

# **The Responsibility to Protect**

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## **Success or failure of the principle?**

An attempt to overcome its obstacles  
&  
analysis of its implementation in the Libyan crisis.

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**ΠΑΝΤΕΙΟ ΠΑΝΕΠΙΣΤΗΜΙΟ**  
ΚΟΙΝΩΝΙΚΩΝ ΚΑΙ ΠΟΛΙΤΙΚΩΝ ΕΠΙΣΤΗΜΩΝ



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# **ABSTRACT**

Since its adoption in 2005, the principle of the Responsibility to Protect (R2P) has had to face several obstacles and criticisms to its implementation. In this paper, I will analyse how to solve the problem of its non-binding nature, how to reform the UN system to implement it adequately and how to improve its single and most important element: the responsibility to prevent. Moreover, I will state how to create the political will to react to mass atrocities, how to overcome the obstacles of the selectivity and double standards in its implementation and how to make individual States, regional organisations and the United Nations accountable for the misuse of R2P, for the failure to prevent a crisis and for the omission to act in cases of commission of mass atrocity crimes. The tension between R2P and State's sovereignty, along with the problems of any humanitarian intervention and of delivering R2P in Africa, as post-colonial countries criticise the principle for being a new form of Western colonialism, will also be studied.

The overcoming of these obstacles will furthermore be analysed in light of the ongoing Libyan crisis, when the R2P theory has most recently been put into practice. Has R2P become a success, or a failure?

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*Iune Baravalle*





# GLOSSARY

5PMs	Five permanent members of the United Nations Security Council
AL	Arab League
art	article
ASEAN	Association of Southeast Asian Nations
ASF	African Standby Force
ASR	ILC's Articles on State Responsibility for Internationally Wrongful Acts
AU	African Union
AUPSC	African Union Peace and Security Council
CaH	Crimes against Humanity
CIL	Customary International Law
CSO	Civil Society Organisations
DARIOS	ILC's Draft Articles on the Responsibility of International Organisations
EC	Ethnic Cleansing
ECOWAS	Economic Community of West African States
EU	European Union
GCC	Gulf Cooperation Council
HI	Humanitarian Intervention
HRC	Human Rights Council
HRW	Human Rights Watch
IC	International Community
ICC	International Criminal Court
ICG	International Crisis Group
ICISS	International Coalition for Intervention and State Sovereignty
ICJ	International Court of Justice
ICRtoP	International Coalition for the Responsibility to Protect
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IL	International Law
IOs	International Organisations
IMF	International Monetary Fund
MS	Member States
NATO	North Atlantic Treaty Organisation
NGOs	Nongovernmental organisations
OAS	Organisation of American States
OAU	Organisation of the African Union
OSAPG	Office of the Special Advisor on the Prevention of Genocide
OSCE	Organisation of Security and Cooperation in Europe
p	page
pp	pages
R2P	Responsibility to Protect

RECs	Regional Economic Communities
Res	Resolution
ROs	Regional Organisations
SADC	Southern African Development Community
SAPG	Special Advisor on the Prevention of Genocide
TNC	Transitional National Council (Libya)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United States
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
WC	War Crimes
WSOD	World Summit Outcome Document

*To my loved ones,  
Giorgio and Maribel.*

&

*To Prof. Stelios Perrakis*



# **INTRODUCTION**



In the 2005 World Summit Outcome Document (WSOD) (see Annex I), the United Nations (UN) embraced a new principle that left behind the discussed and problematic right of humanitarian intervention (HI). R2P was given birth in 2001 by the International Commission on Intervention and State Sovereignty (ICISS), sponsored by the Government of Canada, and reminds the responsibility of States to protect their own populations against mass atrocity crimes, namely genocide, crimes against humanity (CaH), war crimes (WC) and ethnic cleansing (EC). However, in case a State is unable or unwilling to protect them, the residual responsibility of the international community (IC) comes then into place by enforcing the different R2P measures, which range from economic, diplomatic, humanitarian and other peaceful means to, in extreme cases and as a last resort, collective military action in a timely and decisive manner.

In the world in which we live, where unfortunately mass atrocity crimes happen and will continue to happen, a principle like R2P raises some hope: those crimes can and should be stopped. In fact, every single major instrument has always been visionary and non-practical, like the Universal Declaration of Human Rights (UDHR) and the following International Conventions on Civil and Political Rights and on Economic, Social and Cultural Rights.

Moreover, the compromise and endorsement of the R2P principle is not only directed to the IC, to regional organisations (ROs) and to individual States, but also to civil society organisations (CSOs) and to all of us, individual citizens. That is why I have chosen this topic, as it is part of my individual responsibility to promote and implement it. I will try to contribute to the improvement of what for me is a principle that should change the world's politic priorities, putting in the front line the protection of civilians and victims of atrocity crimes.

Many and extensive literature has been written about this topic, about the problems of its implementation, about its scope, its challenges, etc..., which make difficult any innovative contribution. Nevertheless, I will contribute to it by proposing some innovative approaches and ideas, by studying and combining all the different obstacles the implementation of R2P has to face and the proposals to overcome them,

and, moreover, by analysing the recent case of Libya,<sup>1</sup> where R2P has been invoked, implemented and has created a precedent. Never before there has been a UNSC resolution so clearly authorising coercive measures under R2P and with the support and authorisations from ROs like the Arab League (AL), the African Union (AU) and the European Union (EU).

This paper, under the title “*R2P: success or failure of the principle? An attempt to overcome its obstacles and analysis of its implementation in the Libyan crisis*”, is divided in three parts. First of all, the concept of R2P and its origins will be explained, before entering into the second and main part of the thesis, where I will analyse and try to overcome the different obstacles to its implementation. In the third part, I will examine a case that shows the translation of the R2P theory into practice in light of the different R2P obstacles already analysed: the R2P response to the Libyan crisis. Some of the obstacles explained in the previous part will be overcome in this case, but others not. Finally, as a conclusion through the analysis of the different obstacles, the solutions to overcome them and the analysis of the Libyan crisis (still ongoing), the current status of R2P will be stated: is it a success, or, in the contrary, is it a failure? Will this principle be able to put an end to the commission of atrocity crimes and to the IC’s inaction towards them?

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<sup>1</sup> Libyan Arab Jamahiriya, hereafter Libya.



## **1) Methodology**

This thesis draws on extensive literature from academic, civil society, ROs and UN sources, journals and online worldwide newspapers. I also conducted over 11 field interviews in Harare (Zimbabwe) in May 2011. I interviewed academics from the University of Zimbabwe; lawyers and directors of CSOs and NGOs like Zimbabwe Lawyers for Human Rights, Crisis in Zimbabwe Coalition, Zimbabwe Human Rights NGO Forum, Zimbabwe Peace Project, Research and Advocacy Unit; lawyers from the Zimbabwe Advocate's Chambers; directors of women's organisations like Zimbabwe Women Lawyers Association and of the Southern and Eastern African Regional Centre of Women's Law; and a Magistrate from the Harare Supreme Court winner of the 2009 Women Human Rights Defenders' Award. These visits were facilitated by the Centre for Human Rights of the University of Pretoria, with the important support of the European Inter-University Centre for Human Rights and Democratisation.

Moreover, the drafting of the thesis started in the Institute for International Law of Peace and Armed Conflict of the Ruhr-University in Bochum (Germany), where I developed part of my second semester (from February to April) under the supervision of Prof. Horst Fischer, and continued in Athens (Greece), in the Panteion University's European Centre of Research and Training on Human Rights and Humanitarian Action, under the supervision and important help of Prof. Stelios Perrakis (from May to June). The support, contributions and feedbacks received from the different supervisors have been extremely valuable for the outcome of this thesis.

Furthermore, between Bochum and Athens, I had the opportunity to join the field trip to Zimbabwe organised by the regional master in Human Rights and Democratisation of the University of Pretoria, which highly contributed to my research, and where I could conduct the different interviews which results will be illustrated in the part of the thesis related to Africa. Lastly, the final part of this paper has been drafted from Monrovia, Liberia, where I currently am and from where I am submitting it.

## **2) Case study selection**

The Libyan uprising and subsequent humanitarian crisis started just at the beginning of the second semester, when I was still developing the content of this thesis. The events happening in the country showed a direct link with my thesis topic (R2P), and I decided to include it, as its analysis in light of the different obstacles to R2P's implementation would show if they have been overcome or not.

The initial idea was to compare two cases in which R2P has been applied and in which the IC's responses have been different. Ivory Coast was thus the second case study of this paper, but for problems with the limited space allowed, it finally could not be analysed.

**- I -**

**THE RESPONSIBILITY**  
**TO PROTECT:**

**A NEW REALITY**



*“There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things”*

*- Niccolò Machiavelli<sup>2</sup> -*

**And so it is for the Responsibility to Protect**

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<sup>2</sup> Niccolò di Bernardo dei Macchiavelli was an Italian philosopher, humanist, and writer based in Florence during the Renaissance. He is one of the main founders of modern political science.



## 1) The emergence of a new principle: from humanitarian intervention to the Responsibility to Protect

Humanitarian intervention<sup>3</sup> has been controversial when it has happened (as in Somalia, Bosnia, East Timor, Kosovo, etc) as well as when it has failed to happen (as in Rwanda and Darfur). Moreover, interventions of the 1990s were inconsistent and lacked any coherent theory which could justify the infringement of State sovereignty.<sup>4</sup>

In September 1999, during the 54<sup>th</sup> session of the UN General Assembly (UNGA), former Secretary-General Kofi Annan reminded the failures of the UNSC to act in Rwanda and in Kosovo. He then urged the UN member states (MS) to “*find common ground in upholding the principles of the UN Charter, acting in defence of our common humanity*”. A year later, in his Millennium Report to the UNGA, he recalled the challenge:

*“... 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>5</sup>

This challenge was responded in September 2000 by the Government of Canada, which established the ICISS, composed by twelve commissioners and independent experts who fairly reflected developed and developing countries and a wide range of geographical backgrounds, viewpoints and perspectives.<sup>6</sup> The ICISS issued, in December 2001, the report *The Responsibility to Protect*. This was the crucial first step towards the emergence of a new principle: R2P, which would later on be embraced by the UN.

It was first seriously embraced by the emerging AU,<sup>7</sup> which in 2002 and in its Constitutive Act recognised the right of the Union to interfere in MS’ internal affairs

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<sup>3</sup> Concept and details of the term “humanitarian intervention” can be found in point II.6.

<sup>4</sup> Francis Kofi Abiew, 1999, pp. 16-17.

<sup>5</sup> UNSG Kofi Annan, 2000, p. 48.

<sup>6</sup> ICISS, 2001, pp. VII - 2.

<sup>7</sup> Evans, Gareth, 2009, p. 20.

when cases of genocide, WC and CaH would be happening. It thus shifted from the idea of non-intervention of its predecessor (the OAU) to the non-indifference one.

The genocide taking place in Darfur (Sudan) in 2003 captured the international attention during the oncoming years and restated the dilemma on HI. R2P started then to be articulated in the UN, in a series of important but non-binding UN documents, which were moreover reaffirmed by different UNSC resolutions. The most important ones are listed below:<sup>8</sup>

- *A More Secure World: Our Shared Responsibility*, Report of the UNSG's High Level Panel on Threats, Challenges and Change (2004);
- *In Larger Freedom: Towards Development, Security and Human Rights for All*, UNSG Report (2005);
- *The World Summit Outcome Document*, adopted by UNGA (2005);
- UNSC Res. 1674 of Protection of Civilians in Armed Conflict (2006);
- UNSC Res. 1706 on the situation in Darfur (2006);
- *Implementing the Responsibility to Protect*, UNSG Report (2009);
- General Assembly Resolution on the Responsibility to Protect (2009);
- *Early Warning, Assessment and the Responsibility to Protect*, UNSG Report (2010);

During the 2005 World Summit, more than 150 Heads of State and Governments stated unanimously in the UNGA their support for a non-binding resolution affirming the responsibility of States and the IC to protect populations from being slaughtered around the world. The paragraphs 138 and 139 of the Outcome Document (see Annex I) clearly established the basis of R2P, a principle since then embraced by the UN, and which offers a narrower list of situations under its scope (CaH, WC, EC and genocide) than those originally enounced in the ICISS' report. Those paragraphs constitute the transformation of a policy into an official doctrine, which was expressly reaffirmed by the UNSC in its 2006 Resolution 1674 (paragraph 4).<sup>9</sup>

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<sup>8</sup> President of the UNGA, 2009, p. 3.

<sup>9</sup> The Security Council “reaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”



In 2004, following the Rwanda's and the Balkans' genocides, Juan Méndez was appointed as Special Advisor for the Prevention of Genocide (SAPG) by the former UNSG Kofi Annan, which mission is "*fully supported*" by the Heads of State as agreed in the WSOD (paragraph 140, see Annex I). In 2007, UNSG Ban Ki-moon appointed Francis M. Deng as the new SAPG at the level of Under-Secretary-General and on a full-time basis, and Edward Luck as the Special Advisor focusing on R2P, at the level of Assistant-Secretary-General.<sup>10</sup> The creation of the Office of the Special Advisor on the Prevention of Genocide (OSAPG) and the appointments of the SAPG and on R2P have been the most advanced UN's enterprises towards the prevention of genocide and CaH, and represented moreover a turning point in the fortunes of R2P at the UN. Nonetheless, the OSAPG has by no means fully realised its potential yet.<sup>11</sup>

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<sup>10</sup> OSAPG (<http://www.un.org/en/preventgenocide/adviser/index.shtml>).

<sup>11</sup> Gareth Evans, 2008, p.237.

## 2) The concept

With the ICISS's report, the debate about intervention for human protection purposes shifted from the "right to intervene", to the "responsibility to protect". R2P implies an "*evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention.*"<sup>12</sup>

"Responsibility" is a contested concept among the legal and philosophical literature.<sup>13</sup> It can be defined as "*actions or forbearances that one is deemed bound to perform or observe,*"<sup>14</sup> and the source of its duties should be clarified in every case. In the R2P case, universal human rights and "common humanity" are the sources claiming for this responsibility.<sup>15</sup> In fact, a crisis begins with the harm of individual rights through violence, but the scale of atrocities inflicted to those individuals affects us collectively, through the international harm principle.<sup>16</sup> The commission of mass atrocities is a failure to treat people as humans, a threat to humanity's values and interests. This is what generates an international moral responsibility to act.<sup>17</sup>

As stated in the ICISS's report, R2P foundations lie primarily in the obligations inherent in the concept of sovereignty; in the responsibility of the UNSC (under art. 24 of the UN Charter) as it has to maintain international peace and security; in the specific legal obligations under human rights and other human protection declarations, covenants and treaties, international humanitarian law and national law; and in the developing practice of states, ROs and the UNSC itself.<sup>18</sup>

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<sup>12</sup> ICISS, 2001, p. 17.

<sup>13</sup> Cane, Peter, 2002, p. 64.

<sup>14</sup> Erskine, Toni, 2003, p. 11.

<sup>15</sup> Evans, Gareth, 2008, p. 2.

Gareth Evans reinforced this view with his statement that "the case for R2P rests simply on our common humanity."

<sup>16</sup> May, Larry, 2005, p. 44.

<sup>17</sup> Welsh, Jennifer M. & Banda, María, 2010, pp. 217-218.

<sup>18</sup> ICISS, 2001, p. XI.

R2P states that each individual State has the responsibility to protect the populations in its territory from genocide, WC, EC and CaH. The IC<sup>19</sup> should encourage, assist and help States to prevent the commission of such mass atrocity crimes. Sovereignty is seen as and entails responsibility, and thus, in case a State fails to protect its populations, because it is unable or unwilling to exercise its responsibility to protect, the IC bears a residual responsibility to protect the peoples of that State. It will have the responsibility to react, through the UN and in order to stop the ongoing atrocity crimes, using appropriate diplomatic, humanitarian and other peaceful means and, in extreme cases and as a last resort, collective military action in a timely and decisive manner.<sup>20</sup>

The UNSC is the right and the unique authority that could authorise a military intervention. If authorisation fails in a compelling case, there are two alternatives: an emergency session under the “United for Peace” procedure held by the UNGA, under which the decision to intervene can be approved by two-thirds majority; or the attempt of ROs to gain the UNSC authorisation under Chapter VIII of the UN Charter.<sup>21</sup> In the case of the “United for Peace” procedure, the decision would not directly authorise the proposed intervention, but would legitimate it and would furthermore send a strong signal to the UNSC to reconsider its failure to act.

The R2P principle is composed of three elements representing three specific responsibilities. The first element is the responsibility to prevent atrocity crimes from arising. It is the single and most important dimension of R2P,<sup>22</sup> but it is usually forgotten or poorly implemented. Prevention must address the root and direct causes of internal conflict and other man-made crisis putting populations at risk. It is discouraging the fact that prevention is costly, but the IC needs to understand that more costly is any HI than the prevention of mass atrocities. Secondly, the responsibility to react to those situations with a whole range of measures, enounced in Chapter VI (peaceful measures),

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<sup>19</sup> “International community” is a term used in international relations to refer to all peoples, cultures, and Governments of the world or to a group of them. The term is used to imply the existence of common duties and obligations between them. It is also emerging as an autonomous subject.

<sup>20</sup> UNGA, 2005, p. 30 (paragraphs 138,139 and 140).

<sup>21</sup> Hamilton, Rebecca J., 2006, p. 291.

<sup>22</sup> ICISS, 2001, p. XI.

Chapter VII (enforcement measures) and Chapter VIII (regional arrangements) of the UN Charter,<sup>23</sup> from persuasive (like diplomatic, economic, humanitarian and other peaceful means) to coercive ones (like sanctions, international prosecution, and in extreme cases, military intervention). And finally, it includes the responsibility to rebuild, particularly after an intrusive intervention, providing full assistance with recovery, reconstruction and reconciliation.<sup>24</sup>

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<sup>23</sup> UN Charter, 1945.

<sup>24</sup> ICISS, 2001, p. XI.

**- II -**

**OBSTACLES TO THE**  
**IMPLEMENTATION**  
**OF R2P**



In this second part of the thesis the different obstacles to the implementation of R2P will be analysed, attempting to overcome each of them through different possible proposals. Nevertheless, some suggestions are less likely to be applied than others, not because of their unrealistic nature, but because of the political challenges and other interests that might exist and prevail.

The R2P's non-binding character, which will be analysed in the first place, supposes one of the main problems, even if it is nevertheless discussed that R2P forms already part of customary international law (CIL) or that it can evolve into it. Secondly, in case R2P is not recognised as or does not become a legal and binding principle, a UN reform would be needed. A deeper acceptance of R2P will only come through a satisfactory reform of the UNSC, criticised for being undemocratic and for applying double standards, triviality and selectivity in its decisions. Moreover, the failure of the responsibility to prevent, the single and most important element of R2P, supposes the failure of the IC and individual States to invest time and efforts to address the root and direct causes of internal conflicts and other man-made crisis putting populations at risk.

Moreover, in case R2P's coercive measures have to be implemented, the political will to act plays a vital role. There can be knowledge of what is happening or about to happen, acknowledgment of the IC's responsibility to protect and the capacity and resources to act, but, quite often, the reluctance of Governments and international and ROs refrains the R2P's implementation, as it is hard, expensive and politically sensitive. Furthermore, the selectivity of its implementation, its misuse in some cases, and the lack of States', coalitions of States' or ROs' accountability when a misuse or omission happens constitute other major obstacles. In addition, in extreme cases, as a last resort and with UNSC authorisation, R2P allows collective military action. But the deployment of military forces for human protection purposes is still very discussed and problematic, as it always entails the loss of innocent lives and its benefits could be much less than its costs. Finally, there is the challenge of delivering R2P in Africa, as there exists a strong criticism against R2P coming from African countries with a postcolonial background, which only see it as a new form of Western colonialism.





## 1) The non-binding character of R2P

The first and main obstacle of R2P is its declared non-binding character. The 2005 WSOD, which is a UNGA Resolution, is a political commitment and “*a non-binding recommendation for MS*,”<sup>25</sup> even if it was approved by consensus. It is however discussed that R2P forms already part of CIL or that it has the potential to evolve into it (as it is a broadly accepted international norm), that there exists a certain State practice in this regard and thus, that it is a legal and binding principle. But most legal commentators<sup>26</sup> agree with the fact that R2P is not yet an international legal norm, “*as it lacks clarity and has not been appropriately legislated.*”<sup>27</sup>

### *The nature of UNGA resolutions*

The UNGA is not a law-making body with powers to approve legally-binding norms.<sup>28</sup> Nevertheless, the fact that it lacks those powers does not mean that its declarations or resolutions do not have any effect.<sup>29</sup> Those kinds of resolutions often work as a starting point to establish or create International Law (IL), as they constitute evidence of CIL or contribute to its formation (if there is a general and consistent State practice accompanied by *opinio juris*).<sup>30</sup> The UNGA is the world’s most representative (and democratic) body, thus, a reached consensus is a reasonable ground for the existence of an international *opinio juris* on a given issue.

In the case of the WSOD, the final consensus which led to its approval created the above mentioned *opinio juris*, also regarding R2P. But the substantial evidence of State practice in R2P matters remains argued. The more States use the language of R2P to justify interventions or the use force against another State, the more evidence there is that a customary rule of R2P exists.<sup>31</sup> At this stage, R2P has not yet been recognised as

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<sup>25</sup> Strauss, Ekkehard, 2009, p. 293.

<sup>26</sup> Like Carsten Stahn, 2007, p.102.

<sup>27</sup> Bellamy, Alex J. & Reike, Ruben, 2010, p. 268.

<sup>28</sup> With the exception of the areas of UN finances and international operations.

<sup>29</sup> Welsh, Jennifer M. & Banda, María, 2010, p. 229.

<sup>30</sup> Hailbronner, Klein, paragraphs 43-54.

<sup>31</sup> Zeffert, Henrietta, 2011 (<http://rightnow.org.au/writing-cat/feature/australia%E2%80%99s-involvement-in-the-libyan-crisis-and-security-council-resolution-1973-navigating-the-gray-area-between-legitimacy-and-legality/>).

a binding rule of CIL, and thus its inclusion as part of it has not been accomplished. Nevertheless, the recent and clear cases of R2P's invocation and implementation in Libya and in Ivory Coast suggest a change and a contribution to the State practice needed to include R2P among CIL. If this tendency continues, future developments in this regard will undoubtedly help the R2P evolution into CIL.

On the other hand, UNGA declarations and resolutions may exceptionally create an obligatory source of IL. This was the case of the UDHR, which was originally a non-binding declaration like the WSOD, and later on became the precursor of the two covenants and an element of CIL.<sup>32</sup> The R2P principle could also follow the same chance.

Moreover, the ICJ's ruling on *Nicaragua vs. United States*<sup>33</sup> also recognised the binding character of a UNGA resolution in exceptional cases. Even if this move was very much criticised, the same could be asked for the UNGA resolution on R2P (paragraphs 138, 139 and 140 of the WSOD). The ICJ could give the legal and binding nature R2P needs to avoid the selectivity and double standards on its implementation.

#### ***The added value given by UNSC resolutions***

Since the adoption of the WSOD, R2P has been invoked in several UNSC resolutions: Res. 1674/2006 and 1894/2009 on the protection of civilians in armed conflict; Res. 1706/2006 on the situation in Darfur; Res. 1814/2008 on the situation in Somalia; and the recent Res. 1973/2011 and 1975/2011 on Libya and Ivory Coast respectively. In many of those resolutions, the R2P wording was not specifically used, but it was clearly applied, reiterated and reaffirmed.

The above cited UNSC resolutions have indeed added juridical value to the R2P norm. By applying it, the UNSC is contributing to its reaffirmation and to the creation of an emerging State practice by the State's implementation of its resolutions. If the UNSC continues in this line of action, the R2P principle will finally acquire the status of CIL.

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<sup>32</sup> Asamoah, Obed Y., 1966, p. 78.

<sup>33</sup> ICJ, *Nicaragua vs. United States of America*, 1986.

On the other hand, in the hypothetical case of the approval of an UNSC resolution regarding R2P, the issue of its legal character would be solved, as it would finally have an uncontested binding nature.

***R2P's first pillar: a norm that reinforces legal commitments***

There exists a general consensus recognising R2P as a norm; the lack of agreement comes when trying to identify what kind of norm.<sup>34</sup> As expressed by Alex J. Bellamy,<sup>35</sup> “R2P is not a single norm, but a collection of shared expectations [...] about how States relate to populations under their care,” expectations which are already embedded under international humanitarian law (IHL), refugee law, international criminal law and human rights law, agreed at the highest level and endorsed by both the UNGA and the UNSC.<sup>36</sup> Under conventional and CIL, States have positive obligations deriving from the right to life<sup>37</sup> and are legally and morally required not to intentionally kill civilians. Those facts were even confirmed by UNSG Ban Ki-moon in his 2009 report *Implementing the Responsibility to Protect*, where he moreover stated that R2P does not alter the legal obligations of MS, indeed it reinforces them.<sup>38</sup>

There are some other evidences that support the fact that positive duties under R2P's first pillar already exist:<sup>39</sup>

- In the *Bosnia vs. Serbia* judgement,<sup>40</sup> the International Court of Justice (ICJ) expressed that States have a legal obligation to take all necessary measures available to prevent genocide, and that they can be held responsible for its commission. Moreover, the ICJ provided significant guidance and parameters for the emerging obligation of an extraterritorial State's responsibility to prevent genocide.<sup>41</sup> More details will be raised in this regard in points II.3 and II.5.

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<sup>34</sup> Chataway, Teresa, 2007, p. 197.

<sup>35</sup> Bellamy, Alex J., 2010, p. 160-162.

<sup>36</sup> Ki-moon, Ban, 2009, pp. 4-5.

<sup>37</sup> Strauss, Ehhehard, 2009, p. 298.

<sup>38</sup> Ki-moon, Ban, 2009, pp. 4-5.

<sup>39</sup> R2P first pillar: States have the primary responsibility to protect populations from mass atrocities.

<sup>40</sup> ICJ, 2007, paragraphs 428-438.

<sup>41</sup> Rosenberg, Sheri P., 2009, p. 464.

- Common art. 1 of the Geneva Conventions requires States “*to undertake respect and to ensure respect for the present Conventions in all circumstances*” (IHL), which represents the precursor of the R2P doctrine.<sup>42</sup>
- The International Law Commission’s (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) requires the cooperation of States to end breaches of the law.<sup>43</sup>
- The UNSG recognition of the UN’s failure to prevent the Rwandan genocide represented implicitly the recognition that the UN should have acted to prevent and to halt it.<sup>44</sup>

As seeing, R2P first pillar’s commitments regarding the primary responsibility of States to protect their population from mass atrocities are deeply embedded in existing IL, much of which is considered *jus cogens*.

Nevertheless, even if considered as a norm which reinforces already existing legal commitments related to genocide, CaH, WC and EC,<sup>45</sup> it is weakly and arbitrarily enforced, based upon the willingness and capacity of the UNSC.<sup>46</sup> As stated by Louise Arbour, former UN High Commissioner for Human Rights, a lesson learned from the massacres that occurred in Rwanda and Srebrenica is that a compulsory legal framework for action is needed, “*a framework that would trigger not just a political or moral responsibility to act, but a legal one that carries legal consequences.*”<sup>47</sup>

### ***Legal quality of R2P’s second pillar***

The IC’s responsibility to assist States to fulfil its R2P constitutes the second pillar of the principle. The commitments under it, set out in the WSOD paragraphs 138 and 139 (see Annex I) and based on the Genocide Convention and IHL (which place a number of obligations on States to *encourage* and *assist* other States to *ensure*

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<sup>42</sup> Cooper, Richard H. & Voïnov Kohler, Juliette, 2009, p. 3.

<sup>43</sup> See ILC, 2000, art. 41.

<sup>44</sup> See “*Report on the Independent Enquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*”, S/1999/1257, 1999, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement>.

<sup>45</sup> Von Schorlemer, Sabine, 2007, pp.5-7.

<sup>46</sup> Contarino, Michael & Lucent, Selena, p. 562.

<sup>47</sup> Arbour, Louise, 2007, p. 12.

compliance with the law) are less well legally defined<sup>48</sup> than the first pillar obligations, and thus pose more problems. Have States an obligation to assist other States?

The ICJ's judgement *Bosnia vs. Serbia*, which found Serbia responsible to prevent the genocide taking place in Srebrenica (as it had political, military and financial influence over the Bosnian Serb army and sufficient information about the potential genocide),<sup>49</sup> provided significant guidance of the existence of a legal obligation to take positive action to prevent genocide on the part of States that have influence and information.

Moreover, IHL states a wide range of pillar two responsibilities related to ensuring compliance and preventing WC. In fact, a core part of the 1949 Geneva Conventions indicates the obligation of States to abide by the law and to ensure that others do the same. Their common art. 1 establishes the duties “*to respect and to ensure respect for the present Convention in all circumstances.*” The duty to “*ensure respect*” could reasonably be extended to R2P's second pillar duties to help States to exercise their R2P and to assist them to build the necessary capacity. Consequently, it could be argued that States with the capacity to do so have a legal obligation to assist other States in their R2P responsibilities.<sup>50</sup>

### ***Is there a legal obligation under R2P's third pillar?***

There exist some emerging ideas, even if depending on a very progressive reading of the law, that creates responsibilities for States within the current framework of the law. They are based on the above mentioned ICJ's ruling in *Bosnia vs. Serbia*, the identification of States' responsibilities by the ILC and the emerging idea that IOs have legal responsibilities too<sup>51</sup> (as will be analysed in next point II.3).

A combination of the ICJ's *Bosnia vs. Serbia* case and the R2P principle suggests the existence of an emerging legal duty to prevent and halt genocide. This will allow, in the future, that States being victims of genocide bring a case to the ICJ against

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<sup>48</sup> Bellamy, Alex J. & Reike, Ruben, 2010, p. 269.

<sup>49</sup> ICJ, 2007.

<sup>50</sup> Bellamy, Alex J. & Reike, Ruben, 2010, pp. 280-282.

<sup>51</sup> *Ibidem*, p. 282.

the countries that should have prevented it<sup>52</sup> and against the UNSC permanent members (as they are the world's leading military powers, and thus, have the capacity to intervene). The charge would be the failure to take reasonable measures to prevent and halt genocide.<sup>53</sup>

Moreover, the responsibilities of IOs, currently analysed by the ILC in its Draft Articles on Responsibility of IOs (DARIOs), would also allow to state that the IO's failure to act would represent a breach of the legal obligation to prevent genocide (art. 8 DARIOs). Like States, they would be also accountable for internationally wrongful acts.

### ***Conclusion***

The WSOD is the product of the largest ever congregation of Heads of State and Government. The agreement produced by the 2005 World Summit carries an immense political weight.<sup>54</sup> And so it is for the agreement on R2P. Nevertheless, its legal nature remains contested, as a UNGA resolution has not a binding character.

However, the legal significance that this principle has acquired cannot be contested. And it is just a matter of time to see the R2P norm becoming part of CIL, as the needed State practice is emerging very quickly.

Furthermore, in case a UNSC resolution related to R2P is approved, all its implementation problems would be solved, as it would acquire a clear binding character forcing the IC and especially the UNSC and its 5PM to act in cases under the scope of R2P, under the threat to be accountable if they do not. No double standards would be possible, no selectivity in UNSC decisions, but an application of the norm in every R2P case, without distinctions. Nonetheless, taking into account the position of Russia and China in relation to the principle, this option seems not lucky to be approved.

A ruling from the ICJ stating the legal and binding nature of R2P could also help to overcome this obstacle. As seen in the Nicaragua case, the ICJ can declare that a UNGA resolution can have, in exceptional cases, a binding character.

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<sup>52</sup> Detailed information on which States have a special duty to prevent genocide will be given in next point II.3.

<sup>53</sup> Bellamy, Alex J. & Reike, Ruben, 2010, p. 285.

<sup>54</sup> Ibidem, p. 273.

Several are thus the options R2P has in order to become a binding norm. Nevertheless, there needs to exist the political will allowing this change, from the part of the States in order to create a certain State practice that would allow R2P to be part of CIL, from the part of the UNSC and especially the 5PM to approve a resolution, from the part of the ICJ to issue a ruling, and from the part of Governments and NGOs/CSOs to pressure all the cited bodies to recognise and transform R2P in a legal and binding norm.

## 2) The need of a UN reform

### *The problems of the current UN system when implementing R2P*

In case R2P is not recognised or does not become a legal and binding principle, a UN reform would be needed. The implementation of R2P requires an IO able to provide not only benefits to its members, but also sanctions through a legitimate and effective collective enforcement mechanism, to manage threats to international peace and security. This IO should be trusted fair and efficient, and should create a shared identity, at least for R2P. Unfortunately, the UN does not meet these requirements,<sup>55</sup> and thus, it does not provide much optimism regarding its ability to implement R2P. Moreover, as the researcher Mr. Anthony Reeler<sup>56</sup> stated, “*what we need is a world government, based on 2 principles: to apply and use the Law, and to apply Power. We have the Law, but we do not have any Power. That is why there is a lack of political will.*”

Major problems for R2P’s implementation come from the political influences on UNSC’s decisions and the UN’s inadequate operational capacity.<sup>57</sup> As some MS have opined, this body seems not to be the most legitimate to decide about R2P and sovereignty interferences, because of its double standards and selectivity in its decisions<sup>58</sup> and because of its unrepresented and undemocratic current membership, as it does not have a permanent representation from Latin America, the Middle East, Africa and the Indian sub-continent. Moreover, the democratic credentials of some of its members are very questioned (like in the case of China, where democratic elections are denied). Furthermore, the five permanent members (5PMs) of the UNSC (France, China, Russia, the United Kingdom (UK) and the United States (US)) do not reflect the political balance of the world and look after their own interests and those of their allies, blocking any resolution or R2P measure against them. The UN remains the proper forum for extensive international political dialogue and decision-making, but a change

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<sup>55</sup> Mayer, Susan E., 2009, pp.55-56.

<sup>56</sup> Anthony Reeler is the Director of Research and Advocacy Unit. Interviewed in Harare (Zimbabwe), 5 May 2011.

<sup>57</sup> Mayer, Susan E., 2009, pp.55-56.

<sup>58</sup> Pace, William; Deller, Nicole & Chhatpar, Sapna, 2009, p. 225.



of the current UNSC's structure is needed in order to transform it into a democratic, effective and respected body. A deeper R2P's acceptance will only come through a satisfactory reform of the UNSC.

In this regard, some suggestions of UNSC reform are more likely to be taken into account than others, depending on the willingness of its 5PMs. Those proposals include the expansion of the UNSC membership, which should be a prerequisite to R2P's implementation; the abolition of the veto power, or at least its use in R2P cases; and an ICC reform regarding the task of determination of R2P violations (currently under the scope of the UNSC) and its limited universal jurisdiction. Those suggestions will be briefly explained below.

### *Expansion of the UNSC membership*

Almost since the UNSC founding, the idea of its enlargement has been present. In 1993 the UNGA established a Working Group on the issue (Res. 48/26), and in 1997, the UNGA former President Razali presented his reform plan, known as the "Razali Plan." Moreover, during the 2005 World Summit, the first priority for MS was the UNSC membership expansion.<sup>59</sup> UNSG Ban Ki-moon has furthermore shown his support towards the idea of inviting more permanent members to the UNSC.<sup>60</sup> Global realities have changed dramatically since the body's first meeting in 1946, and its permanent membership has not. But even if the need of reform has been established, there is still no agreement (for more than two decades) on the exact reforms to implement.<sup>61</sup>

The UN has 192 MS, and only 15 form part of the UNSC and are deciding about issues like those related to R2P, sovereignty interferences and the maintenance of peace and security, affecting the whole IC. Moreover, five of them are permanent members, and the other ten States are elected by the UNGA and rotate every two years among the different UN MS, on the basis of the "equitable geographic distribution" formula.<sup>62</sup>

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<sup>59</sup> Strauss, Ekkehard, 2009, p. 295.

<sup>60</sup> See <http://www.theepochtimes.com/n2/content/view/46797/>.

<sup>61</sup> Bourantonis, Dimitris & Magliveras, Konstantinos, 2002, p. 24.

<sup>62</sup> Ibidem.

Furthermore, there exists not an equitable geographic representation among the permanent members; they do not equally represent every region.

The total number of UNSC members should be increased, to allow at least 25 States (10 permanent and 15 non-permanent members) to form part of this important decision-making body. Twenty five is a more representative number, and is a quantity that would not pose excessive problems when trying to make decisions in a timely manner.

The permanent membership should thus be enlarged from 5 to 10 members, with, of course, no right to veto, as this is an undemocratic power that should be abolished, as will be discussed later on. The problem that then arises is how to choose which countries should benefit from this status. It seems that the proposed candidates (even if some States have shown their opposition and reluctance towards some of them) are: Brazil, Japan, India, Germany and an African country (South Africa or Nigeria).<sup>63</sup> In my opinion, it is extremely important that the UNSC reaches a geographical balance among its permanent members (and non-permanents too), and, moreover, that the candidates comply with human rights obligations, have a democratic character (even if it is not the case of some of the already 5PM, like China) and the military capacity to maintain international peace and security. These important and basic requirements should be taken into account. Does Nigeria fulfil them? Does the inclusion of Germany contribute to the equal geographical balance among the permanent members?

Among the UNSC non-permanent members, the same rules should be applied. Countries with undemocratic and poor human rights records should not be allowed to form part of the UNSC, and in each term, there should be an equal number of States from each continent. In the exceptional case where there is no country from a geographical area that fulfils the mentioned criteria, and taking into account that immediate re-election is not allowed,<sup>64</sup> the UNGA should decide if the seat should

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<sup>63</sup> Galen Carpenter, Ted, 2010 (<http://nationalinterest.org/blog/the-skeptics/long-overdue-adding-permanent-members-the-un-security-council-4380>).

<sup>64</sup> See UNSC membership (<http://www.un.org/sc/members.asp>).

remain empty, or if it should be given to a State from one of the most populated continents.

A reform like the one proposed would only enhance the democratic and representative character of the UNSC, thus allowing a better endorsement and implementation of R2P. Moreover, the basic requirements of democratic character and compliance with human rights obligations would force States to change their behaviour and structures if they wish to form part of the UNSC.

### ***Abolition of the veto power***

The veto power is unacceptable, and there should be a strong commitment to abolish it, in the interest of the IC and the democratic nature the UNSC and its decisions should have. The current debates on the possible UN reforms trying to adapt its structure and mechanisms to the needs and challenges of the 21<sup>st</sup> century should envisage this important option.

Nevertheless, I must confess that the removal of the veto power from the UN Charter is a utopia. How to refrain the 5PM veto in a resolution that would extremely limit their current powers? None of them would ever allow such limitation. A softer version regarding the veto reform might be more realistic.

### ***No use of veto in R2P cases***

Another proposed measure, already formulated in the 2005 WSOD (but rejected), and later on by the UN Secretary-General Ban Ki-moon in his report *Implementing the Responsibility to Protect* (paragraph 61), urges the 5PMs of the UNSC to “*refrain from employing or threatening to employ their veto power in cases of genocide, war crimes, ethnic cleansing and crimes against humanity.*”<sup>65</sup> This would be the only solution in case the abolition of the right to veto is not decided. The 5PMs, instead of vetoing resolutions on R2P should abstain from using it, and at least allow the rest UNSC members to approve R2P decisions. This commitment should be embraced in a binding resolution, instead of leaving it just as an oral promise.

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<sup>65</sup> Ki-moon, Ban, 2009, pp. 26-27 (paragraph 61).

Fortunately, there exists a recent case that illustrates an improvement towards this commitment. The two UNSC permanent members (China and Russia) that threatened to veto the resolution allowing a no-fly zone over Libya, finally abstained. The UNSC Res. 1970 and 1973 were approved and a no-fly zone enforced. Nonetheless, the crisis in Syria seems not to have the same chances, as Russia and China already stated their intention to veto a resolution allowing military measures.

### *ICC reform*

On the other hand, the suggestion of a reform of a different and non-UN body, the ICC and its Rome Statute, expressed in the part of the thesis dedicated to UN reform proposals, can seem wrongly placed. However, as the modifications that will be examined involve the UNSC too (limiting some of its tasks), I think this is the right place to include it.

The belief that the responsibility to stop atrocity crimes is a responsibility of both national Governments and the IC led to the establishment of the ICC through the 1998 Rome Statute, with prospective jurisdiction from July 2002 (when it was finally ratified by 60 States). The Court has not only the power to make the perpetrators of genocide, EC, WC and CaH accountable,<sup>66</sup> it has also universal jurisdiction, meaning that any State-party can bring to trial any person accused of such crimes (including Government officials), if national courts have fail to prosecute them, and irrespective of any connection between the criminal and the State in question.

Nonetheless, the ICC's universal jurisdiction has an important limitation: it is a prerequisite that States sign the Rome Statute to be able to refer to the Court a situation happening in their territory (or by referral from the UNSC). As for July 2011, 116 States have joined the ICC (the last being Tunisia)<sup>67</sup> and between the non-signatories, some major powers: US, Russia, China and India. The UN and the ICC States-parties should persuade the non-signatory ones to sign and ratify the Rome Statute. Otherwise, the ICC should be given universal jurisdiction regardless of the countries that have not legislated

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<sup>66</sup> The art. 5 of the Rome Statute lists Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression within the jurisdiction of the ICC.

<sup>67</sup> See <http://www.icc-cpi.int/Menu/ASP/states+parties/>.

to allow their courts to apply it. This would require a revision of the Rome Statute,<sup>68</sup> especially in its art. 15.1,<sup>69</sup> in order to give the ICC Prosecutor the power to investigate R2P violations even in non-State parties (*proprio motu*, without the need of an UNSC referral). The Prosecutor would then be able to act more quickly, and, moreover, in a less politicised manner and still needing the UNSC authorisation to issue an arrest warrant in non-State parties.<sup>70</sup> If this reform does not take place (which can be likely taking into account that China, Russia and the US would not be willing to see their immunity from the ICC reduced); or all the countries worldwide do not join the ICC; or the UNSC does not refer to the ICC all the cases regarding R2P criminals, impunity for mass atrocity crimes will still be possible.

Moreover, under the current law, the ICC has no role in the determination of when a violation of R2P has occurred, as it is only committed to prosecution and punishment matters. This task is under the scope of the UNSC (as expressed in the ICISS' report and the WSOD),<sup>71</sup> body responsible for the enforcement of R2P, and which unfortunately decides when the R2P norm has been violated on the basis of a political process.<sup>72</sup> If any of the UNSC reform proposals raised in point II.2 is not implemented, the UNSC will continue to deliver political decisions based on double standards, selectivity and narrow interests, not allowing an impartial determination of when a R2P violation has been committed.

The ICC seems to be the impartial and appropriate body that could be in charge of a juridical rather than political R2P violation determination. Even if acknowledging and agreeing with what the ICISS stated in its report (*“the task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has”*),<sup>73</sup> but aware of the past and current irregular and selective UNSC

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<sup>68</sup> The art. 121 of the Rome Statute states that seven years after its entry into force, any State party to the treaty may propose revisions, which should be submitted to the UNSG, who would then distribute the proposed reform to the States. Three months later, the Assembly of States Parties would determine whether to adopt or not the proposals.

<sup>69</sup> Art. 15.1 of the Rome Statute: *The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.*

<sup>70</sup> Contarino, Michael & Lucent, Selena, 2009, pp. 569-570.

<sup>71</sup> ICISS, 2001, p. XII and UNGA, 2005, paragraph 139.

<sup>72</sup> Contarino, Michael & Lucent, Selena, 2009, pp. 563-564.

<sup>73</sup> ICISS, 2001, p. XII.

performance and failures<sup>74</sup> in R2P cases and the difficulties of making this body *work better* if a reform of it does not take place, I would transfer the task of the determination of a R2P violation to a better suited and less politicised body: the ICC. A revision of the Rome Statute in the same art. 15.1 could also empower the ICC to legally determine when a State has failed its obligations under R2P. In fact, the Court has already the expertise and the capability to do so: when its Pre-Trial Chamber decides that a situation is sufficiently grave to start an investigation (art. 15.2 Rome Statute), it has also determined that a Government has failed to fulfil its R2P. Nevertheless, issuing a ruling in this regard goes beyond its current functions.<sup>75</sup> However, if finally allowed (through a revision of the Rome Statute) the UNSC should as a next step deliberate and take appropriate action, thus remaining the ultimate authority in R2P. The ICC would only supplement it.

Furthermore, if the ICC is finally empowered to rule on the determination of R2P violations, and in the case of a silence from the UNSC, it would provide the legal justification to multilateral coalitions or ROs willing to halt the commission of mass atrocities. And equally important, the absence of such ruling would make difficult for States wishing to intervene in a crisis to justify their unauthorised interventions. Moreover, a juridical R2P determination by the ICC may with the time produce norms and standards supported by international jurisprudence, defining the content and the appropriate legal measures to enforce R2P and developing criteria for future cases.<sup>76</sup>

Nevertheless, as expressed when analysing a UNSC reform, such a strong ICC reform may unlikely be approved, mainly because of a possible opposition of the three non-ICC States and permanent members of the UNSC (US, China and Russia) not wishing to narrow their power tasks. However, we should not assume that because the reform is difficult the failure is inevitable. A softer reform could also be proposed, in case the major one could not be implemented. This soft version consists on an

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<sup>74</sup> More will be explained in this regard in point II.5, when analysing the obstacles of selectivity and of the lack of accountability for inaction in R2P crises.

Nevertheless, taking the example of Darfur, the UNSC did not take sufficiently decisive and strong action because a consensus between its members and the political will to act were not found.

<sup>75</sup> Contarino, Michael & Lucent, Selena, 2009, p. 570.

<sup>76</sup> Ibidem, p. 571.

amendment of the Rome Statute allowing the ICC to issue non-binding legal recommendations to the UNSC in cases of R2P violations.<sup>77</sup>

The ICC Treaty Review Conference<sup>78</sup> that was held in Kampala (Uganda) from May to June 2010 could have been an important opportunity to raise these revisions. Unfortunately, no issues were expressed in that regard.

### ***Conclusion***

As concluding remarks, I might say that if any of the above mentioned possible UNSC reforms is not taken into account, R2P would continue to have a trivial and poor implementation, always favouring the “immunity” of the 5PMs and their allies (as seeing with Israel) , and only enforcing measures against weak and less powerful States committing mass atrocity crimes. Nevertheless, the ongoing debate on the need of a UN reform to adapt it to the realities and challenges of the 21<sup>st</sup> century may raise some hope in this regard, as at least it has been agreed that the UN should be reformed. The question is how. The above suggestions may not only improve the democratic status and functioning of the UNSC, but also the implementation and enforcement of the R2P norm. Moreover, a solution through a greater involvement of the ICC in the determination of R2P violations and through a worldwide universal jurisdiction could also contribute to the R2P’s strengthening.

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<sup>77</sup> Contarino, Michael & Lucent, Selena, 2009, p. 571.

<sup>78</sup> See: <http://www.icc-cpi.int/Menus/ASP/ReviewConference/>.

### 3) The failure of the responsibility to prevent

The failure of the responsibility to prevent, the single and most important element of R2P, supposes the failure of the IC and individual States to invest time and effort to address the root and direct causes of internal conflicts and other man-made crisis putting populations at risk. This third obstacle exists because prevention is costly and because usually no one notices an implementation of prevention measures, and Governments, States and the IC want their actions clearly visible and noticed. But what needs to be understood is that, at the end, military intervention for human purposes will always be more costly, in treasure and in blood, than the prevention of mass atrocities.

Under Chapters VI and VIII of the UN Charter can be found a catalogue of conflict prevention measures, which includes negotiation, mediation, conciliation, enquiry, arbitration and judicial settlement measures and resort to regional agencies. Moreover, in Boutros Boutros-Ghali's 1992 *Agenda for Peace*, the UN role as a preventive diplomacy mechanism was emphasised. But only with the 1999 report of the Carnegie Commission on Preventing Deadly Conflict<sup>79</sup> a culture of conflict prevention emerged. Later on, the UNSG Kofi Annan issued in 2001 the report on the *Prevention of Armed Conflict*, with the leitmotif "to move from a culture of reaction to a culture of prevention."

In fact, if there would be a successful implementation of the different prevention mechanisms, the other R2P elements (the responsibility to react and the responsibility to rebuild) would not need to be executed. It is only when prevention fails, that reaction mechanisms should be executed. That is why "R2P is about effective prevention action at the earliest possible stage."<sup>80</sup> Consequently, more attention and economic investment should be agreed by the IC in this regard. The IC should help countries to help themselves in the prevention of atrocity crimes.

The early warning commitments agreed to in 2005 have yet to be put in place. The recent UNSG's 2010 report on *Early Warning, Assessment and the Responsibility*

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<sup>79</sup> See: <http://www.wilsoncenter.org/subsites/ccpdc/pubs/ditch/ditchfr.htm>.

<sup>80</sup> Evans, Gareth, 2008, p. 56.



*to Protect* offers a roadmap to strengthen the UN Secretariat's early-warning capacity.<sup>81</sup> The implementation of the recommendations expressed in the report should be a priority for members of the R2P Friends Group.<sup>82</sup> Moreover, early warning is also one of the key areas where CSOs can make important contributions.

There always exist early warning signs anticipating cases of genocide and other mass atrocity crimes. Before the Holocaust, the Rwandan Genocide, and the atrocity crimes committed in the former Yugoslavia, there were already situations of growing repression, human rights abuses, hate speech directed to a particular group, etc...<sup>83</sup> But no action was taken on time. In fact, many situations have the potential to evolve into mass atrocity crimes, like colonial occupation; war; revolution; historical grievances and enmities; poor governance; poor education; religious, ethnic and political tensions; social discrimination and exclusion of certain groups; corruption; contests over resources; recent rankling social traumas; rapid political, social or economic dislocation; and arrogant elites prospering in the midst of widespread poverty. But this is not an exhaustive catalogue, many other early warning signs may exist, and, moreover, usually R2P crimes occur under the cover of war.<sup>84</sup> Nevertheless, prediction is always controversial and a source of disagreement. Consequently, detailed field-based analysis is absolutely critical.

A good analysis of a potential crisis situation is not only a precondition for early responses, but is also critical for choosing the most appropriate and timely policy response from the different preventive measures. An extensive analysis and evaluation of them is detailed in Gareth Evans' book *The Responsibility to Protect: ending mass atrocity crimes once and for all*, in its fourth chapter: *Before the Crisis: the Responsibility to Prevent*,<sup>85</sup> and in many other literature. Thus, they will not be discussed in this paper. Nevertheless, in Annex III, a detailed toolbox of preventive measures can be found.

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<sup>81</sup> Ki-moon, Ban, 2010.

<sup>82</sup> The Group of Friends on R2P is an informal cross regional group of UN MS that share a common interest in R2P and in advancing this norm within the UN system.

<sup>83</sup> Evans, Gareth, 2008, p. 79.

<sup>84</sup> Ibidem, pp. 81-82.

<sup>85</sup> Ibidem, pp. 79-104.

### *Effective conflict prevention*

Prevention “*begins at home*,” said the UNSG Ban Ki-moon in his 2009 report *Implementing the Responsibility to Protect*,<sup>86</sup> and the “*protection of populations is a defining attribute of sovereignty*.” The international community has a supplemental role, and consequently has to exercise its prevention tasks accordingly.

Effective conflict prevention requires three major factors:<sup>87</sup>

- 1) Detailed knowledge of the countries and regions at risks. Strong analysis and good early warning mechanisms are needed;
- 2) The toolbox of policy instruments potentially available has to be understood by policymakers,
- 3) Availability in practice and capability to deliver the appropriate responses, and the necessary political will to do it.

There exists the knowledge of the countries at risks, as there is a list of countries of R2P concern (as will be shown in the next paragraph), and detailed information coming from NGOs<sup>88</sup> and other organisations that monitor, evaluate the risks and disseminate all the information about R2P crises. Moreover, in the era in which we live, where the events arising are known worldwide just a second later they happen, there is no excuse that could justify a lack of knowledge of a possible crisis. The toolbox of prevention mechanisms (see Annex III) is also understood and known, but policymakers may prioritise their interests and pursue a military intervention rather than explore all possible and available prevention instruments (this has been the case in Libya, as will be argued in the next chapter III). The third factor requires capability and political will. Political will is capable of being created through domestic pressure and mobilisation, but capability requires a minimum of economic and technical aspects that may allow the implementation of preventive measures, and unfortunately many States do not have it.

When trying to identify the countries of R2P concern, it is important to specify what makes a country a “R2P situation.” First of all, the R2P concept should be clear: it

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<sup>86</sup> Ki-moon, Ban, 2009, p. 10.

<sup>87</sup> Evans, Gareth, 2008, p. 81.

<sup>88</sup> NGOs like ICG, the International Coalition for the R2P (ICRtoP), HRW, etc.

concerns situations where mass atrocity crimes (namely genocide, EC, WC and CaH) are actually occurring or about to occur, or where they could deteriorate to this extent in the medium or longer term unless preventive measures are taken. A “R2P watch list” criteria has been developed in this regard, which is not exhaustive and which needs of more development of criteria, quantitative models and qualitative indicators. Mr. Gareth Evans, one of the main R2P authors, proposed five criteria that could already identify countries at risk of R2P crises:<sup>89</sup>

- 1) A past history of mass atrocities by repressive Governments or groups;
- 2) Still persistent tensions, because of past conflict, low income, low income growth, pervasive sense of hopelessness, discrimination, repressed cultural identity, etc...;
- 3) Society’s weak institutional structures to resolve grievances and tensions peacefully (the political and legal systems and the policy and army security infrastructures);
- 4) The negative receptivity of the country or society to external influence;
- 5) The absence of a good leadership.

Following those criteria, and taking into account that everything depends on a case-by-case analysis, some countries have been identified under the R2P watch list. It is the case of Burma/Myanmar, Burundi, China, Democratic Republic of Congo, Iraq, Kenya, Sri Lanka, Somalia, Sudan, Uzbekistan and Zimbabwe.<sup>90</sup> Extreme attention and a special focus should be directed to those countries, in which the IC should commit and involve itself in the establishment of prevention measures to avoid the deterioration of their situation. The IC does know the countries of R2P concern; there is thus no excuse to do not involucrate in their improvement. In fact, it should monitor their deterioration<sup>91</sup> and should not delegate this task to NGOs and other organisations. Moreover, the best single predictor of future conflict is past conflict in the same place. There is consequently a need to put in sustained resources and commitment during the years that follow peace agreements to stop the whole horrible cycle of violence from

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<sup>89</sup> Evans, Gareth, 2008, pp. 71-76.

<sup>90</sup> Ibidem, p. 76.

<sup>91</sup> Anthony Reeler, interviewed in Harare (Zimbabwe), 5 May 2011.

starting again.<sup>92</sup> Furthermore, a commitment to stop the trade of arms to those countries should be established among all the IC, with no exceptions.

### ***Threat of international prosecution***

It is important to advance the pursuit of international criminal justice as a necessary element of prevention, achievable by reducing the prospects of impunity.<sup>93</sup> The ICC and the two ad hoc tribunals (ICTR and ICTY) have an important role to play not only as reaction mechanism, but also as preventive ones. ICC's prosecution could be "one of the few credible threats faced by leaders of warring parties," and may act as deterrent to would-be human rights abusers.<sup>94</sup> In fact, the experiences of the ICC in Uganda, the DRC and Sudan suggest that the threat to prosecution does influence abusive leaders' decisions. But, as seen in the previous point II.2, many countries are still not under the ICC's jurisdiction, as they are not willing to ratify the Rome Statute. As a result, the Court's power as a mass atrocities prevention mechanism and as a promoter of accountability and the rule of law remains limited.

ICC's tasks should be enhanced through a real and worldwide universal jurisdiction, allowing it to become a serious threat to all human rights abusers, regardless of their country of origin or of commission of atrocities. Without a real worldwide jurisdiction, the ICC will continue to depend on the UNSC for the referral of cases of atrocity crimes committed in non-State parties, which, as previous experiences have shown, may unfortunately not refer all the cases that should be referred. Only through the UNSC or ICC reforms raised in point II.2, the threat of international prosecution and punishment would play a key role as a major prevention mechanism.

### ***Particular responsibility to prevent of some States, ROs and the UN***

States have an obligation of due diligence and the responsibility to prevent genocide, as stated in the Genocide Convention. This obligation is not a duty of result, but of conduct.<sup>95</sup> Moreover, the ICJ expressed in its judgement *Bosnia vs. Serbia* that

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<sup>92</sup> Evans, Gareth, 2008, p. 235.

<sup>93</sup> Bassiouny, Cherif, 2009, p.33.

<sup>94</sup> Grono, N., 2006, p. 3.

<sup>95</sup> Strauss, Ekkehard, 2009, 316.

States should take all reasonable measures to prevent it even outside their borders.<sup>96</sup> But some States have more responsibility than others in this preventive task, as they have the means and the influence (being political, economic, military, etc) able to affect the outcome of a possible genocide in the country at risk.<sup>97</sup> Those States should consequently implement their responsibility to prevent. Moreover, ROs and the UN are in the same situation as the mentioned States, as they as well have the influence and the capacity to prevent.

Therefore, States with an important influence in the countries at risk of genocide, the UN and the respective regional and sub-ROs have a special duty to prevent it, and should be aware of it. CSOs and NGOs could easily raise awareness of the States/ROs/UN's existing duty, which, as will be suggested in point II.5 (when stating their accountability for the failure to prevent) should be extended to the other types of atrocity crimes under the scope of R2P. Their extraterritorial responsibility to prevent should be translated in all kind of prevention efforts, involving their economic assistance too. Examples of prevention mechanisms can be found in Annex III.

Moreover, the threat of accountability for the breach of an international obligation like the responsibility to prevent could, as well as the threat of individual accountability for the commission of atrocity crimes, contribute to change Governments', ROs' and the UN's behaviour regarding the implementation of their duty to prevent.

#### ***Prevention by ROs, NGOs and CSOs***

Prevention is the area where ROs and NGOs/CSOs can contribute the most. Their potential should be enhanced and supported by Governments, other ROs and the whole IC.

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<sup>96</sup> ICJ conclusions extracted from the *Bosnia and Herzegovina vs. Serbia and Montenegro* judgement.

<sup>97</sup> ICJ judgement, *Bosnia vs. Serbia*, paragraph 431 : "if a State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit."

Ten years ago and based on the *Brahimi Report*, investments were made by most ROs to strengthen their capacity for preventive action.<sup>98</sup> Local or national NGOs, as well as ROs, are more familiar with the warring parties and with the possible conflict, and should consequently be the firsts to implement prevention mechanisms. Nevertheless, more funding should be agreed to develop their early warning and prevention capacities.

The role of NGOs and CSOs is critical too as they can create the domestic pressure needed to push Governments to implement their responsibility to prevent. Many of them already work in important areas like reconciliation, demobilisation and reintegration of ex-combatants, conflict resolution, peacebuilding, etc, which constitute an important advancement of their responsibility to prevent. They should moreover be aware of their potential when applying the R2P principle.

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<sup>98</sup> Carment, David & Fischer, Martin, 2009, p. 263-265.

#### **4) The lack of political will to act**

There can be knowledge of what is happening or about to happen, acknowledgment of the IC's responsibility to protect and the capacity and resources to act, but, very often, the reluctance of Governments and of the intergovernmental organisations in which they sit refrains R2P's implementation.

Implementing R2P is hard, expensive and politically sensitive. The institutional capability to deliver the right kind of response at the right time (by way of prevention, reaction or rebuilding) will not be there. Therefore, it is indispensable to find the necessary political will to do it. And it is not only the responsibility of the IC (sovereign States with the capacity to help and support), of the IOs (like the UN), of the ROs (EU, AU, AL, Association of Southeast Asian Nations (ASEAN), Organisation of American States (OAS), North Atlantic Treaty Organisation (NATO), Organisation of Security and Cooperation in Europe (OSCE)), of the sub-ROs (Southern African Development Community (SADC), Economic Community of West African States (ECOWAS), etc), of the international criminal courts (ICC, ICTR, ICTY), of the NGOs and CSOs and the media, it is also the responsibility of all the individuals.

There is a need of political commitment to influence public policy, to get local and national politicians engaged with R2P. Political will is capable of been created and is subjected to change, and its key elements are the *“knowledge of the problem; the concern to do something about it; the confidence that doing something will make a difference; the institutional processes capable of translating that knowledge; the concern and confident belief into relevant action; and the leadership.”*<sup>99</sup>

The key factor to generate political will is the bottom-up mobilisation: domestic support through the media, from decision makers and with good arguments (through moral imperatives, financial, political and national interest arguments).<sup>100</sup> Domestic mobilisation and pressure are often the only ways to force Governments to prevent the perpetration of mass atrocity crimes and to react to halt them once they happen. In fact,

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<sup>99</sup> Evans, Gareth, 2008, p. 224.

<sup>100</sup> Ibidem, pp. 227-231 & Evans, Gareth, 2009, p. 26.

Governments are susceptible to pressure, and democracies are more prone to exercise their R2P when pressured by domestic political mobilisations.<sup>101</sup> Nonetheless, it is also the work of CSOs and NGOs, analysing, raising awareness, warning and alerting nationals of what is happening abroad and needs to be stopped that might generate the required mobilisation able to pressure Governments.

We are now conscious of the power that the Internet and the different social networks have, and thus must be used to raise awareness on cases of atrocity crimes around the world and to promote R2P. Facebook and Twitter<sup>102</sup> have become very important tools to raise awareness and to mobilise people almost immediately. They have played a crucial role organising and mobilising protests of discontent citizens claiming for democracy and human rights during the recent 2011 Arab Uprisings in the Middle-East (in Tunisia, Egypt, Bahrain, Yemen, Morocco, Libya and Syria, among others).

The media also play a key role while transmitting the knowledge of what is happening. They have the responsibility to report real-time transmission of images of suffering, which generates strong reactions and the domestic and international pressure to act, as they are conscience-shocking and action-motivated. Any means that modern technology offers have to be used if we do want to ensure the knowledge of R2P situations, and thus, the mobilisation of people for the cause.

We neither have to neglect the mobilising power of celebrities. They can be very effective and high-visibility spokespersons for the victims, and the benefits of celebrity involvement far outweigh the dangers associated with them.<sup>103</sup> The UN has already collaborated with celebrities who share human rights concerns, and has given them the title of “UN Goodwill Ambassadors,” under which they try to raise awareness about humanitarian crisis and to help with fundraising. Celebrities are an effective way to attract citizens’ attention, being able to sensitise and mobilise them very quickly.

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<sup>101</sup> Power, Samantha, 2009, p. IX.

<sup>102</sup> They constitute the current main social networks on the Internet.

<sup>103</sup> Schulz, William F., 2009, p.155.



As mentioned above, Governments are quite often reluctant to react in cases of atrocity crimes because of the high-cost of R2P's measures and its political sensitivity. Therefore, if domestic mobilisation is capable to pressure them, guided by "*spokespersons who can make the plight of the victims poignant and clear,*"<sup>104</sup> by celebrities compromised with the cause, or by a movement promoted via the Internet or Facebook, by NGOs and CSOs, Governments will be obliged to react. If they ignore the voice of their citizens, they would have to deal with the loss of their confidence, and no Government is willing to face a problem of this kind, as it would certainly hurt it in elections time.

Only if a big number of people insist and claim for their Governments' responsibility to protect populations from mass atrocity crimes, R2P would become an effective mechanism. Therefore, R2P must be implemented on all different levels of the decision-making. An illustrative example of this argument is the Anthony Lake's<sup>105</sup> response to US human rights organisations that approached him pressuring for American intervention in Rwanda: the only way the US Government would intervene would be if massive popular protests began to occur demanding such action.<sup>106</sup>

Then, a question arises: would this type of domestic pressure provoke the Governments' reaction against atrocity crimes committed in the territory and by any of the UNSC 5PMs? With the actual UN system, any coercive measure against them would not be approved by the UNSC under articles 41 or 42 of the UN Charter, as those countries would use their veto power. For the moment, this question remains unanswered and has raised important criticisms against R2P, as it shows that it will not be applied to superpowers and their allies, but only to weak and less powerful countries. We could say that R2P supposes a big failure in this respect as it is discriminatory.

In this regard, the recent pro-democracy protests happening in the Middle-East since the beginning of 2011 seem to encourage some Chinese demonstrators seeking democracy and human rights in China. But any mobilisation or demonstration against

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<sup>104</sup> Schulz, William F., 2009, p.155.

<sup>105</sup> Anthony Lake was a national security adviser to US President Bill Clinton at the time of the Rwandan Genocide in 1994.

<sup>106</sup> Rieff, David, 1999, p. 6.

China's Government has been immediately stifled by the police and the military forces, and international journalists have been threatened with the revocation of their visa if they report such protests. If the ideals of the Tunisian "Jasmine Revolution" evade the Internet censorship and gain followers in China, we will witness the reaction of its Government, which promised to use strict and decisive measures to avoid any demonstration (as seen in March 2011) and which warned that any threat to the Communist Party-led stability could bring "disaster."<sup>107</sup> If China then becomes a "new Libya", how would the IC react? Would coercive measures be approved against one of the UNSC permanent members in case they are needed? Would any R2P measure be implemented? Maybe we could find an answer to those questions in the oncoming months, or we could just conclude that R2P will never (under the current UNSC structure) be implemented against any of the UNSC's 5PMs, not only because of the obstacle of the veto power, but also because any military intervention under R2P should have a reasonable prospect of success.

In those cases, what could be tried, and may work, is peer group pressure. No country around the world, independently of its size or power, is immune to it, as they are now much more concerned about their international image. This was the case of Indonesia, an important military and regional power (230 million inhabitants and more than 300.000 members in the armed forces) which finally succumbed to the strong collective international pressure (essentially diplomatic pressure and directly applied by different presidents and prime ministers) and allowed the military intervention headed by Australia to protect the civilians of East Timor.<sup>108</sup>

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<sup>107</sup> Buckley, Chris, 2011 (<http://ecodiario.eleconomista.es/telecomunicaciones-tecnologia/noticias/2879888/03/11/China-state-media-warn-against-protest-calls-in-capital.html>).

<sup>108</sup> Evans, Gareth, 2008, p. 63.

## **5) Selectivity and lack of accountability for the misuse, the failure to prevent and the omission to act in R2P crises**

R2P's implementation has also to face the difficult obstacles of selectivity, misuse, and the lack of States', coalitions of States' or ROs' accountability for this misuse, for their failure to prevent, and for their omission to act in R2P crises. The undemocratic UNSC is also known for its application of double standards, for its reaction only if the interests of its 5PMs or their allies are involved, and its inaction if their national interests could be in peril (using their veto power). Moreover, as observed in the Iraq, Afghanistan and Georgia cases, R2P can be invoked in situations where there is no R2P justification, problem which only contributes to the misunderstanding and consequent rejection of the principle. Those cases only weakened the R2P's cause. In addition, and as seen when analysing the failure of the responsibility to prevent, there should also be accountability for the inaction of the States that have a special duty to prevent genocide (and as proposed, other mass atrocity crimes), as they have an important influence in the country at risk.

### ***Selectivity of R2P's implementation***

The R2P principle has been applied selectively. There are cases where it has been invoked (like recently in Ivory Coast and Libya) and cases where it has not even been brought into play and there was a clear commission of crimes under the scope of R2P (like in forgotten crises as Somalia, Afghanistan, Burma/Myanmar,<sup>109</sup> Zimbabwe, and in Iraq after the US invasion). The veto power of the UNSC's 5PM is one of the main reasons of the application of double standards.

The political and economic costs of military intervention are extremely high. States will consequently only intervene if they have a compelling self-interest.<sup>110</sup>

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<sup>109</sup> In 2007, a UNSC resolution regarding widespread human rights violations in Myanmar was double-vetoed. The objections explained by Russia and China were that *the situation was the affair of a sovereign State, that the situation was not a threat to international peace and security and that human rights issues should be taken up by the Human Rights Council rather than the UNSC* (see Pace, William; Deller, Nicole & Chaatpar, Sapna, 2009, pp. 224-225).

<sup>110</sup> Mayer, Susan E., 2009, p. 50.

A very recent case of double standards involves one of the UNSC 5PM. When the US President Obama defended his military actions in Libya in March 2011, he said: “*some nations may be able to turn a blind eye to atrocities in other countries. The United States of America is different.*”<sup>111</sup> Two weeks later, the AL asked the UNSC to consider the imposition of a no-fly-zone over the Gaza Strip in order to protect civilians from Israeli air strikes.<sup>112</sup> But the US, an uncritical Israel’s ally, will never allow it and will undoubtedly veto the passage of such a resolution, regardless of the number of Palestinian civilians Israel kills. This is a clear double standard. Why the killing of Palestinian civilians has not the same importance as the killing of Libyan citizens? Why any UNSC resolution has been issued to stop the Israeli use of forbidden weapons against the Palestinians? The US has vetoed all UNSC resolutions concerning Israel,<sup>113</sup> and nothing suggests that this tendency may change.

Moreover, and, surprisingly, the case of Somalia has neither been seeing through the prism of R2P, despite the widespread attacks on civilians and the commission of CaH, WC and EC and the call for R2P’s implementation from the Special Representative of the UNSG in Somalia, Ahmedou Ould-Abdallah.<sup>114</sup> International actors have been reluctant to link the situation to R2P, as they tended to prioritise their interests over those of the Somali civilians.

It seems that some crises (or countries) are more “interesting” than others, meaning by interesting more aligned with the national interests of the countries willing to act in order to halt the commission of atrocity crimes. Moreover, external assistance tends to favour some regions over others (notably western and southern Africa),<sup>115</sup> and double standards become somewhat rampant in the sphere of HI.<sup>116</sup> Amazingly, the crisis in Libya caused an extremely quick reaction from the IC, which rapidly decided to intervene. The uprisings in Yemen, Bahrain and Syria are not very different, especially the latter one, are also counting a big number of civilian deaths caused by Government’s

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<sup>111</sup> Sowards, Matt, 2011 (<http://thenewpolitical.com/2011/03/29/obama-libya-speech-recap/>).

<sup>112</sup> See <http://www.abc.net.au/news/stories/2011/04/11/3187616.htm>.

<sup>113</sup> See <http://www.jewishvirtuallibrary.org/jsource/UN/usvetoes.html>.

<sup>114</sup> See UNSC provisional report on its 5858<sup>th</sup> meeting, on the situation in Somalia (S/PV.5858).

<sup>115</sup> Powell, Kristiana & Baranyi, Stephen, 2005, p. 3.

<sup>116</sup> Ayoub, Mohammed, 2004, p. 99-118.

action, and no major attention has been given to them. Why? More discussions about this issue will be held in the next chapter III.

An important question then arises: how can the selective implementation of R2P be avoided? Different options could in fact avoid it, options which were already stated in previous points of the thesis. The possible solutions are as follows, and not in order of importance:

- 1) With a recognised binding character of R2P, the obstacle of selectivity would be overcome, as the principle would have to be implemented in every situation that reaches the R2P threshold.
- 2) If the task of determination of a R2P violation is finally transferred to the ICC, its juridical determination will not allow any selectivity. The UNSC will still have the final say, as it is the body in charge of authorising the use of force, and may decide not to act, but in this case ROs or coalitions of States would have the legal justification to act even without a UNSC authorisation.
- 3) If the veto power is abolished or it is not used in R2P cases, and, moreover, the UNSC membership is increased, a democratic decision-making procedure will make difficult any selective implementation of R2P.
- 4) If any of the previous options is not realised, the only way to implement R2P measures in countries or situations where Western powers do not have any economical or political interest would be through both domestic and international pressure and mobilisation. CSOs and NGOs should play an important role in these mobilisations, raising awareness and pressuring Governments to act.

#### ***The current lack of accountability***

There is a need of stronger systems of public and political accountability. Decision-makers should be required to answer for their contested actions or omissions. Even today, no one in key Governments, at the UN or at the concerned ROs have been held accountable for the mistakes and the failure to prevent and to act in Rwanda and Darfur, and, moreover, no one has neither been held accountable for the illegal

interventions in Iraq or Afghanistan,<sup>117</sup> which had no prior or retrospective UNSC authorisation and neither any R2P justification. There should be Governments' and IOs' accountability for illegal interventions, as well as for their inactions.

The UNSC, for example, should be required to give justifications for its decisions related to R2P to the UN member states in the UNGA.<sup>118</sup> Moreover, in the same line, individual Governments should also account for their obligations and actions under R2P in their national Parliaments.

As will be raised in the next paragraphs, some proposals will make possible the accountability of the UN, of States and of ROs concerned for the misuse of R2P, for the failure to prevent atrocity crimes when there is a special duty to do it, as well as for the omission to act in R2P crises.

### ***Accountability for the misuse of R2P***

Unfortunately, there exist cases where the IC, ROs, individual or coalitions of States, following their own interests, argue that an intervention is needed in order to solve a crisis in a given country. Moreover, in some situations, they even affirm they are acting under R2P, while in fact they just use it to dominate others through war or the threat of war.<sup>119</sup>

Iraq was the main example of how not to apply R2P. There was an absence of a prior or retrospective UNSC authorisation, which made the 2003 US-led invasion<sup>120</sup> simply illegal under IL. There was not an actual commission of atrocity crimes (even if they happened in the past, in the late 1980s and early 1990s)<sup>121</sup> that could justify a R2P intervention, and it was neither likely to occur. Other options could have been explored before a military intervention, like an international indictment (which profoundly discredits and undermines the leader), which means that it was not the last resort as it is

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<sup>117</sup> Kosovo is not mentioned in this list as the NATO intervention may have had a R2P justification, even if it neither had an UNSC authorisation. In fact, an independent report on the crisis concluded that NATO's action was not strictly legal, but it was legitimate.

<sup>118</sup> Mepham, David & Ramsbotham, Alexander, 2007, p. 66.

<sup>119</sup> Volk, Joe & Stedjan, Scott, 2009, p. 201.

<sup>120</sup> The US and UK-led military action in Iraq cannot be called humanitarian intervention, but invasion, as it did not fulfil the analysed requirements for being a HI.

<sup>121</sup> Strauss, Ekkehard, 2009, pp. 312-313.

required. Moreover, its humanitarian purpose was questioned, as it was mainly subsidiary rather than the dominant purpose of the action. Furthermore, US forces committed abuses (torture, mistreatment of detainees, excessive force) which demonstrates a lack of rigorous commitment to IHL, and which is incompatible with the concept of HI.<sup>122</sup> Consequently, the intervention was not only illegal, but also illegitimate. And R2P's coercive action cannot be justified in the basis of past behaviour. In the Iraqi case, where there is in fact a justified international concern as significant human rights abuses have been committed, the response should have been through other kind of reaction mechanisms, like censure or sanctions, for example,<sup>123</sup> and the criminal prosecution of Saddam Hussein for the commission of atrocities in the past.<sup>124</sup>

There are nevertheless other cases where R2P has been invoked and there was no evidence of R2P crimes: in 2008, Russia invoked R2P to justify its unilateral armed intervention in Georgia. Against it, it was stated that the protection of nationals abroad goes beyond R2P's scope, that the scale of Russian's intervention was disproportionate, and that it was illegal, as there was any UNSC authorisation for it.<sup>125</sup> Furthermore, it is quite surprising how a country which has never shown its support to R2P,<sup>126</sup> and has moreover threatened several times to use its veto power in cases where there is an attempt to States' sovereignty and internal affairs, suddenly invokes it. Fairly narrow interests are obviously behind its action in Georgia.

It is time to make Governments and ROs accountable for their illegal interventions in sovereign States. The lack of a UNSC authorisation allowing an intervention constitutes a grave breach of IL, but the lack of any R2P justification that could legitimate it is even worst, as it shows that the intervention does not even pursue the goal of halting human suffering, but only narrow interests.

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<sup>122</sup> Roth, Kenneth, 2009, pp. 103-109.

<sup>123</sup> Evans, Gareth, 2008, pp. 69-71.

<sup>124</sup> Roth, Kenneth, 2009, p. 105.

<sup>125</sup> Bellamy, Alex, 2010, p. 150-153.

<sup>126</sup> Moreover, in the 2005 World Summit, Russia tried to convince R2P supporters to take R2P provisions out of the WSOD, arguing against them and expressing its general objections to any attempt to give the authority to the UN to intervene in cases of genocide (see Strauss, Ekkehard, 2009, p. 295-298).

Unfortunately, the only possible options that at the moment might be able to stop a misuse of R2P by States, IOs or ROs are domestic and international mobilisations and peer group pressure against their actions. As explained in point II.4, when analysing how to create the political will to act, the same parameters can be used for the opposite case: mobilisation and pressure to avoid or stop an action. Regrettably, the experience showed that the worldwide 2003 mobilisations against the intervention in Iraq did not have the desired end... Peer group pressure might have better results, but a combination of both should make Governments and ROs understand and stop their wrongful actions. In fact, as stated by the ILC's ASR, when an individual State or a coalition of States commit a serious breach of IL (like an intervention in a sovereign country without UNSC authorisation), other States have an obligation to cooperate to stop the serious breach through lawful means and through an IO (like the UN) or collective cooperation.<sup>127</sup> Nonetheless, the ILC also recognised that this aspect might go further than the current CIL.<sup>128</sup>

Nevertheless, the UN's ILC raises some hope in the question of how to render IOs responsible. It began in 2002 a project to establish the responsibility of IOs<sup>129</sup> for both their wrongful actions and their omissions. The DARIOs are modelled on the ASR, and presume that primary rules of obligation apply to IOs too, as they are also subjected to IL. The ILC provisionally adopted 66 articles in its 2009 session.<sup>130</sup> As occurred with the ASR, the DARIOs have already been cited, even if in their provisional form, by some national courts.<sup>131</sup> Some of its draft articles state when IOs should be accountable and the consequences of their internationally wrongful acts:<sup>132</sup>

- Art. 3: responsibility of an IO for its internationally wrongful acts;
- Art. 4: elements of an internationally wrongful act of an IO;

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<sup>127</sup> Arts. 40 and 41 ILC's ASR.

<sup>128</sup> See: Commentary to Draft Article 2, paragraph 3, *Yearbook of the International Law Commission*, 2001, Vol. II, Part two.

<sup>129</sup> Here, the term "international organisation" includes not only intergovernmental organisations, but also ROs and any other instrument governed by IL.

<sup>130</sup> See [http://untreaty.un.org/ilc/summaries/9\\_11.htm](http://untreaty.un.org/ilc/summaries/9_11.htm).

<sup>131</sup> See [http://www.law.nyu.edu/ecm\\_dlv3/groups/public/@nyu\\_law\\_website\\_faculty\\_faculty\\_profiles\\_jalvarez/documents/documents/ecm\\_pro\\_066900.pdf](http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_faculty_faculty_profiles_jalvarez/documents/documents/ecm_pro_066900.pdf).

<sup>132</sup> ILC, 2009 (<http://untreaty.un.org/ilc/reports/2009/2009report.htm>).



- Art. 9: IOs acts not in conformity with international obligations;
- Art. 11.3: IOs breaches of a duty to prevent;
- Art. 16.3: IOs responsibility in certain cases when it directs another IO to take action;
- Art. 29: cessation and no repetition;
- Art. 30: reparation.

The ILC's DARIOs will, once approved and adopted, show how to proceed to make IOs and ROs accountable. Then, injured States might be able to bring cases to the ICJ not only against Governments, but also against IOs and ROs, in order to make them accountable for their illegal and illegitimate intervention in their territory, violating IL and breaching their sovereignty. And, furthermore, they will be able to claim reparations too.

#### *Accountability for the failure to prevent*

As stated by the ICJ in its judgement *Bosnia vs. Serbia*,<sup>133</sup> States have an obligation of due diligence and the responsibility to take all reasonable measures to prevent genocide even outside their borders.<sup>134</sup> But some States might be more responsible for the prevention of genocide in a territory outside their borders than others. That is why the ICJ settled some parameters to determine when a State has to discharge its obligations: it needs to have the means and the influence (geographic distance, strong political and economic links, etc) able to affect the outcome to prevent genocide.<sup>135</sup> Nevertheless, this determination is very fact-dependent, as there should be an assessment *in concreto*,<sup>136</sup> and because a State can only be held responsible if genocide was actually committed (even if the duty began with the knowledge of its possible risk).<sup>137</sup>

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<sup>133</sup> ICJ found that Serbia had political, military and financial influence over the Bosnian Serb army and sufficient information about the potential for genocide in Srebrenica and yet took no action to prevent the genocide. ICJ, 2007, paragraph 425.

<sup>134</sup> ICJ conclusions extracted from the *Bosnia and Herzegovina vs. Serbia and Montenegro* judgement.

<sup>135</sup> ICJ, 2007, paragraph 430.

<sup>136</sup> Ibidem.

<sup>137</sup> Strauss, Ekkehard, 2009, p. 317.

A legal obligation to prevent genocide when a State has the knowledge, the means and a strong influence over another State or non-State actor that could change the course of events, is thus emerging.

For example, some scholars suggest that cases could have been brought to the ICJ against France,<sup>138</sup> for its failure to prevent the Rwandan genocide, as it had both the knowledge, the means and the influence to stop it,<sup>139</sup> and against China in relation with the Darfur genocide, as its diplomatic, economical and military contribution in Sudan was decisive.<sup>140</sup> Nevertheless, the kind of standards allocating the international R2P set by the ICJ may cause many problems, as the way to determine if a State has influence in another country is very subjective: how to determine when a State has sufficient capacity or influence to prevent genocide?<sup>141</sup> And, in some cases, those parameters ultimately only identify possible bearers of responsibility; they still cannot create a definitive State obligation to act.<sup>142</sup> In the near future, the ICJ should establish what level of influence would be sufficient, addressing objective rather than subjective parameters for its determination.<sup>143</sup> This would enable cases of State's failure to prevent genocide (as stated in the Genocide Convention) to be brought to the ICJ in order to make them accountable and implement remedies.

Moreover, the UN and the respective ROs (if proved that they have the capabilities and resources to prevent) should also be held accountable for their failure to prevent genocide in the States under their influence. Both kinds of organisations have an undoubted political and economic influence in the countries under their jurisdiction, influence able to change the outcome of the commission of genocide. Furthermore, they (usually) have the means and the capability to implement their responsibility to prevent. Consequently, their responsibility should also be required, and their impunity avoided. Besides, the UNSG's recognition of the UN's failure to prevent the Rwandan genocide

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<sup>138</sup> Rwanda suggested a possible legal action against France for its alleged military and political support in 1994 to the radical Hutu regime responsible of the genocide, and moreover, for assisting the perpetrators to escape.

<sup>139</sup> Wallis, Andre, 2006, p. 84.

<sup>140</sup> Reeves, Eric, 2008 (<http://www.sudanreeves.org/Article207.html>).

<sup>141</sup> Rosenberg, Sheri P., 2009, p. 472.

<sup>142</sup> Welsh, Jennifer M. & Banda, María, 2010, pp. 224-225.

<sup>143</sup> Rosenberg, Sheri P., 2009, p. 472.

proved that the UN should have acted to prevent and to halt it.<sup>144</sup> Thus, apart from France, the UN, the OAU and the East African Community (if it had the capability and available means) were also responsible for the prevention of the Rwandan genocide, and should have prevented it. They did not, and as a result they should have been held accountable for this failure.

In a strict legal sense, the Genocide Convention cannot be applied to other mass atrocity crimes. However, as R2P is basically a doctrine of prevention (like the Genocide Convention), it should be proposed to the ICJ to apply a similar evidentiary standard as the one applied in the *Bosnia vs. Serbia* case, in order to extend the accountability of States' failure to prevent genocide to other R2P atrocity crimes (CaH, EC and WC).

Moreover, the idea that ROs should be held responsible and accountable for their failure in their duty to prevent is also expressed, as seen above, in the art. 11.3 of the ILC's DARIOs, and thus will be soon developed.

#### ***Accountability for the omission to act in R2P crises***

There exists an absence of mechanisms to hold the IC accountable retrospectively for its failure to implement its responsibility to protect.<sup>145</sup> When analysing how to make States, ROs and IOs accountable for their omission to act in R2P crises, the same arguments applied to make them accountable for the failure to prevent genocide should also be applied for not halting it once committed.

As stated in the Genocide Convention, States have an obligation of due diligence not only to prevent genocide, but also to halt it. Moreover, following the reasoning of the ICJ's ruling on *Bosnia vs. Serbia*, where States can be held accountable for failing to prevent genocide outside their borders when they have the knowledge, the influence and the means to do it, it could also be said that those States should also be held accountable for failing to halt it. The important parameters are, as analysed above, to have the

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<sup>144</sup> See "Report on the Independent Enquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda", S/1999/1257, 1999, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement>.

<sup>145</sup> Welsh, Jennifer M. & Banda, Maria, 2010, p. 219.

influence and the means to halt it. And this responsibility should be extended, not only to the UN and the ROs and sub-ROs that fulfil the same criteria and cover the geographical area where the genocide is being committed, but also to other mass atrocity crimes under the scope of R2P.

Moreover, the ILC's DARIOs (art. 4)<sup>146</sup> also state the responsibility of States and IOs both for their actions and omissions. Consequently, the omission to act when there is an obligation to do it under IL (as requires de Genocide Convention) constitutes a breach of IL and thus will have consequences for the organisations responsible to act.

### ***Conclusion***

As seeing, the problem of selectivity when implementing R2P can be overcome. Nevertheless, some changes in the current system need to be done in order to avoid the use of double standards when applying it. Moreover, the political will to avoid it has to exist, and this seems to be at the heart of the problem.

On the other hand, the accountability for the misuse of R2P, for the failure to prevent R2P crises, and for the omission to act when mass atrocities are being committed is possible. The ICJ did already a step forward when it recognised the duty of some States to prevent genocide even outside their borders, but further and equally important steps are being taken by the ILC, which is working on the recognition of the responsibility and accountability of IOs.

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<sup>146</sup> Art. 4 DARIOs says that “*there is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) Is attributable to the international organization under international law; and (b) Constitutes a breach of an international obligation of that international organization.*”

## **6) Sovereignty vs. R2P and the problems of humanitarian intervention**

### ***Sovereignty vs. R2P***

The traditional view of sovereignty attributes an absolute control on States' internal affairs and immunity from external intervention. This view was also reflected in the UN Charter (in its art. 2.7)<sup>147</sup> and reinforced with the UN membership expansion during the decolonisation era (as will be seen in next point II.7).

On the contrary, R2P suggests that sovereignty has always entailed rights and responsibilities. Even theorists defending an unrestrained State sovereignty can agree in this point.<sup>148</sup> Thomas Hobbes clearly stated that the sovereign's authority was based in an unwritten contract between the State and the individuals, where the individuals sacrifice their freedom in return for security and the State take all necessary measures to preserve peace. But this contract is broken if the State poses an existential threat to them.<sup>149</sup> Consequently, sovereignty entails domestic responsibility, a duty of care towards individuals, as well as rights. This is the concept of "sovereignty as responsibility" also expressed in the ICISS' report. Nevertheless, even if UN MS adopted the language of R2P, they did not adopt the idea of sovereignty as responsibility in order to avoid possible interferences in their internal affairs.<sup>150</sup>

Nonetheless, and in line with R2P premises, there is a growing recognition that humanitarian crisis constitute threats to international peace and security, thus justifying the IC's involvement<sup>151</sup> in the sovereign territory of a State.

As stated in the UNSG report *Implementing the Responsibility to Protect*, "R2P seeks to strengthen sovereignty, not to weaken it. It seeks to help States to succeed, not just to react when they fail."<sup>152</sup> UNSG Ban Ki-moon moreover expressed that "as

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<sup>147</sup> Art. 2.7 UN Charter: "Nothing should authorize intervention in matters essentially within the domestic jurisdiction of any State."

<sup>148</sup> Bellamy, Alex J. & Reinke, Ruben, 2010, p.270.

<sup>149</sup> See Thomas Hobbes, *Leviathan*, Oxford: Oxford University Press, 1996.

<sup>150</sup> Bellamy, Alex J. & Reinke, Ruben, 2010, p.272.

<sup>151</sup> Cooper, Richard H. and Voïnov Kohler, Juliette, 2009, p. 3.

<sup>152</sup> Ki-moon, Ban, 2009, pp. 7-8.

*Secretary General, I do not interfere with internal politics. But when it comes to fundamental rights, when there is a clear violation of those rights, I will speak out.*<sup>153</sup>

In this line, the AU transformed its predecessor's policy of non-interference into a policy of non-indifference, declaring that Africans can no longer be indifferent to WC and other atrocity crimes. Sovereignty claims can no more be a barrier to address them.<sup>154</sup> Nevertheless, the same policy does not apply in Asian countries, from which much of the reluctance towards R2P comes: their RO, the ASEAN, is strongly committed to the principle of non-interference.<sup>155</sup>

### ***Humanitarian intervention: the concept***

Military intervention for human purposes is a *desperately serious, extraordinary and exceptional matter*.<sup>156</sup> Its goal cannot be other than to halt or avert human suffering. Nonetheless, if we want R2P to be taken seriously and to be effective, it has to include the threat and the possibility of military intervention as a last resort.<sup>157</sup>

When talking about HI, there should be a distinction between consensual and non-consensual interventions. In the first case, a Government should invite or consent to external military intervention, like happened in recent years in Liberia, Sierra Leone, Ivory Coast, the Democratic Republic of Congo, Southern Sudan and Darfur. Non-consensual interventions are more problematic, as they can explode into a war, and should only be carried out under the "*imperative of stopping an ongoing or imminent mass slaughter that might justify the risk to life.*"<sup>158</sup>

Following the suggestions established in the ICISS report, six are the requirements that legitimise a HI: right authority, just cause, right intention, last resort, proportional means and reasonable prospects of success.<sup>159</sup> More details of each requirement can be found in Annex II. Nevertheless, some of them will be briefly

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<sup>153</sup> UN Department of Public Information, 2011 (c) (<http://www.un.org/News/Press/docs/2011/sgsm13548.doc.htm>).

<sup>154</sup> Mepham, David & Ramsbotham, Alexander, 2007, p. X.

<sup>155</sup> Carment, David and Fischer, Martin, 2009, pp. 269-270.

<sup>156</sup> Evans, Gareth, 2008, p.59.

<sup>157</sup> Mayer, Susan E, 2009, p. 44.

<sup>158</sup> Roth, Kenneth, 2009, pp. 102-103.

<sup>159</sup> ICISS, 2001, p. XII.

examined below, and will moreover be analysed in next chapter III in light of the intervention carried out in Libya.

### ***Humanitarian intervention: the last resort***

One of the major problems of the responsibility to react is that it is claimed to be only about military intervention, forgetting that it involves a whole range of measures to be taken into account before the authorisation of any military action can take place. Moreover, its responses should be tailored to the specific needs of each situation and be rooted in a thorough analysis of the country and the regional context.<sup>160</sup> In fact, Burundi is a clear example of the multifaceted character of R2P, as any military intervention was deployed to solve the commission of atrocity crimes and continuing EC. Other reaction measures included Nelson Mandela's political mediation, preventive deployment of peacekeeping troops and recommendations to achieve a sustainable peace.<sup>161</sup> Another illustrative example of R2P in practice, avoiding a military intervention and the worsening of the situation, has been the successful diplomatic mission in Kenya in response to the violence erupted during the disputed 2007 elections. The coordinated diplomatic effort conducted by three eminent persons mandated by the AU persuaded the Kenyan President and his opponent to conclude a power-sharing agreement, thus preventing a worse campaign of mass atrocities.<sup>162</sup>

Consequently, it is very important that the requirement of HI as a last resort is strictly followed, which means that all other reasonable peaceful and non-peaceful measures must have been explored without any positive result in the halt of the commission of atrocity crimes. Below are some examples of the different policy options available under mediation, negotiation and diplomacy, sanctions and legal measures to pressure States or non-State actors:<sup>163</sup>

- Mediation, negotiation and diplomacy are soft policy options, which have been effective in helping with the resolution of conflicts. In the last 20 years, more civil wars have ended through this kind of measures than in the past two

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<sup>160</sup> Mepham, David & Ramsbotham, Alexander, 2007, p. X.

<sup>161</sup> Evans, Gareth, 2008, pp. 58-59.

<sup>162</sup> Bellamy, Alex J., 2010, p. 154.

<sup>163</sup> Mepham, David & Ramsbotham, Alexander, 2007, p. 11.

centuries, mainly “because the UN has provided leadership, opportunities for negotiation, strategic coordination and the resources needed for implementation.”<sup>164</sup> Those measures will not be sufficient by themselves to provide effective protection to civilians, they need to be reinforced by more coercive policy instruments. Nevertheless, they will be part of the solution. Important role should be played by NGOs (potential that should be enhanced), by other countries (especially the neighbouring ones), by the different regional arrangements and by the UN (key institution) through the UNSC Ban Ki-moon and the UN Department of Political Affairs (unfortunately, severely under-resourced...);

- Sanctions are tremendously important but under-resourced policy instruments. They include arms embargoes, financial penalties, restrictions on income-generating activities in war economies, curbs on access to fuel, flight bans and travel restrictions, limits on diplomatic representation, suspension of membership or expulsion from regional or international bodies.<sup>165</sup> Nevertheless, sanctions are criticised by their humanitarian impact, their enforceability and their efficacy in changing behaviour (behaviour that did not change in cases like Libya<sup>166</sup> or Zimbabwe,<sup>167</sup> for example).
- Legal measures include the threat and imposition of international legal sanctions from had doc tribunals and the ICC.<sup>168</sup> Nonetheless, in order to make the threat of prosecution effective worldwide, the ICC should have real universal jurisdiction (as already claimed in points II.2 and II.3).

It is essential that every reasonable peaceful and coercive measures that in each case can be implemented are thus explored, but time pressures and other exigencies may not allow it. In this case, UNSC can authorise, under Chapter VII, military intervention

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<sup>164</sup> Human Security Centre, 2005, p. 151.

<sup>165</sup> ICISS, 2001, p. 30-31.

<sup>166</sup> In Libya, Coronel Qaddafi continued with his State-sponsored violence against the Libyan rebels, even though all kinds of economic sanctions were applied against him and his regime (arms embargoes, travel restrictions, expulsion from the Human Rights Council, frozen bank accounts, etc)

<sup>167</sup> In Zimbabwe, the different economic sanctions applied against President Mugabe could not change his violent behaviour against the opposition party and neither the well known commission of human rights abuses by his regime.

<sup>168</sup> Mepham, David & Ramsbotham, Alexander, 2007, pp. 12-19.



if it considers that non-military options “*would be inadequate or have proved to be inadequate.*”<sup>169</sup> But very solid arguments should be given to demonstrate that non-military measures would fail... In the next chapter, when analysing the international response towards the crisis in Libya, I will come back to this point analysing how it was put into practice.

### ***UNSC authorisation: previous or retrospective?***

Another controversial issue is the previous or retrospective UNSC authorisation for military intervention. In all cases, it should be sought prior to any intervention for human purposes,<sup>170</sup> but a commitment to human rights cannot exclude an anticipatory action in case the UNSC fails to act in situations where there is a threat or a clear commission of atrocity crimes. Nevertheless, it is right to be sceptical about it. In some urgent situations, as argued by Kofi Annan’s High Level Panel, UNSC authorisation may be sought after operations have commenced.<sup>171</sup> This was the case, for example, of the ECOWAS interventions in Liberia (1991) and in Sierra Leone (1997-1998), which were carried out without prior UNSC approval, but were seen as legitimate and strictly lawful by most Africans.<sup>172</sup> In the contrary, problematic were the pre-emptive interventions in Kosovo and in Iraq, which occurred without explicit UNSC authorisation, and did not get it afterwards. They are thus criticised for being illegitimate and illegal. But both cases have to be considered with a different approach, as the US and UK-led intervention in Iraq was extremely unpopular, and the NATO-led intervention in Kosovo is seen by some scholars as the way ROs can overcome the UNSC inaction in R2P cases.

During a R2P discussion in the UNGA in July 2009, the Cuban Government raised some provocative questions regarding military intervention for human purposes: “*Who is to decide if there is an urgent need for an intervention in a given State, according to what criteria, in what framework, and on the basis of what conditions? Who decides it is evident the authorities of a State do not protect their people, and how*

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<sup>169</sup> UN Charter, 1945.

<sup>170</sup> ICISS, 2001, p. XII.

<sup>171</sup> UN, 2004, paragraph 272a.

<sup>172</sup> Mepham, David & Ramsbotham, Alexander, 2007, p. 43.

*is it decided? Who determines peaceful means are not adequate in a certain situation, and on what criteria? Do small States have also the right and the actual prospect of interfering in the affairs of larger States? Would any developed country allow, either in principle or in practice, humanitarian intervention in its own territory? How and where do we draw the line between an intervention under the Responsibility to Protect and an intervention for political or strategic purposes, and when do political considerations prevail over humanitarian concerns?”*<sup>173</sup> The Cuban diplomat is in fact stating the important problematic behind R2P. Answers to the firsts and lasts questions can be found at the beginning of this paper, when proposing in point II.2 to transfer the determination task from the UNSC to the ICC, a non-political but judicial body that would determine when a violation of R2P has been committed in line with objective parameters; and in point II.4 when analysing how to mobilise the political will to act, and how to confront it when mass atrocities are committed in the territory of the 5PM. Nevertheless, the question of who determines that peaceful means are not adequate highlights an important and existing problem. The answer is the UNSC, but based on what criteria? The same question will arise when analysing the response to the Libyan crisis.

### ***Need of guidelines on civilian protection***

In practice, it is extremely difficult to carry out an intervention with the goal of civilian protection. There is a clear need to seriously rethink the “how” of military intervention, to minimise civilian casualties and the damage to the country’s infrastructures. Mission’s objectives result to be too ambiguous, not stating clear rules of engagement as to how troops should respond to violent threats to civilians.<sup>174</sup> Clear mandates for civilian protection should be established, in order to fill in the gaps in the doctrine and in the training for peace operations. The protection and demilitarisation of camps, the establishment of safe heavens, the disbanding and disarmament of militias and the intervention on behalf of civilians under threat can be effective military

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<sup>173</sup> Pino Rivero, Anet, 2009, p. 3.

<sup>174</sup> Terrie, J., 2006.

activities with the goal of civilian protection.<sup>175</sup> Nevertheless, clear guidelines and doctrine should be developed regarding civilian protection strategies.

### *UN needs its own standby force for R2P crimes*

In 2010, more than 80 percent of the existing UN peace operations were deployed in the African continent.<sup>176</sup> The principal contributors of troops for such UN missions are developing countries, which militaries lack the sophisticated modern capabilities required to protect civilians in crisis of extreme violence.<sup>177</sup> The appropriate and adequate capacity to protect them can thus be questioned. The UN should agree to create a standing rapid-response force, with the most sophisticated equipment and specialised training, to be deployed in cases of R2P crimes. In fact, every RO has each own troops, with the exception of the UN. This would avoid the slow deployment of peace-troops resulting from the current practice of waiting for the national contingents to do so. Moreover, this UN standby force would be extremely qualified and consequently able to effectively implement its civilian protection mandate in cases of mass atrocity crimes, and able to minimise any casualty coming from its intervention in the country at risk or where the crimes under R2P's scope are being committed. At present, one of the main problems of any military intervention is the number of victims among innocent civilians it always causes. Well prepared and trained UN soldiers in cases where there is an actual or possible commission genocide, CaH, EC and WC would be able to prioritise the protection of civilians and avoid methods of warfare that do not distinguish between combatants and non-combatants.

These kinds of armed forces are the ones that have to intervene and deal with the protection of civilians in cases of mass atrocity crimes, and not soldiers without the adequate training. Consequently, an own UN standby force for R2P cases is urgently needed.

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<sup>175</sup> Mepham, David & Ramsbotham, Alexander, 2007, p. 47.

<sup>176</sup> Centre on International Cooperation, 2011.

<sup>177</sup> Mepham, David & Ramsbotham, Alexander, 2007, p. 46.

## **7) R2P as a new form of Western colonialism: the problem of delivering R2P in Africa**

### *African criticism of R2P*

Many African countries were colonised by European imperial powers centuries ago. They are new States that have recently acquired their sovereignty, and some of them are still struggling to give a greater substance to their formal acquisition of juridical sovereignty.<sup>178</sup> Many also perceive UNSC authorisations for international intervention in Africa and the NATO engagement in the region as a revival of the “standard of civilisation” used in the 19<sup>th</sup> century to justify the colonisation. As such, they are reluctant to the new international activism and to the principle of R2P, which, in extreme cases and as a last resort, leads to a HI that could threat their sovereign status.

As said above, under some specific circumstances (in the case of failure of other peaceful means) and requirements (just cause, right intention, proportional means, last resort, reasonable prospects and right authority),<sup>179</sup> R2P allows the use of military intervention for humanitarian purposes. And this is seeing by several postcolonial States as a “cover to legitimise the neo-colonialist tendencies of the major powers.”<sup>180</sup>

The fear to a new colonialism by Western or former colonial powers under the form of a R2P HI constitutes an important obstacle to the delivery of R2P measures in Africa, and for their acceptance. It is important to avoid a misuse of the principle by powerful States to further their agendas, and it has to be said that there is nothing inherently imperialistic about it. Moreover, R2P is about safeguarding humanitarian and human rights principles whenever they are violated.

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<sup>178</sup> Ayoob, Mohammed, 2004, pp. 99-118.

<sup>179</sup> ICISS, 2001, p. XII.

<sup>180</sup> Hamilton, Rebecca J., 2006, p. 292.

### *Further obstacles*

Moreover, the idea of “African solutions for African problems” is gaining an increasing support, even if, as McDonald Lewanica<sup>181</sup> stated, “*this is just an excuse to do nothing, as Africa cannot deal itself with its own problems.*” As will be explained in the following paragraphs, the first response and measures to stop the crimes under the scope of R2P should come from the nearest regional or sub-ROs (Regional Economic Communities (RECs) in the case of Africa). In fact, in Africa, as Ms. Emilia Muchawa<sup>182</sup> declared, there exists the idea that if you have a problem, it is your neighbour who should come and help you. This reality would not only avoid the colonialism criticisms and the rejection of R2P, thus achieving more acceptance, but would also allow a response from better suited bodies, as they are more familiar with the crisis situation, with the region and with the parties in conflict.

Furthermore, the tradition of solidarity among African leaders, or the so called “African brotherhood” (illustrated in a 2000 Zimbabwean picture, showing President Robert G. Mugabe’s slogan “*good neighbours don’t complain*”),<sup>183</sup> constitutes another important obstacle. The norm of mutual protection is still strong, more than the emerging norms on the protection of civilians, and some African Heads of State will not denounce the mass atrocities their neighbours are committing. And what R2P actually says is that *good neighbours should complain*. Since January 2011, during the AU debates in Addis Ababa, some standards of democracy and shared values started to gain an important role in the African agenda.<sup>184</sup> Many African leaders are becoming aware of the importance of halting mass atrocities committed under their neighbour’s territory, as they are a threat to the security and stability of their own region. A good example of this changing tendency comes from Botswana, country that did not recognise Mugabe as the

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<sup>181</sup> McDonald Lewanica is the Coordinator of the NGO Crisis in Zimbabwe Coalition. Interviewed in Harare (Zimbabwe), 6 May 2011.

<sup>182</sup> Emilia Muchawa is the Director of Zimbabwe Women Lawyers Association. Interviewed in Harare (Zimbabwe), 5 May 2011.

<sup>183</sup> The photograph shows two houses. In the one on the left there is a man sitting with a pipe and reading a book, and everything is clean, pretty and tidy. In the house on the right everything is falling down, all is dirty, messy, children are screaming and crying, and the mother is been beaten by her husband. The man on the left is Robert Mugabe, and the man on the right is Thabo Mbeki. And the slogan says: “*good neighbours don’t complain.*”

<sup>184</sup> McDonald Lewanica, interviewed in Harare (Zimbabwe), 6 May 2011.

president of Zimbabwe after the 2008 elections.<sup>185</sup> Consequently, the idea of African brotherhood seems to slowly come to an end, as it will no more be an excuse to cover the African neighbouring leaders' atrocity crimes.

### *Involvement of ROs: an old idea*

In fact, there is an increasing claim for the involvement of ROs in the implementation of R2P, as the complexity of today's internal conflicts demands a regional solution due to the importance of the conflict's regional dimension. But this does not constitute a new idea, as it was already stated in art. 52 of the UN Charter.<sup>186</sup> Furthermore, this article also specifies that ROs should "*make every effort to achieve pacific settlement of local disputes [...] before referring them to the Security Council.*" Thus, they should complement UN efforts to maintain international peace and security. The concept of a "regional-global security partnership" was born later on, in 1992, when UNSG Boutros Boutros-Ghali stated the importance of "*regional action as a matter of decentralisation, delegation and cooperation with the United Nations effort.*"<sup>187</sup> Nevertheless, in their commitments with R2P, ROs are still today seeing only "*as sub-contractors under the UN, with no independent responsibility to protect.*"<sup>188</sup> This vision is also supported by the WSOD (which gives them a conditional responsibility to protect), in the contrary of the ICISS report's idea, which suggests that they should have a responsibility to protect that exists independently.<sup>189</sup> However, it is important to highlight that this does not mean that ROs could then use military action without the prior (or in extreme cases, *ex post facto*) consent of the UNSC, primary guardian of international peace and justice.

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<sup>185</sup> Robert G. Mugabe did not win the 2008 elections and did not transfer the power to his opponent. He did not step down from power.

<sup>186</sup> Art. 52 UN Charter: "*Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.*"

<sup>187</sup> UNGA, 1992.

<sup>188</sup> Haugevik, Kristin M., 2009, p. 350.

<sup>189</sup> Ibidem.

### ***ROs capabilities to implement R2P***

The complexity of the internal conflicts that occur today demands a regional solution, as the regional dimension of the conflict is very important.<sup>190</sup> But the potential and capability to protect of ROs vary considerably. A quick analysis of each of the main ones will show their potential contribution to R2P, as well as their strengths or weaknesses.

- **NATO** is mainly specialised in direct reaction tools within the security sector category (it has in this regard an advanced force able of rapid deployment, the NATO Response Force (NRF)),<sup>191</sup> with an important role in international security politics and with long-term experience in responding to conflict situations. In the case of Kosovo, it showed how ROs may act when the UN fails to do it.<sup>192</sup>
- The **EU** is also becoming an important actor in international security politics, with a primary focus in the prevention of conflicts and the reconstruction of post-conflict societies. It has the necessary economic assets and a broad range of protection tools. Recently, it has also included military reaction tools, creating the rapid reaction “EU Battlegroups,”<sup>193</sup> thus becoming more and better equipped than the UN in this regard.
- **OSCE**, the world’s largest RO (56 MS), encompasses political and diplomatic means rather than military, having thus an important potential in the R2P areas of prevention and post-conflict reconstruction. Nevertheless, because of its two recurrent challenges (ineffective decision-making procedures and insufficient or vague mission mandates), the OSCE has been marginalised, even if it has a unique role in areas like Asia.
- The **AU**, which is becoming a serious security actor in Africa, focuses on prevention and reaction tasks, even if it has limited resources. More will be explained about the AU in the following paragraphs.

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<sup>190</sup> Carment, David & Fischer, Martin, 2009, p. 262.

<sup>191</sup> Mepham, D. & Ramsbotham, A., 2007, p. 58.

<sup>192</sup> It has to be noted that this vision on NATO’s intervention in Kosovo without an UNSC authorisation is very discussed, as it is seeing by many others as a violation of IL.

<sup>193</sup> Mepham, D. & Ramsbotham, A., 2007, pp. 57-58.

- ASEAN's promotion of R2P lies in prevention and rebuilding, as its core principles (non-use of force, non-interference and consensus-based decisions) constrain it.
- The same applies to the world oldest RO, the OAS, which does not address in its Charter how to respond to mass atrocity crimes. Neither ASEAN nor OAS have assisted yet in the structural prevention or reconstruction after atrocities committed in their region.<sup>194</sup>

All those ROs have the capabilities needed to have a role in the implementation of R2P, but, as seeing, their final contribution differs significantly. Consequently, it should be avoided to deal with them under the same collective term in the R2P context.<sup>195</sup> There is a need to differentiate between their potential, their capabilities and their MS's individual and collective willingness to implement R2P, as the consensual-based decision-making process of the OSCE, the ASEAN and the OAS allow individual MS to block any collective action. Moreover, the relative absence of their implication in the use of force over the last two decades can be understood given the financial and political costs of interventions.<sup>196</sup>

In order to become valuable actors in the implementation of R2P, some ROs have thus to undergo through adjustments, if, of course, they are willing to do so. They are better suited to take on protection tasks, as they are more familiar with the conflicting parties, more sensible to the conflicting issues of their region and they have a self-interest to secure peace and stability in it. The IC should also contribute and support the improvement and enhancement of the role of regional and sub-ROs, especially in Africa, where the issue of the lack of resources is more acute.

Focusing on the African continent, the different RECs (a total of seven) have still a long way to go to develop any security cooperation mechanisms.<sup>197</sup> In this regard, Mr. Lewanica added that it would be ideal if the primary response to mass atrocities comes from the REC in which the country suffering them seats, but, in case this is not

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<sup>194</sup> Haugevik, Kristin M., 2009, pp. 351-361.

<sup>195</sup> Ibidem, pp. 360-361.

<sup>196</sup> Carment, David & Fischer, Martin, 2009, p.263.

<sup>197</sup> Powell, Kristiana & Baranyi, Stephen, 2005, p. 3.



possible or would not happen because of a lack of political will to act (like in the case of the Zimbabwe's 2008 crisis and SADC's inaction), the AU should then take the leading role, and, as a last option, the UN. But even if the RECs lack capacity, they should try to implement R2P reaction measures, while at the same time should ask for the assistance of the AU and the UN.

### *The Zimbabwean case study*

Zimbabwe is a clear and illustrative example involving all the previous issues. The country was an ancient British colony which suffered an extremely violent liberation war. In 1980, the year of its independence, President Mugabe came into power. Zimbabwe experienced then widespread State-sponsored violence, terror and human rights abuses. During the 2008 elections, President Mugabe started a campaign on terror against the opposition. In fact, there is still an ongoing debate whether those crimes against his opponents and human rights activists met the R2P's threshold.<sup>198</sup> Similarly, there are also questions as to whether wider socio-political issues, including the policy recklessness in Mugabe's destruction of the economy and health system, constituted crimes under the scope of R2P. Both UN and AU responses failed to undertake effective measures to address the Zimbabwean crisis.

In Zimbabwe, there exists a cyclical escalating violence every time presidential elections are coming. Elections will be held very soon, at the beginning of 2012, and the tensions and some violence can already be felt in the country. Some Zimbabweans fear the arrival of 2012 elections, but few others are able to dream with a Government change. On the other hand, people from Zimbabwe still remember, especially during elections' time, the sufferance caused by the liberation war from the British. In addition, they are bombarded with propaganda constantly issued in the media by Mugabe's Government, reminding what the British did to them, how violent the liberation war was, and that Western countries only want Zimbabwe's resources.<sup>199</sup> There is thus not much hope that an international intervention would be welcomed in case CaH would be committed by their Government in next year elections. In Ms. Muchawa's opinion, as a

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<sup>198</sup> ICRtoP (<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-zimbabwe>).

<sup>199</sup> Emilia Muchawa, interviewed in Harare (Zimbabwe), 5 May 2011.

result of Mugabe's propaganda, Zimbabweans would not see any intervention coming from the Western world as protective. *"They would allow Westerns to observe, but they would not understand that the intervention would have the goal to protect them."* Moreover, she added that they have no faith in the Western's capacity to protect, taking into account which were their (in)actions in Rwanda and Darfur. That is why SADC, the nearest RO, would be more welcome to intervene. The same opinion shares Mr. Rangu Nyamurundira,<sup>200</sup> from Zimbabwe Lawyers for Human Rights, and Ms. Jestina M. Mukoko,<sup>201</sup> National Director of the Zimbabwe Peace Project, who would not support a military intervention in Zimbabwe coming from Western countries instead of by the regional body. Ms. Mukoko explained that, in case an intervention is needed, it should first come by the nearest regional block (in this case, SADC), and then, from the UN, as *"regional organisations should play a critical role. They should be given the opportunity to intervene and to solve those kinds of situations."* I completely support this idea, and what could be proposed in this regard is to ask the IC to wait to be given the note by the regional (in this case, SADC) or continental blocks (AU), to exhaust the nearest domestic remedies as possible before they can come in. But, what happens if this permission for international action never comes, and there is a clear commission of mass atrocity crimes? Then, undoubtedly, the IC, through the UN, should act as soon as possible. A short deadline for sub-regional or regional action (no more than 10 days since the actual commission of atrocities) should then be established, after which the UN should act. Furthermore, during this short period of ten days, the UN should be preparing its action in case the ROs finally fail to do it, and thus intervene on the eleventh day.

Ms. Priscilla Chigumba,<sup>202</sup> Magistrate of the Supreme Court of Zimbabwe, also highlights the need of a more protagonist role of the ROs, but would not oppose to an

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<sup>200</sup> Rangu Nyamurundira is the Projects Manager of Zimbabwe Lawyers for Human Rights. Interviewed in Harare (Zimbabwe), 3 May 2011.

<sup>201</sup> Jestina M. Mukoko is the National Director of Zimbabwe Peace Project. Interviewed in Harare (Zimbabwe), 6 May 2011.

Ms. Mukoko was kidnapped from her house and tortured during 21 days by President Mugabe's intelligence service, under false accusations and continuous death threats. Her case was known internationally.

<sup>202</sup> Priscilla Chigumba is a Magistrate of the Supreme Court of Zimbabwe, and winner of the 2009 Women Human Rights Defenders' Award. Interviewed in Harare (Zimbabwe), 5 May 2011.

international intervention in case it is needed. She nevertheless stated that even if Zimbabweans would allow an intervention to protect them, *“they would be uncomfortable with it.”* Following this idea, Prof. Julie Stewart,<sup>203</sup> expressed that *“we would all like an intervention, even if we would not be keen on the idea.”* And she added that, as already mentioned before, the first answer should come from any of the African bodies. The problem is that they do not have a history of success in their interventions...

Opposite opinions defending a first reaction from the IC (as the African ROs are still underdeveloped and lack financial resources and the political will to act) were supported by Mr. Phillip Pasirayi<sup>204</sup> (from Crisis in Zimbabwe Coalition) and by Jeremiah Mutongi Bamu<sup>205</sup> (from Zimbabwe Lawyers for Human Rights). They nevertheless highlighted that in case an intervention is needed in Zimbabwe, the British should not take a prominent role, which is understandable as they were the colonising power. The latter also expressed that *“an international intervention is better, as it is quicker to come and more decisive, even if it only follows other interests different than the protection of civilians.”* And he added that there is an important lack of confidence in the regional structures, which makes the IC more suitable to command an intervention, until it could be gradually replaced by regional institutions when reformed. Moreover, Mr. Bamu expressed that those organisations would also support the African brotherhood idea, not intervening in an African State. However, there exist examples of interventions coming from ROs, like in the cases of Rwanda and Ivory Coast. Nonetheless, it is also true that African regional arrangements are reluctant to intervene militarily in cases of R2P, but, as has been demonstrated above, the obstacle of the African brotherhood idea is coming to an end.

Concluding the remarks on the research done in Zimbabwe, it can be said that the discrepancy between the different opinions also allows some final conclusions. In

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<sup>203</sup> Prof. Julie Stewart is the Director of the Southern and Eastern African Regional Centre of Women’s Law. Interviewed in Harare (Zimbabwe), 4 May 2011.

<sup>204</sup> Phillip Pasirayi is the Spokesperson of Crisis in Zimbabwe Coalition. Interviewed in Harare (Zimbabwe), 6 May 2011.

<sup>205</sup> Jeremiah Mutongi Bamu is the Senior Projects Lawyer of Zimbabwe Lawyers for Human Rights. Interviewed in Harare (Zimbabwe), 6 May 2011.

general, there is a lack of confidence in the different organisations, both international and regional, with criticisms against both kinds of bodies. But, even if in some opinions an international intervention would be better, because it is “*more decisive*,” better equipped and better prepared, it does not mean that it would be quicker. Moreover, as already explained, ROs are better suited to resolve conflicts in their region, and the deployment of the military would be even quicker, because of the proximity, and they would more efficiently negotiate with the parties in conflict. And, countries with a post-colonial background, with thus a strong feeling of protection of their newly acquired sovereignty, would more welcome an action from a regional body than from the IC. This said, we neither have to neglect the obstacle of the lack of political will to act of certain ROs, especially in Africa. Nevertheless, the political will is capable of being created, as explained in point II.4, and the African continent is making some improvements in this regard.

#### ***AU capabilities towards R2P***

On the other hand, Africa’s operational capacity is quite limited, and the way to get an African response to mass atrocity crimes can only come through the strengthening of the AU’s and the RECs’ capacities and financial resources. Many improvements have already been done in this regard, but much more needs to be achieved. The transition from the OAU to the AU supposed an important shift in the African policy to endorse the R2P principle, a shift from the idea of non-interference in States internal affairs to non-indifference in situations of mass atrocities.<sup>206</sup> As seeing in the crisis of 2007 elections in Kenya and the successful diplomatic mission mandated by the AU able to avoid the escalation of violence, African members expressed that the AU should take a leadership role in those kinds of situations happening in the continent.<sup>207</sup> Moreover, the AU’s Constitutive Act is the first international treaty that recognises the right of an IO to intervene in the internal affairs of a MS for human protection purposes. Additionally, the Peace and Security Council (AUPSC) was created, then the Panel of the Wise (five senior Africans helping to prevent and to mediate serious conflicts in the

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<sup>206</sup> African Union, 2000, art. 4.

<sup>207</sup> Bellamy, Alex, 2010, p. 154.

continent),<sup>208</sup> and finally the African Standby Force (ASF), formed by regional brigades from the African RECs and which should have reached its full operational capacity in 2010 (but did not yet). The ASF constitutes a big step towards the protection of civilians, but more assistance from the IC is needed to improve its peacekeeping and non-peacekeeping capacities (tasks like observation and monitoring, preventive deployment, post-conflict disarmament and demobilisation).<sup>209</sup>

### *Conclusion*

Formal responsibility, capabilities and political will are thus crucial if regional and sub-ROs should have a leading role in the implementation of R2P. But financial and technical support from the IC, other ROs or individual States is also critical to contribute to the potential's development of those organisations. Moreover, the goal of civilian protection should be prioritise in every organisation, including the UN, and a common understanding and universal doctrine between it and the different regional and sub-ROs should be developed, stating how the protection of civilians should be carried out in the different and specific contexts.

In cases where the IC should after all react under R2P, it should try to find the support and the authorisation from the RO and sub-RO involved in the area of intervention (as happened in Libya), in order to try to engage those bodies and to enhance their cooperation, as they have a better knowledge about the situation and the conflict, crucial aspects for a successful intervention.

Moreover, on July 12<sup>th</sup>, the 3<sup>rd</sup> annual informal interactive dialogue on R2P will be convened by the UNGA. Interestingly, the focus will be on the role of ROs and sub-ROs in implementing R2P, and will be an opportunity to strengthen their regional capacity to protect and their role in preventing and halting mass atrocities.

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<sup>208</sup> Mepham, David & Ramsbotham, Alexander, 2007, pp. IX-XI.

<sup>209</sup> Powell, Kristiana & Baranti, Stephen, 2005, p. 5.



**- III -**

**FROM THEORY TO**  
**PRACTICE:**  
**THE LIBYAN CRISIS**





## 1) The crisis in Libya: background

Since the beginning of 2011, different uprisings spread across the Middle East, starting in Tunisia and Egypt and continuing in Yemen, Bahrain, Libya, Morocco, Syria and Jordan. The peaceful protesters' claims for democracy and human rights were able to force President Ben Ali in Tunisia and President Hosni Mubarak in Egypt to step down from power. Nevertheless, the Government's reactions in the other countries have been very violent.

Inspired by the so called "Arab Spring" or "Jasmine Revolution," the demonstrations started also in Libya, on February 15<sup>th</sup> 2011 in the capital of Tripoli, demanding an end to the despotic 41-year ruling of the autocrat President Muammar Gaddafi, who came into power in 1972 after overthrowing King Idriss.<sup>210</sup> But the response from the Libyan Government to the peaceful demonstrations was the dispatch of the national army with the order to crush the unrest. In a broadcasted speech on February 22<sup>nd</sup>, Gaddafi confessed that he would "*rather die a martyr than to step down,*" and called on his supporters to "*cleanse Libya house by house until protestors surrender.*"<sup>211</sup> Military aircrafts and forces were indiscriminately firing at civilians, and foreign African mercenaries were used to attack protesters.<sup>212</sup> Arbitrary detentions, enforced disappearances, torture, summary executions, violence and intimidation against journalists and media professionals,<sup>213</sup> live ammunition against demonstrators, systematic rapes; shocked by the violent reaction of the Libyan Government, UNSG Ban Ki-moon declared that such attacks constitute serious violations of IHL and thus must stop immediately. In fact, as it was finally stated by the Prosecutor of the ICC, those gross and systematic violations of human rights amount to CaH.<sup>214</sup>

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<sup>210</sup> Refugees International, 2011 (<http://www.trust.org/alertnet/blogs/alertnet-news-blog/libya-is-there-a-place-for-military-intervention>).

<sup>211</sup> See President Gaddafi's televised speech at: <http://english.aljazeera.net/news/africa/2011/02/201122216458913596.html>.

<sup>212</sup> See <http://www.crisisgroup.org/en/publication-type/media-releases/2011/immediate-international-steps-needed-to-stop-atrocities-in-libya.aspx>.

<sup>213</sup> UNSC Resolution 1973, 2011, p. 1.

<sup>214</sup> See <http://www.icc-cpi.int/NR/exeres/D07229DE-4E3D-45BC-8CB1-F5DAF8370218.htm>.

Across Libya, members of the Government, the military, tribal leaders and army units defected and joined the opposition movement, which established an interim opposition government called Transitional National Council (TNC)<sup>215</sup> recognised as the legitimate ruling body of Libya by many States (like Qatar, Portugal, France, etc), the EU and the AL.<sup>216</sup>

The Libyan crisis has now turned into a civil war between Gaddafi's supporters and opponents, and with the current intervention of the IC enforcing a no-fly zone. As for July 12<sup>th</sup>, when this paper has been submitted, the conflict is still ongoing.

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<sup>215</sup> See <http://www.ntlibya.org/english/>.

<sup>216</sup> See <http://arabnews.com/opinion/editorial/article345492.ece>.

## 2) The International Community's response to the Libyan crisis

Populations in Libya are facing mass atrocities. The attacks by Gaddafi's regime have caused an unknown number of deaths and wounded, and have forced thousands of people to flee the country. The Government clearly failed to protect its citizens, as it was the main perpetrator of violence and of crimes under R2P's scope. The IC's residual responsibility to protect has then to come into place.

For the first time, the determination of the IC to ensure the protection of civilians has been clear and quicker than ever. Condemnation from individual States, ROs, NGOs, CSOs and the UN did not last to be expressed. Their responses to the Libyan crisis have been extremely important, and have moreover considerably advanced the cause and the implementation of the R2P principle.

### *The UN response*

The international response through the UN system has been firm and swift, with a quick and strong reaction as ever before. Several have been the bodies that have condemned and taken action in regard to the Libyan crisis.

Already on February 22<sup>nd</sup>, the **UNSG's SAPG and on R2P** issued a press release reminding the Libyan Government of its responsibility to protect and called for an end to the violence.<sup>217</sup> The **HRC** had on February 25<sup>th</sup> a Special Session on the situation of human rights in Libya,<sup>218</sup> and adopted the Res. S-15/2, calling to a cease of all human rights violations, establishing an international commission of inquiry and recommending the **UNGA** to suspend Libya's membership from the HRC,<sup>219</sup> which unanimously suspended it on March 1<sup>st</sup>.<sup>220</sup>

The **UNSC Ban Ki-moon's** reaction and condemnation of the violence was one of the firsts coming from the UN system. His commitment to R2P was again reaffirmed

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<sup>217</sup> See press release:  
<http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers%20Statement%20on%20Libya,%2022%20February%202011.pdf>.

<sup>218</sup> See <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10749&LangID=E>.

<sup>219</sup> HRC, 2011, p. 4.

<sup>220</sup> See <http://www.un.org/News/Press/docs//2011/ga11050.doc.htm>).

when he reminded the Libyan Government to implement its responsibility to protect and the IC's residual responsibility to protect the Libyan people. Moreover, on March 5<sup>th</sup> he appointed the former Minister of Jordan, Abdelilah Al-Khatib, as special envoy to Libya to address the humanitarian crisis and prepare a transition of power.<sup>221</sup>

The UNSC issued unanimously on February 26<sup>th</sup>, after its February 22<sup>nd</sup> press statement condemning the violence and the use of force against civilians,<sup>222</sup> the Res. 1970 (see Annex IV), demanding an end to the violence in Libya and referring the situation to the ICC.<sup>223</sup> A clear reference to Libya's "*responsibility to protect*" was expressed,<sup>224</sup> and an arms embargo on the country imposed,<sup>225</sup> as well as a travel ban and assets freeze on Gaddafi's family and certain Government officials.<sup>226</sup> It also expressed its readiness to consider taking additional appropriate measures if necessary, and established a new Committee to monitor sanctions and to liaise with MS.<sup>227</sup> The measures adopted were robust, but unfortunately will not stop or prevent further atrocities.<sup>228</sup>

To confront the increasing violence against Libyan populations, the UNSC met again on March 17<sup>th</sup> and approved the Res. 1973 (see Annex V) calling for the implementation of a no-fly zone and a ceasefire<sup>229</sup> as the situation in Libya "*constitutes a threat to international peace and security.*"<sup>230</sup> The resolution also includes a stronger arms embargo,<sup>231</sup> and the extension of the travel bans and assets freeze to additional individuals.<sup>232</sup> Important points of the resolution refer to the responsibility of the Libyan

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<sup>221</sup> See <http://dailytimes.com.ng/article/un-appoints-new-envoy-libya>.

<sup>222</sup> See <http://www.un.org/News/Press/docs/2011/sc10180.doc.htm>.

<sup>223</sup> It has to be noted that it is the second time that the UNSC refers a case to the ICC after the genocide in Darfur.

<sup>224</sup> UNSC Res. 1970, 2011, p. 1: "*Recalling the Libyan authorities' responsibility to protect its population.*"

<sup>225</sup> Ibidem, p. 3.

<sup>226</sup> Ibidem, 2011, pp. 4-5.

<sup>227</sup> Ibidem, p. 6.

<sup>228</sup> Dunne, Tim, 2011 (<http://www.lowyinterpreter.org/post/2011/03/03/Libya-and-R2P-What-now.aspx>).

<sup>229</sup> UNSC Res. 1973, 2011, pp. 2-3.

<sup>230</sup> Ibidem, p. 2.

<sup>231</sup> Ibidem, p. 4.

<sup>232</sup> Ibidem, p. 5.

authorities to protect the Libyan population,<sup>233</sup> state that the violence committed may amount to CaH,<sup>234</sup> and authorises MS (after notification to the UNSG) “to take all necessary measures” to protect civilians under threat, while excluding a foreign occupation force of any kind in Libyan territory.<sup>235</sup> UNSG Ban Ki-moon issued a statement highlighting the historic and important decision achieved by the UNSC, as the Res. 1973 “affirms, clearly and unequivocally, the international community’s determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own Government.”<sup>236</sup>

### ***The regional and sub-regional response***

Statements by the regional and sub-ROs have been crucial for the moving forward of the IC. In fact, Western countries and NATO indicated that the approval from the ROs was a requirement for them to move forward with coercive measures.<sup>237</sup>

The **Arab League** took a strong position and condemned Gaddafi’s attacks on his own people. AL Secretary-General Amr Moussa stated on March 3<sup>rd</sup> that “*the Arab League will not stand with its hands tied while the blood of the brotherly Libyan people is split.*”<sup>238</sup> The same day, it suspended the participation of Libya from the League,<sup>239</sup> and began to consider the imposition of a no-fly zone, which was finally convened in its extraordinary session of March 12<sup>th</sup>, calling the UNSC to take all necessary measures to impose it.<sup>240</sup> The AL has also indicated its intention to cooperate with the Libyan TNC and to coordinate with the UN, the AU, the EU and the Organisation of the Islamic Conference.

The **African Union** denounced on March 10<sup>th</sup> that the violence performed in Libya posed a “*serious threat to peace and security in the country and in the region as a*

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<sup>233</sup> UNSC Res. 1973, 2011, p. 1: “*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>234</sup> Ibidem, p. 1.

<sup>235</sup> Ibidem, p. 3 (paragraph 4).

<sup>236</sup> See <http://www.un.org/News/Press/docs/2011/sgsm13454.doc.htm>.

<sup>237</sup> See <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya>.

<sup>238</sup> See <http://af.reuters.com/article/libyaNews/idAFLDE7212AI20110302>.

<sup>239</sup> See <http://www.reuters.com/article/2011/02/22/libya-protests-league-idUSLDE71L2GK20110222>.

<sup>240</sup> See <http://www.reuters.com/article/2011/03/12/libya-arabs-council-idUSLDE72B0DW20110312>.

*whole.*”<sup>241</sup> Its efforts turned around a calling for a political solution, trying to facilitate dialogue and engaging all parties through the creation of a High-Level Committee on Libya,<sup>242</sup> and expressly rejected any form of foreign military intervention.<sup>243</sup> Nevertheless, the organisation has been criticised for its slow and weak response to the Libyan crisis.

On the other hand, the African Court on Human and Peoples’ Rights declared the commission of “*massive human rights violations*” carried out by the Libyan Government, and ruled on March 31<sup>st</sup> and for the first time against a State, requiring the regime to refrain from violent actions and to appear before the court within 15 days.<sup>244</sup>

The **European Union**, under its decision on February 26<sup>th</sup> to implement UNSC Res. 1970, imposed a travel ban and a freeze of financial assets on Libyan Government members. Moreover, on March 10<sup>th</sup>, the European Parliament adopted a Resolution recognising the TNC as the official representation of the Libyan opposition, and which furthermore stressed the duty of EU MS to “*honour their Responsibility to Protect.*”<sup>245</sup>

On March 27<sup>th</sup> and in cooperation with other States, **NATO** took control of the UN-mandated military mission Operation Odyssey Dawn, initiated by a coalition of States formed by US, France, UK, Denmark, Canada, Italy, Qatar, Spain, Belgium, Norway and United Arab Emirates.<sup>246</sup> Its mandate remained limited to the enforcement of the no-fly zone, even if it could also act in self-defence. NATO moreover stated that its mission is the protection of civilians.

### ***The ICC response***

After the UNSC’s referral of the Libyan situation to the ICC<sup>247</sup> (as Libya is not party to the Rome Statute, and thus its leaders should be referred by the UNSC for

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<sup>241</sup> See <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=17002&tid=30061>.

<sup>242</sup> See <http://www.reuters.com/article/2011/03/10/libya-africanunion-idUSLDE7292IY20110310>.

<sup>243</sup> See <http://www.news24.com/Africa/News/AU-rejects-military-intervention-in-Libya-20110311>.

<sup>244</sup> See <http://www.hrw.org/en/news/2011/03/30/libya-african-rights-court-issues-first-ruling-against-state>.

<sup>245</sup> European Parliament, 2011 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0095+0+DOC+XML+V0//EN&language=EN>).

<sup>246</sup> See [www.odyssey-dawn.net](http://www.odyssey-dawn.net).

<sup>247</sup> UNSC Res. 1970, 2011, p. 2.

investigation) to investigate if the crimes committed amount to CaH, the ICC Prosecutor Luis Moreno-Ocampo decided on March 2<sup>nd</sup> to launch an investigation<sup>248</sup> after a preliminary examination of the available information, which was an unexpected quick reaction.<sup>249</sup> He finally concluded on May 2<sup>nd</sup> that CaH have been committed from February 15<sup>th</sup> onwards.<sup>250</sup> On June 27<sup>th</sup> he issued an arrest warrant for Muammar Gaddafi and two of his top aides (his son Saif al-Islam and the intelligence chief Abdullah al-Sanussi),<sup>251</sup> as he found that there are “*reasonable grounds*” to believe that the three men are “*criminally responsible*” for the murder and persecution of civilians. Moreover, charges for the use of rape as a weapon of war are likely to be added, as expressed by the ICC Prosecutor.<sup>252</sup>

### ***The response from individual States***

For the first time, several individual States (especially Canada, UK, France and Switzerland) showed an unequivocal condemnation for the violence committed against the Libyan population and the existence of the political will to stop the atrocities in the country. They took unilateral actions against Gaddafi time before the approval of UNSC 1970, freezing financial assets and imposing travel bans and other sanctions on the regime. Moreover, France, Lebanon and UK played a strong role during the drafting of the UNSC Res. 1973. Some States officially recognised the TNC as the legitimate body now governing in Libya.

### ***The response from NGOs and the civil society***

NGOs and CSOs all around the world called on the UN, EU, AU and other world leaders to embrace their responsibility to protect the Libyan people. They denounced the use of brutal force against peaceful protesters, and issued urgent appeals and open statements<sup>253</sup> proposing and recommending measures to protect civilians in the country. Especially NGOs like Human Rights Watch (HRW), International Crisis

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<sup>248</sup> See <http://www.icc-cpi.int/NR/exeres/3EEE2E2A-2618-4D66-8ECB-C95BECCC300C.htm>.

<sup>249</sup> Usually, ICC Prosecutors take months to announce such decision.

<sup>250</sup> See <http://www.reuters.com/article/2011/05/02/us-libya-warcrimes-idUSTRE7417VU20110502>.

<sup>251</sup> See <http://www.icc-cpi.int/NR/exeres/D07229DE-4E3D-45BC-8CB1-F5DAF8370218.htm>.

<sup>252</sup> See <http://www.haguejusticeportal.net/smartsite.html?id=12778>.

<sup>253</sup> Like the one jointly issued by the Global Centre for R2P and the International Coalition for R2P; and by the ICG.

Group (ICG), Global Centre for the R2P, Genocide Alert, Amnesty International and the Institute for Security Studies<sup>254</sup> played a key role raising awareness and releasing important number of articles on the issue. Moreover, HRW, Interights and the Egyptian Initiative for Personal Rights initiated a case against Libya at the African Commission on Human and People's Rights on February 28<sup>th</sup>.<sup>255</sup>

NGOs and CSOs consequently played a key role in the Libyan crisis mobilising people worldwide, raising awareness and condemning the situation. They have clearly implemented their R2P, and not only in this case, but also in silent crises like Somalia, Ivory Coast, Gaza, Darfur, etc, as their mobilisation is not selective and does not use double standards.

The condemnation of Gaddafi's violence did not come only from different organisations, **individuals** also played an important role. Gaddafi's own ambassadors around the world quit in disgust, triggering the UNSC to take action. Moreover, Libya's Justice and Interior Ministers resigned, as well as two senior Libyan fighter pilots who refused to obey orders to bomb on protestors.<sup>256</sup> On the other hand, people worldwide supported R2P and claimed for an international reaction to stop the Libyan crisis.

### *The media response*

The media played a crucial role retransmitting all around the world what was happening in Libya and were constantly informing about new developments. In fact, Libya has been in the daily news since February 15<sup>th</sup>. They also denounced the situation and called for action.

It is however quite interesting, and surprising, how the international media have played a key role in the Libyan crisis, highlighting the humanitarian nature of the Western intervention, and just some passing mentions can be found about the crises in Bahrain, Yemen and Syria. The same happened with the crisis in Ivory Coast, which

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<sup>254</sup> See <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya>.

<sup>255</sup> See <http://www.hrw.org/en/news/2011/03/30/libya-african-rights-court-issues-first-ruling-against-state>.

<sup>256</sup> Christian Science Monitor's Editorial Board, 2011(<http://www.csmonitor.com/Commentary/the-monitors-view/2011/0222/The-world-s-responsibility-to-protect-Libyans>).



started when President Laurent Gbagbo refused to step down after being defeated by Alassane Ouattara in the 2010 elections: the mass atrocities committed did not attract the international media attention, as no major coverage was done. It is thus clear that the media play their role applying double standards and choosing how to respond to the coverage of a crisis depending on their interests, exactly like the UNSC and many States.

### 3) Libya: a R2P success?

The situation in Libya has been a test case for the UNSC and its implementation of the R2P principle. Libya today is the place and the time to enforce the commitment agreed during the 2005 World Summit and to convert the noble statements and words of R2P into facts.

The IC's response to the situation in Libya has been a gradual implementation of diplomatic, economic, humanitarian and coercive means against its regime, which, in words of Ramesh Takur,<sup>257</sup> demonstrates that "*R2P is coming closer to being solidified as an actionable norm.*"<sup>258</sup>

#### *The veto obstacle: overcome*

Russia and China threatened to veto any resolution concerning the use of coercive measures. But this threat against tough action was overcome, mainly because of the support and authorisation for a no-fly zone coming from the AU, the AL and the Gulf Cooperation Council (GCC), and because of the strong letter supporting the Res. 1970 by Libya's permanent representative to the UN, who broke down in tears begging to save his country.<sup>259</sup> It was clear that Arab, Islamic and African nations, as well as the defecting Libyan diplomats, supported an effective action to protect.<sup>260</sup> Consequently, China, Russia, Germany, India and Brazil abstained, instead of opposing or vetoing, and the resolutions 1970 and 1973 could be approved.

Nevertheless, we should also ask the question of what could have been done if the UNSC would not have implemented its responsibility to protect the Libyan populations. With the authorisation and a clear mandate from the AU and the AL, backed by the Organisation of Islamic Conference and the GCC, NATO could then

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<sup>257</sup> Ramesh Takur, professor of political science of the University of Waterloo, was a UNSG Assistant and a R2P commissioner.

<sup>258</sup> See <http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3292-ramesh-thakur-the-star-un-breathes-life-into-responsibility-to-protect->

<sup>259</sup> Cotler, Irwin, 2011 ([http://www.nytimes.com/2011/03/01/opinion/01iht-edcotler01.html?\\_r=1](http://www.nytimes.com/2011/03/01/opinion/01iht-edcotler01.html?_r=1)).

<sup>260</sup> Thakur Ramesh, 2011 (<http://www.theepochtimes.com/n2/opinion/the-worlds-responsibility-to-protect-libyans-53257.html>).

have taken limited but legitimate action.<sup>261</sup> Furthermore, the UNGA could also try to approve a resolution under the “United for Peace” procedure, allowing military action. It would not make it legal (as the UNSC is the only authority able to do it), but would give it a legitimate status, sending moreover a signal to the UNSC to reconsider its authorisation. Otherwise, and taking into account that only the West has the military assets needed to implement a no-fly zone, no other action would have been possible.

The two UNSC Res. on Libya have been a major step forward for the protection of the Libyan people and for the IC’s commitment to stop mass atrocities. The R2P language has been endorsed, explicitly invoked and applied by the UNSC. Until today, no mission has been authorised by the UNSC against a functioning Government<sup>262</sup> that so explicitly used R2P.<sup>263</sup>

#### ***A clear failure of the responsibility to prevent***

Arabs have taken the initiative to rebuild their societies. They want freedom, respect for human rights and democratic principles. Should not the West have had promoted these values, as part of its responsibility to prevent mass atrocities? The US administration’s support for the Tunisian, Yemeni, Bahraini, Egyptian and Saudi Arabian dictatorships<sup>264</sup> (among others) does not seem to be a policy fulfilling its responsibility to prevent, but just to further its national interests. The brutal human rights violations, the arbitrary killings of peaceful protesters and the imprisonment of reform leaders by the despotic regimes of Yemen and Bahrain have still the US crucial backing.<sup>265</sup> Politics seem to win, while commitments to R2P are easy to say, but difficult to find the political will to be enforced. The West is accomplice of privileging stability over Arab’s freedom.

Moreover, several Western States sold weapons to Gaddafi, acknowledging the nature of his regime. If the responsibility to prevent would have prevailed among

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<sup>261</sup> Thakur, Ramesh, 2011 (<http://www.theepochtimes.com/n2/opinion/the-worlds-responsibility-to-protect-libyans-53257.html>).

<sup>262</sup> In Somalia and Rwanda, the UNSC authorized the use of force only when it judged that there was not a functioning Government to consult.

<sup>263</sup> The Economist, 2011 (<http://www.economist.com/node/18709571>).

<sup>264</sup> Barghouti, Omar, 2011(<http://newslick.in/node/2252>).

<sup>265</sup> Ibidem.

economic interests, no country would have armed the Libyan Government. And, furthermore, how could Libya have been elected to be part of the HRC? Public shaming should make Western and African countries rethink their policies.

On the other hand, it has to be studied through an assessment *in concreto*, as already stated when analysing the particular responsibility to prevent of some States, ROs and the UN, the possibility of making them accountable for their failure to prevent the Libyan crisis. A deep study and evaluation should state which countries and ROs in which Libya seats (AU, AL, the Organisation of Islamic Conference and the GCC) had the economic, military and political influences, the means and the knowledge to prevent the commission of CaH in Libya (in case the ICJ would rule agreeing on the proposal to extend the special duty of some States to prevent genocide also outside their borders to other mass atrocity crimes). Then, the identified States and regional or sub-ROs would be held accountable for failing to prevent the crimes committed in Libya.

Furthermore, some countries have also a special responsibility to act and halt the Libyan slaughter, like those that provided the Libyan regime with the weapons that are now killing innocent civilians (like Spain, UK, France, Italy and US, for example, and moreover, like the EU as it granted huge amounts of weapons export licenses to Libya), and those that supported Gaddafi's regime during the past years (like the US and many other Western countries). In case the IC would not have reacted against Gaddafi, not only the above mentioned States could be held accountable and be brought to the ICJ for their failure to stop the ongoing mass atrocities (if the ICJ finally rules on the extension of the duty to halt genocide to other atrocity crimes), but also the ROs involved and the UN itself. The ILC's DARIOs (art. 11.3) will hopefully soon be approved and will raise some light on how to proceed in this emerging practice.

### ***The obstacle of double standards: surmounted?***

Unfortunately, cases of double standards are still rampant. If the concern is to protect lives, why no Western power has intervened to save the Palestinians living in

Gaza from the slaughter perpetrated by the Israeli army in January 2009?<sup>266</sup> US President Barack Obama talked about the “self determination”, the “inalienable right to freedom” and the “inclusive democracy” for Libyan people,<sup>267</sup> but, why those important terms do not refer also to the Palestinians? Why Palestinians are not as important as Libyans? Do they not have the right of self-determination he asks for the Libyans? The number of casualties caused by Gaddafi’s regime is not very different in order of magnitude from the one caused by Israel’s attacks on Gaza in 2007 or in Lebanon in 2006, but the US blocked all the calls for Israel’s cease-fire in the UN.<sup>268</sup>

Moreover, after the resolution authorising the no-fly zone over Libya, the AL asked the UNSC in April 2011 to impose it also over Gaza.<sup>269</sup> Nevertheless, no resolution has been approved on the subject. The AU asked too for its imposition over Somalia, and called for a five-point roadmap (protection of civilians, cessation of hostilities, implementation of democratic reforms),<sup>270</sup> but its calls did not merit any humanitarian consideration from the UNSC.

Furthermore, is it not a double standard to reject the ICC, but to refer others to it? China, Russia, India and the US voted for the resolutions or abstained. Is it not a big hypocrisy?

### ***The role played by regional and sub-regional organisations***

Regional and sub-ROs have played a key role condemning Gaddafi’s actions, and authorising the IC to take measures like the no-fly zone. Nevertheless, their reactions should have been faster and more effective. Despite the AUPSC consultations in March deciding to send a fact-finding mission, the response has been slow and overtaken by the situation on the ground.<sup>271</sup> The AU and the AL do not have the

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<sup>266</sup> See <http://www.opednews.com/articles/Israel-Faces-War-Crimes-Ch-by-Mark-C-Eades-090123-835.html>.

<sup>267</sup> Barghouti, Omar, 2011 (<http://newsclick.in/node/2252>).

<sup>268</sup> Purkayastha, Prabir, 2011 (a) (<http://newsclick.in/international/libya-mission-regime-change>).

<sup>269</sup> See: <http://www.reuters.com/article/2011/04/10/us-palestinians-israel-arabs-idUSTRE73923020110410>.

<sup>270</sup> Purkayastha, Prabir, 2011 (a) (<http://newsclick.in/international/libya-mission-regime-change>).

<sup>271</sup> Kagame, Paul, 2011 (<http://allafrica.com/stories/201103240033.html>).

military capacity, or the will, to open a front on behalf of rebels,<sup>272</sup> but they could have sent peacekeepers to prevent more assaults on eastern Libyan cities.

On the other hand, the IC should have included the AU in the decision-making process, as it did with the AL.<sup>273</sup> This would have added even more legitimacy to the operations taking place. Nevertheless, taking into account that only the African countries seating in the UNSC have raised their voice against the Libyan situation and the rest remained silent although Libya is a member of the AU, it is understandable that the IC did not insist more in its involvement. Nevertheless, the AU could have contributed with a valuable political support and moral authority for the coalitions' actions.<sup>274</sup>

### ***The criticism of R2P as a new form of colonialism: avoided?***

As analysed in the previous chapter (point II.6), there exists an important criticism to any Western action in the African continent, especially in countries with a post-colonial background. Libya was assaulted in 1836 by the Turkish, invaded in 1912 by the Italians, conquered in 1943 by the English and occupied in 1951 by British, American and Italian troops.<sup>275</sup> The reluctance of the Libyan people to any foreign help through the form of military intervention would thus be understandable.

Nevertheless, the no-fly zone was more than welcome, as Gaddafi's opposition, the AU, the AL and the GCC called for it. As concluded when analysing the problem of delivering R2P in Africa (under the study of the Zimbabwean case), it does not matter if the country has suffered from colonisation: it is more important to save lives and to stop the commission of atrocity crimes. And this conclusion could also be seeing in the Libyan case.

Nonetheless, it is extremely important to have the approval and authorisation from the main ROs in the area, the AU, the AL and the GCC in this case. Without them,

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<sup>272</sup> Prashad, Vijay, 2011 (<http://newslick.in/international/intervening-libya>).

<sup>273</sup> Kagame, Paul, 2011 (<http://allafrica.com/stories/201103240033.html>).

<sup>274</sup> Ibidem.

<sup>275</sup> Britto García, Luis, 2011 (<http://www.lavozdelsandinismo.com/opinion/2011-03-19/cuando-veas-arder-libia/>).

the foreign intervention would have revived painful memories of Western colonialism and strengthened Gaddafi's hand, undermining the legitimacy and having a tragic impact on the anti-Gaddafi uprising.<sup>276</sup> Moreover, the claims from the Libyan people were also vital for the decision to intervene.

Consequently, through the Libyan case it has also been demonstrated that the post-colonial States' view of R2P as a new form of colonialism can be overcome, like in Zimbabwe. But it has to be clear that the involved ROs have to play a key role in order to help R2P to be welcome in the States under their influence. And, moreover, every military intervention should have their consent and authorisation and do not exceed from what they allow, if the IC wants the interventions to continue to be accepted and welcomed.

#### *The intervention in Libya: fulfilled all the requirements?*

As already mentioned in the previous point II.6 and more detailed in Annex II, in order for an international intervention to be authorised, it has to fulfil six important requirements: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects of success. In the following paragraphs I will analyse the fulfilment of each of them in order to conclude on the legitimacy and the correct use of the military intervention (the no-fly zone) taking place in Libyan territory.

The requirement of **right authority** issuing the prior authorisation to intervene has clearly been fulfilled, as there has been a UNSC Res. approving the no-fly zone. Moreover, in Libya, the world has witnessed an actual large scale loss of life of Libyan citizens,<sup>277</sup> with a genocidal intention to eliminate Gaddafi's opposition members, and which is the product of deliberate State action, as the President Muammar Gaddafi is the one ordering the massacre. This is a **just cause** to take action.

UNSC Res. 1970 and 1973 (see Annexes IV and V) highlight the implementation of measures with the goal of civilian protection, which constitutes the

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<sup>276</sup> Muzzafar, Chandra, 2011 (<http://newsclick.in/international/quit-gaddafi-quit>).

<sup>277</sup> The exact number of victims is unknown, but the HRC stated it in between 10,000 and 15,000, from February 15<sup>th</sup> to June 9<sup>th</sup> 2011.

**right intention** needed and the main purpose of any HI. But, is civilian protection also the goal of the States pushing for the intervention and implementing it?

Every day, Libya exports 1.6 million barrels of petrol to Europe, allowing it to continue functioning.<sup>278</sup> Its petrol reserves are well known and estimated in 42 millions of barrels.<sup>279</sup> Since the beginning of the crisis in Libya, the oil price has enormously been destabilised, causing its rise to the unimaginable cost of US\$114.2 a barrel and creating a worldwide oil crisis, as Libya is the major oil supplier to Europe after Saudi Arabia.<sup>280</sup> Market analysts advised that if the petrol exports from Libya stop, oil prices might raise to US\$200 a barrel,<sup>281</sup> collapsing the already in crisis Western economies. Moreover, Gaddafi threatened the EU to move away from the role he played stopping African immigration into Europe, and after the EU intervention in the crisis, it is clear that he will not continue helping in immigration matters. Furthermore, many Western countries are very much criticised for the amount of their expenditure in weaponry. An intervention like the one carried out in Libya offers the perfect justification to it, and provides the excuse to continue feeding the market of weapons. And, interestingly, Libya is a country that has removed foreign military bases from its territory and nationalised its natural resources, facts that might not be in line with Western interests, which might see an opportunity for change with Gaddafi's removal.

All those arguments and covered interests seem to be at the heart of the intervening powers' mobilisation. The goal of civilian protection is not their main purpose; otherwise, they would also have acted to protect Palestinians, Ivoirians, Yemenis, Bahrainis, Syrians, etc, instead of applying double standards. Of course, it has to be understood that the intervention has to provide them some benefits, as they are committing their troops (putting their soldiers' lives in peril) and expending millions (France has already spent € 160 million,<sup>282</sup> and the US is spending the crazy amount of

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<sup>278</sup> Britto García, Luis, 2011 (<http://www.lavozdelsandinismo.com/opinion/2011-03-19/cuando-veas-arder-libia/>).

<sup>279</sup> Ibidem.

<sup>280</sup> Muzzafar, Chandra, 2011 (<http://newsclick.in/international/quit-gaddafi-quit>).

<sup>281</sup> Ibidem.

<sup>282</sup> See <http://af.reuters.com/article/topNews/idAFJ0E76902T20110710>.



US\$ 2 million daily<sup>283</sup>). Nevertheless, this should not have removed the goal of civilian protection as the main purpose of the intervention. And this is just what has happened, as will be stated in the next paragraphs, when analysing how the enforcement of the no-fly zone is being carried out.

An important and difficult question that arises when analysing the different requirements is: was the military intervention in Libya the **last resort**? Or other measures could have been explored with chances to stop the Libyan slaughter? The IC, individually and through the UNSC, adopted gradually several measures like the assets freeze, travel bans, arms embargo, etc, ranging from economic and diplomatic to coercive sanctions. But thus measures, even if important, are not able to impact on the protection on civilians, and were thus finally accompanied by the approval of a no-fly zone over the Libyan territory. Nevertheless, on March 1<sup>st</sup>, the Venezuelan President Hugo Chávez, a known Gaddafi's friend and ally, offered to create an international commission, formed by delegates from different countries, to mediate in the conflict.<sup>284</sup> The proposal was approved by Gaddafi, who seemed willing to cooperate, and had also the support from the AL. But, interestingly, it was quickly rejected by the Western powers (France and the US expressed their strong opposition to any mediation, saying that Gaddafi does not need anyone to tell him what to do).<sup>285</sup> Why was this measure rejected? Even if it comes from another dictator who supports Gaddafi's actions, it could have had an important and positive impact, as the Libyan "leader" accepted the international mediation. It seems that some Western powers were in a hurry to intervene. In my opinion, the Peacebuilding Commission would have been a critical measure able to persuade Gaddafi to stop the killings, to change the outcome of the crisis and to effectively protect civilians. Consequently, the military intervention was not the last resort. This option should have been tried.

In line of the requirement stating the need to use **proportional means**, *the scale, duration and intensity of the planned military intervention should be the minimum*

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<sup>283</sup> See <http://www.dailymail.co.uk/news/article-2001778/Libya-war-costs-US-taxpayers-2m-day-Gaddafi.html>.

<sup>284</sup> See <http://english.eluniversal.com/2011/03/04/president-hugo-chavez-offers-to-mediate-in-libyan-conflict.shtml>).

<sup>285</sup> Ibidem.

*necessary to secure the defined human protection objective.*<sup>286</sup> Enforcing a no-fly zone, which means to destroy and to avoid Gaddafi's air defences, and moreover the non-authorisation to put boots on the ground, seems proportionate. Nevertheless, nothing has been said about its duration, even if it can be understood that the no-fly zone will be enforced until the end of the hostilities.

If a military intervention is finally approved, it is because there is a **reasonable prospect of success**. The battle for Libya, which started on March 18<sup>th</sup>, is facing several challenges. The consequences of the intervention should not be worse than the causes of inaction, and the coalition of intervening States and NATO are causing several civilian casualties. Gaddafi's regime developed Libya as a whole, and various sections of the people benefited from it. Moreover, he has the ability to manipulate different sections of the Libyan population to his ends<sup>287</sup> (that is why he has been so long in power). Thus, a faction of the population strongly supports him, and, as seeing, is ready to continue fighting until they die. That is why the battle, which was supposed to be quick and with fast results, is now counting its fourth month. Maybe more attention should have been given to this requirement, even if it is clear that the intervening parties have the means and the capacity to win the battle.

The approval of a military intervention, a no-fly zone in this case, should be very carefully examined and debated, and should meet all the requirements needed in order to be called humanitarian. Nevertheless, all of them were not met. In my opinion, the no-fly zone was premature. Chávez's Peacebuilding Commission should have been given a chance, and through its mediation maybe Gaddafi would at least have stopped the killings of innocent civilians.

### ***The enforcement of UNSC Res. 1973***

On the other hand, it is also important to study how the intervention is being carried out, in light of the UNSC Res. 1973 that authorises it.

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<sup>286</sup> ICISS, 2001, p. XI.

<sup>287</sup> Purkayastha, Prabir, 2011 (a) (<http://newsclick.in/international/libya-mission-regime-change>).

The UNSC Res. 1973 (see Annex V) authorises to take “*all necessary measures*” to protect Libyan civilians from harm.<sup>288</sup> The military operations should entail surveillance and monitoring activities, humanitarian assistance and enforcement of the arms embargo and of the no-fly zone. A no-fly zone is not soft measure; it involves taking out air defences, bombing runways and taking out aircrafts that breach it.<sup>289</sup> And only the West has the military assets and operational capability for these tasks.<sup>290</sup>

NATO, after taking the control of the Odyssey Dawn Operation, and along with France, UK and the US, is enforcing the no-fly zone and targeting Libyan Government’s heavy weaponry.<sup>291</sup> Boots on the ground are not permitted by the UNSC Res. 1973<sup>292</sup> and moreover, neither authorised by the AU and the AL.

In the almost forth month of intervention, no major achievements have resulted. The no-fly zone should have redressed the imbalance between Gaddafi’s capacity to strike from the air and the impossibility of it on the side of the rebels. Instead, it has caused many civilians casualties. NATO’s apologies for the errant missile strike that killed nine civilians on June 20<sup>th</sup>,<sup>293</sup> along with other casualties caused by the Western side, do not help the humanitarian mission.

On the other hand, there has been a debate whether to enforce a no-fly zone or to arm the rebels on the ground<sup>294</sup> in order to solve the imbalance between Gaddafi’s weaponry and the opposition’s one. It was clearly decided in favour of enforcing the no-fly zone, as arming the rebels has the risk to escalate the conflict rather than stopping it. An arms embargo was approved in Res. 1970 and strengthened in Res. 1973, and covers both parties of the conflicts: Gaddafi’s supporters and the rebels, as both are committing atrocity crimes. The rebels are also using heavy weaponry and land mines, firing

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<sup>288</sup> UNSC Res. 1973, 2011, p. 3 (paragraph 4).

<sup>289</sup> See <http://www.bbc.co.uk/news/world-africa-12676248>.

<sup>290</sup> Thakur, Ramesh, 2011 (<http://www.theepochtimes.com/n2/opinion/the-worlds-responsibility-to-protect-libyans-53257.html>).

<sup>291</sup> See [www.un.org/News/Press/docs/2011/sgsm13548.doc.htm](http://www.un.org/News/Press/docs/2011/sgsm13548.doc.htm).

<sup>292</sup> UNSC Res 1973, 2011, p. 3 (point 4): “...while excluding a foreign occupation force of any form on any part of the Libyan territory...”

<sup>293</sup> See <http://www.politico.com/news/stories/0611/57335.html>.

<sup>294</sup> Landler, Mark; Bumiller, Elisabeth & Lee Myers, Steven, 2011 (<http://www.nytimes.com/2011/03/30/world/africa/30diplo.html>).

indiscriminately and tolerating child soldiers among them, which constitute war crimes.<sup>295</sup> Nevertheless, Western powers (being France the first to do it)<sup>296</sup> have provided the rebels with weapons and moreover encouraged them to attack the territories under Gaddafi's control. This is a clear violation of the UNSC Res. 1970 and 1973, which impose an arms embargo in the whole Libyan territory, and of the goal of civilian protection. Arming the rebel faction, which is using his weaponry indiscriminately, will not protect any civilian, but rather the contrary, will cause more casualties among the civilian population.

Moreover, it seems that the no-fly zone has been extended to a "no-drive zone," which clearly exceeds what has been authorised by the UNSC resolutions. The first steps to implement a no-fly zone suppose to take out communications and anti-aircraft sites, but bombing Gaddafi's residence in Tripoli (and killing his youngest son and three grandchildren in April 30<sup>th</sup>),<sup>297</sup> military (command-and-control centres frequented by Gaddafi and his family) and non-military targets in the country causing civilian casualties defers considerably from the imposition of a no-fly zone. In addition, declaring that Gaddafi himself is a possible target<sup>298</sup> is a complete misunderstanding of what the goal of the mission is. Russia, China and India have strongly criticised how the intervention is being conducted.<sup>299</sup> The AL Secretary-General Amr Mussa has furthermore indicated that "*what has happened in Libya differs from the goal of imposing a no-fly zone and what we want is the protection of civilians and not bombing other civilians.*"<sup>300</sup> The coalition's operation is losing the international support it struggled to maintain. Nevertheless, the UNSC Res. 1973's very broad expression allowing "*the member States to take all necessary measures*"<sup>301</sup> leaves a door open to extend the measures at the coalition's will...

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<sup>295</sup> Goldberg, Mark Leon, 2011 (<http://www.undispatch.com/rebel-war-crimes-in-libya>).

<sup>296</sup> See <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8606541/France-supplying-weapons-to-Libyan-rebels.html>.

<sup>297</sup> See <http://www.globalpost.com/dispatch/news/regions/middle-east/110501/gaddafi-son-grandchildren-killed-nato-airstrike-libya-video>).

<sup>298</sup> See <http://www.guardian.co.uk/world/2011/mar/20/coalition-criticism-arab-league-libya>.

<sup>299</sup> Ibidem.

<sup>300</sup> See [http://www.straitstimes.com/BreakingNews/World/Story/STIStory\\_647320.html](http://www.straitstimes.com/BreakingNews/World/Story/STIStory_647320.html).

<sup>301</sup> UNSC Res. 1973, 2011, p. 3 (paragraph 4).

Furthermore, to the enforcement of the no-fly zone have to be added political and diplomatic efforts to solve the crisis. No military action alone “*would succeed in ending the conflict*”, said Brazil’s Ambassador to the UN. The ROs (the AU and the AL and the GCC especially) should take the lead mediating and finding a political solution to Libya.

These political efforts should mediate to advance the protection of civilians, but will also require the end of Gaddafi’s rule, as already called for by Western and Arab Governments.<sup>302</sup> Nevertheless, it has to be highlighted that the UNSC resolutions do not call for Gaddafi to step down and do not authorise his removal, but call for the cease of the commission of mass atrocities. And, interestingly, his removal seems to have become the goal of the coalition’s mission; otherwise, why should NATO bomb his compound? The no-fly zone has unilaterally been expanded to a military campaign for regime change,<sup>303</sup> with the imaginable goal of installing in power someone who would be more favourable to and in line with Western interests (like happened in Iraq).

### ***Who is exactly protecting the IC?***

The goal of the intervention that is being carried out under the UNSC Res. 1973 is supposed to be the protection of Libyan civilians. But, through the analysis of the previous paragraphs a question arises: who are them exactly?

Many of those who were called “civilians” and “peaceful demonstrators” have clearly armed themselves. They have become combatants, and consequently they do not fall anymore under the category of citizens that should be protected by the IC. As mentioned above, the rebels are committing war crimes too, firing indiscriminately killing also civilians and making very little distinction between immigrant African workers<sup>304</sup> and the African mercenaries used by Gaddafi.

Moreover, who are the members of the TNC? It is chaired by the former Minister for Libya, Mustafa Abdul Jalil, and has 31 members, but just few names have

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<sup>302</sup> The Economist, 2011 (<http://www.economist.com/node/18709571>).

<sup>303</sup> Purkayastha, Prabir, 2011 (b) (<http://newsclick.in/international/libya-and-yemen-%E2%80%93-study-contrast>).

<sup>304</sup> See <http://www.afrol.com/articles/37515>.

been released,<sup>305</sup> while the rest remain shadowy figures. The Libyan rebel commander, Abdel-Hakim al-Hasidi, who was a member of the Libyan Islamic Fighting Group,<sup>306</sup> has admitted the existence of a link between his fighters and al-Qaeda<sup>307</sup> and that the jihadists and mercenaries who fought against the foreign occupation in Iraq are those fighting now in Libya against Gaddafi.<sup>308</sup> In fact, Libya was the main contributor of fighters during the mentioned war, and “*Libyans were more fired up to travel to Iraq to kill Americans than anyone else in the Arabic-speaking world,*” said Andrew Exum, a counterinsurgency specialist and former Army Ranger.<sup>309</sup> This means that the US is arming and supporting rebels who voluntarily fought against it during the Iraqi war.

One thing is the protection of civilians, and a different one is the support to an opposition movement from which we know very little, and this little demonstrates that some of its members have links with al-Qaeda and other Islamic extremist factions. Many Western Governments have already recognised the TNC as the actual ruling body of Libya, which is a premature step taking into account the lack of information we have about it and its real goals. The West should be more cautious, and should limit its support to the TNC and the rebels until it is not crystal clear who they are exactly. A different thing is the support and protection to the civilian population, those who have not armed themselves and cannot be qualified as combatants, which has to continue and is the goal of the UNSC resolutions.

### ***The IC’s responsibility to rebuild Libya***

As explained in the first chapter, R2P also involves a responsibility to rebuild, particularly after an intrusive intervention. This means that the IC’s duties do not finish

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<sup>305</sup> See <http://www.libyanmission-un.org/tnc.pdf>.

<sup>306</sup> The Libyan Islamic Fighting Group killed dozens of Libyan rebel troops in guerrilla attacks in Derna and Benghazi in 1995 and 1996, and even if it is not part of al-Qaeda, the US West Point Military Academy’s Combating Terrorism Centre says that both “*share an increasingly co-operative relationship.*”

<sup>307</sup> Al-Qaeda is a global militant Sunni Islamist group founded by Osama bin Laden in 1988-1989. It operates as a terrorist network comprising both a multinational stateless army and a radical Sunni Muslim movement calling for global Jihad. It was the author of the 11<sup>th</sup> of September attacks in New York, among others.

<sup>308</sup> See <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8407047/Libyan-rebel-commander-admits-his-fighters-have-al-Qaeda-links.html>.

<sup>309</sup> See <http://www.asiantribune.com/news/2011/03/17/libyan-rebellion-has-radical-islamist-fervor-benghazi-link-islamic-militancyus-milit>.

with the protection of the Libyan civilians, but rather also imply the provision of full assistance with recovery, reconstruction of the country and reconciliation among Gaddafi's supporters and opponents. The rebuilding of Libya will surely take a long time, and should start with a political transition to democracy, which should be supported and assisted by the IC (but not controlled by it). And it is the Libyans those who have to build up and choose their own democracy, based on their traditions and culture, the West cannot impose its model, even if basic standards have to be respected (like periodic elections, democratic institutions, promotion of human rights, etc).

The West should not abandon Libya after the intervention will be over. It should implement its responsibility to rebuild the country, respecting Libya's values and culture, and not imposing its owns.

### ***Future developments***

After the submission of this paper, the Libyan situation will continue to address new events and developments. Few of them can already be cited, even if their result will be known later on.

Firstly, Gaddafi's daughter, Aisha Gaddafi, has filed on June 7<sup>th</sup> in Paris and in Brussels a lawsuit against NATO<sup>310</sup> for bombing his father's compound in Tripoli, on April 30<sup>th</sup>, killing her younger brother and three nephews. She alleged NATO's commission of war crimes, as "*the decision by NATO to target a civilian home in Tripoli constitutes a war crime,*"<sup>311</sup> said one of Aisha Gaddafi's lawyers, and with which I do agree. Officials are now assessing whether the case could be admitted, procedure that will take few weeks. If admitted, the case would advance and give more light on the emerging norms on the accountability of IOs for internationally wrongful acts, in which the ILC is currently working.

A different and possible lawsuit is the one that US President Obama could also face, if admitted. The US House of Representatives has filed against him a complaint in the US Federal Court for taking military action in Libya without seeking the approval of

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<sup>310</sup> See <http://www.globalpost.com/dispatch/news/regions/middle-east/110607/muammar-gaddafi-daughter-lawsuit-war-crimes-assassination-n>.

<sup>311</sup> Ibidem.

the US Congress.<sup>312</sup> They argue that he has violated the 1973 War Powers Resolution, which limits the President's power to send military forces to a foreign country to a maximum of 90 days, deadline that expired on June 18<sup>th</sup>.<sup>313</sup> For a longer period, the President should have sought the declaration of war from the Congress, required by the US Constitution,<sup>314</sup> which he has not. It will be very interesting to see how this case develops, if the President Obama would be charged for a violation of the US Constitution, and, in that case, if it would suppose the removal of US forces from the Libyan mission.

Finally, the mediation process to solve the Libyan crisis continues, as NATO officials will meet on July 13<sup>th</sup> with the rebel movement.<sup>315</sup> Mediation and negotiations between the conflicting parties should be a priority, but it is important not to forget with what kind of movement (which has links with al-Qaeda) they are meeting and negotiating the transition to democracy.

### ***Conclusion***

Can we state that the implementation of R2P in the Libyan crisis has been a success? After the analysis given in the previous paragraphs, I can undoubtedly say that the Libyan case has supposed a tremendous advancement of the R2P doctrine, contributing moreover to the needed State practice to become part of CIL. The international response to a R2P crisis has been quicker than ever, and from all IC's sectors. Libya constitutes an important precedent for the R2P cause. It cannot be seen as a failure.

Nevertheless, it can neither be seen as an absolute success. Even if the IC has reacted against the atrocities committed by Gaddafi, important obstacles in the adequate implementation of R2P have not been overcome. The intervention in Libya is guided by fairly narrow interests, and not by the goal of civilian protection. Moreover, it has

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<sup>312</sup> See [http://www.washingtonpost.com/blogs/2chambers/post/kucinich-other-house-members-file-lawsuit-against-obama-on-libya-military-mission/2011/06/15/AGrzd6VH\\_blog.html](http://www.washingtonpost.com/blogs/2chambers/post/kucinich-other-house-members-file-lawsuit-against-obama-on-libya-military-mission/2011/06/15/AGrzd6VH_blog.html).

<sup>313</sup> See <http://www.elheraldo.co/internacional/obama-podria-violar-ley-de-eu-por-operaciones-en-libia-25424>.

<sup>314</sup> See filed complaint: [http://kucinich.house.gov/UploadedFiles/Libya\\_Complaint\\_Master.pdf](http://kucinich.house.gov/UploadedFiles/Libya_Complaint_Master.pdf).

<sup>315</sup> See <http://thejournal.eu/2011/07/nato-officials-to-meet-with-libyan-rebels/>.



supposed the application of double standards, intervening in this case but ignoring other crises with the same magnitude and same commission of mass atrocities as Gaza and now Syria. Furthermore, all peaceful means have not been explored before taking the decision to carry out the military intervention (the no-fly zone), as Chávez's Peacebuilding Commission should have been given a chance, as it could have had a positive impact in the outcome of the crisis. Any HI is always problematic, since it also entails civilian casualties, and should thus have been the last resort. Also, as noted before, the goal of the intervention has been changed, being the removal of Gaddafi rather than the protection of civilians its main purpose.

A case that could have been an example of adequate R2P's implementation, of solid and unequivocal international reaction, has again demonstrated how easy it is to misuse it to further own agendas. UNSC resolutions should avoid broad expressions (like "*take all necessary measures*") allowing undetermined actions enforced at the intervening parties' will. Military intervention is the R2P element that needs the most improvement. An own UN standby force for R2P cases would undoubtedly help in this matter, as it would carry its civilian protection mandate impartially, not favouring any State's interests.

Libya has been a major step forward and has demonstrated how the R2P principle has advanced in the IC's agenda, even if has also shown which of its elements need further improvement, control and commitment. Nevertheless, there is still a long way to go.



# **CONCLUSION**



Is change possible? Can we, ordinary people, influence the nation-State system to exercise R2P in order to achieve the goal of human security? In fact, the past few hundred years of history suggest that it is possible to stop the commission of mass atrocity crimes. Issues that were unconceivable in the past are now seeing as fully rights integrated and as part of our societies. Religious freedom was an extreme proposal at the time, like gender equality and the abolition of slavery. Today, we take them for granted, and they constitute rights that people could not imagine before. Nevertheless, some slavery continues, and gender equality and religious freedom are not rights recognised worldwide. But the advancement in those issues is undeniable. The same hope I raise for R2P, even if the possibility seems remote, as remote as the free exercise of religion, women's suffrage or the abolition of slavery.

R2P may still seem visionary, but in the current year 2011 we have assisted to an incredibly advancement of its cause. The IC as a whole has finally acknowledged its responsibility to protect populations at risk, has clearly invoked R2P in the crises happening in Ivory Coast and Libya and consequently, has overcome many of the obstacles stated and analysed in this paper. The implementation of R2P is possible, what needs now to be achieved is its adequate and correct implementation. This means that the different measures proposed here to avoid a selective application of R2P or the use double standards need a stronger commitment. Moreover, even if R2P has worked in Libya, it has not in Somalia, in Gaza, in Bahrain, in Syria, and in many other crises that are happening right now. Therefore, further consideration needs to be addressed to the proposals stated in this paper, which will only strengthen the IC's commitment to the R2P cause and will only allow its correct implementation. The political will to undergo through the proposed UNSC and ICC reforms needs to be found, as well as to greatly improve the prevention resources and early warning mechanisms. Moreover, and as observed in the Libyan case, ROs involved in the crisis area should be asked for authorisation before any intervention, and they should try to play a leading role in its resolution, if their capacities allow it.

Special attention has to be addressed to the enforcement of measures supposing a military intervention in a sovereign State. First of all, with no exceptions, they have to

be implemented as a last resort: every peaceful mean with chances to have a positive outcome in the crisis should be explored. Proposals for diplomatic mediation and negotiation, like the Peacebuilding Commission offered by the Venezuelan President, should never be dismissed. These kinds of measures can even accompany tougher ones, which raises the question of why Chávez's commission has not been given a chance even once the no-fly zone has been enforced. Moreover, any HI has to be carried out with no possibility of mistakes or civilian casualties and with a clear, understood and non-modifiable mandate of civilian protection. A highly prepared, trained in civilian protection and equipped UN standby force for R2P situations should be created, and should be the only military force deployed in cases of genocide, WR, EC and CaH.

The UNSC resolutions on Libya have supposed a major step forward. The question is no longer if the IC should act to halt the commission of mass atrocities or not, but how to do it. If the measures adopted finally succeed (even if R2P's implementation has not been perfect and has not overcome all the analysed obstacles) tyranny everywhere will be put on notice. As UNSG Ban Ki-moon stated, "*the age of impunity is dead. Today we are moving decisively towards a new age of sovereignty as responsibility.*"<sup>316</sup>

The important advancement of R2P during the last years, especially this one, has demonstrated that the principle can be implemented, that the commission of genocide, WC, CaH and EC can be halted, and that the IC is united towards this goal. For this reasons, R2P cannot be seen as a failure. Nonetheless, taking into account that it is still not fully and adequately implemented in every crisis of R2P concern, and that it still needs major improvement, it can neither be stated as an absolute success. However, R2P is already in the way to become a success. It just needs to overcome its still existing obstacles and challenges, and in this paper have been stated important proposals that might help it to faster march its way towards the success, towards the unequivocal affirmation that atrocity crimes worldwide can and will be halted.

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<sup>316</sup> See <http://www.un.org/News/Press/docs/2011/sgsm13548.doc.htm>.

# **ANNEXES**





# **ANNEX I**

## **Paragraphs 138-139-140 of the World Summit Outcome Document**

Heads of state and government agreed to the following text on the Responsibility to Protect in the Outcome Document of the High-level Plenary Meeting of the General Assembly in September 2005.

### **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, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities 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 and to assisting those which are under stress before crises and conflicts break out.

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



# ANNEX II

## R2P SYNOPSIS (ICISS Report)

### THE RESPONSIBILITY TO PROTECT: CORE PRINCIPLES

#### (1) Basic Principles

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

#### (2) Foundations

The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:

- A. obligations inherent in the concept of sovereignty;
- B. the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
- C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
- D. the developing practice of states, regional organisations and the Security Council itself.

#### (3) Elements

The responsibility to protect embraces three specific responsibilities:

- A. **The responsibility to prevent:** to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
- B. **The responsibility to react:** to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
- C. **The responsibility to rebuild:** to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

#### (4) Priorities

- A. **Prevention is the single most important dimension of the responsibility to protect:** prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.

- B. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.

## **THE RESPONSIBILITY TO PROTECT: PRINCIPLES FOR MILITARY INTERVENTION**

### **(1) The Just Cause Threshold**

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

- A. **large scale loss of life**, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- B. **large scale 'ethnic cleansing'**, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

### **(2) The Precautionary Principles**

- C. **Right intention:** The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.
- D. **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, with reasonable grounds for believing lesser measures would not have succeeded.
- E. **Proportional means:** The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.
- F. **Reasonable prospects:** There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

### **(3) Right Authority**

- A. There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
- B. Security Council authorisation should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorisation, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.
- C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It

should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.

- D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support.
- E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:
  - a. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and
  - b. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorisation from the Security Council.
- F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation - and that the stature and credibility of the United Nations may suffer thereby.

#### **(4) Operational Principles**

- A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.
- B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.
- C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.
- D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.
- E. Acceptance that forced protection cannot become the principal objective.
- F. Maximum possible coordination with humanitarian organisations.



# ANNEX III

## THE PREVENTION TOOLBOX

Source: Evans, Gareth, *The Responsibility to Protect: ending mass atrocity crimes once and for all*, 2008.

<b>POLITICAL &amp; DIPLOMATIC MEASURES</b>	<b>ECONOMIC &amp; SOCIAL MEASURES</b>
<p><u>Structural:</u></p> <ul style="list-style-type: none"> <li>● Promotion of good governance               <ul style="list-style-type: none"> <li>● Deliver civil and political rights</li> <li>● Distribute justice</li> <li>● Accept strong CSO</li> </ul> </li>   <li>● Promotion of membership in IOs</li> </ul>	<p><u>Structural:</u></p> <ul style="list-style-type: none"> <li>● Support the economic development               <ul style="list-style-type: none"> <li>● Development assistance and cooperation</li> <li>● Technical assistance to adopt institutional reforms</li> <li>● Acceptance of trade regimes</li> <li>● Assistance to develop transport infrastructures</li> <li>● Regional and larger economic integration strategies</li> </ul> </li>   <li>● Support education for tolerance               <ul style="list-style-type: none"> <li>● Attention to formal education + media dissemination programmes</li> </ul> </li>   <li>● Community peacebuilding               <ul style="list-style-type: none"> <li>● Strengthen sustainable economic development, democracy and human rights</li> <li>● Viable political structures</li> <li>● Increase capacity to manage change without resort to violence</li> </ul> </li> </ul>
<p><u>Direct:</u></p> <ul style="list-style-type: none"> <li>● Preventive diplomacy               <ul style="list-style-type: none"> <li>● Direct “good offices” role of UNSG</li> <li>● Fact-finding missions</li> <li>● Eminent persons’ commissions</li> <li>● Conciliation and mediation</li> <li>● Nonofficial “second-track” dialogue</li> </ul> </li>   <li>● Threat of political sanctions               <ul style="list-style-type: none"> <li>● Diplomatic isolation</li> <li>● Suspension of organisation membership</li> <li>● Travel and asset restrictions</li> <li>● “Naming and shaming”</li> </ul> </li> </ul>	<p><u>Direct:</u></p> <ul style="list-style-type: none"> <li>● Aid conditionality</li>   <li>● Threat of economic sanctions               <ul style="list-style-type: none"> <li>● Selective trade embargoes</li> <li>● Freezing of dissolution of trade agreements</li> <li>● Capital controls</li> <li>● Withdrawal of investment</li> <li>● Withdrawal of IMF or World Bank support</li> </ul> </li>   <li>● Economic incentives               <ul style="list-style-type: none"> <li>● Promise or delivery of better trade terms</li> <li>● New investment</li> <li>● More favourable taxation treatment</li> <li>● Access to technology</li> <li>● Lifting existing negative sanctions</li> </ul> </li> </ul>

## THE PREVENTION TOOLBOX

<b>CONSTITUTIONAL &amp; LEGAL MEASURES</b>	<b>SECURITY SECTOR MEASURES</b>
<p><u>Structural:</u></p> <ul style="list-style-type: none"> <li>• Promotion of fair constitutional structures</li> <li>• Promotion of human rights               <ul style="list-style-type: none"> <li>• Constitutional or legislative guarantees</li> <li>• Creation of effective human rights commissions</li> </ul> </li> <li>• Promotion of the rule of law</li> <li>• Fight against corruption</li> </ul>	<p><u>Structural:</u></p> <ul style="list-style-type: none"> <li>• Security sector reform</li> <li>• Military to civilian governance</li> <li>• Confidence-building measures</li> <li>• Small arms and light weapons control</li> </ul>
<p><u>Direct:</u></p> <ul style="list-style-type: none"> <li>• Legal dispute resolution</li> <li>• Threat of international criminal prosecution</li> </ul>	<p><u>Direct:</u></p> <ul style="list-style-type: none"> <li>- Preventive deployment</li> <li>- Non-territorial show of force</li> <li>- Threat of arms embargo or end of military cooperation programmes</li> </ul>



# ANNEX IV

United Nations

S/RES/1970 (2011)



**Security Council**

Distr.: General  
26 February 2011

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## **Resolution 1970 (2011)**

**Adopted by the Security Council at its 6491st meeting, on  
26 February 2011**

*The Security Council,*

*Expressing grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians,*

*Deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,*

*Welcoming the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya,*

*Taking note of the letter to the President of the Security Council from the Permanent Representative of the Libyan Arab Jamahiriya dated 26 February 2011,*

*Welcoming the Human Rights Council resolution A/HRC/S-15/2 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible,*

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

*Expressing concern at the plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya,*

*Expressing concern also at the reports of shortages of medical supplies to treat the wounded,*

*Recalling the Libyan authorities' responsibility to protect its population,*

11-24558 (E)



Please recycle The recycling symbol, a triangle of arrows forming a circle.

*Underlining* the need to respect the freedoms of peaceful assembly and of expression, including freedom of the media,

*Stressing* the need to hold to account those responsible for attacks, including by forces under their control, on civilians,

*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

*Expressing concern* for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya.

*Mindful* of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations,

*Acting* under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,

1. *Demands* an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population;
2. *Urges* the Libyan authorities to:
  - (a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;
  - (b) Ensure the safety of all foreign nationals and their assets and facilitate the departure of those wishing to leave the country;
  - (c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and
  - (d) Immediately lift restrictions on all forms of media;
3. *Requests* all Member States, to the extent possible, to cooperate in the evacuation of those foreign nationals wishing to leave the country;

*ICC referral*

4. *Decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;
5. *Decides* that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;
6. *Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the

Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

7. *Invites* the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

8. *Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

*Arms embargo*

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

(a) Supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training, as approved in advance by the Committee established pursuant to paragraph 24 below;

(b) Protective clothing, including flak jackets and military helmets, temporarily exported to the Libyan Arab Jamahiriya by United Nations personnel, representatives of the media and humanitarian and development works and associated personnel, for their personal use only; or

(c) Other sales or supply of arms and related materiel, or provision of assistance or personnel, as approved in advance by the Committee;

10. *Decides* that the Libyan Arab Jamahiriya shall cease the export of all arms and related materiel and that all Member States shall prohibit the procurement of such items from the Libyan Arab Jamahiriya by their nationals, or using their flagged vessels or aircraft, and whether or not originating in the territory of the Libyan Arab Jamahiriya;

11. *Calls upon* all States, in particular States neighbouring the Libyan Arab Jamahiriya, to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from the Libyan Arab Jamahiriya, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraphs 9 or 10 of this resolution for the purpose of ensuring strict implementation of those provisions;

12. *Decides* to authorize all Member States to, and that all Member States shall, upon discovery of items prohibited by paragraph 9 or 10 of this resolution,

seize and dispose (such as through destruction, rendering inoperable, storage or transferring to a State other than the originating or destination States for disposal) items the supply, sale, transfer or export of which is prohibited by paragraph 9 or 10 of this resolution and decides further that all Member States shall cooperate in such efforts;

13. *Requires* any Member State when it undertakes an inspection pursuant to paragraph 11 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspections, the results of such inspections, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

14. *Encourages* Member States to take steps to strongly discourage their nationals from travelling to the Libyan Arab Jamahiriya to participate in activities on behalf of the Libyan authorities that could reasonably contribute to the violation of human rights;

*Travel ban*

15. *Decides* that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I of this resolution or designated by the Committee established pursuant to paragraph 24 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory;

16. *Decides* that the measures imposed by paragraph 15 above shall not apply:

(a) Where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation;

(b) Where entry or transit is necessary for the fulfilment of a judicial process;

(c) Where the Committee determines on a case-by-case basis that an exemption would further the objectives of peace and national reconciliation in the Libyan Arab Jamahiriya and stability in the region; or

(d) Where a State determines on a case-by-case basis that such entry or transit is required to advance peace and stability in the Libyan Arab Jamahiriya and the States subsequently notifies the Committee within forty-eight hours after making such a determination;

*Asset freeze*

17. *Decides* that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in Annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all

Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee;

18. *Expresses* its intention to ensure that assets frozen pursuant to paragraph 17 shall at a later stage be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

19. *Decides* that the measures imposed by paragraph 17 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) To be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services in accordance with national laws, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) To be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee; or

(c) To be the subject of a judicial, administrative or arbitral lien or judgment, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgment provided that the lien or judgment was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraph 17 above, and has been notified by the relevant State or Member States to the Committee;

20. *Decides* that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 17 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

21. *Decides* that the measures in paragraph 17 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 17 above, and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, 10 working days prior to such authorization;

*Designation criteria*

22. *Decides* that the measures contained in paragraphs 15 and 17 shall apply to the individuals and entities designated by the Committee, pursuant to paragraph 24 (b) and (c), respectively;

(a) Involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in the Libyan Arab Jamahiriya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law, including aerial bombardments, on civilian populations and facilities; or

(b) Acting for or on behalf of or at the direction of individuals or entities identified in subparagraph (a).

23. *Strongly encourages* Member States to submit to the Committee names of individuals who meet the criteria set out in paragraph 22 above;

*New Sanctions Committee*

24. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council (herein "the Committee"), to undertake the following tasks:

(a) To monitor implementation of the measures imposed in paragraphs 9, 10, 15, and 17;

(b) To designate those individuals subject to the measures imposed by paragraphs 15 and to consider requests for exemptions in accordance with paragraph 16 above;

(c) To designate those individuals subject to the measures imposed by paragraph 17 above and to consider requests for exemptions in accordance with paragraphs 19 and 20 above;

(d) To establish such guidelines as may be necessary to facilitate the implementation of the measures imposed above;

(e) To report within thirty days to the Security Council on its work for the first report and thereafter to report as deemed necessary by the Committee;

(f) To encourage a dialogue between the Committee and interested Member States, in particular those in the region, including by inviting representatives of such States to meet with the Committee to discuss implementation of the measures;

(g) To seek from all States whatever information it may consider useful regarding the actions taken by them to implement effectively the measures imposed above;

(h) To examine and take appropriate action on information regarding alleged violations or non-compliance with the measures contained in this resolution;

25. *Calls upon* all Member States to report to the Committee within 120 days of the adoption of this resolution on the steps they have taken with a view to implementing effectively paragraphs 9, 10, 15 and 17 above;

# ANNEX V

United Nations

S/RES/1973 (2011)



**Security Council**

Distr.: General  
17 March 2011

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## **Resolution 1973 (2011)**

**Adopted by the Security Council at its 6498th meeting, on  
17 March 2011**

*The Security Council,*

*Recalling* its resolution 1970 (2011) of 26 February 2011,

*Deploring* the failure of the Libyan authorities to comply with resolution 1970 (2011),

*Expressing* grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties,

*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,

*Condemning* the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions,

*Further condemning* acts of violence and intimidation committed by the Libyan authorities against journalists, media professionals and associated personnel and *urging* these authorities to comply with their obligations under international humanitarian law as outlined in resolution 1738 (2006),

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

*Recalling* paragraph 26 of resolution 1970 (2011) in which the Council expressed its readiness to consider taking additional appropriate measures, as necessary, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya,

*Expressing its determination* to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel,

*Recalling* the condemnation by the League of Arab States, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that have been and are being committed in the Libyan Arab Jamahiriya,

11-26839 (E)



Please recycle The recycling symbol, a triangle of arrows forming a circle.

*Taking note* of the final communiqué of the Organisation of the Islamic Conference of 8 March 2011, and the communiqué of the Peace and Security Council of the African Union of 10 March 2011 which established an ad hoc High Level Committee on Libya,

*Taking note also* of the decision of the Council of the League of Arab States of 12 March 2011 to call for the imposition of a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya,

*Taking note further* of the Secretary-General's call on 16 March 2011 for an immediate cease-fire,

*Recalling* its decision to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court, and *stressing* that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account,

*Reiterating its concern* at the plight of refugees and foreign workers forced to flee the violence in the Libyan Arab Jamahiriya, *welcoming* the response of neighbouring States, in particular Tunisia and Egypt, to address the needs of those refugees and foreign workers, and *calling on* the international community to support those efforts,

*Deploring* the continuing use of mercenaries by the Libyan authorities,

*Considering* that the establishment of a ban on all flights in the airspace of the Libyan Arab Jamahiriya constitutes an important element for the protection of civilians as well as the safety of the delivery of humanitarian assistance and a decisive step for the cessation of hostilities in Libya,

*Expressing concern* also for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

*Welcoming* the appointment by the Secretary General of his Special Envoy to Libya, Mr. Abdel-Elah Mohamed Al-Khatib and supporting his efforts to find a sustainable and peaceful solution to the crisis in the Libyan Arab Jamahiriya,

*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya,

*Determining* that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security,

*Acting under* Chapter VII of the Charter of the United Nations,

1. *Demands* the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians;

2. *Stresses* the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people and *notes* the decisions of the Secretary-General to send his Special Envoy to Libya and of the Peace and Security Council of the African Union to send its ad hoc High Level Committee to Libya with the aim of facilitating dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution;



3. *Demands* that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance;

#### **Protection of civilians**

4. *Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council;

5. *Recognizes* the important role of the League of Arab States in matters relating to the maintenance of international peace and security in the region, and bearing in mind Chapter VIII of the Charter of the United Nations, *requests* the Member States of the League of Arab States to cooperate with other Member States in the implementation of paragraph 4;

#### **No Fly Zone**

6. *Decides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians;

7. *Decides further* that the ban imposed by paragraph 6 shall not apply to flights whose sole purpose is humanitarian, such as delivering or facilitating the delivery of assistance, including medical supplies, food, humanitarian workers and related assistance, or evacuating foreign nationals from the Libyan Arab Jamahiriya, nor shall it apply to flights authorised by paragraphs 4 or 8, nor other flights which are deemed necessary by States acting under the authorisation conferred in paragraph 8 to be for the benefit of the Libyan people, and that these flights shall be coordinated with any mechanism established under paragraph 8;

8. *Authorizes* Member States that have notified the Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6 above, as necessary, and *requests* the States concerned in cooperation with the League of Arab States to coordinate closely with the Secretary General on the measures they are taking to implement this ban, including by establishing an appropriate mechanism for implementing the provisions of paragraphs 6 and 7 above,

9. *Calls upon* all Member States, acting nationally or through regional organizations or arrangements, to provide assistance, including any necessary over-flight approvals, for the purposes of implementing paragraphs 4, 6, 7 and 8 above;

10. *Requests* the Member States concerned to coordinate closely with each other and the Secretary-General on the measures they are taking to implement

paragraphs 4, 6, 7 and 8 above, including practical measures for the monitoring and approval of authorised humanitarian or evacuation flights;

11. *Decides* that the Member States concerned shall inform the Secretary-General and the Secretary-General of the League of Arab States immediately of measures taken in exercise of the authority conferred by paragraph 8 above, including to supply a concept of operations;

12. *Requests* the Secretary-General to inform the Council immediately of any actions taken by the Member States concerned in exercise of the authority conferred by paragraph 8 above and to report to the Council within 7 days and every month thereafter on the implementation of this resolution, including information on any violations of the flight ban imposed by paragraph 6 above;

#### **Enforcement of the arms embargo**

13. *Decides that* paragraph 11 of resolution 1970 (2011) shall be replaced by the following paragraph : "Calls upon all Member States, in particular States of the region, acting nationally or through regional organisations or arrangements, in order to ensure strict implementation of the arms embargo established by paragraphs 9 and 10 of resolution 1970 (2011), to inspect in their territory, including seaports and airports, and on the high seas, vessels and aircraft bound to or from the Libyan Arab Jamahiriya, if the State concerned has information that provides reasonable grounds to believe that the cargo contains items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, *calls upon* all flag States of such vessels and aircraft to cooperate with such inspections and authorises Member States to use all measures commensurate to the specific circumstances to carry out such inspections";

14. *Requests* Member States which are taking action under paragraph 13 above on the high seas to coordinate closely with each other and the Secretary-General and *further requests* the States concerned to inform the Secretary-General and the Committee established pursuant to paragraph 24 of resolution 1970 (2011) ("the Committee") immediately of measures taken in the exercise of the authority conferred by paragraph 13 above;

15. *Requires* any Member State whether acting nationally or through regional organisations or arrangements, when it undertakes an inspection pursuant to paragraph 13 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspection, the results of such inspection, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

16. *Deplores* the continuing flows of mercenaries into the Libyan Arab Jamahiriya and *calls upon* all Member States to comply strictly with their obligations under paragraph 9 of resolution 1970 (2011) to prevent the provision of armed mercenary personnel to the Libyan Arab Jamahiriya;

**Ban on flights**

17. *Decides* that all States shall deny permission to any aircraft registered in the Libyan Arab Jamahiriya or owned or operated by Libyan nationals or companies to take off from, land in or overfly their territory unless the particular flight has been approved in advance by the Committee, or in the case of an emergency landing;

18. *Decides that* all States shall deny permission to any aircraft to take off from, land in or overfly their territory, if they have information that provides reasonable grounds to believe that the aircraft contains items the supply, sale, transfer, or export of which is prohibited by paragraphs 9 and 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, except in the case of an emergency landing;

**Asset freeze**

19. *Decides* that the asset freeze imposed by paragraph 17, 19, 20 and 21 of resolution 1970 (2011) shall apply to all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the Libyan authorities, as designated by the Committee, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as designated by the Committee, and *decides further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the Libyan authorities, as designated by the Committee, or individuals or entities acting on their behalf or at their direction, or entities owned or controlled by them, as designated by the Committee, and directs the Committee to designate such Libyan authorities, individuals or entities within 30 days of the date of the adoption of this resolution and as appropriate thereafter;

20. *Affirms* its determination to ensure that assets frozen pursuant to paragraph 17 of resolution 1970 (2011) shall, at a later stage, as soon as possible be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

21. *Decides* that all States shall require their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction to exercise vigilance when doing business with entities incorporated in the Libyan Arab Jamahiriya or subject to its jurisdiction, and any individuals or entities acting on their behalf or at their direction, and entities owned or controlled by them, if the States have information that provides reasonable grounds to believe that such business could contribute to violence and use of force against civilians;

**Designations**

22. *Decides* that the individuals listed in Annex I shall be subject to the travel restrictions imposed in paragraphs 15 and 16 of resolution 1970 (2011), and *decides further* that the individuals and entities listed in Annex II shall be subject to the asset freeze imposed in paragraphs 17, 19, 20 and 21 of resolution 1970 (2011);

23. *Decides* that the measures specified in paragraphs 15, 16, 17, 19, 20 and 21 of resolution 1970 (2011) shall apply also to individuals and entities determined by the Council or the Committee to have violated the provisions of resolution 1970

(2011), particularly paragraphs 9 and 10 thereof, or to have assisted others in doing so;

**Panel of Experts**

24. *Requests* the Secretary-General to create for an initial period of one year, in consultation with the Committee, a group of up to eight experts ("Panel of Experts"), under the direction of the Committee to carry out the following tasks:

(a) Assist the Committee in carrying out its mandate as specified in paragraph 24 of resolution 1970 (2011) and this resolution;

(b) Gather, examine and analyse information from States, relevant United Nations bodies, regional organisations and other interested parties regarding the implementation of the measures decided in resolution 1970 (2011) and this resolution, in particular incidents of non-compliance;

(c) Make recommendations on actions the Council, or the Committee or State, may consider to improve implementation of the relevant measures;

(d) Provide to the Council an interim report on its work no later than 90 days after the Panel's appointment, and a final report to the Council no later than 30 days prior to the termination of its mandate with its findings and recommendations;

25. *Urges* all States, relevant United Nations bodies and other interested parties, to cooperate fully with the Committee and the Panel of Experts, in particular by supplying any information at their disposal on the implementation of the measures decided in resolution 1970 (2011) and this resolution, in particular incidents of non-compliance;

26. *Decides* that the mandate of the Committee as set out in paragraph 24 of resolution 1970 (2011) shall also apply to the measures decided in this resolution;

27. *Decides* that all States, including the Libyan Arab Jamahiriya, shall take the necessary measures to ensure that no claim shall lie at the instance of the Libyan authorities, or of any person or body in the Libyan Arab Jamahiriya, or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 1970 (2011), this resolution and related resolutions;

28. *Reaffirms* its intention to keep the actions of the Libyan authorities under continuous review and underlines its readiness to review at any time the measures imposed by this resolution and resolution 1970 (2011), including by strengthening, suspending or lifting those measures, as appropriate, based on compliance by the Libyan authorities with this resolution and resolution 1970 (2011).

29. *Decides* to remain actively seized of the matter.

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