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THE RESPONSIBILITY TO PROTECT:
RHETORIC AND REALITY IN THE INTERVENTION IN LIBYA

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In the framework of:

E.MA – European Master's Degree in
Human Rights and Democratisation

First Semester:

Venice, Monasterio di San Niccolò
EIUC – European Inter University-Centre
for Human Rights and Democratisation

Second Semester:

Sevilla, Universidad de Sevilla

Academic Year:

2010/2011

ABSTRACT

This thesis examines the normative development of the principle of Responsibility to Protect (R2P) from its initial conception, formulated by the International Commission on Intervention and State Sovereignty, to its final endorsement in the 2005 World Summit Outcome Document. The evolution of R2P has precipitated the debate on the responsibilities of both individual states and the international community to protect populations against genocide, war crimes, crimes against humanity and ethnic cleansing. The notion of R2P has been accepted as an umbrella term that is not limited to military intervention alone but includes a responsibility to prevent, react and rebuild.

The military intervention in Libya has shown that the rhetoric of R2P when put into practice, has had to face the controversies surrounding the reality of the use of force as a legal and legitimate instrument of protection. The implementation of the R2P principle sought to avoid the challenges posed by the problematic legacy of humanitarian interventionism. However, these issues persist and must be constantly debated if the commitment to strengthen the legitimacy and the authority of the international community to end atrocity crimes is to be translated into effective protection of civilians.

LIST OF ABBREVIATIONS

AU	African Union
CAAT	Campaign Against Arms Trade
EU	European Union
GAOR	General Assembly Official Records
GCR2P	Global Centre for the Responsibility to Protect
HLP	High-Level Panel
HRC	Human Rights Council
ICC	International Criminal Court
ICG	International Crisis Group
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICRtoP	International Coalition for the Responsibility to Protect
IHL	International Humanitarian Law
LAS	League of Arab States
MS	Member States
NATO	North Atlantic Treaty Organisation
NGOs	Non Governmental Organisations
OIC	Organisation of the Islamic Cooperation
R2P	Responsibility to Protect
TNC	Transitional National Council
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
US	United States
WMD	Weapons of Mass Destruction

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1. INTRODUCTION

Damned if you do and damned if you don't. This is the conundrum that has defined all humanitarian interventions that have or have not happened in the past two decades.

As Hugo Grotius argued in 1625 in *'De Jure Belli ac Pacis'*, "though it is a rule established by the laws of nature and of social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomedes provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations."¹

The codification within the United Nations (UN) Charter in 1945 of the principle of sovereign equality² and the right of non-interference³ in a state's internal affairs, congealed into bedrocks of international law, has been met with an overgrowing sense that the international community cannot stand by and ignore the mass atrocities⁴ unfolding on their TVs and in the newspaper headlines in the name of these principles.

States cannot avail themselves of the protective shield of sovereignty to freely and with impunity commit mass human rights violations against their own people they should be protecting. With the development of international and human rights law a series of limits have been applied to the exercise of the power of the state on its citizens. The state is not only accountable internally but also to an international society that accepts the regulation of the conduct of a state when it is directly and negatively affecting the human rights and fundamental freedoms of its people.

In the emergence of a new post cold-war order in which the rule of law, justice, human rights and democracy started shaping the obligations not only of individuals, but

¹ Grotius, 1625, book II, ch.25, para VIII.

² United Nations, *Charter of the United Nations*, adopted at the United Nations Conference on International Organisations, in San Francisco, USA on 26 June 1945, UNTS XVI, entered into force 24 October 1945 (hereinafter 'UN Charter'), art. 2(1).

³ *Ibid.*, art. 2(7).

⁴ This term will be used, interchangeably with 'atrocities crimes', throughout the thesis in specific reference to crimes of genocide, crimes against humanity, war crimes and ethnic cleansing, to which the application of the subject of this thesis is limited.

also states, the belief that sovereignty could not trump responsibility was also developed in terms of the responsibility of the larger community of nations to respond to the needs of people at risk.

This idea was popularised by Bernard Kouchner and Mario Bettati, who coined the notion of a '*droit d'ingérence*'⁵ to develop the need for a duty to assist people in danger that would override the traditional legal principles of state sovereignty and non-intervention. Although the UN, in the 1970 Declaration of Friendly Relations, reiterated that "the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security"⁶, by the 1990s the principle of non-intervention was under great strain in light of situations in which crimes committed were seen themselves as threats to international peace and security and to the conscience of the world, for standing by would mean to be indirectly complicit.

This happened during the Rwandan Genocide, which shocked humanity: the tragedy of the event was made even more appalling by the fact that no one did anything to stop it, not the UN, not the United States (US), not any 'coalition of the willing'. Without analysing the reasons surrounding the failure to respond to the mass murder of hundreds of thousands of people when there was the presence and the capacity to do so, this was unarguably a case that nobody was willing to let happen again. Yet, in 1995 it did in the UN-protected safe haven of Srebrenica, where more than eight thousand Bosnian Muslims were slaughtered. This, once more, highlighted the serious discrepancy between what the UN preached and what it did. Although great enthusiasm had developed around the efforts to internationalise institutions of peace and justice, realisation was setting in that, while norms could be advanced, human behaviour was not following the same exponential growth path.

Fast forward to the intervention in Kosovo in 1999 and the coalition of the willing was back on track, but the UN was lagging behind. Although some arguably assert that this intervention was legitimate, it is considered illegal, as NATO's air

⁵ Bettati, 1996.

⁶ UN General Assembly Resolution 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', UN Doc. A/RES/25/2625, 24 October 1970.

bombing campaign was not authorised by the UN.⁷ This fact raised the fundamental question of where authority for ‘international executive action’⁸ lay and whether an intervention could ever be considered legitimate if it lacked the UN’s legitimate authority. The only explicit legal authority for justifying an exception, other than self-defence⁹, to the rule of non-intervention, exists under Chapter VII of the UN Charter, which fully empowers the SC to take action, including the use of force, in situations in which it deems it “necessary to maintain or restore international peace and security.”¹⁰

But could the UN and its SC be considered the only legitimate authority, even if so inherently flawed in providing effective protection in situations of human rights violations that are so serious that they constitute a threat to peace and security world wide? If the SC were dead-locked in authorising an intervention because of its constitution and subsequent irreconcilable internal power-politics dynamics, could other authorities claim the right to intervene?

As the Independent International Commission on Kosovo report concluded, the intervention in Kosovo suggested the need “to close the gap between legality and legitimacy” and that the UN adopt “a principled framework for humanitarian intervention, which could be used to guide future responses to imminent humanitarian catastrophes.”¹¹

The intervention in Kosovo and the side-lining of UN authorisation also highlighted the difficulty in distinguishing between moral claims for intervention, mainly considered legitimate if coming from the UN, and possible geo-political interests that could so swiftly and suspiciously build a consensus to take collective action, backed by a US-lead coalition of the willing. The latter would allow for claims of neo-colonialism and western imperialism to take the hold of the debate of humanitarian interventionism, losing sight on the importance of building on the consensus to end mass atrocities.

⁷ The Independent International Commission on Kosovo, *Kosovo Report, Conflict, International Response, Lessons Learned* (hereinafter ‘the Kosovo report’), 2000: “the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”

⁸ Orford, 2011, p.10.

⁹ UN Charter, art.51.

¹⁰ *Ibid.* art.39.

¹¹ The Kosovo report, 2000.

It is in light of these needs that the International Commission on Intervention and State Sovereignty (ICISS), sponsored by the Canadian Government, set out to “invent a new way of talking about humanitarian intervention”¹² by constructing the principle of the ‘Responsibility to Protect’ (R2P). The propelling force was the desire to abandon the argument of the right to intervene and with it all the controversial issues that surrounded intervention carried out in the name of this duty, and rather emphasise the responsibility for such intervention, by shifting the focus from the interests of the state to the ones of individuals in need of protection.

Furthermore, R2P’s main contribution has been to shift the debate to a question not of if but how an intervention should take place, and not just involving military intervention but a “continuum of obligations,”¹³ building on the wide spectrum of existing UN mechanisms from conflict prevention to post-conflict state rebuilding, and enforcing them through the elaboration of a three-pillar strategy involving a responsibility to prevent, react and rebuild. This three-dimensional aspect was also reflected in terms of where the responsibility lay: first of all with the sovereign state, who maintains primary responsibility for the protection of its people, secondly with the international community to assist the state through capacity building mechanisms, and finally with the international community to take action to prevent and halt genocide, ethnic cleansing, crimes against humanity and war crimes, to which the application of R2P has been limited.

Although the development and evolution of the R2P doctrine has indeed been a “fascinating piece of intellectual history”¹⁴ on which burgeoning literature has developed, the implementation of this doctrine has not been as attractive, and the effort to strengthen the architecture of the international system and authority in taking action to prevent and end mass atrocities worldwide has suffered from a scant and often exploited use.

The timing of the publication of the ICISS report was not ideal. The attacks of 9/11, resulting in ‘war on terror’ and the alleged humanitarian reasons for the war in

¹² Evans, 2006, p.708. Gareth Evans was the co-chairman of the Commission and one of the key architects of the principle of R2P

¹³ Evans, 2006, p.709.

¹⁴ *Ibid.*, p.704.

Iraq “almost choked at birth what many were hoping was an emerging new norm justifying intervention on the basis of the principle of 'responsibility to protect.’”¹⁵

Nonetheless, the search for an international consensus to strengthen the UN as the legitimate authority of maintenance of world peace and security did not become irrelevant but was, rather, enhanced by past experiences. The legacy of the failed interventions of the 1990s and the war in Iraq reinforced the need to build a system of collective action, within the UN, to prevent and respond to conflicts involving gross violations of human rights.

With the beginning of popular uprisings in North Africa and the Middle East, which were met with brutal government crack-downs, the international community was suddenly spoilt for choice in its endeavour to put the doctrine of R2P into practice and protect populations that were being attacked by their own governments. This happened at a time when it had become “much harder to find someone who completely supports non-intervention.”¹⁶ Although great suspicion still exists in the face of military interventions, the normative development of R2P succeeded in shifting the focus onto the needs of populations at risk and in building the consensus that the question was no longer whether something had to be done but how.

The development of R2P had provided the necessary conceptual framework for action. It was now a question of mobilising the political will for it to be put into practice. The uprising in Libya and the violence with which it was met created what appeared to be a perfect testing ground for the implementation of R2P. The crisis in Libya escalated rapidly and the need for a prompt response by the international community was clear. It was agreed that action needed to be taken to prevent possible mass atrocities from being committed by the Libyan government. Exactly what had to be done in the existing circumstances was not as straight forward.

Although the doctrine of R2P went to great lengths in attempting to shift the focus to prevention, as the single most important aspect of the principle, in the face of impending mass atrocities in Libya, Pandora’s box of military intervention was opened again highlighting the failure of R2P to address the same problems with which humanitarian intervention was concerned. This thesis initially aimed to focus on the responsibility to prevent, but as the situation unravelled it was necessary to analyse the

¹⁵ Evans, 2004(a), p.63.

¹⁶ Pattison, 2011, p.2.

implications and consequences of the hard end of R2P. The UNSC's decision to authorise military intervention in Libya to protect the civilian population has again raised fundamental questions surrounding the authority, legality and legitimacy of the use of force as an instrument of protection.

The main aim of this thesis is to analyse the ongoing intervention in Libya in light of the R2P doctrine and the decision by the UNSC to refer to and implement, for the first time, the R2P principle through two historic resolutions that mark the authorisation of a military intervention against a standing government to protect its population.

This is a great challenge, not only because the situation is unfolding on a daily basis as the thesis is being written, and that substantial conclusions can only be drawn once the outcome is clear, but mainly because the issues that have surfaced with this intervention meet at the crossroads of international law, politics, ethics, international relations and human rights. No answers can be found in any single field. Hence, an attempt at a multi-disciplinary approach to the analysis of the issues involved in the implementation of R2P in the case of Libya. Although the debates on the implications of intervention will continue for a long time to come, lessons can begin to be drawn in terms of the possible use and abuse of R2P.

This thesis is structured by three main parts and a conclusion:

Chapter 2 outlines the elaboration of the principle of R2P starting from its conception defined by the ICISS in a comprehensive report that details the full range of mechanisms available to fulfil R2P: the responsibility to address root causes of conflicts, to react to conflicts in which populations are put at risk, through a tool-box of measures which also include, in extreme cases, the use of force, and to rebuild the country damaged by the conflict, especially after a military intervention has taken place. The normative development of R2P is further considered in light of how the UN has taken forward the principle, through the report of the High Level panel set up by the Secretary General (SG) to focus on the future of the UN and the report by the SG dealing with a wide variety of issues including R2P, and finally the endorsement of the principle in 2005 by the World Summit Outcome Document. A focus on the doctrinal changes that R2P has seen will be undertaken throughout the analysis of the development of this principle to conclude whether it can now be considered an

international norm that dictates when, how and by whom collective action must be taken to protect populations at risk.

Chapter 3 analyses the effort by the SG to operationalise R2P and implement it through existing UN mechanisms to be strengthened and better coordinated, particularly focusing on those dealing with early warning assessment capacities. This chapter will look at the debate surrounding the authority of the UN and more specifically of the SC's to sanction the use of force.

Chapter 4 attempts to apply the principle of R2P to the intervention in Libya and to discuss all the issues arising from the UN authorised military intervention. The first resolution passed in relation to the conflict in Libya will be analysed, considering whether all measures falling short of a military intervention were exhausted, in particular focusing on the referral of the case of the International Criminal Court (ICC) and the relationship between the ICC and R2P. Consideration will be given to the circumstances calling for stronger action and the debates that developed at the time of the international mobilisation to take further action to deal with the Libyan crisis. The second resolution authorising the use of force will be deconstructed, to analyse why it has been historic but problematic in its interpretation and application. Attention will be given to the role played by the African Union (AU) in the development of the concept of R2P and in its implementation, highlighting the precarious consensus materialising over what type of action should be taken to deal with situations like the one unravelling in Libya. Finally the discussion will turn to an overview of the different concerns arising from the intervention, which put into question the legitimacy of the use of force to prevent or halt the commission of crimes, and consequentially of the legality of the actions taken in the name of R2P. After this analysis the main problems with the development of R2P will become clearer as they have taken form through the implementation of R2P in the case of Libya.

The conclusion will then briefly provide an overview of what has been discussed and answer the research question, with a view to possible future developments of the principle of R2P.

2. A LONG WAY HOME, R2P AND ITS FOUNDING DOCUMENTS

2.1 The International Commission on Intervention and Sovereignty Report

The report by the International Commission on Intervention and State Sovereignty (ICISS) is by far the most comprehensive effort to outline the concept of R2P and its application. It focuses on the changing relationship between sovereignty and intervention in response to the challenges presented by the idea of the right to intervene which came to be seen as mainly a violation of sovereignty and a coercive interference with a state's internal affairs. What the report attempted to do, inspired by Francis Deng's work on conflict management in Africa during the 1990s,¹⁷ was underline sovereignty as a responsibility, and reassert the state's primary responsibility for the protection of its citizens.

In relation to the key principle of international law of non-intervention, the challenge the report addresses and attempts to answer was posed by Kofi Annan in his Millennium Report of 2000:

“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 affect every precept of our common humanity? We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.”¹⁸

However, Annan draws the conclusion that “the fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option

¹⁷ The re-characterisation of the idea of sovereignty as a responsibility was first conceptualised by Francis Deng, the current Special Adviser to the UNSG on the Prevention of Genocide and Mass Atrocities. In his book ‘Sovereignty as a Responsibility’ Deng argues that the state's obligation to preserve life-sustaining standards for its citizens is a “necessary condition of sovereignty”. See Deng, 1996, p. xviii.

¹⁸ ‘We the peoples. The role of the UN in the 21st Century’, Millennium Report of the Secretary General, UNGA Official Records (OR), 54th Session, Agenda Item 49(b), UN Doc. A/54/2000, 3 April 2000 (hereinafter ‘Millennium Report’), p.48.

that cannot be relinquished.”¹⁹ The report’s central idea is that sovereignty cannot be seen as control, born from the establishment of the Westphalian system, but must be grounded in a responsibility towards the citizens.²⁰

On reading the ICISS’s proposal for the re-characterisation of sovereignty, one might argue that the implication that “state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare”²¹ derives from a reconsideration of the concept of authority or rather, that this is not a new idea,²² but a reaffirmation of the basic and initial ground of all ‘social contract theories’, which were formulated two centuries ago.

Hobbes, Locke, Rousseau and Montesquieu all shared the belief that lawful authority was to be granted to the government of the king or of the state, or, in Rousseau’s theory, of the people. For a lawful authority to be able to maintain law and order, and protect the life, liberty and property of each individual, the people surrender their natural freedom, power and conscience, by which they abide in the original ‘state of nature’, to abide by the common laws and thus be granted protection against violence and war.

The idea of the social contract is thus that governments retain legitimacy only as long as they are providing protection; if they fail to do so they lose their legitimate authority. The novelty of the re-characterisation of sovereignty, within the principle of R2P, lies in the fact that governments are now not only responsible and accountable to their own people, but to the international community in its entirety, which will judge a state’s actions and failures to act in juxtaposition to its R2P.

Deng poses great reliance on the international community’s judgment because “although accountability...rests with the people of the country, when people are oppressed, their power to hold their governments accountable becomes very limited.”²³ The ICISS report asserts that if a state is either “unwilling or unable”²⁴ to fulfil its responsibility, or if it is itself committing crimes against its own people, it cannot avail itself of the sovereignty principle in order to halt an international intervention to protect

¹⁹ *Ibid.*

²⁰ The Responsibility to Protect’, International Commission on Intervention and State Sovereignty Report (hereinafter ‘ICISS report’), 2001(a), para 2.14.

²¹ *Ibid.*, para 2.15.

²² Luck, 2008(a).

²³ Deng, 1996, pp. xii-xiii.

²⁴ ICISS report, para 4.1.

a population at risk. The community of states is seen as the higher guarantor that individual states are ensuring peace, security and justice. If the state does not have the power, will or the capacity to do so, the international community will then hold a “residual responsibility”²⁵ to “support populations that are in jeopardy or under serious threat.”²⁶ But first and foremost, the international community is there to assist a state in maintaining peace and security; it will positively intervene to reinstate these only when the state is failing to protect its citizens or abusing their human rights. “On the international level, then, sovereignty becomes a pooled function, to be protected when exercised responsibly, and to be shared when help is needed.”²⁷

As decisions to intervene often have negative connotations of aggression and western imperialism, the ICISS report attempts to shift the focus from humanitarian intervention by changing the confrontational language of military intervention and the right to intervene in the hope of encouraging “people to look again, with fresh eyes, at the real issues involved in the sovereignty-intervention debate.”²⁸

The issue of the legality and the right of states to military intervene in another state, breaching the territorial integrity and sovereignty of a state protected within the UN Charter and international law, is replaced by a less “confrontational”²⁹ idea of a responsibility to protect in cases of massive violations of fundamental human rights.

In its Charter, the United Nations established a right to intervention in situations that constitute a threat to international peace and security.³⁰ Through the increasing development and emphasis on human rights, state sovereignty has been renegotiated in terms of a state’s compliance with its obligations under international human rights law and consequently there has been an increasing debate over possible responses by the international community to enforce human rights protection. The UN through evolving practice has interpreted threats to international peace and security to include internal situations of mass human rights violations against civilian populations, which have allowed interventions for humanitarian purposes, as in the case of Somalia.³¹

²⁵ *Ibid.*, para 2.31.

²⁶ *Ibid.*

²⁷ Deng, 1996, p. xviii.

²⁸ ICISS report, para 1.41.

²⁹ Stahn, 2007, p.102.

³⁰ UN Charter, art.39.

³¹ UNSC Resolution 733, UN Doc. S/RES/733, 23 January 1992.

However, this has been in face of strong arguments defending sovereignty and the right of non-interference in states' internal affairs enshrined in the UN Charter,³² continuously made throughout the 1990s. The conceptualisation of R2P by the ICISS has highlighted that this debate between sovereignty and intervention does not just affect the rights of the state, but also fundamentally affects those of individual human beings.³³

The main flaw of the humanitarian intervention notion is in fact that it places too much focus on the states, the sovereignty of the nation threatened by intervention and the interests of the those intervening. The development of R2P shifts the focus on the subjects of such intervention, the population at risk and its needs.³⁴ In contrast with the concept of humanitarian intervention, which loads the dice in favour of a military intervention “before the argument has even begun,”³⁵ the substance of R2P is the “provision of life-supporting protection and assistance to populations at risk.”³⁶ This means that responsibility does not begin and end with a military intervention, which neglects other vital elements of an intervention such as the prevention and rebuilding of countries scorched by conflict. Military intervention should only apply to “extreme cases.”³⁷

The ICISS developed the responsibility to react in a broad way, attempting to deal with the controversial issues surrounding the authority, legality, legitimacy, and effectiveness of the use of force but also trying to construct military intervention as only a small aspect of a much wider concept. The continuing development of R2P and its endorsement by the UN will clearly highlight that the difficulty in achieving consensus around the controversial issues of coercive interventions and the consequent increasing shift of focus onto normatively elaborating the preventive and rebuilding aspects of R2P, will leave the idea of military intervention as still perceived as “more threatening than beneficial,”³⁸ supporting the argument of those who see the principle as “old wine in a new bottle.”³⁹

³² United Nations, *Charter of the United Nations*, 1 UNTS XVI, 1945 (hereinafter ‘UN Charter’), art. 2.7.

³³ ICISS report, para 2.22.

³⁴ *Ibid.*, para 2.28.

³⁵ Thakur, 2006, p.251.

³⁶ ICISS report, para 2.32.

³⁷ *Ibid.*

³⁸ Focarelli, 2008, p.212.

³⁹ *See e.g.*, Marks and Cooper, 2010.

Nonetheless, the achievement of the ICISS in developing the principle of R2P as to include a ‘continuum of obligations’⁴⁰, rather than a single responsibility to military intervene, cannot be underestimated.

Three pillars of action are outlined that individual states and the international community should be guided by in protecting people, confirming that measures exist not just for military intervention when crimes are already occurring, but for preventing them from occurring in the first place and helping people and a state recover from them if they have already occurred. Clearly the effort to end human suffering must be part of a continuing process made up by the three pillars of R2P: prevent, react, rebuild.

2.1.1 Responsibility to Prevent

As a starting point, the ICISS describes the responsibility to prevent as “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.”⁴¹ This, however, is not reflected in the substance of the report, which only dedicates a limited part to the implementation of prevention. As Bellamy interestingly points out, only nine pages of the 85 page-long report are dedicated to the responsibility to prevent.⁴² This in a way is understandable in light of the necessary focus on the very controversial issue of intervention. Yet if the aim was to shift the focus from intervention to prevention, it is hard to see how that has been achieved.

The ICISS report argues that the development of the preventive approach is to be based on a concerted effort to help local efforts address the root causes of a possible conflict⁴³ through early warnings analysis, preventive policy measures and the indispensable political will.⁴⁴ Little is said about what should be done if the latter is lacking; the genocide in Rwanda, the massacre in Bosnia and the crisis in Darfur had all been predicted, but lacked the necessary consensus for collective action.

The ICISS describes a very broad range of measures such as a more accurate early warning analysis of root causes, the strengthening of the SC’s political, economic,

⁴⁰ Evans, 2006, p.709.

⁴¹ ICISS report, p. xi.

⁴² Bellamy, 2009, p.64.

⁴³ ICISS report, para 3.3.

⁴⁴ *Ibid.*, para 3.9.

legal and military capabilities and the role of the SG's preventive diplomacy to further help in implementing prevention efforts.⁴⁵

The problems of implementation of the responsibility to prevent are identified as ones relating to the generally negative receiver's attitude to internationally endorsed measures⁴⁶, showing that issues with interference in internal affairs arise in the very early stages of R2P. To prevent this and the fear that the international community might overstep the bounds of a country's political leaders and end up supporting the other side⁴⁷, the ICISS recommends that "those wanting to help completely recognise and respect the sovereignty and territorial integrity of the countries concerned, and confine their efforts to finding solutions within those parameters."⁴⁸ Clearly, development, good governance, human rights, rule of law, cannot be imposed, but must come from within and supported by the international community. The efforts must be centralised within the UN and funding must be made available for development.⁴⁹

Overall, the ICISS contribution in clarifying aspects of preventive measures helps to stress the importance of the responsibility to prevent but such a "broad and diluted"⁵⁰ range of preventive tools create an uncertainty as to which ones exactly can be used to prevent the four crimes covered by R2P, genocide, war crimes, crimes against humanity and ethnic cleansing, risking the failure in their application and operationalisation. It is important to point out, at this stage, that the ICISS report makes no mention whatsoever of arms dealing and trading, a factor that increases and enables atrocity crimes. This could be seen as an example of contradictions within the international community; it acknowledges its responsibility to resolve conflict while contributing to it through arms deals.

⁴⁵ *Ibid.*, para 3.18-3.29.

⁴⁶ *Ibid.*, para 3.34.

⁴⁷ *Ibid.*, para 3.35.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* para 3.32.

⁵⁰ Bellamy, 2009, p.131.

2.1.2 Responsibility to react

Although there is no clear assessment procedure to determine when they can no longer be pursued, when preventive measures are exhausted and fail and the state that holds primary responsibility is “unable or unwilling to redress the situation”⁵¹, it falls on the international community to take coercive action. This may include “political, economic or judicial measures and in extreme cases, but only extreme cases, they may also include military action.”⁵²

After describing all possible coercive measures that fall short of military intervention,⁵³ the ICISS assumes the difficult but noble task of establishing what the extreme cases and exceptional circumstances are that require military action. To do so it first establishes the “Just Cause Threshold” which requires the occurrence of actual or apprehended “large scale loss of life”, whether by genocide or not, and “large scale ‘ethnic cleansing’”⁵⁴. However, there is no specification or quantification for when these thresholds should be introduced. What it comes down to is the single obstacle of “persuading states, particularly powerful states, to accept risk in order to save people in distant lands, when there are but few strategic interests at stake.”⁵⁵ One could argue that too stringent criteria would have further compromised the acceptance of such responsibility. Much room for discretion was clearly necessary in order for the principle to be taken on board and for criteria to be considered, but as much as the ICISS initiated the effort of outlining necessary criteria for a coherent and unselective judgement of what situations require a military action, the UN, as will be later seen, will then discard such restriction on its discretion, further allowing for its credibility and legitimacy to be questioned. The ICISS outlines a series of “precautionary principles” that need to be met for the intervention to be considered legitimate both in principle and action⁵⁶:

1) Right intention: “The primary purpose of the intervention must be to halt or avert human suffering.”⁵⁷ It is interesting that the ICISS does not exclude the existence of other purposes than the one of protection, which must be the primary one, but not necessarily the sole one. The question of strategic interests at stake does not appear to

⁵¹ ICISS report, para 4.1.

⁵² *Ibid.*

⁵³ *Ibid.*, para 4.3-4.9.

⁵⁴ *Ibid.*, p. xii.

⁵⁵ Bellamy, 2009, p.58.

⁵⁶ ICISS report, para 4.3.

⁵⁷ *Ibid.*, p.xii.

be considered as one that precludes or undermines the legitimacy of the intervention. On the contrary in the ICISS report's supplement, it is stated that "there should be a predominantly humanitarian motive, while accepting that considerations of national interest will inevitably intrude. In fact, if risks and costs of intervention are high and interests are not involved, it is unlikely that states will enter the fray or stay the course. Those who advocate action to protect human rights must inevitably come to grips with the nature of political self-interest to achieve good ends."⁵⁸

2) Last resort: "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."⁵⁹ "The responsibility to react can only be justified when the responsibility to prevent has been fully discharged."⁶⁰

3) Proportional means: "The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question"⁶¹, and at all times the intervention should abide by international humanitarian law. Higher standards are suggested, but not considered.⁶²

4) 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."⁶³ In relation to this point, when considering the possibility of an intervention against any major power, and the obvious consequences that this would entail, the Commission states clearly its position, which underlines the entire report, put forward to answer many of the double-standards issues that arise: "the reality that interventions may not be able to be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in any case."⁶⁴ However, it is then a clear concern that the failure to protect in all those cases that call for action will lead to the loss of credibility of the United Nations, as the ICISS states in relation to the next principle.⁶⁵

⁵⁸ 'The Responsibility to Protect: Research, Bibliography, Background', ICISS, (hereinafter ICISS RBB'), 2001(b), p.157.

⁵⁹ ICISS report, 2001(a), p. xii.

⁶⁰ *Ibid.*, para 4.37.

⁶¹ *Ibid.*, para 4.39.

⁶² *Ibid.*, para 4.40.

⁶³ *Ibid.*, p. xii.

⁶⁴ *Ibid.*, para 4.42.

⁶⁵ *Ibid.*, p. xiii.

5) Right Authority: “There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has. Security Council authorization should in all cases be sought prior to any military intervention action being carried out.”⁶⁶

The question of right authority is key to the implementation of the R2P. As Pattison argues, “we first need to know who are the most suitable agents to undertake intervention before we can identify how to increase their willingness to act.”⁶⁷ The ICISS, although highlighting its well-known weaknesses, stresses the importance of the role and responsibility of the Security Council. In light of the explicit prohibition existing in the UN Charter to military interventions in a sovereign state and because of the lack of any “humanitarian exception”⁶⁸ to such prohibition, it is for the SC Member States (MS) to exercise their legal authority and discretion in favour of protection purposes, especially in the use of the veto power. The ICISS argues that it “is unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern,”⁶⁹ and thus invites SC MS, when their interests are not claimed to be involved, to refrain from using their veto power, and if necessary constructively abstain.⁷⁰

The issue here is whether Security Council authorisation is the only one permitted in the ICISS’s framing of R2P. If the SC fails to discharge its responsibility in conscience-shocking situations, it would be unrealistic to expect that other means and forms of action be ruled out.⁷¹ Taking into account past experiences when the SC has failed to act, the ICISS does not discount alternative means of discharging the responsibility to protect.⁷²

⁶⁶ *Ibid.* p. xii.

⁶⁷ Pattison, 2010, p.9.

⁶⁸ *Ibid.*, para 6.13.

⁶⁹ *Ibid.*, para 6.20.

⁷⁰ *Ibid.*, para 6.21.

⁷¹ *Ibid.*, para 6.39.

⁷² *Ibid.* para 6.28.

Alternative sources of authorisation for military interventions include the General Assembly (GA) under the “Uniting for Peace” procedure⁷³. Although the GA decisions are not binding, if action is supported by an “overwhelming”⁷⁴ majority of MS, this would provide the intervention with a high degree of legitimacy and “encourage the Security Council to rethink its position.”⁷⁵

Furthermore, regional organisations are considered to be a further possibility for collective action,⁷⁶ although better if within their defining boundaries. As the ICISS underlines “it has long been acknowledged that neighbouring states acting within the framework of regional or sub-regional organizations are often (but not always) better placed to act than the UN, and Article 52 of the Charter has been interpreted as giving them considerable flexibility in this respect.”⁷⁷

However the problem of the unwillingness of regional actors, such as the African Union (AU) to interfere in state’s internal affairs is known practice, as in the case of Sudan. This has often been put down to the fact that MS of such organisation would not want to set a precedent for intervention, by which “today’s intervener could become the object of tomorrow’s intervention.”⁷⁸ On the flip side, however, interventions undertaken by regional organisations in states not members of such organisation have been incredibly controversial, as the North Atlantic Treaty Organisation (NATO) action in Kosovo demonstrated. These situations are thus better avoided. In all cases, the question of the right authority is in fact key to whether R2P can be enforced legitimately. Undeniably, the authorisation of the SC has proven strictly necessary to make an intervention legal.

That the UN risks losing its credibility if it does not act with coherence and at all times when situations require an intervention is clear, but at the same time one should

⁷³ UNGA Resolution 377 (V): ‘Uniting for Peace’, UN Doc. A/RES/377(V). 3 November 1950, (hereinafter ‘Uniting for Peace Resolution’) states that “if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.”

⁷⁴ ICISS report, para 6.30.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, para 6.31.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, para 6.33.

accept the fact that the practicality of the UN discharging all such obligations is difficult in many ways, especially due to the constraints posed by the dynamics of politics and power within the organisation. It is thus important that the option remains open for others to exercise the right authority, and that they are seen as legitimate, not only by the people whom they aim to protect but also by the UN, which should support such efforts if it is not able to exercise that authority itself.

The ICISS then calls for operational principles, which among others include the objective of protecting populations and not that of defeating a state,⁷⁹ thus excluding regime change. However, the ICISS qualifies this statement by then arguing that “disabling that regime’s capacity to harm its own people may be essential to discharging the mandate of protection – and what is necessary to achieve that disabling will vary from case to case.”⁸⁰ As Chandler observes, “under the rubric of ‘averting human suffering’ it would appear that few actions can be excluded.”⁸¹ The final operational principle is listed as the exercise of the “maximum possible coordination with humanitarian organisations.”⁸²

2.1.3 Responsibility to Rebuild

This last operational principle is of extreme importance in light of the third part of R2P, which consists in following through after military action has taken place and demonstrating a “genuine commitment to build a durable peace, and promoting good governance and sustainable development,”⁸³ so that the international community’s presence is no longer required. To achieve this, steps must be taken to establish local political processes and judicial systems, and the three fundamental elements of security, justice and economic development.⁸⁴ As the ICISS points out “intervening to protect human beings must not be tainted by any suspicion that it is a form of neo-colonial imperialism.”⁸⁵ Responsibility must be handed back over to the people of the state, avoiding any possibility of a fall back into conflict and hostility. Exactly how this is to be done is not clearly specified by the ICISS report but best practices for post-conflict

⁷⁹ ICISS report, p. xiii, (4)C.

⁸⁰ *Ibid.*, para 4.33.

⁸¹ Chandler, 2004, p.70.

⁸² ICISS report, p. xiii, (4)F.

⁸³ *Ibid.*, para 5.1.

⁸⁴ *Ibid.*, para 5.7.

⁸⁵ *Ibid.*, para 5.31.

and peace operations have long been discussed, and perhaps because of this, the ICISS did not feel compelled to offer very detailed practical guidance.

The ICISS's initial purpose is to set a new approach to intervention with "consistent, credible and enforceable standards to guide state and intergovernmental practice"⁸⁶ with the focus on the establishment of clear rules and criteria for deciding on the legitimacy of military intervention. However, it also appears that in order to achieve great consensus, many concepts were left vague and undefined, possibly in order to rewrite humanitarian intervention in a more acceptable manner. Criticisms have been advanced to suggest that the ICISS report outlined the R2P concept in too vague terms and with highly subjective judgments⁸⁷ that have left it wide open to interpretation and instrumentalisation, although the report was very well received and praised.

The problem of the lack of definition of the just cause thresholds, as mentioned above, allows for a lack of accountability in relation to the international community and its decision and discretion in deciding whether or not to take action. If it does, there is no criterion or threshold that guarantees it is acting morally.

The problem of abuse of power is manifest: "the assumption that major powers, tasked with intervening as 'good international citizens', will act with higher moral legitimacy than powers which lack military and economic resources, relies on morality directly correlating with power, that is, 'right equalling might'. The Commission's assumption that 'right equals might' is little different from the Realpolitik doctrine that 'might equals right'."⁸⁸ Although the ICISS attempted to change the language of humanitarian intervention and the negative connotations attached to it, clearly the substance of the issues endures.

It remains to be seen how the concept of R2P has been stretched or narrowed so far, through its further development and consideration in other reports, and if such ambitious goals are just elegant rhetoric or have been put into practice. What rings true about the principle of R2P is that "one of (...) [its] most striking aspects (...) appears to be the gap between the promise and the reality."⁸⁹

⁸⁶ *Ibid.*, para 2.2-2.3.

⁸⁷ Chandler, 2004, p. 69.

⁸⁸ *Ibid.*, p.76.

⁸⁹ Chandler, 2010(a), p.1.

2.2 The High Level Panel Report. “A More Secure World: Our Shared Responsibility”

The difficult question of right authority was next taken on by the UN High Level Panel on Threats, Challenges and Change.⁹⁰ In part three of the Report, dedicated to collective security and the use of force, the Panel analyses Chapter VII of the UN Charter, the obligations outlined within it and the question of legitimacy.⁹¹

In its first assertion on the issue of intervention, the HLP points to the lack of clarity within the Charter in terms of what can be done in response to those situations that appear to be posing a threat to the internal population of a state rather than to the international community as a whole. Although the UN Charter “reaffirm(s) faith in fundamental human rights”⁹² it does not clearly specify what should be done in situations where such fundamental human rights are being violated to the extent that mass atrocities are being committed. There is no explicitly stated right to collective action for a humanitarian intervention to save lives of populations at risk.

The only existing right to such action under chapter VII of the UN Charter is if the Security Council decides to determine that an internal situation amounts to a threat to international peace and security. As there is no higher authority that can claim such decision-making power, threats to international peace and security are what the SC says they are. Thus, the Panel sets out to reinterpret the principle of non-intervention contained in Article 2(7)⁹³ of the UN Charter in light of “genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing,”⁹⁴ which must be considered a threat to international security and peace, and thus trigger the application of Chapter VII.⁹⁵

⁹⁰“A More Secure World: Our Shared Responsibility, Report of the Secretary General’s High-level Panel on Threats, Challenges and Change. New York: United Nations, 1 December 2004 (hereinafter ‘HLP report’). The High Level Panel (HLP) was created by the then Secretary General of the UN, Kofi Annan, in 2003, to generate new ideas about the kinds of policies and institutions required for the UN to be effective in the 21st century, by examining new global threats and provide an analysis of future challenges to international peace and security.

⁹¹ HLP report, para. 199-209.

⁹² *Ibid.*, para. 199.

⁹³ UN Charter, art 2(7) states that: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

⁹⁴ HLP report, para. 200.

⁹⁵UN Charter, Chapter VII regulates the “Action with Respect to threats to the peace, breaches of the peace and act of aggression”.

Although the Panel stated that it endorsed “the emerging norm that there is a collective international responsibility to protect,”⁹⁶ it recommended that the decision to exercise such responsibility remain in the hands of the Security Council. This is a clear departure from the ICISS vision that, in cases where the SC was unable or unwilling to act on its duties, R2P could be implemented by regional organisations or other coalition of the willing.

The Panel in fact addressed the question of legitimacy, endorsing the ICISS report, but exclusively in relation to the SC, which, it stated, should be guided by “five basic criteria of legitimacy”⁹⁷, slightly altering the ones initially conceived by the ICISS: the seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences. Such guidelines must be adopted and followed in order to achieve SC consensus and “maximize international support for whatever the Security Council decides.”⁹⁸ As Stahn points out, “this approach was guided by the ambition of the drafters of the report to reinforce the UN system after the 2003 intervention in Iraq,”⁹⁹ which happened without SC consensus. The HLP unequivocally places full and exclusive authority for collective action in the name of R2P within the SC. The Panel did not even attempt to address issues relating to situations in which the SC is stalled by internal political and power struggles, but rather invited the SC Members to “pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.”¹⁰⁰

Overall, the implementation of the responsibility to protect is left as a question for the Security Council and its legitimacy in deciding whether to take forceful action. The debate over the issue of unauthorised intervention was not carried forward, and this strict focus on the role of the Council and silence on other sources of legitimate authority to carry out interventions, would continue in the Secretary-General’s following report.

⁹⁶ HLP report, para 203.

⁹⁷ HLP report, para 207.

⁹⁸ *Ibid.* para 206.

⁹⁹ Stahn, 2007, p.106.

¹⁰⁰ HLP report, para 256.

2.3 Report of the Secretary General: “In Larger Freedom: Toward Development, Security and Human Rights for All.”

In this report the Secretary General covered a range of issues dealing with development, security, human rights and advanced proposals to deal with the very present challenges of a changing world, in light of the High Level Panel on Threats report’s findings, which was commissioned to strengthen the UN’s collective security system.

The first thing to note in Annan’s 2005 report in relation to R2P is that, in a possible attempt to reverse the focus on the issue of the use of force clearly given by the HLP report, the principle of R2P is first mentioned, not in the section dealing with the use of force¹⁰¹ but in the fourth section dedicated to “Freedom to live in dignity.”¹⁰²

This is a clear attempt to “detach the idea of responsibility from an automatic equation to armed force,”¹⁰³ as the ICISS had tried, and to redirect attention to the importance of the use of peaceful means, mainly focusing on development, and “diplomatic, humanitarian and other methods”¹⁰⁴ to address causes and situations of mass atrocities.

Again, the SG focuses on the role of the UN, stressing the imperative of strengthening the UN as an instrument of collective action,¹⁰⁵ made to work better rather than finding alternatives to it. No discussion is dedicated to possible alternative sources of authority for the use of force without authority of the SC. Instead, the discretion of the SC is called upon in interpreting crimes of genocide, ethnic cleansing, war crimes and crimes against humanity as threats to international peace and security, against which humanity should be able to look to the SC for protection.¹⁰⁶ Furthermore, the SG maintains that the SC should be guided by criteria in its decision to authorise the use of force: the seriousness of the threat, the proper purpose of the proposed military action; whether means short of the use of force might reasonably succeed in stopping

¹⁰¹ ‘In Larger Freedom: Towards Development, Security and Human Rights for All’, Report of the Secretary General, UN GAOR, 59th Session, Agenda Items 45 and 55, UN Doc. A/59/2005, 21 March 2005 (hereinafter ‘In Larger Freedom’), para 122-126.

¹⁰² *Ibid.*, para 132.

¹⁰³ Stahn, 2007, p.107.

¹⁰⁴ In Larger Freedom, para 7(b).

¹⁰⁵ *Ibid.*, p.59, IV.

¹⁰⁶ *Ibid.*, para 124.

the threat; whether the military option is proportional to the threat at hand; whether there is a reasonable chance of success.¹⁰⁷

As the ICISS, followed by the HLP report, the SG considers a set of criteria fundamental to the guarantee that the SC carries out its decisions in a transparent and public way, which would make such decisions more easily accepted and respected by states and the international society, leaving aside doubts of disguised motives. The SG considers this a matter of such importance that it recommends the SC to adopt a resolution outlining the criteria and stating its intention to be guided by them when it decides whether to authorise or mandate the use of force,¹⁰⁸ thus improving accountability and deterring unilateral and illegitimate pre-emptive wars.

Overall, the call for action is urgent, and R2P should pass the legislation era and move on to one of implementation.¹⁰⁹ Because of the well known past failures of the UN to act in a timely manner to prevent genocide and other atrocities, it is of vital importance for a system of collective action to be strengthened and for Governments to be held to account both to their citizens and to each other, and for the international community to act on its declarations and principles to recognise and protect human rights and fundamental freedoms.

“Nowhere is the gap between rhetoric and reality - between declarations and deeds - so stark and so deadly as in the field of international humanitarian law. It cannot be right, when the international community is faced with genocide or massive human rights abuses, for the United Nations to stand by and let them unfold to the end, with disastrous consequences for many thousands of innocent people.”¹¹⁰

In Evans opinion, “the third milestone passed”¹¹¹ when Annan stated that not only did he see the R2P principle as an “emerging norm” as defined in the HLP report, but stressed that “while I am well aware of the sensitivities involved in the issue (..) I believe we must embrace the responsibility to protect, and, when necessary, we must act on it.”¹¹²

¹⁰⁷ *Ibid.* para 126.

¹⁰⁸ *Ibid.* para 126.

¹⁰⁹ *Ibid.*, para 132.

¹¹⁰ *Ibid.*, para 134.

¹¹¹ Evans, 2006, p.714.

¹¹² In Larger Freedom, para 135.

2.4 The 2005 World Summit Outcome Document

The wish for R2P to be embraced came true when it was unanimously endorsed and formally adopted during the High Level Plenary Meeting of the 60th Session of the GA, the largest gathering of Heads of State and Governments in history, the product of which was the 2005 World Summit Document, which in paragraphs 138 and 139 stated:

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

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic 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.”¹¹³

¹¹³ World Summit Outcome Document, adopted by GA Resolution 60/1, UN A/RES/60/1 (hereinafter ‘Outcome Document’), 24 October 2005.

This was endorsed by one hundred and ninety one states who decided that the rule of non-intervention, one of the corner stones of international law, codified in the UN Charter, did not apply in cases where a government was committing genocide, war crimes, crimes against humanity and ethnic cleansing against its own people or manifestly failing to provide protection.

In paragraph 79, the leaders reaffirmed “that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security.”¹¹⁴

This endorsement appears to be stating that no Charter amendments are necessary to enable the UN to interpret the provisions of Chapter VII as applying to situations that include mass atrocities being committed in a single state as threats to international peace and security. This is a legally significant interpretation and validation of the powers of the SC to authorise humanitarian interventions. Under the acknowledgment that states have a R2P, the principle was transformed from “a commission proposal actively supported by a relatively small number of like-minded states, into an international principle endorsed by the entire UN membership.”¹¹⁵

However this “was anything but inevitable”¹¹⁶, as the overall Summit outcomes were incredibly disappointing considering the extent of the SG’s proposals in his report ‘In Larger Freedom’, in which he had pleaded that “the business of the summit to be held in September 2005 must be to ensure that, from now on, promises made are promises kept.”¹¹⁷ The acceptance of R2P was one of the very few concessions made to the principles of national sovereignty and of non-interference in domestic affairs, together with the decision to replace the Commission on Human Rights with the Human Rights Council and create a Peacebuilding Commission.¹¹⁸

The latter can be considered as a further strengthening of the commitment by the international community to fulfil its R2P. “Its formation indicates recognition by the international community of a fundamental failure of previous civilian protection efforts;

¹¹⁴ *Ibid.* para 79.

¹¹⁵ Bellamy, 2009, p.95.

¹¹⁶ Evans, 2006, p.714.

¹¹⁷ In Larger Freedom, para 22.

¹¹⁸ Evans, 2006, p.714.

failures that the Peacebuilding Commission's creation seeks to significantly address, fostering the development and implementation of a holistic responsibility to protect.”¹¹⁹

However the R2P principle was not agreed on as easily. All aspects of R2P were hotly debated in the High Level Plenary Meeting, during which SC members were very divided. The principle of R2P was also out rightly rejected by some governments members of the Non Aligned Movement (NAM), such as India and Venezuela.¹²⁰ The latter made it clear in its statement to the Assembly that it did not agree with the process and the adoption of the Summit Document, which had been undemocratic and excluded the great majority of members of the GA.

Furthermore ambassador Araque argued that: “a reading of the pertinent paragraphs in the document immediately raises the question of who is in a position to "protect" under the terms of the document, as well as who is in a position to send troops many thousands of miles away. Who has the financial resources, weapons and logistics to carry out actions to protect. (...) The document makes absolutely no reference to one of the worst threats to humankind's future or to the universal and profoundly human yearning for comprehensive and unconditional nuclear disarmament. Today the major powers possess weapons of mass destruction capable of destroying all life on the planet many times over. And yet there is not even the most tepid, faint or remote reference to that very heart-felt desire on the part of the vast majority of the world's people.”¹²¹

Rightly so, Venezuela pointed out that there was no discussion and mention on the issue of disarmament and arm control in the Outcome Document, just as there was none in the preceding reports either. The issue of arms trade should be considered fundamental to the fulfilment of the R2P, especially in terms of the responsibility to prevent. The idea of a collective responsibility to prevent nations run by rulers without internal accountability of their power from acquiring or using Weapons of Mass Destruction (WMD) was strongly advanced by Feinstein and Slaughter, who argued that “the responsibility to protect is based on a collective obligation to avoid the needless slaughter or severe mistreatment of human beings anywhere - an obligation that stems from both moral principle and national interest. The corollary duty to prevent

¹¹⁹ Cooper and Marks, 2010, p.13.

¹²⁰ Bellamy, 2009, p.68.

¹²¹ ‘Addresses on the occasion of the High-Level Plenary Meeting’, Mr. Rodríguez Araque, Ambassador to Venezuela, at the General Assembly Session 60 meeting 8, *UNDemocracy*, 16 September 2005.

governments without internal checks from developing WMD capacity addresses the same threat from another source: the prospect of mass murder through the use of WMD, which have a destructive potential far beyond the control of any attacker.”¹²²

Overall, although the principle was fully endorsed by all UN member states sitting at the GA during the 2005 Summit in New York, this was done with severe limitation, compared to what was initially envisaged by the ICISS. First of all it constrained the application of R2P to the four specific crimes of genocide, ethnic cleansing, crimes against humanity and war crimes, arguing that expanding its application to other situations such as natural disasters would challenge its implementation. Additionally the international community’s R2P is triggered only when a state is “manifestly failing”, rather than unable or unwilling,¹²³ to protect its population from such crimes, without specifying what such a manifest failure entails.

Most importantly, the central need for ‘precautionary measures’ and a ‘just cause’ threshold, as was established in the ICISS report, and confirmed, although slightly altered, in the HLP report and in the SG’s report ‘In Larger freedom’, was strongly opposed by the permanent five members of the Security Council, who “remained solidly against a ‘code of conduct’.”¹²⁴ This was mainly due to the US refusal to have any limit placed on the Security Council’s, and thus its own, freedom to judge each case, and on a number of less powerful countries, which thought that these criteria could be abused.¹²⁵ As stated in paragraph 139, the international community accepted a responsibility to act and stated their preparedness to act ‘on a case to case basis’, thus retaining complete discretion on when to engage in such action, meaning that there cannot be any “shared expectations in specific emergencies.”¹²⁶

Although some states claimed that the concept of collective action should not preclude action absent SC authorisation, there was no mention of possible action being agreed upon by the GA, by individual states or by regional organisations or coalitions of the willing, without SC authorisation.

Recalling the case of Darfur and the finger pointing which occurred in terms of who was supposed to take action and assume responsibility, Bellamy stresses that “the

¹²² Feinstein and Slaughter, 2004.

¹²³ ICISS report, para 4.1.

¹²⁴ Bellamy, 2009, p.83.

¹²⁵ Evans, 2006, p. 717.

¹²⁶ Bellamy, 2006(a), p.8.

World Summit simply did not address the question of how to proceed when the most appropriate agents are unwilling to act or when states argue that others are better placed to act. This problem was not helped by the fact that the summit dodged the question of unauthorised intervention.¹²⁷

Thus, it remained unclear whether anyone, outside the UNSC framework, could legally and legitimately respond to atrocity crimes being committed at a time when there is an unbreakable stalemate within the Security Council. Within the Outcome Document, the right to interfere in a state's internal affairs lies on the balance of interests and alliances within the SC, rather than on any established legal criteria. Collective responsibility is only explicitly recognised in relation to diplomatic, humanitarian and other peaceful R2P measures that fall short of the use of force. However, the significance the ICISS report attributed to prevention is hardly noticeable in the Outcome Document.

Peral rightly argues that "if R2P represents an attempt to avoid the territorial state using the shield of sovereignty in order to legally massacre its citizens, it is equally unacceptable that the UNSC uses the shield of its discretionary powers in order to prevent international action being deployed to protect the victims."¹²⁸ Furthermore, the Outcome Document, as well as the other reports previously analysed, are silent on the issues of non-compliance with R2P. This sheds further doubt on the intention for the principle to become a norm of international law or just a political statement.¹²⁹

Overall, a final general consensus was reached on the need for a responsibility to protect, and the need for national States primarily, and the international community secondarily, to exercise their authority in order to achieve such protection, through the possible use of force when all other measures failed. However the lack of the legal admissibility of this principle remains evident. Orford argues that "most agree that the World Summit Outcome cannot be understood to impose new legal obligations that are binding upon states acting either unilaterally or collectively."¹³⁰ The only legal authority exists within the UN and its Security Council. Through the development of the principle, a strong attempt has been made to reinforce the institutional mechanisms of

¹²⁷ Bellamy, 2006(a), p.7.

¹²⁸ Peral, 2011, p.3.

¹²⁹ Stahn, 2007, p.118.

¹³⁰ Orford, 2011, p.23.

the UN and strengthen the consensus around its role as the legitimate representative of the international community.

So, although some viewed the Outcome Document as a great achievement in the history of international affairs others saw it as a failure and a missed opportunity, the so called “‘R2P-lite’”¹³¹ and just as a mere reassertion and reinforcement of western imperialism and the right to intervene in a state’s domestic affairs, it can be argued that it established the consensus for the need for a new norm to protect at risk-populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and created expectations that the commitment to R2P would include actual action by the international community, represented within the UN, to prevent situations as occurred in Rwanda from ever happening again.

This level of consensus helps increase the pressure on the UN, together with national governments and international policy and law making institutions to take on their responsibility and to translate rhetorical promises into effective action. This is demonstrated by the fact that the SC in 2006 passed the first resolution in which it endorsed for principle of R2P in the context of the protection of civilians in armed conflict.¹³² The effort to push for adoption of R2P did not end with the Outcome Document but continued with the aim of operationalising the principle.¹³³ In the part dedicated to the operationalisation of R2P, it will be discussed whether steps have been taken to actually clarify such matters and achieve a consistent implementation framework or whether the concept of R2P is purposely left indefinite and vague, so that members of the SC can interpret their responsibility as they see fit.¹³⁴

¹³¹ “‘R2P-lite’ - that is, without specifying the criteria governing the use of force and insisting upon Security Council approval.” Weiss, 2006, p.750.

¹³² UNSC Resolution 1674, UN Doc. S/RES/1674, 28 April 2006: “*Reaffirms* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”

¹³³ Bellamy, 2009, p.93.

¹³⁴ Alvarez is suspicious: “Instinct should warn us there must be something wrong as well as right with an idea that can be endorsed by such strange bedfellows, and there is. R2P’s normative “legs” result from its not always consistent, various iterations as well as from the lack of clarity as to whether it is a legal or merely political concept. It means too many things to too many different people.” *See* Alvarez, 2007, p.4. Stahn, too, argues that the divergence in the way that R2P was conceived and explained in each of its founding documents explains part of its success. “The notion became popular because it could be used by different bodies to promote different goals.” *See* Stahn, 2007, p.118

3. THE OPERATIONALISATION OF R2P, FROM WORDS TO...MORE WORDS?

3.1 Reports of the Secretary General: “Implementing the R2P” and “Early warning, assessment and the responsibility to protect”

The way that effective R2P action must be implemented is considered in the 2009 and 2010 SG reports. The first report on the implementation of R2P reflects the desire born out of the World Summit to continue consideration of R2P. As the SG clearly states, “the present report responds to one of the cardinal challenges of our time, as posed in paragraphs 138 and 139 of the 2005 World Summit Outcome: operationalizing the responsibility to protect.”¹³⁵ After consulting with governments, engaging with civil society and creating the position of a UN Special Adviser on R2P¹³⁶, Ban Ki-Moon took on the task of putting together the first comprehensive document on the implementation of R2P.

The 2009 report outlines the measures necessary to implement R2P, ranging from prevention to rebuilding a country torn by mass atrocities, which were then to be further considered by the General Assembly and individual states: “the task ahead is not to reinterpret or renegotiate the conclusions of the World Summit but to find ways of implementing its decisions in a fully faithful and consistent manner.”¹³⁷

In his report, the Secretary General framed the necessary mechanisms of protection for the achievement of R2P around three founding pillars, outlined as follows:

Pillar I: “the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.”¹³⁸ The State is “the bedrock of the responsibility to protect, the purpose of which is to build responsible sovereignty, not to

¹³⁵ Implementing the Responsibility to Protect, Report of the Secretary General, UN GAOR, 63rd Session, Agenda Items 44 and 107, UN Doc. A/63/677, 12 January 2009, (hereinafter ‘Implementing R2P report’), p.1.

¹³⁶ On 11 December 2007, Ban Ki-Moon’s appointment of Edward Luck as his new Special Adviser on the Responsibility to Protect was confirmed by the UNSC. Mr Luck would bear the primary role of conceptual development and consensus-building, in recognition of the fledgling nature of the international agreement on the responsibility to protect populations from genocide, ethnic cleansing, war crimes and crimes against humanity, as stated by the SG in a letter to the SC dated 31st August 2007, available at

<<http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=467>>.

¹³⁷ Implementing R2P report, para 2.

¹³⁸ *Ibid.*, p.8.

undermine it.”¹³⁹ To meet the requirements of responsible sovereignty the State must “build institutions, capacities and practices for the constructive management of the tensions so often associated with the uneven growth or rapidly changing circumstances that appear to benefit some groups more than others.”¹⁴⁰ “Respect for human rights is an essential element of responsible sovereignty.”¹⁴¹

Pillar II: “the commitment of the international community to assist States in meeting those obligations. It seeks to draw on the cooperation of Member States, regional and sub regional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system.”¹⁴² This assistance would of course require the consent of the interested state but if it was the state itself committing crimes against the population it should be protecting, then “assistance measures under pillar two would be of little use and the international community would be better advised to begin assembling the capacity and will for a ‘timely and decisive’ response.”¹⁴³ The measures for such response are found in the following pillar.

Pillar III: “the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection.”¹⁴⁴ The international community must use all peaceful, diplomatic and humanitarian means, available under Chapter VI and VIII of the UN Charter, to exercise their own responsibility to protect as stated in para 139 of the Outcome Document.¹⁴⁵ If these measures prove unsuccessful and if the State is manifestly failing to protect its own population, the international community is prepared to take action through Security Council’s authorisation and under Chapter VII.¹⁴⁶

The SG, once again, reaffirmed that “there is no room for a rigidly sequenced strategy or for tightly defined “triggers” for action” and thus, although he outlined a number of ways in which the international community can comply with Pillar III¹⁴⁷, he gives no guidelines as to when military intervention is required. What the SG does do is

¹³⁹ *Ibid.*, para 13.

¹⁴⁰ *Ibid.*, para 14.

¹⁴¹ *Ibid.*, para 16.

¹⁴² *Ibid.*, p.9.

¹⁴³ *Ibid.*, para 29.

¹⁴⁴ *Ibid.*, p.9.

¹⁴⁵ Outcome Document, para 139.

¹⁴⁶ Implementing R2P report, para 49.

¹⁴⁷ *Ibid.*, para 61-64.

remind the international community that “the credibility, authority and hence effectiveness of the United Nations in advancing the principles relating to the responsibility to protect depend, in large part, on the consistency with which they are applied. This is particularly true when military force is used to enforce them. In that regard, Member States *may want to consider* the principles, rules and doctrine that should guide the application of coercive force in extreme situations relating to the responsibility to protect”¹⁴⁸, as addressed and endorsed in the ICISS report and Annan’s ‘In Larger Freedom’, but abandoned in the 2005 Outcome Document.

So, although the scope and reach of UN measures in terms of prevention and rebuilding is wide and carefully analysed and defined, in relation to the contentious issue of the use of coercive force, the SG merely invites MS to consider the application of criteria that can guide such action in order for the UN not to lose credibility, but leaves it up to the complete discretion of each state.

One of the most vociferous critics of this deficiency is Ramesh Thakur who, as quoted by Bellamy¹⁴⁹, argues that this report does not answer questions on who has the authority to make decisions on the use military force, how such decisions are guided, and how systematic risk assessments and early warning indicators can be institutionalised so that international capability to deliver R2P can be developed.

On the other hand, the case has been made by more pragmatic thinkers, such as Luck, that “whatever one thinks about compliance pull, there is strong reason to believe that the RtoP provisions of the 2005 Outcome Document would never have been agreed upon if they were any more specific on the course of action that would have to be followed in cases of manifest failure to protect.”¹⁵⁰

The Secretary General’s report undoubtedly reflects the consensus achieved during the World Summit on capacity-building and long term prevention, rather than on intervention, and that the “difference between the critics and the Secretary-General, therefore, is the difference between what the critics would like RtoP to mean, and what states have actually agreed to.”¹⁵¹ Luck also argues that “agreeing that something ought to be done when an important international standard has been breached in unacceptable

¹⁴⁸ *Ibid.*, para 62. (emphasis added).

¹⁴⁹ Quoted in Bellamy, 2011, p.40.

¹⁵⁰ Luck, 2010, pp.11-12.

¹⁵¹ Bellamy, 2011, p.41.

ways is the critical first step. That is why norms and standards matter. Their task is not to determine with any precision what the most appropriate policy response should be in each case.’¹⁵²

Nonetheless, it is still clear that the lack of a call for adequate guidelines on the use of force undermines the effort of the report to achieve a solid and clear consensus on all defining elements of R2P, as it only does so in relation to the establishment of a framework of analysis and early warning assessment¹⁵³ rather than on a framework for military intervention, clearly the most contentious of all elements of R2P and the one mostly requiring further debate and analysis.

Although expectations throughout the development of R2P were clearly running high to finally redefine humanitarian intervention as a much broader but better outlined measure to end specific crimes, it is also true that the Security Council maintained a clear position from the very beginning, since the ICISS first issued its report: “while the UK and France were undoubtedly the leading advocates of the Responsibility to Protect among the P-5, and (along with the United States) flatly rejected the Russian and Chinese view that unauthorized intervention be prohibited in all circumstances, they too expressed concerns. In particular, they worried that agreement on criteria would not necessarily produce the political will and consensus required to respond effectively to humanitarian crises.’¹⁵⁴

One can see the position of these members of the SC as a rational and objective one, which takes into consideration the political dynamics of the institution. This position is also clear evidence of the fact that western SC members strongly resist limitation on their discretion and accountability for their action or inaction, which would be more easily assessable if there were specific criteria that guided decisions to intervene. Hence, the shift of focus on Pillar I and II avoids further discussion of the need for a ‘Just cause’ or the ‘reasonable prospect of success’, but reaffirms the moral authority of the United Nations as the guardian of international peace and security.

To strengthen the role of the UN, its institutions and mandates, the view has been that “it is not the intervention (or reaction) aspect which is central but the continuum of

¹⁵² Luck, 2010, p.11.

¹⁵³ Glen, 2010, p.30.

¹⁵⁴ Bellamy, 2006(b), p.6.

international oversight which is crucial.”¹⁵⁵

The UN has increasingly attempted to assert its role and responsibility as the guarantor of peace and security and as the legitimate authority in taking action in situations of humanitarian crisis: “if the collective conscience of humanity (...) cannot find in the United Nations its greatest tribunal, there is the grave danger that it will look elsewhere for peace and justice.”¹⁵⁶

In answering concerns about the dilution of the need for international force to prevent and halt mass killings and the lack of criteria which would allow for the misuses of this force, the Secretary General argued in the introduction to this report that “the best way to discourage States or groups of States from misusing the responsibility to protect for inappropriate purposes would be to develop fully the United Nations strategy, standards, processes, tools and practices for the responsibility to protect.”¹⁵⁷ Furthermore, he stated that “unless all three pillars are strong the edifice could implode and collapse” and that “all three must be ready to be utilized at any point, as there is no set sequence for moving from one to another, especially in a strategy of early and flexible response.”¹⁵⁸

Indeed, the 2009 report focuses mainly on prevention, capacity building and early warning systems, and in its Annex to the report, dedicated precisely to ‘Early Warning and Assessment’¹⁵⁹, the Secretary General stresses the importance of the development of an “integrated framework” which would “entail utilizing the information gathered and insights gained by existing United Nations entities”¹⁶⁰, thus avoiding the creation of “costly new programmes or radically new approaches”¹⁶¹ but rather enhancing those already existing which can be further developed.

Ban Ki-Moon further responds to the call by the 2005 World Summit for the “expansion of the United Nations capabilities for early warning and assessment of possible genocide, war crimes, ethnic cleansing and crimes against humanity”¹⁶² by

¹⁵⁵ Chandler, 2010(a), p.131.

¹⁵⁶ ‘Secretary General Presents his Annual Report to the General Assembly’, *UN Press Release*, SG/SM/7136 GA/9596, 20 September 1999.

¹⁵⁷ Implementing R2P report, p.2.

¹⁵⁸ *Ibid*, para 12.

¹⁵⁹ *Ibid*, Annex, p.31.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid.*, para 68.

¹⁶² Early warning, assessment and the responsibility to protect, Report of the Secretary General, UN Doc. A/64/864, 2010, p.1.

stating in his 2010 follow up report on “Early Warning, assessment and R2P” that: “My strategy for implementing the responsibility to protect calls for early and flexible response is tailored to the circumstances of each case. Getting the right assessment - both of the situation on the ground and of the policy options available to the United Nations and its regional and subregional partners - is essential for the effective, credible and sustainable implementation of the responsibility to protect.”¹⁶³

The lessons of the 1990s, specifically the cases of Rwanda and Srebrenica, highlighted the failure of the analytical capacity of the UN and the “endemic weakness”¹⁶⁴ of insufficient information sharing by MS and UN agencies. The report further highlights the importance of a “two-way flow of information (...) between the UN and regional and sub-regional organizations on matters relating to R2P, especially in relation to early warning, assessment and timely and decisive response.”¹⁶⁵

To increase early warning capacity the SG went further in suggesting to join the office of Mr. Deng, the Special Adviser on the Prevention of Genocide and the one of the recently appointed Special Adviser on R2P, so to “save resources, eliminate redundancy and maximize synergies.”¹⁶⁶

Overall, however, within the development of the R2P principle, there has been no introduction of new human rights or obligations of states, but rather a reassurance that the international community has agreed to strengthen the United Nation’s commitment to build on mechanisms for prevention and assistance in rebuilding from conflict. The 2005 Summit’s “acceptance of R2P rhetoric adds nothing substantially new.”¹⁶⁷

Reflecting on the development of the R2P from the ICISS report to the 2009 SG report, initially the choice was to either challenge sovereignty through military intervention or allow the principle of non-interference to be used as a shield to let states exercise full control over their population, including committing mass atrocities against it. Now, ideally, the choice would be to avoid both scenarios by strengthening sovereignty in the first place, for the state to exercise its sovereignty in a responsible manner, so there will be no need for a military intervention. The focus is thus on

¹⁶³ *Ibid.*, para 19.

¹⁶⁴ *Ibid.*, para 7.

¹⁶⁵ *Ibid.*, para 11.

¹⁶⁶ *Ibid.*, para 17.

¹⁶⁷ Chomsky, 2009, p.3.

institution capacity building rather than coercive intervention.¹⁶⁸ On such moral obligations, there is no controversy. The report on the implementation of R2P managed to gain the consensus it had set out to re-establish, and the UNGA adopted a resolution noting the report and agreeing to carry forward the consideration of R2P.¹⁶⁹

Although this would appear as a step in the right direction, it is also a step backward in addressing the crucial issues of international politics that have allowed, on one hand for mass atrocities to happen and not be averted, such as in the case of Rwanda and Srebrenica, and on the other, illegal and, most would now agree, illegitimate¹⁷⁰ interventions such as the one in Kosovo.

3.2 The debate on the UN's authorisation of military intervention

Evans, one of the primary architects of the ICISS report and leading authority on R2P, has argued that “as critical as the dimensions of prevention and rebuilding are, the core of the debate [on R2P] - and the most difficult conceptual and political issue - is the issue of reaction.”¹⁷¹

However, it is increasingly evident that because of the inability to reach consensus on when and how Pillar III should be acted upon, and other fundamental issues “such as disarmament and the proliferation of weapons of mass destruction,”¹⁷² the General Assembly and the Secretary General preferred to focus on underlining the importance of enforcement of already existing assistance and capacity building measures.

Orford believes that the need for consensus on the scope of R2P at the General Assembly is responsible for the focus away from “licensing military intervention for

¹⁶⁸ Chandler, 2010(b), p.163.

¹⁶⁹ UNGA Resolution 63/308: ‘The Responsibility to Protect’, A/RES/63/308, 7 October 2009.

¹⁷⁰ The Independent International Commission on Kosovo, *Kosovo Report, Conflict, International Response, Lessons Learned*, 2000: “the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”

¹⁷¹ Evans, 2004(b), p.84.

¹⁷² Implementing R2P report, para 4. Ban Ki-Moon admitted that it was impossible to find consensus on this issue, but rather than following on such statement by underlining the importance of disarmament and control of arms trade for the fulfilment of R2P, he stated that “it is therefore a tribute both to the determination and foresight of the assembled world leaders and to their shared understanding of the urgency of the issue that they were able to agree on such detailed provisions regarding the responsibility to protect.” This issue merits further discussion but it exceeds the scope of this thesis.

protection purposes”¹⁷³ to “strengthening existing practices of executive rule, such as fact-finding, preventive diplomacy, human rights monitoring and administration.”¹⁷⁴ This is confirmed by the fact that the SG’s 2009 report and the 2005 Outcome Document were almost unanimously accepted during the General Assembly Debate on R2P, which took place in a series of sessions in July 2009.¹⁷⁵

The only sturdy attempt to shift back the focus onto the use of military intervention to react to atrocity crimes and onto the issue of authority solely placed in the hands of the SC, was engaged most notably by Venezuela, Cuba, Nicaragua and Sudan, who questioned the 2005 Outcome Document agreement¹⁷⁶ and argued for continuous debate around the issue of the ‘right to intervention’, which contravened international law and the principle of non-interference.¹⁷⁷ This effort was also shared by the President of the General Assembly himself, Miguel d’Escoto Brockmann, who described R2P as “redecorated colonialism”¹⁷⁸ and attempted in many ways to jeopardise the commitment and the consensus around the principle of R2P.¹⁷⁹

Among the four panellists who he invited to speak at the General Assembly Debate, Bricmont argued that “the protection of the weak always depends on limitations of the power of the strong” stressing that the real issue at stake was not the diplomatic or preventive aspects of R2P, but “the military part of the so-called ‘timely and decisive response’, and the challenge that it represents for national sovereignty.”¹⁸⁰ Chomsky too contended that “in substance R2P (...) is a subcase of the ‘right to humanitarian intervention’, omitting the part that has been contested, the right of use of force without Security Council.”¹⁸¹

Chomsky also called into question the reference to R2P as an ‘emerging norm’, arguing that “virtually every use of force in international affairs has been justified in terms of R2P”¹⁸² and went on to recall the ‘Corfu Channel case’ heard in the ICJ in 1948, in which it was held that interventions, “from the nature of things, would be

¹⁷³ Orford, 2011, p.183.

¹⁷⁴ *Ibid.*

¹⁷⁵ Global Centre for the Responsibility to Protect report, 2009 (hereinafter ‘GCR2P report’),

¹⁷⁶ *Ibid.*, p.4.

¹⁷⁷ *Ibid.*, p.7.

¹⁷⁸ Quoted in Thakur, 2011, p.157.

¹⁷⁹ Bellamy, 2011, p.43.

¹⁸⁰ Bricmont, 2009, p.1.

¹⁸¹ Chomsky, 2009, p.4.

¹⁸² *Ibid.*, p.1.

reserved for the most powerful states, and might easily lead to pervert the administration of justice itself.”¹⁸³ After more than 60 years, the concern remains the same, as history has continued to prove Thucydides maxim that “the strong do as the wish, the weak suffer as they must”¹⁸⁴ and unfortunately, the development of R2P has done little to address this issue.

During the Assembly, several states argued that because of the current composition of the SC, Western powers could exercise an undue influence over its decisions. In particular, India called for the Council’s permanent membership to be changed “to reflect contemporary realities and make them forces for peace and capable of acting against mass atrocities,”¹⁸⁵ but the idea that SC reform was paramount to the effective implementation of R2P was rejected as an excuse to delay its progress.

On the contrary, from R2P’s initial formulation in the ICISS report, which did not exclude single states, coalitions and regional organisations as sources of legitimate authority¹⁸⁶, to the World Summit Document, and Implementing R2P report, there is a distinct shift away from the debate on humanitarian intervention and the legality and legitimacy of the use of force, and a clear move to limit the source of such legitimate and legal authority to the UNSC.

The UN remains the representative of the ‘international community’ although, as Weiss argues, this term is vague and does not define, on judgment day, the specific entities to be held accountable when there is a failure to intervene, or the intervention itself is a failure.¹⁸⁷ The fact that the 2005 Outcome Document so strictly limited the primacy over the use force to the decision of the Security Council reinforces the arguments of those who see R2P as a “trojan horse used by the powerful to legitimize their interference in the affairs of the weak.”¹⁸⁸

Furthermore, the failure of the World Summit Document to discuss and endorse the implementation of precautionary principles and guidelines for the authorisation of the use of force, which were put forward in the reports of the ICISS, the HLP, and of the previous SG, goes further in allowing the questioning of the SC’s decision-making

¹⁸³ The Corfu Channel case, quoted in Chomsky, 2009, p.2.

¹⁸⁴ Quoted in Chomsky, 2009, p.1.

¹⁸⁵ GCR2P report, p. 6.

¹⁸⁶ ICISS report, 2001(a), para 6.35

¹⁸⁷ Weiss, 2001, p.424.

¹⁸⁸ Bellamy, 2005, p.2.

policy, which is no new story, but is especially strong in terms of the legitimate authority to sanction military interventions under the R2P principle.

The only constraint asked of the Security Council is to “refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect.”¹⁸⁹ There is a vast amount of literature written on the necessary reform of the Security Council, and especially of the veto power, which should be seen as fundamental to the proper implementation of R2P. The need for institutional reform becomes ever so evident in light of the effort of the global community to put an end to mass atrocities. Annan had argued that rather than finding alternatives to the possibly tainted authority of the Security Council, it should be made to work better by insisting on the adoption of specific criteria to guide it in deciding whether to authorise military force.¹⁹⁰

The lack of criteria and of any real obligation imposed on UN Member States to protect endangered civilians means that “the council retains the freedom to decide when and where to act, based on the traditional interplay of humanitarian concerns and the permanent members’ national interest.”¹⁹¹

The documents through which the doctrine of R2P has evolved differ on how exactly to act once the evidence is clear that a military intervention is necessary in light of a state’s failure to protect its own population. However, from the 2005 Outcome Document one can deduce that the only authority that can decide if a situation requires a coercive intervention is the SC.

Essentially, the implementation of the hard end of R2P remains dependant upon the political will of the SC, which has demonstrated a weak commitment to act, on a case to case basis mainly, according to the geo-political interests in the country involved and not according to the gravity of a situation or a just cause threshold, leaving the door wide open for the misuse and abuse of R2P as a weapon of imperial intervention.

Since its conception, the United Nations has not been focused on the protection of populations and individual rights, but on those of states. This is highlighted by the fact that the UN recognised a responsibility to protect but opted for stating its

¹⁸⁹ Implementing R2P report, para 61.

¹⁹⁰ In Larger Freedom, p.59, IV.

¹⁹¹ Bellamy, 2006(a), p.8.

preparedness to act if it saw fit, rather than recognising the duty to protect all people from genocide, war crimes, crimes against humanity and ethnic cleansing. Thus it can be questioned whether the R2P principle has established any new legal obligations, because of the “consistent radical selectivity”¹⁹² with which it is applied. R2P has attempted to reinforce the UN as the representative of the international community with the legitimate power and authority to preserve world peace and justice by protecting its people, but it has not addressed the fundamental questions surrounding the composition of the UNSC, and the internal politics within it although full discretion and authority has been given to it to act as the world’s protector.

The great political, rather than legal question, in how such undisputed authority should be exercised, as there are no criteria, within the UN Charter or established by R2P, to guide the Council and limit its discretion. Thus, it appears to be the case that the critically different interests of the SC permanent members will be the ones dictating action, with the ones of the most influential states being exercised more than others.

“As its name suggests, the UN was conceived with the affairs of nation states in mind, rather than the rights of individuals. (...) The United Nations Security Council would comprise the Big Four - the United States, the Soviet Union, Britain and China - and would be invested with the authority to operate as the world's policemen. The United Nations General Assembly was basically a sop to the smaller nations: a talking shop with responsibility for non-security issues, such as humanitarian and social affairs. (...) The iron fist of global power was thus wrapped in the velvet glove of international humanitarianism.”¹⁹³

Through the analysis of the case of Libya and the intervention currently undertaken in the name of R2P, it will be seen whether the sun has ever really set on humanitarian intervention¹⁹⁴ and if a new dawn exists for an accepted international norm to protect people, or if this is yet another disguise for “humanitarian imperialism”¹⁹⁵ and interventionism based on destabilising political regimes, according to the geo-political interests of the strongest powers in the United Nations.

¹⁹² Chomsky, 2009, p.5.

¹⁹³ Sellars, 2002, p.xi.

¹⁹⁴ Weiss, 2004.

¹⁹⁵ Chomsky, 2008.

4. R2P IN ACTION, THE LIBYAN TESTING GROUND

4.1 UN Resolution 1970, responding to calls for action.

In the wake of the Arab revolutions, and the fall of Tunisia's President Ben Ali, and of President Mubarak in Egypt, Libya too saw the insurgence of popular protests against the rule of its President, Colonel Muammar Gaddafi, in power since 1969. On February 15th revolts started in Benghazi and other towns in the east of Libya, calling for the resignation of its despotic president. From the beginning, the protests were met with violence and repression by government forces, but the movement spread and turned into an armed insurrection.¹⁹⁶

The description of the situation in the media quickly assumed tragic tones as reports of security forces crushing unarmed protesters¹⁹⁷ and snipers firing on civilians from rooftops began to make the headlines. Allegations of African mercenaries being brought in to attack protesters were backed by Libyan people who had captured some mercenaries and extrapolated confessions that they had been contracted by the Libyan government and instructed to fire live bullets at protesters.¹⁹⁸

However, from the start, the information coming out of Libya has been sketchy because of the wide spread media and communication crackdown.¹⁹⁹ This has meant that most videos, images, sound clips and comments could not be independently verified by the news agencies who were reporting them, including images of

¹⁹⁶ See "Libya timeline: 3 months of conflict", *News24*, 16 May 2011.

¹⁹⁷ International Crisis Group, 'Popular Protests in North African and the Middle East (V): Making Sense of Libya', 2011, (hereinafter 'ICG report'), p.4 states that claims that protesters were unarmed: "would appear to ignore evidence that the protest movement exhibited a violent aspect from very early on. While there is no doubt that many and quite probably a large majority of the people mobilised in the early demonstrations were indeed intent on demonstrating peacefully, there is also evidence that, as the regime claimed, the demonstrations were infiltrated by violent elements".

¹⁹⁸ As reported by *The Independent*, an Amnesty International Investigation has since argued that such allegations, according to the evidence it collected, are unfounded and that "those shown to journalists as foreign mercenaries were later quietly released (...) Most were sub-Saharan migrants working in Libya without documents." Cockborn, 'Amnesty questions claim that Gaddafi ordered rape as weapon of war', *The Independent*, 24 June 2011.

¹⁹⁹ ICG report, 2011, p.4: "much Western media coverage has from the outset presented a very one-sided view of the logic of events, portraying the protest movement as entirely peaceful and repeatedly suggesting that the regime's security forces were unaccountably massacring unarmed demonstrators who presented no real security challenge. (...) Likewise, there are grounds for questioning the more sensational reports that the regime was using its air force to slaughter demonstrators, let alone engaging in anything remotely warranting use of the term 'genocide'."

demonstrations in support of Colonel Gaddafi, allegedly mobilised and staged by the regime.²⁰⁰

The unrest appeared to be taking place mainly in the eastern part of the country, a long way from Tripoli. Soon violent clashes broke out in the central ‘Green Square’ of the capital, and international human rights group, including Human Rights Watch, reported that dozen of protesters had been killed and hundreds injured²⁰¹, echoed by hospital workers’ statements that they were running out of supplies and the number of inpatients was dramatically increasing. The number of reported deaths rose exponentially as the days went by.

On the other hand, in response to the growing media coverage of the oppression in Libya, Gaddafi’s son, Saif al-Islam, appeared on Libyan State television on the 21st February and claimed that reports of the violence were being exaggerated and that foreigners, exiles, drug addicts, Islamists and the media were responsible for the crisis and warned of civil war if the trouble continued.²⁰² Gaddafi himself, on a state televised speech addressing the nation, claimed that he would die a martyr and ordered a crackdown on his opponents, inciting his supporters to hunt down and “kill the cockroaches” house by house.²⁰³ He also invited the UN or other organisations to send a fact-finding mission to Libya to verify media reports that were being relied upon as factual evidence.²⁰⁴

The position of Gaddafi and his son, arguing that the insurrection was lead by Al-Qaeda and young drug users, was hard to reconcile with the growing number of Libyan military officials and diplomats who defected and condemned the government’s repression and violence against its own people. Members of the Libyan mission to the United Nations repudiated Gaddafi on the 21st of February and called him a “genocidal

²⁰⁰ The latest video of Gaddafi supporters in the Green Square of Tripoli shows thousands bearing the green colours and flags in support of their government. See OnToDenver, ‘Gaddafi address to tens of thousands of supporters on Green Square’, *YouTube Video*, 1 July 2011.

²⁰¹ ‘Libya: Security Forces Kill 84 Over Three Days’, *Human Rights*, 18 February 2011. Within the next days HRW called for the UN, the US and the international community to replace catch-phrase condemnations with action to help protect the protesters.

²⁰² ‘Gaddafi’s son: We Will Eradicate Them All’, *The Guardian*, 21 February 2011.

²⁰³ ‘Libya protests: Defiant Gaddafi refuses to quit’, *The BBC News*, 22 February 2011.

²⁰⁴ As reported by ABC News, Gaddafi questioned how the UN could freeze assets, impose sanctions and an arms embargo, and implement a travel ban “based purely on media reports alone”, Amanpour, ‘Moammar Gadhafi Denies Demonstrations Against Him Anywhere in Libya’, *ABC News*, 28 February 2011.

war criminal.”²⁰⁵ They asked then for an ICC investigation for crimes against humanity and crimes of war, such as warplanes firing on demonstrators in Tripoli. This accusation was followed by the first military personnel defection by two senior pilot officers who landed their jets in Malta after refusing orders to bomb protesters in Benghazi, followed by a series of statements by military and officials calling on the international community to react.²⁰⁶

A series of statements denouncing Gaddafi and his forces opening fire on anti-government protesters followed by the international community, most notably from the League of Arab States (LAS) banning the Libyan delegations from participating in the LAS and all bodies affiliated to it.²⁰⁷ The African Union also issued a strong statement condemning “the indiscriminate and excessive use of force and lethal weapons against peaceful protestors”²⁰⁸ and called for an immediate end to all acts of violence.

Calls for action grew stronger from the international civil society too. Amnesty International accused the SC and the AU of failing the Libyan people in their hour of greatest need.²⁰⁹ A group of more than sixty NGOs asked the UNGA to pass a resolution to suspend Libya from the Human Rights Council.²¹⁰ The day after the HRC held a special session on the situation in Libya and adopted Resolution S-15/2,²¹¹ which recommended the UNGA suspend Libya from the Council and that an International Commission of Inquiry be established to gather evidence and testimonies on the Libyan crisis.

This request was immediately effected and on 1st March, for the first time, a country was suspended from the UN top human rights body for committing “gross and systematic violations of human rights.”²¹² This was the first step that showed a

²⁰⁵ Moynihan, ‘Libya’s U.N. Diplomats Break With Qaddafi’, *New York Times*, 21 February 2011.

²⁰⁶ ‘Libyan pilots and diplomats defect’, *Al Jazeera*, 22 February 2011.

²⁰⁷ Eleiba, ‘Arab League bans Libya’, *Ahramonline*, 23 February 2011.

²⁰⁸ Communique of the 261st Meeting of the Peace and Security Council, *African Union Peace and Security Council*, 23 February 2011.

²⁰⁹ ‘Security Council and African Union failing the Libyan people’, *Amnesty International*, 23 February 2011.

²¹⁰ ‘Civil Society: UN General Assembly should suspend Libya’s UN Human Rights Council membership’, *Human Rights Watch*, 24 February 2011.

²¹¹ Resolution S-15/1: ‘Situation of human rights in the Libyan Arab Jamahiriya,’ UN Doc. A/HRC/RES/S-15/1, *Human Rights Council*, 25 February 2011.

²¹² UNGA Resolution 62/2651: ‘Suspension of the rights of membership of the Libyan Arab Jamahiriya in the Human Rights Council, A/RES/65/2651, *UNGA*, 1 March 2011.

commitment to take positive action against the Libyan government, which was continuing to violently repress its own people.

The haste with which this and following resolutions were passed against the Libyan Government was remarkable, and indeed was questioned by the Venezuelan permanent representative to the UN, who denounced the decision to suspend Libya from the HRC, stating that it “could only take place after an objective and credible investigation that confirms the veracity of the fact. No country can be condemned *a priori*.”²¹³

Nonetheless, it was clear that Gaddafi’s words had shocked civil society worldwide and had reminded everyone of the atrocities committed in Rwanda to which the world had stood by and watched. No one was willing to let this happen again. “Never again” resounded loud and clear. A true test of the R2P commitment to save the lives of populations at risk of genocide, war crimes, crimes against humanity and ethnic cleansing was necessary, and Libya appeared to be the perfect testing ground.

On February 26th, the UNSC put its own R2P into action after it issued a press statement “calling on the Government of Libya to meet its responsibility to protect its population.”²¹⁴ This was the first time since its adoption in 2005 that the Security Council had mentioned the doctrine in a formal statement in reference to an on going crisis.²¹⁵ The Security Council’s call and the statements by the UNSG’s advisers on the Prevention of Genocide and R2P reminding Libyan authorities of their R2P their own people²¹⁶ served little to stop the continuing reported violence in Libya.

Therefore, as the Libyan State was manifestly failing to protect its own people, the responsibility now fell onto the international community, according to the 2005 Outcome Document unanimously embraced by the GA, to take action and use appropriate measures to protect the Libyan population.

In “swift, decisive action”²¹⁷ the UNSC adopted Resolution 1970 under art.41, Chapter VII of the UN Charter, which allowed the SC to approve a packet of measures

²¹³ Valero, 1 March 2011, para 22.

²¹⁴ ‘UN Security Council Press Statement on Libya’, SC/10180, 22 February 2011.

²¹⁵ Goldberg, ‘A “Responsibility to Protect” Libya’, *UN Dispatch*, 23 February 2011.

²¹⁶ ‘UN Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Libya’, *UN Press Release*, 22 February 2011.

²¹⁷ ‘In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters’, SC/10187/Rev.1, *UNSC Press Statement*, 26 February 2011.

including asset freeze and individually named travel bans against Gaddafi, his family and senior government officials, an arms embargo, and most importantly a reference of the situation to the International Criminal Court for investigation and possible prosecution for crimes against humanity.

4.1.1 R2P and the ICC: converging and diverging responsibilities

Resolution 1970 was considered “historic”²¹⁸ because of the unanimity with which it was passed. China and Russia, known for their distrust of international justice, did not avail themselves of their veto power but supported the resolution, and especially the most controversial part, the referral of the case of Libya to the ICC.

The fact that Libya is not a party to the Rome Statute meant that intervention by the ICC on alleged crimes committed in Libya could only happen if the Libyan authorities accepted the jurisdiction of the Court, or if the SC decided to refer the situation, as the ICC Prosecutor reminded just days before the resolution was passed.²¹⁹ Thus, the referral of the crisis in Libya to the ICC was welcomed as a confirmation that the ICC still retained an important role in the resolution of conflicts but at the same time, this was a test for the ICC to “inspire confidence in its ability to provide a meaningful, significant and above all prompt response to the crisis.”²²⁰

The referral only pertains to facts occurred only after February 15th and 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.”²²¹

Although the referral is to be welcome as evidence of an existing international effort to fight impunity, the immediate issue concerns how it would be received and acted upon by parties and non-state parties to the Rome Statute.

Some argue that the case of Libya, together with other attempts to prosecute repressive leaders still in power during ongoing conflicts, as was done with Al-Bashir in

²¹⁸ Evans, ‘No-fly zone will help stop Gaddafi’s carnage’, *The Financial Times*, 28 February 2011.

²¹⁹ ‘Statement by ICC Prosecutor Luis Moreno-Ocampo on Libya’, *ICC Press Release*, 23 February 2011.

²²⁰ Schabas, ‘Libya Referred to International Criminal Court by Security Council’, *PhD Studies in Human Rights weblog*, 27 February 2011.

²²¹ Resolution 1970, para 5.

Sudan, the Army Leaders of the Lord's Resistance Army in Uganda and Charles Taylor for his involvement in the Sierra Leone civil war, shows a new tendency to use the ICC as "the judicial arm of Western intervention in weaker countries."²²² The legitimacy of the ICC and this referral is questioned by the fact that three of the five permanent members of the SC do not recognise the jurisdiction of the ICC. Furthermore a strong argument exists on whether the involvement of the ICC at such an early stage of the conflict, only a week after the conflict began, and the decision of the Prosecutor to investigate the case only a few days after the resolution was passed, might impede any peaceful resolution to the crisis.

The issue of 'peace vs justice', on which burgeoning literature exists, is clearly one that many commentators have sought to bring up and debate. While many argued that the ICC referral would serve as a warning to those around Gaddafi that continuing to support him would mean going down with him, thus attempting to further weaken his support, this was questioned by those who believe that an ICC indictment would further induce Gaddafi to hold onto power and fight till the bitter end.

The ICC's involvement in an on going crisis and the issuing of indictments may reduce the possibility of a political and peaceful solution, and prolong bloody conflicts, as in the case of Darfur,²²³ the only other case, apart from Libya, which was referred to the ICC by the SC. "By applying the pressure of justice to a savage leader, the ICC may have perpetuated, rather than ended, his crimes: Col. Gadhafi and his sons and generals do not dare end their campaign of violence if it means spending years in a Dutch cell."²²⁴

Furthermore the ICC's implication in the Libyan conflict could potentially frustrate efforts to mediate an exit of Gaddafi from power and a transitional process to democracy, as will be seen below. As was seen in the case of Darfur, the AU, together with the LAS and China, asked for the decision to indict Bashir to be deferred, arguing that an arrest warrant was "hindering the peace process and threatening Sudan's stability."²²⁵ In response to the Security Council's refusal to act under powers granted to

²²² Johnstone, 'What Does the ICC Stand For? The Imperialist Crime Cover-Up: Arrest Warrant for Moamar Qadhafi', *Global Research*, 3 June 2011.

²²³ Nouwen, 2011, p.8.

²²⁴ Saunders, 'When Justice Stands in the Way of a Dictator's Departure', *The Globe and Mail*, 2 April 2011.

²²⁵ International Crisis Group, 2009, p.1.

it by art.16 of the Rome Statute²²⁶, the African Union declared, interestingly during an AU meeting in Libya, at a time when Gaddafi had been elected the AU chairman, that “AU Member States shall not cooperate...for the arrest and surrender of President Omar al Bashir of Sudan.”²²⁷

Greenberg reported that the decision did not demonstrate a general consensus as it was reached “through the use of manipulative tactics and bullying from the current chairman of the African Union, Muammar Gaddafi”²²⁸ but it is also reported that Mr. Ping, the AU Commissioner Chair, stated that the AU resolution was “showing to the world community that if you don't want to listen to the continent, if you don't want to take into account our proposals ...we also are going to act unilaterally.”²²⁹

In the preamble of the 1970 resolution, a non operative but yet significant section, the SC reiterated that it had the power, under art.16 of the Rome Statute, to suspend investigations and proceedings for 12 months, possibly pointing to a signal that the SC “would consider stopping the ICC process in exchange for the peaceful transfer of power”²³⁰ to allow for other ways of achieving justice more ‘effectively’.

As arrest warrants have now been issued by the ICC²³¹ against Gaddafi²³², his son Saif al-Islam, and Libya's military intelligence chief, Abdullah al-Senussi, it remains to be seen whether this will further undermine Gaddafi and demonstrate that he has lost all legitimacy, or increase his determination to stay. It can be argued that a

²²⁶ Statute of the International Criminal Court, adopted by the Rome Conference for an International Criminal Court, in Rome, Italy on 17 July 1998, UN Doc. A/CONF. 183/9, *entered into force* 1 July 2002 (hereinafter ‘Rome Statute’), art. 16, on the ‘Deferral of investigation or prosecution’ states that: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

²²⁷ AU General Assembly Decision 245/13: ‘Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), AU Doc.Assembly/AU/Dec.245/13, 3 July 2009, para 10.

²²⁸ Greenberg, ‘African Union Declaration Against the ICC Not What it Seems’, *Foreign Policy in Focus*, 6 August 2009.

²²⁹ ‘AU criticised over Bashir decision’, *Al Jazeera*, 4 July 2009.

²³⁰ Bosco, ‘The Libya resolution: prosecution as bargaining chip?’, *Foreign Policy*, 27 February 2011.

²³¹ ‘Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi’, *ICC Press Release*, 27 June 2011.

²³² Muammar Gaddafi is the second sitting head of state to be indicted by the ICC in its nine-year history, after Al Bashir was indicted in 2009 but is yet to be arrested. Bashir has since travelled freely throughout Africa and the Middle East, and was on his way to China when Gaddafi’s arrest warrant was issued. *See* ‘Delayed Sudan Leader Omar al-Bashir arrives in China’, *The BBC News*, 27 June 2011.

possible peace deal including his exit and exile is now significantly more difficult, if not completely invalidated, as stated by insurgent officials.²³³

The use that the SC has made of the ICC shows a clear attempt to empower the ICC as a means to demonstrate the commitment of the international community to end atrocity crimes and holding those who commit them accountable, not just *post factum* but during the commission itself. For those advocating R2P, the ICC is, within the doctrine's toolbox, the instrument that gives judicial enforcement to a political willingness to make not only the state, but single individuals responsible for their actions, first to their people, and secondly to the international community. As it is not a legally binding doctrine, R2P lacks enforcement mechanisms for legal accountability.

The R2P doctrine concerns itself, a part from ethnic cleansing, with the same crimes that can be tried by the ICC, namely genocide, war crimes and crimes against humanity and rejects the idea that sovereignty can be used as a shield to protect and render immune individuals who have committed such crimes. It is primarily the State that must act according to its responsibility to protect but if it fails or is unwilling to do so, it is the responsibility of the international community to intervene. The same applies under the complementarity principle of the ICC, which can apply its jurisdiction only if the state fails to investigate and prosecute an alleged perpetrator of atrocity crimes.

Furthermore, although the ICC does not contemplate preventive measure, as R2P endeavours to emphasise prevention through timely intervention, so should the ICC “emphasise a preventive and constructive mission instead of a retributive one.”²³⁴ This would help shift the burden of implementation on the national level before it reaches the international dimension. At the same time, through the endorsement of R2P, it becomes the international community's responsibility, but not a legal obligation, to ensure accountability for the commission of internationally recognised crimes, through international criminal law and the jurisdiction of the ICC.

As stated in the part of the R2P implementation report about Pillar I, “by seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunals have added an essential tool for implementing the responsibility to protect, one

²³³Ajbaili and Ghasemilee, ‘Is ICC Arrest Warrant for Qaddafi Enforceable? Doubtful’, *Al Arabiya*, 27 June 2011.

²³⁴Schiff, 2011, p.11.

that is already reinforcing efforts at dissuasion and deterrence.”²³⁵

However, the effectiveness of deterrence and the dissuasion impact can only exist if a crime perpetrator fears the real risk of punishment. Gaddafi has been clearly defiant of the ICC and does not recognise its jurisdiction.²³⁶ It is unlikely that the arrest warrant issued against him will encourage his inner circle to collaborate with the ICC; only the Libyan Interim National Council²³⁷ has expressed its intention to help bring the indicted to justice²³⁸.

As with R2P, the ICC can only function through the support and collaboration of its signatory states. In this case, as the ICC arrest warrant is based on a UN Security Council referral, not only state parties to the Rome Statute, but all members of the UN, amongst which Libya, should collaborate with the Court to apprehend the Libyan suspects if entering their territory.²³⁹

The African Union has yet again decided that it will not cooperate in the execution of the arrest warrants, as it noted that they “seriously complicate the efforts aimed at finding a negotiated political solution to the crisis in Libya”, and went further in requesting the SC, as in the case of Darfur, to activate the provisions of art.16 of the Rome Statute and defer the ICC process, in the “interest of justice as well as peace in the country.”²⁴⁰

This decision indicates that willingness to collaborate with the ICC has waned considerably in Africa, which sees itself as the main victim of ICC’s jurisdiction as to

²³⁵ Implementing R2P report, para 18.

²³⁶ As reported by Al Arabiya, “Libyan Justice Minister Mohammed Al Qamoodi told a news conference in Tripoli on Monday that the ICC arrests warrants would not affect Colonel Qaddafi and his son: “Libya does not accept the decisions of the ICC which is a tool of the Western world to prosecute leaders in the Third World””, Ajbaili and Ghasemilee, ‘Qaddafi scoffs at ICC arrest warrant as not enforceable’, *Al Arabiya*, 27 June 2011.

²³⁷ For more information on the Libyan Interim Transitional National Council (hereinafter ‘TNC’) see The Libyan Interim National Council – Official Website, available at <<http://www.ntclibya.org/english/>>.

²³⁸ See ‘Statement by ICC Prosecutor on decision by Pre-Trial Chamber I to issue three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi’, *ICC Press Release*, 28 June 2011.

²³⁹ UNSC Resolution 1970, UN Doc. S/RES/1970, (hereinafter ‘Resolution 1970’), 28 February 2011, para 5, states: “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.

²⁴⁰ ‘Decisions Adopted During the 17th African Union Summit’, The African Union, *Directorate of Information and Communication*, Malabo, Equatorial Guinea, 1 July 2011.

date the ICC has only prosecuted Africans.²⁴¹ The lack of AU support will seriously affect the credibility and legitimacy of the Court, which is accused of being politically instrumentalised by the most powerful, as evidenced by its unwillingness, for example, to try cases involving US and UK soldiers and war crimes committed during the Iraq war, or NATO's crimes during its bombing campaign in Kosovo²⁴².

4.1.2 In R2P we trust, or not?

The belief in the international community's responsibility to protect the Libyan people, however, prompted calls for stronger action, including the imposition of a no-fly zone, without carefully considering its prospect of success. The lack of criteria to guide the decision to begin an armed intervention, such as those advanced by the ICISS but discarded by the Outcome Document, meant that little consideration was given to the potential outcomes of armed intervention, such as whether its effects could positively outweigh the consequences of inaction. In theory, the use of force to end the conflict in Libya could be justified by a moral obligation, but in practice would only be justified by its success. Fundamental questions of who the relevant actors are and what are the relevant interests at play, and thus what might the consequences and outcomes of an intervention be,²⁴³ were pushed aside in light of the risk of atrocity crimes being or about to be committed.

First and foremost, however, the resolution was passed to ensure the responsibility to protect civilians, by "recalling the Libyan authorities' responsibility to protect its population."²⁴⁴ Although this shows a clear commitment by the SC to the protection of human rights and a strong endorsement of the doctrine of R2P, it cannot be claimed to have fully succeeded.

One of the first reasons for questioning the triumph of R2P in light of the unanimous endorsement of Resolution 1970, is the blatant radical selectivity and inconsistency with which preliminary action was taken in Libya, followed by a full blown military intervention, while other situations that arguably required the

²⁴¹ See 'Situations and Cases', the ICC, available at <<http://www.icc.cpi.int/Menu/ICC/Situations+and+Cases/>>.

²⁴² For a more detailed discussion of the alleged war crimes committed by NATO forces during the war in Kosovo see Schwabach, 2001.

²⁴³ See Al Jazeera's lengthy argument on 'The Drawbacks of Intervention in Libya', *Al Jazeera*, 20 March 2011.

²⁴⁴ Resolution 1970.

enforcement of the principle of R2P even more, were not receiving protection from the State nor from the international community. Many have questioned, and continue to question, the application of the principle of R2P to the case of Libya, and not to the ongoing repression in Bahrain, Yemen²⁴⁵, or Syria,²⁴⁶ which have received only half hearted condemnations. This could potentially undermine the doctrine of R2P and cause it to be seen, yet again, as western imperialism pushing for geo-politically interested interventions in the guise of humanitarian interventionism.

This was the reason why the ICISS had set out to re-conceptualise the issues surrounding the sovereignty-intervention debate, so people would see them through “fresh eyes”²⁴⁷ and not focus on the interests of states, but rather of individuals at risk. However, as will be further seen, it is precisely this attempt to shift the focus and the failure to address the controversies surrounding the use of force to implement R2P that has opened Pandora’s box and let out all the unresolved problems of the militarisation of humanitarianism.

The endorsement of R2P, as seen by its normative development, was only possible because it lacked any strict criteria to delimit the use of force to specific situations, and allowed flexibility of application on a ‘case by case’ basis. As many R2P supporters argue in its defence, it does not mean that just because the international community cannot or chooses not to act everywhere, it should not act anywhere, when there is sufficient political will. However, the validity of the political will to undertake coercive action in Libya rather than in other countries was indisputable in the light of reported crimes against humanity and war crimes against the Libyan population. These atrocity crimes required intervention in a “timely and decisive manner.”²⁴⁸

Further doubts were raised and continue to be so, on whether all appropriate diplomatic, humanitarian and other peaceful measures had been explored and found inadequate, as prescribed by the 2005 Outcome Document, before collective action under Chapter VII of the UN Charter could be considered. R2P highlights the broad range of measures available to prevent a situation from escalating once early warnings

²⁴⁵ As argued by many, Yemen and Bahrain are not attracting stronger action than condemnation because they are allies of the US. *See for eg.* Cohen, ‘Stop Bombing in Libya’, *The Huffington Post*, 21 March 2011.

²⁴⁶ The Guardian reports that the UN is unable to agree on action in Syria because of resistance from Russia and China, ‘UN Fails to Agree on Condemning Syria’, *The Guardian*, 28 April 2011.

²⁴⁷ ICISS report, 2001(a), para 1.41.

²⁴⁸ Outcome Document, para 139.

are established, including preventive diplomacy and deployment of peacekeepers²⁴⁹ and negotiation, enquiry and involvement of regional agencies or arrangements to achieve pacific settlements, as provided for in Chapter VI and VIII of the UN Charter. Aside from the sanctions and the threat of prosecution by the ICC it can be argued that other preventive measures were neither explored nor satisfied before the ‘last resort’ of the use of force was considered. On the contrary, with Libya coercive measures appeared to be the first, rather than the last, to be considered.

A commission made up of representatives of the UN, the AU and the LAS could have been dispatched to Tripoli to try and negotiate a cease-fire.²⁵⁰ The AU had established an Ad-Hoc High Level Committee²⁵¹ proposing to increase efforts from all parties in Libya, together with AU, LAS, OIC, EU and UN partners, to find a political solution to the crisis and reject any foreign military intervention, “whatever its form.”²⁵² However the loud calls for stronger action due to Gaddafi’s defiance of Resolution 1970, suffocated the possibility of even discussing a mediated exit. For those seeking an intervention, the argument was that the Libyan regime, by ignoring calls to end attacks by its forces on civilians as requested in Resolution 1970, had lost its legitimacy. The onus now fell upon the international community to take stronger collective action, and hesitancy was unacceptable. Peral argued that Resolution 1970, which reminded Libya of its own responsibility to protect the victims of its own attacks, was “absurd” and possibly a “strategy of the Council not to discharge its own responsibilities under international law.”²⁵³ By March 3rd, the UN was being accused of not having taken its responsibility to protect seriously enough and of being a “disappointment”²⁵⁴ and of not having “the stomach for difficult decisions.”²⁵⁵

Stronger calls for action were heard from across the political spectrum, including the LAS.²⁵⁶ The imposition of a no fly zone is what many was seen as the next step to

²⁴⁹ Akhavan, 2011, p.23.

²⁵⁰ The President of Venezuela’s calls to set up a “committee of peace” were refused by the US, France and the TNC, while the Arab League was still considering the offer. See ‘Chávez proposes ‘committee of peace’ to mediate between west and Gaddafi’, *The Guardian*, 3 March 2011 and ‘Libyan rebels reject proposed negotiations with Gaddafi’, *International Business Times*, 4 March 2011.

²⁵¹ Communique of the 265th Meeting of the Peace and Security Council, AU document PSC/PR/COMM.2 (CCLXV), 10 March 2011, para 8.

²⁵² *Ibid.*, para 6.

²⁵³ Peral, 2011, p.2.

²⁵⁴ Singer, ‘When Justice calls for Military Intervention’, *TODAYonline*, 3 March 2011.

²⁵⁵ O’Brien, ‘Right to Protect Libyans?’ *Winnipeg Free Press*, 4 March 2011.

²⁵⁶ ‘Arab states seek Libya no-fly zone’, *Al Jazeera*, 12 March 2011.

be taken by the UNSC to demonstrate its genuine intention to protect the Libyan people. The World Summit consensus on R2P had to be put into practice, if it were not, Libya would become “R2P’s graveyard.”²⁵⁷ Thakur argued that Libya was the time and place to redeem the pledge of R2P and that “there are no limits to what can be done in responding to these atrocity crimes.” He called for the enforcement of a no-fly zone, under which “if Libyan pilots fly, they die.”²⁵⁸

The world was watching the UN response to countries in which popular protests were met with violent repression. As the doctrine of R2P envisaged the military option as the last resort for extreme cases, Libya, it was argued by R2P proponents, was “as extreme as it gets.”²⁵⁹ It was obvious to the upholders of R2P that not only were the lives of the Libyan people at stake but the credibility of the UN and the Security Council in its capacity to implement R2P hung in the balance.

More cautious commentators saw that the Libyan crisis was more than just a test for R2P but about the validity of another western military intervention: “the Libyan crisis confronts two sorts of ‘never agains’. There is the ‘never again’ to mass atrocities and war crimes that came out of the experiences such as Rwanda and Srebrenica – and which led to the birth of R2P. And there is the ‘never again’ to armed western intervention to overthrow an Arab dictator that came out of the Iraq war.”²⁶⁰

It was because of the Iraq legacy that suspicion was voiced of a US lead intervention in Libya, which, for example, led the Organisation of the Islamic Cooperation²⁶¹ and the TNC²⁶² to call for a no-fly zone with no direct military intervention, although it was questionable how a foreign air force which would undertake attacks on Libyan military objectives, would not amount to a direct military intervention. As the US Secretary of Defence explained, establishing a no-fly zone in

²⁵⁷ Thakur, ‘UN breathes life into ‘responsibility to protect’, *TheStar*, 21 March 2011.

²⁵⁸ Thakur, ‘We have a duty to stop Libyan slaughter’, *TheStar*, 28 February 2011.

²⁵⁹ Evans, ‘No-fly zone will help stop Gaddafi’s carnage’, *The Financial Times*, 28 February 2011

²⁶⁰ Rachman, ‘Better for Libya to Liberate Itself’ *The Financial Times*, 28 February 2011.

²⁶¹ ‘Final Communique Issued By The Emergency Meeting Of The Committee Of Permanent Representatives To The Organization Of The Islamic Conference On The Alarming Developments In Libyan Jamahiriya’, Organisation of the Islamic Cooperation (hereinafter ‘OIC’), 8 March 2011, supporting the international call to impose a no-fly zone but “stressing the principled and firm position of the OIC against any form of military intervention to Libya”.

²⁶² ‘Founding Statement of the Interim Transitional National Council’, The Libyan Interim Transitional National Council, 5 March 2011: “(...) we request from the international community to fulfil its obligations to protect the Libyan people from any further genocide and crimes against humanity without any direct military intervention on Libya soil”

Libya would clearly require attacks on Libyan territory and assets²⁶³, but as Rasmussen, Head of NATO, stated, a no-fly zone could not be planned unless it was demonstrably needed, there was strong regional support for it and it was unequivocally mandated by the Security Council.²⁶⁴ Again, another ‘illegal’ war as was Kosovo could not be considered as a viable option. The stage was set, and the necessary support consolidated for the UN to be re-empowered through R2P, as the world’s protector of peace and justice.

4.2 UN Resolution 1973: opening R2P’s Pandora’s Box

On March 17th 2011, the Security Council passed a resolution in which the situation in Libya was determined as a continuing threat to international peace and security, thus allowing the exception to the prohibition of the “threat or use of force against the territorial integrity or political independence of any state”²⁶⁵ and enforcing the measures envisaged under Charter VII of the UN Charter to prevent or halt massive human rights violations. The SC, after citing the condemnations of the situation in Libya by the LAS, AU and OIC, building on an international consensus to justify an intervention, while at the same time, quite contradictorily, reaffirming a “strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya,”²⁶⁶ allowed Member States “acting nationally or through regional organisations or arrangements, and acting in cooperation with the Secretary General, to take *all necessary measures* (...) 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* (...)”²⁶⁷ and imposed “a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians.”²⁶⁸

²⁶³ ‘Gates: Libyan no-fly zone would require attack’, *CBS News*, 3 March 2011.

²⁶⁴ ‘Update Report on Libya No.1’, *Security Council Report*, 14 March 2011.

²⁶⁵ UN Charter, art. 2(4).

²⁶⁶ UNSC Resolution 1973, UN Doc. S/RES/1973, (hereinafter ‘Resolution 1973’), 17 March 2011.

²⁶⁷ Resolution 1973, para 4. (emphasis added).

²⁶⁸ *Ibid.* para 6.

The resolution was passed with ten votes in favour²⁶⁹, none against and five abstentions by China, Russia, India, Brazil and Germany. The reasons given for abstention included the fact that peaceful means had not been prioritised and that it was not clear how and by whom all the necessary measures allowed would be enforced, and what they included and excluded. Nonetheless China and Russia refrained from employing their veto power because of support from the LAS and the AU²⁷⁰ and possibly, as Ban Ki-Moon had warned, because of the “political costs, domestically and internationally, for anyone seen to be blocking an effective international response to an unfolding genocide or other high-visibility crime relating to the responsibility to protect.”²⁷¹

This is the first time that a resolution of this kind has been passed since the Security Council voted on the situation between Kuwait and Iraq requiring Member States to take ‘all necessary means’ to “restore international peace and security in the area.”²⁷² It is thus not the first time that the SC has interpreted an internal situation to be a threat to international peace and security, which allows for an intervention under art. 39 of the UN Charter. But it is possibly the first time that the Security Council has passed a resolution authorising ‘all necessary measures’, including the use of force, against a functioning government, without its consent, to protect civilians and civilian populated areas, thus essentially authorising a military ‘humanitarian intervention’, in which the UN shifts from a position of professed impartiality to taking sides in protecting one party to the conflict.

This change appears inevitable as a consequence of the Outcome Document having restricted R2P to atrocity crimes, in which there is a perpetrator and a victim,²⁷³ which does not allow for the UN to be committed to neutrality and impartiality. Orford argues that the UN responded to the need to “become more political and less impartial through the turn to human rights”²⁷⁴, as a result of the atrocities committed during the 1990s. The embrace of R2P confirmed this commitment to reject the sovereignty of

²⁶⁹ UN Charter, art 27(2) states: “Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.”

²⁷⁰ ‘Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions’, *UN Press Release*, SC/10200, 17 March 2011.

²⁷¹ Implementing R2P report, para. 61.

²⁷² UNSC Resolution 678, UN Doc. S/RES/678, 29 November 1990.

²⁷³ Welsh, 2011.

²⁷⁴ Orford, 2011, p.102.

those in government who commit crimes and to reassert the authority of the UN as the worlds “greatest tribune”²⁷⁵ to fight cruelty, injustice and seek peace for all people.

With the passing of Resolution 1973, the SC has broadened its authority for action to include situations of internal domestic conflict where one or more of the crimes protected under R2P, are taking place or risk being so. It did not do so for the Rwandan Genocide, or for the NATO intervention in Serbia, or the 2008 invasion of Gaza by Israel²⁷⁶, but the case of Libya seemed to allow for such an intervention, as regional actors appeared to be supporting stronger measures and recognised the UN’s capacity to enforce its responsibility to protect the world’s people.

In passing the resolution, the SC had to reconcile the need for both legitimacy gained through the moral and ethical justification of having to protect the Libyan civilians, and legality, by approving the use of force under Chapter VII of the UN Charter. Although the latter does not allow the use of military force for humanitarian reasons, as a result of the consensus established through R2P, the UN could not allow another Kosovo to undermine its authority and for other actors to take its place as protectors of humanity. It follows that the SC has had to expand its discretion, through the endorsement of R2P, to allow for the exception to the right of non-intervention and interference in internal matters of any state²⁷⁷ that was committing mass violations of human rights.

According to R2P, such discretion remains restricted to four specific crimes. Of the four, ethnic cleansing has no legally defined status, but crimes against humanity are considered as part of international customary law, established into positive international

²⁷⁵ ‘Secretary General Presents His Annual Report to the General Assembly’, *UN Press Release*, SG/SM/7136 GA/9596, 20 September 1999.

²⁷⁶ The Security Council has also failed to respond to the recent calls by the LAS to impose a no-fly zone over Gaza after the escalation of attacks by Israel against Palestinians, *see* ‘Arab League calls for no-fly zone over Gaza’, *Reuters*, 10 April 2011. The call has also come from Richard Falk, the U.N.’s special rapporteur on human rights in the occupied Palestinian territories, who has argued that “In the last several years, the UN Security Council has endorsed the idea of humanitarian intervention under the rubric of “a responsibility to protect” (...) and no world circumstance combines the misery and vulnerability of the people more urgently than does the situation of the people of Gaza living under occupation since 1967. Surely the present emergency circumstances present a compelling case for the application of this protective response under UN auspices. If this does not happen, it will again demonstrate to the people of the world, especially those in the Middle East, that geopolitics trumps international law and humanitarian concerns and leaves those victimized with few options”, ‘Entry denied, detention and expulsion’, *Today’s Zaman*, 26 December 2008.

²⁷⁷ *Ibid.* art 2(7).

law through the Nuremberg Charter.²⁷⁸ War crimes, first codified in the Hague Conventions of 1899 and 1907, have since been more clearly defined in the international customary laws of the Geneva Conventions, that regulate the conduct of war and must be applied to all situations of armed conflict.²⁷⁹ The crime of genocide imposes a legal obligation on States that have ratified the Genocide Convention, to prevent and punish crimes of genocide.²⁸⁰ As these are legally recognised crimes, to which the application of R2P is limited by the 2005 Outcome Document, the debate on thresholds has now shifted to the proof and evidence needed to determine the existence of such crimes.²⁸¹

Whether one argues that necessity, proportionality, or reasonable prospects of success should have been not only considered, but satisfied to allow for the intervention in Libya to happen, or whether there existed evidence to prove that genocide, crimes against humanity or war crimes were about to occur or were in fact taking place, it is hard to see how any legally viable argument was made to justify how the case of Libya required the application of R2P in its sharpest end, compared to other situations such as Syria where hundreds of demonstrators have been killed and many more wounded, arbitrarily arrested, tortured and disappeared.²⁸²

A decisive factor in the decision to pass Resolution 1973 was probably the promptness with which the threat of genocide was used to describe the possible action that Gaddafi was about to take in Benghazi, given the words he had spoken on national radio²⁸³ when addressing the rebels in Benghazi, just hours before the SC would convene: “It’s over ...We are coming tonight. You will come out from inside. Prepare yourselves from tonight. We will find you in your closets. (...) We will show no mercy and no pity (...).”²⁸⁴ Notably Gaddafi told his troops to let those rebels who surrendered

²⁷⁸ Mikulaschek, *The Stanley Foundation*, 2008, p.12.

²⁷⁹ *Ibid.*, p.11-12.

²⁸⁰ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by resolution 260 (III) of the United Nations General Assembly in Paris, France on 9 December 1948, 78 U.N.T.S. 277, *entered into force* 12 January 1951, (hereinafter ‘Genocide Convention’), art.1.

²⁸¹ Welsh, 2011.

²⁸² International Coalition for the Responsibility to Protect (ICRtoP), ‘The Crisis in Syria’, 2011.

²⁸³ Interesting to note here the evocation, yet again, of the Rwanda genocide during which the use of national radio was a fundamental device for the incitement and spread of violence against the Tutsi, so much so that “In 1999, Clinton issued a policy directive permitting US interventions in any future cases in which radio stations called for violence”. See Thompson, 2007, p.53.

²⁸⁴ ‘Gaddafi tells Benghazi his army is coming tonight’, *Reuters UK*, 17 March 2011.

their arms go, without pursuing them.²⁸⁵ This indicates that Gaddafi intended to target armed rebels only, rather than unleash his forces against all civilians indiscriminately, initiating a possible genocide. Furthermore, it can be argued that it is usually the case that if one intends to execute crimes to the extent of genocide, an attempt would be made to shield such intention rather than publicly announce it, especially knowing that this could lead to a mobilisation of a vigilant international community.

However no one was willing to take the risk or the blame for a possible massacre. As Luck argued: “the concept of RtoP rests on prevention: we don’t want to wait until dead bodies pile up and we can clinically prove exactly what happened, instead we seek to intervene soon enough to prevent mass violence.”²⁸⁶ The consequences of inaction appeared graver than those of action, although judging whether the passing of this resolution prevented Gaddafi from the mass killing of Libyans, which the US has since questionably estimated at 100,000²⁸⁷, is problematic. As Akhavan argues, it is “evident that the time to act is before a spark becomes a conflagration”²⁸⁸ but measuring the success of genocide prevention by what did not happen, and thus any assessment of the intervention in terms of what it averted, is highly unreliable. The initial NATO action in the first days of establishing and enforcing a no-fly zone might have prevented a “blood bath (...) that would have stained the conscience of the world”²⁸⁹ but the success of the intervention should only be measured in the long term by the effectiveness of its main objective of protecting civilians.

The concerns over US and NATO’s actions were soon voiced by the LAS and the AU. LAS secretary general Amr Mussa on the 20th March, just a couple of days after the resolution was passed, condemned the bombing campaign and stated that:

²⁸⁵ *Ibid.*

²⁸⁶ Luck, ‘Council Action on Libya "Historic" Implementation of RtoP’, interview with Ross, *International Peace Institute*, 28 March 2011.

²⁸⁷ “We were looking at ‘Srebrenica on steroids’ - the real or imminent possibility that up to a 100,000 people could be massacred, and everyone would blame us for it”, statement made by White House Middle East strategist Dennis Ross during a White House briefing, as commented on by Douthat, Ross, ‘100,000 Libyan Casualties?’ in Opinion Pages, *The New York Times*, 24 March 2011.

²⁸⁸ Akhavan, 2011, p.4.

²⁸⁹ President Obama stated: “I firmly believe that when innocent people are being brutalized; when someone like Qaddafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save many thousands of lives—then it’s in our national interest to act. And it’s our responsibility.” ‘Weekly Address: President Obama Says the Mission in Libya is Succeeding’, *The White House, Office of the Press Secretary*, 26 March 2011.

“What is happening in Libya differs from the aim of imposing a no-fly zone (...) and what we want is the protection of civilians and not the shelling of more civilians.”²⁹⁰ The fundamental regional support that had been relied upon to pass the resolution was now dwindling, especially among AU States.

4.2.2 The African Union: left out in the cold or unwilling to act?

Although the vote of South Africa, Nigeria and Gabon, as non permanent members of the SC, was decisive in allowing Resolution 1973 to pass with one vote more than necessary, it has been argued that President Zuma, had been pressured specifically by Obama to vote on the resolution and that his envoy at the UN had failed to appear for the final vote and had to be chased up by Susan Rice, the US ambassador to the UN, to make sure he gave his affirmative vote.²⁹¹ As much as these reported facts could be relied upon to judge decision-making processes within the SC, it seems that the AU’s response at the time of passing the resolution and after its implementation, was confused and contradictory. Unarguably though, as much as the AU’s support was identified as a critical component, as soon as it became clear that it would not support the kind of use of force that the coalition of the ‘more willing’ had in mind, “the need for that support, indeed the AU itself, disappeared from Western discourse on the issue.”²⁹² Mr. Ping, Chairman of the African Union, has strongly argued that the Union was never consulted and “totally”²⁹³ ignored over the Libyan crisis, hindering its efforts to outline an alternative resolution to the conflict. One could ask, however, if a real consensus does exist within the African Union to act in cases of conflict that require R2P.

As Luck has argued, African States had already committed themselves to the idea of a responsibility to protect human rights and promote good governance before the 2005 Outcome Document was indorsed.²⁹⁴ Five years earlier in fact, the AU Constitutive Act asserted, for the first time in an international treaty, the authority of the AU to forcibly intervene in one of its MS “pursuant to a decision of the Assembly in

²⁹⁰ Cody, ‘Arab League condemns broad Western bombing campaign in Libya’, *The Washington Post*, 20 March 2011.

²⁹¹ Akonor, ‘AU’s Mistake of Policy and Principle’, *AllAfrica.com*, 13 June 2011.

²⁹² Bennis, ‘Lybian Intervention Threatens the Arab Spring’, *Al Jazeera*, 22 March 2011.

²⁹³ ‘African Union ‘ignored’ over Libya crisis’, *HARDTalk, The BBC News*, 25 March 2011.

²⁹⁴ Luck, 2008(b), p.2.

respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”²⁹⁵, enforcing the idea of sovereignty as responsibility and a right of regional intervention if such responsibility failed to be acted upon by the State, demonstrating an intention “to shift the AU's stance from non-intervention to what is now commonly referred to as the doctrine of non-indifference.”²⁹⁶

This was proven after the HLP issued its report on the future of the UN, to which the AU responded by establishing the “Ezulwini Consensus.”²⁹⁷ In relation to the endorsement of R2P, the AU agreed that: “since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take actions in this regard.”²⁹⁸ This meant that although the AU recognised the importance of the authorisation for intervention by the UN, it also accepted that the approval, in times of urgency, could be sought *post factum*.

But the focus of the Constitutive Act is not just on the sharp end of R2P; rather, it recognises first of all the sovereign equality and interdependence among MS²⁹⁹ and the right of non-interference in the internal affairs of a MS³⁰⁰, prohibiting the use or the threat of the use of force.³⁰¹ It also advocates for the creation of a common defence policy³⁰² and the promotion of peace, security, and stability, democratic principles and institutions, popular participation and good governance as its main objectives,³⁰³ outlining the full spectrum of preventive and post-war rebuilding measures also present within the R2P principle. Finally, it intends to promote and protect human and peoples’

²⁹⁵ Constitutive Act of the African Union, adopted at the Thirty-Sixth Ordinary Session of the Assembly of the Heads of State and Government of the Organization for the African Unity (OAU), in Lomé, Togo on 11 July 2000, OAU Doc. CAB/LEG/23.15, entered into force on 26 May 2001, (hereinafter ‘AU Constitutive Act’) art. 4(h). This article has since been amended and now reads: “The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council”.

²⁹⁶ Williams, 2007, p.256.

²⁹⁷ ‘The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus”’, African Union Executive Council, 7th Extraordinary Session, Ext/EX.CL/2 (VII), 7-8 March 2005.

²⁹⁸ *Ibid.*, para B(i)

²⁹⁹ AU Constitutive Act, art. 4(a).

³⁰⁰ *Ibid.*, art. 4(g).

³⁰¹ *Ibid.*, art. 4(f).

³⁰² *Ibid.*, art. 4(d).

³⁰³ *Ibid.*, art. 3(f)(g).

rights, signalling a change from mere human rights promotion to protection by “acting directly on behalf of individuals whose rights have been abridged.”³⁰⁴

Notwithstanding the AU’s effort to institutionalise R2P, it is still argued that the organisation is not willing to “challenge the sovereignty of one of its more powerful members, even though that member has engaged in norm-violating behaviour.”³⁰⁵

Confirmation is found in the current Libyan conflict: as with the case of Sudan, the AU continues to show a great reluctance to undermine the sovereignty of a state, its territorial integrity and independence. So far, there has been no direct condemnation of Gaddafi, a strong advocate for a pan-African vision and of African unity³⁰⁶, and his alleged criminal actions. The AU has increasingly attempted to take on the role of the negotiator because as time goes by, it has become evident that the NATO campaign is failing to produce a resolution to this conflict, but rather increasing the stale-mate between the rebel stronghold and Gaddafi’s forces.³⁰⁷

Although some argue that the AU’s response to the Libyan conflict has been “slow and ineffective”³⁰⁸ and “timorous and confusing”³⁰⁹, there was unarguably a concerted, albeit uncoordinated, effort to play a pivotal role to resolve the Libyan crisis. The set up of an Ad-Hoc Committee³¹⁰ which was scheduled to visit Tripoli on March 18th and 19th on the same days the bombing began, to negotiate a political solution to the conflict, clashed with the voting of Resolution 1973, which did not allow the group of African heads of states to fly into the Libyan restricted zone, until April 10th.

By then, a proposed “road map” for a political settlement and a cease-fire was presented to Gaddafi, who accepted it³¹¹, but the rebels immediately refused the negotiation on the basis that it did not meet their core demand for Gaddafi and his inner circle to relinquish power.³¹² This was a missed opportunity for the conflict to be resolved through negotiations. The AU’s role was questionable, as it was not appearing

³⁰⁴ Welch, 1991, p. 536.

³⁰⁵ Williams, 2007, p.278.

³⁰⁶ McKinney, ‘Gaddafi a hero for African rights and liberation’, *Pan-African News*, 27 March 2011.

³⁰⁷ Marcus, ‘Libya stalemate leaves Nato without ‘Plan B’’, *The BBC News*, 11 May 2011.

³⁰⁸ Aning and Atuobi, 2011, p.16.

³⁰⁹ Akonor, ‘The War in Libya: The African Union’s Mistake of Policy and Principle’, *The Final Call*, 27 June 2011

³¹⁰ Communique of the 265th Meeting of the Peace and Security Council, AU document PSC/PR/COMM.2 (CCLXV), 10 March 2011, para 8

³¹¹ Denyer and Fadel, ‘Gaddafi accepts African Union’s road map for peace’, *The Washington Post*, 10 April 2011.

³¹² Fahim, ‘Truce Plan for Libya Is Rejected by Rebels’, *The New York Times*, 11 April 2011.

to support the desires of the rebels, and supposedly a part of the population of Libya, for a new democratic regime that replaced Gaddafi's despotism.

While the African Union continues to negotiate an exit strategy for Gaddafi, now clearly changing its position by requiring him to step down³¹³ and most recently presenting to the Libyan parties an official Framework Agreement on a political solution to the crisis in Libya and a negotiation process in which Gaddafi confirmed he would not participate³¹⁴, which the rebels have reportedly accepted³¹⁵, no representative of the coalition of the willing have commented on this, or welcomed the proposal of a ceasefire. On the contrary, the NATO forces have relentlessly continued and increased their campaign of airstrikes, bombarding not only military targets, but mistakenly targeting rebels³¹⁶ and reportedly bombing also hospitals³¹⁷, TV stations and a university³¹⁸, civilian targets which could constitute indiscriminate attacks prohibited by the laws of war, and claiming an unverified number of civilian lives³¹⁹, falling within the 'collateral damage' of NATO's mandate to protect civilians and civilian populated areas.

The Human Rights Council (HRC) has reported on the allegations of crimes committed by NATO forces but has stated that it is not able to ascertain the veracity of the facts, and that so far it has found no evidence of NATO intentionally targeting civilian areas or engaged in indiscriminate attacks on civilians.³²⁰ The Commission also

³¹³ 'AU Calls for Gaddafi to Step Down', *AllAfrica.com*, 9 June 2011.

³¹⁴ 'Official Presentation by the AU to the Libyan Parties of a Proposal on a Framework Agreement for a Political Solution to the Crisis in Libya', *AU Press Release*, 1 July 2011.

³¹⁵ 'Libya rebels welcome AU's 'Gaddafi-free' talks offer', *The BBC News*, 2 July 2011

³¹⁶ See 'NATO Forces Accidentally Kill 15 Libyan Rebels, Injure 7', *ABC News*, 2 April 2011; Five rebels 'killed in Nato strike in Libya', *The Independent*, 7 April 2011; 'Libya: Nato strike 'kills rebels' in Misrata', *The BBC News*, 28 April 2011.

³¹⁷ Panzer motion, 'Nato planes suspected of bombing hospital in Misdah', reported by *British civilians for peace in Libya*, *YouTube Video*, 23 April 2011.

³¹⁸ Nazemroaya, 'Breaking News: Photographic evidence: NATO Bombed Libya's Nasser University', *Global Research*, 12 June 2011.

³¹⁹ About 10 days after the NATO bombing began, reports were that 40 civilians had already been killed. See 'NATO taking reports of Libya civilian deaths seriously', *Reuters Africa*, 31 March 2011; 'Libya: Nato 'killed 15 civilians' in Sorman air strike', *The BBC News*, 20 June 2011. The Libyan Government has since argued that NATO bombing has claimed more than 700 civilian lives; see 'Libya says NATO air raids 'killed 700 civilians'', *The BBC News*, 31 May 2011.

³²⁰ Human Rights Council Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, 17th Session, Agenda Item 4, UN Doc. A/HRC/17/44, 1 June 2011 (hereinafter HRC report), para. 235.

wrote to NATO asking for information relating to its operations in Libya but to date had not received a response.³²¹

Overall, although in the context of a war or during military action, the loss of civilian life is often a tragic but inevitable component, it is hard to understand how even the loss of one civilian life, in a UN mandated mission to protect such life, can be acceptable or excused. An excessive and disproportionate use of force, which causes incidental loss of civilian life or damage to civilian objects “that would be excessive in relation to the concrete and direct military advantage anticipated from the attack”,³²² could also constitute violations of laws of war.

As President Zuma recently stated, the intention of the UN resolution was to protect civilian lives, which instead “have been lost due to these bombs, and civilian infrastructure has suffered untold damage”. Furthermore, he reiterated that the resolution did not “authorise a campaign for regime change or political assassination.”³²³

Resolution 1973 appears to lack clear initial objectives, apart from the intervention itself, and has now converted into the air support of one of the fighting forces of the civil war in Libya, which could easily undermine the mandate to protect civilians, if it exposes populated areas to greater dangers and may cost more lives than it attempts to save. As the ICISS stated “the aim of the human protection operation is to enforce compliance with human rights and the rule of law as quickly and as comprehensively as possible, but it is not the defeat of a state; this must properly be reflected in the application of force, with limitations on the application of force having to be accepted, together with some incrementalism and gradualism tailored to the objective to protect.”³²⁴

4.2.3 Intervention in Libya: legal, but legitimate?

The difficulty in assessing the legality and more so the legitimacy of the NATO intervention in Libya is that no specification was given in Resolution 1973 of what “all necessary measures” involved, meaning that it would be for the ‘coalition of the

³²¹ HRC report, para. 15.

³²² ‘Q & A on Laws of War Issues in Libya’, *Human Rights Watch*, 25 March 2011.

³²³ ‘AU: Gaddafi won't take part in talks’, *News24*, 26 June 2011.

³²⁴ ICISS report, para 67.

willing’, in this case NATO, in its ‘Operation Unified Protector’, to freely interpret the mandate and, through the lack of a framework of action, which would include a system of check and balances, apply any unrestrained use of force with complete impunity. In Resolution 1970, the SC stated that the ICC’s jurisdiction would not apply to non-Libyans nationals of a country not party to the Rome Statute for alleged acts arising out of operations in Libya.³²⁵ This paragraph was not included to exclude possible crimes committed by mercenaries as it only applies to acts or omissions “arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council.”³²⁶ Thus it would only exclude the application of the ICC jurisdiction to those acting under the SC mandate, but not party to the ICC.

The SC essentially authorised a use of force “the extent and form of which is solely at the discretion of those parties that volunteer to intervene on behalf of the UN.”³²⁷ NATO itself would be deciding on and justifying its own actions. However, in assessing the legality of NATO’s actions one can only judge them by the goal stated in the resolution, namely to protect civilians and civilian populated areas. To grant the use of force to do so in such vague and undefined terms as “all necessary means”, allows for the intervening parties to interpret the means according to their own self- interest. Obama, Sarkozy and Cameron have clearly specified that “Gaddafi must go.”³²⁸

Rasmussen, Head of NATO, in the June monthly press briefing, by answering a question on when the final curtain falls for NATO, whether this is with Gaddafi’s death or his arrest, stated that NATO does not target individuals but that it endorses the international call for Gaddafi to step down. The Head of NATO goes on to define the three military objectives of the NATO intervention: to end all attacks on civilians, the withdrawal of Gaddafi forces to their barracks and thirdly immediate and unhindered humanitarian access to people to provide aid. Nonetheless, he argues, it is “hard to imagine a complete end to all attacks against civilians as long as Gaddafi remains in power.”³²⁹

³²⁵ Resolution 1970, para. 6.

³²⁶ *Ibid.*

³²⁷ Kochler, 2011, p.1.

³²⁸ Obama, Cameron, Sarkozy Joint Letter On Libya’, *International Business Times*, 15 April 2011.

Although they admitted that the resolution does not authorise to remove Gaddafi by force, they qualified this by stating that it is impossible to imagine a future with him in power and that he “must go, and go for good”.

³²⁹ NatoCommunity, ‘NATO Secretary General’s monthly press briefing’, *YouTube Video*, 6 June 2011.

There has been a great divide of opinion within the coalition forces on whether Gaddafi can be considered a legitimate target³³⁰, highlighting the discrepancy allowed in interpreting Resolution 1973. Since NATO's mission, due to terminate on June 27th, has now been extended for another 3 months³³¹, it is becoming more evident that the NATO mission will be considered successful only once Gaddafi has gone, thus once the regime has changed. This goal is not expressed in Resolution 1973 but on the other hand, it is not excluded, as a foreign occupation force is.³³² However, if it were authorised, the SC would be "obliged to provide a clear, reasoned argument for any resolution that purports to effect a change in the legal rights or obligations of any state or other subject of international law."³³³

The SC is the only body authorised to strengthen, suspend or lift the measures provided by Resolution 1970 and 1973.³³⁴ As it has not extended the resolution to authorise or support regime change, from an international law perspective, it appears to remain unlawful. More so, the overthrow of a regime is not, according to the ICISS report, a "legitimate objective", although discretion on a case-to-case basis is allowed in deciding whether the disabling of a regime's capacity to harm its own people may be "essential to discharging the mandate of protection."³³⁵ The main justification for targeting Gaddafi has so far been that as head of the military and therefore his elimination is inherent to the necessary means required to protect civilians and civilian populated areas under threat of attack.³³⁶

Unless it is shown that targeting Gaddafi in a specific circumstance would be the necessary way of stopping an attack, it is hard to see how the bombing of Gaddafi's

³³⁰ As reported by the BBC, The UK Prime Minister stated that the resolution did not allow the targeting of Gaddafi while the UK Defence Secretary did not exclude the possibility of such action. See 'Libya: Removing Gaddafi not allowed, says David Cameron', *The BBC News*, 21 March 2011. On the other hand a NATO official has since confirmed that Gaddafi is considered as a 'legitimate target', see Townsend, 'NATO official: Gadhafi a legitimate target', *The CNN*, 9 June 2011.

³³¹ Epstein, 'Message to Muammar: NATO extends Libyan mission 90 days', *Politico*, 1 June 2011.

³³² Resolution 1973, para 4.

³³³ Wheatley, 2006, p.551.

³³⁴ Resolution 1973, para 28, the SC "*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".

³³⁵ ICISS report, para 4.33.

³³⁶ Philippe Sands, Professor of Law and UK barrister, argues that: "the authorisation of "all necessary measures" is broad and appears to allow the targeting of Gaddafi and others who act to put civilians 'under threat of attack', words that go beyond the need to establish a connection with actual attacks". See 'UN's Libya Resolution 1973 is better late than never', *The Guardian*, 18 March 2011.

residential compound and the killing of one of his sons and three of his grandchildren,³³⁷ a matter which has not raised much discussion in mainstream media,³³⁸ could be justified.

Since Rasmussen's statements, it has been reported that NATO is stepping up its efforts to target Gaddafi, as confirmed by a commander of the NATO Joint Operations Command.³³⁹ It is questionable how NATO's alleged intention to target Gaddafi can be reconciled with Resolution 1970 and the 1973 resolution preamble, which reiterates that the jurisdiction of the ICC applies to the case of Libya and that those responsible or complicit in attacks against civilians must be held accountable. As the ICC has now issued arrest warrants against Gaddafi, his son and his military intelligence chief, it is hard to see how his killing could be justified under international law. Were NATO to take justice into its own hands, it would risk undermining the legitimacy of both the ICC and the UN. Rather than the ICC and those acting under the principle of R2P working together, there is evident incongruity between NATO's strategy and the ICC judicial process.

Although a due process of law that will hold any party who has committed war crimes or crimes against humanity accountable is necessary, it is hard not to challenge this as 'selective justice' as it is unlikely that any accountability will arise over NATO's actions, as happened for potential war crimes committed during the intervention in Kosovo.³⁴⁰ Collateral damage and regime change, through the direct targeting of Gaddafi, appear to be accepted as consequences of NATO's use of force in the name of R2P, although this may only serve in further damaging the legitimacy of this intervention, and consequentially of the principle of R2P.

NATO's intervention in Libya is also questionable because it has undeniably "crossed a line"³⁴¹ and taken sides in a civil conflict and supported rebels, represented by the TNC, whose aim is to oust Gaddafi and institute a democratic regime.³⁴² It is not

³³⁷ 'Nato kills Gaddafi son and grandchildren', *Arab Times*, 1 May 2011.

³³⁸ One of Gaddafi's daughters, and mother of one of the children killed, has since filed a war crimes lawsuit against NATO in Belgium under its 'universal jurisdiction' to try genocide, war crimes and crimes against humanity. See 'Gaddafi's daughter files "war crimes" lawsuit related to NATO air strike that killed relatives', *Global Post*, 8 June 2011

³³⁹ Spillius, 'Libya: Nato 'trying to kill Col Gaddafi'', *The Telegraph*, 26 June 2011.

³⁴⁰ See *supra* fn. 242

³⁴¹ Annan, 'Mediation and Libya', Interview with Alec Russell, *The Financial Times*, 16 May 2011.

³⁴² The TNC has released a statement outlining its vision of a post-Gaddafi democratic Libya. See 'A vision of a democratic Libya', *TNC*, 29 March 2011.

known who the rebels exactly are and whether they represent the majority of the population. As was mentioned earlier, many demonstrations in support of Gaddafi have not made the headlines, and if so, only on Libyan TV. Most heads of states involved in the NATO intervention showed a clear intention of supporting the rebels when they officially recognised the TNC as the legitimate representative of the Libyan people.³⁴³ However, as Johnstone observed “this recognition was an extraordinary violation of all diplomatic practice and principles.”³⁴⁴

It meant the de-recognition of Gaddafi’s government and its institutions, which some have argued could have the “unhelpful result of ‘letting Gaddafi off the hook’³⁴⁵ for his responsibilities, such as to protect diplomats and foreign journalists. Furthermore, no question has been raised of holding the rebels responsible for their wrongful actions; allegations, which do not reach mainstream media,³⁴⁶ are surfacing that they too have committed crimes.³⁴⁷

Rather, the rebels have been provided with military intelligence and arms, France being the first to openly call for arming the insurgency against Gaddafi after it air-dropped arms to Libyan rebels.³⁴⁸ In rebutting accusations of having breached the arms embargo, it claimed this was “necessary” to protect civilians from an imminent attack, and thus did not violate the UN sanctioned arms embargo³⁴⁹, confirming that resolutions 1970 and 1973 are wide open to interpretation. The arms embargo is enforced by Resolution 1970 paragraph 9, but in paragraph 4 of Resolution 1973 the SC “authorises Member States (...) to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas

³⁴³ As of the 3rd of July, Turkey became the 14th nation to recognise the TNC following Germany, Australia, Britain, France, Gambia, Italy, Jordan, Malta, Qatar, Senegal, Spain, the United Arab Emirates and the United States. See ‘Turkey recognises Transitional National Council’, *The BBC News*, 3 July 2011. For more on the meanings of recognition of the TNC and its legality see Talmon, ‘Recognition of the Libyan National Transitional Council’, *American Society of International Law*, 16 June 2011.

³⁴⁴ Johnstone, ‘Why are they making war on Libya?’, *Counter Punch*, 24 March 2011.

³⁴⁵ Greene, ‘Legal experts debate whether Libyan Rebel Group Constitutes a Government’, *The National Law Journal*, 7 June 2011.

³⁴⁶ The key role that western media has played in this conflict resembles the one it played before and during the NATO lead intervention in Kosovo. A deeper analysis of this issue falls beyond the scope of this thesis but is fundamental in understanding the promotion of the intervention in Libya. See for eg Lendman, ‘War Propaganda: Western Media Promotes NATO Terror Bombing of Libya’, *Global Research*, 3 July 2011.

³⁴⁷ See for eg., Lubin, ‘Libyan Rebel War Crimes: The Videos America Doesn't Want You To See’, *Business Insider*, 18 April 2011.

³⁴⁸ Gelie, ‘La France a parachuté des armes aux rebelles libyens’, *Le Figaro*, 28 June 2011.

³⁴⁹ ‘Russia slams France's ‘crude violation’ of Libya arms embargo’, *France24*, 30 June 2011.

under threat of attack in the Libyan Arab Jamahiriya.” This can be interpreted as an exception to the arms embargo if such arms are provided for the protection of civilians. Notwithstanding this possible interpretation, there cannot be any guarantee that arms provided to the rebels or to the citizens will be used to protect themselves and other civilians. The provision of arms is undoubtedly not permitted to assist the rebels in order to achieve the goal of overthrowing the Gaddafi government. Clearly, any State that provides the rebels with arms will not be able to control what will be done with such arms. Furthermore, were France to be found in breach of the arms embargo, there are no real enforcement mechanisms in place to hold any party accountable for undertaking arm deals with the rebels, or with Gaddafi.

The issue of arms trade is of grave concern, especially considering the number of arms present in the country before the beginning of the conflict, as a result of lucrative arms transactions with Libya by European countries before the latter became concerned with such weapons being used against the Libyan people themselves.³⁵⁰ When it is reported that Gaddafi’s officials are handing out 1.2 million guns to ordinary citizens for them to defend themselves against the rebels,³⁵¹ one cannot help wonder where those guns come from.

The arming of rebels and the support of one side in a civil war falls within a wider discussion of International Humanitarian Law (hereinafter ‘IHL’) and the problem with distinguishing a combatant from a civilian, according to the principle that civilians who take up arms and take direct part in hostilities cease to be considered civilians as such and thus can be subject to direct attacks.³⁵² Many rebels are civilians who have taken up arms, but the resolution does not call upon the MS to assist the rebels, but to protect civilians. Questions have been raised as to which civilians the UN backed intervention aims to protect. Exclusively the ones attacked by Gaddafi’s forces? All civilians may be considered at risk, including ones that support Gaddafi and could

³⁵⁰ The Campaign Against Arms Trade (CAAT) states that most of the weapons present in Libya have been supplied to Gaddafi by European countries: in 2009 Libya was sold weapons worth €343 million by the European Union. See ‘EU arms sales to North Africa double in one year’, *CAAT*, 8 February 2011. This is an issue of fundamental importance in the implementation of R2Prevent, but is not within the limits of this thesis.

³⁵¹ ‘In the Brother Leader’s bunker’, *The Economist*, 30 June 2011.

³⁵² For more on the discussion of this principle, which goes beyond the scope of this thesis, see Melzer, ‘Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law’, *The International Committee of the Red Cross (ICRC)*, 2009. For an application of principles of IHL to the intervention in Libya, see ‘Q & A on Laws of War Issues in Libya’, *Human Rights Watch*, 25 March 2011.

be subject to attacks by rebels, as are civilians who take up arms only in self-defence and to defend their families. The SC resolution urges the Libyan authorities to comply with IHL but mentions nothing on the intervening states' obligations.

The implications of potential lack of respect for IHL by intervening forces again undermines the role of the UN, which is “simultaneously playing military and humanitarian roles, and [is] effectively a party to the conflict. (...) Such blurring of roles ultimately complicates or hinders impartial humanitarian access to people on both sides of a conflict”³⁵³ creating a situation in which the humanitarian provision of aid cannot reach areas in need because of the on going conflict and the continuous NATO bombardment, mandated by the UN. The request by Ms. Arnos, the UN humanitarian chief, that all parties agree to a cease-fire and that all respect IHL and ensure civilians are spared, has not been met.³⁵⁴

Humanitarian conditions in Libya are deteriorating³⁵⁵ and have fuelled a mass exodus to Europe and a large-scale refugee crisis. Europe has responded by closing its frontiers. The heart-breaking story told by one of nine survivors of the seventy-two people who drifted at sea for sixteen days after escaping from Libya, sighted by a military helicopter but never rescued, is irreconcilable with the principle of R2P, under which the NATO intervention is mandated in Libya. Who is responsible for the lives of the 1,400 Africans³⁵⁶ who, since the start of the Libyan conflict, have tried to reach the safe coasts of Europe and ended up drowning in the Mediterranean sea? Despite alarms being raised, and a priest in Italy allegedly contacting Italy's Coast Guards and the NATO command in Naples, NATO has denied any wrongdoing, saying it was unaware of any rescue calls.³⁵⁷

UNHCR says that one in ten migrants fleeing conflict in Libya by sea is likely to drown or die from hunger and exhaustion in appalling conditions during the crossing.³⁵⁸ This raises questions about the decision by European countries such as Italy, Spain,

³⁵³ Daccord, ‘Protection of Civilians: lessons from Libya and Ivory Coast’, *ICRC*, 10 May 2011.

³⁵⁴ ‘Top UN official urges pause in fighting in Libya to allow aid to reach those in need’, *UN Press Release*, 9 May 2011.

³⁵⁵ Nebehay, ‘Red Cross alarmed by Libya situation, fears worse’, *Reuters*, 5 July 2011.

³⁵⁶ Marima, ‘Our seas of dead Africans’, *Al Jazeera*, 14 June 2011. Amnesty International puts the death toll at 1,800. See Elsayed-Ali, ‘Europe must reaffirm its commitment to the rights of refugees and migrants’, *Live Wire, Amnesty International*, 21 June 2011.

³⁵⁷ ‘NATO: Investigate Fatal Boat Episode’, *Human Rights Watch*, 10 May 2011.

³⁵⁸ Lewis, ‘U.N. says 10 percent fatality for Libya sea migrants’, *Reuters*, 13 May 2011.

France and the UK to support this intervention and its extremely high costs³⁵⁹ and then be unable to increase aerial surveillance of boats in trouble, and support for refugees escaping a conflict zone. The stench of hypocrisy is dismaying. While bombs are being dropped in Libya to protect civilians, those same forces are refusing to welcome the refugees escaping the bombs, violence, and the deteriorating humanitarian situation; one wonders where the responsibility to protect lies here. This is in stark contrast to Tunisia and Egypt that, in the midst of their own political turmoil, have been receiving hundreds of thousands of refugees³⁶⁰, with almost no support from the ‘coalition of the willing’.

The Council of Europe Human Rights Commissioner has stated: “European governments and institutions have more responsibility for this crisis than they have demonstrated so far. Their silence and passivity are difficult to accept. When preventing migrants from coming has become more important than saving lives, something has gone dramatically wrong.”³⁶¹

Indeed, implementation of the responsibility to protect in the intervention in Libya seems to have gone astray. When trying to measure the success of NATO’s intervention to date, it is hard to imagine what form a successful intervention would have. Without doubt, a successful humanitarian mission would have different priorities. NATO’s presence in Libya might be legal, as it has been authorised by the SC, but it is losing all its legitimacy, as the goal to protect civilians is clearly not being met.

³⁶⁰ As reported by El Pais, a UNHCR report reveals that only 2% of people fleeing the Libyan conflict have reached Europe. The remaining have stayed in Africa, with Tunisia receiving 550.000 refugees and Egypt 350.000, demonstrating that, as the coordinator for external relations of the UNHCR in Spain states: “there are no humanitarian solutions to political problems, you cannot encourage democratic processes if you then refuse to help.” See Losa, ‘La ONU asegura que solo el 2% de los refugiados libios han huido hacia Europa’, *El Pais*, 20 June 2011. (My own translation).

³⁶¹ ‘Hammarberg calls Europe to action over migrants’, *Human Rights Europe*, 8 June 2011.

5. CONCLUSION

The development of the principle of R2P demonstrates a growing global effort to end mass atrocities. Its endorsement in the 2005 World Summit Outcome Document establishes it as an emergent international norm, which governments have agreed to uphold. The significant contribution of R2P is that it has strengthened the idea that the sovereignty of states is not founded on the control of their territory and their citizens; rather, on the responsibility to protect citizens and their fundamental freedoms and human rights.

As we have seen in the analysis above, the concept of R2P has reinforced the notion that states are primarily responsible for the protection of their population against genocide, war crimes, crimes against humanity and ethnic cleansing. The international community has recognised its complementary responsibility to assist a state in meeting its obligations, and secondly to take collective action if a state is manifestly failing to fulfil its R2P. The doctrine of R2P has highlighted the need for a sense of responsibility that goes beyond military intervention to stop crimes on the brink of being committed or that are already being committed. The implementation of measures to prevent crimes from occurring in the first place is an integral part of R2P, along with the rebuilding of a country that has been torn by conflict.

However, the haste with which the hard end of R2P was implemented in Libya has shown that, although R2P aimed at shifting focus away from the controversial debate on humanitarian intervention, the latter being tainted by suspicions of western imperialism and neo-colonialism, these issues are here to stay.

The intervention in Libya has again raised concern about the use of military force as an instrument of protection and its multifaceted repercussions. Although this historic consensual action has demonstrated the unwillingness of the international community to stand by while atrocity crimes are being committed or are imminent, and there would have been no such action had it not been for the decade-long development of the principle of R2P, the focus has again shifted back to the interests of states rather than on the needs of people at risk.

Resolution 1973 was drafted in such vague and undefined terms that it has allowed for the mandate to protect civilians to be interpreted in an excessively wide

manner. This has led to the UN's impartiality being questioned and has created a perception that R2P could be used as a disguise for regime change or for geo-politically motivated interventions. The intervention in Libya confirms that a legal war is not necessarily legitimate and may defeat its own humanitarian objectives. Although it is a known fact that "normative development and political reality are rarely in synch,"³⁶² the normative development of R2P should take political reality into consideration and in doing so make it resistant to misuse and abuse.

This could be achieved by continuing the debate on the inclusion of criteria to deciding whether a situation requires the application of the use of force for the protection of the population and define the degree of discretion granted to the permanent members of the SC. Allowing the SC unfettered discretion in deciding whether any given situation amounts to a threat to international peace and security does not take into account the reality of the political make up of the SC. By looking at its historical record in deciding whether or not to authorise a military intervention, one must realise that such decisions are not and cannot be premised on the good faith of its permanent members.

Furthermore military interventions are always so problematic that the effort endorsed by the principle of R2P to make the use of force a measure of last resource *in extremis* should be reinforced. As has been stated, in the evolution of R2P prevention is the single most important element inherent in this principle. If the internationally community is really committed to world peace and security, then arm deals should not be undertaken with dictatorial regimes that may one day turn those arms against their people, who will then require the protection of the international community. If there is a real desire to end mass atrocities, then economic inequalities and abuses of fundamental rights cannot be accepted and a government that does not respect and protect its people should not be respected and supported by the international community in its economic and political endeavours.

Furthermore, as the 2005 Outcome Document showed a real international commitment to strengthen the operationalisation of peacekeeping, through the creation of a Peacebuilding Commission, there must be a stronger effort to provide UN

³⁶² Weiss, 2006, p.742.

peacekeepers with the mandate and capacity to effect actual protection when civilians are under immediate threat.

Criteria for collective military action would help to assess which situation requires intervention, to avoid radical selectivity and to determine whether its positive consequences outweigh the negative ones. If force is needed, the military objectives must be clearly stated at the onset and any action undertaken must satisfy the requirements for such goals to be met. Coercive measures should be the minimum dispensable and not jeopardise a peaceful resolution of the conflict. If protection of civilians is the single and ultimate goal, access of humanitarian agencies must be facilitated, rather than hampered through ongoing bombardments.

Those who undertake to protect civilians must show true commitment. Supporting a military intervention that will inevitably cause populations to flee zones of conflict and then refusing to assist those civilians in finding shelter will deeply question the motives for the intervention. The protection of refugees is fundamental to the proper discharge of R2P.

The issue of authority must be held under constant scrutiny. Authority cannot be limited to the SC until the SC is reformed to become a more legitimate representative of the international community. In the meantime, regional organisations such as the African Union should be supported and empowered. They have the powers to intervene under their own charter and greater legitimacy when taking action within their own territory and against a MS of their organisation. The fact that these organisations may be less willing to act may impair timely and decisive action, but attempts to negotiate a cease fire cannot be hindered. All measures that fall short of the use of force should be explored and discharged before force can be considered a viable option, rather than deploying military force first

The intervention in Libya should not end the debate on R2P, but carry it forward with honesty and integrity. Although Henkin's statement that "almost all nations observe almost all principles of international law and almost all of their obligations almost all the time"³⁶³ rings true, the endorsement of R2P has shown a real commitment to not allowing history to repeat itself. R2P should be further elaborated into a more legally and legitimately sound practice for the effective protection of civilians.

³⁶³ Henkin, 1979, p.47.

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