimited; it depends on developments in international law and international relations.⁴⁶

Here, at this juncture the thesis discusses the new approach of State sovereignty in the eyes of the ICISS Report. One of the most significant achievements of the ICISS Report was to re-characterize *State sovereignty as implies responsibility*.⁴⁷ Thus, the ICISS Report affirmed the notion that sovereignty entails not just rights, but insisted that it also encompassed a State's responsibility to protect civilian populations within and outside borders. The ICISS Report under its core principles provides that:

*State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the State itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or State failure, and the State in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.*⁴⁸

As a result, the ICISS Report recognized that the main (the primary) responsibility to protect resides or lays with the State whose people are directly affected by conflict or massive human rights violations,⁴⁹ and that it is only if the State is unable or unwilling to

⁴⁴ See, R. Haass, Existing Rights, Evolving Responsibilities, Remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, at 2, (http://www.georgetown.edu/sfs/documents/haass_sovereignty.pdf.) last visited on February 18, 2012

⁴⁵ W. Thomas and D. Hubert The Responsibility to Protect: Research, Bibliography, Background, Ottawa: International Development Research Centre, (2001)

⁴⁶ Ibid

⁴⁷ See, the ICISS Report, cited above at note 2, P. XI,

⁴⁸ Ibid

⁴⁹ Id, Para.2.30

fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.⁵⁰ Gareth Evans, one of the co-chairs of the ICISS Report explained the approach as follows:

... We sought to turn the whole weary debate about the right to intervene on its head, and to re-characterize it not as an argument about the 'right' of state to anything, but rather about their 'responsibility' – one to protect people at grave risk: the relevant perspective we argued, was not that of prospective interveners but those needing support. The searchlight was swung back where it always should be: the need to protect communities from mass killing and ethnic cleansing, women from systematic rape and children from starvation....⁵¹

Here, the intention of the change of terms, from “the right to intervene” to “the responsibility to protect”, is to foster a change in perspective, avoiding privileging claims of the potentially intervening States over the point of view of those seeking support, and also to escape the traditional focus on the act of intervention, providing a good support for the need of preventive effort or subsequent follow-up assistance.⁵² Therefore, the ICISS report sought to bridge the gap between intervention and sovereignty by introducing a complementary concept of responsibility, under which responsibility is shared by the national State and the broader international community.⁵³

2.1.1.2. The Responsibility to Prevent, React, and Rebuild

The other most important contribution of ICISS Report is its assertion that the responsibility to protect encompasses not only the responsibility to react, but most importantly the responsibility to prevent and the responsibility to rebuild.⁵⁴ Thus, according to the ICISS Report, the international community’s ‘responsibility to protect’

⁵⁰ Ibid

⁵¹ G. Evans, The International Responsibility to Protect: the Tasks Ahead, Address to Seminar on Africa’s Responsibility to Protect, The Centre for Conflict Resolution, Cape Town, 23 April 2007

⁵² L. Bogliolo, “The Responsibility to Protect and the Legality of Using Force,” Human Security Journal (2009) Volume: 8, Pages: P. 22

⁵³ C. Stahn, cited above at note 42, P.103

⁵⁴ See, the ICISS Report, cited above at note 2, Ch. 3, 4 and 5

has three dimensions. These are:⁵⁵ The responsibility to prevent (to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.), the responsibility to react (to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.) and the responsibility to rebuild (to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert). Thus, unlike humanitarian intervention which involves the use of armed force, the parameters of the concept of R2P is about much more than military intervention and, include action to prevent conflict as well as assist and re-construct after the event.

2.1.1.3. The Guiding Principles for Military Intervention

Here, even if the ICISS Report made very clear that, prevention is the single most important elements among the above three dimension of the R2P,⁵⁶ however, if preventive measures fail to resolve a situation, then in extreme and exceptional cases, the responsibility to react may involve the need to resort to military action.⁵⁷

Therefore, the ICISS Report came up with six principles in order to justify or legitimacy of military intervention: the "*just cause*" threshold,⁵⁸ the *four precautionary principles*,⁵⁹ and the requirement of "*right authority*."⁶⁰ The four precautionary principles are *right intention, last resort, proportional means* and *reasonable prospects*. In addition, the ICISS Report listed a number of operational principles to be followed. These included the need for clear objectives, a common military approach among partners, and an acceptance of limitations and rules of engagement which fit the situation.⁶¹ Nevertheless,

⁵⁵ Id, P. XI, 3

⁵⁶ Ibid, P. XI, 4

⁵⁷ Id, P. 31, Para 4.10

⁵⁸ Id, P.XII

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Id, P.XIII

the R2P criteria themselves are somewhat ambiguous and leave room for interpretation. Therefore, there is a hidden tension over what is more important: the criteria or the competent and enduring authority. Here, the following sections will discuss these six principles in brief.

A. Just cause

In the ICISS's view, military intervention for human rights protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert human suffering:⁶² Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

Obviously, if either or both of these conditions are fulfilled, subsequently the "just cause" principle satisfied that, the decision to military intervention is justified or legitimate. Here, the ICISS's intention is to allow intervention only in situations of extreme need and irreparable harm so as to limit the exceptions to the principle of non-intervention.⁶³

B. The Four Precautionary Principles

Here, in addition to the just cause principle, the ICISS Report recommended four precautionary principles so as to justify military intervention. These are: right intention⁶⁴ (the primary purpose of the intervention, whatever other motives intervening States may have must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned), last resort⁶⁵ (military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable

⁶² Id, P.XII, 1 (A and B)

⁶³ ICISS Report (2001) Para 4.18-19.

⁶⁴ Id, P.XII, 2 A

⁶⁵ Id, P.XII, 2 B

grounds for believing lesser measures would not have succeeded), proportional means⁶⁶ (the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective), and reasonable prospects⁶⁷ (there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction)

C. Right Authority

The last principle which perhaps is the most important one is “right authority”. The ICISS Report addressed the issue of which body should be charged with authorizing military interventions. The ICISS Report is clearly in favor of the UN Security Council. It provides that;⁶⁸

There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has. Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.

However, the question that comes to one’s mind is, what if the UN Security Council failed to vote to authorize while all the other principles are satisfied. This is exactly the issue that had to be confronted with Kosovo in 1999 when all the elements of a horrific new ethnic cleansing operation were falling into place, Russia and China, however, made it equally clear that they would not sanction any use of force against the authorities in

⁶⁶ Id, P.XII, 2 C

⁶⁷ Id, P.XII, 2 D

⁶⁸ Ibid

Belgrade because they viewed Kosovo's crisis as an internal problem for the Federal Republic of Yugoslavia.⁶⁹ Consequently, when the Security Council rejects a proposal or fails to deal in a reasonable time for matters of military intervention, the ICISS Report recommended some alternative operational system:

*Consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.*⁷⁰

Therefore, the ICISS Report, besides the UN Security Council, explicitly mentions and recognizes the possibility of military intervention through the authorization of the General Assembly or outside of the UN framework, by regional or sub-regional organizations.

2.3. The United Nations and The Responsibility to Protect

2.3.1. A More Secure World: Our Shared Responsibility

The concept of the responsibility to protect, as developed in the ICISS Report, was then considered by the Secretary-General's High-Level Panel on Threats, Challenges and Change report entitled: *A more secure world: Our shared responsibility*. (Hereinafter the High-Level Panel Report),⁷¹ convened by the then Secretary-General Kofi Annan in order to evaluate the adequacy of existing policies and institutions with regard to contemporary threats to international peace and security. The High-Level Panel treated the responsibility to protect in two parts of its report.⁷²

⁶⁹ _____, the Responsibility Not to Veto: A Way Forward 2010. (http://www.globalsolutions.org/files/public/.../RN2V_White_Paper_CGS.pdf) last visited on February 20, 2012

⁷⁰See, the ICISS report, cited above at note 2, P.XIII, 3(E(I and II))

⁷¹ See, the High-Level Panel Report, cited above at note 22

⁷² Id, Para 29-30 and Para 199-203

The High-Level Panel Report mentioned the nexus between sovereignty and responsibility in the opening pages and subsequently developed the outline of the R2P in the context of the use of force, in a section entitled "Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect."⁷³ Similar to that of ICISS Report, the High-Level Panel Report highlights the responsibility of the State for the wellbeing of its people as well as the collective international responsibility to protect civilians from massive human rights violations.⁷⁴

Moreover, the High-Level Panel Report confirms the competence of the Security Council to act under Chapter VII of the U.N. Charter when massive human rights violations occur, and develops criteria for the legitimacy of the use of force similar to those suggested by the ICISS Report, and also urges the permanent members to refrain from using the veto in cases of genocide and large-scale human rights abuses.⁷⁵ However, the debate about the responsibility to protect took a new turn in the High-Level Panel Report, where it directly related to institutional reform of the United Nations.⁷⁶ The High-Level Panel Report saw the idea of responsibility to protect as a means to strengthen the collective security system under the UN Charter.⁷⁷ The High-Level Panel Report stated that:

*We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.*⁷⁸

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Id, Para 207 and 256

⁷⁶ See, C. Stahn, cited above at note 42, P.105

⁷⁷ Ibid

⁷⁸ See, the High-Level Panel Report, cited above at note 22, Para 203

Thus, unlike the ICISS Report, which recommended an alternative operational system, the High-Level Panel Report did not envisage that an international responsibility to protect could be invoked by the General Assembly under the “Uniting for Peace” procedure or through regional or sub-regional organizations in the absence of Security Council authorization;⁷⁹ rather it focuses that a collective international responsibility to protect is only exercisable by the UN Security Council.

In general, while the High-Level Panel Report supports the conceptual change in the understanding of sovereignty as responsibility. It also emphasizes that the responsibility for the well-being of human beings is shared between the state and the international community, and the operational content of the responsibility to protect is remarkably restricted to the UN Security Council.⁸⁰

2.3.2. In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General

The other significant document for the genesis and evolution of the responsibility to protect is, the report of the then Secretary-General, Kofi Annan, entitled *In Larger Freedom: Towards Development, Security and Human Rights for All* (Hereinafter the Secretary-General Report).⁸¹

The Secretary-General, in addition to development, security and human rights, which form the backbone of his report, he also includes recommendations on the concept of responsibility to protect. In the section entitled freedom to live in dignity, the Secretary-General recommended that States embrace the merging norm of the responsibility to protect;

⁷⁹ See, the ICISS Report, cited above at note 2, P.XIII, 3(E(I and II))

⁸⁰ M. Payandeh, “With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Lawmaking,” The Yale Journal Of International Law Vol. 35: P.469

⁸¹ See, the Secretary-General Report, cited above at note 23

*...While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it....*⁸²

Here, the concept of R2P was removed from the section on the use of force and placed in the section dealing with freedom to live in dignity, so as to detach the idea of responsibility from an automatic equation to armed force.⁸³ The Secretary-General placed stronger emphasis on the need to implement the responsibility to protect through peaceful means.⁸⁴ Accordingly, unlike the High-Level Panel Report which discusses the responsibility to protect in the context of the use of force, the Secretary-General returns to the broader understanding of the concept by placing his assessment of the responsibility to protect to promote the commitment of all nations for the principles of human dignity and the rule of law.⁸⁵

However, with regard to the use of force, similar to that of the High-Level Panel report, the Secretary-General also focuses on the UN Security Council and does not discuss the possibility of humanitarian interventions without authorization of the UN Security Council. Moreover, the Secretary-General recommended, similar to the High-Level Panel report, five principles when the UN Security Council authorizes or endorses the use of military force.

The task is not to find alternatives to the Security Council as a source of authority but to make it work better. When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed

⁸² Id, Para 13

⁸³ See, C, Stahn, cited above at note 42, P. 107

⁸⁴ Id

⁸⁵ See, the Secretary-General report, cited above at note 23, Para. 133

*in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success.*⁸⁶

Here, the broad focus of the Secretary-General Report on the UN Security Council and the silence of an alternative means of carrying out interventions for purposes of civilian protection indicated a general reluctance to accept military action without the Security Council's authorization.⁸⁷

2.3.3. The 2005 UN World Summit Outcome Document

The 2005 UN World Summit was a watershed moment for R2P,⁸⁸ with a number of further shifts in emphasis, because the responsibility to protect was on the agenda of the World Summit, one of the largest gatherings of Heads of State and Government.⁸⁹ A small camp of dissenters, including Algeria, Belarus, China, Cuba, Egypt, India, Iran, Jamaica, Libya, Pakistan, Russia and Venezuela, led opposition to R2P in the negotiations of the World Summit Outcome Document.⁹⁰ Russia, India and Jamaica opposed outright the inclusion of R2P in the World Summit Outcome Document.⁹¹ However, over 170 Heads of State and Government participated in the discussions from September 14–16, 2005, leading to the 2005 World Summit Outcome Document (hereinafter the Outcome Document), which was formally adopted by the General Assembly in Resolution 60/1 (2005).⁹²

In Paragraphs 138-140 of the Outcome Document, Heads of State and Government unanimously affirmed that each individual State has the responsibility to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing,

⁸⁶ Id, Para 126

⁸⁷ See, C. Stahn, cited above at note 42, P. 108

⁸⁸ M, Serrano, Implementing the Responsibility to Protect: The Power of R2P Talk, Global Responsibility to Protect, Forthcoming at 1.

⁸⁹ United Nations Department of Public Information UN Summit Takes on Tough Global Issues (2005) (http://www.un.org/summit2005/press_release_global.pdf.) last visited on March 14, 2012

⁹⁰ E. Strauss, “The Emperor's New Clothes? The United Nations and the Implementation of the Responsibility to Protect” (April 7, 2009), at 15 and 16

⁹¹ Ibid

⁹² See, the Outcome document, cited above at note 4

including the prevention of such crimes.⁹³ They further agreed that States should assist others States in exercising their responsibility.⁹⁴ In addition, they affirmed that the international community has the responsibility to take actions using peaceful means to protect populations from massive human rights violations; and when a State fails to protect its population from such violations, they agreed to take collective action, in a timely and decisive manner, through the UN Security Council, in accordance with the Charter.⁹⁵ The paragraphs are worth citing here in full:⁹⁶

138. *Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*

139. *The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic*

⁹³ Id. Para 138

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Ibid

cleansing, and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. *We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.*

Here, the thesis examines whether or not the Outcome Document explicitly mention the three dimensions of R2P as it articulated under ICISS Report, particularly the responsibility to prevent and react.

Regarding the idea of the responsibility to prevent, the Outcome Document paragraph 138 states that “...*this responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means...*”, Here, the significance of the ICISS Report, which attributed to prevention again perceived as the cornerstone in the Outcome Document. Gareth Evans asserts that, “as every relevant document from the ICISS Report to the Outcome Document makes abundantly clear, R2P is about taking effective preventive action, and at the earliest possible stage.”⁹⁷

The responsibility to react is taken up in paragraph 139, which states plainly and unconditionally that “...*the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect*

⁹⁷ G. Evans, The Responsibility to Protect: An Idea Whose Time Has Come...Gone? P. 290-91

populations from genocide, war crimes, ethnic cleansing and crimes against humanity....” This sentence suggests that the idea of responsibility to react enjoys at least some acceptance with regard to measures falling short of the use of force.⁹⁸

Here, the Outcome Document, despite the fact that it acknowledges the concept of the responsibility to protect, but it demonstrates significant restraint with regard to the responsibility of the international community.⁹⁹ While the ICISS Report applied to “large scale loss of life,” or “large scale ‘ethnic cleansing,’”¹⁰⁰ the Outcome Document limits the scope of the responsibility to protect to four international crimes only (genocide, war crimes, ethnic cleansing, and crimes against humanity), as opposed to ICISS’s criteria. Regarding these specific crimes, R2P theorists have usually argued that R2P must stay focused on imminent large-scale crimes, as trying to solve everything leads to solving nothing.¹⁰¹ Moreover, the criteria for military intervention, as indicated in the ICISS or the High-Level Panel Reports, were not expressly adopted by the UN General Assembly in the Outcome Document. According to Weiss when endorsing the R2P principle without adopting criteria for the use of force and insisting upon the UNSC authorization, the UN General Assembly has adopted ‘R2P-lite’.¹⁰² Thus, it seems that, the UN Security Council remains free to decide whether or not to launch a military intervention.

⁹⁸ C. Stahn, cited above at note 42, P. 109. Here, even if the Outcome Document does not explicitly mention the concept of the responsibility to rebuild or reconstruct, the Heads of State and Government merely expressed their intention to commit themselves, “...as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.” Therefore, the issue of post-intervention engagement was mainly addressed in institutional terms, namely, through the creation of the Peace-building Commission, which was specifically established to address the challenge of helping countries make the transition from conflict to stability and peace.

⁹⁹ M. Payandeh, cited above at note 80, P. 8

¹⁰⁰ See, the ICISS report, cited above at note 2, Para. 4.19.

¹⁰¹ G. Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All (Washington: Brookings Institution, 2008), P. 64

¹⁰² Weiss, ‘R2P after 9/11 and the World Summit’ (2006-2007) 24 Wisconsin International Law Journal 750 Here, even if the Outcome Document did not adopt literally all the six principles for military intervention (right authority, just cause, right intention, last resort, proportional means and reasonable prospects) as it proposed by ICISS, some of the principles have been accepted by the UNGA when adopting the World Summit Outcome. For instance, Paragraph 139 provides that the right authority to decide on military intervention is the UNSC “...*We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate...*”. The same

Here, the Outcome Document does not explicitly provide that intervention could only happen with authorization by the UN Security Council; rather it leaves the door open to unilateral responses through its "case-by-case" basis of collective security and a qualified commitment to act in cooperation with regional organizations as appropriate.¹⁰³ Thus, the meaning the Outcome Document, distinguished from the responsibility driven approach of the High-Level Panel Report towards collective security,¹⁰⁴ in which the later recommended that, a collective international responsibility to protect is only exercisable by the UN Security Council. Moreover, the United Nations Security Council, a year later, in 2006, unanimously reaffirmed the R2P in Resolution 1674,¹⁰⁵ which stated the Council's determination to protect civilians in Darfur. The Secretary-General has vowed to operationalize the R2P and translate the principle from words to actions.

In general, in the Outcome Document, the scope of R2P has been narrowed to four international crimes compared to what the ICISS Report offered. All Heads of States and Governments acknowledged their primary responsibility to protect their population against genocide, war crimes; ethnic cleansing and crimes against humanity. The international community recognized the duty to help the State to fulfill its responsibility by using all non-coercive means available. Regarding the responsibility to react, it belongs to the UNSC and in cooperation with regional organizations to decide on a case by case basis which coercive means it could adopt when the state is manifestly failing to protect its population from those four international crimes.

paragraph establishes the threshold criterion, referred to as the just cause criterion, when '*peaceful means are inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity*'. The other criterion 'last resort' (which stated that every non-military option for the prevention or peaceful resolution of the crisis has been explored before considering military means), was actually included in the World Summit Outcome when indicating '*...should peaceful means be inadequate...*'

¹⁰³ C. Stahn, cited above at note 42, P. 109

¹⁰⁴ See, The High-Level Panel report, cited above at note 22, P. 105

¹⁰⁵ UN SC Resolution 1674 adopted by the SC at its 5430th meeting (28 April 2006) 5430th meeting UN Doc S/RES/1674 (2006) *Recalling* also its previous resolutions...and 1674 (2006) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document.

2.3.4. Other Relevant Documents

In addition to what the thesis discussed and analyzed so far, there are also other relevant documents that contribute a lot for the evolution and progress, and shown support for the concept of the responsibility to protect as articulated in the Outcome Document. For instance, on 12 January 2009, UN Secretary-General Ban Ki-moon released the first comprehensive document on the R2P entitled “*Implementing the Responsibility to Protect*.”¹⁰⁶ The document clarifies how to understand R2P and outlines measures and actors involved in rendering the norm operational. In this document the Secretary-General detailed what is now referred to as the "three pillars" of R2P approach, namely 1) the protection responsibilities of the state, 2) international assistance and capacity building, and 3) timely and decisive response to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity.

It was an opportunity for all UN member states to engage in a constructive discussion on this document and also to signal real commitment on how to address, in the words of the Secretary-General, the "gaps in capacity, will and imagination" necessary to turn R2P from words to deeds.¹⁰⁷ There was much discussion on the challenges to implement this agenda, but member States sent a clear message that preventing mass human rights violations is a moral duty and a political commitment for the United Nations.¹⁰⁸

The Secretary-General released two additional reports in July 2010 and June 2011 in advance of General Assembly Debates on the Responsibility to Protect. On 14 July 2010, Secretary-General Ban Ki-moon released a report entitled “*Early Warning, Assessment, and the Responsibility to Protect*.”¹⁰⁹ The Secretary-General’s Report addresses the gaps and capacities facing the mechanisms of early warning and assessment within the UN

¹⁰⁶ See, the Secretary-General Report, on Implementing the Responsibility to Protect, UN Doc. A/63/677, Jan. 12, 2009. (In July 2009 General Assembly Debate, UN Member States overwhelmingly reaffirmed the 2005 Commitment and passed a consensus resolution UN/A/RES/63/308 taking note of the Secretary-General’s Report)

¹⁰⁷ See. Global Center for the Responsibility to Protect, (<http://www.globalr2p.org/resources/generalassembly.php>) last visited on March 18, 2012

¹⁰⁸ Ibid

¹⁰⁹ See, the Secretary-General’s report, Early Warning, Assessment, and the Responsibility to Protect, UN/A/64/864, 14 July 2010

system. On 27 June, 2011, Secretary-General Ban Ki-moon released a report entitled “*The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to protect.*”¹¹⁰ Here, the report focuses on the mechanisms and capacities that regional organizations possess for effective regional-global collaboration for prevention of mass human rights violations.

2.4. The Legal Status of the Responsibility to Protect

Regarding the status of the responsibility to protect, some question it is simply an old wine in new bottles¹¹¹ and not a novel concept at all. Some call it an emerging norm,¹¹² some think it as soft law,¹¹³ and some even said that it is on its way into achieving the status of customary international law.¹¹⁴ Here, the authority of the responsibility to protect arises from its adoption by the General Assembly in Resolution 60/1.¹¹⁵ However, a resolution of the General Assembly is not a formal source of international law.¹¹⁶ Articles 10–14 of the United Nations Charter lay out the powers of the General Assembly in this regard, which are limited to discussing matters within the scope of the UN Charter and the maintenance of international peace and security, referring matters or making recommendations to the Security Council, or undertaking studies to promote international cooperation. Thus, while the General Assembly’s adoption of the responsibility to protect has significance, it is not an international treaty or other formal legal instrument or it does not create legal obligations.¹¹⁷

¹¹⁰ See, the Secretary-General’s report, The role of regional and sub-regional arrangements in implementing the responsibility to protect, UN/ A/67/877-S/2011/393, 27 June 2011

¹¹¹ S. Marks and N.Cooper, The responsibility to protect: watershed or old wine in new bottles

¹¹² See, C. Stahn, cited above at note 42

¹¹³ J. Welsh & M. Banda, International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities? *Global Responsibility to Protect* 3, 213 (2010)

¹¹⁴ J. Dorsey, The Current Status of the Responsibility to Protect: Where Is—Or Isn’t—It?

¹¹⁵ See, W. Burke-White, cited above at note 26 P. 9

¹¹⁶ *Ibid*, As per Article 38(1) of the Statute of the International Court of Justice, the main sources of international law can be broadly categorized as: international conventions; international custom; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified scholars.

¹¹⁷ *Ibid*

During the course of 2009 the General Assembly debate on the responsibility to protect,¹¹⁸ some States, including Venezuela, Cuba, and Nicaragua, argued that R2P lacks legitimacy because it was not conferred legal status by the Outcome Document, which was not a Declaration, Convention or development within international customary law. They argued that this lack of juridical standing implies that R2P could be in tension with the principles of the UN Charter.

However, many supportive Member States rebutted that they had never argued that R2P is a legal concept, or a legally binding commitment, but is instead a political one. Consequently, many States far seem suggest and believe that the responsibility to protect has moral, but not legal force.¹¹⁹ For instance, both the British and US Governments have indicated that they regard the R2P as a political commitment and not a legal one.¹²⁰ During the 2009 General Assembly debate Brazil's ambassador to the UN, Maria Luiza Ribeiro Viotti, stated:

*R2P is not a novel legal prescription. Rather, it is a powerful political call for all States to abide by legal obligations already set forth in the Charter, in relevant human rights conventions and international humanitarian law and other instruments.*¹²¹

Thus, as Brazil and many other States noted, the variant of R2P accepted by all states at the 2005 World Summit, which the General Assembly broadly recommitted itself to in

¹¹⁸See, Report on the General Assembly Plenary Debate on the Responsibility to Protect 15 September 2009

¹¹⁹A. Brown, Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect? P. 26

¹²⁰ See, Letter from Ambassador John Bolton on the Responsibility to Protect, 30 August 2005 (<http://www.responsibilitytoprotect.org>.) The US position was spelled out in a letter from the former US Ambassador to the UN, John Bolton. It states that in a "general and moral sense" the international community has a responsibility to act when the host state allows atrocities. The letter makes it clear that the US does not believe the UN as a whole, or the Security Council, or individual states, has an obligation to intervene under international law. In a written answer from June 2007, the British Government stated, "Responsibility to Protect remains a political commitment rather than a legal obligation."

¹²¹M. Ribeiro Viotti, 'Brazil – Statement at the GA Debate on The Responsibility to Protect', 23 July 2009 (http://www.responsibilitytoprotect.org/Brazil_ENG.pdf) last visited on March 22, 2012

2009, did not constitute a new set of provisions, but rather amounted to a restatement of existing law.¹²²

Scholars such as Alex Bellamy observed the concept of the responsibility to protect neither new ... nor radical.¹²³ Carsten Stahn explains that, none of the four main documents (which the thesis discussed above) in which R2P has been considered to be binding legal sources. He states:¹²⁴

Even a broader conception of the law which takes account of GA Resolutions and reports of the Secretary General...fails to offer conclusive guidance in this regard. A closer study of the relevant reports and documents reveals considerable divergences of opinion. Different bodies have employed the same notion to describe partly different paradigms. The text of the Outcome Document of the World Summit, which is arguably the most authoritative of the four documents in terms of its legal value leaves considerable doubt concerning whether and to what extent states intended to create a legal norm.

Here, what is clear, however, is that while since at least 1945 States have accepted in principle a number of treaties and endorsed many General Assembly resolutions and grandiose statements related to the protection of citizens, in practice these commitments have been ignored.¹²⁵ This all points to the fact that the key issue is not getting States to agree that they have a responsibility to protect their own citizens – this has long been accepted, though certainly not adhered to – but rather contriving some means by which states can be compelled to abide by the principles they have endorsed but often

¹²² A. Hehir The Responsibility to Protect: 'Sound and Fury Signifying Nothing'? International Relations 2010

¹²³ A. Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq', Ethics and International Affairs, Vol. 19, No. 2, (2005)

¹²⁴ See, C. Stahn, cited above at note 42, P.100-101

¹²⁵ D. Armstrong, T. Farrell and H. Lambert, International Law and International Relations (Cambridge: Cambridge University Press, 2007), P. 157.

disobeyed; hence the need for a focus on innovative means of enforcement rather than generating agreement around principles already accepted.¹²⁶

Therefore, the relevant provisions of the Outcome Document are political statements by Heads of State and Government and the General Assembly reiterating existing international legal rules, potentially laying the groundwork for the establishment of new legal obligations in the future.¹²⁷ More specifically, the document reaffirms existing rules of treaty and customary law prohibiting and requiring the prevention of war crimes, crimes against humanity, genocide and ethnic cleansing. While shifting the focus from the prosecution of such crimes to their prevention, the Outcome Document builds on, rather than creates legal rules.¹²⁸ For a clear and comprehensive understanding of R2P, the following chapter discusses humanitarian intervention and the use of force under international law, particularly within the UN Charter framework in light of the R2P.

¹²⁶ See, A. Hehir cited above at note 122, P.231

¹²⁷ See, W. Burke-White, cited above at note 26, P. 10

¹²⁸ Ibid

CHAPTER THREE

HUMANITARIAN INTERVENTION AND THE CORE PRINCIPLES OF THE UN CHARTER IN LIGHT OF THE RESPONSIBILITY TO PROTECT

3.1. Introduction

As noted in chapter two, the responsibility to protect stems from a fundamental concept: sovereignty entails responsibility. Sovereignty becomes a conditional right. If a state does not fulfill its obligation of guaranteeing the protection of its citizens, it loses its right to invoke sovereignty as the basis for preventing an international intervention which intends to exercise this responsibility.

Thus, the emergence of the responsibility to protect concept gives a window of opportunity to re-visit the humanitarian intervention discourse with a new language. It replaces the controversial humanitarian interventions principle by re-conceptualizing and embedding the controversial question of military intervention in a comprehensive concept with strong focus on prevention.

This chapter briefly assesses the rights of humanitarian intervention, and enquires into how the responsibility to protect differs from the previous approach humanitarian intervention. In addition, it examines the core principles of the UN Charter and the dilemma that has created, on the one hand, respecting the core principles of State sovereignty, non-intervention and non-use of force, and on the other, the responsibility to protect.

3.2. Humanitarian Intervention

The concept of humanitarian intervention and its legitimacy under international law have long been debated.¹²⁹ The origins of the doctrine of humanitarian intervention date back to the 17th-century international lawyer, Hugo Grotius.¹³⁰ Grotius claimed that;

*...the principle of sovereignty could be restricted by principles of humanity and considered that, "whether a war for the subjects of another be just, for the purpose of defending them from injuries by their ruler...if a tyrant...practices atrocities towards his subject, which no just man can approve, the right of human social connection is not cut off in such case...It would not follow that others may not take up arms for them."*¹³¹

Since then, there have been many attempts by several writers to properly define the term humanitarian intervention. Therefore, the thesis will consider some of these definitions as it has far-reaching significant to understand both humanitarian intervention and the responsibility to protect.

Here, several legal scholars defines humanitarian intervention as threat or use of force by a state, group of states, or international organizations primarily for the purpose of protecting the nationals of the target state from widespread deprivations of international recognized human rights.¹³² Though most definitions include the use of force, some argue

¹²⁹ J. Sarkin, "Dealing With Africa's Human Rights Problems: The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect," Journal of African Law, April 2009 P.4

¹³⁰ M. Copithorne, "Kosovo and Beyond" Trilateral Perspectives on International Legal Issues: Conflict and Coherence in C. Carmody, Y. Iwasawa & S. Rhodes, ed., (Baltimore: American Society of International Law, 2003) 173-175. As cited in K. Gibson, the Responsibility to Protect: Is It Time?

¹³¹ F. Abiew, The Evolution of the Doctrine and Practice of Humanitarian Intervention (Kluwer Law International, The Hague, 1999) P.35. Grotius has been named the Father of International Law

¹³² S. Murphy, Humanitarian Intervention: the United Nations in an Evolving World Order (University of Pennsylvania Press, Philadelphia, 1996) P.11-12. The definition is also used by several other legal scholars, see, for instance P. Simons, Humanitarian Intervention: A Review of Literature 01-2 Ploughshares Working Paper (2001) P.2; S. Kirchner, The Human Rights Dimensions of International Peace and Security and Humanitarian Intervention after 9/11, P.12. It defines humanitarian intervention with similar criteria "coercive action by states involving the use of armed force in another state without the consent of the latter

that interventions which resort to force cannot be defined as humanitarian interventions,¹³³ and define humanitarian intervention without reference to the use of force,¹³⁴ thereby placing interventions by other means under the term humanitarian intervention such as (political, economic and diplomatic interference). As Sean D. Murphy notes, the meaning of the word "humanitarian" is quite broad and commonly describes a wide range of activities of governmental and non-governmental actors, seeking to improve the status of individuals and contribute to their well-being.¹³⁵

Thus, humanitarian intervention dictates that the use of force or non-forcible method is acceptable if a State intervenes in another in order to save lives or protect human rights violations. However, even if the reasons for acceptance of a doctrine of humanitarian intervention become convincing in such circumstances, it is not without its difficulties.¹³⁶ Although humanitarian intervention is not rooted in any provision of the UN Charter, it has been implicit in certain findings of and responses to 'threats to international peace and security' under Chapter VII.¹³⁷ Accordingly, humanitarian intervention consists of forcible or non-forcible intervention at the inter-state level, undertaken without any other justification rooted in a legally-binding expression of will.¹³⁸

for the purpose of preventing or putting to a halt gross and systematic violations of human rights and international humanitarian law” This definition of humanitarian intervention does not include the aid provided in cases of natural disasters, which is generally offered with the consent of the home government and has no military component. Such aid may be better described as humanitarian relief operations.

¹³³ See, for instance A. Ryniker, ‘The ICRC’s position on “humanitarian intervention”’ International Review of the Red Cross Vol. 83 Issue 842 (2001) P.527-532.

¹³⁴ See, B. Parekh, ‘Rethinking Humanitarian Intervention’ International Political Science Review Vol. 18, No. 1, (1997) P.54; D. Scheffer, “Towards a Modern Doctrine of Humanitarian intervention” University of Toledo Law Review Vol. 23, (1992), P.266, understood humanitarian intervention to encompass...non-forcible methods, namely intervention undertaken without military force to alleviate mass human suffering within sovereign borders

¹³⁵ S. Murphy, cited above at note 152, P.8

¹³⁶ E. MacSweeney, the Doctrine of Humanitarian Intervention: A Double Standard? P.2

¹³⁷ W. Michael, Hollow Victory: Humanitarian Intervention and Protection of Minorities, Faculty Scholarship Series Paper 969 (1997). Here, no explicit reference is made in the UN Charter to humanitarian intervention, it is in conflict with the prohibition of the threat or used of force in Art.2(4)

¹³⁸ See, R. Kolb, Note on humanitarian intervention P.2 (www.icrc.org/eng/assets/files/other/irrc_849_kolb.pdf), last visited on April 8, 2012

The proponents of humanitarian intervention justify the doctrine on the basis that there seems to be an inherent tension in the UN Charter between the prohibition of the use of force and protection of states sovereignty on the one hand, and the protection and promotion of human rights on the other hand.¹³⁹ Accordingly, the 1990s debate regarding humanitarian intervention was dominated by the struggle for primacy between the competing principles of sovereignty and human rights, darlings of the “global South” and “global North” respectively.¹⁴⁰ The global North argued that where atrocity crimes result from State failure to protect its citizens, human rights must trump state sovereignty.¹⁴¹ In other words, outside States have the right to intervene in the internal affairs of other States in exceptional circumstances.¹⁴² On the other hand, the global South expressed strong opposition to this “so-called right”,¹⁴³ arguing that State sovereignty is a fundamental principle of the international system. As such, it would automatically trump any question of human rights. Their perceptions were most accurately described by Alex Bellamy: “humanitarian intervention is perceived as a “Trojan horse” used by the powerful to legitimize their interference in the affairs of the weak.”¹⁴⁴ In other words, these post-colonial States viewed “human rights” as a mere excuse for intervention by the most powerful States.¹⁴⁵

¹³⁹ See, the UN Charter Articles 1(3)6, 55 and 567. Article 1(3): “The Purposes of the United Nations are ...to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language, or religion”. Articles 55 and 56: All members pledge to take joint and separate action in cooperation with UN to achieve creation of conditions of stability and well-being necessary for peaceful and friendly relations among nations, by promoting universal respect for, and observance of, human rights and fundamental freedoms for all.

¹⁴⁰ A. Lewis, The Responsibility to Protect: a new response to humanitarian suffering? on July 6, 2010

¹⁴¹ G. Evans, cited above at note 97, P. 33

¹⁴² Ibid

¹⁴³ _____, The So-Called Right of Humanitarian Intervention, Trinity Papers, number 13, 2000, P. 17 (http://www.trinity.unimelb.edu.au/publications/trinity_papers/paper13), last visited on April 9, 2012

¹⁴⁴ A. Bellamy, cited above at note 107, P. 32 “Trojan horse” is a tale from the Trojan War (which was waged against the city of Troy by the Achaeans (Greeks) about the stratagem that allowed the Greeks finally to enter the city of Troy and end the conflict. Metaphorically a "Trojan Horse" has come to mean any trick or stratagem that causes a target to invite a foe or an enemy into a securely protected bastion or space. See, (http://en.wikipedia.org/wiki/Trojan_Horse), last visited on April 9, 2012

¹⁴⁵ A. Roberts, The So-called Right of Humanitarian Intervention, Trinity Papers, Number 13, 2000 P. 127

The tension became especially relevant in the 1990s as a result of, among other things, incidents which were perceived as demonstrating the failure of the United Nations system. In the 1990s, the intra-state conflicts which are considered a grave threat to international security than inter-state conflicts started to emerge after the collapse of the structures of the State and the vacuum left by the geopolitical opposition between two superpowers.¹⁴⁶ For instance, the catastrophe in Somalia in 1993, the genocide in Rwanda in 1994, due to international community passiveness; the world stood by as people were systematically massacred.¹⁴⁷ The powerlessness of UN troops stood by as civilians were slaughtered in the town of Srebrenica in Bosnia in 1995, a so-called UN “safe-haven” there was public outcry at the shameful inaction of the United Nations in the face of such flagrant abuse of human rights.¹⁴⁸ And NATO’s decision to bomb Kosovo in 1999 was the most eloquent instances of the UN lack of will, and questioned its authority.

Therefore, the manifest failure of the international community to respond in a coherent and effective manner to the humanitarian crises that have unfolded, seriously undermined the UN’s authority, and the international community finally acknowledged that there was a need to re-define the parameters of international responses to conflicts.¹⁴⁹ As Thomas G. Weiss stated, the sun of humanitarian intervention has set for now.¹⁵⁰

¹⁴⁶See, J. Garrigues, The Responsibility to Protect: From an Ethical Principle to an Effective Policy P.4

¹⁴⁷ See, Human Rights Watch; “World Report 2000”, New York, 1999; P. XIV and XV

¹⁴⁸ Ibid

¹⁴⁹ See, General Assembly and SC, Report of the Panel on UN Peace Operations, (http://www.un.org/spanish/peace/operations_report/), last visited on April 5, 2012

¹⁵⁰ T. Weiss, the Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era *Security Dialogue*, Vol. 35, No. 2, (2004), P.149

3.2.1. The Responsibility to Protect: Is it a new name for Humanitarian Intervention?

Regarding the responsibility to protect some questioned whether or not it is just a new name for humanitarian intervention. However, humanitarian intervention is about the “right” of States to act coercively against others to stop human rights violations; R2P is about the “responsibility” of States to act to protect their own people, and to assist other States to do so, with coercive action only permissible in the most extreme and exceptional circumstances.¹⁵¹

Thus, the emphasis is completely different. Here, even if R2P evolved from the debate on humanitarian intervention, but as this thesis discussed in chapter two, it is a much broader concept, and approaches the issue of state sovereignty in a very different way. The concept was born from a desire to resolve important contradictions of humanitarian need on the one hand, and State sovereignty and the principle of non-interference on the other.¹⁵² The responsibility to protect differed from the older concept of humanitarian intervention by placing emphasis on the primary responsibility of the State to protect its own population, introducing the novel idea that the international community should assist States in this endeavor, and situating armed intervention within a broader range of measures that the international community might take to respond to massive human rights violations.¹⁵³

Here, R2P only allows the use of force as a last resort when a State is manifestly failing to protect its own population. R2P, unlike humanitarian intervention, only relates to the four international crimes (genocide, war crimes, ethnic cleansing and crimes against humanity), and does not relate to other humanitarian emergencies and disasters. Most importantly, R2P focuses strongly on building State capacity to protect its own

¹⁵¹ See, the ICISS report, cited above at note 2, P. 31, Para 4.10

¹⁵² See, International Humanitarian Law and the Responsibility to Protect, a handbook P.12 (www.redcross.org.au/files/IHL_R2P_responsibility-to-protect.pdf), last visited on April 10, 2012

¹⁵³ A. Bellamy, The Responsibility to Protect—Five Years On P.143

populations from these most heinous crimes; while humanitarian intervention silent on such matters.¹⁵⁴

Gareth Evans, co-chair of the ICISS Report, is very quick to defend against any suggestion that the ‘R2P is just another name for humanitarian intervention’.¹⁵⁵ Evans’ assertion that the R2P is designed to be about more than just coercive military intervention for humanitarian purposes is clearly evidenced by the R2P’s focus on prevention, non-military forms of intervention and post conflict rebuilding, in addition to military intervention.¹⁵⁶ In this regard, there is no doubt that the R2P provides a more holistic and integrated approach to conflict prevention, and the avoidance of human rights abuses and mass atrocities, than previous articulations of humanitarian intervention.¹⁵⁷

The terms of the debate is also shifted from “the right of humanitarian intervention” or the “right to intervene” to “the responsibility to protect” in which the former focused on intervention while the latter focus on protection. Here, there is a difference between intervention and protection:

*‘It is one thing to intervene because the country in question is unstable and unable to provide protection to its citizens. It is quite another thing to enforce stability and provide protection for the citizens of that country, having once intervened’.*¹⁵⁸

Therefore, the new R2P terminology is critical to the radical conceptual transformation of humanitarian intervention for three key reasons: First, there was a need to focus attention on the beneficiaries of the doctrine rather than the rights of the intervening States. Second, there was a need to incorporate the often neglected elements of preventative

¹⁵⁴ Ibid, cited above at note 137

¹⁵⁵ G. Evans, cited above at note 97, P. 56

¹⁵⁶ Ibid

¹⁵⁷ E. Massingham, Military intervention for humanitarian purposes: Does the Responsibility to protect doctrine advance the legality of the use of force for humanitarian ends? P.13

¹⁵⁸ S. Juss, International Migration and Global Justice, Ashgate Publishing Limited, England (2006) P. 112

effort and post-conflict assistance. Third, the use of the word ‘right’ was problematic in that it ‘loads the dice in favor of intervention before the argument has even begun’.¹⁵⁹ Thus, the responsibility to protect is more of a linking concept that bridges the divide between the international community and the sovereign State, whereas the language of humanitarian intervention is inherently more confrontational.¹⁶⁰ In essence, the responsibility to protect has fundamentally transformed the concept of humanitarian intervention for three major reasons: it reconciled the competing principles of “sovereignty” and “human rights”;¹⁶¹ focused on prevention as opposed to intervention; and emphasized the protection of innocent victims rather than the “right of any state” to intervene in another.¹⁶²

3.3. The Core Principles of the UN Charter and the Responsibility to Protect

3.3.1. The principles of State Sovereignty and Non-Intervention, and R2P

The responsibility to protect has stimulated controversy partially because it appears to conflict with core principles of international law enshrined in the 1945 Charter of the UN, namely State sovereignty, non-intervention, and a prohibition of the use of force.¹⁶³ Here, the thesis will examine these principles of international law in light of the responsibility to protect.

The international system rests on the fundamental principle of State sovereignty, as expressed by Article 2(1) of the UN Charter. This principle recognizes that each State is an equal and independent entity, responsible for and in control of its own territory, ‘unfettered by external constraints’.¹⁶⁴ This traditional view of State sovereignty is

¹⁵⁹ See, ICISS Report, cited above at note 1, P. 16, 17

¹⁶⁰ R. Thakur, Iraq And The Responsibility To Protect, Global Dialogue Vol. 7, No.1–2, (2005) P.6

¹⁶¹ T. Weiss, cited above at note 150 P. 138

¹⁶² See, International Humanitarian Law and the Responsibility to protect, a handbook P.12 (www.Redcross.org.au/files/IHL_R2P_responsibility-to-protect.Pdf)

¹⁶³ K. Gibson, The Responsibility to Protect: Is It Time? P.3

¹⁶⁴ G. Evans, cited above at note 97, P. 16, 21. Prior to the establishment of the United Nations and the development of international human rights law, there was no legal framework legitimizing the scrutiny of a sovereign state’s treatment of its own population. Nor did there exist a right in customary international law

reflected in the fundamental principle of non-intervention, enshrined in Articles 2(3) and (4) of the UN Charter, which clearly prohibit the use of force by State actors. In other words, States are forbidden from carrying out military incursions into the territory of other States, unless consent is specifically provided by the host State government. The principle is further reinforced by UN Charter Article 2(7) which states, “*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state*”¹⁶⁵ This article proclaims two fundamental principles of international law, namely sovereignty and non-intervention. The principles of sovereignty and non-intervention have been and remain central in the attempt by the international community to maintain peaceful coexistence among States and banish war and violence from international relations.¹⁶⁶ These fundamental principles have even gained the status of non-derogatory norms of international law.¹⁶⁷

Here, despite the normative character of the principles of sovereignty and non-intervention, it is widely acknowledged that a strict adherence to these principles might lead to inaction in the face of massive violations of human rights.¹⁶⁸ Thus, there has been a shift in the understanding of sovereignty and non-intervention, spurred both by a growing sensitivity to human rights and by a reaction to atrocities perpetrated upon citizens by their own leaders.¹⁶⁹ Sovereignty is increasingly defined, not as a license to

to intervene in another state to protect vulnerable populations. Such intervention would have been seen as a violation of state sovereignty.

¹⁶⁵ See, the United Nations Charter Art. 2(7); See, also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits Judgment, ICJ Reports 1986 Para. 202-209. The court stated that the principle of non-intervention and non-use of force is part and parcel of customary international law.

¹⁶⁶ S. Bernhard and J. Varwick, *The United Nations. An Introduction*, Palgrave Macmillan, London (2005), P. 20, 21

¹⁶⁷ S. Malcolm *International Law*, Cambridge University Press (2006) P.1118. In *Nicaragua v United States* of 1986, the International Court of Justice (ICJ) described Article 2 (4) as a peremptory norm of international law, from which States cannot derogate.

¹⁶⁸ Ibid, For instance, throughout the 1990s the international community failed to prevent human rights violations, such as, catastrophes in Somalia (1993), and the genocides in Rwanda (1994) and Srebrenica (1995) and the unauthorized Kosovo intervention of 1999.

¹⁶⁹ See, Global Centre For The Responsibility to Protect, *The Responsibility to Protect: A Primer* (www.globalr2p.org/pdf/primer.pdf), last visited on April 12, 2012

control those within one's borders, but rather as a set of obligations towards citizens.¹⁷⁰
The ICISS Report sets out an elaborate illustration of this paradigm shift:

Sovereignty implies a dual responsibility: externally – to respect sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN Practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum contents of good international citizenship.¹⁷¹

Hence, the principle of State sovereignty must be interpreted in the context of the changing value systems of the international community. Sovereignty should be viewed as turning point on a State's responsibility to protect its citizens and the failure by a State to do so automatically invites intervention by the community of States in various forms, including forcible military intervention.¹⁷² Thus, sovereign rights should be dependent upon the protection of minimum standards of common humanity.¹⁷³ Accordingly, the modern concept of "sovereignty as responsibility" encompasses both the rights and responsibilities of States and underlies the rights and freedoms of peoples and individuals, and represented a major modification to the traditional view of "sovereignty as control".¹⁷⁴

Here, even though the UN Charter provides a robust conception of sovereignty, the trust theory of government and its concomitant principle of limited State sovereignty are implicit in evolving norms of international human rights law.¹⁷⁵ According to Article 29(2) of the UDHR, governments are entitled to impose only such limitations on rights 'as are determined by law solely for the purpose of securing due recognition and respect

¹⁷⁰ Ibid

¹⁷¹ See, the ICISS Report, cited above at note 1, P.8 Para.1.35

¹⁷² D. Kuwali, The end of humanitarian intervention: Evaluation of the African Union's right of intervention, P.46

¹⁷³ Ibid

¹⁷⁴ See, A. Roberts, cited above at note 145, P. 11

¹⁷⁵ Ibid

for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. This provision implicitly endorses a trust concept of government under which all laws must secure due recognition of the rights of citizens, must be for the benefit of citizens, and must, moreover, be consistent with a democratic society.¹⁷⁶

As Kofi Annan has put it, 'the UN Charter was issued in the name of the people, not the governments of the UN. The Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power'.¹⁷⁷

3.3.2. Prohibition of the Use of Force and R2P

The use of force is undoubtedly among the most debated topics within international law. Indeed, the rules governing the use of force form a central element within international law and, together with the principles of State sovereignty and non-intervention, provide the framework for international order and successful coexistence of States.¹⁷⁸ Article 1 of the Charter sets out the United Nations' purposes, the first of which is:

To maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

¹⁷⁶ H. Stacy, "Humanitarian Intervention and Relational Sovereignty" (2006) Stanford Journal of International Relations, Vol.7, Issue1,(2006), P.60

¹⁷⁷ See, K. Annan, speech at Ditchley Park, United Kingdom, (June 26, 1998), P.3 (<http://www.un.org/News/Press/docs/1998/19980626.sgs6613.html>), last visited on April 11, 2012

¹⁷⁸ S. Malcolm, cited above at note 167, P.777.

Article 2 of the Charter stipulates the key principles in respect of the use of force, which has been described as ‘the corner-stone of the Charter system.’¹⁷⁹ Article 2 (3 and 4) stipulates, that:

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

Certainly the language of Article 2(4) is ambiguous and open to interpretation. A lot of scholars suggested that the words ‘against the territorial integrity or political independence of any State’ may have a qualifying effect on the prohibition.¹⁸⁰ Thus, they have argued in favor of a restrictive reading of Article 2(4) of the Charter, according to which interventions for benevolent, humanitarian reasons are construed as falling outside the scope of Article 2(4) because they are not directed against the territorial integrity or political independence of a state.¹⁸¹

However, this is not supported by the *travaux preparatoires* depicting the drafter’s intention behind the inclusion of this phrase.¹⁸² The debates during the drafting of this provision indicate that the phrase was not intended to be restrictive but, on the contrary, was merely included to give more specific guarantees to small states.¹⁸³ International courts and the majority of international lawyers have until now been unwilling to restrict the scope of Article 2(4) of the Charter or enlarge the possible grounds for justification of

¹⁷⁹ I. Brownlie, Principles of Public International Law, Oxford University Press, 6th ed., (2003), P.699.

¹⁸⁰ See, for instance, J. Stone, Aggression and World Order: A critique of United Nations Theories of Aggression, “The Law book Exchange, Ltd., (1958) P. 95; A. D’Amato, ‘Israel’s Air Strike upon the Iraqi Nuclear Reactor’,” American Journal of International Law Vol.77 (1983) P. 584

¹⁸¹ See, e.g., A. Aust, Handbook of International Law P. 216–24 Cambridge University Press, (2005); see also M. Reisman, Coercion and Self-Determination: Construing Charter Article 2(4), (1984)

¹⁸² D. Hovell, “Chinks in the Armour: International Law, Terrorism and the Use Of Force,” University of New South Wales Law Journal Volume 27(2) 2004 P.400

¹⁸³ See, I. Brownlie, International Law and the Use of Force by States (1963) P. 267

the use of force.¹⁸⁴ For instance, the International Court of Justice (ICJ) supported such interpretation in the *Corfu Channel* case,¹⁸⁵ where the United Kingdom argued that it had a right to intervene and sweep the minefield in the Albanian territorial sea, which is a part of State territory, in order to guarantee the right of innocent passage, and to produce mines as evidence before an international court. The ICJ regarded such an intervention as a “manifestation of a policy of force, which has, in the past, given rise to most serious abuses” and declared that it cannot “find a place in international law” because the “respect for territorial sovereignty is an essential foundation of international relations”.¹⁸⁶ Thus, an incursion into the territory of another State constitutes an infringement of Article 2, paragraph 4, even if the incursion is not intended to deprive that State of part or whole of its territory, and the word “integrity” has to be actually read as “inviolability”.¹⁸⁷

Here, the concept of the responsibility to protect does not delimitate the prohibition of the use of force or the non-intervention principle. The ICISS emphasizes the norm of non-intervention as the obligation to respect every other State’s sovereignty¹⁸⁸ and affirms the core non-intervention principle found in Article 2 of the United Nations Charter.¹⁸⁹ Neither does the World Summit Outcome Document imply any dilution of those prohibitions. However, an implicit case for limiting the scope of the prohibition of the use of force as well as of the non-intervention principle could be made in light of the conceptual construction of sovereignty as encompassing responsibility.¹⁹⁰

¹⁸⁴ A. Randelzhofer, “Article 2(4)” the Charter of the United Nations: A Commentary, Bruno Simma. ed., 2^{ed}, Oxford University Press, (2002), P. 117–24.

¹⁸⁵ See, *Corfu Channel Case*, (United Kingdom V. Albania) ICJ Decision of 9 April 1949, P. 4 (<http://iilj.org/courses/documents/CorfuChannel.UnitedKingdomv.Albania.pdf>), last visited on April 18, 2012

¹⁸⁶ *Ibid*

¹⁸⁷ A. Randelzhofer, cited above at note 184, P. 123.

¹⁸⁸ See, ICISS Report, cited above at note 2, Para 2.8

¹⁸⁹ *Id*, Para 6.2

¹⁹⁰ M. Payandeh, cited above at note 80, P.493

The concept of sovereignty as responsibility implies the conditionality of sovereign rights.¹⁹¹ The sovereign right to non-intervention is deemed to be conditional on the State fulfilling its responsibility to protect the people within its territory. Therefore, when a State fails to fulfill its responsibility, it does not have a right against outside interventions undertaken to secure the rights of the people.¹⁹²

3.3.3. Exceptions to Article 2, Paragraph 4

A. Security Council Authorization

There are two exceptions to the general prohibition in Article 2(4) of the UN Charter. The first is the enforcement measures taken by the Security Council under Chapter VII of the Charter which, in Article 42, grants the UN Security Council the power to authorize the use of force to intervene in a sovereign nation after it has found, under Article 39, that there exists a threat to peace, breach of the peace or act of aggression:¹⁹³

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

Thus, the Security Council must be convinced, that the State against which the force is to be used poses ‘*a threat to peace...*’ and that this cannot be averted in any other way than by the use of force. Here, traditionally, what constituted “a threat to international peace and security” had been narrowly defined as the maintenance of inter-state order,¹⁹⁴ and the Security Council’s right to use force under Article 42 was not seen to include a right

¹⁹¹ David Rodin, The Responsibility To Protect and the Logic of Rights, in From Rights to Responsibilities, Rethinking Interventions For Humanitarian Purposes (Oliver Jutersonke & Keith Krause eds., 2006) P. 55

¹⁹² Ibid

¹⁹³ See, UN Charter, Art. 39, 41 and 42; Here, in order to enable the Security Council to carry out military measures, Article 43 obliges all UN member states to enter into special agreements with the Security Council and to make armed forces available to it. Under Article 27(3) of the Charter, in order for the Security Council to authorize the use of force, it must have the approval of seven of its members, including the concurring votes of all five permanent members (US, France, UK, Russia and China).

¹⁹⁴ P. Simons, Humanitarian Intervention: A Review of Literature 01-2 Ploughshares Working Paper (2001) P.5

to intervene in a State to prevent or stop egregious and widespread violations of human rights.¹⁹⁵ Because the UN Charter was framed and approved in the aftermath of the two World Wars that, the Charter is focused on wars and acts of aggression between States, and it was designed to act against States that intend to engage or actually engage in aggressive acts against other States.¹⁹⁶

However, since the end of the Cold War, the Security Council practice has progressively expanded the definition of “international peace and security” to allow the UNSC to respond to grave humanitarian crises even where such situations have been purely domestic in nature.¹⁹⁷ Because the second half of the twentieth century has shown that threats to international peace and security increasingly originate not from conflicts between States but from conflicts within States.¹⁹⁸ Here, it makes no sense to argue that intervention can only be lawful when a humanitarian crisis becomes a threat to other States.¹⁹⁹ Such a frame work is unnecessary because threats can already be dealt with through Chapter VII of the UN Charter, in the case of international peace and security, or self-defense, when the threat is more specifically targeted.²⁰⁰ In turn, if intervention is truly designed to avert an extreme and urgent humanitarian crisis, that should be justification enough, and there would be no need for a threat argument at all.²⁰¹ Accordingly, the Security Council has labeled not only inter-state conflicts but also intra-

¹⁹⁵ P. Simons, From Intervention to Prevention: The Emerging Duty to Protect, Global Dialogue Vol.7 No.1–2 (2005) P.3

¹⁹⁶ A. Randelzhofer, cited above at note 184, P. 717-720

¹⁹⁷ Ibid, The Security Council imposed sanctions on Iraq not only due to its invasion of Kuwait, but also because of the massive human rights violations directed against the Iraqi civilian population, which the Security Council qualified as a threat to international peace and security due to the subsequent flow of refugees. S.C. Res. 688, No. 3, 9–14, U.N. Doc. S/RES/688 (Apr. 5, 1991); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) In the case of Rwanda, the Security Council highlighted the magnitude of human suffering as a threat to peace and security.

¹⁹⁸ C. Gray, The Use of Force and the International Legal Order in International Law, (Malcolm D. Evans, ed., 2006) Oxford University press, P. 615, 623. Here, The Security Council has authorized military interventions in internal conflicts for numerous reasons: to avert or mitigate a humanitarian crisis, to interfere with massive human rights violations, or to avoid or contain destabilizing effects on neighboring states or a region.

¹⁹⁹ J. Brunne and S. Toope, “The Use of Force: International Law after Iraq,” the International and Comparative Law Quarterly, Vol. 53, No. 4 (2004), P.804

²⁰⁰ Ibid

²⁰¹ Ibid

state conflicts, as “threats to the peace” under Article 39 of the Charter.²⁰² The High Level Panel put the point robustly:

*...step by step the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of an international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a ‘threat to international peace and security’, not especially difficult when breaches of international law are involved.*²⁰³

The responsibility to protect, as it was accepted and endorsed in 2005 UN World Summit by international community, supports the competence of the Security Council to intervene when massive human rights violations occur.²⁰⁴ It also provided that there are just causes that justify the use of force beyond the two exceptions of the UN Charter, offer pathways for intervention not authorized by the Security Council, and amend the way the Security Council does business.²⁰⁵

B. Individual or Collective Self-Defense

The second exception to the prohibition of the use of force is stipulated in Article 51 of the UN Charter, which protects the inherent right of States to resort to the use of force individual self-defense or for the purposes of collective self-defense. Accordingly, every State must have the right to defend itself when being attacked. A State does not require a Security Council resolution in order to defend itself by force but even the right to self-defense is subject to action by the Security Council, as is clear from the terms of Article 51.²⁰⁶

²⁰² Ibid, C. Gray, cited above at note 198

²⁰³ See, the High-Level Panel Report, cited above at note 22, P. 202

²⁰⁴ See, M. Payandeh, cited above at note 80, P. 495–96.

²⁰⁵ See, M. Saxer, The politics of responsibility to protect, P. 6 (www. Library.fes.de/pdf-files/iez/global/05313-20080414.pdf), last visited on April 17, 2012

²⁰⁶ See, UN Charter Art. 51; it also requires States to report immediately any use of force under this provision to the Security Council and allows for the Security Council ‘to take at any time such action as it deems necessary in order to maintain or restore international peace’.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

Here, in order to ensure that the Security Council can take the measures necessary, the members of the United Nations should immediately inform the Security Council of the measures taken in the exercise of the right of self-defense. Therefore, under the UN Charter, States can only use force against other States if either authorized by the Security Council; or in self-defense against an armed attack until the Security Council has dealt with the issue. Thus, unilateral military intervention without a Security Council mandate is prima facie illegal, unless the targeted State has committed an armed attack that would justify the intervention under Article 51.

CHAPTER FOUR

THE INTERNATIONAL COMMUNITY AND THE UN SECURITY COUNCIL'S RESPONSE TO THE LIBYAN CRISIS

4.1. Background to the Crisis in Libya

Mohamed Bouazizi, a street vendor, lit himself on fire to protest the seizing of his produce laden wheelbarrow and the physical mistreatment he received at the hands of public officials.²⁰⁷ Bouazizi's death caused protests in his hometown (Tunisia), which rapidly spread to surrounding areas and, eventually, the capital city of Tunis.²⁰⁸ The Tunisian government responded with force by arresting demonstrators, having its security forces faceoff with protestors, and cutting the nation's internet access.²⁰⁹ A mere twenty-eight days following Bouazizi's self-immolation the Tunisian government fell and President Zine al-Abidine Ben Ali fled to Saudi Arabia in exile.

The spirit of the uprising in Tunisia rapidly spread to other nations in the Arab world, being fueled by widespread discontent about unemployment, increasing costs of living, corruption, and autocratic leaders.²¹⁰ Egypt fell in only eighteen days, with Hosni Mubarak being forced to step down and leave the country.²¹¹

Consequently, following the anti-establishment movements in neighboring Egypt and Tunisia, Libya itself soon became the next nation in the Arab world to feel the effects of populist uprisings.²¹² On February 15, riots broke out in the city of Benghazi following

²⁰⁷ N. Noor, Tunisia: The Revolution that Started it All, *International Affairs Review* (Jan. 31, 2011), (<http://www.iar-gwu.org/node/257>) last visited on April 19, 2012

²⁰⁸ *Ibid*

²⁰⁹ *Ibid*

²¹⁰ *Libya Protests: Second City Benghazi Hit by Violence*, BBC News (Feb. 16, 2011), (<http://www.bbc.co.uk/news/world-africa-12477275>) last visited on April 20, 2012. Similar to his feelings regarding Tunisia, Gaddafi was not silent on the events ongoing in Egypt, stating, "Hosni Mubarak should be honored - it would have even been better if he had remained president of Egypt."

²¹¹ *Libya Crisis: Rebellion or Civil War?* BBC News (Mar. 10, 2011), (<http://www.bbc.co.uk/news/world-africa-12690713>) last visited on April 20, 2012

²¹² *See Libya Crisis: Rebellion or Civil War?*, BBC News (Mar. 10, 2011), (<http://www.bbc.co.uk/news/world-africa-12690713>) last visited on April 20, 2012

the arrest of a human rights activist, which then turned into a conflict against the government with the protestors ultimately calling for Gaddafi's resignation.²¹³ The crisis that started out with peaceful demonstrations quickly turned into an internal conflict after street protests were violently suppressed by the Government, especially in the eastern parts of the country.²¹⁴ The protests that began notably in the country's second city, Benghazi, (which became the opposition's stronghold and was soon subject to shocking brutality as Muammar Gaddafi dispatched the national army to crush the unrest),²¹⁵ spread within weeks across the country.²¹⁶ The Human Rights Watch reporting that 'on the evening of February 15, authorities used tear gas and batons, as well as attackers in street clothes, to disperse protesters in Benghazi, injuring 14 people' and possibly killing one.²¹⁷ Violence quickly escalated, with reports of the deaths of 24 protesters on 17 February, and of security forces attacking peaceful protesters with teargas and live ammunition.²¹⁸ As of March 2, 2011, the exact death toll was unknown, with U.N. Secretary General Ban Ki-moon citing reports that around 1,000 people had died in the conflicts in Libya since February 15, 2011, and one Libyan human rights organization claiming that possibly 6,000 people had been killed.²¹⁹

²¹³ *Libya: Timeline of Key Events Since February 2011*, UN Integrated Regional Information Networks: Humanitarian News and Analysis (Apr. 8, 2011), <http://www.irinnews.org/report.aspx?reportid=92410> last visited on April 20, 2012

²¹⁴ See, Report of the Assessment Mission on the Impact of the Libyan Crisis on the Sahel Region, UN S/2012/42 7 to 23 December 2011, P.2 The revolt in Libya was part of series of public demonstrations and protests that call for democracy and regime change that resonated across the Arab world starting with mass protests in Tunisia and Egypt that toppled the leaders of both countries (President Ben Ali and Hosni Mubarak respectively), and reaching as far as Syria, Yemen and Bahrain as well (also called the 'Arab Spring')

²¹⁵ 'Libya Protests: Second City Benghazi Hit by Violence' BBC News, London (16 February 2011) (<http://www.bbc.co.uk/news/world-africa-124772754>) last visited on June 5, 2012

²¹⁶ 'Battle for Libya: Key moments' Aljazeera English, Doha (19 November 2011) (http://english.aljazeera.net/indepth/spotlight/libya/2011/10/201110201042447067_60.html4) last visited on June 5, 2012

²¹⁷ 'Libya: Arrests, Assaults in Advance of Planned Protests' Human Rights Watch, New York (17 February 2011) (<http://hrw.org/news/2011/02/16/libya-arrests-assaultsadvance-planned-protests4>) last visited on June 5, 2012

²¹⁸ 'Libya: Security Forces fire on "Day of Anger" Demonstrations' Human Rights Watch, New York (18 February 2011) (<http://www.hrw.org/news/2011/02/17/libyasecurity-forces-fire-day-anger-demonstrations4>) last visited on June 6, 2012

²¹⁹ *Qaddafi Vows to Fight to 'Last Man and Woman' as Loyal Forces Battle Rebels*, FOXNEWS.COM (Mar. 2, 2011), <http://www.foxnews.com/world/2011/03/02/diplomats-nato-eu-mulling-libyan-fly-zone/>

The Libyan leader expressed clear intent to continue committing massive human rights violations by announcing to Benghazi residents that his forces would show “no mercy” to rebels.²²⁰ Gaddafi once more issued threats to protesters which Kinsman describes as “chillingly similar to radio broadcasts before the massacre in Rwanda, saying “we will march to cleanse Libya, inch by inch, house by house, home by home, alley by alley, person by person, until the country is cleansed of dirt and scum”.²²¹ Gaddafi’s cruel objective was clear in his potent speech, when he used language reminiscent of the genocide in Rwanda and stated that he would rather die a martyr than step down.²²² He announced the intention to “fight to the last drop of blood.”²²³ The infamous words of Gaddafi’s son, Saif al-Islam Gaddafi, on 21 February 2011 have proved the situation:

*Libya is at a crossroads. If we do not agree today on reforms ... rivers of blood will run through Libya...We will take up arms...we will fight to the last bullet. We will destroy seditious elements. If everybody is armed, it is civil war, we will kill each other...Libya is not Egypt, it is not Tunisia.*²²⁴

Meanwhile, the rebels set up a local governing council for Benghazi and also announced the establishment of an interim opposition Government called the Transitional National Council (NTC) on February 26, 2011 under the leadership of former Justice Minister Mustafa Abdul Jalil, the first government official to break

²²⁰ D. Stanglin, Gaddafi Vows to Attack Benghazi and Show ‘No Mercy’, USA Today (Mar. 17, 2011), (<http://tinyurl.com/6atpca3>) last visited on June 6, 2012

²²¹ J. Kinsman, "Libya: A Case for Humanitarian Intervention", 2011Policy, Vol. 81; See, 236 BBC News as it happened 22-02-11 (<http://news.bbc.co.uk/2/hi/africa/9405325.stm>) last visited on June 7, 2012

²²² See, International Coalition for the Responsibility to Protect. 2011. Crisis in Libya. (<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya>) Civil society, regional and international actors saw the warning signs of mass atrocities. Rather than stand by and risk failing to act while more civilians had been subject to mass violence, these actors urgently took action to prevent these heinous crimes.

²²³ See, “Gaddafi's vow: Will fight to last drop of blood”, MSN News, 23 February 2011, (<http://news.in.msn.com/international/article.aspx?cp-documentid=4952792>) The National Transitional Council, Mustafa Abdul-Jalil, the head of NTC, called upon the international community to impose a no-fly zone. He warned that if Gaddafi recaptured the city (Benghazi), it would result in the death of half a million people.

²²⁴ See (<http://www.news24.com/Africa/News/Gaddafi-son-Libyafaces-rivers-of-blood-20110221>) last visited on June 8, 2012

ties with Gaddafi.²²⁵ The NTC released a statement on March 5, 2011 following its first meeting in the temporary headquarters established in Benghazi, in which it declared itself the sole national representative of Libya.²²⁶ The statement also called on the international community to “*fulfill its obligations to protect the Libyan people from any further genocide and crimes against humanity without any direct military intervention on the Libyan soil.*” With this, Gaddafi intensified his crackdown aided by loyal troops, special-forces under the command of his son Khamis as well as mercenaries from neighboring states.²²⁷

Following 15 February 2011 political protests demanding an end to Libyan leader Muammar Gaddafi’s 42-years reign, wherein Libyan civilians found themselves the target of mass atrocities at the hands of government armed forces; the international community, regional and sub-regional bodies acted to protect the populations through a range of diplomatic, economic, political and latter military measures.²²⁸

Initially, the international community, including the United Nations, the African Union, the European Union and the League of Arab States launched several diplomatic initiatives in a bid to bring the crisis to a quick end. Those efforts were unsuccessful in preventing an escalation of the crisis, bringing Libya to the verge of a major humanitarian catastrophe, especially in the eastern parts of the country.²²⁹ Here, the following section

²²⁵ See, Interim Transitional National Council. 2011. Libyan Rebels appeal to UN for protection, formal recognition. (<http://www.ongo.com/v/532638/-/1/0A29AE6DBA9E8194/libyan-rebels-appeal-to-un-for-protection-formal-recognition>) last visited on June 8, 2012. Since the beginning of the revolt, members of the government and both military leaders and units defected to join the opposition.

²²⁶ Ibid

²²⁷ A. Hauslohner, “Among the Mercenaries: “Portrait of a Gaddafi Soldier””, Time, March 1, 2011, (<http://www.time.com/time/world/article/0,8599,2056006,00.html>) last visited on June 9, 2012. The issue of mercenaries has lingered long and there were also reports about atrocities committed by the rebels against African migrant workers and black Libyans accusing them to be part of the mercenary forces loyal to Gaddafi.

²²⁸ The Libyan crisis drew the attention of the international community to grievous violations of human rights when the Qaddafi government deployed its military to massacre unarmed civilian protestors, mobilizing fighter jets, African mercenaries, and snipers, and it was been labeled a clear case for when timely and decisive response to uphold R2P in the face of an imminent threat of mass atrocities should occur.

²²⁹ See, the Report, cited above at note 214

briefly will discuss the international community, regional and sub-regional bodies' responses to the Libya crisis at early stage.

4.2. The Initial Responses of the International Community to the Crisis in Libya

The international response to the Libyan crisis has been swift, with action being taken in a shorter period of time than ever before in a mass atrocity situation.²³⁰ UN-Secretary-General Ban Ki-moon stated on 22 February that he was shocked and disturbed by accounts that Libyan authorities fired on demonstrators and declared that the attacks which constitute serious violations of international humanitarian law must stop immediately.²³¹ UN experts as well as regional and sub-regional organizations echoed the Secretary-General's statement and condemned Gaddafi's massacre of his own people, demanding investigations into attacks and stated that gross violations of human rights could amount to crimes against humanity.

There were a variety of responses in the international community to the events in Libya.²³² As the conflicts between Gaddafi's security forces and the civilian, anti-government forces escalated, concerned parties within Libya and throughout the international community debated about the international community's role in this conflict.²³³ The international community²³⁴ initial reacted to the Libyan crisis at different

²³⁰ E. Nibishaka The Libyan Revolt and (South) African Response, (www.rosalux.co.za/wp-content/files_mf/libyanrevolt5_2011.pdf) last visited on June 9, 2012. In contrast to other crises that alleged gross violations of human rights which could amount to crimes against humanity such as Syria, Yemen and Bahrain as well, the international community, particularly the UNSC produced a decisive response in a relatively short period of time.

²³¹ See, Press Release, Secretary-General, Outraged Secretary-General Calls for Immediate End to Violence in Libya, U.N. Press Release SG/SM/13408, AFR/2119 (Feb. 22, 2011). (www.unric.org/en/unric-library/26483) Last visited on June 9, 2012

²³² See Ian Black & Patrick Wintour, *Libya: International Response Gathers Pace after Gaddafi Counterattacks*, The Guardian.com (Feb. 24, 2011), <http://www.guardian.co.uk/world/2011/feb/24/Libya-international-response-gathers-pace> (noting France considered implementing no-fly zones and Switzerland freezing Gaddafi's assets).

²³³ See Qaddafi Vows to Fight to 'Last Man and Woman' as Loyal Forces Battle Rebels, FOXNEWS.COM (Mar. 2, 2011), <http://www.foxnews.com/world/2011/03/02/diplomats-nato-eu-mulling-libyan-fly-zone/> (describing the internal debates of the Libyan rebels and the international community's create plans to enforce a no-fly zone).

institutional levels and with a great variety of measures. Primarily, the international community used diplomatic, economic as well as political means and then adopted coercive measures.

4.2.1. The Peace and Security Council of the African Union

While establishing the AU, African leaders recognized the scourge of conflicts in Africa as constituting a major impediment to the socio-economic development of the continent.²³⁵ Whilst the AU is guided by the objective of “*promoting peace, security and stability on the continent*”²³⁶, it is also based on the principle of “*respect for sanctity of human life....*”²³⁷ Concerning the legal framework, for example, the Constitutive Act of AU stated that;

*“The Union had a right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity.”*²³⁸

Thus, the member States of the African Union were enjoined to respect democratic principles, human rights, the rule of law and good governance. These principles were a marked departure from Charter of the OAU.²³⁹ Unlike its predecessor organization, which exalted traditional sovereignty norms, the AU Constitutive Act mandates the organization to deal with human rights issues in member states which are no longer regarded as matters essentially within the domestic jurisdiction of states. However, even

²³⁴ Here, the working definition of the international community refers to the community of the UN Members, which can express themselves and act through the UN itself and also through regional and sub-regional organizations.

²³⁵ See, Constitutive Act of the African Union (2000), Preamble Para. 9

²³⁶ Ibid, Article 3(F).

²³⁷ Ibid, Article 4(O).

²³⁸ Ibid, Article 4(h). Also, member states were given a right to request intervention from the Union in order to restore peace and security.

²³⁹ Ibid, Article 4(m). The AU leaders recognized the failures of the OAU in the area of conflict resolution. Due to the doctrine of non-intervention, the OAU became a silent observer to the atrocities committed by its member states. A culture of impunity and indifference was cultivated and became entrenched in the international relations of the African countries.

if the African Union (AU) has a right to intervene in circumstances like the Libyan crisis pursuant to Article 4(h) of the AU Constitutive Act, such right was not invoked.

Here, although the African Union kept an inaction note in the initial phases of the crisis in Libya, for the first time, at its 261th sitting held on 23rd February 2011, AU Peace and Security Council (PSC) discussed the crisis in Libya. The PSC strongly condemned the *“indiscriminate and excessive use of force and lethal weapons against peaceful protesters, in violation of human rights and international Humanitarian Law.”*²⁴⁰ The PSC in its communiqué took a decision to *“urgently dispatch a mission of Council to Libya to assess the situation in the ground.”*²⁴¹ However, there was no mission which was dispatched urgently.²⁴² The failure of the PSC to act without delay in the crisis set the basis upon which it came to be marginalized by the UNSC.²⁴³

On 10th March 2011 the AU Peace and Security Council (PSC) met at the Heads of State and Government level and issued a communiqué which roundly condemned the indiscriminate use of force by authorities in Libya. However, the PSC rejected ‘any foreign military intervention, whatever its form’, and suggested political solution for the duration of the conflict.²⁴⁴

²⁴⁰ See, African Union, Communiqué of the 261st Meeting of the Peace and Security Council, Dec. PSC/PR/COMM (CCLXI), (Feb. 23, 2011). Para.2 Here, besides to PSC, African Commission on Human and Peoples’ Rights also condemned the violence and use of force against civilians and the suppression of peaceful demonstrators, and called on the government of Libya to immediately end the violence and to ensure the respect for human rights in Libya. AU Commission chairperson, Jean Ping, condemned the ‘disproportionate use of force against civilians’ and appealed for an immediate end to the violence.

²⁴¹ Ibid, Para 6

²⁴² K. Apuuli, The Principle of ‘African solutions to African Problems’ under the spotlight: The African Union (AU) and the Libya Crisis, P.2

²⁴³ Because on 26th February 2011, acting under Chapter VII, the UNSC passed Resolution 1970 which effectively precluded the AU from being the lead organization to deal with the Libya situation. Thus, the failure of the PSC to immediately establish the fact finding mission paved the way for the UNSC to pull the rug from the feet of the AU in the Libya crisis

²⁴⁴ See, African Union, Communiqué of the 265th Meeting of the Peace and Security Council, PSC/PR/COMM.2 (CCLXV), (10 March 2011). Here, the PSC took two important decisions which also came to be overtaken by the UN SC action. First, it established a roadmap through which the Libya crisis could be resolved, including calling for: urgent African action for the cessation of all hostilities; cooperation with the competent Libyan authorities to facilitate the timely delivery of humanitarian assistance to the needy populations; protection of foreign nationals, including African migrants living in Libya; and adoption and implementation of political reforms necessary for the elimination of the causes of the current crisis. However, the Roadmap was soon rejected by NTC as it did not call for Gaddafi’s

Here, despite the fact that, diplomatic channel was obviously inappropriate due to the continuing violations by the Libyan authorities, the AU failed to use military intervention even if the AU's Constitutive Act Article 4(h) enunciated one of the most interventionist regimes in the world in cases of human rights abuses and regional instability.²⁴⁵ Thus, as far as the African Union PSC concerned, the decision to adhere a political solution to the Libyan crisis was failed. They tried to get the Libyan Government and the members of the National Transitional Council on the same table, but never on the same wavelength.²⁴⁶

4.2.2. The Council of the League of Arab States

On March 12, 2011, the Council of the League of Arab States met to discuss the situation in Libya, and it decided to suspend Libya's membership and endorsed on a consensus basis a request to the U.N. Security Council:

*...to take measures to impose a no-fly zone over the movement of Libyan military planes immediately, and to establish safe areas in the places exposed to shelling as preventive measures allowing to provide protection for the Libyan people and the residents in Libya from different nationalities, taking into account the regional sovereignty and integrity of neighboring countries.*²⁴⁷

The Arab League statement was welcomed by international observers who view regional support as a prerequisite for any direct intervention, including any multilateral military operation to impose a no-fly zone. For instance, when the UNSC Resolution 1973 passed,

resignation and it failed to take into account the human rights violations already perpetrated by Gaddafi forces. Secondly, the PSC established an AU High Level *ad hoc* Committee on Libya comprising five heads of state and government, together with the chairperson of the Commission (namely; Congo-Brazzaville, Mali, Mauritania, South Africa and Uganda. Para.7 and 8

²⁴⁵ See, Mail and Guardian , [Africa must support Libya intervention](http://mg.co.za/article/2011-04-01-africa-must-support-libya-intervention) (<http://mg.co.za/article/2011-04-01-africa-must-support-libya-intervention>) last visited on June 10, 2012

²⁴⁶ _____, [The African Union's Responsibility to Protect in The Libyan Crisis 2011](#), P.13 Submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa)

²⁴⁷ See, Resolution 7360, "Arab League Urges U.N. to Impose No-Fly Zone over Libya," March 12, 2011. The Gulf Cooperation Council also called on the Security Council to impose a no-fly zone over Libya on 7 March 2011. On February 22, 2011, the General Secretariat of the Organization of the Islamic Conference also strongly condemned the excessive use of force against civilians in Libya and called the ongoing coercion and oppression a humanitarian catastrophe.

it recognizes “the important role of the League of Arab States in matters relating to the maintenance of international peace and security in the region,” and requests that the member States of the Arab League “cooperate with other Member States in the implementation of” measures taken pursuant to the resolution to protect Libyan civilians.

4.2.3. The Council of the European Union (EU)

On 20 February 2011, the High Representative of the EU for Foreign Affairs and Security Policy Catherine Ashton first reacted to the unfolding events in Libya on 20 February 2011.²⁴⁸ She issued a declaration on behalf of the EU stating that the EU “condemns the repression against peaceful demonstrators and deplors the violence and death of civilians.” The EU moreover urged the Libyan “authorities...to immediately refrain from further use of violence...”²⁴⁹ The EU thereby acknowledged that the Libyan regime under Gaddafi demonstrated a threat to the security of the people in Libya. Shortly after that, it also assumed its responsibility to act, but not without a request by the Libyan people.²⁵⁰ On 23 February 2011, President of the European Council, Herman Van Rompuy stated that the EU “should not be patronizing, but should also not shy away from using its political and moral responsibility.”²⁵¹ “While the decision on the future of Libya should be made by its citizens, the EU’s ...responsibility is to help.”²⁵²

At the extraordinary European Council meeting on 11 March 2011, the Heads of State declared that Gaddafi had lost all legitimacy as an interlocutor and urged him to step down.²⁵³ They welcomed and encouraged the TNC in Benghazi, which, while not

²⁴⁸ See, Declaration by the High Representative, Catherine Ashton, on behalf of the European Union on events in Libya, Brussels, 20 February 2011 (www.consilium.europa.eu/uedocs/cms_data/docs/.../119397.pdf) last visited on June 10, 2012

²⁴⁹ Ibid

²⁵⁰ M. Gottwald, Humanizing Security? The EU’s Responsibility to Protect in the Libyan Crisis P.17

²⁵¹ See, Statement by Herman Van Rompuy, President of the European Council, on the developments in the EU’s Southern neighborhood, Brussels, 23 February 2011 (www.european-council.europa.eu/...president/press-releases (new) last visited on June 10, 2012

²⁵² Ibid

²⁵³ See, Council of the European Union, Declaration of the Extraordinary European Council, 11 March 2011 (EUCO 7/1/11 REV 1), Brussels, 20 April 2011, (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119780.pdf) .last visited on June

recognized as the sole representative of Libya, was henceforth considered “a political interlocutor”.²⁵⁴ Ostensibly referring to the R2P principles, Van Rompuy at the press conference following the extraordinary EU session stated the following:

*“In order to protect the civilian population, Member States will examine all necessary options, provided that there is a demonstrable need, a clear legal basis and support from the region. We will work with the United Nations, the Arab League, the African Union and our international partners to respond to the crisis.”*²⁵⁵

On 22 May 2011, Catherine Ashton opened a liaison office in Benghazi in order to support “the nascent democratic Libya in border management, security reform, the economy, health, education, and in building civil society.”²⁵⁶ Thus, the EU has been praised for its quick and substantial delivery of humanitarian aid and for its far-reaching sanctions regime.²⁵⁷

4.2.4. UN Security Council Resolution 1970

As the study discussed in chapter three, the UN Charter prohibits the use of force, other than under Article 42. For the use of force to be legitimately authorized, the Security Council must determine that other means, which would not involve the use of force, have been exhausted with no success of stemming the disturbance to international peace and security. Furthermore, there is a long-standing tradition in the international community against armed intervention in the internal affairs of a state.²⁵⁸

10. EU had imposed sanctions, an arms embargo and a travel ban on Gaddafi and members of his family, and frozen the assets held by Libya’s sovereign wealth fund and central bank.

²⁵⁴ Ibid

²⁵⁵ See, Van Rompuy cited above at note 251

²⁵⁶ Toby Vogel, “EU opens office in Benghazi”, in European Voice, 23 May 2011, (<http://www.europeanvoice.com/article/2011/may/eu-opens-office-in-benghazi/71147.aspx>.) last visited on June 11, 2012

²⁵⁷ N. Koenig, *The EU and the Libyan Crisis: In Quest of Coherence?* P.13

²⁵⁸ U.N. Charter Art. 2

The situation in Libya was one that put the international community in a precarious position of having to balance the need to protect civilian lives from Gaddafi's forces while adhering to the UN Charter and respecting a nation's sovereignty.²⁵⁹ The responsibility to protect civilians is a state's responsibilities as a sovereign nation.²⁶⁰ However, the state charged with protecting the civilian population is often the party putting the civilian lives at risk.²⁶¹ When this occurs, it becomes increasingly recognized that the international community must intervene.²⁶²

Thus, with Libya's conflict, the Security Council acted, at least initially, on pleas to prevent crimes against humanity by Libya's diplomatic mission to the UN, which had broken ties with the Gaddafi Government and claimed to be the representative of the true sovereign, the people.²⁶³ Treating the diplomatic mission's request as an explicit request of the Libyan people, on February 26, 2011, the United Nations Security Council called an emergency session that ultimately adopted Resolution 1970 (2011).²⁶⁴ The United States Mission to the United Nations stated, "The UN Security Council has adopted a comprehensive resolution to respond to the outrageous violence perpetrated by Muammar Gaddafi on the Libyan people. This resolution imposes immediate measures to stop the violence, ensure accountability and facilitate humanitarian aid."²⁶⁵ Thus, Resolution 1970 adopted certain multilateral non-forceful measures,²⁶⁶ which imposed an arms embargo, asset freezes and travel bans on Muammar Gaddafi, members of his family, and several Government officials. It also made reference to Libya's "responsibility to

²⁵⁹ *Libya the UN And the AU Should Take Charge*, AFRICA News (June 22, 2011), <http://www.foroyaa.gm/modules/news/article.php?storyid=7155> last visited on June 11, 2012

²⁶⁰ _____, *Protection of Civilians in Armed Conflict: Humanitarian Challenges in West Africa* (May 19-21, 2003), <http://www.iss.co.za/pubs/CReports/Ghana03/Report.html>. last visited on June 11, 2012

²⁶¹ Id

²⁶² Id

²⁶³ U.N. Mission Urges Gaddafi's Downfall, Reuters, 21 February 2011. (www.reuters.com/.../2011/.../us-libya-un-mission) last visited on June 10, 2012

²⁶⁴ See, UN Security Council, Resolution 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011). Resolution 1970 affirmed Libya's 'responsibility to protect' and marked the first time the Council had referred to the R2P framework since a 2006 Resolution on the situation in Darfur.

²⁶⁵ *Fact Sheet: UN Security Council Resolution 1970, Libya Sanctions*, United States Mission to the United Nations (Feb. 26, 2011), <http://www.usun.state.gov/briefing/statements/2011/157194.htm> last visited on June 10, 2012

²⁶⁶ Ibid

protect”²⁶⁷ and referred the situation to the International Criminal Court for investigation into reports of crimes against humanity.²⁶⁸ One of the most notable provisions of Resolution 1970 was the prohibition of arms being sent to Libya.

In the preamble paragraphs of the Resolution, the Security Council referred to the statements and condemnations made by other organs of the United Nations as well as by regional organizations.²⁶⁹ Elaborating on the alleged human rights violations, the Security Council expressed its concern at the situation in Libya and condemned the violence and the use of force before it deplored more specifically the gross and systematic violation of human rights and “the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government.”²⁷⁰

4.2.5. Other UN Bodies and Structures

Many UN bodies quickly became seized of the crisis and condemned the violent attacks against civilians by Gaddafi’s forces. On 22 February 2011, the Special Advisers on the Prevention of Genocide and the Responsibility to Protect issued a press release on the situation in Libya in which they reminded the Libyan government of its responsibility to protect its population and called for an immediate end to the violence. Three days later, the UN Human Rights Council (HRC) met on 25 February 2011, and opened a Special Session on “the situation of human rights in the Libyan Arab Jamahiriya.”²⁷¹ The HRC adopted Resolution S-15/2 which called for the following: the Libyan government to cease all human rights violations; an international commission of inquiry to be dispatched to Libya; recommendation to the General Assembly for the suspension of Libya from the Council.

²⁶⁷ See, Recalling the Libyan authorities’ responsibility to protect its population (Second page of preamble, UNSC Resolution 1970 (2011))

²⁶⁸ Ibid, Preamble Para 6, Notably, Resolution 1970 made explicit reference to Article 16 of the Rome Statute, which allows the Security Council to defer an investigation by the ICC in order to maintain international peace and security. On 2 March 2011, the Prosecutor of the ICC, Luis Moreno Ocampo decided to launch an investigation following a preliminary examination of available information.

²⁶⁹ Ibid, Preamble Para 3,5

²⁷⁰ Ibid, Preamble Para 2

²⁷¹ See, (www.ohchr.org/english/.../HR_council/.../15session/HRC-S-15-1_AU)

In response, the UN General Assembly unanimously suspended Libya's membership to the Council on 1 March 2011.²⁷² Later, on 1 June 2011, the report submitted to the HRC by the International Commission of Inquiry stated that Libyan government and opposition forces committed crimes against humanity and war crimes since the start of the crisis.²⁷³ Speaking before the General Assembly, Ban Ki-moon declared "the world has spoken with one voice: we demand an immediate end to the violence against civilians and full respect for their fundamental human rights, including those of peaceful assembly and free speech."²⁷⁴ He continued to warn that "there is no impunity...that those who commit crimes against humanity will be punished" and informed the General Assembly that "time is of the essence; thousands of lives are at risk."²⁷⁵

Therefore, in the Libyan crisis, a range of measures, including diplomatic, economic, humanitarian, were in fact adopted at least in the early days through the above international, regional and sub-regional bodies with unprecedented speed and decisiveness. These measures send a strong message that those responsible for human rights abuses can be held accountable, and rebutted those who argued that the resort to the use of force demonstrates that R2P is only about military intervention. However, despite this unanimous message from the international community, the attitude of the Gaddafi Government showed no fundamental change, instead express clear intent to attack the population in Benghazi and halt the mass violence on protesters. This was the point in the crisis that saw the UNSC yielding to calls from the Libyan people, the Arab

²⁷² See, (www.un.org/News/Press/docs//2011/ga11050.doc.htm)

²⁷³ According to the Report of the International Commission of Inquiry on Libya, (UN Human Rights Council, A/HRC/19/68), P.7 Gaddafi forces engaged in excessive use of force against demonstrators in the early days of the protests, leading to significant deaths and injuries. The nature of the injuries indicates an intention to kill; the level of violence suggests a central policy of violent repression. These actions breach international human rights law as an arbitrary deprivation of life.

²⁷⁴ B. Ki-moon, 2011. Libya and Middle East unrest, (<http://www.guardian.co.uk/world/blog/2011/mar/16/arab-and-middle-east-protests-libya>) last visited on June 10, 2012

²⁷⁵ Ibid

League, and a cross section of the international community to vote for Resolution 1973. Non-forceful measures yielded to measures involving the use of force.²⁷⁶

4.3. R2P in Action: The UNSC Resolution 1973 on Libya

4.3.1. Responsibility to Protect in Security Council Resolution 1973

The United Nations Security Council in a bid to protect the civilians and on grounds of humanitarian intervention, justified the concept of responsibility to protect,²⁷⁷ which had been discussed heavily since the 2000s at the UN and elsewhere (this study extensively discussed under chapter one), directly applied to the Libyan crisis. Here, it was not the first time that the Security Council approved enforcement measures with reference to the responsibility to protect;²⁷⁸ however, it is the first time that the UNSC authorized the use of force for the purpose of human protection against the will of the acting government of a functioning state and applied the R2P concept for intervention in a state for the protection of civilians using Article 41 (peaceful measures), and Article 42 (use of force) of the UN Charter.

Hence, while taking the decision to intervene in Libya using its Chapter VII powers, the UNSC equally found in accordance with the R2P principle, namely that the Libyan government had failed to protect its citizens by itself committing gross violations of

²⁷⁶ G. Ajebe, Just War Theory Revisited: The Case for a New Legal Regime for Humanitarian Forceful Intervention P.64 Here, the international condemnation of the crisis in Libya by statesmen, leaders of international governmental and non-governmental organizations, regional organizations and the UN, was testimony of the growing shared social and normative understanding of R2P.

²⁷⁷ The endorsement of Resolution 1973 was a landmark moment in the development of the Responsibility to Protect. The debate among Member States around the situation in Libya was not about whether to act to protect civilians for mass atrocities but how best protect the Libyan population. This indication of Member States prioritizing the protection of civilians for mass crimes reflects a historic embrace of the R2P principles agreed to in 2005 World Summit. The U.S. ambassador to the UN, Susan Rice, stated on Libya ‘I can’t remember a time in recent memory when the Council has acted so swiftly, so decisively, and in unanimity on an urgent matter of international human rights’

²⁷⁸ UN Security Council Resolution (UNSCR) 1706 (31 August 2006) mentioned R2P when authorizing the use of force in Darfur. Other comparable cases include Res. 794 (1992), authorizing the United Task Force to enter Somalia and Res. 929 (1994), authorizing French troops to protect civilians during the ongoing genocide in Ruanda. However, while Res. 794 was taken in the absence of a central Somali government, Res. 929 was supported by the interim government

human rights.²⁷⁹ Thus, the primary responsibility to protect the Libyan people was on the government and its failure to do so establishes international responsibility. This phrasing and the actual move towards adopting a new approach to intervention for humanitarian reasons has led to the argument that the action in Libya was based on R2P.²⁸⁰

The UNSC on 17 March 2011, acting under the Chapter VII of the Charter, passed Resolution 1973 with ten in favor, none against, and five abstained.²⁸¹ Among them China and Russia were the two permanent members, who could have cast their veto to prevent the intervention and decided not to use force. Their decision can be viewed as an acknowledgment of the call of the ICISS and the Secretary-General Ban Ki-moon not to use the veto power when no vital national interest at stake. The Resolution formed the legal basis for military intervention in the Libyan conflict, demanding an immediate ceasefire and authorizing the international community among other things, to establish a no-fly zone and to take all necessary measures, short of foreign occupation to protect civilians and civilian-populated areas including Benghazi.²⁸² Notable sections of Resolution 1973 included:²⁸³

²⁷⁹ See, preamble for UNSC resolution 1973. Here, although the R2P concept has been invoked in different conflict situations in the past decade, for example in the Darfur conflict and in Kenya during the 2008 post electoral violence, it is the first time the UNSC has applied the R2P concept for intervention in a state for the protection of civilians using Article 41 & 42 of the UN Charter that, the intervention in Libya is said to be a milestone in the development of the R2P regime of interventionism.

²⁸⁰ See, G. Ajebe, cited above at note 56 P.65 one could argue that the Libyan case could be seen as an R2P case, although Resolution 1973 also refers to the UN Charter in that the situation in Libya constitutes “a threat to international peace and security.”

²⁸¹ Ten Security Council members voted in favor (Bosnia and Herzegovina, Colombia, Gabon, Lebanon, Nigeria, Portugal, South Africa, and permanent members France, the United Kingdom, and the United States). Five members (Brazil, Germany, and India, and permanent members China and Russia) abstained, with none opposed. This means that none of the four BRIC countries were supported the mission. Russia and China expressed concern about the United Nations and other outside powers using force against Gaddafi while Germany expressed fear that military action would lead to more casualties. Three African countries, South Africa, Gabon and Nigeria, presently members at the UN-Security council, approved resolution 1973.

²⁸² see, UNSC resolution 1973, cited above at note, 227 Para 4

²⁸³ Resolution 1973 mandates a no-fly zone which is a rare measure for the Security Council to use. Two previous cases involving the use of no-fly zones are pertinent here, Iraq in 1991 and Bosnia in 1992. The UN Secretary-General Ban Ki-moon issued a statement immediately after the meeting highlighting the historic decision achieved by the Security Council and his expectation for immediate action. He said that Resolution 1973 “Affirms, clearly and unequivocally, the international community's determination to fulfill its responsibility to protect civilians from violence perpetrated upon them by their own government”

Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that party to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians,

Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,

Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011) [Note: paragraph 9 establishes an arms embargo on Libya], to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory;

Directs the U.N. Secretary General to convene an eight-person Panel of Experts to monitor the situation in Libya and implementation of Resolutions 1970 and 1973; Establishes a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians,

However, nothing in Resolution 1973 (2011) authorized member States to “act nationally or through regional organizations or arrangements” to help the rebel forces with arms. If that had been the case, surely Resolution 1973 would not have had support from China and Russia, as well as from the League of Arab States, the African Union and the Organization of the Islamic Conference. Nevertheless, that was what happened just a few weeks after the approval of Resolution 1973. Not only were China, Russia and regional Arab/African organizations condemning NATO operations in Libya, but Gareth Evans, one of the R2P founding fathers stated that NATO was stretching the Security Council

mandate on Libya “to the absolute limit.”²⁸⁴ Though it can be argued that the extension of the Security Council mandate by NATO was a way to guarantee the protection of the Libyan people through the removal of its central threat in terms of the Gaddafi regime, the reality is that NATO’s interpretation of Resolution 1973 was stretched to meanings that were not on the document approved by the Security Council members. Here, the following section, will closely analyze the Security Council's authorization in order to assess the scope and the limits of the mandate.

4.3.1.1. Protection of Civilians and Civilian Populated Areas

Resolution 1973 offers protection to a wide category of people in Libya, even if they are or have been fighting. In humanitarian law, a “civilian” is “any person not a combatant.”²⁸⁵ There are many different ways to address protection threats, and numerous actors play important roles in protecting civilians. National governments bear the primary responsibility for ensuring that their populations are effectively protected, and all parties to conflict governments and armed groups have an obligation to prevent harm to civilians in the conduct of hostilities. When States are unable or unwilling to protect their population, international actors, such as individual member States, regional organizations, intergovernmental organizations, or the United Nations Security Council, may become engaged in efforts to remind parties of their obligations to protect civilians, and may take measures to prevent abuses and protect people from harm.²⁸⁶

The UNSC Resolution 1973 (2011) on Libya has been the most visible, and arguably most controversial, action of the UNSC in the name of civilian protection.²⁸⁷ The authorization of military force to protect civilians by international forces outside of UN peacekeeping missions, and without the consent of the host government, is a vastly

²⁸⁴ G. Evans, ‘[NATO stretching UN Libya mandate](#): Evans’, *Sidney Morning Herald* (4 May 2011); AVAV, ‘[R2P: Sovereignty and Intervention after Libya](#)’, *World Politics Review* (USA: 28 June 2011).

²⁸⁵ Here, the definition of combatant is narrow and does not cover rebel forces unless they are under an effective command structure that enforces the international law of armed conflict; and distinguish themselves from the civilian population while they are attacking, or carry arms openly during each military engagement.

²⁸⁶ See, [Protection of Civilians in 2010 Facts, figures and the UN Security Council’s response](#)

²⁸⁷ _____, [Protection of Civilians in 2010 Facts, figures and the UN Security Council’s Response](#)

different context from the way protection of civilians has been discussed in the UNSC prior to the Libyan crisis.²⁸⁸

Paragraph 4 of Resolution 1973 provided with a broad legal mandate to protect civilians in Libya by authorizing “all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”²⁸⁹ The overarching purpose of Resolution 1973 was the protection of civilians, and there were five key ways that paragraph 4 authorized this protection: (1) a mandate to use “all necessary measures”; (2) protection of “civilian populated areas including Benghazi”; (3) protection of areas “under threat of attack”; (4) an exception to the arms embargo “notwithstanding paragraph 9 of resolution 1970”; and (5) exclusion of a “foreign occupation force” that still allows for limited presence on the ground.

Here, as the study discussed in chapter three, the core mandate of the UNSC is to maintain international peace and security. Here, while it is important in placing the protection of civilians within the UNSC’s mandate to maintain international peace and security, the UNSC should consider the protection of civilians based on the need to prevent harm to civilians, and not only because civilian suffering may cause more violence.²⁹⁰ Moreover using military means to protect civilians is risky and challenging and must be based on thorough assessment of civilian vulnerability to threats of violence; it must not be reduced to only attacking belligerents.

²⁸⁸ C. Henderson, International Measures for the Protection of Civilians in Libya and Cote d’Ivoire, 60 Int’l & Comp. L.Q. 767, 770 (2011). The UNSC Resolution 1973, On March 19–20, 2011 a multi-national coalition, spearheaded by France, the United Kingdom and the United States began a broad campaign of air strikes against pro-Gaddafi forces under the names Operation Odyssey Dawn [US], Operation Ellamy [UK] and Operation Harmattan [FR]. On 31 March, the North Atlantic Treaty Organization (NATO) took command of the operation under the name Operation Unified Protector (OUP).

²⁸⁹ See, Security Council Resolution 1973, Paragraph 4

²⁹⁰ The Security Council adopted Resolution 1973, “Acting under Chapter VII of the Charter of the United Nations.” The Security Council can authorize the use of force under Chapter VII, Article 42 of the U.N. Charter when situations pose a threat to international peace and security. See U.N. Charter arts. 39, 41, 42

Moreover, Resolution 1973 extended protection to civilians and “civilian populated areas including Benghazi.”²⁹¹ According to the Geneva Convention, even if military personnel are present in an area, their presence does not “deprive the area of its civilian nature.”²⁹² Thus, coupled with the Geneva Convention, three words—“civilian populated areas” authorized states to use force to protect entire towns and villages in Libya, even if legitimate military targets existed within them, so long as civilians were present.²⁹³ The reference to the protection of “populated areas” is important because it allows for the defense of cities and other areas held by rebel forces even if the Libyan armed forces are not directly targeting the civilians therein, since any Libyan assault would inevitably place civilians at risk. Moreover, the authorization permits attacks on Libyan security forces that, while not directly engaged in attacks on civilians or areas populated by civilians, are supporting, or reasonably could be expected to support, such attacks, even far from the battlefield.

The explicit inclusion of Benghazi in Resolution 1973 as a protected area was especially significant because it was the command and control center for the Libyan opposition since the revolution began in February.²⁹⁴ This was a clear acknowledgment by the Security Council that the Gaddafi regime and the Libyan opposition were not moral equals entitled to the same protection. Accordingly, the authorized NATO forces to

²⁹¹ S.C. Res. 1973, Para. 4. See, Draft Security Council Resolution, CBS NEWS (Mar. 16, 2011), http://www.cbsnews.com/htdocs/pdf/March_16_LibyaDraftResolution2011_1.pdf? The draft resolution limited protection to “civilians and civilian objects.” Resolution 1973 broadened the scope of protection to include entire “civilian populated areas” of Libya and thus everything not just “civilians and civilian objects” within those areas

²⁹² See, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S 3

²⁹³ S.C. Res. 1973, Para. 4. This broad mandate to protect all civilian populated areas, and its aggressive implementation, was a significant departure from the limited “safe areas” that supposedly received protection during the war in Bosnia. In response to attacks on civilians in Srebrenica, the Security Council designated Srebrenica as a “safe area which should be free from any armed attack ,” but did not at first authorize means by which states could protect Srebrenica

²⁹⁴ See S.C. Res. 1973, Para. 4; see also Into the Unknown; The Libya Campaign, Economist, Mar. 26, 2011, at 29 (describing Benghazi as a stronghold for the Libyan opposition forces and important because of Resolution 1973 which allowed allies to use ‘all necessary measures’ to protect civilians in areas like Benghazi from Gaddafi’s forces).

protect non-civilians including the Libyan opposition forces as long as they were within an area populated by at least one civilian.²⁹⁵ By extending protection to “civilian populated areas including Benghazi,” the Security Council recognized that those needing protection may also be engaged in self-defense. This phrase was crafted in such a way that not only permitted Libyans to engage in self-defense, but also assisted them in doing so.²⁹⁶

Here, on the question of targeting Gaddafi, there appears to be a division of opinion among politicians that targeting Gaddafi personally was not allowed.²⁹⁷ However, the study argues that paragraph 4 of Resolution 1973 does not prohibit the targeting of Gaddafi and rather authorizes it where this is deemed necessary to protect civilians and civilian populated areas. Professor Malcolm Shaw shared this view, and said: “Anything that supports Libyan jets including the military command structure, airfields and anti-aircraft batteries would be legitimate.” But, he cautioned, not all Libyan government sites could be hit: “I wouldn’t think that blowing up the finance ministry in Tripoli would be authorized.” Professor Ryszard Piotrowicz, also agreed that the UN Resolution 1973 appears to sanction attacks on Gaddafi, and targeted attacks on senior Libyan officials might be justified if this is the only way to stop attacks on civilians.

4.3.1.2. All Necessary Measures

The Security Council quickly responded to the violence in Libya with a comprehensive resolution that authorized “all necessary measures” to stop attacks on civilians. The phrase “all measures necessary” is known from constitutional rights doctrine as part of the proportionality requirement and as it has become a dominant theme in transnational and comparative constitutional law,²⁹⁸ it requires a least-restrictive means test. A measure

²⁹⁵ P. Williams and C. Popken, Northern Africa and the Mideast: to Where? Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity, Case Western Reserve Journal of International Law 2011 P.5

²⁹⁶ Ibid

²⁹⁷ The British Prime Minister David Cameron and the UK’s Chief of Defence Staff, General Sir David Richards have indicated that targeting Gaddafi personally was not allowed

²⁹⁸ A. Sweet & J. Matthews, “Proportionality Balancing and Global Constitutionalism”, (47 Colum. Journal International Law 72 2008)

may not go beyond what is strictly necessary in order to achieve a certain goal. Thus, the intervening States would have to show that every action they take is essential with regard to the objective they are pursuing, namely the protection of civilians and civilian-populated areas.

As scholar Dapo Akande argued, there is a danger that the expression “all necessary measures” will be interpreted in a sense as part of the *jus in bello*, i.e. as part of the law that regulates individual targeting and the conduct of hostilities. Such an interpretation would suggest that each individual act of targeting needs to be justified as an act that is essential for achieving the broader objective. Instead, Akande argued that, the limitations on force authorized by the UN Security Council should be thought of, in terms similar to the *jus ad bellum* and in terms similar to what we have in the law of self defense. First of all, these limitations are directed, in general terms by reference to the overall levels of force used and not, usually, in connection with individual acts of targeting. Secondly, the key questions in this area are whether it is necessary to use force and whether the force used is proportionate in connection with achieving the objective specified by the resolution. So here the question really is whether the force used is proportionate to achieving the goals set out by the resolution, i.e. protecting civilians and civilian populated areas. Here, the study believes that what ‘all necessary measures’ will depend on particular circumstances. In other words, there should be some proximate connection between stopping the slaughter of civilians and the use of force to destroy the Libyan military causing the slaughter.

The phrase “all necessary measures” is employed by the Security Council Resolution 1973 to authorize the use of force under Chapter VII, Article 42 of the UN Charter.²⁹⁹ The expression has rather been a cipher for the authorization to use military force. This is, however, not the way the Security Council has been understood the phrase in the past.³⁰⁰ Necessary here does not mean that each individual act of targeting must be

²⁹⁹ J. Lobel & M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires and the Iraqi Inspection Regime*, *Journal of International Law* 124, 129 (1999)

³⁰⁰ D. Akande, *What Does UN Security Council Resolution 1973 Permit?* (March 23, 2011)

absolutely essential to achieving the goal set out by the resolution.³⁰¹ In the past, all necessary means has simply been viewed as short hand for authorization of the use of force.³⁰² That expression has not been viewed as what imposes limitations on the scope of force but that limitation has instead been taken as flowing from the objective that the use of force is designed to achieve.³⁰³

The immediate and aggressive implementation of “all necessary measures” was a dramatic shift from the timid and tardy implementation conducted by the international community in response to attacks on civilians for instance in Bosnia.³⁰⁴ In Bosnia, over a year passed before the Security Council authorized U.N. member states to take “all necessary measures, through the use of airpower” to protect “safe areas.”³⁰⁵ As a result, while the international community in Bosnia hesitated to authorize force and then failed to use the full extent of force authorized, approximately one hundred thousand lives were lost and 2.2 million civilians displaced.³⁰⁶ Fortunately for the Libyan people, the Security Council did not wait for wide-spread massacres before authorizing “all necessary measures,” and the US, British, and French led coalition did not hesitate to implement the full scope of its mandate by using all available resources and by striking all crucial targets.

4.3.1.3. Notwithstanding Paragraph 9 and Excluding a Foreign Occupation Force

In paragraph 4 of Resolution 1973, the Security Council authorized States to take all necessary measures to protect civilians “notwithstanding paragraph 9 of Resolution 1970

³⁰¹ Ibid

³⁰² Id

³⁰³ Id. For instance, in Resolution 678 dealing with Iraqi invasion of Kuwait, the limitation on the force was that the force was to remove Iraq from Kuwait and to restore international peace and security in the area. In Resolution 1973, the limitation is that the use of force must be directed at protecting civilians and civilian populated areas under threat of attack.

³⁰⁴ See, P. Williams and C. Popken, cited above at note 295

³⁰⁵ See, Security Council Resolution, Doc. S/RES/836 (June 4, 1993), Para.10 Even after the Security Council authorized the use of force, force was rarely actually used.

³⁰⁶ See, BBC NEWS (June 21, 2007), <http://www.news.bbc.co.uk/2/hi/Europe/6228152.stm>; U.N. High Commissioner for Refugees, UNHCR Global Appeal 224 (Ann Encontre et al. eds., 2004), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?>

(2011)”³⁰⁷. Here, paragraph 9 of Resolution 1970 required states “to prevent the supply, sale or transfer to the Libyan Arab Jamahiriya of arms and related materiel of all types and technical assistance, training, financial or other assistance, related to military activities....”³⁰⁸ In common language, when “notwithstanding” is used as a preposition, as it is in paragraph 4 of Resolution 1973, it means “despite.”³⁰⁹ Thus, States could use all necessary measures to protect civilians “despite paragraph 9” of Resolution 1970.

Although the meaning of this phrase has been debated, the logical interpretation is that this phrase created an exception to the paragraph 9 Resolution 1970 arms embargo for measures that were necessary to protect civilians, measures that may include arming and training civilians so that they may protect themselves.³¹⁰ Here, “notwithstanding paragraph 9” was interpreted aggressively by the French and Americans, and narrowly by the British, to allow for arming of the Libyan opposition. The U.S. believed that “notwithstanding paragraph 9” created a blanket exception to the arms embargo: “Resolution 1973 amended or overrode the absolute prohibition of arms to anyone in Libya so that there could be legitimate transfer of arms if a country were to choose to do that,” said U.S. Secretary of State Hilary Clinton.³¹¹ The U.K., on the other hand, interpreted “notwithstanding paragraph 9” more narrowly, to allow only for arming the Libyan opposition with “defensive weapons” in “certain limited circumstance.”³¹² On June 29 2011, France was the first and only of the three NATO leaders to confirm that it

³⁰⁷See, Security Council Resolution 1973, Para. 4.

³⁰⁸ See, Security Council Resolution 1970, Para. 9. Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories....”

³⁰⁹ Notwithstanding Definition, Merriam-Webster.Com, <http://www.merriam-webster.com/dictionary/notwithstanding>

³¹⁰ See, P. Williams and C. Popken, cited above at note 295 P.20

³¹¹ N. Watt, U.S. Paves Way to Arm Libyan Rebels, Guardian (Mar. 29, 2011), <http://www.guardian.co.uk/world/2011/mar/29/arms-libya-rebels> last visited on June 10, 2012

³¹² Richard Spencer, France Supplying Weapons to Libyan Rebels, The Telegraph (U.K.) (June 29, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/Libya/8606541/France-supplying-weapons-to-Libyan-rebels.html> last visited on June 10, 2012

had actually provided weapons to the Libyan opposition.³¹³ Here, phrase “notwithstanding paragraph 9” reflects an understanding by the Security Council that those who need protection may also be engaged in self-defense.

Yet, despite the inclusion of “notwithstanding paragraph 9,” some commentators are skeptical that this phrase was intended by the Security Council to create an exception to the arms embargo, arguing that it would never have passed if that had been so.³¹⁴ Others are simply critical of the fact that “notwithstanding paragraph 9” did indeed create an exception to the arms embargo,³¹⁵ preferring an arms embargo that would have applied equally to the Gaddafi regime and the Libyan opposition.³¹⁶ “Notwithstanding paragraph 9” in Resolution 1973 lifted the arms embargo for NTC forces if it was necessary to protect civilians under threat of attack.

Resolution 1973 allowed states the flexibility of putting limited foreign intelligence and military personnel on the ground in Libya so long as they did not constitute “a foreign occupation force of any form on any part of Libyan territory.”³¹⁷ While on its face, this provision would appear to exclude the presence of any boots on the ground,³¹⁸ it in fact appears that the drafters cleverly chose the term “occupation force,” which is not without legal significance.

³¹³ See, D. Jolly & K. Fahim, *France Says It Gave Arms to the Rebels in Libya*, New York Times, June 30, 2011, at A4.

³¹⁴ M. Milanovic, *Can the Allies Lawfully Arm the Libyan Rebels?* (Worrying that the Security Council implicitly took sides in this conflict and created a wink-wink embargo exception)

³¹⁵ D. Akande, *Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?* (Arguing that the law did create an exception to the arms embargo to assist the protection of civilians and civilian populated areas)

³¹⁶ Y. Vanderman, *Is Providing Arms to Libyan Rebels Illegal?* (Showing that the drafters of Resolution 1973 did not really through the resolution as an exception to the arms embargo. However, Secretary Clinton stated that the US interpreted that Resolution 1973 overrode the absolute prohibition on arms to anyone in Libya).

³¹⁷ See, Security Council Resolution 1973, Para. 4.

³¹⁸ G. Evans, *UN Targets Libya with Pinpoint Accuracy*, NAT'L TIMES (Mar. 24, 2011), <http://www.theage.com.au/opinion/politics/un-targets-libya-with-pinpoint-accuracy-20110323-1c6pc.html#ixzz1aIS0mLtW> last visited on June 10, 2012

Some commentators interpret the inclusion of this phrase as expressing the intent of the Security Council to avoid a situation similar to Iraq.³¹⁹ While this phrase certainly set the tone that there would not be heavily-armed peacekeeping forces in Libya, it also represents clever drafting that allowed for some military presence on the ground. This phrase ultimately provided states fulfilling the mandate with a wider range of available measures to protect civilians as the conflict progressed.

4.3.1.4. No Fly Zone

Resolution 1973 besides what the study discussed above, it also imposed “a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians.”³²⁰ No-fly zones are generally implemented for the purpose of restricting the territorial state’s military operations; either to protect the civilian population, as in the case of Libya, or simply to hinder its military activities.³²¹ In essence, a no-fly zone constitutes a de facto “occupation” of a state’s sovereign airspace.³²² The most significant aspect of Resolution 1973, and that which most sharply distinguishes it from previous no-fly zones, lies in the fact that it contemporaneously authorizes military action beyond the maintenance of a no-fly zone to protect civilians and civilian “populated areas.”³²³

³¹⁹ Compare Libya UN Resolution 1973: Text Analyzed, BBC NEWS (Mar. 18, 2011), <http://www.bbc.co.uk/news/world-africa-12782972> (claiming that because Resolution 1973 specifically excludes any foreign occupation force that the operation will not be another Iraq and instead would have a clear limit), with Jeff Bridoux, Why Libya Will Not Be a Second Iraq, Open democracy (Apr. 15, 2011), <http://www.opendemocracy.net/opensecurity/jeff-bridoux/why-libya-will-not-be-second-iraq> (analyzing the problems with Resolution 1973’s vagueness) last visited on June 10, 2012

³²⁰ Security Council Resolution 1973, P. 6, U.N. Doc S/RES/1973 (Mar. 17, 2011). At its most basic level, a no-fly zone is a three-dimensional piece of airspace, usually over another state’s land or sea territory, in which aircraft may not fly. The mere launch of an aircraft from an airfield within the zone constitutes a violation.

³²¹ No fly-zones must be distinguished from aerial blockades, which involve blocking entry or exit of aircraft to specified airfields or coastal areas under enemy control, primarily to prevent neutral aircraft from transporting goods and personnel to the enemy. Aircraft attempting to “breach” a blockade by crossing over a set line in the sky, including civilian and/or neutral aircraft, can be intercepted, forced to land, inspected and “captured”; those which resist become military objectives and are therefore liable to attack. Program On Humanitarian Policy And Conflict Research, Manual On International Law Applicable To Air And Missile Warfare P.156 (2009) , available at <http://www.ihlresearch.org/amw/manual/>

³²² Here, however, the no-fly zones do not qualify as an occupation in law of armed conflict terms, an important point since Resolution 1973 prohibits occupation. See Security Council Resolution 1973, Para. 4.

³²³ Security Council Resolution 1973, Para. 4. Thus, the no-fly zone extends throughout the country, not just over areas in which the fighting is taking place or in which civilians are at particular risk. Combined

A no-fly zone resolution, like any resolution contemplating the use of force, will generally designate who can take enforcement action. There are three possible alternatives;³²⁴ First, a U.N.-commanded and controlled force (i.e., “Blue Helmets”) may be authorized to maintain the zone. In light of the complexity of mounting no-fly zone operations and the United Nations’ limited military capabilities, this option is highly unlikely to be used. Second, the resolution may authorize “Member States” generally or specific states to enforce the zone. In the latter case, only those states so designated may act. In the former case, states acting on their own or in an ad hoc coalition may police the zone. Third, the Council may designate an international organization, either by name or in general, as an authorized enforcement entity. Here, in Resolution 1973 the Security Council opted for a combination of the second and third options.³²⁵

Resolution 1973 also confirms that any state can (and should) act in support of the operation, for instance by providing over-flight and basing rights to enforcing states.³²⁶ Even absent such a provision in the Resolution, assistance—or at least non-support of Libyan government forces—would be required as a matter of U.N. Charter law. Article 2(5) of the Charter specifically provides that “all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.”³²⁷ Similarly, Article 25 provides that “Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”³²⁸ In other words, any support to the Libyan government in violating the no-fly zone would be unlawful, and arguable any state asked to provide assistance to enforce the zone (short of providing armed forces) would have to

with the “protection of civilians” authorization, the broad geographical scope of the zone reveals the extent to which Resolution 1973 is targeted at crippling the Libyan government’s ability to operate militarily.

³²⁴ M. Schmitt, *Wings over Libya: The No-Fly Zone in Legal Perspective* P. 4 a

³²⁵ Security Council Resolution 1973, Para. 4-5.

³²⁶ *Ibid*, Para. 9

³²⁷ U.N. Charter, Art. 2, Para. 5

³²⁸ *Ibid*, Art. 25

comply with such a request.³²⁹ Consequently, Resolution 1973 applies the no-fly zone to civilian as well as military aircraft, extends it throughout Libya, and, most importantly, couples it with an authorization to use military force to protect the civilian population.

4.3.2. Military Intervention and Regime change in Libya for the Protection of Civilians

The regime change issue became the most controversial one after the NATO intervention in Libya. Although Resolution 1973 does not require the deposition of the Libyan regime, rather one of the main objectives is *“to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya,”*³³⁰ however, it was clear that many of the coalition members hoped for regime change as a desired outcome. The US President Barak Obama, the former French President Sarkozy and UK Prime Minister David Cameron made it clear that they want Gaddafi to go. The three leaders declared that “it is impossible to imagine a future for Libya with Gaddafi in power” and it is “unthinkable” that he “can play a part in the future government.”³³¹ So during the intervention it is argued that the intervening forces constantly moved beyond the strict mandate they had been given by Resolution 1973. On the other hand, Russia and China later expressed their regret for not having used their veto on Resolution 1973 when they had the chance. According to them, the Libyan intervention is proof that western states cannot be trusted to stay within the limits of a mandate.³³² Similar criticisms, although

³²⁹ See, M. Schmitt, as cited above note 325, P. 4

³³⁰ See, paragraph 4 of the Resolution 1973. Here, although Resolution 1973 does not require the deposition of the Libyan regime, the interveners have made it clear that they were not going to stop the military campaign in the country unless Colonel Gaddafi leaves office. See, (<http://www.guardian.co.uk/world/2011/apr/15/obama-sarkozy-cameron-libya>) last visited on June 13, 2012

³³¹ Joint Op-ed by President Obama, Prime Minister Cameron and Former France President Sarkozy: ‘Libya's Pathway to Peace’, The White House, Office of the Press Secretary, April 14 2011, (<http://www.whitehouse.gov/the-press-office/2011/04/14/joint-op-ed-President-obama-prime-ministercameron-and-President-sarkozy>) last visited on June 14, 2012. Of course, the ICISS Report contemplated the issue of regime change. It cannot be the primary goal of the military intervention but it is not excluded when neutralizing the ‘regime’s capacity to harm its own people may be essential to discharging the mandate of protection’.

³³² Y. Sun, Syria: What China Has learned From Its Libya Experience? Asia Pacific Bulletin 152, 2012 ; E. Micheal, The Responsibility to Protect and Regime Change European Neighborhoods Watch 76, 2011

formulated in far less explicit terms, could be heard from regional organizations such as the African Union and the Arab league.

On April 26th, the African Union iterated its commitment to Resolution 1973, but immediately continued to stress “the need for all countries and organizations involved in the implementation of Security Council Resolution 1973 to act in a manner fully consistent with international legality and the resolution’s provisions, whose objective is solely to ensure the protection of the civilian population”³³³. This can only be interpreted as a more subtle way of stating that the African Union also considered the intervening states, who were upholding the no-fly zone for more than a month at the time, to be moving beyond their mandate.

In analyzing the claim that, intervening forces went beyond their mandate in Libya, the study recognizes two ways of approach. The first, which is used by the ‘criticasters’ follows from a very strict interpretation of Resolution 1973 and argues that in the often aggressive way the no-fly zone was implemented, the intervening forces went beyond their mandate. Resolution 1973, in line with the Responsibility to Protect, prefers a peaceful solution to the Libyan conflict to an armed one; it does mandate the use of all means necessary to protect civilians and civilian populated areas, not regime change.³³⁴ The second line of reasoning, which will suit the intervening states much better, pays more attention to the actual situation on the ground and argues that in order to provide a lasting peace in Libya, one cannot focus solely on a cessation of violence, but also has to pay attention to the root causes of the situation.³³⁵

Thus, assuming Resolution 1973 is in line with the Responsibility to Protect, the international community focused on the responsibility to prevent, meaning that extensive attention should also be paid to the sources of violence in a humanitarian crisis. Considering that the Gaddafi regime had made its intentions more than clear for those

³³³ See, African Union Peace and Security Council, Communiqué of the 275th meeting, Addis Ababa: 26-04-2011.

³³⁴ J. Maessen, the Libyan Intervention, Triumph and Downfall of the Responsibility to Protect in One

³³⁵ Ibid

who had rebelled against it, and any peaceful attempts to come to a ceasefire, let alone a lasting solution had led to nothing, so one could make an argument that regime change at this stage of the intervention, although still not explicitly mandated by the resolution, was the only realistic way to take away the source of the conflict and provide for a situation which might result in a lasting peace.

Here, at the beginning of the intervention, the genuine ambition of the intervening forces was to stop Gaddafi from causing a large-scale human rights violation among the Libyan population through the imposition of the no-fly zone. Alongside the no-fly zone, the international community had also taken a number of other measures, such as an arms embargo, a ban on flights for the Libyan regime and an 'asset freeze' for certain members of the Gaddafi clan. These measures were designed to put pressure on the Gaddafi regime, to lead it to the negotiation table and to provide a lasting peace in Libya.

Of course, Resolution 1973 authorized the use of 'all means necessary' to protect civilians and civilian populated areas, it does not foresee a lasting solution for the conflict through military means. In its preamble, the resolution calls for an immediate ceasefire and a complete end to all violence and all attacks against, and abuses of, civilians and to the sending of a Special Envoy in cooperation with the African Union.³³⁶ It is through this diplomatic path that the resolution sought to facilitate a dialogue which was to lead to 'the political reforms necessary to find a peaceful and sustainable solution'.³³⁷ The resolution text implies that the crisis should come to a lasting solution through peaceful means and certainly does not choose one of either side in the conflict. As a result, one could make a good argument that the intervening forces were neither in compliance of Resolution 1973, nor the responsibility to protect if they took explicit side of the NTC at the early stage of the crisis.

However, as the conflict evolved further it became obvious that there was no chance that the Gaddafi regime could be trusted or be lead to the negotiation table in a peaceful

³³⁶ C. Robert, Thinking About Libya, the Responsibility to Protect and Regime Change 2011

³³⁷ See, Security Council Resolution 1973

manner. It was illustrative that the Libyan authorities announced an immediate cease-fire the day after resolution 1973 was adopted, but continued the shelling of liberated cities and the march upon Benghazi. Because the Gaddafi regime proved unwilling to negotiate a ceasefire and had made it its foremost objective to “to cleanse Libya, inch by inch, house by house, home by home, alley by alley, person by person, until the country is cleansed of dirt and scum,”³³⁸ the coalition was unable to achieve the main goal of Resolution 1973 “to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi”, without stretching the strict mandate it was given. Had the intervening forces not taken a pro-active stance in the Libyan Civil war and not explicitly chosen the side of the National Transitional Council, it is reasonable to state that civilian casualties would have been much higher and Libyan situation would have deteriorated into deadlock.³³⁹

Here, even if the UN Resolution 1973, the goal of the intervention, is to protect Libyan civilians from human rights violations, nevertheless, can this goal be meaningful and successful without the removal of Gaddafi and his regime from power? The study strongly argues that, if Gaddafi remains in power, this would make the coalition members and NATO’s leadership look ineffective. In fact, the limited scope of the intervention may set the action up for failure as it is. It will be almost impossible to leave with Gaddafi still in power with any kind of credible assurance that the same civilians will remain protected. Therefore, had the intervening forces kept themselves to a strict interpretation of Resolution 1973, the humanitarian outcome in Libya would have been far worse, which would not have been in the spirit of the Resolution 1973; regime change was not a goal of the intervening forces, it merely proved necessary to achieve the goals of Resolution 1973. Given the well-founded fear that if Gaddafi were to regain control of rebel-held territory he could perpetrate further crimes, assisting the rebels in preventing him from regaining such control was, arguably, a part of protecting civilian from massive human rights violations.

³³⁸ See, J. Kinsman, cited above at note, 221

³³⁹ C. Robert, cited above at note, 336

4.3.3. The Responsibility to Protect: After Libya

Here, once NATO operations in Libya were clearly aligned with regime change rather than the strict mandate of Resolution 1973, the question is whether or not the responsibility to protect still relevant for the future? Of course, thirteen days after Resolution 1973, another one was adopted on the Cote d'Ivoire situation reaffirming the "primary responsibility of each state to protect civilians" and authorizing UNOCI "to use all necessary means to carry out its mandate to protect civilians under imminent threat."³⁴⁰ A few months later, while NATO aircraft bombed the positions of Gaddafi and helped the rebel forces, three Security Council resolutions were adopted on Sudan and another on the Yemen crisis, both on the grounds of the responsibility to protect, authorizing UNISFA, "without prejudice to the responsibilities of the relevant authorities, to protect civilians in the Abyei Area (South Sudan) under imminent threat"³⁴¹ and invoking "the Yemeni Government's primary responsibility to protect its population."³⁴²

Thus, the extension of the United Nations mandate by NATO in Libya did not destroy the responsibility to protect concept, but it is a factor slowing an international response to the present crisis in Syria. After peaceful demonstrations and more aggressive revolts, the country is now in a state of civil war.³⁴³ Since the protests began, Syrian security forces have reportedly killed at least 15,000 civilians.³⁴⁴ The Syrian government is killing its

³⁴⁰ See, Resolution S/1975 (2011) 'Cote d'Ivoire', 30 March, Security Council (NY: UN).

³⁴¹ See, Resolution S/1990 (2011) 'Sudan', 27 June, Security Council (NY: UN); Resolution S/1996 (2011) 'Sudan', 8 July, Security Council (NY: UN); Resolution S/2003 (2011) 'Sudan', 29 July, Security Council (NY: UN).

³⁴² See, Resolution S/2014 (2011) 'Yemen', 21 October, Security Council (NY: UN).

³⁴³ M. Rifkind, Shashank Joshi, 'It's time to support the opposition in the Syrian civil war', *Financial Times* (London: 5 February 2012)

³⁴⁴ Due to the security situation, it is difficult to establish precisely how many civilians have been killed, but most organizations estimate the figure at over 10,000. These estimates do not include Syrian government or Free Syria Army casualties. See, e.g., *Syria Crisis: Counting the victims*, BBC, May 29, 2012, (<http://www.bbc.co.uk/news/world-middle-east-18093967>) these attacks appear to be intensifying. The UK-based Syrian Observatory for Human Rights estimates that over 13,000 civilians have been killed since May 2012; including nearly 2000 in July alone. These attacks have created a humanitarian crisis in Syria. Tens of thousands of refugees have fled Syria into Jordan, Lebanon, Turkey, and Iraq, and more than 35,000 Syrians have sought refuge along the Turkish-Syrian border. Most recently, one news organization reported that from July 19th to July 20th, 2012, approximately 30,000 Syrians crossed the border into Lebanon.

own people.³⁴⁵ This is an undeniable fact for the Syrian people, the Syrian government, Syrian neighbors, the Arab League members, and the international community which is part of the United Nations' structure. While the Syrian people go on being killed by its own rulers, the Security Council is once again paralyzed by its own functional structure and the institutional mechanism that should contribute to overcome this paralysis. Of course, the Arab League has been an involved actor since the worsening of the Syrian crisis, through the approval of historic sanctions against the Assad regime, on July 21, the Arab League pinpointed Syria in its statements regarding ending the violence against civilians, leading several regional governments to begin to remove their ambassadors and suspend operations in Syria. The Arab League suspended Syria's organizational membership on 12 November and adopted a number of sanctions on the repressive regime on 27 November. An observer mission³⁴⁶ to the Syrian territory was not able to minimize the effects of the Assad regime towards its own people even while the Arab observers were in Syrian territory.³⁴⁷

Similarly, the United Nations' structure through its different bodies and commissions has expressed concern over the Syrian crisis since August 2011, mainly with the Human Rights Council report,³⁴⁸ the Security Council presidential statements³⁴⁹ and through a General Assembly resolution,³⁵⁰ the reality is that it did not manage to rise above an expected outcome: Russian and Chinese veto on a timely and decisive Security Council resolution.³⁵¹

³⁴⁵ See, Amnesty International, 'Syria', *Annual Report 2011* (London: Amnesty International, 2012).

³⁴⁶ See, Resolution 7442 (2011) 'Full text of Arab League resolution against Syria', 27 November (Cairo: League of Arab States 2011)

³⁴⁷ See, 'Report of the Head of the League of Arab States Observer Mission to Syria for the period from 24 December 2011 to 18 January 2012', 27 January (Cairo: League of Arab States 2012).

³⁴⁸ See, Report of the independent international commission of inquiry on the Syrian Arab Republic, 23 November, Human Rights Council, General Assembly (NY: UN). A/HRC/S-17/2/Add.1 (2011)

³⁴⁹ See, 'Statement by the President of the Security Council on Syria', 3 August, Security Council Presidency (NY: UN) S/PRST/2011/16 (2011); "Security Council press statement on Damascus terrorist attack", 6 January 2012, Security Council (NY: UN) S/PRST/2012/3(2012)

³⁵⁰ See, 'Situation of human rights in the Syrian Arab Republic', 19 December, General Assembly (NY: UN). A/RES/66/176 (2011)

³⁵¹ UN Security Council members 'Draft Resolution on Syria, 2 February 2012' This attempt, on February 2012, had the same conclusion and only reinforced the Security Council's state of paralysis, mainly because the draft resolution directly called "for an inclusive Syrian-led political process conducted in an

4.3.4. Changing context on R2P: The Syrian crisis

Although the Libya and Syria cases are comparable in the sense that grave violations of human rights are being committed by corrupt dictators for decades, there are many more surrounding factors, in which the two cases differ significantly.

First, the ethnic and religious constellation of Syria is much more diverse than the Libyan one. In Libya, 97% of the population consists of Sunni Muslims.³⁵² In Syria, the population is much more ethnically diverse; 74% of the population consists of Sunni Muslims, 14 % are Shia and 10 % are Christians. Furthermore, the ruling class in Syria, consisting of Bashar al-Assad and his entourage, are part of the Syrian Shia minority.³⁵³ Because of the fragmentation of the Syrian population, and the locus of power being within one of the ethnic minorities, it will be much more difficult for an intervention to be successful, let alone ease the path to lasting peace.

With regard to the feasibility of an intervention in Syria, Guiora makes an argument which is closely related, and might be a consequence of the above sketched Syrian demographic constellation; he points out that in Libya there was an armed and well organized opposition, whereas the same cannot be said of the Syrian opposition, “an organized rebel group is receiving significant international military assistance; an unorganized opposition has barely received the traditional platitudes that accompany non-intervention in the face of extraordinary violations of human rights”.³⁵⁴ Guiora thus argues that the international community might also be acting on account of a feasibility argument; in Libya a solid basis for intervention was already present, increasing the chances of success for an intervention, while in Syria this is absent. Ironically, in a situation where the opposition is not well-organized, there might be a more dire need for

environment free from violence, fear, intimidation and extremism, and aimed at effectively addressing the legitimate aspirations and concerns of Syrian people.”

³⁵²See, World Fact book-Libya. CIA 2012(<https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html>) last visited on June 18, 2012

³⁵³See, World Fact book-Syria. CIA 2012 (<https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>) last visited on June 18, 2012

³⁵⁴ A. Guiora, , Intervention in Libya, yes; Intervention in Syria no 2012, SSCN P. 16

intervention then one where this is not the case. Besides the demographic of Syria and presence or absence of a well-organized armed opposition, there are a multitude of other factors which might influence the feasibility of successful military intervention. One could also point to the explosive geopolitical situation in Syria and the in comparison to Libya much stronger Syrian army.³⁵⁵

Here, one can argue that the linkage between the implementation of the responsibility to protect and the subsequent regime change in Libya that is one of the reasons Russia and China have vetoed any Security Council resolutions on Syria.³⁵⁶ As in Libya, France, the UK and the US were the proponents of the resolution, China and Russia the opponents. The stated reason for the Russian and Chinese veto on Syria, is that they perceived the resolution as being “a potential violation of Syria’s sovereignty, which could allow for military intervention or regime change”³⁵⁷ In the initial reservations Russia and China voiced over Resolution 1973, they underlined their concern for, in that case, Libya’s sovereignty. At the time they did not however so explicitly voice their concern for the intervention to degrade into military intervention and regime change.³⁵⁸ The Russian and Chinese post-facto view that the intervening forces had trespassed their mandate in Libya, transforming the no-fly zone into a military intervention with naked regime change as its ultimate goal, resonates directly in their explanation of why they vetoed a resolution on Syria.³⁵⁹ One can also argue that Russia and China are afraid of the shadow of the future, in that a decisive response by the Security Council to Syrian repressive measures against its own population could be a precedent used in the future against their

³⁵⁵ B. Maya, Development of Conflict in Arab Spring Libya and Syria: From Revolution to Civil War. Washington University International Review 1:76-96. 2012

³⁵⁶ S. Rodrigues, Somewhere Between Civil War and Regime Transition: The Responsibility to Protect Response to Libya and Syria. Small Wars Journal Article Jun 12 2012 If the military reaction to the Libyan crisis gave responsibility to protect a bad name in terms of “regime change,” surely the label given by the inaction in the Syrian situation will be unpronounceable.

³⁵⁷ H. Paul, Syria resolution vetoed by Russia and China at United Nations. *Guardian*, 2012-02-04

³⁵⁸ L. Baodong, Explanation of Vote by Ambassador Li Baodong after Adoption of Security Council Resolution on Libya 17-03-2011. (<http://www.china-un.org/eng/hyyfy/t807544.htm>) last visited on June 19, 2012

³⁵⁹ J. Foust, ‘Syria and the pernicious consequences of our Libya intervention’, *The Atlantic* (Washington: 6 February 2012)

own authoritarian regimes.³⁶⁰ However, the Syrian situation underlines the Security Council's limitations in intervening in a timely and decisive manner, even when the most heinous crimes against humanity are being committed under the eyes of the international community.³⁶¹

Here, McCormack argues that, the responsibility to protect is not enough to protect Syrian people, and subsequently some other response must be found outside the Security Council's structure.³⁶² However, intervention without a Security Council resolution is contrary to the stipulations of the responsibility to protect concept. Other scholars also argue that a military intervention would be catastrophic³⁶³ in the sense that it would bring more harm than good to the Syrian people; others argue that a military intervention with a no-fly zone framework should be conducted immediately.³⁶⁴

Generally, the humanitarian crisis in Syria, although receiving similar condemnation from a majority of the international community, it has resulted in a completely different response, compared to that of Libya.³⁶⁵ According to a February 2012 report commissioned by the United Nations Human Rights Council, Assad's security forces

³⁶⁰ B. Raman, 'Russian-Chinese nervousness influences their vote on Syria', Paper No. 4898 (New Delhi: South Asia Analysis Group, 5 February 2012)

³⁶¹ J. Traub, 'Intervention in Syria is morally justified and completely impractical', *The New Republic* (Washington: 10 February 2012)

³⁶² T. McCormack, 'The responsibility to protect and the end of the Western century' in Philip Cunliffe (ed.) P. 35-48. The Kosovo crisis in the 1990s had a similar context. While an authoritarian dictator with a record of genocide, ethnic cleansing, and crimes of war and against humanity was giving signs of repeating these crimes towards his own population and was unwilling to negotiate, the Security Council was paralyzed by the Russian and Chinese vetoes. As a result, NATO took the lead with a military intervention on March 1999

³⁶³ A. Cordesman, & A. Nerguizian, 'Instability In Syria: Assessing the Risks of Military Intervention' (Washington: Centre for Strategic and International Studies, 13 December 2011)

³⁶⁴ M. Weiss, 'Russia, Iran and Hezbollah are already intervening in Syria. Why aren't we?' *Daily Telegraph* (London, 6 February 2012)

³⁶⁵ Here, in the Syrian case, in-between measures were considered, for instance, Kofi Annan as the joint Arab League-UN envoy for Syria attempted to implement a six-point peace plan to terminate the violence in the country have failed. In a news conference, Annan said the Syrian people "desperately need action" but criticized the UN Security Council for "finger-pointing and name-calling". Annan's six-point plans are; 1 Syrian-led political process to address the aspirations and concerns of the Syrian people, 2 End to violence by all sides; army troops to stop using heavy weapons and withdraw to barracks, 3 Parties to allow humanitarian aid, 4 Authorities to free political detainees, 5 Authorities to ensure freedom of movement for journalists and 6 Authorities to allow peaceful demonstrations

have committed “widespread, systematic, and gross human rights violations”³⁶⁶ by indiscriminately using heavy weapons, including tanks, artillery, and helicopter gunships, against civilians.³⁶⁷ Additionally, the Report also found that Syrian forces had deliberately shot civilians, shelled residential areas, and tortured hospitalized protesters.³⁶⁸

The Report concluded that Syria has “manifestly failed” to protect its own people.³⁶⁹ Thus, the Syrian crisis is an R2P situation where the responsibility to react has shifted to the international community because of Assad’s cessation of his sovereign responsibility. Therefore, a failure to act, when humanitarian intervention is needed most, undermines the credibility not only of the United Nations, but also it will transform R2P from an admirable goal into a hypocritical, exploited political instrument.

³⁶⁶ See, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Para 2 delivered to the General Assembly Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012)

³⁶⁷ Ibid, Para. 39-46

³⁶⁸ Ibid, Para. 39-46

³⁶⁹ Id

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

The responsibility to protect originated in the international community's failures to respond adequately to massive human rights abuses. Failure to act in the 1994 Rwanda genocide,³⁷⁰ the horror of inadequate intervention in Bosnia, and the non-UN-authorized intervention in Kosovo in 1999 set off angry and deeply divisive recriminations around the world for acts of omission and commission,³⁷¹ the then-UN Secretary General Kofi Annan called upon the international community to reach a consensus on when military intervention is justifiable.

In the face of questions such as--how to generate political will to intervene, how to structure effective interventions, and how to overcome the paralyzing force of the permanent member veto in the Security Council--the notion of a responsibility to protect was born. Throughout the 1990s, scholars and practitioners had called for fresh thinking about sovereign States and non-intervention, and some advocated a duty to intervene in humanitarian crises, especially for the purpose of providing humanitarian aid to victims.³⁷² The most significant transformation in approaches to intervention in humanitarian crises took place in 2001, with the publication of *The Responsibility to Protect*, the report of the International Commission on Intervention and State Sovereignty (ICISS), an independent body established by Canadian Government. Aiming “to build a

³⁷⁰ K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (Houndmills: Palgrave Macmillan, 2005). Rwanda exposed the tragedy of inaction, the shame of a lack of political will to intervene. When genocide erupted in Rwanda in 1994, the Security Council was aware of the degree of violence and potential for escalation, but it feared for the security of the U.N. peacekeepers that had been stationed in Rwanda since 1993.

³⁷¹ See A. Schnabel and R. Thakur (eds.), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (Tokyo: United Nations University Press, 2000).

³⁷² See, e.g., Francis M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa* xvii-xix (1996) (proposing that sovereignty represents not a right to nonintervention, but rather a responsibility to govern effectively); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *Journal of International Law* (2007).

new international consensus on how to respond in the face of massive violations of human rights,”³⁷³ the Report treated as its central premise the assertion that “sovereignty implies responsibility.”³⁷⁴

Unlike humanitarian intervention, R2P aspires to ground national and international action in law and institutions. Rather than compromising sovereignty, it harnesses the notion of sovereignty as responsibility. The doctrine of humanitarian intervention may be summed up as, “military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants.” This differs from R2P on at least three grounds. First, the remit of “humanitarian intervention”, which aims at preventing large scale suffering or death, whether man-made or not, is far broader than that of R2P which focuses on the prevention of four crimes: genocide, war crimes, crimes against humanity and ethnic cleansing. Second, humanitarian intervention automatically focuses upon the use of military force, by a state or a group of states, against another state, without its consent. As such it overlooks the broad range of preventive, negotiated and non-coercive measures that are central to R2P. Third, to the extent that the doctrine of “humanitarian intervention” is predicated on the basis of the “right to intervene,” it assumes that it can proceed without the need to secure legal authorization. However, R2P changed the scope and focus of the stubborn debate of humanitarian intervention among other things; transformed the controversial “right to intervene” to the “responsibility to protect”, and strongly argued that besides to diplomatic pressure, economic and political sanction, there are just causes that justify the use of force beyond the two exemptions of the UN Charter.

The responsibility to protect articulated and progressively refined beginning mainly from the triggering events the International Commission on Intervention and State Sovereignty (ICISS) report to the 2005 UN World Summit Outcome Document. The modern concept of ICISS “sovereignty as responsibility” represented a major modification to the

³⁷³ See, the ICISS Report , at 81

³⁷⁴ Id. at xi

traditional view of “sovereignty as control”.³⁷⁵ In articulating a responsibility to protect, the ICISS Report envisioned three key duties. First, the responsibility to protect entails a responsibility to prevent “both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.”³⁷⁶ Second, when the responsibility to prevent fails to avert a humanitarian crisis, a responsibility to react is triggered.³⁷⁷ Third, after intervention, a responsibility to rebuild requires “full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.”³⁷⁸ These three responsibilities arise from the ICISS's central concern: “the interest of all those victims who suffer and die when leadership and institutions fail.”

The ICISS argued that the essential nature of sovereignty had changed from state privileges and immunities to the responsibility to protect people from atrocity crimes. Where the state defaulted on its solemn responsibility owing to lack of will or capacity, or because it was itself complicit in the commission of the atrocities, the responsibility to protect tripped upwards to the international community acting through the authenticated structures and procedures of the UN. Put in simple, R2P represents a radical transformation in the international community’s approach to major cases of humanitarian suffering. Most importantly, there has been a massive shift in emphasis from intervention to prevention, such that R2P has become a widely accepted norm within the international community.

The responsibility to protect has undergone a series of debates and discussions in the U.N. system, with no real consensus emerging on the propriety of the principle except, perhaps, that it should remain a principle and not be codified as any binding legal obligation. The first formal discussion among world leaders of the responsibility to

³⁷⁵ A. Roberts, ‘The So-Called Right of Humanitarian Intervention’, *Trinity Papers*, number 13, 2000, P. 1-23, (http://www.trinity.unimelb.edu.au/publications/trinity_papers/paper13), P.17 last visited on June 21, 2012

³⁷⁶ See, the ICISS Report, at xi.

³⁷⁷ Id

³⁷⁸ Id at 2

protect took place during the 2005 World Summit. Certainly, the 2005 World Summit Outcome Document endorsed by world leaders apparently embraced R2P as regards cases of genocide, war crimes, ethnic cleansing and crimes against humanity. The World Summit ultimately endorsed a responsibility to protect in its Outcome Document, which was formally adopted by the General Assembly later the same year. The principle that the meeting endorsed, however, represented a severely scaled-back version of the ICISS's original proposal.³⁷⁹ All States thus codified within a multilateral framework their willingness to take measures which would be non-coercive in the first instance but when necessary coercive, specifically mentioning Chapter VII of the UN Charter, in cases where national authorities show signs of their inability or unwillingness to protect the population on their territory. According to the Outcome Document the Security Council can, on a case-by-case basis, exercise R2P when a massacre is ongoing and only military action can put an end to it.

In recent years the international community has accepted R2P both conceptually and in practice, including by invoking the principle in UN Security Council resolutions. The unanimous approval of the R2P doctrines at the 2005 World Summit as well as the fruitful discussions on implementing the R2P at the General Assembly in July 2009 appeared to indicate that the UN has successfully managed the challenge of demands for humanitarian intervention by separating the notion of protection from the debate of contentious military intervention. The responsibility to protect is not about rights at all, but about duties. The primary duty holder is the sovereign state, which should offer security and protection to its own citizens from the four mass atrocity crimes. The wider international community has the responsibility to encourage and assist individual states in meeting that responsibility. When the state failed in its duty to safeguard the lives and well-being of its own people, or itself the perpetrator of massive human rights violations, the international community must be prepared to take

³⁷⁹ See T. Weiss, R2P After 9/11 and the World Summit, Journal of International law 741, 750 (2006)

appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter.

Humanitarian intervention is not expressly mentioned in the UN Charter, and it has remained one of the most controversial and hotly debated issues in the areas of international law as its status remains uncertain and the practice of states has raised protracted debates.³⁸⁰ The ratification of the United Nations Charter in 1945 severely curtailed the legality of humanitarian interventions, because Article 2(4) prohibits the “...threat or use of force...” against another state. The Charter allows only two exceptions to this prohibition: Article 51 in Chapter VII of the Charter allows a nation to use force in self-defense if an armed attack occurs against it or an allied country, and the UN Security Council is authorized to employ force to counter threats to breaches of international peace. One of the main ideas of R2P is that there are just causes that justify the use of force beyond the two exemptions of the UN Charter.

One of the most important achievements of the Responsibility to Protect is that it is supposed to have overcome the dichotomy between state-sovereignty and non-intervention on the one hand and the responsibility the international community has to intervene in cases of mass violations of human rights on the other. The 2001 ICISS report and Resolution 1973 are both a fine example of balancing these two seemingly contradictory positions. R2P attempts to overcome the North-South sphere debates over humanitarian interventions in the 1990s and builds a broad consensus on how the international community can deal with cases of mass atrocities occurring in a given sovereign nation. R2P also attempts to strike a balance between unilateral interference and institutionalized indifference.³⁸¹ It will help the world to be better prepared normatively, organizationally and operationally to meet the recurrent challenge of

³⁸⁰J. Sarkin, “Dealing With Africa’s Human Rights Problems: The Role of the United Nations, the African Union and Africa’s Sub-Regional Organizations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect,” Journal of African Law, April 2009 P.4

³⁸¹ R. Thakur, Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism

external military intervention wherever and whenever it arises again, as assuredly it will.³⁸²

In the Libyan crisis, Muammar Gaddafi's government allegedly committed war crimes and crimes against humanity in response to peaceful civilian protest, crimes which fall under the R2P framework. Muammar Gaddafi called on his supporters to go out and attack protestors, which he labeled "rats" and "cockroaches" and to "cleanse Libya house by house". Gaddafi expressed clear intent to continue committing massive human rights violations by announcing to Benghazi residents that his forces would show "no mercy" to rebels. Thus, the debate among UN member States around the situation in Libya was not about whether to act to protect civilians from mass human rights violations but how to best protect the Libyan population. Beginning from mid February, a range of peaceful and coercive measures (diplomatic incentives, asset freezes, travel bans, arms embargo, and expulsion from intergovernmental bodies, ICC referral) were adopted by an array of international and regional actors with unprecedented speed and decisiveness. On February 26, 2011, the United Nations Security Council stated in resolution 1970 that "widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity." The resolution referred to "incitement to hostility and violence against the civilian population made from the highest level of the Libyan government." There was condemnation, from African Union, Arab League, Gulf Cooperation Council, European Union, Security Council, the Human Rights Council, and General Assembly.

Gaddafi's lack of compliance with Resolution 1970, and his further attacks on civilians, then led to Resolution 1973 (of 17 March 2011), which calls for using "all necessary means" to protect civilians and civilian-populated areas from attack, and for that purpose authorizing a no-fly zone over Libya and air strikes to protect civilians, this was likely due to the influence that regional organizations had in supporting stronger measures. This means preventing attacks on towns and cities, whether those attacks are directed at civilians or even at what would ordinarily be legitimate military targets. The adoption

³⁸² Ibid

Resolution 1973 and the ensuing military intervention in Libya have been widely hailed as events of historic importance.

Given the events in Libya, many have questioned whether the concept of R2P was used not only to protect civilians, but also to fulfill a desire, from the beginning of the mission, for regime change. As it was, UNSCR 1973 passed with only 10 votes and 5 abstentions. No Permanent Member used its veto, but the commentary surrounding the resolution's enactment suggests significant worry about the potential abuse of military force for just this kind of greater political purpose. Here, even if the speed with which the international community responded to the crisis in Libya must be applauded, there have been differing argument on NATO's interpretation and implementation of Resolution 1973.

Some argue that the coalition forces declared Gaddafi's removal of power to be a precondition for a ceasefire, which led to calls that NATO was not acting to protect civilians, but rather was pursuing regime change. China and especially Russia voiced regrets over having abstained Resolution 1973, claiming that the NATO forces had overstepped their mandate for enforcing a no-fly zone, enforcing regime change. Both countries complained that they had been deceived by the West, claiming that the NATO allies were converting R2P into an instrument of regime change. Indeed it was very difficult to enforce the very intents and objectives of Resolution 1973, because it was obvious enough that Gaddafi was prepared to continue to slaughter his people in a civil war to retain power.

Thus, even if the truth about the NATO intervention in Libya may be very well, similarly by moving beyond Resolution 1973 and choosing the side of the National Transitional Council, the intervening forces have indeed stopped Gaddafi from marching on Benghazi and saved thousands of lives.

Like the Libyan crisis, more dramatic action to protect civilians is needed in Syria. It has become obvious that non-military measures, including diplomatic efforts, economic sanctions, travel bans, and arms embargo, have failed to halt the threat of mass atrocities. Certainly, it is clear that military intervention and more robust measures are needed to

halt President Assad's belligerent attacks on civilians. Rhetoric, even the harsh words of condemnation, could not stop or prevent Al-Assad and his regime from murdering numerous innocent civilian.

RECOMMENDATIONS

Responsibility to protect seeks to fill the vacuum between legality and legitimacy in the international community's interventions with the objective of protecting human rights in extreme circumstances. It is about protecting civilians from genocide, war crimes, crime against humanity and ethnic cleansing with a range of measures including military. However, the lack of clear codified criteria for military intervention (the set of criteria proposed by the ICISS report "right authority, just cause, right intention, last resort, proportional means, reasonable prospect," have not been expressly adopted by the 2005 World Summit Outcome Document) could be abused by great powers to legitimize special interest driven interventions. The criteria set forth by the ICISS provide the best solution to refocusing the R2P mandate and its implementation. Under these criteria, the international community can honor state sovereignty, while still safeguarding citizens from mass human rights violations. Therefore, R2P needs to be substantiated with a set of internationally codified criteria or at least widely accepted criteria help to restrain the abuse of R2P by great powers or narrow down whom, under which circumstances, and with which means is obliged to intervene and it provides a basis for a broad international consensus that enhances the crucial legitimacy for interventions.

Though the ICISS report and the 2004 High Level Panel Report provide guidelines on how a new R2P concept should be operationalised, there is still much to be done to clearly define what is and what is not part of R2P. It is necessary to make a distinction between the situations that are responsibility to protect cases and the ones that are not, and it is also necessary to distinguish the responsibility to protect cases that had an international response based on the doctrine with a Security Council resolution from the cases that did not. It must be clear about the goals to be achieved by an intervention. An authorizing UN Security Council resolution must not only clearly outline what the specific goals are, but also importantly, clarify what they are not.

The advocates of R2P must get away from the rhetoric of ‘democracy’ versus ‘dictators’. R2P is not about the pros and cons of different governance structures; it is about the prevention of human catastrophe, regardless of political ideology. Many non-democratic States want to support the concept, but such terminology creates an unnecessarily political and ideological environment. Since R2P is the way forward for a new legal regime for humanitarian forceful intervention, there is need for more to be done for it to become a legally binding norm of international law.

It is a great danger that the selective appliance of R2P will create double standards, undermining the legitimacy of the concept. Why intervention in Libya and not in Syria, Yemen, Bahrain and other countries? The selective application of R2P could prejudice the consolidation of this principle in international law. Acting in one crisis while leaving another aside will raise concerns over double standards. Thus, in each case the UNSC must be argued comprehensibly if it qualifies as a R2P case or not. Otherwise, the values on humanitarian intervention, as advocated by the R2P are not so widespread and dominant in the international community that they trump all other military, socio-economic and political interests.

The UN Security Council must provide clear leadership in protecting civilians affected by conflict through acting consistently to protect civilians, particularly when the authorizing the use of force, ensuring that such authorization is based on a clear articulation of threats and risks to civilians, and indicating how the proposed actions will minimize and address such threats. Permanent members of UN Security Council must renounce the use of their veto when the Council is discussing situations of grave protection of civilian concern, including actual or incipient war crimes, crimes against humanity, ethnic cleansing, and genocide.

Even if every crisis situation is unique and requires a different response according to the threat of violence and the needs of the populations, there should not be silence in the face of mass human rights violations. The controversy over the response to the crisis in Libya resulted in a prolonged silence in the face of mass atrocities being committed in Syria,

particularly in the Security Council from South Africa, India, Brazil, China and Russia, who specifically cited Libya as cause for concern over permitting non-military measures in Syria. The NATO mission in Libya and the challenges faced within the country must not deter member States and regional organizations from condemning and responding to mass human rights violations anywhere.

Finally, in the case of Syria, substantial and well-documented evidence from multiple sources indicates that the government is committing atrocity crimes that, the Security Council must authorize the use of force to prevent Syria's continuing atrocity crimes, either acting pursuant to R2P or on the basis that Syria represents a threat to the peace and security of the region.

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