

# Responsibility to Protect and its applicability in Libya and Syria

Erfaun Norooz

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**Abstract:** The evolved human rights law has called for a shift international law with regard to humanitarian intervention. In the post-Cold War atmosphere, growing global awareness of human rights violations have captured the attention of the international community as never before, and the issue of intervention for human protection purposes has turned into a serious matter of contention. Consequently, humanitarian intervention has undergone a transformation. The doctrine of Responsibility to Protect (R2P) is the outcome of several years of diplomatic negotiations about how and under what circumstances the international community has the right to intervene in another state to protect citizens. This has caused considerable controversy and has attracted much attention in recent years. The main topic of my thesis is Responsibility to Protect from Libya to Syria. To this end, I will explore the role of the R2P principle with regard to the current challenges. I will particularly apply R2P to the recent case of Libya and the current situation in Syria. The concerns over the use of force based on Resolution 1973 in Libya have entangled and tarnished the R2P doctrine's reputation. Importantly, the invocation of R2P in Libya has had adverse implications by reacting to the bloodshed in Syria and this will affect the future of R2P. The intervention in Libya undoubtedly managed to save many civilian lives. Regrettably, the international community has so far wavered to intervene in Syria. There are many throughout the world who wonder why has there not been a humanitarian intervention in Syria under the R2P doctrine. Therefore, I will deal with this question and analyze whether the case of Syria warrants the application of the R2P principle, and if it does, what reasons have kept it from being enforced.

**Keywords:** Human rights, Responsibility to Protect (R2P), humanitarian intervention, Arab Spring, NATO, use of force.

## I. Introduction

It has taken a gloomily long time for the idea to take hold that mass victimization and gross human rights violations are the world community's concern. In fact, the evolved human rights law has called for a shift international law with regard to humanitarian intervention<sup>1</sup>. In the post-Cold War atmosphere, growing global awareness of human rights violations have captured the attention of the international community as never before, and the issue of intervention for human protection purposes has turned into a serious matter of contention. Consequently, humanitarian intervention has undergone a transformation. Many demands for intervention<sup>2</sup> have so far been made, some of them were met and others not<sup>3</sup>. The various reactions to the crises of 1990s such as Rwanda, Somalia, Bosnia and Kosovo necessitated a timely collective action. In reaction to this, the International Commission on Intervention and State Sovereignty (ICISS) came into existence. The publication of its report was in response to the following question posed by the Secretary –General of the United Nation, Kofi Annan in his Millennium Report: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica- to gross and systematic violations of human rights that offend every precept of our common humanity?"<sup>4</sup>

The doctrine of Responsibility to Protect (R2P) is the outcome of several years of diplomatic negotiations about how and under what circumstances the international community has the right to intervene in another state to protect citizens. This has caused considerable controversy and has attracted much attention in recent years.

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<sup>1</sup> Gareth Evans, 'The Responsibility to Protect after Libya and Syria' (2012) available at: <http://www.gevans.org/speeches/speech476.html>, accessed on: 12 August, 201.

<sup>2</sup> For reasons of brevity, hereinafter, humanitarian military intervention will be referred to as humanitarian intervention.

<sup>3</sup> UN, UN Summit Document, UN doc. A/Res./60, UN Summit Outcome Document, (24 October 2005)

<sup>4</sup> Kofi Annan, 'We, the peoples': The Role of the United Nations in the 21st Century' (New York: United Nations, 48 2000) available at: <http://www.unmillenniumproject.org/documents/wethepeople.pdf> accessed on: 18 August, 2013.

The doctrine of R2P tends to alter the relationship between sovereignty and the responsibility of states to their citizens as well as the duties of the international community<sup>5</sup>.

From 2001 to 2005, the R2P principle developed from a concept promoted by an independent commission of experts and was approved by the UNGA. Thakur and Weiss (2009) argue that R2P "is possibly the most dramatic normative development of our time-comparable to ...Nuremberg...and the 1948 Convention on Genocide."<sup>6</sup> The principle of R2P<sup>7</sup> has been under fire in the literature. The growing criticisms are focusing on "state sovereignty the anxiety of imperialistic oppression of western values on the rest of world, the anxiety for extension of the number of military interventions and dependence on the political will of states."<sup>8</sup>

The main topic of my thesis is Responsibility to Protect from Libya to Syria. To this end, I will explore the role of the R2P principle with regard to the current challenges. I will particularly apply R2P to the recent case of Libya and the current situation in Syria. The concerns over the use of force based on Resolution 1973 in Libya have entangled and tarnished the R2P doctrine's reputation. Importantly, the invocation of R2P in Libya has had adverse implications by reacting to the bloodshed in Syria and this will affect the future of R2P.

The Arab Spring reached Syria in March 2011. At this time, the global community in the Geneva II Middle East peace conference was actively (discussing?) how to handle the long-running civil war in Syria. Serious human rights violations, committed primarily by the Syrian Ba'ath regime, but also by the opposition, can be found across Syria. The death toll in Syria's civil war has risen to at least 130,000 and more than 3 million Syrians have so far fled their country<sup>9</sup>.

The intervention in Libya undoubtedly managed to save many civilian lives. Regrettably, the international community has so far wavered to intervene in Syria. There are many throughout the world who wonder why has there not been a humanitarian intervention in Syria under the R2P doctrine. Therefore, I will deal with this question and analyze whether the case of Syria warrants the application of the R2P principle, and if it does, what reasons have kept it from being enforced.

## A. Research question

Considering the UN's intervention in Libya and the current situation in Syria, what lessons can be drawn in reference to the R2P principle?

## B. Structure

My thesis will be divided into five analytical chapters. My first chapter aims to contextualize the background, historical analysis, formulation and development of R2P. The next chapter will focus on the discussion of the legal basis of state sovereignty, non-intervention, the prohibition of the use of force and humanitarian intervention with a stress on its ties to R2P.

I will also clarify the link between international law and the R2P doctrine. The following chapter will be dedicated to the implementation of R2P, and for this purpose I will study and evaluate the R2P cases/situations in which the Security Council has previously played a role. Rwanda, Srebrenica and Darfur cases will be discussed to show the importance of R2P in the past. The fourth and final chapters will analyze two cases, Libya and Syria, in order to assess whether the international community acted in accordance with the R2P principle or if each case is looked at individually, and has yet to agree upon a common pattern applicable to all cases. In addition, I will make a comparison between the intervention in Libya and the inaction in Syria, while discussing the future prospects of R2P. I will conclude that the R2P principle is not appropriate to apply to all cases and the Syrian case definitely presents a case of R2P even though three elements; Right authority, Right intention and Rea-

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<sup>5</sup> Supra note 1.

<sup>6</sup> Ramesh Thakur and Thomass Weiss, 'R2P from idea to norm-and action? Global Responsibility to Protect' (2009) Vol.1, No.1, 23.

<sup>7</sup> I will use The R2P doctrine and the R2P principle interchangeably in my theses.

<sup>8</sup> Simon Chesterman, *Just war or just peace? Humanitarian intervention and international law*, (Oxford University Press 2011) 134.

<sup>9</sup> UNHCR, 'Syria regional Refugee Response' (10/1/2014), available at <http://data.unhcr.org/syrianrefugees/regional.php> accessed on: 11 August, 2014.

sonable prospects; are missing. Additionally, strong objections from some countries in the world community owing to a combination of political interests and geopolitics, coupled with a general anti-interventionist feeling, have prevented the application of R2P in Syria.

## C. Methodology

I will consult a wide range of primary and secondary sources to answer my research question as follows: Legislation (UN documents, the Security Council's resolutions, World Summit Documents etc.); the websites of international organizations; case law of the ICJ; appropriate cases (Rwanda and Bosnia...) amongst others. I will also interview several senior diplomats in Permanent Missions to the United Nations in Vienna.

## II. The road to R2P

### A. The International Commission on Intervention and State Sovereignty, 2001

After the Iraq and Kosovo crises, the credibility of the UNSC was questioned and the international community started to lose faith in the UN system. The former UN Secretary-General, Kofi Annan's priority was to restore the UN's credibility. He had frequently challenged the GA to find a solution. In 1999 he asked the General Assembly in his speech, "If humanitarian intervention is, indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that offend every precept of our common humanity?"<sup>10</sup>

In 2000, Kofi Annan challenged the international community to come up with a new approach for humanitarian intervention<sup>11</sup>. Following his speech, several member states launched a debate on the "use of force in defense of human rights protected in the UN Charter and customary international law."<sup>12</sup> Many member states made critical comments on the abuse of the right to intervene. On the other hand, Kofi Annan stressed that sovereignty of states do not have to be considered as "a shield for gross human rights violations". The 'right to intervention' must be viewed as a 'Responsibility to Protect'<sup>13</sup>. In April 2000 Annan seriously challenged the Millennium Summit, stating that "Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle-not even sovereignty-can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can."<sup>14</sup>

A ray of hope was seen with the Canadian government which was determined to face the challenge issued by Kofi Annan. The International Commission on Intervention and State Sovereignty (ICISS), sponsored by the Canadian government, was established in September 2000<sup>15</sup>. The Commission was required to tackle all aspects of the debate. The most complete treatment of the state sovereignty and intervention principles was seen in the ICISS report. In 2001 the ICISS came up with its report, named 'The Responsibility to Protect'<sup>16</sup>. The ICISS re-categorised sovereignty as responsibility rather than control. Evans from Australia co-chaired the ICISS. He explains that the "The R2P means that sovereign states have a R2P their own citizens from avoida-

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<sup>10</sup> Former Secy. Gen., Kofi Annan, 'Millennium Report 2000' (2000) 48 available at: <http://www.un.org/millennium/sg/report/> accessed on: 14 August, 2014.

<sup>11</sup> Nick Wheeler, 'Legitimate Humanitarian Intervention: Principles and Procedures' (2001) 21 *MelbJIntLaw*, Melbourne Journal of International Law, 550.

<sup>12</sup> *Ibid.*

<sup>13</sup> Report of the Secretary-General, Millennium Report of the Secretary-General of the United Nations, 'We the peoples: the role of the United Nations in the twenty-first century', U.N Doc A/54/20 (2000).

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

<sup>15</sup> Gareth Evans, 'From humanitarian intervention to the responsibility to protect' (2006) 24 *Wiscinsin International Law Journal*; No: 3, 708-709.

<sup>16</sup> It was a 90 page report and a 400 page supplementary volume, available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> accessed on: 15 July 2014.

ble catastrophe like from mass murder, rape and from starvation. However, when they are unable to do so, the R2P these citizens must be taken over by the broader community of states."<sup>17</sup>

The commission put stress on 'sovereignty as responsibility' and simply stated that state sovereignty indicates responsibility, and the core responsibility for the protection of its citizen rests with the state per se. If a state shirks its duty, the international community has to take on the responsibility<sup>18</sup>. The ICISS borrowed the formula 'sovereignty as responsibility' from Deng (1996) who was of the belief that "sovereignty should no longer be seen as a protection against external interference in a state's internal affairs. Rather, the state must be held accountable to domestic and external constituencies."<sup>19</sup>

Indeed, the commission proposed dual responsibilities for the states, both internally and externally. States are duty-bound to shoulder the responsibility of "the safety, life, and welfare of their citizens. However, the commission stressed that at the same time states bear an external responsibility with regard to the international community through the United Nations."<sup>20</sup> The ICISS determined three situations in which the external responsibility of the states comes into play:

- "When a particular state is clearly either unwilling or unable to fulfill its responsibility to protect";
- "When a particular state... is itself the actual perpetrator of crimes or atrocities" or
- "Where people living outside a particular state are directly threatened by actions taking place there."<sup>21</sup>

Importantly, the ICISS placed stress on the significance of the preventive aspect as the single most essential element of the R2P principle. Furthermore, according to the report, the military intervention on human protection grounds must be considered only in exceptional circumstances<sup>22</sup>. The military intervention would only be justified if "serious and irreparable harm occurring to human beings, or imminently likely to occur."<sup>23</sup>

The Report has articulated the R2P principle around 3 key elements: the responsibility to prevent, the responsibility to react and the responsibility to rebuild<sup>24</sup>. Regarding the legitimacy of intervention, the ICISS developed several core criteria which were deemed to apply to 'both the Security Council and member states; namely the just cause threshold principle, the precautionary principle, right authority and outlined operational principles<sup>25</sup>.

The commission put forward the following precautionary principles to address the legality of intervention:

- "Right intention: The primary purpose of the intervention must be to halt or avert human suffering
- Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored
- Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.
- Reasonable prospects: There must be a reasonable chance of success."<sup>26</sup>

Above all, the commission clearly stated that the UNSC is the only body to authorize military intervention for human protection purposes<sup>27</sup>. However, the ICISS report did not exclude the potential intervention by the UNGA, regional organizations or coalitions of the states to protect citizens in case of the UNSC's failure to act. The ICISS report managed to receive considerable support because it avoided taking the final position on the

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<sup>17</sup> Supra note 15.

<sup>18</sup> 'Report of the International Commission on Intervention and State Sovereignty' (2001) International Development Research Centre Ottawa 10.

<sup>19</sup> Francis Deng and et. al, *Sovereignty as Responsibility: Conflict Management I Africa*, (The Brookings Institution, Washington D.C. 1996).

<sup>20</sup> Carsten Stahn 'Responsibility to protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *The American Journal Of International Law*, No 1.

<sup>21</sup> Supra note 18, 17.

<sup>22</sup> Supra note 18, XII.

<sup>23</sup> Ibid, XII.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Supra note 18, XII.

<sup>27</sup> Ibid.

issue of the legality/legitimacy of unauthorized intervention<sup>28</sup>. However, the report was not embraced enthusiastically by all member states. Russia and China worked to prohibit unauthorized interventions without exception. Although, the UK, U.S. and France were supportive, they were concerned about "agreement on criteria would not necessarily produce the political will and consensus required to respond effectively to humanitarian crises."<sup>29</sup>

In the view of Evans (2008) the report made four valuable contributions towards humanitarian intervention: "A new way of talking about humanitarian intervention; it insisted upon a new way of talking about sovereignty; it clearly spelled out what responsibility to protect means and finally it provided guidelines for military intervention."<sup>30</sup>

## B. United Nations High Level Panel on Threats, Challenges and Change, 2004

In late 2003, Former UN Secretary-General, Kofi Annan in pursuit of developing the R2P principle, set up the High Level Panel on Threats, Challenges and Change to respond to the recent developing challenges<sup>31</sup>. The mandate of the panel was to analyze the current and future threats to peace and security and recommend practical measures. The panel released a 141 page report titled 'A More Secure World: Our Share Responsibility' in December 2004. The report adopted a human security approach and made 100 recommendations on a broad spectrum of issues<sup>32</sup>. The report viewed the R2P doctrine as a method of making the collective security system stronger. In the panel's view the notion of R2P was rather ambiguous<sup>33</sup>. Although the panel identified a particular duty of every state to protect its citizens<sup>34</sup>, it simply stated that "responsibility to protect of every State when it comes to people suffering from avoidable catastrophe- mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease."<sup>35</sup>

Scholars have noted that the mention of the responsibility of 'every state' is open for a wide range of interpretation. It could be interpreted as "a simple reminder of the *erga omnes* nature of the international obligations (e.g., in cases of genocide, torture, and grave breaches of the Geneva Conventions) that give rise to the responsibility to protect. However, the text also allowed for a broader reading that endorsed a wider concept of responsibility under which the responsibility of the host state shifts to every other state in cases where the former is unable or unwilling to act."<sup>36</sup>

Moreover, the panel's report expanded on the 5 basic criteria<sup>37</sup> of legitimacy for the use of force, clearly using the language mentioned in the ICISS report<sup>38</sup>. In addition, the panel's recommendation underlined that "the task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has."<sup>39</sup>

## C. The report of Secretary-General, 2005

The former Secretary-General, Kofi Annan in his report in 2005 highlighted that "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

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<sup>28</sup> Supra note 20, 104.

<sup>29</sup> Alex J. Bellamy 'Whither the Responsibility to Protect, Humanitarian Intervention and the 2005 World Summit' (2006) 20 Ethics & International Affairs (2) 144.

<sup>30</sup> Supra note 15.

<sup>31</sup> High Level Panel on Threats, Challenges and Change, A More Secure World: Our Share Responsibility, 2 December 2004, UN Doc A759/565 (2004).

<sup>32</sup> Gareth Evans, The Responsibility to Protect: Ending Mass Atrocity Crime Once and For All, (Washington DC, Brookings Institution 2008) 45.

<sup>33</sup> Supra note 20, 105.

<sup>34</sup> Supra note 31, paras. 29-30.

<sup>35</sup> Ibid, para. 201.

<sup>36</sup> Supra note 20, 105.

<sup>37</sup> Right intention, last resort, proportional means, reasonable prospects and right authority.

<sup>38</sup> Supra note 31, recommendation 106-107.

<sup>39</sup> Supra note 31, recommendation 53-57.

responsibility to protect, and, when necessary, we must act on it."<sup>40</sup> Kofi Annan in his statement to General Assembly invited the international community to "embrace the principle of the Responsibility to Protect, as a basis for collective action against genocide, ethnic cleansing and crimes against humanity-recognizing that this responsibility lies first and foremost with each individual state, but also that, if national authorities are unable or unwilling to protect their citizens, the responsibility then shifts to the international community, And that, in the last resort, the United Nations Security Council may take enforcement action according to the Charter."<sup>41</sup>

Furthermore, Annan laid particular stress on the necessity to put the R2P principle into practice through peaceful means. The international community's responsibility to protect became a responsibility to "use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations."<sup>42</sup> Importantly, in line with the commission and panel, humanitarian intervention was portrayed as an ultima ratio measure that, if adopted, must be put into practice by the UNSC<sup>43</sup>. Moreover, the report touched on the 5 basic criteria of legitimacy for the use of force, mentioned in the ICISS report. Therefore, in comparison to the commission and panel, there was not any substantive distinction regarding humanitarian intervention<sup>44</sup>.

## D. The Summit Outcome Document, 2005

In 2005 more than 150 states met at the World Summit<sup>45</sup> to commemorate the sixtieth anniversary of the UN. Due to the effort of the former Secretary-General, Kofi Annan and the R2P advocates, the R2P doctrine grew into an important topic at the UN Millennium Summit, and negotiations eventually resulted in the UN World Summit Outcome Document<sup>46</sup>. Some states argued that the issue was too ambiguous and that there was a high potential for abuse, while others questioned the legality of R2P<sup>47</sup>. The Summit unanimously adopted paragraphs 138-140 of the R2P principle. The Summit's outcome document was later adopted as a General Assembly resolution. Of note, the three paragraphs were positioned in Sect. IV on Human Rights and Rule of Law, and not Sect. III on Peace and Collective Security<sup>48</sup>.

It is worth quoting the whole three paragraphs; paragraphs 138-140 of the World Summit's Outcome Document declared that:

### 1. Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

"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 of the United Nations, to help protect populations from 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 accord-

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<sup>40</sup> "Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights For All", General Assembly 59th Session, A/59/2005, (March 21, 2005).

<sup>41</sup> Ibid, para 133.

<sup>42</sup> Ibid, para 135.

<sup>43</sup> Ibid, para 135.

<sup>44</sup> Thomass G. Weiss, *Humanitarian Intervention* (Polity 9 April 2012) 2nd ed, 115..

<sup>45</sup> Alex J .Bellamy, 'Whither Responsibility to Protect? Humanitarian Intervention and 2005 World Summit' (2006) 20 *Ethics and International Affairs Issue*, 146.

<sup>46</sup> Ekkehard Strauss, 'A bird in the hand is worth two in the bush-On the assumed Legal nature of Responsibility to Protect' (2009) 1, *Issue 3*, 293-300.

<sup>47</sup> Richard H. Cooper, Juliette Voinov KohlerKohler, *Protect: The Global Moral Compact for the 21st Century*, (New York: Palgrave MacMillan 2009) 184-188.

<sup>48</sup> Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (1 Jan 2007) 101 *The American Journal of International Law*, No. 1, 104-106.

ance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic 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 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.<sup>49</sup>

Although the three paragraphs did not impose any legal obligation,<sup>50</sup> the mention of the R2P doctrine in the outcome Document was a major breakthrough in international law<sup>51</sup>. Notably, besides the three paragraphs cited above, some other commitments show the same commitment to the R2P principle. For instance, paragraph 133 declared that: "... Safeguarding the principle of refugee protection and to upholding our responsibility in resolving the plight of refugees, including through the support of efforts aimed at addressing the causes of refugee movement, bringing about the safe and sustainable return of those populations, finding durable solutions for refugees in protracted situations and preventing refugee movement from becoming a source of tension among states".<sup>52</sup> Contrary to the ICISS report, the R2P principles, which the member states have agreed to endorse, are narrow in scope and are limited to the application of R2P to four particular crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. Kuwali (2008) believes that the reason for this limitation is to reduce the potential for any abuse of the right to stage humanitarian interventions<sup>53</sup>. In addition, the R2P 2005 made no reference to regional bodies and paragraph 139 insists on the key role of the UNSC. Use of force may be carried out only if authorized by the UNSC and when other, peaceful and diplomatic means used under Chapters VI and VIII of the UN Charter are unlikely to succeed<sup>54</sup>. Furthermore, some commentators argue that there was less stress on the Responsibility to Rebuild or reconstruct rather than Prevention in the R2P 2005<sup>55</sup>. Finally, the R2P 2005 did not endorse the use of ICISS' criteria for the use of force; instead, it left the door open to responses only on a 'case by case basis'<sup>56</sup>.

## E. UNSG R2P Reports 2009-2010 the three Pillars approach

The UNSG has issued two major reports on R2P: in 2009 the report on implementing the Responsibility to Protect<sup>57</sup> and in 2010 the report on Early Warning Assessment and the Responsibility to protect<sup>58</sup>. The 2009 report has made a valuable contribution to turning R2P into an implementable concept. It did not intend to abandon the R2P 2005 concept. As Ban Ki-Moon stated: "Is not to reinterpret or renegotiate the conclusions of the World Summit but to find ways of implementing its decisions in a fully faithful and consistent manner."<sup>59</sup>

In his report, the Secretary General outlined a three pillar strategy as following:

1. Pillar One: The Protection Responsibilities of the State
2. Pillar Two: International assistance and capacity building
3. Pillar Three: Timely and decisive response

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<sup>49</sup> UN, Un Summit Document, UN doc, A/Res./60, UN Summit Outcome Document, 138-140 (24 October 2005)

<sup>50</sup> The Summit Outcome Document was endorsed by the General Assembly by resolution that has a non-binding nature. Nevertheless, GA resolutions are considered as valuable contribution to the evolution of international law. See: D. Gierycz, 'The Responsibility to Protect. A Legal and Rights-based Perspective' in Global Responsibility to Protect' Special Issue: R2P and International Law (2010) 2 No. 3, 250-253.

<sup>51</sup> Supra note 46, 292-293.

<sup>52</sup> Supra note 49, 133.

<sup>53</sup> Dan Kuwali, 'The Conundrum of Conditions FOR Intervention under Article 4 of the African Union Act' (2008) African Security Review, 92.

<sup>54</sup> Alex J. Bellamy, 'The Responsibility to Protect towards a living Reality', (April 2013)A report written for the United Nations Association-UK, 11.

<sup>55</sup> Michael Newman, 'Revisiting the Responsibility to Protect' (2009) 80The Political Quarterly, Issue 1, 98.

<sup>56</sup> Supra note 45, 167.

<sup>57</sup> Supra note 46, 94.

<sup>58</sup> Supra note 49, 167.

<sup>59</sup> Secretary-General, "UNSG Report: Implementing the Responsibility to Protect" (2009).

The three pillars switched the emphasis of the R2P doctrine to different approaches<sup>60</sup>. Notably, military intervention does not play a crucial role<sup>61</sup>. The R2P of ICISS regarding the Responsibility to Prevent is divided into first two pillars—the state and the international community are asked to carry out the Responsibility to Prevent. In addition, the Responsibility to Rebuild loses its significance and mentioned concisely under the second pillar, the peacebuilding discussion<sup>62</sup>. The Responsibility to React is under the umbrella of the third pillar, although there is a tangible stress on the particular measures rather than use of force<sup>63</sup>. I will briefly outline the three pillar strategy.

## 1. Pillar One: The Protection Responsibilities of the State

This pillar reflects the responsibility of the state to protect its populations from genocide, war crimes, ethnic cleansing and crime against humanity; as it was clearly set out in the paragraph 138 of the 2005 WSOD<sup>64</sup>. That duty of the state is the most essential responsibility of the state which has its origin in state sovereignty.

## 2. Pillar Two: International assistance and capacity building

In line with paragraphs 138 and 139 of the 2005 WSOD, the second pillar of 2009 report considers the commitment of international community to help and empower states to fulfill their R2P obligations by providing measures such as “granting development assistance, aiding states’ security sectors, and building mediation and dispute resolution capacities”.<sup>65</sup>

## 3. Pillar Three: Timely and decisive response

The third pillar, in line with paragraph 139, is a well-timed and collective reaction by the international community<sup>66</sup>. The third pillar refers to the Chapter VI (peaceful measures) and VII (the coercive use of force) when a state clearly neglects to afford protection and to fulfill its obligations in case of mass atrocities<sup>67</sup>.

In the next chapter, I will focus on humanitarian intervention based on principle of sovereignty, principle of non-intervention and the prohibition of use of force. Then I will discuss about the legality of humanitarian intervention and compare R2P with humanitarian intervention. Finally, I will shed light on the legal status of R2P.

## III. Humanitarian Intervention

The evolution from humanitarian intervention to the notion of R2P has been a “fascinating piece of intellectual history”.<sup>68</sup> Humanitarian intervention has found its place as a controversial premise within the literature of international relations and international law since the end of the Cold War<sup>69</sup>. The controversy occurs when humanitarian intervention is at odds with the principles of sovereignty, non-intervention and the prohibition of the threat, or use of force<sup>70</sup>. The UN Charter carries articles concerning the principle of sovereign equality of states such as Article 2 (1). The notion of sovereignty is connected to the non-intervention principle enshrined in Arti-

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<sup>60</sup> Secretary-General, “2010 Report: Early Warning, Assessment and the Responsibility to Protect”.

<sup>61</sup> Supra note 55, 2.

<sup>62</sup> David Chandler, R2P or Not R2P? More State building, Less Responsibility, (Global Responsibility to Protect 2010)161-166.

<sup>63</sup> Jennifer Welsh, Turning Words into Deeds? The Implementation of the Responsibility to Protect, (Global Responsibility to Protect 2010)162-164.

<sup>64</sup> Ibid.

<sup>65</sup> Supra note 59, para. 38.

<sup>66</sup> Supra note 55, para. 11.

<sup>67</sup> Supra note 59, Para. 56.

<sup>68</sup> Gareth Evans, “From humanitarian intervention to the responsibility to protect”, (2006) 24 Wisconsin International Law Journal, No.3, 704.

<sup>69</sup> Fernando R. Teson, ‘The Liberal Case for Humanitarian Intervention’ in J. L. Holzgrefe and R. O. Keohane ed., Humanitarian Intervention: Ethical, Legal, and Political Dilemmas (2003) Cambridge University Press, New York 110.

<sup>70</sup> Ibid.



cle 2 (7) <sup>71</sup>. The raising prominence of humanitarian intervention in some super powers and intergovernmental organizations policy is an evolution with a profound implication which have been the fruit of growing global awareness of human rights and responsibilities. Several humanitarian interventions occurred during the Cold War both with and without the UN's consent. The 1990s in particular was characterized by many scholars as a 'decade of humanitarian intervention'. Humanitarian intervention has a troubled past. Whether it is the failure to act in Rwanda, the half-hearted and delayed response in Darfur, the haphazard use of force in Bosnia, or non-UN-authorized humanitarian intervention in Kosovo, "there is a deep division about the morality, efficacy and consequences of humanitarian intervention." <sup>72</sup>

## A. Defining Humanitarian Intervention

There are a number of definitions of humanitarian intervention both classic and modern. For instance, the Encyclopedia of Public International Law (1995) defines humanitarian intervention in the classical sense as follows: "Humanitarian intervention may be seen in any use of armed force by a state for the purpose of protecting the life and liberty of its own nationals or those of third states threatened abroad, although this type of intervention is mostly discussed as an aspect of self-defence."<sup>73</sup> According to Robertson (2004), modern humanitarian intervention could be defined as the following: "A doctrine under which one or more states may take military action inside the territory of another state in order to protect those who are experiencing serious human rights persecution, up to and including attempts at genocide."<sup>74</sup> Some points such as the use of force, lack of permission of the targeted state, and protection of the nationals of the targeted state from gross human rights violations, are common among most definitions<sup>75</sup>. In addition, both the classic and modern definitions distinguish between humanitarian intervention and other kinds of military aggression owing to its "purpose and content"<sup>76</sup>. One has to differentiate between humanitarian intervention and humanitarian aid, although these terms are sometimes used interchangeably. The latter is not at odds with the principle of state sovereignty, and it necessitates the permission of the host state<sup>77</sup>.

For the purpose of this thesis, humanitarian intervention is defined as follows: "Forcible action by states to prevent or to end gross violations of human rights on behalf of people other than their own nationals, through the use of armed force without the consent of the target government and with or without UN authorization."<sup>78</sup>

## B. The principle of sovereignty

Prior to the birth of the R2P doctrine, the legality of international action against gross human rights violations was always open to debate. As previously highlighted, there has been a battle between sovereignty and human rights<sup>79</sup>. As ICISS report testifies: "External military intervention for humanitarian protection purposes has been controversial both when it has happened as in Somalia, Bosnia and Herzegovina and Kosovo as well as when it has failed to happen, as in Rwanda."<sup>80</sup> The advocates of the sovereignty principle have claimed that domestic events are not concerned with the international community. Indeed, humanitarian intervention has been on the horns of a dilemma of what the international community has to do when facing a struggle of inter-

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<sup>71</sup> United Nations, Charter of the United Nations, 1 UNTS XVI, (24 October 1945) available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 5 August 2013]

<sup>72</sup> Policy Analysis Brief, 'Sudan and the implications for Responsibility to Protect' (October 2009) The Stanley Foundation, 7.

<sup>73</sup> Peter Macalister-Smith ed. Encyclopedia of Public International Law (Netherlands: Elsevier Science B.V. 1995) 926.

<sup>74</sup> David Robertson, A Dictionary of Human Rights, 2nd edition (London, Europe Publications 2004)119.

<sup>75</sup> Hagar Taha, 'The failure to protect, again: a comparative study of international and regional reactions towards humanitarian disaster in Rwanda and Darfur' (22 April 2011) 9.

<sup>76</sup> Ibid.

<sup>77</sup> Martin Griffiths and T. O`Callaghan, International Relations: The Key Concepts (New York: Routledge, 2002) 145-146.

<sup>78</sup> Saban Kardas, 'Humanitarian Intervention: The evolution of the idea and practice' (June-July 2001) VI Journal of International Affairs, 2.

<sup>79</sup> Alex J. Bellamy, Responsibility to protect (Cambridge Polity Press 2009) 8-10.

<sup>80</sup> Supra note 18, vii.

national law requirement and moral perspectives<sup>81</sup>. The classic pronouncement of Max Huber in the 1928 *Island of Palmas case*<sup>82</sup> is one of the most noticeable descriptions of the principle of sovereignty, the jurist noted in his Award:

“Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.”<sup>83</sup>

Therefore, the principle of sovereignty is equal to independence. In fact, the only restrictions which states have to face are those limits of the international law to which the states have agreed. The principle of sovereignty (based on equality and independence) lies in the settlement of Westphalia of 1648. In accordance with the Westphalia Treaties’ notion of national sovereignty, states are not legally allowed to intervene in the domestic affairs of each other<sup>84</sup>. The principle of sovereignty exists at customary international law and the UN Charter and continues to be as an “essential component of the maintenance of international peace and security”.<sup>85</sup> In line with the terms of Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States: “The state as a person of international law should possess the following qualifications: (a) a permanent population, (b) a defined territory, (c) government and (d) capacity to enter into relations with the other states.”<sup>86</sup>

In this vein, The UNSC has reaffirmed its commitment to the above-mentioned criteria in a number of resolutions such as Resolution 1079 concerning the Croatia<sup>87</sup> (1996) and Resolution 1858 (2008) regarding Burundi<sup>88</sup>. However, state sovereignty is not unlimited. International law imposes considerable limits on state sovereignty. Firstly, the UN Charter highlights in chapter VII that sovereignty is not an obstruction to action taken by the UNSC regarding a threat to international peace and security. Secondly, state sovereignty is also restricted by customary and treaty obligations under international law. In particular, there are growing obligations in both the areas of human rights law and international humanitarian law, which impose serious obligations to protect people and property<sup>89</sup>; for example, the recognition of the concept of *erga omnes* obligations<sup>90</sup> by the ICJ in the *Barcelona Traction case*<sup>91</sup>.

Thirdly, various non-state participants, such as non-governmental organizations (NGOs) particularly in the field of international human rights law and international environmental law, have shown trends to restrain state sovereignty<sup>92</sup>. Moreover, it has been argued by many scholars that sovereignty cannot be used as a shield

<sup>81</sup> Anthea Roberts, ‘Legality VS Legitimacy: Can Use of Force be illegal but Justified?’ In A.P. E. Macdonald (eds.), *Human Rights, Intervention and the Use of Force* (2008) Oxford University Press 177-178.

<sup>82</sup> *Island of Palmas Case (or Miangas), United States v Netherlands, Award*, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration.

<sup>83</sup> United Nations, *Reports of International Arbitral Awards*, Vol. II, 827-871 (1948).

<sup>84</sup> Francis Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague, Kluwer, 1999) 26.

<sup>85</sup> *Supra* note 18, Supplement ICISS Report, 5.

<sup>86</sup> Montevideo Convention on Rights and Duties of States, League of Nations Treaty Series, Vol. 19, 165(1934). The Convention has recently been under fire by several scholars due to its lack of analytical room for developments, such as self-determination. See T. D. Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’, (1999) 37 Colum. J. Transnat’l L. 403, 435, 437, 449.

<sup>87</sup> UN Security Council, On the situation in Croatia Resolution 1079 (1996) Adopted by the Security Council at its 3712th meeting, on 15 November 1996, 15 November 1996, S/RES/1079 (1996).

<sup>88</sup> UN Security Council, Security Council resolution 1858 (2008) [on extension of the mandate of the UN Integrated Office in Burundi (BINUB)], (22 December 2008).

<sup>89</sup> Christopher M. Ryan, ‘Sovereignty, intervention and the law: A tenuous relationship of Competing Principles’ (1997) *Millennium: Journal of International Studies*, 76-78.

<sup>90</sup> It is widely believed that *erga omnes* obligations “lies outside the domestic sphere of a state and Article 2(7) cannot constitute a bar to intervention”. See Ramesh Thakur, “The responsibility to protect”, in Thakur, R., ed, *The United Nations Peace and Security, from Collective Security to the Responsibility to Protect* (2006) Cambridge, Cambridge University Press 246.

<sup>91</sup> *Barcelona Traction Case, Light and Power Company, Limited (Belgium v. Spain)*; Second Phase, International Court of Justice (ICJ), 5 February 1970, para 33.

<sup>92</sup> Miyoshi Masahiro, “Sovereignty and International Law”, Emeritus of International Law Aichi University, Japan, (2013) available at: [https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro\\_miyoshi\\_paper.pdf](https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf) . accessed on: 01 July, 2014.

against intervention. For instance, Lauterpacht in the sixth edition of Oppenheim's International Law stated as following: "When a State renders itself guilty of cruelties against and persecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible."<sup>93</sup>

Additionally, *the Lotus principle* or *Lotus approach* stresses that sovereignty is not absolute and states are bound by international law<sup>94</sup>. Thus, as the ICJ explained in *the Corfu Channel case*: "Sovereignty is no longer absolute but rather an institution which has to be exercised in accordance with international law."<sup>95</sup>

### C. The principle of non-intervention

Undoubtedly, the principle of non-intervention, as a part of customary international law, is well established in contemporary international law. The principle of non-interference protects the right of a sovereign state to exercise jurisdiction within its territory. Jurisdiction widely contains the authority of a state to govern people and property within its territorial boundaries. According to this principle (which is empowered by international law) other states have no right to intervene in the internal affairs of a sovereign state<sup>96</sup>.

The principle of non-intervention has been reaffirmed in several treaties such as the Charter of the Organization of American States and was also reaffirmed in the Constitutive Act of the African<sup>97</sup> Union<sup>98</sup>. The ICJ has also stressed the importance of the principle of non-interference and territorial sovereignty in *the Nicaragua*<sup>99</sup>, *Corfu Channel*<sup>100</sup> and *Democratic Republic of Congo v Uganda* cases<sup>101</sup>. The ICJ expounded in its judgment in the Nicaragua case as following: "The principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States."<sup>102</sup>

In addition, the Court concluded in its judgment of 2005 in *Democratic Republic of Congo v Uganda*: "Uganda had violated the sovereignty and also the territorial integrity of the DRC. Uganda's actions equally constituted interference in the internal affairs of the DRC and in the civil war raging there."<sup>103</sup><sup>103</sup> In addition to Article 2(7) of the UN Charter, the UNGA confirmed the principle of non-interference in its 1408th meeting on 21 December 1965 as follows: "No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, or cultural elements are condemned."<sup>104</sup> This provision laid stress on both the significance of state sovereignty and the principle of non-intervention, as well as emphasizing the importance of these two principles at the level of in-

<sup>93</sup> Lassa Oppenheim, INTERNATIONAL IAW 22-23, H. Lauterpacht ed., 6th ed, 280 (1974).

<sup>94</sup> *S.S. "Lotus" Case, France v Turkey*, Judgment, (1927) PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7th September 1927, Permanent Court of International Justice (historical) [PCIJ].

<sup>95</sup> *Corfu Channel Case (United Kingdom v. Albania)*; Assessment of Compensation, 15 XII 49, International Court of Justice (ICJ), 15 December 1949. Para 43.

<sup>96</sup> Sir Michael Wood, 'The Principle of NON-INTERVENTION in Contemporary International Law: NON-INTERFERENCE in a State's Internal Affairs used to be a Rule of International Law: Is it still?' Chatham House, 3. (2007) available at: <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il280207.pdf> accessed on: 15 March, 2014.

<sup>97</sup> The Act of the African Union departed from classic principle of non-intervention and its Article 4 (h) reads that "the right of the Union 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." See The Constitutive Act of the African Union, Art.4, July 11, 2002, OAU Doc. CAB/LEG/23.15 (2002).

<sup>98</sup> Chris Abbott, Rights and Responsibilities: Resolving the Dilemma of Humanitarian Interventions (Oxford Research Group 2005) 3.

<sup>99</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; Jurisdiction of the Court and Admissibility of the Application, International Court of Justice (ICJ), 26 November 1984.

<sup>100</sup> *Supra* note 95.

<sup>101</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*; Request for the Indication of Provisional Measures, International Court of Justice (ICJ), 1 July 2000.

<sup>102</sup> *Supra* note 99, para 205.

<sup>103</sup> *Supra* note 96, para 165

<sup>104</sup> General Assembly resolution 2131 (XX) entitled Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty was adopted on 21 December 1965, by a vote of 109 votes to none, with one abstention.

terstate relations. Moreover, there are multiple examples of resolutions such as Resolution 688 on Iraq in 1991; Resolution 1802 on Timor in 2008 and Resolution 1079 on the Republic of Croatia in 1996 are direct reference by the UNSC where the provisions of Article 2, paragraph 7 of the UN Charter were reaffirmed<sup>105</sup>.

## D. The prohibition of the threat or use of force

The prohibition of the use of force<sup>106</sup> is the most significant manifestation of the principle of non-intervention which is established in Article 2 (4) of the UN Charter as following: "All members in their international relations shall refrain from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the purpose of the UN."<sup>107</sup>

This provision explicitly forbids war and all forms of aggression. Almost the same wording was used in Resolution 573 in 1985 and 611 in 1988 regarding the conflict between Israel and Tunisia<sup>108</sup>. Furthermore, the UNGA Resolution 2625 (1970) on Principles of International Law concerning Friendly Relations requires that: "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized."<sup>109</sup>

In fact, the Resolution has reinforced the Article 2 (4) similar to several UNSC and UNGA resolutions<sup>110</sup>. For instance, the UNSC Resolution 748 reaffirmed that: "In accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every state has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force."<sup>111</sup> Due to *erga omnes* principle of law and *jus cogens* rule, the provision contains both the member states and non-member states<sup>112</sup>. In addition, Article 2 (6) requires that: "the Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."<sup>113</sup>

Thus, it calls for non-Member states for the sake of international peace and security. One has to note that Article 2 (4) does not completely forbid the use of force; rather it takes exception in definite situations. For

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<sup>105</sup> Supra note 96, 3.

<sup>106</sup> Many international documents have reaffirmed the principle of non-use of force. Some of them are listed as following: "Geneva Protocol of 1924 (it didn't come into force); Locarno Agreement of 1925; Briand-Kellogg Pact of 1928; the Litvinof (Moscow) Protocol of 1929; Stimson Doctrine of 1931; the Montevideo Convention on the Rights and Duties of States of 1933 (it did not come into force); Rio de Janeiro Agreement of 1933; 1970 Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN; 1975Helsinki Final Act; Manila Declaration of 1982; the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten Peace and Security and the Role of the United Nations in this Field (A/RES/43/51); and the 1990 Paris Charter for a New Europe". See: United Nation Treaty Collection, available at: <http://treaties.un.org/Home.aspx> or Colombia University Law School, Arthur W. Diamond Library Research, Guide to Treaty Research, available at [http://library.law.columbia.edu/guides/Guide\\_to\\_Treaty\\_Research#Databases\\_-\\_Multilateral\\_Treaties](http://library.law.columbia.edu/guides/Guide_to_Treaty_Research#Databases_-_Multilateral_Treaties).

<sup>107</sup> Supra note 71, Article 2 (4).

<sup>108</sup> UN Security Council, Resolution 573 (1985) Adopted by the Security Council at its 2615th meeting, on 4 October 1985, 4 October 1985, S/RES/573 (1985).

<sup>109</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970.

<sup>110</sup> Resolution 748 (1992) Adopted by the Security Council at its 3063rd meeting, on 31 March 1992, 31 March 1992, S/RES/748 (1992).

<sup>111</sup> General Assembly resolution 2131 (XX) entitled Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty was adopted on 21 December 1965, by a vote of 109 votes to none, with one abstention.

<sup>112</sup> M. Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes, Law and Contemporary Problems', (1996) 59, No. 4, (1996) available at: <http://scholarship.law.duke.edu/cgviewcontent>. accessed on: 15 March, 2014.

<sup>113</sup> Supra note 71, Article 2 (6)

instance, self-defense (Article 51), collective operations (chapter VII) and measures against enemy state (Article 53) all takes use of force<sup>114</sup>. A number of scholars such as Beyerlin (1994) believe that "humanitarian intervention is clearly enough, in conflict with the prohibition on the use of force in Article 2 (4) of the Charter."<sup>115</sup> On the contrary, others like Bowett (1958) Reisman (1974) disagree with the restrictionists and Reisman (1974) argues as following:

"Article 2 (4) of the Charter should be interpreted in accordance with its plain language, so as to prohibit the threat or use of force only when directed at the territorial integrity or political independence of a state."<sup>116</sup>

Therefore, they believe humanitarian intervention could be lawful because "it seeks neither territorial change nor a challenge to the political independence."<sup>117</sup> The UK used in the Corfu Channel case exactly the same argument: "Our action...threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence."<sup>118</sup>

Nevertheless, the ICJ rejected the argument. Brownlie (1963) also argues likewise: "The conclusion warranted by the *travaux préparatoires* is that the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantee to small states and that it cannot be interpreted as having a qualifying effect."<sup>119</sup>

## E. Legality of humanitarian intervention

Although the principles of sovereignty, non-intervention and non-use of force have been broadly realized by the international community, the Second World War gave rise to the execution of these principles<sup>120</sup>. Crimes against humanity were identified in international law with the aid of drafting the Charter of Nuremberg Tribunal in 1945<sup>121</sup>. Later on, subsequent to recognizing genocide as a crime by the Convention on the Prevention and Punishment of the Crime of Genocide in 1948<sup>122</sup>, human rights-related issues developed into a crucial matter of international law. In the same vein, states have started to shoulder a responsibility to act against gross human rights violations.

Such a close link could be seen in paragraphs 138 and 139 of the UN World Summit Outcome Document in respect to the R2P doctrine. Hereby states are obliged to protect their populations from four grave crimes: genocide, war crimes, ethnic cleansing and crimes against humanity<sup>123</sup>.

Within such a context, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Rome Statute of the International Criminal Court of 1998<sup>124</sup> represent the two primary sources where the true significance of four grave crimes are explained. International humanitarian law identifies the legal grounds for war crimes<sup>125</sup>.

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<sup>114</sup> Francis K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Hague, Kluwer Law International 1999) 67- 68.

<sup>115</sup> Ulrich Beyerlin, cited in S. Duke, *The State and Human Rights: Sovereignty versus Humanitarian Intervention* (International Relations 1994) 34.

<sup>116</sup> Micheal Reisman, 'A humanitarian Intervention to Protect the Ibos' in R.B. Lillich (ed) *Humanitarian Intervention and the United Nations* (Charlottesville, University Press of Virginia 1973) 177

<sup>117</sup> Julius Stone, *Aggression and World Order: a Critique of United Nations Theories of Aggression* 2nd ed, (London: Stevens & Sons, Ltd. 1958)63-64.

<sup>118</sup> *Supra* note 95, para 296.

<sup>119</sup> Ian Brownlie, *International law and the use of force by states* (Oxford, Clarendon Press 1963) 267-269.

<sup>120</sup> *Ibid.*

<sup>121</sup> United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* ("London Agreement"), (8 August 1945).

<sup>122</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, *Treaty Series*, vol. 78, 277.

<sup>123</sup> See for a detailed analysis of the UN World Summit Outcome Document.

<sup>124</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227- (1998).

<sup>125</sup> 125. "International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict." UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, *Treaty Series*, vol. 78, p. 277, See also: Committee International

Article I of the Genocide Convention identifies genocide as a crime under international law both in times of war and peace. Moreover, Article VIII reads that "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any other acts enumerated in article III."<sup>126</sup>

In much the same vein, it raises the possibility of the UN participation on the basis of international criminal law. In addition, self-defense (Article 51), collective operations (chapter VII) and measures against enemy state (Article 53) as the exceptions of Article 2 (7) as well as the post-cold war events such as those in Iraq and former Yugoslavia, have had negative effects on absolute sovereignty and the non-use of force principles. Indeed, these factors have weakened the notion that humanitarian intervention is illegal<sup>127</sup>. In fact, these factors have raised a discussion on the interpretation of humanitarian intervention and international law between restrictionists and counter-restrictionists<sup>128</sup>.

Restrictionists believe that humanitarian intervention is illegal because the UN Charter forbids the use of force. As Brownlie firmly noted "there is little or no reason to believe that humanitarian intervention is lawful within the regime of the Charter."<sup>129</sup> They realize that the UNSC has the legal authority under the Chapter VII to permit use of force. Nevertheless, they argue that the UNSC has jurisdiction under Article 39, only if international peace and security is endangered and the UNSC can't authorize intervention only on humanitarian grounds<sup>130</sup>.

On the other side, counter-restrictionists argue that the legal right of humanitarian intervention is based on two claims: first, the UN Charter carries the provisions to protect fundamental human rights, and second, the customary right of humanitarian intervention<sup>131</sup>. They believe that human rights are as crucial as international peace and collective security in the Charter. Several articles such as Article 1 (3), 55 and 56 as well as the preamble of Charter all highlight the significance of human rights<sup>132</sup>.

Article 1 (3) determines the protection of human rights as one of the principle purposes of the UN system. As previously noted, counter-restrictionists consider a humanitarian exception to the use of force under Article 2 (4). In opposition, restrictionists hold the belief that peace and collective security is the most central aim of the Charter. Thus, any use of force should be outlawed. As Röling mentions as following: "Article 2 (4) as a prohibition of the use of first military power, is the fundamental premise on which the UN Charter is built. ...It is the precondition for life itself in the atomic era."<sup>133</sup> Having acknowledged that there is no legal basis for unilateral humanitarian intervention in the Charter; counter-restrictionists argue that humanitarian intervention is allowed by customary international law<sup>134</sup>.

On the other hand, restrictionists argue that state practice and *opinio juris* show that, even though humanitarian intervention is becoming acceptable in international law, it is not a well-established exception to Article 2(4). Indeed, the UN Charter has severely limited the *jus ad bellum* as a customary right<sup>135</sup>. Another

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Genève, Advisory Service on International Humanitarian Law, available at: [http://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf).

<sup>126</sup> Supra note 121.

<sup>127</sup> Sean D. Murphy, 'Protean Jus Bellum' (2009) Berkeley Journal of International Law, 38-39.

<sup>128</sup> Ibid.

<sup>129</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press 1963) 20.

<sup>130</sup> Taylor Seybolt, *Humanitarian Military Intervention: The Conditions for Success and Failure* (Oxford University Press 2008) 9.

<sup>131</sup> Christ D. Gray, *International Law and the Use of Force* (Oxford, New York: Oxford University Press 2000) 25-28.

<sup>132</sup> Supra note 129.

<sup>133</sup> Bernard V.A., Röling, *International Law in an Expanded World* (University of Michigan 1960) 7.

<sup>134</sup> The existence of a rule of customary international law requires two elements of State practice "and the conviction that the practice reflects, or amounts to law (*opinio juris*)."<sup>134</sup> See: A. Cassese, *International Law*, 2nd ed, (Oxford, New York: Oxford University Press 2005) 156.

<sup>135</sup> However, As Kofi Annan put it: "there is a developing international norm in support of intervention"; in addition, as the Court in the Nicaragua Case noted, "international law changes". Importantly, the human rights law has made it necessary for a change in the provisions or interpretations of the Charter regarding to threats on human rights. Thus, there is a strong possibility that humanitarian intervention might be seen as an exception to Article 2 (4) in the foreseeable future. See: A. Cassese, *International Law*, 2nd ed, (Oxford, New York: Oxford University Press 2005) 156. See: Supra note 99, para 208. See: M. Stanulova, *Has humanitarian inter-*

counter-argument is that there is a moral duty to intervene to protect civilians from gross human rights violations. As Teson (1998) states that "sovereignty derives from a state's responsibility to protect its citizens and when a state fails in its duty, it loses its sovereignty rights."<sup>136</sup> The opponents to this perspective argue that interventions based on moral justifications and human values trigger potential abuse. The classic example of this was Hitler, who argued that it was essential, to occupy Czechoslovakia to shield the life and liberty of the German population living there<sup>137</sup>. Furthermore, restrictionists argue that self-interest is a key motive behind intervention and they deny the role of a humanitarian motive. Bellamy and Wheeler (2008) state that "those who advance moral justifications for intervention, run up against the problem of how bad a humanitarian crisis has become before force can be used."<sup>138</sup> They also accuse the states of applying humanitarian intervention selectively. Indeed, the states are particular about when and where to intervene<sup>139</sup>.

## F. Differences between humanitarian intervention and R2P

The R2P principle could be interpreted as another name for humanitarian intervention. In fact, the R2P doctrine is different to humanitarian intervention<sup>140</sup>. As Evans (2008) points out: "The biggest misunderstanding about R2P was the belief that R2P is just another name for humanitarian intervention."<sup>141</sup> Undoubtedly, one can claim that humanitarian intervention paved the way for the emergence of the R2P doctrine. While humanitarian intervention is about military response, "responsibility to protect is much more nuanced, much more multi-dimensional."<sup>142</sup>

The R2P principle puts a considerable stress on the fundamental interests of the endangered population of a state. As noted before, humanitarian intervention is narrower than the R2P doctrine because R2P involves a sequence of responses and contains several measures such as: prevention, reaction, rebuilding and diplomatic pressure. Most importantly, the focus of multi-dimensional concept of R2P is more on 'responsibility to prevent'<sup>143</sup> rather than intervention which has only one dimension - military deployment<sup>144</sup>. Former Australian Minister for Foreign Affairs, Evans put it as follows:

"The first thing about R2P is that it involves a presentational shift from the language of the right to intervene to the language of responsibility to protect, so you no longer talk about the right of the big guys or anyone else to throw their weight around but the responsibility of everyone to prevent these atrocities occurring, you talk not in terms of intervention as the key idea but protection, so you shift the paradigm, the way of looking at this away from the interveners to the victims, those who suffer-death, rape, displacement, violence, horror- in these situations."<sup>145</sup>

Humanitarian intervention consists of legally binding treaties and convention, but the R2P doctrine is not legally binding. Nevertheless, in terms of crimes concerned with R2P, states are legally obliged through other conventions and treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948<sup>146</sup>.

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vention become an exception to the prohibition on the use of force in Article 2 (4) of the UN Charter? (The University of Edinburgh, 2010) 10.

<sup>136</sup> Fernando R. Teson, 'Humanitarian Intervention: an Inquiry into Law and Morality' (1998) 2nd ed. Irvington-On-Hudson, N.Y.: Transnational, 128.

<sup>137</sup> Ibid.

<sup>138</sup> Alex J. Bellamy and Nicholas J. Wheeler, 'Humanitarian Intervention in World Politics', in *Globalization of World Politics: an Introduction to International Relations*, eds (2008) Oxford: Oxford University Press 524.

<sup>139</sup> Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (Pennsylvania State University Press 2002) 177.

<sup>140</sup> Dayvid Chandle, *Unraveling the Paradox of the Responsibility to Protect* (Irish Studies in International Affairs, Department of Politics and International Relations, University of Westminster, London 2011).

<sup>141</sup> Gareth Evans, *Responsibility to protect: ending mass atrocity crimes once for all* (Washington DC, Brookings Institution 2008) 56.

<sup>142</sup> Ibid.

<sup>143</sup> 143. According to ICISS, Responsibility to prevent consists of three main components: early warning and analysis mechanism, root cause prevention efforts, and direct prevention efforts.

<sup>144</sup> Alex Bellmay, *Responsibility to protect: the global effort to end mass atrocities* (Polity Press 2009) 130.

<sup>145</sup> Supra note 142.

<sup>146</sup> Shin-Wha lee, 'The Responsibility to Protect in Humanitarian Emergencies: from Libya to North Korea?' (2012) EAI Asia Security Initiative, Working Paper 22, 14.

According to the Summit Outcome Document, the R2P doctrine revolves around the idea that the use of military force must be deployed both with the UNSC's authorization, and under the UN Charter's framework<sup>147</sup>. On the contrary, humanitarian intervention frequently does not regard the UNSC's authorization as a prerequisite. Indeed, based on the R2P doctrine, military intervention could also be made during the preventive stage without the use of force. The R2P principle only permits for the use of force as a final resort if a state manifestly neglects to protect its citizens<sup>148</sup>. Moreover, one of the main differences is that the R2P doctrine only covers the specific crimes of genocide, crimes against humanity, war crimes and ethnic cleansing and no other humanitarian catastrophes as humanitarian intervention does. In addition, the R2P doctrine deals with 'building state capacity' to guard their populations against atrocities, while humanitarian intervention does not<sup>149</sup>.

According to Australian Red Cross handbook, "R2P is not humanitarian intervention by another name, but does allow use of force under Chapter VII of the UN Charter."<sup>150</sup>

## G. The legal status of R2P

R2P's legal dimension has been subject to debate as a non-binding political concept<sup>151</sup>, soft law<sup>152</sup>, a general principle of international law<sup>153</sup>, an emerging legal norm or even as 'rhetorical trick' which is used "cleverly to shift emphasis away from the intervention of the international community."<sup>154</sup> During the GA debate regarding R2P in 2009, five delegations clearly viewed R2P a principle without legal character<sup>155</sup> and seven delegations shared the view that the doctrine is not a new one, and it is based on pre-existing obligations<sup>156</sup>. High-level Panel on Threats, Challenges and Change, named R2P an 'emerging norm'<sup>157</sup>.

The R2P doctrine is viewed by many supporters as a legal norm *de lege ferenda*, or an 'emerging norm' of customary international law. In 2006, Weiss, one of the major researchers of the ICISS, stated that "the R2P certainly qualifies as emerging customary law."<sup>158</sup> As highlighted before, customary international law consists of two elements namely, state practice backed up by *opinio juris*. The supporters argue that the explicit approval of paragraphs 138 and 139 of Resolution 60/1 has given birth to R2P as "instant customary law". The practice of the UNSC in Resolutions 1973 and 1975 of 2011 manifest an *opinio juris*<sup>159</sup>. The opponents argue that R2P needs more support in international customary law rather than non-binding resolution of the GA<sup>160</sup>.

A fair number of proponents of a legal obligation are of the opinion that the R2P doctrine is deeply rooted in pre-existing, treaty-based law, namely, in human rights covenants (ICESR & ICCPR)<sup>161</sup>, the Convention on the

<sup>147</sup> UNGA; 2005; World Summit Outcome, Article 19, See page 7 for more information.

<sup>148</sup> Advisory Council on International Affairs, 'The Netherlands and the Responsibility to Protect: The responsibility to protect people from mass atrocities', (2010) No. 70, 65.

<sup>149</sup> Ibid, 66.

<sup>150</sup> Australian Red Cross, International Humanitarian Law and the Responsibility to Protect: a handbook, (2011) 15.

<sup>151</sup> See Andrew Clapham, 'Responsibility to Protect-Some Sort of Commitment', in V. Chetail (ed.), Conflicts, Security and Cooperation (2007) Brussels, 191.

<sup>152</sup> See Jenifer M. Welsh and Maria Banda, International Law and the Responsibility to Protect: Clarifying or Expanding State Responsibilities? (2010) 2, Global Responsibility to Protect, Issue 3, 230.

<sup>153</sup> See Peter Hilpold, The duty to protect and the reform of the United Nations-A new step in the Development of international law? (Max Planck UNYB 2006) 50.

<sup>154</sup> Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (1 Jan 2007) 101 The American Journal of International Law, No. 1, 102.

<sup>155</sup> Brazil (A/63/PV.97,p.3), China (A/63/PV.98,p.24), Guatemala (A/63/PV.97,p.14), Morocco (A/63/PV.98,p.13), Monaco (A/63/PV.99,p.12), Venezuela (A/63/PV.99,p.9).

<sup>156</sup> Austria (A/63/PV.98,p.1), Netherlands (A/63/PV.97,p.26), New Zealand (A/63/PV.97,p.25), Mexico (A/63/PV.99,p.18), Sri Lanka (A/63/PV.100,p.2), Nigeria (A/63/PV.98,p.26), Switzerland (A/63/PV.98,p.5).

<sup>157</sup> High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, 2 December 2004, UN Doc A759/565, para. 203 (2004).

<sup>158</sup> Thomas G. Weiss, 'R2P AFTER 9/11 AND THE WORLD SUMMIT'(2007) 24 Wisconsin International Law Journal, No. 3, 750.

<sup>159</sup> Edward Luck, Special Adviser to the Secretary-General, Remarks to the General Assembly on the Responsibility to Protect", (New York 23 July 2009), 3.

<sup>160</sup> Supra note 4, 120.

<sup>161</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993, 3. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999,171.



Prevention and Punishment of the Crime of Genocide (1948)<sup>162</sup>, the Fourth Geneva Convention<sup>163</sup>, international humanitarian law and the UN Charter.

They believe that R2P is well-grounded in international law and it is not a 'completely novel idea' and does not add anything new to the primary rules of international law<sup>164</sup>. They argue that R2P is not a new customary norm; indeed, R2P as a declaration has just given added emphasis to the duties that were already inherent in international law. They reason that a number of Articles of Draft Declaration on Rights and Duties of States(1947), The Universal Declaration of Human Rights<sup>165</sup> or Rome Statute of the International Criminal Court (2002) stand out as applicable to the R2P doctrine<sup>166</sup>. Moreover, they hold the opinion that war crimes, crimes against humanity, genocide and ethnic cleansing are prohibited by international law and considered *jus cogens*<sup>167</sup>; thus, one can conclude that states have already the existing duty and responsibility, regardless of the R2P doctrine. As noted above, there is an inconsistency and ambiguity concerning the legal status of R2P, e.g., professor Anne Peters believes that "R2P is a novel construct which innovatively uses pre-existing legal principles as building blocks for a new edifice ....I submit that R2P is an established hard norm with regard to the host state, and an emerging legal norm with regards to other states and the United Nations."<sup>168</sup>

Or Professor Hobe indicates the said controversy and argues that academic commentators have had a tendency to deny the legal nature of R2P due to the lack of 'specific normative content'<sup>169</sup>. In my estimation, R2P is not simply a political declaration or commitment. In fact, R2P, as a 'norm<sup>170</sup> of international conduct'<sup>171</sup>, is deeply influenced by existing international law and "is constructed as a comprehensive framework for the prevention and containment of massive human rights violation."<sup>172</sup> What is clear is that R2P is not an international legal rule. "It has not been codified in an international treaty; it lacks the state practice and sufficient *opinio juris* to give rise to customary international law; and it does not qualify as a general principal of law."<sup>173</sup>

Its implementation largely depends on the (political) decisions of the SC and cannot be enforced without the consent of its members, i.e. its enforcement can be impeded by a veto of a member of the P5. In an attempt to spell out the legal consequences of the concept of R2P postulated as a binding legal principle of international law, for the SC and its members, Anne Peters, argues that the binding legal force of R2P is not yet settled and "once R2P is accepted as a full-fledged legal principle, the Security Council (and its members) would be under a legal obligation to authorize or to take sufficiently robust action in R2P situations".<sup>174</sup> She suggests a procedural obligation to justify inaction instead. A major reason for the reluctance to accept R2P as a complete legal obligation, incumbent on the SC, is that the Council is dependent on the political will of those states which contribute troops.

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<sup>162</sup> Supra note 122.

<sup>163</sup> International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

<sup>164</sup> Supra note 158, 105.

<sup>165</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>166</sup> International Law Commission, Yearbook of the International Law Commission, vol.1 (1947). UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.

<sup>167</sup> Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties are on peremptory norms (*jus cogens*). See K. Zemanek, 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?' in: Cannizzaro (ed.) (2011) Oxford, Oxford University Press, 288.

<sup>168</sup> Anne Peters, 'International Organizations Law Review' (2011) 8 DOI: 10.1163/157237411X584075, available at [http://ius.unibas.ch/uploads/publics/7561/20111011154344\\_4e94481005a88.pdf](http://ius.unibas.ch/uploads/publics/7561/20111011154344_4e94481005a88.pdf) accessed on: 15 July 2014.

<sup>169</sup> Stephan Hobe, 'The Responsibility to Protect and Security Council Action in Libya' (October-December, 2011) 51 Indian Journal of International Law, No.4, 505-508.

<sup>170</sup> As defined by Cass Sunstein, norms are "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done." See: Cass R. Sunstein, 'Social Norms and Social Roles' (1996) 96 COLUM. L. REV. 4, 903, 914.

<sup>171</sup> William W. Burke-White, 'Adoption of the Responsibility to Protect' (30 July 2011) University of Pennsylvania Law School, Public Law Research Paper No.11-40.

<sup>172</sup> Mehrdad Payandeh, 'With Great Powers Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Law making' (2010) 35: 469 The Yale Journal of International Law 482.

<sup>173</sup> Supra note 171.

<sup>174</sup> Supra note 168.

The SC may authorise, but can in factual terms not compel such action. There is no accepted procedure for distributing the task to particular states, and no generally agreed formula for cost-sharing. If member states refused to contribute troops, then the SC would lack, in the absence of standing agreements, the means to intervene in an R2P situation. Therefore, the SC's role in authorising actions designed to fulfil the international community's responsibility can only be a first step<sup>175</sup>.

To conclude and despite the debate, the power of R2P principle depends on its ability to generate political pressure. The major challenge to human security is to guarantee that states do prevent crimes and the international community responds when states neglect to act. To date, as history clearly "shows, even international law is not inviolable and the legal codification of the Responsibility to Protect would offer no guarantees of human security".<sup>176</sup> As Genser & Cotler further explain: "The desire to legalize the R2P must be balanced against its further substantive development and expanding political consensus of support".<sup>177</sup> As it appears from the debate, a lot remains to be done to enshrine R2P as a legally binding instrument with an implementation mechanism.

#### IV. The road to R2P in practice

In the previous chapter, I discussed the theoretical aspects and the emergence and development of the R2P doctrine. In order to see how R2P is employed in practice, in this chapter, I will analyze three major cases concerning the R2P principle: Bosnia, Rwanda and Darfur. An introduction will be given to every case separately, and then I will focus on the facts and outcomes of the cases in accordance with the R2P doctrine.

##### A. Introduction of the cases

History has witnessed numerous brutal conflicts. Over time, the international community has become more and more conscious that the gross violation of human rights is the world's concern. From the middle of the 19th century, several phenomena such as first Geneva Convention of 1864, the foundation of Red Cross in 1863 and creation of the League of Nations made the international community aware of the need for some sort of collective conscience about atrocities<sup>178</sup>. During the Cold War, a number of humanitarian interventions took place, even though they were prompted by economic and strategic motives; for instance the interventions of Belgium in the Congo in 1960, the United States in the Dominican Republic, and Grenada and Panama in 1965, 1983 and 1989<sup>179</sup>.

The end of the Cold War represented a turning point and created an opportunity for humanitarian interventions, a period of which there have been seventeen such incidents<sup>180</sup>. The 1990s witnessed a sequence of man-made disasters across the globe and there has been a sharp rise in the number of humanitarian interventions authorized by the UNSC. The UNSC began to regard internal conflicts and gross violations of human rights as threats to international peace and security under Article 39<sup>181</sup>. The UN system of collective security attempted to provide an adequate response. During the 1990s, a number of noticeable military operations were launched, and the UNSC provided humanitarian justification for all of them<sup>182</sup>. Evans (2008) divides these interventions into four categories. They were clearly against the wishes of the government concerned such as Northern Iraq,

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<sup>175</sup> Neville F. Dastoor, 'The Responsibility To Refine: The Need for a Security Council Committee on the Responsibility To Protect' (2009) 22 HARV. HUM. RTS. J. 25, 26-27.

<sup>176</sup> Jared Genser & Irwin Cotler, *The Responsibility to Protect, The Promises of Stopping Mass Atrocities in our Time* (Oxford University Press 2012) 36.

<sup>177</sup> *Ibid.*

<sup>178</sup> Taylor B. Seybolt, *Humanitarian Military Intervention: The Conditions for Success and failure* (Oxford University Press 2007).

<sup>179</sup> *Supra* note 141, 22-23.

<sup>180</sup> Paul D. Williams and Meghan Stewart, 'Humanitarian Interventions: An idea whose times has come and gone', in W. Van Genugten, M.Scharf and S. Radhin, (ed) *Criminal jurisdiction 100 years after the 1907* (2009) Hague Peace Conference, The Hague T.M.C. Asser Press, 227.

<sup>181</sup> Adele Brown, *Reiventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?* House of the Commons Library Research Paper 2008) 11.

<sup>182</sup> Patrick F.White, 'Normative Considerations bearing on the Responsibility to protect- Prospects and Implications in a Fracturing International System' (2008) *Canadian Military Journal*, 16.

Bosnia and Rwanda, were in a situation where the consent had no bearing on the intervention such as Somalia, were a contentious issue like Haiti, Liberia and Sierra Leone or were confusing such as Timor-Leste<sup>183</sup>.

The interventions, which took place during the 1990s, were often unfinished and self-defeating. For instance, in Somalia, the international community staged a military operation after numerous civilians had already been killed<sup>184</sup>.

In the Balkans, the international community lost the chance to avert several mass murders and despite the de-ployment of the UN peacekeepers in Bosnia in 1992, thousands of Bosnians were killed. In Rwanda, the UN peacekeepers pulled out while the genocide had already began<sup>185</sup>. Another catastrophe, which proved a formidable challenge to the R2P principle, was the Darfur conflict in 2003. The conflict cost the lives of roughly 200.000 civilians and the international community failed miserably to meet the challenge<sup>186</sup>.

In the next section, I will analyze three major cases concerning the R2P principle. I will begin with Bosnia, then Rwanda, and finally Darfur.

## B. Bosnia (Srebrenica)

The disintegration of former Yugoslavia, which began three years prior to the Rwanda genocide, occupied the agenda of the UNSC for almost a decade. When the former Federal Republic of Yugoslavia dissolved it was horrifically violent. During the Cold War, Tito by iron fist managed to control the tensions between ethnic groups in Yugoslavia<sup>187</sup>. President Milošević and his campaign for 'Greater Serbia' were widely blamed for the Bosnian crisis. Slovenia and Croatia declared their independence from Yugoslavia on June 25, 1991. The Muslim-led government of Izetbegović had announced plans for the independence of Bosnia-Herzegovina in 1991. The call for independence gave rise to an all-out war over the Bosnian territory between Bosniaks, Serbs and Croats. Serb forces were aggressive and aimed to ethnically cleanse Bosnia. As a result, numerous Moslems and non-Serbian inhabitants from Bosnia were victims of ethnic cleansing<sup>188</sup>.

The international community, including the UN and the EU proved helpless. As Gow (1997) mentions: "there was a lack of will on behalf of the diplomatic efforts to bring sincere prevention, reaction, and rebuilding."<sup>189</sup> The Serbian leaders did not take the hollow threats of the International community seriously, and Bosniaks became more and more vulnerable to gross human rights violations. In 1992 as the hostilities intensified, The United Nations Protection Force (UNPROFOR) which was initially based in Croatia, established an extended mandate to secure 'safe areas' around Sarajevo and a number of other Bosnian towns notably Srebrenica<sup>190</sup>.

The mandate of UNPROFOR according to the UNSC Resolution 743 was: "to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis"<sup>191</sup>

The operation of UNPROFOR took three years from February 1992 until March 1995 and its mandate expanded to "allow the use of force when responding to attacks against its designated safe areas, and it was enforcing a no-fly zone and controlling six safe areas."<sup>192</sup> Bosnian Serbian forces invaded Srebrenica in July 1995 and slaughtered 8.000 male citizens without the intervention by the UNPROFOR. This mass atrocity was

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<sup>183</sup> Supra note 141, 25-28.

<sup>184</sup> Alan J. Kuperman, 'Rethinking the Responsibility to Protect' (2009) *The Whitehead Journal of Diplomacy and International Relations*, 20. available at <http://blogs.shu.edu/diplomacy/files/archives/Kuperman%20-%20Rethinking%20the%20Responsibility%20to%20Protect.pdf> accessed on 15 May 2004.

<sup>185</sup> Ibid, 21.

<sup>186</sup> Gareth Evans, 'From humanitarian intervention to the responsibility to protect' (2006) 24 *Wisconsin International Law Journal*, No. 3, 705-706.

<sup>187</sup> Paul R. Williams & Meghan E. Stewart 'Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide Case' (2007-2008) *Western Reserve Journal of International Law*, 103-104.

<sup>188</sup> Jacques Semelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (Columbia University Press 2013) 156.

<sup>189</sup> James Gow, *Triumph of the lack of will: international diplomacy and the Yugoslav War* (Hurst & Company, London *The Muslim inhabitants of Bosnia-Herzegovina* 1997) 44.

<sup>190</sup> United Nations Protection Force: Profile, United Nations, (New York 31 Aug. 1996).

<sup>191</sup> UN Security Council, Resolution 743 (1992) Adopted by the Security Council at its 3055th meeting, on 21 February 1992, 21 February 1992, S/RES/743.

<sup>192</sup> Supra note 181.

the largest slaughter in Europe since the Second World War. It was referred to as a symbol of "the passivity of the international community."<sup>193</sup> As Gantz, a peacekeeping advocate mentions "Srebrenica was the failure of NATO and peacekeeping of the UN."<sup>194</sup> By 1993, according to Human Rights Watch report "all parties to the conflict were guilty of the practice ethnic cleansing-the forcible deportation"<sup>195</sup>

Public opinion swayed by images brought in the mass media put pressure on the international community to act. The dire need for intervention was felt, and the international community's political stance of passivity was turned into a political stance of intervention and responsibility to protect<sup>196</sup>. Finally, a three-week military intervention (Operation Deliberate Force) was launched by NATO in August 1995 and forced the parties to the negotiating table in Dayton, Ohio in November 1995<sup>197</sup>.

The Bosnian crisis, as a classic case of weak and inefficient UN intervention, presents a lack of political will on the part of member states to produce an established response to gross violations of human rights as well as the shortage of clearance surrounding humanitarian intervention after the Cold War<sup>198</sup>. As the ICISS report points out: "The Bosnian case- in particular the failure by the United Nations and others to prevent the massacre of thousands of civilians seeking shelter in UN "safe areas" in Srebrenica in 1995- is another which has had a major impact on the temporary policy debate about intervention for human protection purposes. It raises the principle that intervention amounts to a promise to people in need: a promise cruelly betrayed."<sup>199</sup>

The permanent members of the UNSC (P5) were not certain enough how to reconcile the notion of sovereignty with that of human rights. In brief, the Bosnian crisis demonstrated a number of difficulties of "antiquated peacekeeping and intervention protocols and sets up the emergence of R2P."<sup>200</sup> The valuable lessons learned from this had a great impact on the NATO's behavior in Kosovo. However, for both the UN and the international community, these lessons were seemingly forgotten and numerous innocent people lost their lives in a mass genocide in Rwanda.

## B. The Rwanda Genocide, 1994

The population of Rwanda is divided into three ethnic groups: the Hutu (roughly 85%) the Tutsi (14%) and the Twa (1%). Historically, the Tutsi occupied the upper strata and the Hutu the lower. The ethnic animosity between these two ethnic groups increased under German and then Belgian colonial rule culminating in the Hutu overthrowing Tutsi rule. A new wave of tension and ethnic conflict continued after the independence of Rwanda in 1962<sup>201</sup>. In order to regain their former positions, Tutsi refugees in neighboring countries started launching attacks on Hutu government. This cycle of ethnic hostility left a significant numbers of Tutsi dead and gave rise to a flood of refugees<sup>202</sup>. The Rwanda Patriotic Front (RPF), composed mainly of Tutsi exiles in Uganda, staged an attack on Rwanda, and a civil war broke out. The war lasted for a good three years during which an "aggressive and exclusivist Hutu solidarity was consciously being forged in opposition to these despised

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<sup>193</sup> Supra note 179.

<sup>194</sup> Peter Gantz, 'Srebrenica ten years later: Time to Stop Ignoring the Lessons' (2005) 229 available at [www.genocidewatch.org/images/FormYugo13Jul05SrebrenicaTenYearsLater TimeToStopIgnoringtheLessons.pdf](http://www.genocidewatch.org/images/FormYugo13Jul05SrebrenicaTenYearsLater TimeToStopIgnoringtheLessons.pdf) accessed on: 15 July, 2014.

<sup>195</sup> Human Rights Watch, 'Human Rights Watch World Report 1994 - Bosnia-Herzegovina' (1 January 1994) available at: <http://www.refworld.org/docid/467fca8ab.html> accessed on: 10 July, 2014.

<sup>196</sup> Andrew J. Loomis and Susan E. Rice, 'The Evolution of Humanitarian Intervention and the Responsibility to Protect, Brookings Institution Press' (2007) 62-63 available at <http://www.brookings.edu/research/articles/2007/07/human-rights-ric>, accessed on: 15 July, 2014.

<sup>197</sup> Ibid.

<sup>198</sup> Taylor B. SeyBolt, Humanitarian military intervention: The condition for success and failure (Oxford University Press 2008) 69-70.

<sup>199</sup> The ICISS report, Supra note 18, para 1.3.

<sup>200</sup> Jayne Disenza, 'The development of new paradigm of Humanitarian Intervention: Assessing the Responsibility to Protection, Honors Projects, Macalester College' 50, (2013) available at: [http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1042&context=poli\\_honors](http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1042&context=poli_honors) accessed on: 15 June 2014.

<sup>201</sup> Lukin Robinson, 'The Tragedy of Rwanda' (December 2003) 55 Monthly Review Foundation, Issue 07, 52-54.

<sup>202</sup> Ibid.

outsiders the Tutsi?"<sup>203</sup> Through the attempts of some countries in the region and the Organization of African Unity the Arusha Peace Agreement was signed by the RPF and the Hutu government In August 1993. In October 1993, the Security Council established the United Nations Assistance Mission for Rwanda (UNAMIR) "which was a 2,500-person force meant to monitor the ceasefire and contribute to the security of the capital city, Kigali."<sup>204</sup>

The death of the Presidents of Rwanda and Burundi in a plane crash on 6 April 1994 triggered several weeks of massacres. The Hutu Rwanda Army, paramilitary groups and militia carried out the brutal mass murder aiming at eliminating all Tutsi and opposition members. Within 100 days as many as 1 million men, women and children are estimated to have lost their lives<sup>205</sup>. In addition, a further 1.5 million of Rwanda's population had been displaced. Verwimp (2004) writes of the death toll:

"In just 3 months, more than 10 per cent of the general population and approximately 75 per cent of the Tutsi ethnic minority population were killed."<sup>206</sup> Unfortunately, despite the international community's awareness<sup>207</sup> of the manslaughter in Rwanda, "weeks were wasted in determining whether the killing fully met the strict legal definition of genocide."<sup>208</sup> The international community and the UN put off reacting to the ethnic cleansing, owing mainly to the opposition of some P5 particularly the U.S.<sup>209</sup>.

Surprisingly, UNAMIR, which was in Kigali during the mass murder, was forbidden to intervene. A number of countries such as Canada, Argentina, Spain and New Zealand asked for a peacekeeping operation with a stronger mandate and "new Rules of Engagement to protect the innocent civilians" which was turned down by Boutros Ghali, then UN Secretary-General<sup>210</sup>. In April, in Resolution 912 the UNSC voted to reduce the number of peacekeepers of UNAMIR to 270 members. On 7 April Belgium withdrew its 440 troops from UNAMIR<sup>211</sup>.

It should not be forgotten that the casualties certain countries suffered in Somalia such as the U.S. had a significant impact on the reluctance of the International community and the UN system to intervene in Rwanda. As the situation deteriorated, on 17 May the UNSC adopted Resolution 918 which authorized reinforcement for UNAMIR and approved a French-led military intervention known as Operation Turquoise, which would establish neutral protection zones<sup>212</sup>.

The genocide came to an end on July 18, 1994 when the rebel Rwandan Patriotic Army (RPA) broke the ceasefire agreement and finally defeated the Rwandan army. Over one million Hutu refugees fled to Zaire and Tanzania<sup>213</sup>. The international community started to play a major role in the aid recovery effort in Rwanda by running a socioeconomic program. The new Rwandan government received \$4 billion in aid between 1994 and 2000<sup>214</sup>.

As highlighted previously, the 'shadow of Somalia', the 'lack of strategic and national interests of P5', the 'sluggish bureaucratic performance of the UN' and the 'lack of political will' among other elements, were factored into the decision of the international community and the UN on intervention. In fact, Presidents Sarkozy, Bill Clinton and Kofi Annan's apologies to Rwanda for their inactions, are a testimony to their mistakes<sup>215</sup>. Kofi Annan, the Secretary-General of the United Nations held a speech to the Commission on Human Rights at a

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<sup>203</sup> Organization of African Union, 'Rwanda: The Preventable Genocide, African Union' available at: [www.refworld.org/docid/4d1da8752](http://www.refworld.org/docid/4d1da8752) accessed on: 12 March, 2014.

<sup>204</sup> Holly burkhalter, 'A preventable horror?' (1994) Africa Report, 39.6, 17.

<sup>205</sup> Ibid.

<sup>206</sup> Philip Verwimp, 'Death and survival during the 1994 Genocide Rwanda' (2004) 2 population Studies 58, 233.

<sup>207</sup> The 1948 Convention on the Prevention and Punishment of the Crime of Genocide obliges "all states to prevent or punish acts of genocide."

<sup>208</sup> Supra note 122.

<sup>209</sup> Douglas G. Anglin, 'Rwanda: the preventable genocide, The Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events' (2001) 56International Journal 149.

<sup>210</sup> Milton Leitenberg, Rwanda, 1994: International incompetence produces genocide (Peacekeeping and international Relations 23 1994) 6.

<sup>211</sup> Samantha Power, A Problem From Hell, America and the Age of Genocide (Basic Books 2013)343.

<sup>212</sup> Turquoise res 929 22 jun 1994, See: A. Wallis, Silent Accomplice: "The Untold Story of France's Role in the Rwanda Genocide", London: I.B. Tauris, 128 (2006).

<sup>213</sup> Taylor.B. Seybolt, Humanitarian Military intervention, The Condition for success and failure (Oxford University Press 2008) 72.

<sup>214</sup> Supra note 194.

<sup>215</sup> Linda Melvern, A people Betrayed: The role of the West in Rwanda's Genocide (London, Zed Books 2009).

special meeting to mark the International day of reflection on the 1994 Rwanda genocide on behalf of the UN in Geneva as following:

"First, we must all acknowledge our responsibility for not having done more to prevent or stop the genocide. Neither the United Nations Secretariat, nor the Security Council, nor member states in general, nor the international media, paid enough attention to the gathering signs of disaster. Still less did we take timely action..."<sup>216</sup>

Numerous scholars have acknowledged that 'timely intervention could have stopped the genocide'. Among them, Matloff and Dorn concluded their research as following: "The Rwanda genocide definitely could have been foreseen and possibly could have been prevented. At the very least, it could have been greatly mitigated by the UN. This conclusion takes into account the information and resources which were available to the UN, its mandate and its potential and previously demonstrated ability to adapt to difficult situation. The UN peacekeeping mission could undoubtedly have expanded its activities and efforts (diplomatic, humanitarian and military) at an early stage, given the clear warnings available to it.

What was absent was the political will, in the Secretariat and in the Security Council, to make bold decisions and to develop the means to create new information and preventive measures. The lesson of Rwanda is clear: we must build the international political will, as well as an enhanced UN capability, for prevention..."<sup>217</sup> The UN and the international community turned a blind eye to the bloody genocide in Rwanda, and they admitted their failure later on. The function and application of Humanitarian intervention witnessed major deficiencies in the case of Rwanda. Indeed, the factor of 'selectivity' had a great impact on the unwillingness of the great powers. The Rwanda genocide dashed the raised hopes that humanitarian intervention doctrine can stop gross human rights violation effectively.

### C. Darfur

Sudan is situated in the northern part of Africa and is not only the biggest country of the African continent, representing roughly 8% of it, but its population is also one of the most ethnically diverse one. It is divided on a large number of levels, i.e. religion, ethnic and tribal. As a result, throughout its short history since the gain of independence from the United Kingdom in 1956, Sudan has been relentlessly torn by internal conflicts between "the Islamic central government in the north and the largely Christian and Animist population of the south".<sup>218</sup> With the end of the first Sudanese war in 1972, the Addis Ababa Agreement created politically and economically autonomous Southern Sudan Autonomous Region. However, it was only after 10 years of relative peace that the 1972 Agreement was dropped and the hostilities resumed. As for Darfur itself, it is a large region located in the west part of Sudan, covering an area of 493,180 square kilometres (approximately 20% of Sudan), has an estimated population of six Million<sup>219</sup> and consists of an estimated 40 to 90 different ethnic/tribal groups<sup>220</sup>. The name "Darfur" stems from the largest ethnic group inhabiting the region – the Fur, and in Arabic literally means the "home of the Fur"<sup>221</sup>. Along with Fur, Darfur is inhabited by two other black tribes, the Masalit and the Zaghawa, and various other Arab peoples. The difficult environmental conditions of the region and the constant struggle for insufficient water resources progressively deepened tensions between the African agriculturalists and the Arab cattle farmers. The situation has been worsened by governmental policies, which have effectively contributed to the expansion of racism and have 'indirectly' led to targeting of the black Afri-

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<sup>216</sup> See [www.un.org/events/Rwanda](http://www.un.org/events/Rwanda).

<sup>217</sup> Walter Dorn and Jonathan Matloff, 'Preventive the Bloodbath: Could the UN have predicted and prevented the Rwanda genocide?' (2000) 1 *Journal of Conflict Studies* 20.

<sup>218</sup> Amnesty International, 'Sudan: Crisis in Darfur – Urgent Need for International Commission of Inquiry and Monitoring' (28 April 2003) available at: [www.amnesty.org/en/library/asset/AFR54/026/2003/en/094fac27-d6f9-11dd-b0cc-1f0860013475/afr540262003en.html](http://www.amnesty.org/en/library/asset/AFR54/026/2003/en/094fac27-d6f9-11dd-b0cc-1f0860013475/afr540262003en.html) accessed on 02 March 2014.

<sup>219</sup> International Donor Conference for Reconstruction and Development in Darfur, available at: <http://www.darfurconference.com/dinformation> accessed on 12 June 2014.

<sup>220</sup> Sudan's Geography", available at: <http://www.globaldreamers.org/holocaust/darfur/geography.html>.

<sup>221</sup> Minority Rights Group International, "State of the World's Minorities 2007 - Sudan: Darfur", (4 March 2007), available at: <http://www.refworld.org/docid/48a9712a91.html> accessed on 08 March 2014.

cans. Contrary to the religion-based North-South war, the conflict in Darfur is rather ethnic-based as all of the abovementioned groups are predominantly Muslim<sup>222</sup>.

The growing frustration of the non-Arab part of the population with the manifest economic and political marginalization by the Government eventually escalated and turned into the violence. On April 25, 2003 two rebel factions, namely the Darfur Liberation Army (which later became the Sudan Liberation Army) and the Justice and Equality Movement, launched an attack on the Government's air base in the capital of North Darfur, El Fashir, and destroyed several Sudanese Air Force aircrafts and helicopters<sup>223</sup>. It may be argued that the initial outbreak of hostilities in Darfur erupted virtually unnoticed in the shadow of a contemporary large-scale military conflict in Iraq and several other armed conflicts in Sudan. The conflict further escalated in July 2003 when the Sudanese government launched an offensive retaliation against the Sudan Liberation Army (SLA), a combined offensive of heavy air bombardments and ground attacks i.e. soldiers supported by tanks<sup>224</sup>. After a year of fighting between the rebel movements on the one hand, and the Army, Air force and militias mobilized by the Government of Sudan on the other, the African Union deployed its troops in Darfur in the spring of 2004, in order to stanch hostilities and facilitate solution to the conflict.

Shortly after the deployment and in response to a report of the UN High Commissioner on Human Rights, the Security Council of the UN issued its first statement on the matter in which it expressed "its grave concern over the deteriorating humanitarian and human rights situation (...) [n]oting that thousands have been killed and that hundreds of thousands of people are at risk of dying in the coming months"<sup>225</sup>. Furthermore, it listed numerous large scale human rights violations such as "indiscriminate attacks on civilians, sexual violence, forced displacement and acts of violence, especially those with ethnic dimensions"<sup>226</sup> that were taking place in Darfur. The N'djamena Humanitarian Ceasefire Agreement signed on April 8, 2004 as a result of the African Union's efforts and which subsequently led to another agreement signed in Addis Ababa on May 28, 2004 were only a political success as the ceasefire was not observed in practice<sup>227</sup>.

After more than three years of the disastrous civil war, the Darfur Peace Agreement, signed on May 5, 2006 between the Government of National Unity and the Sudanese Liberation Army, became a significant step in a long process of returning peace and stability in Darfur and constituted a final fundament for the subsequent deployment of United Nations peacekeepers<sup>228</sup>. UNAMID was authorized by the Security Council Resolution 1769 on July 31, 2007, acting under Chapter VII of the Charter of the United Nations, as an unprecedented hybrid African Union and United Nations operation. It was a compromise as the initial plan to replace AU mission with UN forces had been strongly objected by the Sudanese Government on the basis that situation in Darfur was an internal affair of Sudan and involvement of western states was 'undesirable'<sup>229</sup>.

As a consequence of intense negotiations, it was agreed that being As a consequence of intense negotiations, it was agreed that being unsuccessful in delivering results, the African Union Mission in Sudan (AMIS) (founded in 2004) would be transformed into an AU/UN hybrid operation in a three-stage process on the condition that forces would remain mainly African<sup>230</sup>. UNAMID's initial mandate comprised two main tasks: (i) protection of its personnel, facilities, installations and equipment, as well as ensuring security and freedom of move-

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<sup>222</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Geneva: UN January 2005), available at: [www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) accessed on 01 June 2014.

<sup>223</sup> Human Rights Watch, 'Darfur in Flames: Atrocities in Western Sudan' (April 2004) 16, no. 5 (A) 9.

<sup>224</sup> Gerard Prunier, *Darfur: A 21st Century Genocide* (Ithaca, NY: Cornell University Press 2008) 14-16.

<sup>225</sup> UN Security Council, Statement by the President of the Security Council: Letter dated 25 May 2004 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council (S/2004/425), 26 May 2004, S/PRST/2004/18.

<sup>226</sup> Ibid.

<sup>227</sup> Scott. Straus, 'Darfur and the Genocide Debate' (2005) 84, *Foreign Affairs*, No. 1, 130.

<sup>228</sup> Human Rights Watch, 'Darfur 2007: Chaos by Design; Peacekeeping Challenges for AMIS and UNAMID' (September 2007)19, No. 15(A).

<sup>229</sup> House of Commons International Development Committee, 'Darfur, Sudan: The Responsibility to Protect' (March 2005), Fifth Report of Session 2004-05, vol. 1 London: House of Commons, 17, available at: [www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67i.pdf](http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67i.pdf) accessed on 04 March 2014.

<sup>230</sup> Johan Brosche, 'DARFUR – Dimensions and Dilemmas of a Complex Situation' (2008) Uppsala University, Department of Peace and Conflict Research, available at: <http://www.ucdp.uu.se/gpdatabase/info/Sud%202.pdf> accessed on 11 January 2014.

ment of its own personnel and humanitarian workers; (ii) support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protects civilians, without prejudice to the responsibility of the Government of Sudan<sup>231</sup>.

As the largest peacekeeping force in the UN history, its authorized initial composition consisted of 19,555 military and 6,432 police personnel, even though it was too late to implement the R2P doctrine. An Agreement on the deployment was reached primarily due to the pressure exercised by China, Sudan's major trading partner and oil importer. In spite of its authorization and international community pressure, UNAMID encountered many obstacles from the Government of Sudan in the period of its deployment, e.g. refusing troops from particular countries, holding equipment in the customs in Port of Sudan and not giving permissions for flights at night<sup>232</sup>.

As of 31 January 2013, it is composed of 20,888 uniformed personnel, 1,087 international civilian personnel, 2,935 local civilian staff and 449 UN Volunteers, with personnel coming from, apart from African countries, China, Germany and Republic of Korea<sup>233</sup>. *Nota bene*, neither the Government of Sudan accepted support from United States nor did the latter offer any<sup>234</sup>. Following the established practice of short-term, renewable mandates, UNAMID's authorization has been revised and extended on several occasions. The most recent Security Council resolution 2063 of 31 July 2012 extended its mandate to 31 July 2013 and, *inter alia*, welcomed the Framework for AU and UN Facilitation of the Darfur Peace Process. Quite notably, the UNSC decided to decrease the strength of military and police components with a target of 16,200 military personnel, 2,310 police personnel<sup>235</sup> and 17 formed police units of up to 140 personnel each to be achieved over a period of 12 to 18 months<sup>236</sup>.

The situation in Darfur represented the first test of the R2P doctrine. The heavy civilian casualties are a testimony to the failure of the Sudanese government to protect its civilians and it has lost its right to state sovereignty due to this failure. According to R2P, when a state is unwilling to protect the citizens from atrocities, the international community should act. The international response to the situation in Darfur has been slow and inefficient. In fact, the international community has not been able yet to shoulder the R2P doctrine in Darfur adequately. Division among the P5 of the UNSC has kept the UN from responding effectively. Some major Muslim organisations such as the Organisation of Islamic Conference and the Arab League have not been supportive enough, nor has the AU kept acting effectively<sup>237</sup>. As already highlighted, the international community and the UN failed to prevent the genocide and all early efforts and advance warnings fell on deaf ears. As Mukesh Kapila, the UN's resident and humanitarian coordinator, points out in his new book: "Senior UN officials and the foreign ministries of key governments failed to treat the situation in Darfur with the urgency or seriousness that it deserved, and put forward various arguments to excuse their failure to act more effectively."<sup>238</sup> Nevertheless, as the genocide grasped the attention of mass media and international public opinion, it was impossible for the international community to keep turning a blind eye to the situation in Darfur<sup>239</sup>.

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<sup>231</sup> Refugees International, UN Security Council Resolution 1769 for Darfur: An Important but Insufficient First Step Towards Protecting Civilians, 2 August 2007, para 15.

<sup>232</sup> *Supra* note 221.

<sup>233</sup> United Nations, UNAMID, Facts and Figures, available at: <http://www.un.org/en/peacekeeping/missions/unamid/facts.shtml> accessed on 29 June, 2014.

<sup>234</sup> Karl Maier and Bill Varner, 'Darfur mission may need China to avert humiliation', in Bloomberg (22 November 2007) available at: <http://sudantribune.com/spip.php?article24847> accessed on 01 April, 2014.

<sup>235</sup> UN Security Council, Security Council resolution 2063 (2012) [on extension of the mandate of the AU/UN Hybrid Operation in Darfur (UNAMID) until 31 July 2013], 31 July 2012, S/RES/2063(2012).

<sup>236</sup> Laurie Nathan, 'No Ownership, No Peace: the Darfur Peace Agreement' (2006) Crisis States Research Centre, Working Paper no. 5, available at: [www.crisisstates.com/download/wp/wpSeries2/WP5.2.pdf](http://www.crisisstates.com/download/wp/wpSeries2/WP5.2.pdf) accessed on 15 April 2014.

<sup>237</sup> Waal, 'Darfur and the failure of the responsibility to protect' (2007) in *International Affairs* 83: 6, 1045.

<sup>238</sup> Mukesh Kapila, *Against the Tide of Evil: How One Man Became the Whistle blower to the First Mass Murder of the Twenty-First Century* by Kapila (Mainstream Publishing 2013) 48.

<sup>239</sup> Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (New York: Pantheon Books 2009) 184-186.



In 2004, Paul Martin, the Prime Minister of Canada, chastised the international community's sluggish reaction to the situation in Darfur, saying: "The UN has been bogged down with the legal definition of genocide."<sup>240</sup>

Lack of international political will and necessary funding, poor capacity to conduct the mission as well as a US reluctance<sup>241</sup> to lead the intervention all prompted the delayed reaction. The UNSC has failed to pass a resolution that would impose comprehensive economic sanctions on Sudan. In April 2006, the Security Council imposed only targeted sanctions on four Sudanese individuals accused of involvement in the Darfur conflict<sup>242</sup>. The UNSC has also taken rather tough measures on the legal front by establishing an International Commission of Inquiry and refereeing the situation in Darfur (based on the findings of the Commission) to the International Criminal Court (ICC) for investigation. On March 4, 2009 the ICC issued an arrest warrant for Omar Hasan Ahmad Al Bashir, President of Sudan, on seven charges of crimes against humanity and war crimes<sup>243</sup>. Al-Bashir was the first sitting head of state indicted by the ICC. On July 2010, the ICC issued another arrest warrant for Al-Bashir for genocide committed in Darfur. It was the first time the ICC issued an arrest warrant for the crime of genocide<sup>244</sup>.

Al-Bashir disobeyed the ICC arrest warrant, and travelled to a number of countries such as Zimbabwe, Qatar and Libya in utter contempt of both the ICC and the international community. He commented: "I have not felt any restriction on movement....I have travelled all necessary travels."<sup>245</sup>

Since September 2005, the international debate on the situation in Darfur has been surrounded by the R2P doctrine. In 2006 the UN Secretary-General, Kofi Annan announced that "The UN Summit's commitment to R2P would only be meaningful if the Security Council is prepared to act swiftly and decisively to halt the killing, rape and ethnic cleansing to which people in Darfur are still being subjected."<sup>246</sup>

Nevertheless it was a late and half-hearted response. In 2006 the UNSC referred clearly to the Responsibility to Protect doctrine in its Resolution 1706<sup>247</sup>. Although it was "ineffective in providing aid or ensuring the deployment of troops into the region", the resolution has been considered a major triumph for the supporters of the R2P principle<sup>248</sup>. The AU and UN member states and their missions have failed to stop the killings and to

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<sup>240</sup> CBS New, 'Crisis in Darfur a timeline' (14 July 2008) available at <http://www.cbc.ca/news/background/sudan/darfur.html> accessed on 28 December 2013.

<sup>241</sup> However, U.S. President George W. Bush and Secretary of State, Colin Powell labeled the violence in Darfur genocide on Sept. 9 2004, saying: "We urge the international community to work with us to prevent and suppress acts of genocide". In addition, the US imposed further economic and diplomatic sanctions on Sudan over the Darfur situation as well as being generous in its aid contribution. See: U.S. secretary of state Colin Powell's testimony to the Senate Foreign Relations Committee on September 9, 2004. Text available at US Department of State, 'Powell Reports Sudan Responsible for Genocide in Darfur' (9 September 2004) available at: [www.america.gov/st/washfileenglish/2004/September/20040909115958JTgnilwoD0.5094873.html](http://www.america.gov/st/washfileenglish/2004/September/20040909115958JTgnilwoD0.5094873.html) accessed on 28 December 2013.

<sup>242</sup> Economic sanctions against the Sudanese government have not been agreed upon because of the oppositions of China and the UK also toyed with that idea. See: Human Rights Watch 'Sudan, Oil and Human Rights' (November 24, 2003) <http://www.hrw.org/en/reports/2003/11/24/sudan-oiland-human-rights> accessed on 25 December 2013. See also: House of Commons International Development Committee, 'Darfur, Sudan: The Responsibility to Protect' (17 March 2005) 1, Fifth Report of Session 2004-05, London: House of Commons, available at: [www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67i.pdf](http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67i.pdf) accessed on 14 April 2014.

<sup>243</sup> ICC-02/05-01/09, 4 March 2009, Situation in Darfur/Sudan in the case of the prosecutor V. Omar Hassan Ahmad Al Bashir, The Warrant of Arrest for President Omar Al-Bashir, available at: <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>, For more information see: A.G. Rojo, 2009, AMICC, The American Non-Governmental Organizations Coalition for the International Crime Court, available at: [http://www.amicc.org/docs/Bashir\\_Warrant.pdf](http://www.amicc.org/docs/Bashir_Warrant.pdf) accessed on 28 arch 2014.

<sup>244</sup> Human Rights Watch, 'Sudan: ICC Warrant for Al.Bashir on Genocide' (13 July 2010) available at: [www.hrw.org/news/07/13/sudan-icc-warrant-al.bashir-genocide](http://www.hrw.org/news/07/13/sudan-icc-warrant-al.bashir-genocide) accessed on 28 arch 2014.

<sup>245</sup> Sam Dealey, 'Omar al-Bashir: Sudan's Wanted Man' (August 13, 2009) Time Magazine.

<sup>246</sup> Kofi Annan, Speech of the Secretary-General to the United Nations Association of the United Kingdom, SG/SM/10332 (31 January, 2006) available at: [www.un.org/News/Press/docs/2006/sgsm10332.doc.htm](http://www.un.org/News/Press/docs/2006/sgsm10332.doc.htm) accessed on 19 May 2014.

<sup>247</sup> The UNSC has issued 26 resolutions, 9 major ones, since the onset of crisis. See: N. Sarwar, 'Darfur crisis: why has the UN failed?' Institute of Strategic Studies, available at: [http://www.issi.org.pk/publication-files/1299645500\\_83412313.pdf](http://www.issi.org.pk/publication-files/1299645500_83412313.pdf) accessed on 21 May 2014.

<sup>248</sup> Chandra Sheehy, 'A lion without Teeth: The failure of the Responsibility to Protect' (2010) Salem State College 12. available at: <http://www.anselm.edu/Documents/NHIOP/Global%20Topics/2010/Sheehyfinal.pdf>, accessed on 12 June 2014. See also: J. Flint, 'Rhetoric and Reality: The Failure to Resolve the Darfur Conflict' (2010) Norwegian Ministry of Foreign Affairs, Small Arms Survey, Graduate Institute of International and Development Studies, Geneva.

observe the R2P doctrine. They have always sought the consent of Khartoum for the full deployment of their missions, as the UN Secretary-General, Kofi Annan pointed out: "Without the consent of the Sudanese government, we are not going to be able to put in the troops. So what we need is to convince the Sudanese government to bend and change its attitude and allow us to go in."<sup>249</sup>

Moreover, the opposition of China (and to a lesser extent Russia<sup>250</sup> and a number of Arab and African states) to a full-fledged intervention in Darfur has been considered a formidable obstacle on the road to peace and security in Darfur<sup>251</sup>.

Causing obstructions by the government of the Sudan has been widely viewed as entirely preventive measures<sup>252</sup>. Many scholars believe that the continuation of the situation in Darfur reflects the extent of the R2P principle's weaknesses. In my estimation, the failure of the R2P doctrine is mainly due to the inadequate implementation of R2P by both the international community and intergovernmental organizations. As noted above, all the efforts have so far been made by the international community to provide the R2P doctrine 'teeth under Chapter VI and VII', i.e. peacekeeping missions, targeted sanctions, ceasefire commission reports, ICC prosecutions, the threats to use of force (albeit hollow) by some super powers and international condemnation have not been practically effective. One can claim that the international community and intergovernmental organizations have failed to effectively apply the R2P principle in Darfur.

Regarding the world's failure to halt the bloodshed in Darfur, I would like to conclude this chapter by quoting the UN Secretary-General, Kofi Annan as saying:

"To judge by what is happening in Darfur, our performance has not improved much since the disasters of Bosnia and Rwanda. Sixty years after the liberation of the Nazi death camps, and 30 years after the Cambodian killing fields, the promise of 'never again' is ringing hollow."<sup>253</sup>

## V. Libya

In this chapter, I will attempt to shed some light on the intervention in Libya. The focus of our attention will be on the Responsibility to Protect on the behalf of the state and the global community. The response of the Libyan regime to the 2011 uprising as well as an assessment of the use of the R2P principle will be discussed. Based on the tangible examples of the Libyan intervention, I will highlight the criteria posed by the R2P doctrine and Just War theory to discuss the legitimacy of the Libyan intervention.

## A. Developments leading to the Adoption of SC Resolution 1973

The Arab Spring protests which occurred in Tunisia and Egypt, broke out in Libya on 15 February 2011. The uprising began peacefully, and later turned violent<sup>254</sup> because of the brutal response of the Gaddafi regime. Many officers joined the opposition, and the 'Interim Transitional National Council' was established. The uprising rapidly escalated to a full-fledged civil war aiming to oust the Gaddafi regime. Gaddafi declared war on the opposition and by March, loyalists re-controlled much of Libya, and it was highly likely that the opposition might

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<sup>249</sup> Secretary-General's Press Conference, New York (13 September 2006) available at: <http://www.un.org/sg/statements/index.asp?nid=2200>. See also: E. Reeves, 'Darfur: Genocide before our eyes' In J. Apsel, *Darfur: Genocide before our eyes* (2004) Institute for the Study of Genocide, 16-18 accessed on 25 July 2014.

<sup>250</sup> China receives 6% of its imported oil from Sudan and Russia sells armaments to Sudan. See Policy Analysis Brief, 'Sudan and the implications for Responsibility to Protect' (October 2009) The Stanley Foundation, 6.

<sup>251</sup> House of Commons International Development Committee, 'Darfur, Sudan: The responsibility to protect' Fifth report of Session 2004-2005", Vol I, 20, available at: <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67i.pdf>, accessed on 23 July 2014. See also: A. Penketh, 'Sudan blocks UN troops in fear Darfur could become a graveyard' (March 11 2006) Independent, London.

<sup>252</sup> Omer Ismail and Annette LaRocco, 'Failing Darfur, Enough Project; To end Genocide and Crimes against Humanity' (August 2012) 7-8 available at: <http://www.enoughproject.org/files/DDPDImplementation.pdf> accessed on 16 March 2014.

<sup>253</sup> A speech organized by the Human Rights Watch, (8 December 2006), The full text available at: [http://hrw.org/un/pdfs/annan\\_address120806.pdf](http://hrw.org/un/pdfs/annan_address120806.pdf) accessed on 26 April 2014.

<sup>254</sup> Alex J. Bellamy and Paul Williams, 'The new politics of protection-Cote d'Ivoire, Libya and the Responsibility to Protect' (2011) *International Affairs* 87 (4), 829-831.

be crushed in Benghazi<sup>255</sup>. Bellamy and Williams (2011) have the following to say about the human rights threats made by Gaddafi against the opposition:

"In words that bore direct echoes of the 1994 Rwanda genocide, Gaddafi told the world that 'officers have been deployed in all tribes and regions so that they can purify all decision from these cockroaches and Libyan who takes arm against Libya will be executed.'<sup>256</sup>

In response to the rapidly disintegrating situation in Libya, various regional and sub-regional organizations together with the UN condemned the gross violations of human rights in Libya and established the grounds for future intervention<sup>257</sup>. For instance, on 22nd of February 2011, the UN High Commission for Human Rights "called on the authorities to stop using violence against demonstrators, which may amount to crimes against humanity."<sup>258</sup> On 22 February, UN officials announced that the situation in Libya is a concrete case of R2P. Ban Ki-Moon's Special Adviser on the Prevention of Genocide said "The regime's behaviour could amount to crimes against humanity and insisted that it comply with its 2005 commitment to R2P."<sup>259</sup> The EU also condemned the violations of human rights in Libya through the words of Catherine Ashton<sup>260</sup>. Moreover, the League of Arab States (LAS)<sup>261</sup>, the Organisation of Islamic Countries (OIC)<sup>262</sup> and the Peace and Security Council of the African Union (AU)<sup>263</sup> vehemently condemned the brutal crackdown on the opposition.

Convincing evidence of gross human rights violations was circulated by media. At this stage, in response to the atrocities, the global community charged the Gaddafi regime with crimes against humanity. The UNSC adopted Resolution S-15/1 and asked the Libyan regime "to meet its responsibility to protect its population and immediately put an end to all human right violations" on 25 February<sup>264</sup>. The Human Rights Council opened a Special Session on 'the situation of human rights in the Libyan Arab Jamahiriya' and passed a resolution that asked the Libyan officials to halt the further bloodshed<sup>265</sup>. As the violence escalated, the SC unanimously passed Resolution 1970 and expressed deep concern about the situation in Libya and considers that "the widespread and systematic attacks...against civilian population may amount to crimes against humanity."<sup>266</sup> The resolution affirmed the Libyan official's responsibility to protect its population as well as imposing an arms embargo on Libya and targeted sanctions on the Libyan administration and Gaddafi family<sup>267</sup>. The SC also referred the situation in Libya to the ICC to convey a strong message to Gaddafi<sup>268</sup>.

Consequently, the International Criminal Court established a prima-facie case that the Gaddafi regime was guilty of crimes. All the above-mentioned responses and diplomatic efforts by the global community didn't

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<sup>255</sup> Christopher Fermor, 'NATO's decision to intervene in Libya: Realist principles or humanitarian norms?' (Winter 2012/13) 8 Journal of Politics and International Studies, ISSN 2047-7651, 328.

<sup>256</sup> Supra note 254, 830.

<sup>257</sup> Spence Zifcak, 'The Responsibility to Protect after Libya and Syria' (2012) 13 Melbourne Journal of International Law.

<sup>258</sup> Reuters, 'Libya attacks may be crimes against humanity: UN', (22 February 2011).

<sup>259</sup> UN Press Release, "Statement by the UN Secretary General Special Adviser on the Prevention of Genocide" (New York, 22 Feb 2011).

<sup>260</sup> Declaration by the High Representative, Cathrine Ashton, on behalf of the European Union on events in Libya, Council of the European Union, 20 Feb 2011, EU Doc 6795/1/11-PRESSE 33.

<sup>261</sup> Ola Gala, 'Arab League bars Libya from meetings, citing forces Crimes', Bloomberg news, (22 Feb 2011)

<sup>262</sup> OIC General Secretariat condemns strongly the excessive use of force against civilian in the Libyan Jamahiriya, OIC, (22 Feb 2011).

<sup>263</sup> AU Communique of the 261th Meeting of the Peace and Security Council, 23 Feb 2011, PSC/PR/COMM (CCLXI).

<sup>264</sup> Situation of Human Rights in the Libyan Arab Jamahiriya, GA Res S-15/1, UN GAOR; 15th spec sesss, 2nd mtg, UN Doc A/HRC/RES/S-15/1(3 March 2011, adopted 25 February 2011) (Resolution S-15/1), adopted by the UN Security Council in Resolution 1970, UN Doc S/RES/1970.

<sup>265</sup> 265. OHCHR, Press Release, Geneva, (18 Feb 2011).

<sup>266</sup> UN Security Council, Security Council resolution 1970 (2011), 26 February 2011, S/RES/1970 (2011).

<sup>267</sup> The Resolution was welcomed by the SC members, although Russia, China and Brazil did not provide backup in practice. See: Alex Bellamy and Paul Williams, 'The new Politics of Protection? Côte d'Ivoire, Libya and the responsibility to protect' (2011) International Affairs 87:4, 838-841.

<sup>268</sup> This power was used to refer the situation in Darfur to the ICC by the SC for the first time. On 27 June 2011 ICC issued an arrest warrants for Libya leader Gaddafi, his son and head of intelligence for alleged crimes against humanity, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1099329.pdf>. See also: Amnesty International, 'ICC Issues Arrest Warrant for Al-Gaddafi' (27 June 2011) available at: <http://www.refworld.org/docid/4e09b8512.html>, Radio Free Europe/Radio Liberty, 'ICC issues arrest warrant for Qaddafi on war crimes charges', Tripoli rejects accusations, (27 June 2011) available at: <http://www.refworld.org/docid/4e0b2e4321.html>.

manage to change Gaddafi's behaviour. Gaddafi forces continued bombarding rebels and the humanitarian crisis was deteriorating<sup>269</sup>. On 12 March 2011 in an unprecedented move, the Gulf Cooperation Council called for the SC to "take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya."<sup>270</sup> Eventually, the attempts of the global community bore fruit and the UNSC followed up with Resolution 1973<sup>271</sup>. On March 17th Gaddafi declared that he would stage an attack on Benghazi and threatened the rebels that "his troops would show no mercy and pity."<sup>272</sup>

## B. The Resolution 1973 and the Responsibility to Protect

Gaddafi's speech acted as a stimulus for the decision of the UK, Lebanon, France and the U.S. to put the draft resolution to a vote. The Resolution 1973 was adopted with 10 votes in favour and five abstentions by China, Brazil, Germany, Russia and India<sup>273</sup>. The SC regarded the situation in Libya "continues to constitute a threat to international peace and security."<sup>274</sup> Thus, pursuant to Chapter VII of the UN Charter, the SC passed several measures including the use of military force<sup>275</sup>. The Resolution 1973 also contains: the protection of civilians, the creation of a no-fly zone, an asset freeze, the enforcement of the arms embargo and a ban on flights<sup>276</sup>. The most important part of the resolution is that it allowed the UN member States "to take all necessary measures...to protect civilians and civilian populated areas"<sup>277</sup> of Libya. Initially, the airstrike campaign began on the March 19th conducted by a coalition of Western states backed up by Qatar and the UAE. On March 24th, 'the Operation Unified Protector' was launched under the umbrella of NATO<sup>278</sup>. NATO declared that the operation would be limited to the enforcement of Resolution 1973 and would be ended as soon as the Libyan government satisfied the following demands: "a) End attacks against civilian populated areas. b) Withdraw to bases all military forces. c) Permit unlimited humanitarian access."<sup>279</sup>

Despite these promises, the impression was quickly formed that NATO was not an impartial player. Indeed, willingly or unwillingly, it was after a regime change<sup>280</sup>. Leading NATO members clarified their intention to oust the Gaddafi regime. In a remarkable jointly-signed statement, Barak Obama, David Cameron and Nicolas Sarkozy reaffirmed their commitments to the Resolution 1973; however, kept on arguing that "it is possible to imagine a future for Libya with Gaddafi in power."<sup>281</sup>

Now, I will assess the applicability of the R2P doctrine to the Libyan intervention

The authorization of the use of military force to protect Libyan citizens against atrocities has been embraced by several member states with open arms. This agreement provides an indication of their acceptance of the R2P doctrine. A number of scholars consider Resolution 1973 a great success for the R2P principle. Secretary-General Ban Ki-Moon stated that: "Resolution 1973 affirms, clearly and unequivocally, the international com-

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<sup>269</sup> Matthias Dembinski and Theresa Reinold, 'Libya and the Future of the Responsibility to Protect – African and European Perspectives' (2012) Peace Research Institute Frankfurt (PRIF), Germany, 12-14 available at: [http://www.hsfk.de/Newsdetail.25.0.html?tx\\_ttnews%5Btt\\_news%5D=985&tx\\_ttnews%5BbackPid%5D=5&cHash=777fb174b0&L=1](http://www.hsfk.de/Newsdetail.25.0.html?tx_ttnews%5Btt_news%5D=985&tx_ttnews%5BbackPid%5D=5&cHash=777fb174b0&L=1) accessed on 12 May 2014.

<sup>270</sup> Resolution 7360 of the Council of the Arab League meeting at the Ministerial level, (12 March 2011).

<sup>271</sup> UN Security Council, Security Council resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya], 17 March 2011, S/RES/1973(2011).

<sup>272</sup> Maria Golovina and Patrick Worship, 'UN Okays military action on Libya' Reuters, (17 March 2011).

<sup>273</sup> The UK, Lebanon, France, Bosnia and Herzegovina, Colombia, Gabon, Nigeria, Portugal, South Africa and the U.S. voted in favour.

<sup>274</sup> Supra note 271, Preamble (n 12).

<sup>275</sup> Supra note 271, para 4.

<sup>276</sup> Supra note 271, para 8 and 13.

<sup>277</sup> Ibid.

<sup>278</sup> France and the UK flew 40% of the sorties. Turkey, Spain, Greece, Romania and the Netherlands provided support by enforcing the no-fly zone and arm embargos at sea, See: C.J. Chivers and D. D. Kirkpatrick, 'Libyan Rebels Complain of Deadly Deals under NATO's Command', The New York Times, 10 (5 April 2011).

<sup>279</sup> NATO Statement on Libya, following the working lunch of NATO Ministers of Foreign Affairs with non- NATO contributors to Operation Unified Protector, (14 April 2011) available at: [http://www.nato.int/cps/en/natolive/official\\_texts\\_72544.htm](http://www.nato.int/cps/en/natolive/official_texts_72544.htm) accessed on 20 June 2014.

<sup>280</sup> Supra note 256, 12-14.

<sup>281</sup> BBC NEWS, 'Libya: Obama, Cameron and Sarkozy vow Gaddafi must go'(15 April 2011) available at: <http://www.bbc.co.uk/news/world-africa-13089758>.

munity's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government."<sup>282</sup>

A former R2P commissioner at the United Nations, Thakur is under the impression that Resolution 1973 is a concrete example of military implementation of R2P and the intervention in Libya has guaranteed the future of the R2P doctrine. He also noted that: "Resolution 1973 marks the first military implementation of the doctrine of Responsibility to Protect....R2P is coming closer to being solidified as an actionable norm."<sup>283</sup> In fact, those in favor of the intervention viewed the military intervention in Libya as a concrete case of the Responsibility to Protect policy adopted by the UN at the 2005 World Summit. According to the former Australian foreign minister and the co-chair of ICISS, Evans, "The international military intervention (SMH) in Libya is not about bombing for democracy or Muammar Gadhafi's head. Legally, morally, politically, and militarily it has only one justification: protecting the country's people."<sup>284</sup>

However, the case of Libya as a highly successful example of R2P and implementation of Resolution 1973 has been under fire by many member states. For instance, Brazil stated that: "The use of force in Libya has made a political solution more difficult to achieve."<sup>285</sup> Furthermore, Resolution 1973 refers to R2P, but solely to its first element, which is the responsibility of the state to protect its citizens, in its preamble<sup>286</sup>. Significantly, the expansion of Resolution 1973 into regime change provoked severe criticism. Critics believe that the protection of civilians is the stated objective of R2P, not the removal of dictators. Thus, the regime change in the case of Libya might have negative effects on future attempts to invoke the R2P doctrine.

As highlighted before, the ICISS, based on 'Just War theory', issued six criteria which must be met before intervention. First there has to be a just cause and there should be "large scale loss of life....which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation."<sup>287</sup> It is quite clear that it was so in the case of Libya, mainly due to the heavy casualties<sup>288</sup>. As a report by the International Commission of Inquiry of the UN Human Rights Council pointed out that "international crimes, specifically crimes against humanity and war crimes, were committed by Gaddafi forces."<sup>289</sup>

Second there must be a right intention and the major intention of the intervention should be "to halt or avert human suffering."<sup>290</sup> As noted before, a number of member states claim that NATO was after the regime change under the pretext of protecting civilians. Thakur (2012) pointed out the following: "If stopping the killing has been the real aim, NATO states would have backed a ceasefire and a negotiated settlement rather than repeatedly vetoing both."<sup>291</sup> There are three distinguishing benchmarks of Libyan intervention which can guarantee that the right intention criterion is fulfilled. First, it is essential that intervention is carried out in a collective way. The military intervention in Libya was a multilateral operation. Second, the intervention must be backed by the people of that country. The population of Libya asked for an intervention to stop the gross human rights violations by the Gaddafi regime.

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<sup>282</sup> Statement by the Secretary-General on Libya, Department of Public Information, News and Media Division (New York 17 March 2011), available at: <http://www.un.org/sg/statements/?nid=5145> accessed on 05 November 2013.

<sup>283</sup> Ramesh Thakur, 'The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics' (2011) Routledge, 173.

<sup>284</sup> Gareth Evans, 'UN targets Libya with pinpoint accuracy', The Sydney Morning Herald (24 March 2011) available at: <http://www.smh.com.au/federalpolitics/political-opinion/un-targets-libya-withpinpointaccuracy20110323-1c6pc.html> accessed on 13 January 2014.

<sup>285</sup> Kevin Boreham, 'Libya and the Responsibility to Protect doctrine' (28 August 2011) Online Opinion, Australia's e-journal of social and political debate, available at: <http://www.onlineopinion.com.au/view.asp?article=12522&page=0> accessed on 25 May 2014.

<sup>286</sup> 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."

<sup>287</sup> Supra note 18, ICISS, para 4.19.

<sup>288</sup> International Criminal Court chief prosecutor, Luis Gabriel Moreno Ocampo estimated that 500–700 people were killed by security forces in February 2011, See: ICRtoP, (2012) available at: <http://www.responsibilitytoprotect.org/>.

<sup>289</sup> Report of the International Commission of Inquiry on Libya, UN Human Rights Council, A/HRC/19/68, (2 March 2012).

<sup>290</sup> Supra note 18, ICISS, para 4.33.

<sup>291</sup> Ramesh Thakur, Libya and the responsibility to protect. Between opportunistic humanitarianism and value-free pragmatism (Institute for Security Studies 6 March 2012) 3.

The third element is the support of other states in the region. In the case of Libya, the GCC and LAS called on the international community for a no-fly zone and appeared utterly supportive. Therefore, the three distinguishing benchmarks for a right intention for the intervention in Libya were fulfilled<sup>292</sup>. The use of military intervention in Libya can be labelled somehow as a last resort. Prior to the intervention, several diplomatic efforts had been made and arm embargo and targeted sanctions were imposed. Critics claim that the case of Libya can't be described as a last resort because peaceful measures were not fully exhausted<sup>293</sup>. There were no attempts to apply peaceful methods to protect civilians, and the speed of the intervention by NATO has become also the target of criticism. As Simmon (2011) noted: "It seems as though the UNSC was unwilling to pursue other options, and thus appears to have failed to take into account one of the primary precautionary principles enshrined by R2P."<sup>294</sup>

The fourth benchmark set forth by the R2P doctrine is that the intervention must be proportional. The coalition chiefly used the enforcement of a no-fly zone, and it was rather effective. Thus, one can argue that the coalition applied proportional force. As Meyer (2011) noted that "there are no indications that the scale, duration or intensity were out of proportion to the Libyan military intervention."<sup>295</sup> However, the Libyan case has been questioned by some critics because of the arming of the rebels by NATO, which violates the principles of the R2P doctrine<sup>296</sup>.

The fifth yardstick is Reasonable prospect. Evans posed the following question to test this criterion: "Will those at risk be overall better or worse off?"<sup>297</sup> In case of Libya, it is rather difficult to respond to this question. Many believe that the NATO operation rescued tens of thousands of citizens in Libya<sup>298</sup>.

Nevertheless, some, including those members of the UNSC who abstained from the vote on Resolution 1973, firmly believe that NATO overstepped and abused the UNSC's mandate<sup>299</sup>. The NATO-led intervention has been under attack because a considerable number of unarmed civilians were killed<sup>300</sup>. As underscored before, critics also strongly condemned NATO for taking the rebel side and not observing neutrality of civilian protection<sup>301</sup> as well as pursuing regime change<sup>302</sup>. As Hall Findlay (2011) notes:

"R2P stands for the prevention of the massacre of innocent civilians and not for the support of Libyan rebels."<sup>303</sup>

Eventually, one can claim that the Right Authority criterion was fulfilled in case of Libya, since the R2P doctrine states that "There is no better appropriate body than the United Nations Security Council to authorize

<sup>292</sup> Europe's World: "The Responsibility to Protect (R2P) and Libya", (02-07-2011) available at: [http://www.europesworld.org/NewEnglish/Home\\_old/PartnerPosts/tabid/671/PostID/2621/language/en-US/Default.aspx](http://www.europesworld.org/NewEnglish/Home_old/PartnerPosts/tabid/671/PostID/2621/language/en-US/Default.aspx) accessed on 01 July 2014.

<sup>293</sup> E-international Relations, 'Why Intervention in Libya was Justified' (25-01-2012) available at: <http://www.e-ir.info/2012/01/25/why-intervention-in-libya-was-justified/> accessed on 21 November 2013.

<sup>294</sup> Simmon, 'Comment on Libya and the Responsibility to Protect' (2011) available at: <http://blog.simmonli.com/2011/03/comment-on-libya-and-the-responsibility-to-protect/> accessed on 10 February 2014.

<sup>295</sup> Jason D. Meyer, 'From Paralysis in Rwanda to Boldness in Libya: Has the International Community Taken 'Responsibility to Protect' from Abstract Principle to Concrete Norm Under International Law?' Social Science Research Network (2011) available at: <http://dx.doi.org/10.2139/ssrn.2035083> accessed on 14 June 2014.

<sup>296</sup> Dayvid Hillstrom, 'The Libyan No Fly Zone: Responsibility to Protect and International Law' (2011) Foreign Policy Journal.

<sup>297</sup> Gareth Evans, *The Reasonability to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington DC: Brookings Institution Press 2008) 256.

<sup>298</sup> Supra note 254, 23

<sup>299</sup> Dayvid Rieff, R2P, RIP, *The New York Times*, 6 (7 November 2011).

<sup>300</sup> According to Human Rights Watch: eight NATO air strikes at least left 72 civilians dead, including 20 women and 24 children, See: NATO: Investigate Civilian Deaths in Libya(14 May 2012) Human Rights Watch, available at: <http://www.hrw.org/news/2012/05/14/nato-investigate-civilian-deaths-libya> accessed on 25 November 2013.

<sup>301</sup> Supra note 220, 11.

<sup>302</sup> Liam Fox, then Secretary of State for Defense when asked whether self-determination for the people of Libya and regime change was a goal he stated: "it is clear that regime change would be a major policy initiative and one that is not signed up to in the Resolution" See: House of Commence Defence Committee, 'Operations in Libya' (2012) Volume I: Report, London, 25, available at: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmdfence/950/950.pdf> accessed on 05 April 2014.

<sup>303</sup> Martha Hall Findlay, *Can R2P survive Libya and Syria?* (Canadian Defence & Foreign Affairs Institute 2011) 6.

military intervention for human protection purposes.<sup>304</sup> The R2P report is also worded as following: "Right intention is better assured with multilateral operations, clearly supported by regional opinion..."<sup>305</sup> As underscored before, the intervention operation was multilateral and received the support of regional organizations.

As analyzed above, despite the considerable criticism, the case of Libya has been hailed as a successful 'first true test' of R2P. Noticeably, the responsibilities to prevent and react have been addressed in Libya. However, another pillar of the R2P doctrine, the international responsibility to rebuild which "requires intervening actors to establish a clear and effective post-intervention strategy,"<sup>306</sup> has remained a critical issue. All three elements of R2P, namely, the responsibility to react, to prevent and to rebuild are of great importance to the ICISS. As noted by the ICISS, R2P is about a "a continuum of intervention, which begins with preventive efforts and ends with the responsibility to rebuild, so that respect for human life and the rule of law will be restored."<sup>307</sup> In the case of Libya, the success has been undermined by the failure of the international community to implement the responsibility to rebuild. The international responsibility to rebuild should deal with sustainable development and economic growth in Libya, as well as disarmament, national reconciliation and recovery built from the ruins of Libya's political infrastructure. Although Libya is "still wrestling with the underlying problems that produced the original intervention action"<sup>308</sup>, when taking Libya's transitional period into consideration, it is rather difficult to see how diligently the responsibility to rebuild will be pursued.

In this section, I have discussed how the SC invoked the R2P principle, paving the way for a forceful international response to address the situation in Libya. In the next section, I will focus on the Syrian crisis and how the UNSC has been paralyzed by the opposition of Russia and China. I'll also examine how the lessons learned from NATO's Libyan operation have so-far delayed a strong collective response by the international community. Finally, after detailing the case of Libya and the situation in Syria, I will conclude by discussing the future of R2P.

## VI. Syria

### A. Background (2011-to present)

Currently, the global community is actively discussing how to handle the long-running civil war in Syria. Serious human rights violations, committed primarily by the Syrian Ba'ath regime, but also by the opposition, can be found all across Syria. The Arab Spring reached Syria in March 2011<sup>309</sup>. The torture of some students, who painted anti-government graffiti, gave rise to the political uprising in this country. The anti-government protests grew steadily across Syria and tens of thousands of Syrians demanded extensive reforms and Assad's resignation<sup>310</sup>. The Syrian regime under Bashar al-Assad resorted to violence against the protesters and many foreign journalists were banned from Syria. After several weeks, the Syrian regime adopted a harsher strategy and bombarded Deraa, the city where the protests broke out, and made the rebels withdraw. In 2012, the growing unrest reached Damascus, the capital city, and Aleppo and the risk of a full-fledged civil war became a reality for Syrians<sup>311</sup>.

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<sup>304</sup> Supra note 9, ICISS, para7.

<sup>305</sup> Supra note 9, ICISS, p XII.

<sup>306</sup> Supra note 9, ICISS, para39.

<sup>307</sup> Supra note 9, ICISS, para7.50.

<sup>308</sup> Maximilian C. Forte, *Slouching Towards Sirte: NATO's War on Libya and Africa* (Baraka Books, 2012) 259. See also: E. Chorin, 'NATO's Libya International and the Continued Case for a RESPONSIBILITY to REBUILD' (2012) 31:365 *Boston University International Law Journal*, available at: [http://www.brg-expert.com/media/publication/342\\_Chorin\\_BUNLJ.pdf](http://www.brg-expert.com/media/publication/342_Chorin_BUNLJ.pdf) accessed on 14 April 2014.

<sup>309</sup> Ramesh Thakur, 'Syrians Are Paying the Price of NATO Excesses in Libya, e-International Relation' (2 March 2012) available at: <http://www.e-ir.info/2012/03/02/syrians-are-paying-the-price-of-nato-excesses-in-libya/> accessed on 26 June 2014.

<sup>310</sup> CNN Website, 'Rebels regroup as regime forces renew assault on Syria's largest city' (10 August 2012) available at: <http://edition.cnn.com/2012/08/09/world/meast/syria-unrest/index.html> accessed on 12 May 2014.

<sup>311</sup> Peter Wilkinson and Nick Thompson, 'Syria: From uprising to civil war', CNN Website (25 July 2012) available at: [http://edition.cnn.com/2012/03/14/world/meast/syria-timeline/index.html?hpt=hp\\_c1](http://edition.cnn.com/2012/03/14/world/meast/syria-timeline/index.html?hpt=hp_c1) accessed on 09 August 2014.

The call for democracy, economic prosperity and job creation were the reasons behind the conflict. Importantly, sectarian conflicts play a pivotal role in the Syrian crisis. The Assad family, security forces and Shabiha militia<sup>312</sup> belong mainly to the Alawite minority group, while the majority of Syrian population is Sunni Muslims<sup>313</sup>. There are a number of opposition groups in Syria against the Assad regime. The Syrian National Council (SNC), created in Turkey in October of 2011, is the most important opposition group. The SNC has pursued total regime change in Syria and called on the international community to intervene<sup>314</sup>.

The Free Syrian Army (FSA) was also formed by the SNC. In June of 2012, the Human Rights Watch (HRW) reported that "the attacks by the government reached the level of crimes against humanity in cities across Syria."<sup>315</sup> The Assad regime has consistently denied resorting to violence and stated that the rebels are behind the violent measures<sup>316</sup>. Assad's refusal to relinquish power gave rise to the creation and competition of two axes. The pro-Assad axis consists of Russia, China, Iran, Venezuela and North Korea, while the anti-Assad axis consists of the U.S., the European countries, Turkey and some Arab states. The two-mentioned axes have been supporting either the Assad regime or the rebels in accordance with their own interests. In fact, Syria has become a regional and international battlefield with various groups of very different ideologies involved in a multi-layered battleground<sup>317</sup>.

On the 21st of August 2013, opposition activists accused Assad's regime of a chemical weapons attack on civilians around Damascus. Shortly thereafter, a number of videos began flooding social media sites showing horrific atrocities dealt to the people of Syria, including many children and babies. Syrian officials have denied the attack and proposed that rebel fighters were behind attack<sup>318</sup>.

## B. International reactions

The conflict in Syria has attracted international attention. Numerous states were fast to acknowledge that Assad has to shoulder the R2P of his citizens, while other countries condemned the rebels instead. Regional organizations such as the Arab League responded to the situation in Syria rather late showing disunity for taking tough measures<sup>319</sup>. At the outset of the crises, the key regional powers such as Turkey and Saudi Arabia were inactive for a number of months; they were not satisfied with Assad regime, "but preferred to subscribe to a policy of the devil we knew."<sup>320</sup>

Later on, Saudi Arabia and some Arab states considered the Syrian crisis as a chance to wage a proxy war against Iran. Thus, they became actively involved in the crisis<sup>321</sup>. The U.S. and the EU condemned the blood-

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<sup>312</sup> They are paramilitary groups who have been blamed by the Syrian opposition for the most violent excesses committed against the rebels and also blamed for the massacre in Houla. See: Syria unrest: Who are the shabiha? BBC NEWS, (29 May 2012), available at: <http://www.bbc.co.uk/news/world-middle-east-14482968> accessed on 03 June 2014.

<sup>313</sup> Supra note 268.

<sup>314</sup> New York Times news "Coverage of Syria" (19 September 2013), available at: <http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html> accessed on 07 May 2014.

<sup>315</sup> Human Rights Watch, 'World Report Chapter: Syria' (2012), available at: [http://www.hrw.org/sites/default/files/related\\_material/syria\\_2012.pdf](http://www.hrw.org/sites/default/files/related_material/syria_2012.pdf) accessed on 02 February 2014.

<sup>316</sup> Since 2011, more than 100,000 people have lost their lives and millions more, including one million children, have fled Syria. See: Reuters, Syria, available at: <http://www.reuters.com/places/syria> accessed on 02 February 2014.

<sup>317</sup> Supra note 269.

<sup>318</sup> BBC NEWS, 'Syria chemical attacks: What we know' (16 Sep 2013), available at: <http://www.bbc.co.uk/news/world-middle-east-23927399> accessed on 17 May 2014.

<sup>319</sup> As a response to the crisis, the Arab League suspended Syria's membership and later on imposed some sanctions and arm embargoes on Syria and requested a resolution from the SC. See: Bloomberg 'Syrian Arab League Membership Suspended for Killing of Civilian Protesters' (13 November, 2011) available at: <http://www.bloomberg.com/news/2011-11-12/arab-league-suspends-syria-s-membership-shelling-kills-16-people-in-yemen.html> accessed on 02 February 2014.

<sup>320</sup> Itamar Rabinovich, 'The Devil We Knew' New York Times, (18 November 2011) available at: [http://www.nytimes.com/2011/11/19/opinion/the-devil-we-knew.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/11/19/opinion/the-devil-we-knew.html?pagewanted=all&_r=0) accessed on 14 December 2013.

<sup>321</sup> T. Lister, 'How Syria differs from Libya' CNN World, (10 February 2012) available at: <http://globalpublicsquare.blogs.cnn.com/2012/02/10/how-syria-differs-from-libya> accessed on 12 November 2013.



shed strongly and imposed targeted and economic sanctions as well as arms embargoes on the Assad regime<sup>322</sup>. The UNSC has been divided over how to react to the situation in Syria. The UNSC did not respond quickly, primarily because it was deeply involved in the Libyan intervention. In April of 2011, the members of the UNSC considered a draft press statement on Syria suggested by some European members. The SC members couldn't enter into any agreements owing to the objections of Russia and Lebanon<sup>323</sup>.

Undoubtedly, China and Russia have always been supportive of the Assad's regime from the very outset of the crisis. On the 4th of October 2011, France, Portugal, Germany and the UK circulated to the SC a draft resolution concerning the situation in Syria. The draft reminded Assad's regime about its responsibility to protect its citizens and condemned the gross human rights violations in Syria. The draft text was under discussion in the SC and some members such as Brazil, India, South Africa, Russia and China expressed dissatisfaction, stating that the Syrian crisis must be resolved through a Syria-led political process<sup>324</sup>. In August of 2011, the President of the SC issued a presidential statement on Syria and expressed his deep concern regarding the worsening situation in this country<sup>325</sup>.

On the 4th of February 2012, Russia and China vetoed the draft resolution of the Security Council resolution condemning the violence in Syria and supported the Arab League's January 22nd decision to facilitate a Syrian-led political transition<sup>326</sup>. Shortly after the vote was taken, the SC witnessed a bitter debate. The French Ambassador summed up the mood amongst the resolution's supporters as follows: "This is a sad day for the Council; it is a sad day for the Syrians; and it is [a] sad day for all the friends of democracy....History has compounded our shame because today is the anniversary of the Hama massacre [in 1982] and falls only one day after another massacre in Homs. The father killed on a mass scale; the son has followed in his footsteps. Horror would seem to be hereditary in Damascus."<sup>327</sup> The British Ambassador also stated that "[t]hose who blocked Council action today must ask themselves how many more deaths they are prepared to tolerate before they support even modest and measured action".<sup>328</sup>

The Russian Ambassador counterattacked as following: "From the very beginning of the Syrian crisis, some influential members of the international community, including some sitting at this table, have undermined any possibility of a political settlement, calling for regime change, encouraging the opposition towards power, indulging in provocation and nurturing the armed struggle. ... [no] account [has] been taken of our proposals that along with the withdrawal of the Syrian armed forces from the cities, there should be an end to attacks by armed groups on State institutions and neighbourhoods."<sup>329</sup>

On the 14 of April 2012, the US established a draft resolution and asked for a highly developed team of 30 unarmed UN military observers to support Annan's six-point plan<sup>330</sup>. The draft of the US received the support of all the members and Resolution 2042 was passed<sup>331</sup>.

In April of 2012, the UK and France proposed a draft resolution in the UNSC, and Russia also put another resolution forward<sup>332</sup>. There was adequate support for the draft resolution proposed by Russia which was approved unanimously on the 21st of April 2012 as Resolution 2043.

<sup>322</sup> McNair Chambers, 'Updates on Syria and Sanctions, Overview of UN, US and EU Sanctions and recent events in Syria' (26 June 2012), available at: <http://www.mcnairchambers.com/media/documents/201210/MCNAIRSYRIASANCTIONSUPDATEJUNE2012.pdf> accessed on 12 March 2014.

<sup>323</sup> Neil. MacFarquhar, 'Push in U.N. for Criticism of Syria Is Rejected' New York Times, (28 April 2011)

<sup>324</sup> Draft Res. S/2011/612, Security Council fails to adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protesters, owing to veto by Russian Federation, China and Brazil, India, Lebanon and South Africa abstained. , UN Doc SC/10403; 6627th Meeting, (Oct. 4, 2011).

<sup>325</sup> Statement by the President of the Security Council, UN SCOR, 66th sess, 6598th mtg, UN Doc S/PRST/2011/16 (3 August 2011).

<sup>326</sup> Draft Res. S/2012/77, Security Council fails to adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan, UN Doc SC/10536;6711th Meeting, (Feb. 4, 2012).

<sup>327</sup> UN SCOR, 67th sess, 6711th mtg, UN Doc S/PV.6711 (4 February 2012) 3 (Gérard Araud).

<sup>328</sup> Ibid (Sir Mark Lyall Grant).

<sup>329</sup> Supra note 286 (Vitaly Churkin).

<sup>330</sup> The SC issued a presidential statement to support the Joint Special Envoy's six-point plan for mediation of Syrian crisis, 21 March 2012 (S/PRST/2012/6).

<sup>331</sup> UN Security Council, Security Council resolution 2042 (2012) [on authorization of the deployment of an advance team of up to 30 unarmed military observers to the Syrian Arab Republic] , (14 April 2012), S/RES/2042(2012).

The Resolution established a UN Supervision Mission in Syria (UNSMIS) "to monitor a cessation of armed violence in all its forms by all parties."<sup>332</sup> There was adequate support for the draft resolution proposed by Russia, which was approved unanimously on 21st of April 2012 as Resolution 2043. The distinction between the UK-France draft and the Russian draft was that the European draft contained sanctions and the Russian one did not<sup>334</sup>. One more time the UNSC failed to pass a resolution which would have imposed sanctions on Syria as sponsored by France, Germany, Portugal, the United Kingdom and the United States on the 19th of July 2012. China and Russia again exercised the right of veto over the resolution, and Pakistan and South Africa also abstained<sup>335</sup>.

The West reacted immediately to the deployment of chemical weapons by Assad's regime. The British, U.S. and French governments made public their assessments of the attack, and held Assad's regime responsible. President Obama signaled his reluctance to go "forward without the approval of the United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold Assad accountable."<sup>336</sup>

A team of UN chemical weapons experts investigated the allegations of chemical weapons deployment<sup>337</sup>. On the 16th of September, the UN released its final report which confirmed "unequivocally and objectively" that chemical weapons had been used<sup>338</sup>.

UN Secretary General, Ban Ki-moon called the attack a "war crime", saying the global community "had a responsibility to hold the perpetrators to account". He added it was "the most significant confirmed use of chemical weapons against civilians since Saddam Hussein used them in Halabja in 1988."<sup>339</sup> The UN report's findings were 'indisputable' but did not assign blame<sup>340</sup>. Not surprisingly, the UK, the U.S. and France confirmed that Assad's regime was behind the poison gas attack rather than opposition fighters. Russia, the strongest backer of Syria since the beginning of crisis, called the U.N. report into question and denounced it as "incomplete and highly politicized."<sup>341</sup>

As a harsh response to Assad's alleged chemical attack, the U.S. President, Barak Obama eventually broke the silence and raised the issue of military intervention against the Syrian government<sup>342</sup>. Meanwhile, Russia came up with a proposal for Syria "to put its chemical weapons stockpiles under international control and then have them destroyed by mid-2014."<sup>343</sup> The Syrian government fully embraced the Russian proposal and U.S. President; Barak Obama halted his efforts to win Congressional approval for military intervention against Syrian government<sup>344</sup>. Once again, the British, U.S. and French governments have chosen to pursue diplomacy to deal with the Assad's regime.

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<sup>332</sup> Saira Mohamed, 'The UN. Security Council and the Crisis in Syria, American Society of International Law' (March 26, 2012) Vol 19, Issue 11, available at: <http://www.asil.org/insights120326.cfm> accessed on 04 May 2014.

<sup>333</sup> UN Security Council, Security Council resolution 2043 (2012) [on the establishment of a UN Supervision Mission in the Syrian Arab Republic (UNSMIS)], 21 April 2012, S/RES/2043(2012).

<sup>334</sup> Supra note 292.

<sup>335</sup> Draft Res. S/2012/538, Security Council fails to adopt Draft Resolution on Syria that would have threatened sanctions, due to negative votes of China, Russian Federation, U.N. Doc, 6810th Meeting, S/2012/538(19 July 2012).

<sup>336</sup> Contrast The White House, Statement by the President on Syria, (31 August 2013), available at: <http://www.whitehouse.gov/photos-and-video/video/2013/08/31/president-obama-speaks-syria>.

<sup>337</sup> Supra note 294.

<sup>338</sup> BBC NEWS, 'Syria chemical attack: Key UN findings' (17 September 2013) available at: <http://www.bbc.co.uk/news/world-middle-east-23927399> accessed on 25 January 2014.

<sup>339</sup> See the report: [http://www.un.org/disarmament/content/slideshow/Secretary\\_General\\_Report\\_of\\_CW\\_Investigation.pdf](http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf)

<sup>340</sup> Supra note 323.

<sup>341</sup> Steve Gutterman and O. Holmes, 'Russia says U.N. report on Syria attack biased' (18 September 2013) Reuters, available at: <http://www.reuters.com/article/2013/09/18/us-syria-crisis-russia-idUSBRE98H0RQ20130918> accessed on 12 October 2013.

<sup>342</sup> Obama has already warned that the use of CW by the Assad's forces constituted a "red line that, if crossed, would have enormous consequences." See: J. Ball, 'Obama issues Syria a 'red line' warning on chemical weapons' The Washington Post, (22 August 2012).

<sup>343</sup> BBC NEWS, 'Viewpoints: Can Russia's chemical weapons plan for Syria work?' (12 September 2013) available at: <http://www.bbc.co.uk/news/world-24045429> accessed on 23 November 2013.

<sup>344</sup> The UK Government also has to take its participation in any military action against Syria off the table due to its defeat in the House of Commons on 30 August. See: BBC NEWS, 'Syria crisis: Cameron loses Commons vote

## C. Syria and the Responsibility to Protect

The Syrian crisis has been another actual test for the global community to halt the gross human rights violations which initially gave rise to the R2P doctrine. Based on the International Commission of Inquiry (COI) on the Syrian Arab Republic, the situation in Syria is a tangible case of R2P.

The COI declared that “the government of Syria has manifestly failed in its responsibility to protect its people.”<sup>345</sup> In addition, the Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect stated that the situation in Syria indicates that “crimes against humanity may have been committed there.”<sup>346</sup> Whereas three years into the Syrian conflict, the grave humanitarian situations in Syria (most notably in the besieged cities) have clearly violated the international humanitarian and human rights instruments to which Syria is a party<sup>347</sup>.

As highlighted before, according to the R2P principle, if a state fails to protect its citizens, then the global community has the right to deploy military force as a last resort once all diplomatic options have been exhausted. There is an abundance of evidence that Assad’s regime has been committing mass atrocity crimes. The Human Rights Council stated that “the Syria crisis was being driven by a state policy of deliberate attacks against civilians amounting to war crimes and crimes against humanity.”<sup>348</sup> As mentioned above, although the situation in Syria, “would appear to present a textbook case for the SC action under its chapter VII powers”<sup>349</sup>, the SC draft resolutions against Assad’s regime fell victim to Chinese and Russian vetoes.

The Box below explains the various ‘normative arguments’ which have been open to debate after August 21st attack.

### **Box 1. Contested Arguments for the use of force against Assad’s regime**<sup>350</sup>

**A. Orthodox R2P.** *A military response without a Resolution contravenes R2P and is not lawful or legitimate. Such a position adopts what some international lawyers describe as a ‘restrictionist’ understanding of the use of force in relation to the UN Charter.5 Rests on a positivist understanding of state rights and responsibilities.*

**B. Illegal but legitimate – the Kosovo precedent.** *Military action, though inconsistent with the 2005 articulation of R2P could be condoned if it attained international legitimacy. This is based on a ‘counter-restrictionist’ view, that use of force for humanitarian purposes does not constitute aggression. Rests on a natural law argument about upholding universal moral standards.*

**C. Uniting for Peace.** *Some argue that UN General Assembly authorization is consistent with the UN Charter, albeit not widely regarded by most state actors – especially the Permanent Five (P5) – as a viable alternative to the UNSC. Rests on the view that members of the UNSC act as delegates for UN members as a whole – and therefore have shared responsibility for peace and security.*

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on Syria action’ (30 August 2013) available at: <http://www.bbc.co.uk/news/uk-politics-23892783> accessed on 01 March 2014.

<sup>345</sup> A/HRC/20/CRP.1, 26 June 2012, Human Rights Council, Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic.

<sup>346</sup> Francis Deng and Edward Luck, Special Advisers the Secretary-General on the Prevention of Genocide, F. Deng, and on the Responsibility to Protect, E. Luck, on the Situation in Syria, Press Release, (21 July 2011).

<sup>347</sup> For instance, the fourth Geneva Convention Article 23 requires “free passage of medical supplies for civilians and foodstuffs for children under fifteen”<sup>26</sup> and the first Geneva protocol Article 69-71 requires that “essential humanitarian supplies be provided to the civilians.”

<sup>348</sup> Independent International Commission of Inquiry, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, paras 50, 57, delivered to the Human Rights Council, U.N. Doc. A/HRC/21/50, Aug.16, 2012.

<sup>349</sup> P.R.Williams, J. T. Ulbrick, J. Worboys, ‘Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis’ 45 Case Western Reserve Journal of International Law, available at: <http://law.case.edu/journals/JIL/Documents/45CaseWResJIntL1&2.23.Article.Williams.pdf> accessed on 26 December 2013.

<sup>350</sup> Tim Dunne, Alex J. Bellamy, ‘Syria, R2P IDEAS in brief, AP R2P’ (2013) 3 Asia Pacific Center for the Responsibility to Protect, No.5, 2. For more information of ‘models’ of authorization See: N. J. Wheeler and T. Dunne, Operationalizing Protective Intervention in W. Andy Knight and Frazer Egerton (eds.) The Routledge Handbook of the Responsibility to Protect ,87-102 (New York: Routledge, 2012).

**D. Constructive non-compliance with legal regime.** *This position is outside the conventional R2P framework and majority opinion in international law. It holds the view that existing law has to be broken for new laws to be made.*"

Finally, the UNSC adopted resolution 2118 unanimously on the 27th of September 2013. It was a considerable breakthrough in ending the deadlock that had paralyzed the SC for the past thirty months, and provided a framework for the elimination of Syrian chemical capabilities<sup>351</sup>. It recalled the SC Resolutions 1540, 2042 and 2043 and obliged Syria to destroy its chemical weapons stockpile no later than the 30th of June 2014. The resolution states that in a case of non-compliance, it would impose "Chapter VII" measures. It also determined that "the use of chemical weapons anywhere constituted a threat to international peace and security." and called for the "full implementation of the 27 September decision of the Organization for the Prohibition of Chemical Weapons (OPCW), which contains special procedures for the expeditious and verifiable destruction of Syria's chemical weapons."<sup>352</sup> Secretary-General, Ban Ki-moon praised the resolution's passage as "the first hopeful news on Syria in a long time", but stressed, "We must never forget that the catalogue of horrors in Syria continues with bombs and tanks, grenades and guns". He added the plan to eliminate Syria's chemical weapons was "not a license to kill with conventional weapons."<sup>353</sup> President Obama and John Kerry hailed the resolution and called it "a major diplomatic breakthrough."<sup>354</sup>

Similar to the UN report, resolution 2118 neither states nor implies that the Assad's regime was behind the August 21st attack. Noticeably, the resolution clearly "stresses" that "the only solution to the current crisis in the Syrian Arab Republic is through an inclusive and Syrian-led political process."<sup>355</sup> Thus, many critics called the resolution 'a political compromise'.

I will assess how the R2P doctrine justifies a military intervention in Syria in the next section.

## D. R2P assessment in Syria

Just case: undoubtedly, Assad's regime has attacked civilians and since 2011, more than 100,000 people have lost their lives and millions more, including one million children, have fled. As stressed before, according to a number of international organizations such as the UNHRC, Assad's regime has committed "widespread, systematic, and gross human rights violations"<sup>356</sup> Furthermore, Human Rights Watch reported about human rights abuses in Syria as follows: "Dozens of extrajudicial executions, killings of civilians and destruction of civilian property that qualify as war crimes, as well as arbitrary detention and torture."<sup>357</sup>

Regarding the situation in Syria, some international experts made contributions to help establish a prima facie case. Former Chief Prosecutor to the Special Court of Sierra Leone, Professor David Crane, supervised a team to document the atrocities carried out in Syria since March of 2011<sup>358</sup>. His team's investigative report was in line with other leading NGOs and independent organizations, reinforcing that crimes against humanity have been committed in Syria<sup>359</sup>. One can claim that the situation in Syria has established a prima facie case of on-

<sup>351</sup> UN Security Council, Security Council resolution 2118 (2013) [Security Council Requires Scheduled Destruction of Syria's Chemical Weapons], 27 September 2013, S/RES/2118 (2013).

<sup>352</sup> U.N. Doc, Security Council Requires Scheduled Destruction of Syria's Chemical Weapons, Unanimously Adopting Resolution 2118 (2013) SC 11135, Department of Public Information, News and Media Division, New York, available at: <http://www.un.org/News/Press/docs/2013/sc11135.doc.htm>.

<sup>353</sup> Ibid.

<sup>354</sup> Patrick Goodenough, 'U.N. Resolution on Syria, Hailed As Triumph by Kerry, Doesn't Blame Assad for Chemical Attack' CNSNews.com, (2012) available at: <http://www.cnsnews.com/news/article/patrick-goodenough/un-resolution-syria-hailed-triumph-kerry-doesn-t-blame-assad> accessed on 14 March 2014.

<sup>355</sup> Supra note 342.

<sup>356</sup> Independent International Commission of Inquiry, 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) available at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf)

<sup>357</sup> Human Rights Watch, 'They burned my heart' (3 May 2012) available at: <http://www.hrw.org/reports/2012/05/02/they-burned-my-heart-0> accessed on 16 March 2014.

<sup>358</sup> Syracuse University College of Law, 'Report on the Syrian Crisis: Mapping Atrocities in Syria' 2012 65-66.

<sup>359</sup> Ibid, 70.

going mass atrocity crimes committed by Assad's regime based on various independent sources; therefore, the Just Case element is fulfilled.

Right intention: As I discussed in the case of Libya, there are three distinguishing benchmarks of intervention which can guarantee that the right intention criterion is fulfilled. First, it is essential that intervention be carried out in a collective way. Second, the intervention must be backed by the people of that country. The third element is the support of other states in the region. A UN military action has not yet taken place because of the deep disunity among the P5. Noticeably, the opposition leaders have also remained divided over military intervention in Syria<sup>360</sup>. In response to the crisis, regional organizations such as LAS and the Arab League suspended Syria's membership and later imposed sanctions on Syria, requesting a resolution from the SC. Totally, the Right intention criterion cannot be applied to Syria.

Last resort: military action must be used as a last resort after exhausting peaceful options. In fact, in the case of Syria, the global-community has taken all sorts of diplomatic measures, and all to date have failed to halt the human rights violations and bloodshed. The global community has "tried multiple rounds of regional and UN-brokered peace plans and sanctions"<sup>361</sup> which thus far have been fruitless. Indeed, Assad's regime has deployed heavy military weapons, such as cluster bombs and chemical weapons to punish unarmed civilians<sup>362</sup>. If the SC decides to take any military action in Syria in the future, this component of R2P will be fulfilled.

Proportional means: The fourth benchmark set forth by the R2P doctrine is that the intervention must be proportional. Assad's regime has made direct attacks against unarmed civilians; thus, a no-fly zone could be a proportional military reaction to the situation in Syria as was imposed in Bosnia (Resolution 781) and in Libya (Resolution 1973)<sup>363</sup>. Moreover, Ostrander argues that "establishing safe heavens near the Turkish and Jordanian borders where civilians can be sheltered" is another option in line with the proportionality standard<sup>364</sup>.

Reasonable prospects: There must be a fair chance of success for military intervention. In fact, military intervention must cause more good than harm. As underscored before, the creation and competition of two axes, namely, the pro-Assad axis which consists of Russia, China, Iran, Venezuela and North Korea, the anti-Assad axis which consists of the U.S., European countries, Turkey and various Arab states, as well as the direct involvement of Al Qaeda-linked militants and various religious and regional groups in Syria, have made it all difficult to intervene.

Right authority: As highlighted before, the SC, as the most rightful and primary body to authorize use of force in Syria, has been utterly paralyzed due to the growing disunity among P5. The criterion of Right authority is missing in the case of Syria, as a consequence of open Russian and Chinese opposition<sup>365</sup>.

The situations in Bosnia, Rwanda, Darfur and now Syria have revealed that the UNSC cannot always prevent mass atrocity crimes and react quickly and firmly to them<sup>366</sup>. In my estimation, the Security Council's failure or delay to react in the face of mass atrocity crimes, which is prohibited as recognized as *jus cogens* under Article 53 of the Vienna Convention on the Law of Treaties, has caused an obstruction to the R2P doctrine<sup>367</sup>. In

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<sup>360</sup>Stephen Star, 'Syria: to intervene or not to intervene?' Global Post (12 March 2012) available at: <http://www.globalpost.com/dispatch/news/regions/middle-east/120309/syria-foreign-intervention> accessed on 12 April 2014.

<sup>361</sup> Supra note 340, 20

<sup>362</sup> Ibid, 23.

<sup>363</sup> C. J. Chivers, 'Syria Unleashes Cluster Bombs on Town, Punishing Civilians' New York Times (20 December 2012) available at: [http://www.nytimes.com/2012/12/21/world/middleeast/syria-uses-cluster-bombs-to-attack-as-many-civilians-as-possible.html?\\_r=0](http://www.nytimes.com/2012/12/21/world/middleeast/syria-uses-cluster-bombs-to-attack-as-many-civilians-as-possible.html?_r=0) accessed on 12 October 2013.

<sup>364</sup> Sam Ostrander, 'The Responsibility to protect the Syrian people, International Affairs Review' (7 May 2012) available at: <http://www.iaar-gwu.org/node/%20406> accessed on 10 September 2013.

<sup>365</sup> Nader Hashemi and Danny Postel, Syria Dilemma (Boston: The MIT Press 2013) 184-186.

<sup>366</sup> Russia and China vetoed three anti-Syria resolutions threatening military action and sanctions in October 2011, and in February and July 2012 respectively. They are also opposing the current push by the US, UK and France to stage a limited war on Syria because of the employment of chemical weapons by the Assad's regime, vowing to veto any resolution that paves the way for the military intervention in Syria. See: J. Lauria, 'Russia, China veto Syria Resolution at UN' The Wall Street Journal, (19 July 2012) available at: <http://online.wsj.com/article/SB10000872396390444097904577536793560681930.html> accessed on 12 November 2013.

<sup>367</sup> Several analysts interpreted this obstruction to the R2P doctrine as 'the most serious limitations of the R2P doctrine', See: R. Tarnogorski, Libya and Syria: Responsibility to Protect at a Crossroad (Polish Institute of International Affairs 26 November 2012) 4-5 available at: [http://www.pism.pl/files/?id\\_plik=12260](http://www.pism.pl/files/?id_plik=12260), See also:

fact, the case of Syria has so far demonstrated that the familiar Cold War intransigence of the SC to authorize force has made a comeback, meaning that gaining legal consent for the use of force, even in mass atrocity crimes, has apparently become a herculean task. Taken together, in the case of Syria, the three elements of Right authority, Right intention and Reasonable prospects are missing.

I will analyze in the next section how the global community has distinguished between the cases of Libya and Syria and what happened to the R2P doctrine in the short period between these two cases. Later, I will discuss the future outlook of R2P.

## E. Comparison between Libya and Syria

The SC authorized the use of "all necessary measures" to protect unarmed Libyan civilians within one month of the onset of the protests. Almost three years later, despite a death toll of well over 100.000, the P5 has not been able to unite with each other in the case of Syria<sup>368</sup>. Even the last UNSC Resolution, 2118, doesn't call for any military intervention. Indeed, the SC has been so divided and indecisive on Syria that it cannot even impose sanctions on Assad's regime, let alone take military measures. As highlighted in chapter two, the P5 are generally very selective when considering whether to intervene in another state's territory to protect civilians. The P5's national interests have great impact on this selectivity. As Bellamy (2012) points out: "The Security Council must decide which course to take on a case-by-case basis. There is no 'one-size-fits-all approach' at all."<sup>369</sup> The case of Syria is entirely different from the case of Libya in a number of ways. The difference between the two becomes apparent when comparing the risks an international intervention might face in Syria, with the risks faced in Libya. Unlike Libya, the Syrian army is strong and well-equipped<sup>370</sup>. Conversely, the opposition fighters are less well-armed and extremely heterogeneous. Most importantly, tribal, sectarian and religious divisions are stronger in Syria than Libya. In addition, the involvement of Al Qaeda-linked militants under a handful of banners and other various religious and regional groups in Syria is far stronger than Syria. One should keep in mind the risk of a regional proxy war. The direct and deep involvement of Assad's major allies, namely, Russia, Iran and Hezbollah, must be weighed carefully by those who are on the pro-action side in Syrian case. Conversely, Gaddafi was relatively isolated with no genuine allies in the Arab World<sup>371</sup>.

All the above-mentioned factors are combined with a population over three times as large as Libya; the Syrian Arab Republic encounters "a high possibility of severe post-intervention violence."<sup>372</sup> (Look at the Box 2, *Libya V. Syria*)

In addition, the regional and sub-regional actors in the case of Libya played a far more active role and acted as a 'gate opener'. In the case of Syria, the regional players have been less active and embraced a rather passive policy towards Syria because of a "fear of regime change, of being the cause for civil war and regional instability."<sup>373</sup> Most importantly, the opposition of China and Russia has been the most preventive factor. Moscow and Beijing, which had abstained from resolution 1973, argue that the R2P doctrine was abused in the case

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M. N. Schmitt, 'The Syrian Intervention: Assessing the Possible International Law Justifications' (2013) 89, *International Law Studies of U.S. Naval War College*, available at: <http://www.usnwc.edu/getattachment/2224c233-cd18-4ddf-848d-6c8a125b8dc9/The-Syrian-Intervention--Assessing-the-Possible-In.aspx> accessed on 11 July 2013.

<sup>368</sup>The death toll in Syria is higher than Libya in the days prior to military operation.

<sup>369</sup>Alex J. Bellamy, 'Responsibility to Protect on Trial-or Assad?' *Ethics and International Affairs*, (6 June 2012) available at: <http://www.ethicsandinternationalaffairs.org/2012/responsibility-to-protect-on-trial-or-accessed> on 01 March 2014.

<sup>370</sup> Thanassis Cambanis, 'Should America let Syria Fight On?' *The Boston Globe*, (7 April 2013) available at: <http://www.bostonglobe.com/ideas/2013/04/06/should-america-let-syria-fight/UUtDpctZYyeymgSjgRSBWK/story.html> accessed on 15 May 2013.

<sup>371</sup> *Supra* note 369.

<sup>372</sup> Dalal Nadir Edul, 'The R2P is Dead, Long Live the R2P. Libya, Syria, and the Responsibility to Protect' (2013) 14, *Student Scholarship, Paper 208*, available at: [http://erepository.law.shu.edu/student\\_scholarship/208](http://erepository.law.shu.edu/student_scholarship/208) accessed on 12 July 2014.

<sup>373</sup> Anne Penketh, A, 'Whatever happened to Responsibility to Protect?' *The Foreign Desk - International dispatches from Independent correspondents* (13 June 2011) available at: <http://blogs.independent.co.uk/2011/06/13/whatever-happened-to-responsibility-to-protect/> accessed on 12 July 2014.

of Libya and stated that the NATO-led coalition had stretched the UN mandate into a license for regime change. They believe that "Libya has given R2P a bad name".<sup>374</sup>

A Chinese researcher believes that: "the Libya experience probably stung Chinese officials, who also worry about a possible Western or Israel military strike against Iran's nuclear facilities... If the Libyan model applied to Syria, then it could be applied again and again, so China and Russia are more resolute this time."<sup>375</sup> The BRICS nations - Brazil, Russia, India, China and South Africa - argue that Syria's sovereignty and territorial integrity must be respected and any action must be in line with "the United Nations Charter principles of non-interference in internal affairs."<sup>376</sup> (Look at the table below to see the BRICS's votes in the SC and GA on Syria). Sun (2012) explains that "In abstaining on the Libya resolution, China and Russia gained nothing, while losing everything."<sup>377</sup> Undoubtedly, this time, China and Russia want to protect their own interests in the region.

Table 1<sup>378</sup> BRICS' Votes in SC and GA on Syria

	1 <sup>st</sup> vetoed draft SC res 4/10/2011	2 <sup>nd</sup> vetoed draft SC res 4/2/2012	GA res 66/253 A 16/2/2012	3 <sup>rd</sup> vetoed draft SC res 19/7/2012	GA res 66/253 B 3/8/2012
Russia	No	No	No	No	No
China	No	No	No	No	No
India	Abstain	Yes	Yes	Yes	Abstain
Brazil	Abstain	N/A	Yes	N/A	Yes
South Africa	Abstain	Yes	Yes	Abstain	Yes

\*Brazil was no longer a Security Council member in 2012.

Also, the U.S.'s interests may be best served by preventing military action in Syria for a number of reasons. The U.S. must consider some geopolitical factors, such as the interests of Israel that is a major ally of the U.S. and a neighbor to Syria. Israel is widely considered to be a main risk factor if the U.S. was to lead a military action in Syria. This was not an issue in Libya. Moreover, it is unclear if "a replacement of the Assad regime would be more or less favorable to U.S. interests."<sup>379</sup> Not to mention, restoration of access to the oil of Libya was of crucial importance for the EU states, unlike Syria. The U.K., Italy and France have seriously banked on the Libya's oil reserve<sup>380</sup>.

Pursuant to what was said above, though the criteria for the justification for a military intervention under R2P exists in Syria, the global community has only imposed sanctions<sup>381</sup> and expressed widespread condemnations against Syria. The P5 have shown that they invoke R2P on a case by case basis and their own national interests outweigh the much higher crimes of *erga -omnes* nature.

<sup>374</sup> Ibid.

<sup>375</sup> The Guardians, 'China defends Syria veto in people's daily article' (6 February 2012) available at: <http://www.theguardian.com/world/2012/feb/06/china-syria-veto-peoples-daily> accessed on 12 March 2014.

<sup>376</sup> Supra note 285.

<sup>377</sup> Yun SUN, 'Syria: What China Has Learned From its Libya Experience' Asia Pacific Bulletin, East-WestCenter (27 February 2012) available at: [http://www.eastwestcenter.org/sites/default/files/private/apb152\\_1.pdf](http://www.eastwestcenter.org/sites/default/files/private/apb152_1.pdf) accessed on 10 May 2014.

<sup>378</sup> 378. Andrew Garwood- Gowers, 'The BRICS and R2P: Lessons from Libyan and Syrian crises' In Sancin, Vasilka & Dine, Masa Kovic (Eds.) Responsibility to Protect in Theory and Practice, (2013) GV Zalozba, Ljubljana, Slovenia. available at: <http://eprints.qut.edu.au/59649/2/59649.pdf> accessed on 14 May 2013.

<sup>379</sup> Supra note 363, 18.

<sup>380</sup> Yuki Yoshida, 'A Theoretical Assessment of Humanitarian Intervention and R2P' (16 January 2013) available at: <http://www.e-ir.info/2013/01/16/from-kosovo-to-libya-theoretical-assessment-of-humanitarian-intervention-and-the-responsibility-to-protect/> accessed on 20 May 2013.

<sup>381</sup> The EU, U.S. and Arab League have so far imposed sanctions on Syria. See: Factbox: 'Sanctions imposed on Syria' Reuters, (28 November 2013) available at: <http://www.reuters.com/article/2011/11/28/us-syria-arabs-sanctions-idUSTRE7AR1A020111128> accessed on 22 June 2014.

Box 2: Libya versus Syria<sup>382</sup>

<u>Libya</u>	<u>Factors</u>	<u>Syria</u>
Yes	UNSC Resolutions	No
Very High	Regional Support for intervention	Med.
Low/Med	Civilian Deaths by Government	Very High
None	Presence of Allied States	Yes
50,000-130,000	Size of Military	400,000
Very High	Organized Rebels	Low/Med.
Very High	Presence of Oil	Low
Low	Sectarian/Ethnic Divides	Very High
Low	Potential for Regional Destabilization	Very High
Approximately 1 Month	Time until Intervention	3 Years, No Intervention

## F. Future outlook for R2P

The Syria crisis conveys the warning message that R2P application has been 'selective' and been developing on 'case-by-case' basis. The NATO-led military intervention into oil rich Libya as the first tangible case, and the validation of the Responsibility to Protect was hailed by advocates of this doctrine. In an emerging multipolar system, the shift from civilian protection to regime change in Libya, and the relative inaction of the UNSC in Syria, cast a deep shadow on the future of the R2P doctrine<sup>383</sup>.

The R2P doctrine lacks an important constituent as Williams (2012) argues: "What to do when the SC fails to act in the case of mass atrocity crimes?"<sup>384</sup> Undoubtedly, this question significantly affects the future outlook for R2P. Williams (2012) suggests that under these circumstances, "a regional organization or coalition should be able to authorize and undertake the limited use of force to protect populations from mass atrocities."<sup>385</sup> Clearly, this alternative is not in line with the ICISS principles and unilateral action is legally arguable under R2P absent UNSC resolutions.

On the other hand, it indicates that the future use of the R2P doctrine will likely rely on the role of regional organization. As highlighted above, regional attitudes towards aggressive international reactions in the cases of Libya and Syria have been highly effective. As Bellamy and Williams (2012) pointed out about the consensus of the LAS, GCC and OIC on Libyan crisis: "the position taken by the relevant regional organizations proves to be the game changer."<sup>386</sup> The case of Syria has so far proved that "R2P is limited by regional attitudes."<sup>387</sup>

Another matter is the traditional tension between military intervention and sovereignty. This imposes a limit on the implication of R2P. While the EU countries and P3<sup>388</sup> are totally in favor of all three pillars of R2P, Russia and China's (P2) opposition to the third pillar of the doctrine will throw a shadow on future cases of R2P. The BRICS have expressed their mistrust and concerns over Western-led military intervention in many ways. They, as well as other critics, view the R2P doctrine as a 'cloak for regime change' or as 'Western neo-imperialism'<sup>389</sup>. They also have labeled R2P 'the new Trojan Horse of the Western world'. In an attempt to respond to some of the above-mentioned concerns, Brazil released a 'concept paper' called 'Responsibility While Protecting' (RwP) in November of 2011. The RwP repeats the Just War principles which are deeply embedded in R2P. It also maintains that "the use of force must produce as little violence and instability as possible and under no circum-

<sup>382</sup> Supra note 363, 24.

<sup>383</sup> Several scholars such as Hoffmann (2012), Garwood-Gowers (2012), Bellamy and Williams (2012) and Findlay (2011) have contributed to debate about the future of R2P.

<sup>384</sup> Paul Williams ed, 'Preventive mass atrocity crimes: the responsibility to protect and the Syria crisis' (2012) Case Western Reserve Journal of International law, Forthcoming American University, WCL Research Paper No.2012-45, 12-14.

<sup>385</sup> Ibid

<sup>386</sup> Supra note 254, 829.

<sup>387</sup> Aqsa Mahmud, 'Emerging Voices: Limits to R2P-Lessons from the Arab Spring conflicts' (2013) available at: <http://opiniojuris.org/2013/08/07/emerging-voices-limits-to-r2p-lessons-from-the-arab-spring-conflicts/> accessed on 12 August 2013.

<sup>388</sup> The U.S., UK and France.

<sup>389</sup> D. Wagner and D. Jackman, 'BRICS from unstable foundation for multilateral action' (2 April 2011) Foreign Policy Journal, 57.



stances can it generate more harm than it was authorized to prevent.”<sup>390</sup> Although the West, Russia and China did not embrace the RWP enthusiastically, the UN Secretary General in his September 2012 report<sup>391</sup> on R2P paid considerable attention to the concept; it might help shape the development of the R2P debate in the future<sup>392</sup>.

In the future, the BRICS nations may remain suspicious of regime change and continue expressing their opposition to the implementation of the third pillar of the R2P doctrine<sup>393</sup>. More importantly, one fears that the P5s’ self-interests and their selective national concerns might end up being the end of the R2P doctrine in the future due to the lack of consistency. Indeed, another failure to act by the UNSC, as a consequence of ‘selective application’ and self-interests, could further undermine the credibility of the R2P doctrine in years to come.

As a remarkably young doctrine, if R2P is to survive, it has to be efficient. As I discussed before, R2P is not just a military reaction. The R2P doctrine is about preventing, responding and rebuilding. Scholars advise that R2P cannot survive if it is unable to be used to its full potential, including serious consideration of the unpleasant necessity for “preventive deployment as an effective tool for mass atrocity prevention”<sup>394</sup>.

## VII. Concluding remarks

I have tried to shed some light on the invocation of the R2P doctrine by the international community, the authorization of “all necessary measures” to protect civilians in Libya, as well as the international community’s failure to act in Syria despite the same or even worse human rights violations. I also discussed three major cases in the past (Srebrenica, Rwanda and Darfur) where the R2P doctrine has played a principle part. I have illustrated that all three of these cases suffered from a lack of political will and described how the vain attempt of the world community and the UN system to prevent the atrocities and protect innocent civilians has damaged the reputation of R2P. I have shown that both Libya and Syria cases have highlighted the ongoing tension between humanitarian intervention and traditional sovereignty which is a formidable obstacle in the path of R2P.

To answer the main research question of my thesis, in the case of Libya, I assessed the applicability of the R2P doctrine for the intervention in Libya and clarified that the six R2P criteria are fulfilled, but the NATO action in Libya was not precisely in line with the mandate set in Resolution 1973. In both cases, Syria and Libya, the international community and the regional players vehemently condemned the attacks and declared crimes against humanity were being committed. The international community enforced a no-fly zone over Libya and NATO launched air strikes against Gaddafi’s force. Despite even worse human rights atrocities in Syria, the international community has failed to effectively act thus far. In the case of Syria, the assessment of the R2P principle reveals that there is a lack of a right intention because the Security Council cannot reach an agreement to impose sanctions on Assad’s regime and the opposition is deeply divided. More importantly, various groups from moderate Islamists to Salafi-jihadists have been involved. Furthermore, the criterion of reasonable prospects is not fulfilled because military intervention would not meet all the challenges in this country. Additionally, the element of the right authority has not been met as a consequence of the vetoed resolutions by Russia and China.

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<sup>390</sup> Permanent Mission to the UN (Brazil), Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General-Responsibility while Protecting: Elements for the Development and Promotion of a Concept, UN Doc A/66/551-s/2011/701.

<sup>391</sup> UNGA ‘Report of the Secretary-General: Responsibility to Protect-timely and decisive response’ (25 July 2012) UN Doc A/66/874-S/2012/578.

<sup>392</sup> Thorsten Benner, Brazil as a norm entrepreneur: The Responsibility While Protecting initiative, GPPI working paper, Berlin: Global Public Policy Institute (March 2013).

<sup>393</sup> Supra note 363.

<sup>394</sup> 394. The future of the Responsibility to Protect: finding a way forward, UNA-UK roundtable on the R2P: Summary of proceedings and recommendations, 3 (16 April 2013) available at: <http://www.una.org/sites/default/files/UNA-UK%20R2P%20roundtable%202013%20-%20Summary%20and%20recommendations.pdf> accessed on 05 June 2014. See also: Matthew M. Plain, *Invoking the Responsibility to Protect (R2P): A Realist Critique* (LAP LAMBERT Academic Publishing, 2013) 128-134. See also: H. Nikoghosyan, ‘The Upheavals in Libya and Syria, and their Impact on Responsibility to Protect Doctrine’ (2014) 12, *Turkish Policy Quarterly*, Number 1,116-118. available at: [http://www.turkishpolicy.com/dosyalar/files/vol\\_12-no\\_1-nikoghosyan.pdf](http://www.turkishpolicy.com/dosyalar/files/vol_12-no_1-nikoghosyan.pdf) accessed on 10 May 2014.

There are considerable similarities between the Libya and Syria cases. The brutal dictators were suppressing their own citizens and tens of thousands of Libyans and Syrians were forced to flee their own countries. On the other hand, there are prominent differences as well; such as the global notoriety of Gaddafi and the threat of refugee flow into the EU. One can cite several factors, including geopolitical circumstances and regional interests for the failure of the international community to act in the case of Syria. Above all, some members of the UNSC are afraid that any mention of the use of force in a new UNSC Resolution on Syria will be similarly misused for regime change in the country. One has to bear in mind that the R2P doctrine is not about regime change and the redistribution of power, but it is actually about the protection of civilians and prevention of massive human rights violations. The prevention of genocide, war crimes, ethnic cleansing and crimes against humanity fall within the purposes of the UN. Pursuant to Article 1 (3) and 55 of the UN Charter, the organization shall promote and encourage respect for human rights. In contrast, the practice of the SC in the case of Syria has affirmed that national interests of the SC members are far more important than anything else and political actors give high priority to human security predominated by the surrounding political context.

The controversial intervention in Libya and the present impasse in Syria have seriously concerned the future of the R2P principle in an increasingly multipolar system, and many scholars and international lawyers believe that the failure to act in Syria undermines the credibility of the UNSC and it will "transform the R2P doctrine from an admirable goal into a hypocritical, exploited political instrument."<sup>395</sup> The most obvious lesson to be drawn is that the implementation of R2P doctrine is absolutely selective and a 'pick and choose' policy is an issue that must be addressed. Many scholars believe that the implementation of the R2P doctrine is becoming more and more fastidious and case-by-case based.

Another lesson to be learned is that the Syrian crisis has presented the difficulty of applying the R2P principle when a crisis develops into a full-scale civil war in which both sides are committing gross human rights violations. Moreover, the ongoing refusal to engage in a unilateral intervention in Syria testifies that states currently consider the collective security system and international law more than ever before. The cases have also demonstrated that the small attempts made by the international community in terms of prevention have revealed that the doctrine still has a long way to go.

In my estimation, it would be premature to name Syria as the death knell of the R2P doctrine as many do; however, it is crystal clear that selective application and the shift from civilian protection to regime change has landed a devastating blow to the R2P principle, as Hoffmann points out in her book: "the R2P was from the start doomed to become a responsibility to select."<sup>396</sup> It is worth noting that the Rwanda, Darfur, Srebrenica, Libya and Syria cases are totally different cases and one should not assume that the SC will react similarly to future cases.

Over all, R2P is missing an essential component. What shall the world community do when the UNSC is deadlocked by a veto?

There should be another way to ensure the protection of suffering civilians. For instance, one possibility would be to use the General Assembly and the Uniting for Peace Resolution, or have regional organizations resort to a limited use of force, such as no-fly zones and humanitarian safe havens.

Even some, like Weiss (2009), recommend veto modification regarding to the R2P doctrine in cases where the UNSC faces a deadlock. Some, like Dastoor (2009), call for the establishment of a Security Council Committee on the Responsibility to Protect (R2P-SCC) that "would be tasked with monitoring and analysing situations worldwide where the application of R2P might be appropriate."<sup>397</sup> If the R2P doctrine is going to survive as a part of normative behaviour, the international community should provide a firm foundation for the missing component. Thus, a reform on the institutionalization and implementation of R2P is deeply needed.

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<sup>395</sup> Thomass G. Weiss, 'The Illusion of UN Security Council Reform' (2003) *Washington Quarterly* 26, no. 4, 147-151.

<sup>396</sup> Julia Hoffmann and André Nollkaemper, *Responsibility to Protect: From Principle to Practice* (Pallas Publications 2013).

<sup>397</sup> Neville F. Dastoor, 'The Responsibility to Refine: The Need for a Security Council Committee on the The Responsibility to Protect' (2009) 22, *Harvard Human Rights Journal*, 25-62.

It has now been more than a decade since the ICISS gave birth to the R2P doctrine and presented it to the world community. The R2P principle was born out of the ever-present concept of 'never again'. The R2P cases stand as a chilling testament: the world community has not learned from the past lessons.

As Evans states: "I don't think there is any policymaker in the world who fails to understand that if the Security Council does not find a way of genuinely cooperating to resolve these cases, working within the nuanced and multidimensional framework of the R2P principle, the alternative is a return to the bad old days of Rwanda, Srebrenica and Kosovo."<sup>398</sup>

The R2P doctrine may never evolve into a wholly legal, binding responsibility, and a concise, well-established legal accountability of the SC for failure to protect may never come to light, due to all of the reasons mentioned and strong opposition to the implementation of the third pillar by some members of the SC. Optimistically, the first and second pillars of the doctrine will continue to remind UN member states to abide by their individual legal obligations as set forth in the UN Charter - to observe the relevant human rights conventions and international humanitarian laws already in place to prevent future atrocities and keep its people safe.

**Author:** Dr. Erfan Norooz, International Consultant

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