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The Responsibility to Protect Civilians in Armed Conflict

Master's Thesis

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LIST OF ABBREVIATIONS

AU- African Union
CAT- Convention against Torture
CEDAW- Convention on the Elimination of all Forms of Discrimination against Women
CERC- Convention on the Elimination of all Forms of Racial Discrimination
CRC- Convention on the Rights of a Child
ECOWAS- Economic Community of West African States
EU- European Union
ICC- International Criminal Court
ICCPR- International Convention on Civil and Political Rights
ICESCR- International Convention on Economic Social and Cultural Rights
ICISS- International Commission on Intervention and State Sovereignty
ICJ- International Court of Justice
ICRC- International Committee of the Red Cross
IDPs -Internally Displaced Persons
IEC -Independent Electoral Commission
IHL- International Humanitarian Law
IHRL- International Human Rights Law
ILC- International Law Commission
NATO- North Atlantic Treaty Organization
NGO- Non-Governmental Organization
OAS- Organization of American States
OAU- Organization of African Unity
OHCHR- Office for the High Commissioner for Human Rights
PSC- Peace and Security Council
R2P- Responsibility to Protect
SC- Security Council
SG- Secretary General
UDHR- Universal Declaration of Human Rights
UN- United Nations
UNGA- United Nations General Assembly
UNHCR- United Nations High Commissioner for Refugees
UNOIC- United Nations Operation in Côte d'Ivoire
UNSC- United Nations Security Council

Table of Contents

Acknowledgements	i
List of Abbreviations	ii
Table of Contents	iii
Introduction	1
1. HISTORICAL EVOLUTION AND CONCEPTUAL FRAMEWORK OF THE RESPONSIBILITY TO PROTECT	6
1.1 Background	6
1.2 From Humanitarian Intervention to the Responsibility to Protect	6
1.2.1 Definition of the Concept of the Responsibility to Protect	6
1.2.2 Humanitarian intervention at the End of the Cold War Era	7
1.3 Historical Evolution of the Responsibility to Protect	8
1.4 The Concept of the Responsibility to Protect	10
1.4.1 Core Elements of the Responsibility to Protect	10
A. The Responsibility to Protect	10
i) Early Warnings and Analysis	12
ii) Root causes prevention	13
iii) Direct prevention efforts	14
B. The Responsibility to React	16
i) Measures short of military action	16
a) Non-Military sanctions	17
b) Economic sanctions	17
c) Political and diplomatic sanctions	20
ii) Military action	20
C) The Responsibility to Rebuild	22
1.5 Further Development of the Responsibility to Protect	24
1.5.1 High-level Panel Report 2004	24
1.5.2 The Report of the UN Secretary-General	26
1.5.3 Outcome Document of the 2005 World Summit	26
CHAPTER 2: INTERNATIONAL LAW AND THE LEGAL FRAMEWORK OF THE RESPONSIBILITY TO PROTECT	29
2.0 International Law and Conventional Frameworks for the Responsibility to Protect	29
2.1 Debates Surrounding the Legal Character of the Responsibility to Protect	29
2.2 Legal Impact of the Responsibility to Protect in International Law	32

2.3 Pillars of the Responsibility to Protect and its Legal Framework	35
2.3.1 Pillar One- The Protection Responsibilities of the State	35
2.3.2 Pillar Two - International Assistance and Capacity-Building	40
2.3.3 Pillar Three – Timely and Decisive Response	44
CHAPTER 3: THE RESPONSIBILITY TO PROTECT IN PRACTICE	48
3.0 Understanding the Legal Meaning of Protection	48
3.1 Libya	49
3.1.1 The Emergence of the Libyan Crisis	49
3.1.2 The International Response to the Libyan Crisis Prior to Resolution 1973.....	51
3.1.3 Resolution 1973 and the Military Intervention in Libya	55
3.1.4 The Libyan Crisis and the Responsibility to Protect.....	56
3.2 Côte d'Ivoire.....	58
3.2.1 Background to the Conflict in Côte d'Ivoire	58
3.2.2 International Response to the Conflict in Côte d'Ivoire	59
3.2.3 An Analysis of the Conflict in Côte d'Ivoire and the Responsibility to Protect	61
3.3 Ukraine	63
3.3.1 Russia’s Grounds for Invading Ukraine	63
3.3.2 Russia and the Responsibility to Protect	64
CHAPTER 4: CHALLENGES ENCOUNTERED IN THE IMPLEMENTATION OF THE RESPONSIBILITY TO PROTECT	67
4.1 The Legal Structure for the Implementation of the Responsibility to Protect	67
4.2 Structural Composition of the UNSC and the Use of Veto	68
4.3 Lack of Political Will.....	72
4.4 Conclusion	74
4.5 Findings	76
4.6 Recommendations	78
BIBLIOGRAPHY	80

Introduction

In the decades after the WWII, the nature of armed conflicts changed. The traditional conflict between states rapidly diverted and gave way to irregular conflicts between rival armed groups.¹ This change resulted in insurgencies, state repression, civil wars and state collapse with a more devastating effect on the civilian population. As victims of both war and of mass atrocity crimes during war times, securing the protection of civilian population remains one of the greatest ethical, political and institutional challenge confronted by the world today.² The slaughtering of civilian population over the second half of the twentieth century “whether in peacetime or war... has been a recurring stain on the world’s collective conscience”.³ While the nature of the state too witnessed some changes, a considerable number of communist and some newly decolonised countries became perpetrators of mass atrocities and the principal victims of this violence were civilians within their sovereign state.⁴

Throughout the Cold war period, the world was divided into two hostile blocks: the Communist East and the Capitalist West. The struggle for world power between these two blocks led to a series of disagreements which eventually impeded the ability of the United Nation Security Council (hereinafter the UNSC) to fulfil its Charter obligations in maintaining international peace and security. Most of the Resolutions during the Cold War years was vetoed by the permanent members of the SC which made interventions unlikely to take place at all.⁵ For the first time, the UNSC adoption of Resolution 660 in connection with the Iraq-Kuwait conflict in 1990 illustrates the effective application of the UN collective security system in action. Another outstanding example worth citing was the adoption of Resolution 84 in 1950 during the Korean war. With the authorization of the UNSC, a UN Command was formed to provide military support for South Korea following invasion by North Korea.⁶ Coupled with a strong emphasis on the non-interference principle,⁷ the UNSC failure to act in the Rwandan Genocide and Srebrenica further paralysed the Council. This impediment and dilemma disabled the SC’s ability to effectively avert crimes against humanity. To this end, the practical application of

¹Thakur, R. (2011). Libya and the responsibility to protect between opportunistic humanitarianism and value-free pragmatism. *Security Challenges*, 7(4), p. 14, pp.13-25.

² Evans, G. (2012). Responding to atrocities: the new geopolitics of intervention. *SIPRI yearbook*, 1(1), p.15, pp. 15-39.

³ *Ibid*

⁴ *Supra* note 1 at p.14

⁵ B. Boutros-Ghali, put the number of vetoes cast during the period 1946 and the end of the Cold War in 1990, at 279: Report of the UN Secretary General: “*Agenda for Peace*”, A/47/277-s/24111, 17 June 1992, paragraph 14, p. 43.

⁶ United Nations Security Council Resolution 84, adopted on July 7, 1950.

⁷ Article 2(7) of the UN Charter states “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state 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”.

humanitarian intervention was destined to fail and consequently, resulting in contradictory views regarding the use of force under the UN system.

The end of the Cold war ushered the international community into a new era with renewed hopes that the objectives of the UN Charter would be realised. This alongside the collapse of the Soviet Union, showed the international community's willingness to use force for humanitarian purposes.⁸ This positive change in attitude towards humanitarian intervention played a major role in shaping international relations during the 1990's.⁹ However, the ongoing failure in preventing mass atrocities between and within states continually gave rise to new threats and highlighted the horrors of wars to which the civilian population became subjected to. Even though fewer wars are fought today than just two decades ago with fewer instances of genocide and crimes against humanity, statistics shows that the killing of civilians in wartime is still alarming high in numbers far exceeding armed combatants.¹⁰

Not only did the UN fail to prevent these atrocities but their inconsistent and indifferent reactions to the inhumane acts that grossly and systematically violated the human rights of civilians within the boundaries of a sovereign state triggered an international debate. This debate raised the question whether the principle of non-intervention enshrined in article 2(7) of the UN Charter should be unconditionally adhered to even under such circumstances. Conscious of this problem of civilian protection and accompanied by a much greater evident willingness to find a long-standing solution to the political debate surrounding humanitarian intervention, the doctrine of the Responsibility to Protect (hereinafter R2P) was developed. Although the R2P norm emerged in 2001, its antecedents can be traced to the predictions for human safety and intervention made by the then SG Kofi Anan in 1998 and 1999. In one of his landmark statements, he said "sovereignty implies responsibility, not just power". He further insisted that "state frontiers ... should no longer be seen as a watertight protection for war criminals or mass murderers".¹¹ Against the backdrop of NATO's intervention in Kosovo in 1999, he added that "No government had the right to hide behind national sovereignty in order to violate the human rights or the fundamental rights of its people".¹² The R2P therefore reflects a close relationship between sovereignty and human rights.

⁸ Orford, A. (2003). Reading humanitarian intervention: Human rights and the use of force in international law, Vol. (30), *Cambridge University Press*, p.1

⁹ *Ibid*

¹⁰ *Supra* note 2 at pp.15-16

¹¹ Thakur, R. (2016). The United Nations, peace and security: from collective security to the responsibility to protect. *Cambridge University Press*, p.274

¹² *Ibid* at p.275

In response to a call by Kofi Anan, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in 2001. He urged the UN to look for ways to reconcile sovereignty and human rights. With a mandate to find a balance between respect of sovereignty and intervention for the purpose of protecting human rights, the ICISS came up with the concept of the R2P. This concept is rooted in the principle that state sovereignty encompasses legal obligations and this view was clearly articulated in Paragraph 138 of the World Summit Outcome Document.¹³ This Document recognised the primary responsibility of each state to protect its people but where a state demonstrates its inability or unwillingness to fulfil this responsibility, this may give rise to an international responsibility to protect.¹⁴ Nevertheless, even though the norm of non-intervention remains one of the bedrock principle international law, the ICISS acknowledged that in certain circumstances such as gross violation of human rights, a limited view on the scope of the principle must be adopted by all relevant actors.

a) Aim/Objective of the Thesis

The objectives of this thesis are as follows:

1. To highlight the historical evolution and the conceptual framework in the establishment of the concept of the R2P.
2. To analyse the legal framework in the implementation of the R2P principle in protecting civilians in armed conflict.
3. To examine the challenges encountered in the implementation of the R2P principle in protecting civilians in armed conflict.
4. To provide recommendations on how the R2P principle can be effectively implemented in protecting civilians in armed conflict.

In the light of the forgoing, this thesis seeks to;

To assess the application of the R2P by the UN and the international community and to find out whether the application of the R2P in the last decades has achieved its original purpose in terms of providing protection to innocent civilians during armed conflict. It will carry out an in-depth analysis of case studies of civilian protection in armed conflict.

¹³ 2005 World Summit, Sept. 14-16, 2005, 2005 World Summit Outcome, U.N. Doc. A/60/L.1 (Sept. 20, 2005), p. 31. Paragraph 138 states: '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.'

¹⁴ ICISS, The Responsibility to Protect, XI.

To achieve this, the legal nature of the doctrine of the R2P will be examined with an overview of the legal framework and principles underlying this concept. Moreover, it seeks to examine ways in which the R2P can add practical and legal value to the overall purpose of the UN. This analysis is focused on the legal issues and how the existing legal normative framework can be upheld to strengthen the application of the concept and its practical implementation in the face of mass egregious human rights violations.

Overall, this thesis would aim to provide a comprehensive analysis of the R2P civilians in armed conflict, drawing on a range of legal, political and institutional perspectives. It would seek to identify the key challenges and opportunities for the implementation of this principle and propose recommendations for enhancing its effectiveness in promoting civilian protection in times of armed conflict.

b) Research Questions

In order to achieve the aim of this work, it seeks to answer the following questions.

1. How effective is the legal framework of the Responsibility to Protect (R2P) in preventing civilian casualties in armed conflict?
2. What is the role of international organizations, such as the United Nations, in implementing the R2P in armed conflicts, and to what extent have they been successful in protecting civilians?
3. What are the main challenges faced in implementing the R2P framework in armed conflicts, and how can they be addressed?
4. Can external military intervention be justified on the ground that a state has failed to fulfil its obligation in providing protection to its citizens?

c) Research Methodology

This thesis will use a qualitative research design to gather data from various sources, most specifically secondary sources. The secondary sources will include academic literature, reports, and case studies on the implementation of the R2P principle in protecting civilians in armed conflict.

The analysis of the implementation of the R2P principle in protecting civilians in armed conflict is expected to reveal gaps and challenges in the implementation of the principle. Some of the challenges that may be identified include the lack of political will by governments to implement the principle, the failure of the UNSC to act, and the absence of a clear legal framework for the implementation of the principle. The thesis is also expected to provide recommendations on how the R2P principle can be effectively implemented in protecting civilians in armed conflict.

d) Overview of the Chapters

Chapter 1 provides the background and explores the historical and conceptual framework of the Responsibility to Protect principle. It discusses the history of the concept, its origin in response to the failure to prevent mass atrocities in the 1990s, and the formation of the International Commission on Intervention and State Sovereignty (ICISS) to address the tension between state sovereignty and the international community's responsibility to protect populations. The chapter also provides a definition of the R2P principle and its core principles, namely the responsibility to prevent, react, and rebuild. In summary, this chapter provides a background to the R2P principle, including its origins, development, and the historical framework that underpins it.

Chapter 2 explores the legal framework of the R2P by making reference to the already existing human rights and humanitarian law principles. This chapter will address the debates surrounding this principle and the impact of its non-binding character in international law. It will also highlight the core principles of the R2P in the light of its normative legal character.

Chapter 3 focuses on the practical implementation of the R2P principle in protecting civilians in armed conflict. The chapter will further provide case studies of the R2P in Libya, Côte D'Ivoire and the ongoing Ukraine war. Although there is a dire need to protect the Ukrainian population, the UN and the international community has remained indifferent to the situation. It is evident that the applicability of the R2P is questionable as it remains unclear whether theory matches reality. After examining the challenges faced in implementing the R2P principle in these conflicts, this chapter will further dissect the measures taken to overcome these challenges.

Chapter 4 It identifies some of the challenges that hinder the implementation of the principle, including the lack of political will by governments, the UNSC's failure to act, the tension between state sovereignty and human rights and the absence of a clear legal framework. Also, in this chapter we will evaluate the effectiveness of the application of the R2P in practice and propose recommendations for its effective implementation. It identifies three key areas for improvement, namely measures to strengthen the legal and institutional frameworks for civilian protection, building political will, and strengthening the role of the UN Security Council. The chapter proposes specific measures for achieving these objectives, including the development of a clear and comprehensive legal framework, raising awareness of the principle, and reforming the UN Security Council's decision-making process.

Keywords: Responsibility to Protect, Civilian Protection, Armed conflict, Intervention, Human rights, Gross violations, Sovereignty, Non-Intervention, Use of force.

CHAPTER ONE

HISTORICAL EVOLUTION AND CONCEPTUAL FRAMEWORK OF THE RESPONSIBILITY TO PROTECT

1.1 Background

For most part of the 1990, the long-standing international debate of how the international community should response when confronted with situations of catastrophic human rights violation within a state have not gone away. If the response is in the affirmative, then the question that usually follows is whether military actions are the most appropriate measures to take against another state for the purpose of protecting its people from human rights violations? The answer to this remains a contested issue today, as the attitude of the international community is still strongly rooted in the principle of state sovereignty and non-intervention. This position was clearly highlighted by Kofi Anna in his 1998 speech to the Ditchley Foundation, stating that, “so long as the conflict rages within the borders of a single State, the old orthodoxy would require us to let it rage.”¹⁵ To him, this "old orthodoxy" was never absolute.¹⁶

1.2 From Humanitarian Intervention to the Responsibility to Protect.

1.2.1 Definition of the Concept of the R2P

For the purpose of this work, the contemporary definition of humanitarian intervention as defined by Robertson will be adopted in this work. According to him, it is a doctrine that permits one or more states to use military force inside the borders of another state in order to order to defend persons who are subjected to severe human rights violations, including genocide attempts.¹⁷ In this regard, humanitarian intervention, in its contemporary understanding, continues to differ from other forms of military intervention or from the bare use of force because it is pursued for reasons other than simple self-interest, such as preventing populations from mass atrocities against humanity or inhumane treatment.¹⁸ As a result, due to its intent and focus, humanitarian intervention can be distinguished from other forms of military intervention or aggression.

¹⁵ K. A. Annan, Secretary-General Reflects on ‘Intervention’ in Thirty-Fifth Annual Ditchley Foundation Lecture, 26 June 1998, Press Release SG//SM/6613. Available at: <http://www.un.org/press/en/1998/19980626.sgsm6613.html> last accessed 01/03/2023.

¹⁶ *Ibid*

¹⁷ Robertson, D. (2004). A Dictionary of Human Rights, 2nd ed., *London: Europa*, p.119

¹⁸ Ercan, P. G. (2016). Debating the Future of the ‘Responsibility to Protect’ The Evolution of a Moral Norm, p.18

1.2.2 Humanitarian Intervention at the End of the Cold War Era

Charged with the responsibility to provide basic human security to victims of atrocities, international law and community failed in upholding this responsibility throughout the 20th century.¹⁹ Acts of state genocide, ethnic cleansing and crimes against humanity have at times been facilitated through the inaction of the international community. In particular, the Rwandan genocide and the Srebrenica massacre are clear examples which do not only depict the incompetence of the UNSC but also, it clearly demonstrates their failure to effectively respond to these crises. While this disturbing reality illustrates a rigid conformity with the fundamental principle of sovereignty, it heightened the need for a reappraisal of armed humanitarian intervention. As has been traditionally understood under the Treaty of Westphalia, sovereignty continuous to shield offenders from sanctions.²⁰

Nevertheless, the inaction of the UNSC in the face of these crises, followed by large-scale atrocities and the proliferation of devastating internal wars, triggered the legal debate surrounding sovereignty of states and brought the principle of non-intervention articulated in Article 2(4) UN Charter under intense strain in the 1990's. As rightly noted by Stockburger, 'this inaction, although legal, was in the broadest sense of the term immoral'.²¹ However, although it remained unclear how the international community should act in the face of systematic violations of fundamental human rights, it has become increasingly clear that sovereignty in itself no longer shield perpetrators from punitive measures.²² Following the failure of prevention, the UNSC surprisingly established ad hoc tribunals for the former Yugoslavia and Rwanda which made a new interference into the fortress of state sovereignty. It is against this backdrop that the doctrines on the right to humanitarian intervention gained additional relevance in the light of this situation.²³

The outcome of the human rights crises in the 90's was the construction of the R2P. However, humanitarian intervention has continued to be an effective foreign policy tool in the face of massive crimes against humanity, even though its use has caused moral and legal divisions within the international community.²⁴ Although the right to humanitarian intervention had attained widespread acceptance by the end of the 19th century, debates over whether or not to forcefully intervene on humanitarian grounds sprung from various interventions that took place

¹⁹ Stockburger, P. (2010). The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking. *Intercultural Human Rights Law Review*, Vol.5, p.365, pp.365-405

²⁰ *Ibid*

²¹ *Ibid*

²² Arbour, L. (2008). The responsibility to protect as a duty of care in international law and practice. *Review of International Studies*, 34(3), p.446

²³ *Ibid*

²⁴ *Supra* note 18 at p. 19

during this period. For example, the failed intervention in Somalia, the inaction of the UN in Rwanda and the unauthorised intervention in Kosovo.

In past decades, states and scholars have frequently viewed humanitarian intervention as a ‘right to intervene’. For fear of abuse of this right by states and disproportionate use of force in achieving human rights protection, the international community had consistently refrained from making humanitarian intervention a formal or legal action in responding to severe human rights abuses. However, the need for responses did not just disappear simply because the discussions had remained unresolved. Instead, the contrary happened as the Kofi Annan noted in his remarks to the 54th General Assembly following NATO's intervention in Kosovo:

*‘The inability of the international community in Kosovo to reconcile these two equally compelling interests – universal legitimacy and effectiveness in defense of human rights – has revealed the core challenge to the Security Council and the UN as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand’.*²⁵

As a result, norm-breakers like Kofi Annan, Francis Deng, and Gareth Evans, among many others, decided to introduce an alternative idea called ‘the responsibility to protect’ with the aim of securing the lives and fundamental rights of masses rather than adhering to the divisive arguments in favour of a ‘right to intervene.’ Therefore, it is necessary to find a new consensus and “forge unity” by finding a way to reconcile the prohibition on the use of force and the right of states to freedom from interference in their domestic affairs on the one hand, and the obligation of states to protect fundamental human rights on the other hand.²⁶ In the light of this, a new norm the concept of the responsibility to protect emerged to explain the justification for and the process by which the international community should work to protect those who have been subjected to atrocities.²⁷

1.3 Historical Evolution of the Responsibility to Protect

In order to understand the historical evolution of the concept of the R2P and how far we have come and still have to go, the UN Charter is the ideal place to start. The failure of the League of Nations to outlaw war and push for the maintenance of international peace and security lead to the establishment of the UN. The founders of this new international legal body were principally concerned with keeping states from going to war against each other and in order to achieve this, the Charter was designed in a way that it outlawed the use of force in international relations.

²⁵ Kofi Annan, Address to the 54th Session of the UN General Assembly, 20 September 1999, reprinted in Kofi Annan, *The Question of Intervention: Statements by the Secretary-General* (New York: United Nations Department of Public Information 1999), p. 39

²⁶ ICISS Report, p. VII.

²⁷ *Supra* note 22 at p.447

Although the use of force was prohibited universally, it was still permissible under two circumstances: Article 51 allows for the use of force for the purpose of self-defence against an armed attack²⁸ and Article 39-51 enumerates the circumstances under which the UNSC may authorise the use of force for the maintenance of international peace and security²⁹. Nevertheless, the question whether an external force can be used as a response to an internal catastrophe within a sovereign state was not clearly pointed out in the Charter. However, if we read through the UN Charter, we will realise that the principle of non-interference enshrined in article 2(7) which 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”³⁰ explicitly answers our question in the negative.

Many members of the international community believed that, after the Cold War the world would be relatively secure, and calm as opposed to the upheaval of the previous century. This renewed optimism, however, appeared to be a mirage given that this time period was marked by interstate hostilities, civil wars, and internal strife, as well as widespread mass violations of human rights perpetrated on a large-scale. The wars in Rwanda, Somalia, Iraqi invasion of Kuwait, Yugoslavia, Afghanistan, Bosnia proved that the decade would be anything but peaceful. Even the apparent cooperation between the former warring parties was unable to bring about peace in this new era, and as a result of the massive atrocities committed against civilians, the issue of how and when the international community should react to stop these gross violations was thrust to the fore of global discourse.

Even when circumstances screamed for a reaction, the inaction of the international caused it to become even more deeply divided. Although these conscience-shocking situations repeatedly arose throughout this period, yet the old habit of non-intervention died very hard. As with the pathetically inadequate response to the Rwandan genocide in 1994, the lamentable failure to prevent murderous ethnic cleansing in the Balkans, in particular in Srebrenica, in 1995, or unlawfully as in the Kosovo situation in 1999 without the authority of the SC in the face of a threatened veto by Russia;³¹ all these cases demonstrated a lack of consensus as to what can be and should be done by the international community in the face of mass atrocities.

Throughout the 20th century, the world witnessed a divide between the Global North on the one, being those who strongly believed that humanitarian intervention (or ‘the right to intervene’,

²⁸ Article 51 of the United Nations Charter

²⁹ *Ibid* Article 39-51

³⁰ *Ibid* Article 2(7)

³¹ *Supra* note 31 at p.706

droit d'ingérence in Bernard Kouchner's influential formulation³²) was pivotal in solving human rights violations; and those in the Global South on the other hand who defended the traditional prerogatives of state sovereignty by invoking article 2(7) of the UN Charter as a justification why the world must not interfere in the internal affairs of another state.³³ This controversy remained unresolved in the UN and anywhere else. Therefore, in order to find a way out of this fierce debate, the concept of the 'Responsibility to Protect' was born to resolve this controversy in 2001. Prompted by the chaotic situation at that time, the then UNSG Kofi Annan urged the international community with a task to find a common ground on how to approach these issues.³⁴ In his agitated plea, he challenged the international community with his question:

*"...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?"*³⁵

1.4 The Concept of the R2P

1.4.1 Core Elements of the Responsibility to Protect

The ICISS report outlines three specific responsibilities embodied in the concept of the R2P, namely: the responsibility to protect, react and rebuild. Each of these responsibilities will be discussed in detail below.

A) The Responsibility to Protect.

The R2P is made up of measures taken to prevent serious human rights violations from occurring in the first place. Its main aim is to address both the root causes and direct causes of internal conflicts and other man-made conflicts which may put the population at risk.³⁶ This responsibility places emphasis on the importance of employing early warning mechanism and the need to utilize the root-cause conflict prevention technique. An effective application of this implies that, the eruption of violent situations which may lead to human suffering will be averted in the first place. Therefore, conflict prevention will obviate the need for states to resort to military intervention for the purpose of protecting the civilian population from mass atrocities.

³² Bettati, M., & Kouchner, B. (1987). *Le devoir d'ingérence: peut-on les laisser mourir?*. Paris: Denoël, p.300

³³ Evans, G. (2012). Responding to atrocities: the new geopolitics of intervention. *SIPRI yearbook*, 1(1), P.21. See also Payandeh, M. (2010). With Great Power Comes Great Responsibility-The Concept of the Responsibility to Protect within the Process of International Lawmaking, *Yale Journal of International Law*, Vol. 35, p. 470, pp. 469-516

³⁴ Evans, G. (2009). The responsibility to protect: ending mass atrocity crimes once and for all. *Brookings Institution Press*, p. 38.

³⁵ Kofi Annan, The Secretary-General, Millennium Report of the Secretary-General of the United Nations, *We the People: The Role of the United Nations in the 21st Century*, at P. 48, U.N. Doc A/54/20 (2000), available at <http://www.un.org/millennium/sg/report/ch3.pdf> Last 10/01/2023.

³⁶ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* Ottawa, International Development Research Centre, 2001, p. XI

Indeed, this first pillar places the primary responsibility on each state to safeguard its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.³⁷ In his implementation strategy, the then UNSG Ban ki-Moon described this pillar as ‘the ‘bedrock’ of the R2P which derives from sovereign responsibility itself and the international legal obligations that states already had’ (para. 138).³⁸ As noted by the Commission, protection is the most important dimension of the responsibility to protect and requires the exhaustion of all prevention options before any steps toward intervention can be contemplated,³⁹ by specifying the kind of measures that can be applied in case there is a need for an intervention. Less intrusive and coercive measures should always be taken into consideration before applying more intrusive and coercive ones when exercising the responsibility to both prevent and react.⁴⁰ It follows from the UN Charter which encourages the use of peaceful and less coercive means in resolving conflicts. In accordance with Chapters VI and VIII of the Charter, the use of peaceful means and other means void of use of force such as diplomatic, economic, political maybe adopted by the international community under the authority of the UN in protecting vulnerable populations from genocide and other war crimes.

This Commission firmly believes that the obligation to protect implies the obligation to prevent as well. Hence, the prevention of deadly conflict and other forms of man-made catastrophe is, first and foremost the responsibility of sovereign states, and the communities and institutions within them.⁴¹ In order to ensure that a solid base for conflict prevention is established, it is necessary for state institutions to guarantee fair treatment and fair opportunities for all its citizens. However, this is not the sole responsibility of individual states. Therefore, for prevention to be successful, the international community must provide a strong and essential level of support in order to help states fulfil their responsibility and prevent failure, which could have significant international consequences and costs.⁴²

The basic point of preventive efforts is of course to reduce, and hopefully eliminate, the need for intervention altogether. In summary, the main goal of preventive measures is to lessen, and ideally eliminate, the necessity for intervention. In accordance with the ICISS report the following three conditions must be met for an effective conflict prevention: (i) early warnings, (ii) preventive toolbox or the root causes prevention efforts and (iii) political will or the direct prevention efforts.

³⁷ World Summit Outcome Document, para 138

³⁸ Ibid, Para 11(a)

³⁹ ICISS Report, p. XI

⁴⁰ ICISS XI

⁴¹ ICISS p. 19

⁴² ICISS p. 19

i. Early Warnings and Analysis

This requirement is predicated on the notion that awareness of the vulnerability of the existing situation and associated risks is necessary.⁴³ This can be said to be the most important condition for an effective prevention as it tackles the early signs of an impending conflict and takes all necessary actions to prevent it from erupting. Realistically, the possibility of an early warning may only be visible where there is an existing basic data upon which an analysis maybe carried out. Today, the lack of early warning is not often associated with the unavailability of basic data but rather it is the analysis and prescription into appropriate policies and the lack of willingness to act on that analysis.⁴⁴ This poses a serious problem and inhibits the possibility for any timely action to be taken to ensure success in preventing a crisis from erupting. As evident in the UN response to the Rwandan Genocide of 1994, the lack of early warning is not usually the problem but of timely response. In the latter case, it is factual that the international community failed to prevent the 1994 Genocide in Rwanda even in the face of all the existing early warnings prior to the eruption of the conflict. There were plenty of ‘early warnings’ of the Rwandan genocide, but they were systematically ignored because policy makers perceived it as a ‘civil war’, denied the facts, and decided not to intervene, preventing US and UN lawyers from calling the killing ‘genocide’.⁴⁵

Moreover, because there were no well-organized institutions with the necessary knowledge, resources, and authority to provide accurate and trustworthy early-warning information during the Cold War era, the international community was unable to effectively prevent deadly conflicts⁴⁶. In order to avert the errors of the past, the Commission noted that there is an urgent need for the international community to establish a better early-warning system. To achieve this, a wide number of players have been involved in this newly designed warning system such as embassies, UN peacekeeping forces, relief and development NGOs, national and international human rights groups, the International Committee of the Red Cross (ICRC), faith groups, academics, and the media.⁴⁷

Furthermore, a number of international, regional, and non-governmental conflict prevention mechanisms, with a focus on intra-state conflicts, have been established to further strengthen this early warning system. At the regional level, for example, in Africa, the numerous intra-state conflicts that plagued the continent, particularly after the end of the Cold War, and the limited

⁴³ ICISS Report P.20

⁴⁴ Ibid p.20

⁴⁵ Stanton, G. H. (2009). The Rwandan genocide: Why early warning failed. *Journal of African Conflicts and Peace Studies*, Vol. 1(2), P.6

⁴⁶ ICISS Report P. 21

⁴⁷ Ibid

success in resolving these deadly conflicts on the continent made the establishment of a preventive mechanism imperative. The Organization of African Unity (OAU), now known as the African Union (AU), established a Mechanism for Conflict Prevention, Management, and Settlement in 1993 with the aid of external donors.⁴⁸ Paragraph 11 of the Declaration summarises the rationale of this mechanism; we made that decision in light of the history of numerous protracted and destructive conflicts on our continent, as well as the fact that, despite our numerous efforts, we had only had limited success in finding long-lasting solutions.⁴⁹ In Europe, a number of internal mechanisms and practices geared towards conflict prevention was developed by the Organization for Security and Cooperation in Europe.⁵⁰

ii) Root Causes Prevention Efforts

Root cause identification is a vital step requiring every government to take before the outbreak of a conflict. Such efforts should be geared towards addressing every area of the economy including economic and political deficiencies. The UNSC, has emphasized the significance of dealing the underlying causes of conflict and the need to pursue long-term efficient preventive strategies.⁵¹ This concern is explicitly acknowledged in Article 55 noting that solutions to global economic, social and health issues, international cooperation in the fields of education, culture and universal observance of human rights are vital prerequisites in fostering international peace and security through a long-term strategy of conflict prevention.⁵²

Poverty, political repression and uneven distribution of resources are a common denominator in a majority of armed conflicts around the world today and has been widely accepted a root cause for their outbreak. If indeed the quest to have a proper understanding of armed conflict is genuine without leaving any gaps for a reignition of the conflict after it has been solved, then reference must be made to the factors enumerated above. In his most recent report, the SG stated that every action taken to combat poverty and achieve broad-based economic growth also contributes to conflict prevention.⁵³ According to Stewart, policies that address poverty and political, social, and economic inequality among groups will lessen the risk of conflict.⁵⁴

More importantly, the respect for human rights and fundamental freedoms remains an effective conflict prevention strategy. A quick survey of the root causes of a majority of conflicts in recent

⁴⁸ OAU Cairo Declaration on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution, 28-30 June 1993

⁴⁹ OAU Declaration Para 11

⁵⁰ ICISS Report P.20

⁵¹ ICISS Report P. 22

⁵² *Ibid*

⁵³ ICISS Report, p. 22

⁵⁴ Stewart F. (2002), Root Causes of Violent Conflict in Developing Countries. *British Medical Journal*, Vol. 324, p.344, pp. 342-345.

times is often linked to human rights violations. Clearly enough the absence of a sound and effective human rights system in place is most likely to generate dissatisfaction in a state, leading to conflict. When states fail to take steps to ensure that minority rights are protected and to institute political systems in which all groups are represented, then there is a likelihood that its preventive strategies will fail. The 1994 Rwandan Genocide is a case in point. After the WWII, the Rwandan genocide was arguably one of the bloodiest killing sprees in human history.⁵⁵ One of the root causes of the Rwanda Genocide was the non-recognition of the Tutsi minority of Rwanda by the Hutus as foreigners in Rwanda. The Hutus who were the majority regularly expounded the myth that the Tutsi's were invaders from Ethiopia and therefore did not belong to Rwanda. However, under the Belgian rule, even though the Hutus were the majority they were not considered as Rwanda's original ethnic group, instead the Tutsi who were the minority were given preferential treatment.⁵⁶ Upon independence, the Hutus consolidated power and facilitated widespread discrimination against Tutsi, excluding Tutsis from prominent careers and implementing education quotas. The foundation of genocide was laid. Consequently, the existence of unequal economic opportunities for citizens within a state, political and economic monopoly by a segment of the population, political oppression or domination of security services of a state by a particular ethnic group just to name a few, can lead to an outbreak of conflict within a state if not addressed.

iii) Direct Prevention Efforts

Although state authorities are often in a better position to take steps to address potential root causes of an impending conflict, the direct prevention efforts strategy suggests that different instruments such as political, diplomatic, economic and even legal initiative can be applied via institutions like the UN to help prevent internal conflict. The difference between the root cause prevention and the direct prevention effort lies in the different instrument which reflects the shorter time available in which to make a difference.⁵⁷ The chosen instrument to be applied in any given case will largely depend on the nature and intensity of the impending conflict. These tools can be straightforward assistance, positive inducements, or, in more complicated situations, the negative form of threatened punishments.⁵⁸

The application of direct prevention effort is often problematic as these actions and measures can be applied even where the concerned state is reluctant to cooperate. It becomes a challenging

⁵⁵Stephen Irungu Mbuthia, (2019), Did the United Nations Fail to Prevent the Rwandan Civilian War and Genocide in 1994?, *Munich, GRIN Verlag*, <https://www.grin.com/document/468918>

⁵⁶ Stephen Irungu Mbuthia, (2019), Did the United Nations Fail to Prevent the Rwandan Civilian War and Genocide in 1994?, *Munich, GRIN Verlag*, <https://www.grin.com/document/468918>

⁵⁷ ICISS Report, P.23

⁵⁸ ICISS Report, P. 23

task for the international community to collect basic data as well as sensitive information for the purpose of early warning analysis. Their lack of consent may be interpreted as interference in matters which are exclusively within their domestic jurisdiction. Resistance on the path of the concerned state amounts to a violation of their Charter obligation as states have a shared responsibility for preventing threats to peace. They are required to provide full assistance to any action taken by the SC in accordance with the Charter.⁵⁹ This primary responsibility of conflict prevention was reaffirmed by SC Resolution 1366 in 2001 affirming that, conflict prevention is one of the primary responsibility of Member states, which includes their fundamental responsibility to prevent and end impunity for genocide, crimes against humanity and war crimes.⁶⁰ It also recognizes the role of the UN and the international community in conflict prevention.⁶¹ Thus, while the international community through the UNSC has a duty to identify and determine internal issues of gross human violations that may constitute a threat to international peace and security, member states on the other hand must uphold their Charter obligation, which places on them a duty to assist the UNSC in the prevention of threat to peace. Nevertheless, its application depends on the determination of the matter in question within the domestic jurisdiction and of the applicable international laws accordingly.⁶²

Due to uncertainties, it is not always possible for the international community to accurately predict the eruption of an impending conflict within a state. To this end, one of the safest and surest ways to avert conflict is the inclusion of different actors in the conflict prevention framework. The Commission suggests that these diverse actors must strategically cooperate in order to prevent conflicts some of which are states, the UN and its special agencies, international financial institutions, regional organizations, nongovernmental organizations (NGOs), religious organizations, the business community, and the media and scientific, professional and educational communities all have a role to play.⁶³ The devastating effects of armed conflicts cannot be taken for granted anymore. More disturbing is the needless loss of human lives and the reckless waste of precious resources on conflicts rather than on economic and social development. There is therefore the need for the world to genuinely commit its resources at all levels, take practical responsibilities and be ready to act in preventing conflict.

⁵⁹ Article 2(5) of the UN Charter

⁶⁰ Security Council resolution 1366 (2001), on 30 August 2001, available at: <https://www.refworld.org/docid/3c4e945431.html> [accessed 4 March 2023].

⁶¹ *Ibid*

⁶² Naigen, Z. (2016). The Principle of Non-interference and its Application in Practices of Contemporary International Law. *Fudan Journal of the Humanities and Social Sciences*, Vol. 9, P. 449–464 <https://doi.org/10.1007/s40647-016-0126-y>

⁶³ ICISS Report, p.25

B) The Responsibility to React.

The responsibility to react tenet remains the most challenging aspect of the R2P both in understanding and practical implementation. In determining which measure (whether to apply non-coercive or coercive measures) is appropriate to halt gross human rights violations within a state, certain threshold conditions must be satisfied. This specific responsibility becomes application only when there has been an outburst of conflict due to the failure of preventive measures to resolve or contain the situation or where the concerned state is unable or unwilling to address the situation.⁶⁴ Thus, the responsibility to respond or react to this situation of compelling human need and the application of appropriate measures to resolve it now rest with the international community. Although there is no hierarchy in the application of these measures, the Commission notes that if less intrusive or non-coercive measures such as political, economic or judicial prove adequate in halting the human rights abuses then it should be applied first. However, in extreme cases of gross human rights violations which may lead to genocide, crime against humanity or other heinous crimes, military intervention or coercive measures is often the most appropriate under such circumstances.

While the threshold conditions remain the yardstick against which the interventionary measures are measured against, there are several additional precautionary principles which must be satisfied, to ensure that the intervention remains both defensible in principle and workable and acceptable in practice.⁶⁵ These measures will be discussed in the subsequent paragraphs that follow.

i) Measures short of military action

The use of force or military action is not automatic or necessarily required even when a state is unable or unwillingness to resolve an ongoing conflict within its borders. In principle, coercive measures short of military intervention are attempted before resorting to military action if need be. The aim of these measures is to persuade the authorities of the affected state to take or not to take particular action or actions.⁶⁶ It is often believed that sanctions are a great way to persuade states to comply with their Charter obligations or change course as these sanctions inhibits a state's capacity to interact with the outside world. The inherent risk associated with military intervention are obvious such as: death of both military personnels and civilians, destabilization of the economy, destruction of infrastructure, internal displacement of the civilian population and other crimes which are associated with war such as rape, torture, slavery just to name a few.

⁶⁴ ICISS Report, P.29

⁶⁵ ICISS Report, P.29

⁶⁶ ICISS Report, P.29

Thus, the use of non-coercive measures is often a better option worth trying before the use of any deadly force, in order to avert the grave implications that come with its use.

However, non-coercive measures are not void of risk. They are blunt and indiscriminate and if not properly monitored they may impose hardship and suffering on the population most especially on the civilian population. Therefore, sanctions must be used with extreme care to avoid doing more harm than good.⁶⁷ A good example was the use of blanket economic sanctions in the case of Iraq (1990), UNSC Resolution 661.⁶⁸ The humanitarian impact of this sanction on the Iraqi civilian population came to be seen as unacceptable. As a result, pressure was mounted on the UN to address the food and medical shortages on the ground. This therefore led to the establishment of the Oil-for-Food Programme (OFFP), which provided vital support to an Iraqi civilian population caught between a hideous regime and the economic sanctions. Today, a standard exemption for food and medical supplies is now generally recognized by the SC and under international law.⁶⁹ Most importantly, criticism of the Iraqi sanction regime led to the birth of what is known today as “targeted” or “smart” sanctions in the early 21st century. The Commission emphasises on the importance of target sanctions which are designed to specifically impact state authorities responsible for gross human rights violations and the capacity to effectively decrease the impact on innocent civilians.

a) Non-Military Sanctions

These are measures which do not involve the use of force or arms but has the same objective as military intervention- to halt gross human rights violations. These entails arms embargoes (including restrictions on the sale of spare parts), ending military cooperation and training programmes. SC Resolution 418 was adopted in 1977 against South Africa making the arms embargo mandatory for all member states. The aim of this embargo was to reduce ammunition in the country which was used by the South African government at the time to kill all those opposing apartheid and racial discrimination. This arms embargo, associated with other sanctions such as isolation of South Africa, sporting bans and other forms of shunning exerted pressure on the regime and finally brought the apartheid regime to an end.

b) Economic Sanctions

In the early 20th century, country-based sanctions were a common measure used by the UN to pressure countries into complying with a specific foreign policy objective. They are imposed with the aim of limiting the targeted country’s trade and business relations. Countries such as

⁶⁷ ICISS Report, P.29

⁶⁸ Security Council Resolution 661 (1990) on 6 August 1990. Available on [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/661\(1990\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/661(1990)) last accessed 06-03-2023.

⁶⁹ ICISS Report, P. 30

Cuba, Iran, Nicaragua, Panama, Libya, North Korea, Syria and Vietnam have had country-based sanctions imposed on them. Without any doubts, these sanctions can have massive adverse effect on the economy and humanitarian wellbeing of the targeted country. In his 1997 Report, the former UNSG Kofi Annan noted that, country-based sanctions tend to inflict the most harm on vulnerable civilian groups and can cause great collateral damage to third states.⁷⁰ Concerns about the humanitarian consequences of country-based sanctions also known as comprehensive economic sanctions, in particular those imposed on Iraq from 1990 led to the adoption of new forms of sanctions known as “targeted” or “smart” sanctions. It was strongly believed that the complete disarmament of weapons of mass destruction would be rapidly achieved with the adoption of UNSC Resolution 661 against Iraq. However, the humanitarian impact of this sanction was not foreseen, and this brought about legal criticism and a rare outright split among members of the SC, with China, France and Russia demanding their removal, while Britain and the United States insisted on the maintenance. As a result, UN member states became hostile and less receptive of the sanction regime and created a degree of skepticism about the use of sanctions more generally.

The UN and the international community were more willingly to embrace sanctions that were better targeted, designed to achieve specific political ends. Targeting specific sectors of the economy, or individuals or organizations are more likely to influence policies or believed to persuade those responsible for the situation that led to the sanctions being imposed. It helps in mitigating the effect on vulnerable civilians. As stated by the Commission; financial sanctions may target the foreign assets of a country, or a rebel movement or terrorist organization, or the foreign assets of specific leaders. Where individuals are targeted, these efforts have increasingly been expanded also to include members of that individual’s immediate family.⁷¹

Prior to the 1998 terrorist bombings of the US embassies in Tanzania and Kenya, the problem of financing terrorism was almost exclusively addressed as a problem of state sponsors of terrorism or money laundering and criminal financing by nonstate actors (primarily drug traffickers and organized crime).⁷² As a result, different strategies were used to stop the flow of money to terrorists: one strategy was to put pressure on states to reduce their support for terrorism.⁷³ This yielded positive results as states sponsorship of terrorism began to decline after the end of the Cold war. In order to reduce their international isolation, states such as Libya, Iran, Sudan and

⁷⁰ Economic Measures as a Means of Political and Economic Coercion Against Developing Countries: Report of the Secretary-General, A/44/S10 10 October 1989, Available at <https://digitallibrary.un.org/record/78262?ln=en> Last accessed 15/04/2023.

⁷¹ ICISS Report, p. 30

⁷² Clunan, A. L. (2006). The Fight against Terrorist Financing. *Political Science Quarterly*, 121(4), P.574, 569-596.

⁷³ Clunan, A. L. (2006). The fight against terrorist financing. *Political Science Quarterly*, 121(4), p.574, 569-596

Syria began to cooperate with the international community by curbing their support for terrorism. UNSC Resolutions on economic sanctions were used to persuade states such as Libya and Sudan to stop their support for terrorism.⁷⁴ However, the narrative changed following the bombing of the United States embassies on 7 August 1998 in Nairobi, Kenya and Dar es Salaam, Tanzania. These terrorist attacks gave rise to the recognition of non-state actors as sponsors of terrorism. The UNSC passed Resolution 1269 in 1999 requiring states to impose sanctions on and freeze the assets of the Taliban for hosting al Qaeda. Identified as the leader behind the bombings, the freezing of funds and other financial assets of Usama Bin Laden and individuals and entities associated with him drastically affected their ability to continue funding terrorist activities. The financial war on terror became even more intense after the 9/11 terrorist attack on New York and Washington, DC in 2001. The Bush administration used their extended power to freeze the assets of designated persons and entities considered a national security threat and blocked any transactions between them and the US.⁷⁵ In the end, efforts to combat terrorist financing are greatly undermined if countries do not freeze the funds or other assets of designated persons and entities quickly and effectively.⁷⁶

The Commission went ahead to note that, economic sanctions could also take the form of restrictions on income generating activities such as oil, diamonds and logging and drugs.⁷⁷ For instance, in response to the overthrow of Haiti's President Jean-Bertrand Aristide in October 1991, the UNSC passed Resolution 841 (1993)⁷⁸ imposing economic sanctions and an arms embargo on Haiti and demanded Aristide's return to power. This Resolution was passed to outlaw all transfers of 'petroleum and petroleum related products' and 'arms and related materiel of all types' to Haiti. The resolution stated that the UNSC was responding to concerns raised by the Organization of American States (OAS), declared the crisis in Haiti 'a threat to international peace and security', and indicated that the sanctions would remain in place until the de facto authorities in Haiti had 'signed and . . . begun implementing in good faith an agreement to reinstate the legitimate Government of President Jean-Bertrand Aristide.'⁷⁹ In addition, the UNSC reimposed the oil and arms embargo on Haiti via Resolution 873 (1993) after the UN Mission in Haiti was prevented from landing at Port au Prince in October 1993.⁸⁰ These resolutions didn't seem to achieve the desired results and thus prompted the adoption of UNSC

⁷⁴ *Ibid*

⁷⁵ Ortblad, V. (2008). Criminal prosecution in sheep's clothing: The punitive effects of OFAC freezing sanctions. *The Journal of Criminal Law and Criminology*, p. 1440, pp.1439-1466.

⁷⁶ Force, F. A. T. (2013). International Best Practices Targeted Financial Sanctions Related to Terrorism and Terrorist Financing (Recommendation 6), p.4. June < www.fatf-gafi.org.

⁷⁷ ICISS Report, P.30

⁷⁸ UN Security Council Resolution 841, 16 Jun. 1993

⁷⁹ UN Security Council Resolution 841, 16 Jun. 1993

⁸⁰ UN Security Council Resolution 873, 13 Oct. 1993

Resolution 917, which significantly expanded the sanctions regime. The resolution imposed a blanket ban on imports and exports to and from Haiti excluding certain humanitarian goods.⁸¹ In any case, these sanctions are aimed at deterring the perpetrators from continuing to cause harm to the civilian population. Nevertheless, the use of force becomes inevitable where these measures prove ineffective.

c) Political and Diplomatic Sanctions

A regional organization or the UN may use diplomatic and political sanctions to persuade the affected state's authorities to put an end to mass atrocities, thereby, avoiding the unnecessary need for the use of armed force. A diplomatic representative's expulsion, travel restrictions imposed on certain leaders, people, or groups, as well as the suspension or expulsion from international or regional organizations, are just a few examples of the actions that may be taken.⁸² Diplomatic sanctions are political measures taken to express disapproval or displeasure at a certain action through diplomatic and political means, rather than affecting economic or military relations.⁸³ Article 41 of the UN Charter specifically mentions 'severance of diplomatic relations' as a possible measure that can be used by states. The United States for example severed all diplomatic ties with Russia (Soviet Union) by withdrawing their diplomatic recognition from them for over twenty years. Also, in 1984 UK breaks off diplomatic relations with Libya after a police constable named Yvonne Fletcher who was killed outside the Libyan embassy on April 17th of the same year. Nevertheless, instead of completely cutting off all diplomatic ties with another state, the state imposing the sanction may decide to reduce diplomatic ties as a more favourable response. For example, demanding the recall of some or all diplomats and in some cases the closing of the embassy. Moreover, Shellie points out that, diplomatic sanctions are most effective when done under the authority of the UNSC Resolution rather than when they are done unilateral which makes them less universal and effective.⁸⁴

ii) Military action

The military aspect of the R2P remains the most controversial as it legitimises the use of force for humanitarian purposes and touches on two most fundamental principles of international law: the principle of sovereignty and non-intervention. The use of force in the territory of another state by an external actor even on humanitarian grounds remains a controversial issue in

⁸¹ Bromley, M. (2007). United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behaviour. Case Study: Haiti, 1993-94. *SIPRI: Stockholm International Peace*, P.5

⁸² ICISS Report, p.30-31

⁸³ UN General Assembly Fourth Committee: Disarmament, The Role of the Sanctions in Diplomacy, ODUMUNC 2020 Issue Brief, p.3

⁸⁴ Shellie Karabell, 'Why Russian sanctions (and expelling diplomats) won't work', USA Today, 29 March 2018, <https://eu.usatoday.com/story/opinion/2018/03/29/why-russian-sanctions-and-expelling-diplomats-wont-work/470058002/>

international public debate. However, the Commission advocates that military action should only be acceptable in extreme cases of loss of human lives and ethnic cleansing. Taking into consideration the importance of the principle of non-intervention, the Commission devised a mechanism that would create a balance between sovereignty and the respect for human rights. By implication, intervention is defensible in the event of gross human violations. Therefore, when the use of non-coercive measures fails or a state is unable or unwilling to discharge its responsibility, it subverts its sovereignty and gives way for the international community to step in.

Although most states especially weaker states have always kicked against the idea of the use of force for fear of abuse of its application by stronger states, they have under uncontrollable and difficult situations solicited military help from other states in handling a humanitarian crisis. To buttress this point, the Commission found in its consultations that even in states where there was the strongest opposition to infringements on sovereignty, there was general acceptance that there must be limited exceptions to the non-intervention rule for certain kinds of emergencies.⁸⁵ Apparently the use of non-coercive measures alone is not sufficient to persuade states to halt gross human rights violations. For instance, economic or diplomatic sanctions are not appropriate measures in cases such as genocide or crimes against humanity, thus the threat to use force or the actual use of force will be the most appropriate as it can bring hostilities to an end. As noted by Frank Chalk et al. there has never been instances in the modern era where soft power has been used to stop the commission of genocide or crimes against humanity. For instance, in 1971 crimes against humanity were committed in East Pakistan and in 1978, the killings in Cambodia, both of which were stopped through military intervention.⁸⁶

The international community should not wait until another Rwanda or Srebrenica occurs before acting, as this would be insensitive or unreasonable. We still have very recent memories of the atrocities of past wars. Considering this, the Commission makes it clear that waiting until after a genocide has occurred before acting will be morally dubious.⁸⁷ The international community should act when unusual circumstances arise that could result in widespread genocide or ethnic cleansing in order to stop history from repeating itself.⁸⁸ In order to further clarify the operational dimension of using force and what may constitute exceptional circumstances, the Commission states that these exceptional circumstances must be instances that truly shock the conscience of mankind or that so clearly endanger international security and demand military

⁸⁵ ICISS Report, P.31

⁸⁶ Chalk, F., Dallaire, R., & Matthews, K. (2012). The Responsibility to React. In *The Routledge handbook of the responsibility to protect*, Routledge, p.38, pp.36-49.

⁸⁷ ICISS Report, p. 33

⁸⁸ ICISS Report, p. 31

intervention.⁸⁹ Thus, six criteria's were agreed upon as a threshold for violence and abuse which has to be satisfied in order to justify the use of force for the purpose of protecting human rights. They include *right authority, just cause, right intention, last resort, proportional means and reasonable prospects*.⁹⁰ The purpose of these criteria's is to reaffirm the general position that, the use of force is a last resort in extreme cases and remains applicable only after the use of non-coercive measures has failed to contain the situation. As rightly noted by Evans, the responsibility to protect entails above all a responsibility to respond using military force, if necessary, to situations where the need for human protection is urgent.⁹¹

C) The Responsibility to Rebuild

There are no doubts that, there is still a degree of security needed in post-conflict situation to help stabilise the affected state and prevent a reoccurrence of the conflict. This is where the responsibility to rebuild steps in to ensure that the causes that gave rise to the conflict in the first place are properly addressed to ensure a sustainable reconstruction process. As a result, the obligation to rebuild includes the obligation to give all support possible for recovery, reconstruction, and peacebuilding as well as to address the root causes of the harm the intervention was intended to stop or avert.⁹² Without any form of discrimination relating to ethnic origin, religion, sex, colour or relation to the previous source of power in the territory, providing basic security and protection to the population of the affected country is one of the essential functions of an intervention force. They must show a sincere desire to aid in establishing a lasting peace and to advance sustainable development.⁹³ In his 1998 report, the UN Secretary General vividly described the rationale for post-conflict peace building. He notes;

“By post-conflict peace-building, I mean actions undertaken at the end of a conflict to consolidate peace and prevent a recurrence of armed confrontation. Experience has shown that the consolidation of peace in the aftermath of conflict requires more than purely diplomatic and military action, and that an integrated peace building effort is needed to address the various factors which have caused or are threatening a conflict. Peace building may involve the creation or strengthening of national institutions, monitoring elections, promoting human rights, providing for reintegration and rehabilitation programmes, as well as creating conditions for resumed development. Peace building does not replace ongoing humanitarian and development activities in countries emerging from crises. Rather it aims to build on, add to, or reorient such activities in ways that are designed to reduce the risk of a resumption of conflict and

⁸⁹ *Ibid*

⁹⁰ ICISS Report, p. 32

⁹¹ Evans, G. (2006). From humanitarian intervention to the responsibility to protect, *Wisconsin International Law Journal*, Vol.24, No.3, p.709

⁹² ICISS Report, p. XI

⁹³ ICISS Report, p.39

contribute to creating conditions most conducive to reconciliation, reconstruction and recovery’’.⁹⁴

To prevent the reoccurrence of the conflict, the SG further highlighted on the importance of having a post-intervention strategy in place and what needs to be done in the aftermath of the conflict;

“Societies which have emerged from conflict have special needs. To avoid a return to conflict while laying a solid foundation for development, emphasis must be placed on critical priorities such as encouraging reconciliation and demonstrating respect for human rights; fostering political inclusiveness and promoting national unity; ensuring the safe, smooth and early repatriation and resettlement of refugees and displaced persons; reintegrating ex-combatants and others into productive society; curtailing the availability of small arms; and mobilizing the domestic and international resources for reconstruction and economic recovery. Each priority is linked to every other, and success will require a concerted and coordinated effort on all fronts’’.⁹⁵

Following this, policy makers are expected to address these three most important areas, security, justice and economic development in exercising the responsibility to rebuild. Security is of paramount importance as any gaps is likely to reignite the conflict. Providing security to all irrespective of their role during the conflict is a prerequisite for a successful post-conflict process. Apportioning blames or referring to some as guilty is of no relevance at this phase.

Furthermore, in the area of justice, states have a binding obligation under customary international law to criminalize genocide, war crimes and crimes against humanity, to investigate and to prosecute perpetrators of these gruesome acts. Ensuring accountability for human rights violations and past atrocity crimes contributes not only to their prevention but also builds the credibility of institutions.⁹⁶ At the national level, accountability mechanisms can be designed to be non-discriminatory to ensure that all personnels including high government officials can be prosecuted for crimes they committed during the war. The removal of statutory limitations, amnesties or immunities that obstruct the prosecution of State officials and other individuals responsible for atrocity crimes and therefore fall short of international standards, strengthens national legal frameworks for accountability.⁹⁷ For example, in 2003 former Argentina president and more than 400 others were convicted for crimes against humanity, when the state removed legal obstacles in order to prosecute them. Moreso, to prevent a relapse into further violence, a

⁹⁴ The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General, UN Document A/64/210, New York: United Nations, 16 April 1998, cited in ICISS Report, p.40

⁹⁵ *Ibid*

⁹⁶ Responsibility to protect: State responsibility and prevention, Report of the Secretary-General, para 40, UN Doc A/67/929-S/2013/399, 9 July 2013

⁹⁷ *Ibid* para. 41

fair and inclusive transitional justice mechanisms including individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals is highly encouraged.⁹⁸ For instance, in Timor-Leste a Commission for Reception, Truth and Reconciliation was established to undertake truth-seeking and facilitate community reconciliation. Also, the Truth and Reconciliation Commission of South Africa was established after Apartheid to help deal with what happened during that period.

A final peace building responsibility of any military intervention should be as far as possible to encourage economic growth, the recreation of markets and sustainable development.⁹⁹ Post-conflict countries face extraordinary development challenges as they move towards economic recovery. Economic recovery is essential for preventing a resurgence of violence in the post-conflict setting. Therefore, a sound economy is a prerequisite for human development and is crucial to establishing peace in the frail years following a violent conflict.¹⁰⁰ To achieve this, the intervening authorities must ensure that domestic and international resources are evenly distributed and mobilised amongst the population as well as into the different sectors of the economy. Most importantly, any coercive economic measure that may have been applied to the country before or during the intervention should be ended to guarantee their economic recovery.¹⁰¹ It is important to mention here that, there can be no successful economic recovery to lay the ground for inclusive growth without peace and security.

1.5 Further Development of the R2P

Since the publication of the ICISS Report in 2001, a substantial amount of work has been put forth to further define the concept's scope as well as the best way to put it into practice. A number of reports that elaborate on the R2P concept have been endorsed as a result of this.

1.5.1 High-Level Panel Report 2004

The central theme of the 2001 ICISS Report was incorporated into the Panel Report. The panel report drew on the ICISS core principles of the R2P in recognising the default responsibility of each state in providing protection to its people against mass atrocities and other heinous crimes such as rape and starvation, but that this duty must be assumed by the larger community of states resulting from their unwillingness or inability to do so.¹⁰² The Panel acknowledged the inconsistency and ineffectiveness of the SC in handling past humanitarian disasters (Somalia,

⁹⁸ *Ibid* para. 42

⁹⁹ ICISS Report, p.42

¹⁰⁰ Crisis Prevention and Recovery Report 2008: Post-Conflict Economic Recovery-Enabling Local Ingenuity, Available on <https://www.undp.org/publications/crisis-prevention-and-recovery-report-2008-post-conflict-economic-recovery-enabling-local-ingenuity>

¹⁰¹ ICISS Report, p. 42

¹⁰² ICISS Report, p. VIII

Bosnia, Rwanda, Kosovo and Darfur)¹⁰³ and pointed to Chapter VII of the UN Charter as the acceptable standard in guaranteeing international peace and security. In relation to the R2P, the Panel validates the concept as an emerging norm under international law which requires a collective international responsibility to protect.¹⁰⁴ In line with the view of the ICISS, there is a general acceptance that the focus should not be on the right of any state to intervene which in this case is not the bone of contention but should lay in the responsibility of every state to protect people gross violations which can be avoidable if this responsibility is borne by the broader community of states.¹⁰⁵

Moreover, the debate of the concept of the R2P took a new turn from 2004 in the High-Level Panel Report within the context of UN institutional reforms.¹⁰⁶ The R2P concept was viewed by the Panel as a chance to improve the Charter's collective security system.¹⁰⁷ By implication, it recognised the SC as the most appropriate body to authorize military intervention in extreme cases. This legal authority encompasses responsibility to act in the face of humanitarian crisis. To this end, it states:

“We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent”.¹⁰⁸

The successful functioning of the SC largely depends on the cooperation amongst its five permanent members. The use of their veto power in the past paralysed the collective security system and made the SC powerless in the face of mass atrocities. Considering this, the Panel pleaded with the permanent members to promise not to exercise their veto power in situations involving genocide and significant human rights violations in order to prevent history from repeating itself.¹⁰⁹ In finding ways to enhance the effectiveness of the global collective security system, the Panel spelt out five basic criteria to be assessed before the use of force may be considered legitimate. These criteria include seriousness of threat, proper purpose, last resort,

¹⁰³ A more Secure World: Our shared responsibility Report of the High-level Panel on Threats, Challenges and Change, (2004), UN Doc. A/59/565, p. 65-66, Para 201. Available at <https://unidir.org/sites/default/files/conferences/pdfs/report-of-the-panel-eng-0-61.pdf>

¹⁰⁴ *Ibid* p. 66, Para 202

¹⁰⁵ *Supra* note 103 at p. 65, para 201. See also ICISS Report, p. 11

¹⁰⁶ Stahn, C. (2007). Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? *American Journal of International Law*, 101(1), p. 105, pp. 99-120.

¹⁰⁷ *Ibid*

¹⁰⁸ A more secure world: Our shared responsibility Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, p. 66, para 203, (2004), available at <https://unidir.org/sites/default/files/conferences/pdfs/report-of-the-panel-eng-0-61.pdf> last accessed 09/03/2023

¹⁰⁹ *Ibid*, p. 82 Para 256

proportional means, and balance of consequences.¹¹⁰ These criteria are identical to the precautionary principles in the ICISS Report. These standards serve as guidelines for the SC's decision-making process as it considers whether to approve or support the use of military force.¹¹¹

1.5.2 The Report of the UN Secretary-General

The findings of the High-Level Panel Report were endorsed in 2005 by the UNSG, Kofi Annan in his report titled *In Larger Freedom: Towards Development, Security and Human Rights for All*. Referring to Para 203 of the High-Level Panel Report, he reaffirmed that the idea of a collective responsibility to protect must embrace that responsibility, and, when necessary, take action to uphold it.¹¹² In the same light, without completely kicking out the idea of the military intervention where need be, the SG emphasized on the need to prioritise the use non-coercive measures for the protection of civilians from human rights violations. However, where such measures prove futile, enforcement actions may be taken out of necessity in accordance with the UN Charter if so required.¹¹³

The idea that mass atrocities committed within a sovereign state is their sole responsibility may start to quickly change when it starts to threaten regional or international peace and security. Moreso, the notion of R2P was used to constrain, rather than to enable, the use of force.¹¹⁴ Thus, the use of force must be authorised by the SC as it remains the only legitimate body with the authority to act on behalf of all members of the UN. Nevertheless, the SG did not expressly rule out the possibility of unilateral intervention. The silence of the report of any other alternative means, indicates the reluctance of the international community to accept military action without the authorization of the SC. Evidently, as the superior authority, the permanent members of the SC must ensure that their personal interest do not put the international community at risk of another Rwanda or Srebrenica.

1.5.3 Outcome Document of the 2005 World Summit

This idea of the R2P made its way in four short years from the 2001 ICISS Report into the 2005 Summit Outcome Document (Summit Outcome). The unanimous endorsement of R2P was a manifestation of worldwide consensus of the concept adopted by the Sixtieth Session of the

¹¹⁰ *Ibid*, p. 67 Para 207

¹¹¹ *Ibid*

¹¹² In Larger Freedom: Towards Development, Security and Human Rights for all, Report of the Secretary-General, UN Doc. A/59/2005, P. 35, para 135 (2005), available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CPR%20A%2059%202005.pdf> last accessed 09/03/2023

¹¹³ *Ibid*

¹¹⁴ Stahn, C. (2007). Responsibility to protect: political rhetoric or emerging legal norm?. *American Journal of International Law*, 101(1), p. 107

UNGA, attended by over 170 head of states and government.¹¹⁵ The 2005 World Summit debates were structured on the SG's Report *In Larger Freedom Report* and produced the 2005 World Summit Outcome, which incorporated the R2P, albeit in a slightly different form than the proposed doctrine.¹¹⁶ Moreso, it offered the World Summit a chance to re-evaluate the ICISS's suggestions for bridging the gap between legality and legitimacy in cases of flagrant and persistent human rights violations was one of its main benefits.¹¹⁷ Most importantly, the World Summit Outcome Document itself narrowed the focus from the ICISS benchmark of "population suffering serious harm," so that only "four crimes" could trigger R2P, namely: genocide, war crimes, ethnic cleansing, and crimes against humanity.¹¹⁸

On the question of when to intervene, the ICISS adopted a widely accepted position that intervention should only be used in 'extreme cases' when deciding on when to act. This position implies a degree of consensus around the idea that the international community has a responsibility to intervene to save the vulnerable population from humanitarian catastrophes. In the same light, the outcome document accepted the international position of the collective responsibility of the international community to protect civilians from Genocide and other crimes against humanity. Nevertheless, new concerns were raised during the World Summit to identify who bears responsibility- identifying precisely which actors should assume the responsibility to protect. Powerful states were cautious of the fact that, the responsibility was unevenly spread, placing an unrealistic burden of expectations on a small number of actors.¹¹⁹ As aptly noted by Bellamy: "*the challenge of preventing future Rwandas can be boiled down to overcoming a single obstacle: how to persuade states, particularly powerful states, to risk lives and money to "save strangers" in distant lands where few strategic interests are at stake*".¹²⁰

The World Summit declaration suggested that the UN, in cooperation with relevant regional organizations, should assume the responsibility to protect when the host state was unwilling or unable to do so.¹²¹ In practice, this is often challenging as states will disagree on which institution should assume responsibility. In the case of Darfur, there was disagreement amongst the member of the SC- some argued that the government of Sudan retain responsibility and others believed the African Union (AU) should assume that responsibility. Surprisingly, the

¹¹⁵ 2005 World Summit Outcome, G.A. Res. 60/1, 138, U.N. Doc. A/RES/60/1 (Sep. 16, 2005)

¹¹⁶ Eaton, J. (2011). An emerging norm determining the meaning and legal status of the responsibility to protect. *Michigan Journal of International Law*, 32(4), p. 769, pp. 765-804

¹¹⁷ Strauss, E. (2009). A bird in the hand is worth two in the bush—on the assumed legal nature of the Responsibility to Protect. *Global Responsibility to Protect*, 1(3), p. 294, pp. 291-323.

¹¹⁸ Evans, G., Thakur, R., & Pape, R. A. (2013). Humanitarian Intervention and the Responsibility to protect, *International Security*, Vol. 37, No. 4, p. 200, pp. 199–214.

¹¹⁹ Bellamy, A. (2006). The Responsibility to Protect after the 2005 World Summit. *Policy Brief*, (1), p. 7, pp.3-15

¹²⁰ *Ibid*

¹²¹ *Ibid*

members remained silent on the possibility of shifting this responsibility from the government of Sudan to the SC. Unfortunately, the World Summit failed to address this issue. It remains unclear how the international community should proceed when the most appropriate agents are unwilling to act or where states argue that others are in a better position to do so than they are. The final text of the Outcome Document represents a political compromise made to balance the opposing viewpoints and states avoided simplifying the idea of the R2P to a moral obligation.¹²² However, the outcome document encouraged the powerful and capable states to accept their responsibility to protect in principle, but failed to resolve this as the summit dodged the question of unauthorised intervention.¹²³

Paragraphs 138 and 139 reflects previous iterations of the concept of the R2P. Both paragraphs incorporate the responsibility to protect and the responsibility to prevent in its working document. It clearly reflects on the traditional bond of duty between sovereign states and their citizens and reaffirms their primary responsibility to protect its citizens in paragraph 138.¹²⁴ While Paragraph 139 projects the responsibility of the international community to respond in a timely and decisive manner through a collective action.¹²⁵ The outcome document assumed a more reserved stance in relation to the responsibility to take collective action through the SC under chapter VII. The language of this paragraph differs from that of the ICISS as it points towards a voluntary rather than a mandatory engagement. The challenge to prevent future Rwandas and Kosovos were left unresolved at the 2005 World Summit Outcome Document.¹²⁶

¹²² Stahn, C. (2007). Responsibility to protect: political rhetoric or emerging legal norm? *American Journal of International Law*, 101(1), p. 108

¹²³ *Supra* note 116.

¹²⁴ 2005 World Summit Outcome, G.A. Res. 60/1, 138, U.N. Doc. A/RES/60/1 (Sep. 16, 2005), para 138. It states that “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.

¹²⁵ *Ibid* para 139

¹²⁶ Bellamy, A. J. (2006). Whither the responsibility to protect? Humanitarian intervention and the 2005 World Summit. *Ethics & International Affairs*, 20(2), p. 167, 143-169.

CHAPTER TWO

INTERNATIONAL LAW AND THE LEGAL FRAMEWORK OF THE RESPONSIBILITY TO PROTECT

2.0 International Law and Conventional Frameworks for the R2P

Almost all members of the UN became signatories to major international human rights and international humanitarian instruments as a sign of their willingness to never again allow the most terrible forms of prosecution and violence to occur. Evidently, the human atrocities committed in Syria, Yemen, Iraq, South Sudan, Central African Republic falls short of their commitment to effectively prevent and respond to these atrocities.

2.1 Debates Surrounding the Legal Character of the R2P

The question of R2P's legal standing has become more important as it becomes a widely accepted and hotly contested idea in international politics. It is important to re-emphasize here that, R2P arose out of political considerations rather than legal ones. Nevertheless, we cannot deny that the Outcome Document in 2005 was interpreted based on the already existing legal obligations of states to prevent and respond to atrocity crimes.¹²⁷ This implies the R2P did not create or establish any new legal obligations as have been suggested by some. To buttress this view, Abour points out that, 'the responsibility to protect norm is not, as some have suggested, a leap into wishful thinking. Rather, it is anchored in existing law, in institutions and in lessons learned from practice'.¹²⁸ Although it had already been characterised as an emerging principle in customary international law by the ICISS, they acknowledged it would be quite premature to make any claim about the existence now of such a rule.¹²⁹ In November 2004, the High-level Panel on Threats, Challenges and Change endorsed the R2P as an 'emerging norm that there is a collective responsibility to protect' the human rights and well-being of civilian populations¹³⁰, an assessment shared by the SG.¹³¹ On the other hand, even though the ICISS report was incorporated into the Outcome Document, it remained silent as to the legal nature of the R2P. That notwithstanding, most scholars qualify it as a norm¹³², which through state practice might

¹²⁷ Welsh, J. M. (2019). Norm robustness and the responsibility to protect. *Journal of Global Security Studies*, 4(1), p. 56, pp.53-72.

¹²⁸ Arbour, L. (2008). The responsibility to protect as a duty of care in international law and practice. *Review of International Studies*, 34(3), p. 448, pp.445-458.

¹²⁹ ICISS Report, para. 2.24 at p. 15 & para 6.17 at p. 50

¹³⁰ High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, 2 December 2004, UN Doc A759/565, para. 203 (2004)

¹³¹ *Ibid*, para 135

¹³² A norm can be defined ethically, to mean a pattern of behaviour that should be followed in accordance with a given value system or the moral code of a society-a generally accepted standard of proper behaviour; see Thakur, R., & Weiss, T. (2009). R2P: From Idea to Norm—and Action? *Global Responsibility to Protect*, 1(1), p. 23, pp. 22-53.

ultimately become a new rule of customary international law.¹³³ From a legal perspective, some authors refer to it as ‘soft law’¹³⁴ or a new international norm developing into a legal principle.¹³⁵ In addition, the R2P has also been referred to as a ‘rhetorical trick’ aimed at diverting the focus of the international community from intervention as the much contested right to intervene to a less confrontational ideas of the R2P.¹³⁶

The implementation of the R2P became even more complex at the end of the 2005 World Summit as it left so many questions unanswered, the most important being that of unauthorised intervention. Russia and China shared the belief that, no action should be taken without SC authorization and based their argument on the fact that the UN was already equipped to handle humanitarian crisis, thus the R2P risk undermining the Charter if unauthorised intervention is permitted.¹³⁷ A contrary view was held by U.K and France who rejected the idea that unauthorized intervention should be prohibited in all circumstances.¹³⁸ Moreso, statements of heads of states and governments during the World Summit indicated the prevailing division amongst states regarding the legal nature of the R2P. Referred to as a ‘powerful norm of international behaviour’ by the Canadian Prime Minister, Paul Martin, a ‘norm of collective action’ by Mauritius and a ‘duty to help’ by Norway, while Iceland and Italy referred to the R2P as a concept and principle respectively.¹³⁹

The concept of the R2P remains a controversial one and raises the question whether it can be regarded as customary international law or is it becoming a customary norm. Nevertheless, many promoters of the R2P view it as an ‘evolving principle’ of customary international law. The sources of international law are limited to international treaties, customs and general principles of law according to Article 38 of the Statute of the International Court of Justice (ICJ). GA Resolutions may in some instances constitute evidence of customary international law or contribute to its formation. Customary international law requires a general practice of states supported by *opinio juris*.¹⁴⁰ Much of the arguments surrounding the legal character of the R2P

¹³³ Evans, G. (2006). From humanitarian intervention to the responsibility to protect, *Wisconsin International Law Journal*, Vol.24, No.3, P.704; see Macfarlane, S. N., Thielking, C. J., & Weiss, T. G. (2004). The Responsibility to Protect: is anyone interested in humanitarian intervention? *Third World Quarterly*, 25(5), p. 988, pp. 977-992.

¹³⁴ Welsh, J., & Banda, M. (2010). International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities? *Global Responsibility to Protect*, 2(3), p. 230, pp. 213-231.

¹³⁵ Bannon, A. L. (2006). The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism. *Yale Law Journal*, 115(5), p.1158, pp. 1157-1166

¹³⁶ Stahn, C. (2007). Responsibility to protect: political rhetoric or emerging legal norm? *American Journal of International Law*, 101(1), p. 102, pp.99-120.

¹³⁷ Bellamy, A. J. (2006). Whither the responsibility to protect? Humanitarian intervention and the 2005 World Summit. *Ethics & International Affairs*, 20(2), p. 150-151, pp.143-169.

¹³⁸ *Ibid* at p. 151

¹³⁹ Strauss, E. (2009). A bird in the hand is worth two in the bush on the assumed legal nature of the responsibility to protect. *Global Responsibility to Protect*, 1(3), p. 300, pp.291-323.

¹⁴⁰ *Supra* note 139 at p. 293

is contained in paragraphs 138 and 139 of the World Summit Outcome Document urging states to protect their citizens from these crimes and calls for the assistance of the international community where necessary. In these paragraphs, states declared their commitment to act in ways not explicitly provided for in the UN Charter.¹⁴¹ It is against this background that the proponents of R2P hold the view that the R2P is an instant customary law.¹⁴² Adopted by a resolution of the General Assembly, the World Summit Outcome Document is a non-binding recommendation for member states. The UN General Assembly is not a law-making body and lacks the power to pass legally binding rules under the UN Charter. Therefore, opponents of the legal obligation argue that the R2P needs more support in customary international law than the resolution of the UNGA, which is merely advisory.¹⁴³ However, this does not mean that its statements are without any effect. As the world's most representative body, a consensus at the Assembly provides evidence that there is a global legal consensus on a particular subject.¹⁴⁴ As reiterated by the ICJ, resolutions can provide evidence for the existence of a certain rule or emergence of *opinion juris*.¹⁴⁵ UNGA resolutions or pronouncements may reveal the existence or formation of rules of customary international law where they are accompanied by consistent state practice. In certain circumstances, these resolutions adopted by the General assembly may also provide a mandatory source of international law. A good example is the Universal Declaration of Human Rights originally a non-legally binding declaration and later became the foundation of international human rights covenants and, eventually an element of customary law.¹⁴⁶ In the absence of substantial state practice, it remains controversial whether UNGA resolutions or propositions can create legally binding laws.

Moreso, opponents of the R2P are of the view that construing the R2P as an emerging norm is problematic, as the responsibility was developed not within a normative vacuum but within a complex existing legal framework.¹⁴⁷ For instance, it is an already well-established principle in international law that the SC has the authority to act under Articles 39 and Chapter VII of the UN Charter using all necessary measures to halt human rights atrocities which threatens international peace and security. NATO intervention in Kosovo in 1999, raised serious criticism

¹⁴¹ *Supra* note 134 at p. 229

¹⁴² Martin, A. (2018). Responsibility To Protect (R2p) In Theory And Practice–Flaws And Challenges. *Cogito-Multidisciplinary research Journal*, (3), p. 84-93.

¹⁴³ Edward Luck, Special Adviser to the Secretary- General, Remarks to the General Assembly on the Responsibility to Protect in New York on 23 July 2009.

¹⁴⁴ *Supra* note 134.

¹⁴⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 254.

¹⁴⁶ Asamoah, O. Y. (2012). The legal significance of the declarations of the General Assembly of the United Nations. Springer, p. 28.

¹⁴⁷ Payandeh, M. (2010). With Great Power Comes Great Responsibility-The Concept of the Responsibility to Protect within the Process of International Lawmaking. *Yale Journal of International Law.*, 35(2), p. 485, pp. 469-516.

regarding the legality of unauthorised intervention and compromised the role of the SC in maintaining international peace and security. Aware of these dangers, the power of the SC was highly acknowledged in the formation of the R2P and it became an important component in its development. Thus, to consider the R2P as an emerging norm of international law one may become tempted to assume that the authority of the SC is likewise an emerging norm and therefore not yet a part of international law.¹⁴⁸ To Stahn, viewing the R2P as an emerging legal norm raises suspicious as he questions; “how can a concept that is labelled as a “new approach” and a “re-characterization” of sovereignty in 2001 turn into an emerging legal norm within the course of four years, and into an organizing principle for peace and security in the UN system one year later?”¹⁴⁹

The R2P is not a universal rule of law, as already mentioned. It does not meet the criteria for general principles of law, it has not been enshrined in an international treaty, and it does not have enough *opinio juris* and state practice to give rise to customary international law.¹⁵⁰ In fact, it is best understood as a norm of international conduct which either through codification into international treaties or through the development of customary international law, these norms may develop into legal obligations.¹⁵¹ Indeed, as a political statement and a reflection of an expanding political consensus, international intervention under the R2P is induced not by the compelling legal obligation to act but instead, it is more or less dependent on political will.

2.2 Legal Impact of the Responsibility to Protect in International Law

From the forgoing, the R2P cannot be understood as a norm of customary international law. However, this does not mean that the endorsement of the R2P has no legal impact within the international legal framework. Although it is not regarded as a legal concept because it creates no additional legitimate change in law, nevertheless it is grounded in established concepts of international law.¹⁵² The R2P is, at best, a codification and reaffirmation of already-existing laws and principles, and if anything, it contributes to the development of international law.

As has been rightly described by some authors, the prohibition of the use of force enshrined in Article 2(4) of the UN Charter is the “corner stone of the Charter system”.¹⁵³ The prohibition of

¹⁴⁸ *Ibid*

¹⁴⁹ Stahn, C. (2007). Responsibility to protect: political rhetoric or emerging legal norm?. *American Journal of International Law*, 101(1), p. 101, pp. 99-120.

¹⁵⁰ Burke-White, W. W. (2011). Adoption of the Responsibility to Protect. *University of Pennsylvania Law School, Public Law Research Paper*, (11-40), p.71

¹⁵¹ *Ibid*

¹⁵² Molier, G. (2006). Humanitarian Intervention and the Responsibility to Protect after 9/11. *Netherlands International Law Review*, 53(1), 37-62.

¹⁵³ Brierly, J. L. (2012). *Brierly's law of nations: an introduction to the role of international law in international relations*. Oxford University Press.

the use of force is complimented by the principle of non-intervention which prohibits the use of armed intervention in the domestic affairs of another state. The ICISS acknowledged that the doctrine of the R2P had a legal foundation, by first emphasizing that, based on the principle of non-intervention, respecting the sovereignty of other states is a legal obligation that must be adhered to.¹⁵⁴ Quite familiar with fears of weaker nations that powerful states may hide under the banner of this new concept to interfere in their domestic affairs, the ICISS clearly reaffirmed the bedrock non-intervention principle enshrined in Article 2(7) of the UN Charter.¹⁵⁵ The ICISS further notes that, the concept of state sovereignty itself, places a responsibility on the state not only to respect other state's sovereignty, but in addition, to respect the human rights of its citizens.¹⁵⁶ The sovereign right of non-intervention is not an absolute right. It is dependent on the state upholding its responsibility to protect its citizens. Thus, failing to discharge its obligation, it forfeits its sovereign right. Consequently, it risk foreign intervention within its territory for the purpose of providing protection and securing the rights of the vulnerable population. This dilemma is summarized by Thakur who notes that, "to respect sovereignty all the time is to risk being complicit in humanitarian tragedies sometimes".¹⁵⁷ He goes further to posit that, the unqualified concept of state sovereignty which gave a state immunity from accountability for the brutal treatment of its population "has gone with the wind".¹⁵⁸ Thus, sovereignty is no longer considered to be sacrosanct.¹⁵⁹ A similar view was held by the then Secretary General of the UN, Kofi Annan who noted that "states bent on criminal behaviour should know that frontiers are not the absolute defence".¹⁶⁰

The tension on how to reconcile these two fundamental principles which underpin the UN Charter brought about a fierce debate throughout the 90's; on the one hand the sovereign authority of states complimented by the prohibition of the threat or the use of force against the territorial integrity of another state and on the other hand, the obligation of the members of the UN to protect the human rights and the fundamental freedoms, as stipulated in the Preamble of the UN Charter. This dilemma on how to reconcile the prohibition of the use of force in the territorial sovereignty of another state and their obligation to bring to an end the inhumane treatment or human suffering inflicted by the government of a state on its population challenged

¹⁵⁴ ICISS Report para. 2.8, p. 12

¹⁵⁵ *Ibid* para. 6.2, p. 47

¹⁵⁶ *Ibid* para. 2.8, p.12

¹⁵⁷ Thakur, R. (2002). Outlook: Intervention, Sovereignty and The Responsibility To Protect: Experiences from ICISS. *Security Dialogue*, 33(3), p. 324, pp. 323-340.

¹⁵⁸ Thakur, R. (2001). Global Norms and International Humanitarian Law: An Asian Perspective. *International Review of the Red Cross*, 83(841), p.35, pp. 19-44. doi:10.1017/S1560775500106169

¹⁵⁹ Chopra, J., & Weiss, T. (1992). Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention. *Ethics & International Affairs*, 6, p. 95, pp. 95-117. doi:10.1111/j.1747-7093.1992.tb00545.x

¹⁶⁰ Kofi Annan, "Secretary- General's Speech to the 54th Session of the General Assembly," September 20, 1999.

the international community to find a balance between these two concepts. The doctrine of *sovereignty as responsibility* was formulated by Francis Deng, Special Representative to the UNSG for Internally Displaced Persons, as the most constructive way to engage governments in an age of human rights and humanitarian issues. In his view, “Sovereignty as responsibility meant that the state had to take care of its citizens and – if it needed support – call on the sub-regional, regional or continental organisations, or ultimately the international community. But if it did not do that, and its people were suffering and dying, the world would not watch and do nothing. They would find a way of getting involved”.¹⁶¹ Sovereignty just like the prohibition of non-intervention, is deeply rooted in the well-being of natural persons. First, it protects the inhabitants of the victim state and most importantly it secures the stability of the whole international community.¹⁶² Thus the notion of conditional sovereignty¹⁶³ applies when the state violates its human rights obligations.

The concept of the R2P regards the SC as the most important international actor due to its role in the implementation of the concept. It is imperative to state here that, the SC is the political organ of the UN and has the primary responsibility for the maintenance of international peace and security.¹⁶⁴ The competences of the SC are found within the framework of the UN Charter and therefore it is bound to discharge its responsibility within the confines of the Charter. The use of coercive measures is not automatic when a conflict breaks out. The mechanisms for the pacific settlement of dispute under Chapter VI of the UN Charter are invoked to settle the dispute by such means. However, where Chapter VI measures prove insufficient, the application of enforcement measures under Chapter VII will be resorted to by the SC. Before taking any coercive action, the UNSC under Article 39 of Chapter VII shall first of all “determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security” in a specific situation. Under Article 41 and 42 the UNSC can employ either the non-coercive or the coercive measures to give effect to its decisions. Non coercive measures, such as economic sanctions and diplomatic severance, are the primary option but nevertheless if

¹⁶¹ Deng, F. M. (2010). Idealism and realism: Negotiating sovereignty in divided nations. *Dealing with crimes against humanity*, 91, p. 94

¹⁶² Peters, A. (2009). Humanity as the A and Ω of Sovereignty. *European Journal of International Law*, 20(3), p. 534, pp. 513-544.

¹⁶³ It is a concept of sovereignty that implies respect for fundamental human rights. See Payandeh, M. (2010). With great power comes great responsibility the concept of the responsibility to protect within the process of international lawmaking. *Yale Journal of International Law*, 35(2), p.494, pp. 469-516.

¹⁶⁴ Article 24(1) of the UN Charter states; “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”.

these measures prove to be inadequate, the SC may authorize the member States to take military measures to maintain or restore international peace and security.

In all four documents (the report of the Commission on State Sovereignty and Intervention, the High-Level Panel Report, the Report of the Secretary-General, and the Outcome Document of the 2005 World Summit), which formed the very foundation of the concept, the R2P is handled differently. Its explicit commitment in the Outcome Document to act through the SC in these cases is not without any significance.¹⁶⁵ Furthermore, the practice of the SC is not necessarily consistent as it acts on a case-by-case basis, and often emphasizes the unique character of a situation in which it decides to intervene. Therefore, the affirmation of the R2P may help reinforce the SC's authority to take humanitarian action. More importantly, the R2P enhances humanitarian action by the SC with a higher degree of legitimacy. The adoption of the R2P in the World Summit Outcome Document in 2005 made significant changes to the practice of the SC. Unlike during the 90's where the international community tolerated the practice of the Council, the unanimous endorsement of the R2P during the 2005 Summit gave credibility to SC action in favour of its legality and legitimacy by explicitly approving it.

2.3 Pillars of the Responsibility to Protect and its Legal Framework

This section discusses the three pillars on which the R2P rests and which according to the Secretary General Ban Ki-Moon represents the way forward in implementing the concept of the R2P. In his 2009 report, *Implementing the Responsibility to Protect*- SG Ban Ki-Moon underscored that the provisions of paragraphs 138 and 139 of the 2005 Summit Outcome Document are firmly anchored in well-established principles of international law. The obligation of states to prevent and punish these crimes are laid down in conventional and customary international law.¹⁶⁶ He goes further to describe these 'firm anchors' by noting that they are found throughout international law as ranging from state responsibility¹⁶⁷ to principles of international criminal and human rights law.

2.3.1 Pillar One- The Protection Responsibilities of the State¹⁶⁸

The primary responsibility of a state to protect rests with the concerned state. In the opening sentence of paragraph 138 of the Summit Outcome Document "we accept that responsibility and will act in accordance with it", states pledged to accept this responsibility and act in accordance with it. This declaration is the bedrock of the R2P. The SG further noted that pillar one

¹⁶⁵ 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005), para. 139. See also ICISS Report para. 6.16 & 6.17, p. 50

¹⁶⁶ Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, para. 3.

¹⁶⁷ Articulated under International Law Commission's Articles of State Responsibility

¹⁶⁸ Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, para. 11(a)

responsibilities are not without any legal basis as he emphasized that they emanate from the notion of state sovereignty and from pre-existing and continuing legal obligations of state. The obligations reflected in the first pillar of the R2P derive from well-established norms and principles of customary international law and treaty-based international human rights law (IHRL) and international humanitarian law (IHL), and they are both legally binding on all parties.¹⁶⁹ Thus, the provisions in the Outcome Document serve as their reflection, and not the source of their obligation.¹⁷⁰ In order for states to have a better understanding on how to apply the protection obligations proclaimed at the World Summit, revisiting the existing set of legal standards from a rights-based perspective is of utmost importance. More importantly, a review of the fundamental human rights framework might help us to comprehend the nature of the R2P rooted in universal human rights standards, and not a military doctrine aimed at justifying intervention.¹⁷¹ The protection standard included in IHRL and IHL are used as a concrete point of reference against which to judge the conduct of states; and have created a legal foundation for the creation of international criminal courts and tribunals including the international criminal court (ICC).

Nevertheless, the concept of the R2P has been criticised for being overly broad in scope and redundant as to content, because it does not add anything new to the already existing obligations of states under international law.¹⁷² In reality, this may not be so as the potential strength of the R2P lies in numerous legal frameworks on which it operates. Rosenberg notes; “While R2P in some aspects may reinforce or reiterate existing law, its strength lies in the framework it establishes - unearthing, interpreting, and crystallising the obligation to act in the face of mass atrocity crimes”.¹⁷³ To be able to determine if and when a state may be held responsible for failing to take action to prevent human rights atrocities within its territory, it is necessary to first identify the legal standards. Thus, determining state responsibilities under the R2P necessitates a separation of the legal bases for the varying set of obligations. Before we establish the responsibility of states as the main actors in the promotion and protection of human rights on the international plane, it is imperative that we make a clarification between the concept of the R2P and the duty to protect. The former is a concept coined by the ICISS and adopted by the 2005 World Summit Document, and the latter is a widely recognised concept in IHRL that establishes that states have a positive duty in certain situations to stop private actors from violating the

¹⁶⁹Gierycz, D. (2010). The Responsibility to Protect: Legal and Rights-Based Perspective. *Global Responsibility to Protect*, 2(3), p. 251, pp. 250-266.

¹⁷⁰ *Ibid*

¹⁷¹ *Ibid*

¹⁷²Rosenberg, S. P. (2009). Responsibility To Protect: Framework for Prevention. *Global Responsibility to Protect*, 1(4), p. 448, pp. 442-477

¹⁷³ *Ibid*.

rights of others, in addition to a negative duty not to interfere with those rights.¹⁷⁴ In essence it mandates states to take all necessary steps to prevent as well as redress all violations human rights.¹⁷⁵

Under IHRL states have a duty to protect individuals from human rights violations. IHRL is a set of rules established in convention or custom and are codified in international treaties and national bill of rights. In principle, IHRL applies at all times, both in peace time and war time.¹⁷⁶ Focused primarily on the conduct of states, IHRL is grounded in the concept of human dignity, which provides that individuals have inherent attributes that cannot be legitimately restricted by governmental power.¹⁷⁷ This implies that, human rights law requires state actors not to infringe on the human rights of individuals. This positive obligation of states is a well-recognised duty under international law. The establishment of the UN Charter in 1945 set the pace for human rights development and served as a point of departure for further elaboration of human rights standards. The Universal Declaration of Human Rights (UDHR) 1948 and the two human rights Covenants of 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) form the core of international human rights law. Since their adoption, a plethora of other human rights treaties with a more limited focus have been promulgated. These instruments have received a high number of ratifications, they include; International Convention of the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention against Torture (CAT), the Genocide Convention, the Convention on the Rights of a Child (CRC), the 1949 Geneva Conventions, and the Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The ratification of these human rights instruments by most states was a signal that states became more aware about their human rights obligations and the need to effectively implement them in their nations. Evidently, the atrocities committed in the past would have been averted had states been more conscious about their human rights obligations and taken effective measures in their implementation.

¹⁷⁴ Buergeth, T. (1981). To Respect and To Ensure: State Obligations and Permissible Derogations. *The international bill of rights: The covenant on civil and political rights*, 72, p. 74.

¹⁷⁵ *Supra* note 172 at p. 448.

¹⁷⁶ The ICJ in its Advisory Opinion stated, "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities" See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion, 9 July 2004), ICJ, paras. 105, p. 178

¹⁷⁷ Rosenberg, S. P. (2009). Responsibility To Protect: Framework for Prevention. *Global Responsibility to Protect*, 1(4), p. 450, pp. 442-477

States have both general and specific protection obligations under these human rights instruments. The specific instruments focus on protecting the rights of certain group of persons (women, children, internally displaced persons-IDPS, persons with disabilities) or to prevent and punish crimes (genocide, torture, forced disappearance). General obligations of states to protect and promote the human rights of all without discrimination is spelled out in the UDHR. These include the right to life, liberty and security of persons and the express prohibition torture, cruel, inhumane and degrading treatment and slavery.¹⁷⁸ More precise state obligations are highlighted in the two covenants of 1966. For instance, the ICCPR requires state parties to respect and uphold the rights of everyone residing on their territory and subject to their jurisdiction...,¹⁷⁹ to put in place proper legislative measures to fulfil this obligation¹⁸⁰ and to ensure an effective remedy and enforcement measures in cases of violation.¹⁸¹

Vulnerable group of persons such as women, children and IDPs are usually the most affected during conflicts. To address protection issues related to them, a host of international regulations which define state obligations were established. The adoption of the 1997 Guiding Principles on Internal Displacement focuses on the duty and responsibility of states to provide protection to IDPs within their jurisdiction against arbitrary displacement, genocide, murder, summary executions, enforced disappearances, indiscriminate attacks, starvation as a method of combat, rape, mutilation, degrading treatment, gender-specific violence, forced prostitution, slavery, sexual exploitation, child labour, and child soldiers.¹⁸² The above-mentioned crimes may fall into one of the categories of crimes under the jurisdiction of the International Criminal Court (ICC)-genocide, war crimes and crimes against humanity. Children as one of the most vulnerable groups of persons are accorded special protection under the 1989 Covenant on the Rights of a Child (CRC). The CRC contains clearly defined state obligations to protect the rights of a child such as right to live, protection from all forms of sexual exploitation, abduction, child trafficking or sale of children, torture, cruel treatment, capital punishment or life sentence and prevent their recruitment as soldiers during armed conflict.¹⁸³ Also, the recruitment of children under the age of 15 is a war crime under the ICC statute. Gender based violence against women and girls has been around for a long time. To address this issue numerous international

¹⁷⁸ Universal Declaration of Human Rights (UDHR) 1948, Articles 2-4; International Covenant on Civil and Political Rights (ICCPR) 1966, Articles 1-9

¹⁷⁹ Not only citizens but includes refugees, or migrant workers, groups particularly vulnerable to abuses in practice. See ICCPR Article 2.1

¹⁸⁰ ICCPR Article 2.2

¹⁸¹ ICCPR Article 2-3. See Gierycz, D. (2010). The Responsibility to Protect: Legal and Rights-Based Perspective. *Global Responsibility to Protect*, 2(3), p. 254, pp. 250-266

¹⁸² Guiding Principles on Internal Displacement 1997, Principles 3, 6, 10, 11, 13

¹⁸³ Convention on the Rights of a Child (2000), Articles 6, 34, 35, 37, 39, 1989. See also Optional Protocol on the Involvement of Children in Armed Conflict, (2000) and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, (2000).

instruments have been adopted to ensure that women and girls are protected. Nevertheless, there is no specific treaty or convention to this effect. However, the Declaration on the Elimination of Violence against Women adopted by the GA in 1993 remains the most extensive. It was the first international instrument which explicitly addresses violence against women which encompasses but not limited to “physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation”.¹⁸⁴ Although the Declaration is only binding politically, not legally, some of its provisions form part of customary international law. Other instruments focused on the rights of women and girls include: the Geneva Conventions of 1949 and the Additional Protocols of 1977; the Refugee Convention of 1951 and the Protocol of 1967; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 and the General Recommendation 19 on Violence against Women of 1992, and the Optional Protocol of 1999; the CRC of 1989 and the two Optional Protocols of 2000; the Rome Statute of the ICC and Security Council Resolutions on women and peace 1325 (2000) and 1820 (2008).¹⁸⁵

Specific international instruments were adopted to deal with specific crimes of genocide, torture and enforced disappearance: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1984 Convention against Torture and Other, Inhuman or Degrading Treatment or Punishment (CAT), the 2006 Convention on the Protection of All Persons from Enforced Disappearance. The ICC statute also covers these crimes.¹⁸⁶ Most of the provisions of these instruments reflect customary international law with no limited jurisdiction. This implies that these crimes fall under universal jurisdiction and thus requires the cooperation of all states in dealing with them. These conventions oblige states to criminalize these crimes under their legal system.

Traditionally, IHRL was on state conduct and thus, there are no specific human rights instruments set forth which obliges a state to protect individuals from human rights violations committed by private individuals or non-state actors. However, this position has changed under current international law as it is now generally accepted that states have positive obligations to

¹⁸⁴ Article 2 of the Declaration on the Elimination of Violence against Women, 1993

¹⁸⁵ *Supra* note 169 p. 256.

¹⁸⁶ See Article 8 of the Rome Statute of the International Criminal Court 1998.

prevent, punish, investigate and redress human rights violations in areas ranging from the right to life, to respect for private and family life, and the prohibition on discrimination.¹⁸⁷

Monitoring bodies at the international and regional levels have been put in place measures to ensure the effective implementation of human rights law by states. These bodies are made up of independent experts who have as responsibility to oversee human rights implementation. International treaty bodies do more than just provide immediate intervention; they also spot issues and patterns of violations that can be used as early warning systems to prevent the situation from getting worse.¹⁸⁸ The R2P clause could encourage the Treaty Bodies to gather and analyse the relevant data in a methodical manner with the aim of identifying threats and suggesting preventive measures that are in line with their mandates.¹⁸⁹ Prevention, building on pillar one is a key ingredient for a successful strategy for the R2P. In summary, pillar one focuses on prevention measures to help prevent the outbreak of conflicts which may eventually lead to mass human rights atrocities.

2.3.2 Pillar Two - International Assistance and Capacity-Building¹⁹⁰

A highlight of the international community's commitment to assist states in curbing gross human rights violations is stated in Paragraph 138 of the World Summit Outcome Document; The international community ought to support the UN in establishing an early warning system and, as necessary, encourage and assist States in carrying out this duty. This commitment is further asserted in Paragraph 139; We also intend to dedicate ourselves, as required and appropriate, to assisting States in strengthening their capacity to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity as well as to providing aid to those who are in need prior to crises and conflicts. These commitments comprise of four main elements: (a) encouraging states to meet their pillar one responsibilities; (b) helping them to exercise this responsibility; (c) helping them to build their capacity to protect; (d) assisting States under stress before crises and conflicts break out.¹⁹¹ Nevertheless, this primarily political commitment, is not void of legal content.¹⁹² More importantly, fulfilling these obligations necessitates collaboration from Member States, regional and subregional agreements, civil society, and the private sector. Thus, the R2P entails collective obligation of the international community and the national

¹⁸⁷ *Supra* note 177 at p. 452.

¹⁸⁸ *Supra* note 169 at p. 257.

¹⁸⁹ *Ibid*

¹⁹⁰ Ban Ki-Moon, Implementing the Responsibility to Protect, A/63/677, 12 January 2009, para. 11(b)

¹⁹¹ *Ibid* para. 28, p. 15

¹⁹² Reike, R., & Bellamy, A. (2010). The responsibility to protect and international law. *Global Responsibility to Protect*, 2(3), p. 280, pp. 267-286.

obligations of individual states.¹⁹³ A systematic failure by the responsible state to perform an obligation arising under a peremptory norm of general international law¹⁹⁴ may trigger the collective action of the whole international community. A duty to cooperate is envisaged under Article 41 of the Draft articles on Responsibility of States for Internationally Wrongful Acts encourages states to cooperate to put an end to any serious violation through legal means.

Under international law and IHRL treaties, a state's obligation may arise under exceptionally circumstances where it is thought to have 'effective or overall control' over a territory or actions of non-state actors. According to the R2P, governments have a duty to prevent themselves from committing or aiding in the commission of mass crimes outside their borders. At a minimum, this suggests that individual states should refrain from exacerbating atrocity crime of other states.¹⁹⁵ For instance it has been established that China's influence or control over Sudan is most certainly a grave risk of genocide occurring in Darfur. In this light, it is widely acknowledged that China more than any other state has contributed diplomatically, economically, and militarily to the continuation of the atrocities in Darfur.¹⁹⁶ Consequently, China could be under a positive obligation to take steps to prevent human rights atrocities from being committed under general human rights law. However, the law is more ambiguous here. Thus, it is imperative for us to question the existence of a substantive rule of international law that requires a state to take positive action to prevent another state from committing genocide, crimes against humanity, ethnic cleansing or war crimes, as required by the R2P?

States have a number of responsibilities to encourage and aid other states in abiding by the law, specifically under the Genocide convention and IHL.¹⁹⁷ The duty to prevent genocide outlined in the 1948 Genocide Convention is the most explicitly stated legal obligation to take action to stop mass atrocities outside of one's own borders.¹⁹⁸ The ICJ in the *Bosnia v. Serbia* case 2007, raised the question of responsibility by trying to find out whether the respondent state has complied with its obligations to prevent and punish the crime of genocide under Article 1 of the

¹⁹³ Rosenberg, S. P. (2009). Responsibility To Protect: Framework for Prevention. *Global Responsibility to Protect*, 1(4), p. 448, pp. 442-477

¹⁹⁴ Article 40 of the Draft Articles on State Responsibility for Internationally Wrongful Acts. A peremptory norm of international law, also known as a *jus cogens* norm is one which is accepted and recognised by the international community from which no derogation is permitted. See, Article 53 of the Vienna Convention on the Law of Treaties.

¹⁹⁵ Supra note 193 at p. 449-450.

¹⁹⁶ Eric Reeves, 'Beijing's Propaganda Campaign Can't Obscure Complicity in Darfur Genocide', 5 March 2008, <https://sudanreeves.org/2008/03/05/beijings-propaganda-campaign-cant-obscure-complicity-in-darfur-genocide/> last accessed 20 March 2023

¹⁹⁷ Reike, R., & Bellamy, A. (2010). The responsibility to protect and international law. *Global Responsibility to Protect*, 2(3), p. 280, p. 267-286.

¹⁹⁸ Supra note 193 at p. 461.

Genocide Convention.¹⁹⁹ It states: The Contracting Parties affirm that genocide, whether it occurs during peacetime or in time of war, is illegal under international law, and they undertake to prevent and punish it.²⁰⁰

This Article does not expressly prohibit states from committing genocide themselves, but the ICJ asserted in the *Bosnia v. Serbia* case that such a prohibition follows from the fact that genocide is categorized as a crime under international law. Also, it follows from the expressly stated obligation to prevent the commission of the crime of genocide.²⁰¹ The Genocide Convention is not specific as to what the legal obligation to prevent genocide exactly entails.²⁰² For instance, the ICJ elucidated this obligation in 1993 when it ordered Serbia Montenegro to take “all measures within its power to prevent the commission of the crime of genocide”.²⁰³ In 2007, the court took a similar stand where it noted that a state must “employ all means reasonably available to them, so as to prevent genocide as far as possible”.²⁰⁴ Thus, a state may adopt and implement suitable measures or act in ways appropriate to meet its obligations under the Genocide Convention. As declared by the ICJ in the 2007 case, that the duty to prevent is not territorially limited and thus extends beyond the borders of the concerned state. However, this does not implicitly allow for the use of force in the territory of another state. The use of coercive measures where necessary must comply with the general rules of the use of force under international law.²⁰⁵ Thus states will have to seek SC authorization for such protection. Moreover, the court added by explicitly affirming that, the obligation to prevent and the obligation to punish are not separate, yet autonomous legal obligation. The obligation on each contracting State to prevent genocide is both normative and compelling.²⁰⁶

The prohibition of genocide has the character of a *jus cogens* norm (a peremptory norm)²⁰⁷ and therefore binding on all states and the duty to prevent genocide is an *erga omnes* obligation owed by states to the international community as a whole.²⁰⁸ The ICJ in the *Barcelona Traction*

¹⁹⁹ Bosnia and Herzegovina v. Serbia and Montenegro, Judgment 2007, para. 425.

²⁰⁰ Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

²⁰¹ Bosnia and Herzegovina v. Serbia and Montenegro, Judgment 2007, para. 166.

²⁰² Wills, S. (2004). Military interventions on behalf of vulnerable populations: The legal responsibilities of states and international organizations engaged in peace support operations. *Journal of conflict and security law*, 9(3), p. 310, p. 387-418.

²⁰³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Indication of Provisional Measures, Order of 8 April 1993, ICJ Reports, 1993, p. 3, para. 52. A (1).

²⁰⁴ Bosnia v. Serbia Case (2007), paras. 430.

²⁰⁵ Amneus, D., (2008). Responsibility to Protect and the Prevention of Genocide. A Right to Humanitarian Intervention? *The Living History Forum*, p. 33, pp.3-44.

²⁰⁶ Bosnia and Herzegovina v. Serbia and Montenegro, Judgment 2007, para. 427

²⁰⁷ Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda), 3 February 2006, ICJ Reports, 2006, p. 1, para. 64.

²⁰⁸ Toope, S. J. (2000). Does international law impose duty upon the United Nations to prevent genocide. *McGill Law Journal*, 46(1), p.193, pp.187-194.

case²⁰⁹ discussed the *erga omnes* obligation in which it noted that all states were said to have a legitimate interest in the protection of such rights. Another case worth exploring is the Rwandan genocide. The relationship between the French government and the Hutu government during the 1990's alleged that France provided both material and political support to the Hutu government and assisted alleged perpetrators to escape. A 2008 report by the Rwandan government suggested that France had both the knowledge and the influence to stop the genocide. As a result, France may face future legal action from Rwanda for allegedly providing financial support in 1994 to the radical Hutu regime that was ultimately found to be responsible for the genocide.²¹⁰

Since the end of the Cold war, IHL has become the concern of the international community. Large-scale violations of human rights have resulted to human suffering which can constitute a threat to international peace and security and thus can give rise to measure under Chapter VIII of the UN Charter. The adoption of the Geneva Conventions was a response to the intolerable humanitarian situations witnessed in the past. Therefore, violations of IHL could prompt the application of the Geneva Conventions. The contracting parties agree to uphold and ensure upholding the present Convention in all circumstances in accordance with Common Article 1 of the Geneva Conventions. This provision authorized states and, implicitly, international organizations to take measures (not involving the use of force) against States violating humanitarian law.²¹¹ In Article 89 of Additional Protocol I, states are explicitly required to act in cases where laws governing humanitarian law are violated. In such cases, the High Contracting Parties agree to act jointly or individually in accordance with the UN Charter and in response to serious violations of the Conventions or this Protocol. As rightly stated by the ICJ, the fundamental rules of IHL constitute intrangressible principles of customary international law, thereby these rules belong to the indispensable foundation of the international community. A cordial and peaceful relations among states today largely depend on states compliance with these rules particularly those protecting civilians. That notwithstanding, grave violations of fundamental humanitarian principles inevitably affect other states and provoke reactions by them.²¹²

²⁰⁹ Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Second Phase, [1970] LCJ. Rep. 3 at 32, paras. 33, 34

²¹⁰ Rosenberg, S. P. (2009). Responsibility To Protect: Framework for Prevention. *Global Responsibility to Protect*, 1(4), p. 473, pp. 442-477

²¹¹ Schindler, D. (2003). International humanitarian law: its remarkable development and its persistent violation. *Journal of the History of International Law/Revue d'histoire du droit international*, 5(2), p. 175, pp.165-188.

²¹² *Ibid* at p. 188

The language of the R2P under pillar two represents a shift from the view of reacting to atrocities and genocide to a forward-looking view which aims to prevent the atrocities from occurring in the first place. Therefore, it could be argued that states have a moral duty to support other states in exercising their R2P and assisting them in developing the necessary capabilities for doing so.

2.3.3 Pillar Three – Timely and Decisive Response

According to the third tenet of the R2P, the international community has a duty to act in a timely and decisive manner when a host state flagrantly fails to protect its citizens from genocide and other war crimes. Paragraph 139 of the Summit Outcome Document reflects the commitment of the international community under pillar three. It reads:

“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”.

Although the above-mentioned provision prioritises the use of non-coercive or peaceful means in the protection of victims of mass atrocities, pillar three remains the most contested element of the R2P, since it implies the use of military action through the SC to achieve this. Even today, states remain sceptical and have always resisted the idea of the use of force within their territory for humanitarian purposes. However, there is no indication that paragraph 139 of the Summit Outcome Document was intended to be interpreted as giving individual states the legal right to interfere in the domestic affairs of another state without prior authorization from the SC. Bellamy and Reike note, there is nothing in the R2P principle that broadens the rights of states to interfere coercively in the domestic affairs of other states.²¹³ The question that begs for an answer is whether the principle imposes a legal duty on those in positions of power (UNSC) to use coercion measures.

According to international law, when a state violates its international commitment, it is generally obliged to cease the violation, provide adequate guarantees of non-repetition and pay full restitution for any harm caused. Nevertheless, the UNSG’s Special Adviser, Edward Luck notes that the international community should work together using lawful means to stop the violation

²¹³ Bellamy, A. J., & Reike, R. (2010). The responsibility to protect and international law. *Global Responsibility to Protect*, 2(3), p. 282, pp. 267-286.

of peremptory norm of international law involving states.²¹⁴ In Article 41 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, it is possible to strengthen the obligation of states to ensure that they abide by IHL even more and translate it into a legal obligation to use coercion means.²¹⁵ Article 41 requires the cooperation of states in bringing to an end to any serious violations as defined by Article 40 using legal means. As a result, it places a duty on states to prevent violations of peremptory norms of international law. Because the prohibition of these designated crimes have the status of jus cogens, a violation by a state implies that any state may invoke the state responsibility of the concerned state. As a result, whenever a duty owed to the international community is breached, all states have the option of claiming state responsibility as injured parties.²¹⁶ But whether Article 41 creates a positive obligation for states to cooperate for the purpose of putting a stop to these crimes is still up for debate. According to Luck, assuming that such an obligation exists would constitute a very expansive interpretation of international law.²¹⁷ The ILC in its commentary on the Draft Articles acknowledges that there exist a positive duty on states to cooperate but the provision does not prescript in detail what form this cooperation should be taken because of the diversity of the circumstances which could possibly be involved.²¹⁸ However, the ILC observes that, under the auspices of a competent international organization like the UN, cooperation could be carried out. It also envisages the possibility of non-institutionalized cooperation. Again, the provision does not prescribe the measures that are expected to be employed to halt the violation of peremptory norms of international law. Nonetheless, what is required of states is their collective effort to forestall these breaches.²¹⁹ The emphasis on ‘all states’ implies that whether or not a state is affected by a serious breach, the obligation to cooperate applies. In this light, Article 41 reflects a progressive development of international law as noted by the ILC. State cooperation in cases of serious breach could be seen as an evolving state practice since the 1990’s, for instance NATO intervention in Kosovo. Thus, the third pillar of R2P does not, of itself, impose new legal obligations on the international community in cases of genocide, war crimes, ethnic cleansing, or crimes against humanity.

While states obligation to halt violations of these crimes remains unclear under pillar three, the ICJ in *Bosnia v. Serbia* integrated the concept of the R2P in its decision which suggests the

²¹⁴ Luck, E., *The United Nations and Responsibility to Protect*, The Stanley Foundation, p. 5, 2008

²¹⁵ See ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf last accessed 21-03-2023

²¹⁶ See Article 48 (1) (b) of the ILC Articles on State Responsibility for Internationally Wrongful Acts, 2001.

²¹⁷ Luck, E., *The United Nations and Responsibility to Protect*, The Stanley Foundation, p. 5, 2008

²¹⁸ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, ILC section 2 of commentary on Article 41, p. 114

²¹⁹ *Ibid*

establishment of a legal duty on the part of the UNSC to intervene.²²⁰ The UN is required to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms under Article 1(3) of the UN Charter. Thus, it would seem that preventing genocide fall squarely within the goals of the UN.²²¹ Moreso, Arbour coined what he called ‘*the element of influence*’ as a legal ground for holding the SC responsible for failing to protect civilians from gross human rights violations. In his view, because of the wide powers of the SC to influence actions and due to their global reach, they hold an even heavier responsibility than other states to ensure the protection of civilians everywhere.²²² Thus their failure to act in the face of atrocities and the exercise of their veto power to block action necessary to avert genocide, war crimes and crimes against humanity could carry legal consequences following the analysis of the ICJ in the *Bosnia v. Serbia* case.

In the ICISS Report, the Commission noted that the ‘use of the veto, or threat of its use, as likely to be the principal obstacle to effective international action in cases where quick and decisive action is needed to stop or avert a significant humanitarian crisis’.²²³ Article 1 of the Genocide Convention imposes a duty on the UN and its member states to prevent and punish the international crime of genocide. In the case of genocide, a stronger argument can be made for the existence of the duty to prevent, and not just to punish as this was no doubt the underlying reason for the seizure of the jurisdiction of the ICJ in the *Bosnia v. Serbia* case. The Genocide Convention challenges the UN to take its responsibility as the principal organ in the maintenance of international peace and security.²²⁴ Presumably, this article reiterates the powers of the SC outlined in Article 24(1)²²⁵ - which vests all effective power in the UNSC. It is important to point out that Article 24(1) refers not only to the ‘responsibility’ of the Council but also to its ‘duties’ in the maintenance of international peace and security. Even though the duty to prevent genocide is an *erga omnes* obligation par excellence, these duties have been more honoured in breach than in observance.²²⁶ For instance, the UN was silent in Cambodia, Rwanda, Uganda and in former Yugoslavia-there is no legal justification for their silence. In the words of Toope ‘the mantra

²²⁰ Arbour, L. (2008). The responsibility to protect as a duty of care in international law and practice. *Review of International Studies*, 34(3), p. 453, 445-458.

²²¹ Toope, S. J. (2000). Does International Law Impose Duty Upon the United Nations to Prevent Genocide. *McGill Law Journal*, 46(1), p. 191, pp. 187-194.

²²² Arbour, L. (2008). The responsibility to protect as a duty of care in international law and practice. *Review of International Studies*, 34(3), p. 453, 445-458

²²³ ICISS Report p. 51

²²⁴ Article 8 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948

²²⁵ Article 24(1) of the UN Charter states: ‘In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf’.

²²⁶ Toope, S. J. (2000). Does International Law Impose Duty Upon the United Nations to Prevent Genocide. *McGill Law Journal*, 46(1), p. 194, pp. 187-194

‘never again’ is oft repeated, but it has become meaningless in the face of continuing failures to confront contemporary acts of genocide’.²²⁷

In addition to the responsibility of states for international wrongful acts, the ILC expanded this legal accountability for international wrongful acts to include acts committed by international organizations. In so doing, it developed draft articles on the responsibilities of international organizations.²²⁸ Under the rule of general international law, just like states the same type of obligation may well exist for international organizations, thus they should be held liable for acts that violate their international obligations. According to the Third Report, the UN had the power to stop the atrocity in Rwanda, and by doing nothing, it may have violated their legal duty.²²⁹ The UN did acknowledge that the failure to stop the genocide in Rwanda was a failure of the UN system as a whole. According to the ILC’s draft articles, there is a possibility that this failure may have been legal in nature.

From the preceding analysis, it is evident that states have a peremptory legal responsibility to protect individuals within their territory from Genocide, war crimes and crimes against humanity. In fact, the responsibility to prevent articulated in R2P is established under IHRL with respect to the duty to protect. Thus, pillar one of the R2P is a peremptory norm of international law which constitutes a continuing obligation upon states to prevent mass atrocities at all times. This brings us to pillar two in which member states in the Summit Outcome Document committed to assist states with their obligations to protect. while pillar two is also firmly rooted in existing legal frameworks, there is still a lack of consensus as to its precise legal scope. The timely and decisive response of the international community to avert mass atrocity crimes – pillar three remains unclear. The legal status of pillar three is subject to intense scrutiny as a majority of scholars denies such a wide-ranging duty.

²²⁷ *Ibid*

²²⁸ Draft Articles on the Responsibility of International Organizations, ILC, 2011

²²⁹ Third report on responsibility of international organizations, Giorgio Gaja, Special Rapporteur, para. 10, 2005.

CHAPTER THREE

THE RESPONSIBILITY TO PROTECT IN PRACTICE

3.0 Understanding the Legal Meaning of Protection.

Prior to the adoption of the R2P, the idea of “protection” had previously been based primarily on the notion that civilians must be shielded from the effects of war.²³⁰ The protection of civilians in armed conflict is a very old concept which is strongly embedded in IHL and codified in the 1949 Geneva Conventions (applicable to international armed conflicts) and the 1977 Additional Protocols (applicable in non-international armed conflicts).²³¹ Following the end of the Cold War period particularly from the early 1990’s, the broader international community became increasingly concerned with the protection of civilians caught in the midst of armed conflict. After the first report of the Secretary General to the SC in 1999²³² on human protection issues, the SC has since then passed several Resolutions on the civilian protection agenda.²³³

After the R2P was adopted in 2005 at the World Summit, the SC used the term for the first time in Resolution 1674, which dealt with the protection of civilians during times of armed conflict.²³⁴ The resolution reiterated the obligations to protect populations from the crimes found in paragraphs 138 and 139 of the 2005 World Summit Outcome Document.²³⁵ In his view, Roberta describes the targeting of civilians during armed conflict as a ‘flagrant violation’ of IHL.²³⁶ The essence of civilian protection cannot be over emphasised as it is critical to the work of the UN during armed conflict and post conflict situations.

From the foregoing, this chapter sets out to discuss the origins of different conflicts and provides an overview of the implementation of the R2P in the selected cases. Emphasis will also be made on the various measures employed by the international community to ensure civilian protection

²³⁰ Gordon, S. (2013). The Protection of Civilians: An Evolving Paradigm?. *Stability: International Journal of Security and Development*, 2(2), p.2, pp. 1-16, DOI: <http://dx.doi.org/10.5334/sta.cb>

²³¹ These Treaties include: The GCI for the Amelioration of the Condition of the Wounded in Armies in the Field (1949): protects wounded and sick combatants; The GCII for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of the Armed Forces at Sea (1949): protects shipwrecked combatants; The GCIII Relative to the Treatment of Prisoners of War (1949): protects prisoners of war; The GCIV Relative to the Protection of Civilian Persons in Times of War (1949): protects civilians and those in occupied territories; Protocol I to the Geneva Conventions Relating to the protection of Victims of International Armed Conflicts (1977): broadens protection of civilians and limits the means and methods of war; Protocol II Relating to the protection of Victims of Non-International Armed Conflicts (1977): protects civilians and civilian objects in non-international armed conflicts.

²³² Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UNSG, S/1999/957, 8 September 1999.

²³³ For instance, UN Security Council Resolution 1265 (1999), 17 September 1999, UN Security Council Resolution 1296 (2000), 19 April 2000.

²³⁴ UN Security Council Resolution 1674 (2006), 28 April 2006.

²³⁵ *Ibid* p.2

²³⁶ Arnold, R., & Quénivet, N. N. (Eds.). (2008). International humanitarian law and human rights law: towards a new merger in international law. *Brill*, p.314

in the face of gross human rights violation. Particular attention will be paid to the role of regional organisations, the international community and the UNSC to curb the violence. In the discussions that will follow, a legal analysis of the response of the international community during these crises and most importantly, the power struggle amongst the permanent members of the SC in determining whether to adopt a resolution or not.

3.1 Libya

3.1.1 The Emergence of the Libyan Crisis

“The self-immolation of Bouazizi rippled across Tunisia and the Arab world, inspiring pro-democracy movements and uprisings that saw the toppling of one Arab dictator after another”.²³⁷

Often referred to as the martyr of the revolution, Mohammed Bouazizi set himself ablaze on 17 December 2010 in protest against corruption and economic stagnation in Tunisia. Before his eventual death on January 4th, 2011, protest had already sparked across the country with protesters calling on President Zine El-Abidine Ben Ali to resign. The inability of the authorities to use force to put an end to what became known as the Jasmine Revolution led to his resignation and forced him into exile. From Tunisia, the protest spread to other countries: Libya, Yemen, Egypt, Syria and Bahrain. In the paragraphs that follow, we will analyse the Libya crisis as it remains one of the most important case studies for the implementation of the R2P.

Following the anti-governmental movements in neighbouring Tunisia and Egypt, Libya soon became one of the countries that was negatively affected by the Arab spring which emerged at the end of 2010 and plunged the country into a civil war that claimed the lives of many. The authoritarian regime of Colonel Muammar El-Qaddafi has been in power since the military coup of 1969. This four-decade long regime was viewed as tyrannical and brutal with no space for opposition.²³⁸ Throughout Gaddafi’s 42-year rule, Libyans were told that power rested in the hands of the people under a system Gaddafi called Jamahiriya – the so-called “state of the masses.”²³⁹ However this was not the case as in practice Gaddafi decided everything that mattered. In the words of James Gelvin, it was “an Orwellian nightmare,” as “rule by the masses” in principle meant control by “Gaddafi & Co”, backed by repression to keep the system going.²⁴⁰ Despite the many calls of a change in his leadership style, the undemocratic and bad

²³⁷ Sarah Khalil, (2020). Mohamed Bouazizi, 1984-2011: The fire that lit the Arab Spring. Available at: <https://www.newarab.com/analysis/mohamed-bouazizi-fire-lit-arab-spring> last accessed 23/03/2023.

²³⁸ Shafik Mandhai “Libya six years on: No regrets over Gaddafi’s demise” Aljazeera. Last accessed 24/03/2023.

²³⁹ Jonathan M. Winer, (May 2009). ‘Origins of the Libyan Conflict and Options for Its Resolution’, *Policy Paper* 2019-12, Middle East Institute, p.5 available at https://www.mei.edu/sites/default/files/2019-05/Libya_Winer_May%202019%20update_0.pdf Last accessed 24/03/2023

²⁴⁰ Gelvin, J. L. (2015). *The Arab uprisings: What everyone needs to know*. What Everyone Needs to Know (R). <http://dx.doi.org/10.1093/wentk/9780190222741.001.0001>, accessed 24 Mar. 2023

leadership regime of Gaddafi failed to heed to the call of the people. Thus, inspired by the uprising in Tunisia and Egypt, the protest spread to Libya in February 2011 with an almost immediate deterioration of the country's political climate due to the protest for governmental reform and democracy. The initially peaceful protests turned violent as the government forces acted brutally towards protesters against Gaddafi's rule.²⁴¹ The first anti-government demonstrations took place on February 15 in Benghazi, where an estimated 200 protesters gathered in front of the police station to demand the release of renowned human rights attorney Fethi Tarbel after learning of his arrest. Their ultimate call for Gaddafi's resignation and the release of political prisoners was met with wide-spread violence by the Libyan security forces resulting in a number of injuries. As the protest intensified, unrest spread to Tripoli and other cities, lethal force and squad of mercenaries fired live ammunitions against demonstrators. The Human Rights Watch reporting that "on the evening of February 15, authorities used teargas and batons, as well as attackers in street clothes, to disperse protesters in Benghazi, Libya's second largest city, injuring 14 people...one person was killed in the ensuing violence".²⁴² Further reports by Human Rights Watch noted that at least 24 protesters were killed as security forces had attacked them using teargas and live ammunition.²⁴³ Despite the difficulty in obtaining an exact death toll, a medical committee in Benghazi's eastern district reported at least 229 fatalities. UNSG BanKi-Moon cited estimates that as many as 1,000 people may have perished in Libya and one Libyan human rights group says 6,000 people has died since the beginning of the conflict.²⁴⁴

As government committed more desperate acts of violence against protesters and issued blood-curdling threats, these acts drew condemnation from international foreign leaders and human rights organizations. One of Gaddafi's sons Saif al-Islam, delivered a defiant speech on national television on February 20 in which he threatened that if the rebellion continued.²⁴⁵ He vowed that the regime would fight "to the last bullet".²⁴⁶ In his words:

²⁴¹ Perišić, P. (2017). Implications of the Conflicts in Libya and Syria for the "Responsibility to Protect" Doctrine. *Zbornik Pravnog fakulteta u Zagrebu*, 67(5), p. 788, pp. 783-814.

²⁴² 'Libya: Arrests, Assaults in Advance of Planned Protests', Human Rights Watch, February 16, 2011. Available at <https://www.hrw.org/news/2011/02/16/libya-arrests-assaults-advance-planned-protests> last accessed 24/03/2023.

²⁴³ Libya: Security Forces Fire on 'Day of Anger' Demonstrations, Human Rights Watch, February 17, 2011. Available at <https://www.hrw.org/news/2011/02/17/libya-security-forces-fire-day-anger-demonstrations> last accessed 24/03/2023.

²⁴⁴ Qaddafi Vows to Fight to 'Last Man and Woman' as Loyal Forces Battle Rebels, FOX NEWS.com, December 3, 2015. Available at <https://www.foxnews.com/world/qaddafi-vows-to-fight-to-last-man-and-woman-as-loyal-forces-battle-rebels> Last accessed 24/03/2023.

²⁴⁵ Simon Adams, (October 2012), Libya and the Responsibility to Protect, Global Centre for the Responsibility to Protect Occasional Paper Series No. 3, p.5 available at <https://www.globalr2p.org/publications/libya-and-the-responsibility-to-protect/> Last accessed 24/03/2023.

²⁴⁶ Britannica, T. Editors of Encyclopaedia (2023, February 8). Libya Revolt of 2011. Encyclopedia Britannica. <https://www.britannica.com/event/Libya-Revolt-of-2011> Last accessed 24/04/2023.

“Libya is at a crossroads. If we do not agree today on reforms ... rivers of blood will run through Libya...We will take up arms...we will fight to the last bullet. We will destroy seditious elements. If everybody is armed, it is civil war, we will kill each other...Libya is not Egypt, it is not Tunisia”.²⁴⁷

Described as the ‘Butcher of Sirte’,²⁴⁸ Gaddafi initiated a bloody campaign of repression against his own people. Soon after, Gaddafi delivered an angry rumbling speech on state television on 22 February condemning protesters as traitors and called upon loyalist to get out of their houses and attack all opponent of the regime. In words that reminiscent the echoes of the 1994 Rwandan Genocide, he described protesters as drug-crazed “rats,” “cockroaches” and “cowards and traitors”.²⁴⁹ Moreso, Gaddafi declared that ‘officers have been deployed in all tribes and regions so that they can purify all decisions from these cockroaches’ and ‘any Libyan who takes arms against Libya will be executed’.²⁵⁰ He left no doubt about his intentions as he promised to “cleanse Libya house by house”²⁵¹ as he repeatedly vowed to use force to remain in power. Since then, the widespread violence directed at demonstrators intensified to the point where it amounted to crimes against humanity.²⁵²

Initial efforts by the international community to quickly resolve the crisis included non-coercive actions like diplomatic initiatives. But despite their efforts, the conflict continued to escalate, putting Libya, particularly its eastern regions, in danger of a severe humanitarian crisis.²⁵³

3.1.2 The International Response to the Libyan Crisis Prior to Resolution 1973

There were a variety of responses in the international community to the events in Libya.²⁵⁴ The mass violations of human rights committed by government forces prompted the reaction of

²⁴⁷ Gaddafi son: Libya faces rivers of blood, News24, February 21, 2011. Available at <https://www.news24.com/news24/gaddafi-son-libya-faces-rivers-of-blood-20110221> last accessed 24/03/2023.

²⁴⁸ Kituyi, M. (2011). Libya, Côte d'Ivoire Burns as Africa Runs in Circles', *AllAfrica*, 26. Available at <https://allafrica.com/stories/201103280161.html> last accessed 24/03/2023.

²⁴⁹ Simon Adams, (October 2012), Libya and the Responsibility to Protect, Global Centre for the Responsibility to Protect Occasional Paper Series No. 3, p.5 available at <https://www.globalr2p.org/publications/libya-and-the-responsibility-to-protect/> Last accessed 24/03/2023.

²⁵⁰ Bellamy, A. J., & Williams, P. D. (2011). The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect. *International Affairs*, 87(4), p.838, pp. 825-850.

²⁵¹ Simon Adams, (October 2012), Libya and the Responsibility to Protect, Global Centre for the Responsibility to Protect Occasional Paper Series No. 3, p.5 available at <https://www.globalr2p.org/publications/libya-and-the-responsibility-to-protect/> Last accessed 24/03/2023

²⁵² Stephanie Nebehay, Libya attacks may be crimes against humanity: U.N, February 22, 2011. Available at <https://www.reuters.com/article/us-libya-protests-rights-idUKTRE71L4Z020110222> last accessed 24/03/2023.

²⁵³ See, Report of the Assessment Mission on the Impact of the Libyan Crisis on the Sahel Region, UN S/2012/42 7, 23 December 2011, p.2 available at https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/part_i_2012-2013_peace_and_security_in_africa.pdf Last accessed 24/03/2023. (For instance, No-fly zone or sanctions among options being considered as world bids to force Libyan leader to end the violence).

²⁵⁴ Ian Black & Patrick Wintour, Libya: International response gathers pace after Gaddafi counterattacks, *The Guardian Post*, 25 February 2011. Available at https://www.azquotes.com/author/5263-Muammar_al_Gaddafi/tag/dictator last accessed 24/03/2023.

different UN bodies. It also prompted the Arab League, the AU and the Human Rights Council to condemn the use of force against civilians in Libya. The SG called for an immediate end of the violence and expressed his outrage at a press report in which he claimed that assaults against civilians from warplanes and helicopters by the Libyan government would be a grave breach of international humanitarian law, if confirmed.²⁵⁵ Navi Pillay, the UN High Commissioner for Human Rights, demanded an end to all abuses of protesters' human rights and reaffirmed that the Libyan governments obligation to uphold the right to security, liberty, and life. She goes on to say that the protection of civilians should always take precedence over all other factors when preserving law and order. Such unlawful acts against protesters must stop right away, as it could amount to crimes against humanity.²⁵⁶ In the same light, UN Special Advisers to the SG on Genocide prevention (Francis Deng) and on the R2P (Edward C. Luck) confirmed that these attacks constitute crimes against humanity and reminded the Libyan government of their commitment to protecting civilians from the crimes enshrined in the Outcome Document in 2005.²⁵⁷ On the same day, UNSC members condemned violence and the use of force against civilians and expressed their deep concern for the state of affairs in Libya. They demanded an immediate cessation of the hostilities and recalled the obligation of the Libyan government to protect civilians.²⁵⁸

As the atrocities against civilian intensified, several regional organizations condemned the actions of the Libyan authorities. At the initial phase of the crisis, the inaction of the AU was evident but eventually, it took some applaudable steps. At its 261st meeting, which took place on February 23, 2011, the AU Peace and Security Council (PSC) addressed the Libyan crisis for the first time. The PSC condemned the indiscriminate, excessive, and use of deadly force against peaceful protesters as a violation of IHRL and IHL, and it reminded the Libyan government of its duty to defend its citizens.

²⁵⁵ Outraged Secretary-General Calls for Immediate End to Violence in Libya, Press Release, SG/SM/13408-AFR/2119 22 February 2011, Available at <https://press.un.org/en/2011/sgsm13408.doc.htm> Last accessed 24/03/2023.

²⁵⁶ Pillay calls for international inquiry into Libyan violence and justice for victims, United Nations Human Rights Office of the High Commissioner, Press Release 22 February, 2011. Available at <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10743&L> Last accessed 24/03/2023.

²⁵⁷ UN Secretary-General Special Adviser on the Prevention of Genocide, Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya, Press Release SC/10180-AFR/2120, 22 February 2011. Available at <https://reliefweb.int/report/libya/un-secretary-general-special-adviser-prevention-genocide-francis-deng-and-special> Last accessed 24/03/2023

²⁵⁸ Security Council Press Statement on Libya, Press Release SC/10180-AFR/2120, 22 February 2011. Available at <https://press.un.org/en/2011/sc10180.doc.htm> Last accessed 25/03/2023.

The Council stressed “the need for the people of Libya to spare no effort in avoiding any further loss of life”.²⁵⁹ On March 10th, 2011, the PSC issued another communique further condemning the continuing use of force by the Libyan authorities. The PSC, however, rejected all forms of foreign military intervention and instead proposed political solutions to resolve the conflict.²⁶⁰ Unfortunately, their decision to adhere to a political solution to the Libyan crisis was unsuccessful because using diplomatic channels to resolve the situation was clearly inappropriate given how frequently the Libyan authorities were breaking the law.

In the same vein, the Arab League met on 22 February 2011, to discuss the situation in Libya. The Council decided to suspend Libya from League meetings in response to its violent crackdown on protesters.²⁶¹ Following their suspension from the Arab league, Gaddafi on March 12, 2011, promised to reconquer the rebellious eastern region of the country and promised to hunt down his opponents “like rats”.²⁶² To protect the Libyan civilians from Gaddafi’s promised threats, the League passed Resolution 7360 calling on the UNSC:

*“...to take measures to impose a no-fly zone over the movement of Libyan military planes immediately, and to establish safe areas in the places exposed to shelling as preventive measures allowing to provide protection for the Libyan people and the residents in Libya from different nationalities, taking into account the regional sovereignty and integrity of neighbouring countries”.*²⁶³

The European Union’s (EU) response to the Libyan crisis reflected the common position of the EU member states. They expressed grave concern by the situation unfolding in Libya. In a statement released February 23 2011, by Catherine Ashton (High Representative of the EU for Foreign Affairs and Security Policy), she noted that the EU condemned such acts which has resulted in the death of many civilians.²⁶⁴ The EU further urged the Libyan authorities to immediately end the use of force and take appropriate steps to resolve the people’s justifiable demands.²⁶⁵ The EU accordingly acknowledged that the Gaddafi regime in Libya posed a threat to the country’s citizens. Shortly after that, it also acted, but only upon the request Libyan people

²⁵⁹ African Union Peace and Security Council, Communique, 261st Meeting, PSC/PR/ COMM(CCLXI), 23 February 2011, Para 2. Also see Reinold, T. (2013). Africa’s Emerging Regional Security Culture and the Intervention in Libya. *Libya, the Responsibility to Protect and the Future of Humanitarian Intervention*, p.100, pp. 83-109.

²⁶⁰ African Union Peace and Security Council, Communiqué, 265th Meeting, PSC/PR/COMM.2 (CCLXV), 10 March 2011.

²⁶¹ Galal, O., Arab League Bars Libya from Meetings, citing Forces’ Crimes, Bloomberg News Service, 22 February 2011, cited in: Davis, J. (ed.), *The Arab Spring and Arab Thaw, Unfinished Revolutions and the Quest for Democracy*, Routledge, London/New York, 2016, p. 183

²⁶² *Ibid*

²⁶³ Resolution 7360, “Arab League Urges U.N. to Impose No-Fly Zone over Libya”. March 12, 2011

²⁶⁴ Declaration by the High Representative Catherine Ashton on behalf of the European Union on Libya, 6966/11, Brussels, 23 February 2011,. Available at <https://reliefweb.int/report/libya/declaration-high-representative-catherine-ashton-behalf-european-union-libya> Last accessed 25/03/2023.

²⁶⁵ *Ibid*

asked.²⁶⁶ The EU shouldn't be patronizing, but it also shouldn't be afraid to exercise its political and moral responsibility, according to Herman Van Rompuy, who made this statement on the same day.²⁶⁷ Noting further that Libyan citizens have the ultimate duty to decide on the country's future, nevertheless, the EU has a responsibility to assist them in so doing.²⁶⁸

As earlier noted, there is a long-standing tradition in international law prohibiting armed intervention in the internal affairs of a state against armed intervention in the internal affairs of a state. However, it does not shield a state from intervention from the international community where a state fails to carry out its duty to protect civilians within its borders from gross human rights violations. In the Libyan crisis therefore, there was need for the international community to assume its responsibility to protect civilians from the atrocities committed by the Libyan authorities while adhering to the UN Charter and protecting the states sovereignty. Citing the ongoing reports, the SG Ban, prompted the UN members to consider concrete action to put an end to these atrocities. He declared, that it is time for the SC to think about taking actual action.²⁶⁹ Thus, on 25 February 2011 the UN Human Rights Council adopted Resolution S-15/1 on the situation in Libya at its 15th Special Session as a first concrete step towards addressing the human rights situation in Libya.²⁷⁰ The Resolution expressed deep concern with respect to the deteriorating situation and strongly condemned reported human rights violations including indiscriminate attacks on civilians, extrajudicial killings, arbitrary arrests and detention and torture of peaceful demonstrators. It called upon the Libyan government to meet its responsibility to protect its population, to immediately put an end to all human rights violations and to stop any attacks against civilian.²⁷¹

These statements and resolutions signalled the international community's heightened concern with respect to events in Libya and provided the necessary backing for decisive action by the SC.²⁷² Thus, in response to the pleas of the SG to the SC members to recommend different actions as they prepare to engage in the next steps, the UNSC called an emergency session that

²⁶⁶ Marlene G, Humanizing Security? The EU's Responsibility to Protect in The Libyan Crisis, 75 FIJA Working Paper April 2012, p.17

²⁶⁷ Van Rompuy (2011d): Statement by Herman Van Rompuy, President of the European Council, on the developments in the EU's Southern neighbourhood, Brussels, 23 February 2011

²⁶⁸ *Ibid*

²⁶⁹ Fundamental Issues of Peace, Security at Stake, Secretary-General Warns as He Briefs Security Council on Situation in Libya, Security Council, 6490th Meeting (PM), SC/10185, 25 February 2011. Available at <https://press.un.org/en/2011/sc10185.doc.htm> Last accessed 26/03/2023.

²⁷⁰ Situation of human rights in the Libyan Arab Jamahiriya, Resolution adopted by the Human Rights Council, S-15/1, A/HRC/RES/S-15/1, 25 February 2011. Available at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/SpecialSession/Session15/A-HRC-S-15-1.pdf> Last accessed 26/03/2023.

²⁷¹ *Ibid* para. 2

²⁷² Zifcak, S. (2012). The responsibility to protect after Libya and Syria. *Melbourne Journal of International Law*, 13(1), p. 59-93.

ultimately adopted Resolution 1970 on 26 February 2011, under Chapter VII of the UN Charter.²⁷³ This Resolution adopted certain multilateral non-forceful measures,²⁷⁴ which imposed sanctions in the form of financial blocking, asset freezing, and a travel ban on certain designated senior Libyan government officials and certain members of their respective families. The SC took a step further by formally referring the situation in Libya to the ICC for review which has the jurisdiction over crimes against humanity and genocide and imposed an arms embargo on Libya.²⁷⁵ Following these sanctions, the UNGA on March 1, 2011, suspended Libya from membership on the UN Human Rights Council.²⁷⁶

Violence in Libya did not cease in the aftermath of the Resolution²⁷⁷ as the killings, torture and arbitrary detention continued unabated. The range of measures including diplomatic, economic, humanitarian proved insufficient to deal with the situation in Libya. This was the point where the UNSC yielded to the call of the Libyan people, regional organizations and the whole international community to take all necessary measures to protect civilians in Libya. To review the situation and determine what further action is required, the SC met on March 17 and the outcome was the adoption Resolution 1973. Thus, non-coercive measures gave way to measures involving armed intervention.

3.1.3 Resolution 1973 and the Military Intervention in Libya

The Libyan authorities failed to comply with UN Resolution 1970 giving it a chance to step back, diffuse the situation and halt the violence. This opportunity was promptly ignored. Therefore, invoking the R2P, this time on international intervention.²⁷⁸ Clearly, the government failed to live up to its primary responsibility to protect its own people, thus shifting the responsibility to the international community.

In response to the renewed threats to unleash violence against his own people on March 17, 2011, by Gaddafi, the SC passed Resolution 1973²⁷⁹ with ten votes in favour and five

²⁷³ Resolution 1970 (2011) Adopted by the Security Council at its 6491st meeting, U.N. Doc S/RES/1970 on 26 February 2011

²⁷⁴ Fact Sheet: UN Security Council Resolution 1970, Libya Sanctions, United States Mission to the United Nations (Feb. 26, 2011), <http://www.usun.state.gov/briefing/statements/2011/157194.htm>

²⁷⁵ See Resolution 1970 (2011), Preamble paras. 4, 9, 15 & 17

²⁷⁶ *Ibid.* Resolution 1973 (2011). This marked the first time that a member had been suspended from the UN Human Rights Council or its predecessor, the UN Human Rights Commission

²⁷⁷ Perišić, P. (2017). Implications of the Conflicts in Libya and Syria for the “Responsibility to Protect” Doctrine. *Zbornik Pravnog fakulteta u Zagrebu*, 67(5), p. 790, pp. 783-814.

²⁷⁸ Mohammed Hussain AbdAlwahid, (2019), The Security Council role in keeping peace in Africa: Libya as a case study 2011 -2017, p. 16.

²⁷⁹ SC Resolution 1973 (2011), 17 March 2011

abstained.²⁸⁰ The Resolution formed the legal basis for the military intervention in the Libyan crisis. Resolution 1973 reinforced the provisional measures adopted under Resolution 1970 and took a step further to establish more coercive measures involving the use of force. It prioritised the ‘protection of civilians’ by authorizing member states to take any necessary precautions to protect civilians and civilian populated areas under threat of attack. More importantly, the establishment of a no-fly zone to aid in shielding civilians from attacks. The resolution also issued a ban on all flights except those operating for humanitarian purposes. In order to operationalize the ban, member states were obliged to cooperate by taking the necessary steps to ensure compliance. It also strengthened the sanctions (asset freezing) against certain government officials and family members of Gaddafi, initially imposed by Resolution 1970. Also, it also, reinforced the restriction of the arms embargo sanction.²⁸¹

The attack on Libya was the first time the SC had authorized the use of military force for protection purposes against the will of a functioning de jure government.²⁸² Pursuant to the adoption of Resolution 1973, a coalition of western states led by NATO intervened militarily in Libya. An air campaign against Gaddafi’s forces was conducted by the US and NATO assumed the responsibility for enforcing the arms embargo and no fly zone.²⁸³ Gaddafi died on October 20, 2011, at the hands of rebels after seven months of NATO military operation in Libya. The fall of the Gaddafi regime implied the discontinuance of Resolution 1973 application. Following his death, the UN ended a mandate for NATO operations in Libya.²⁸⁴

3.1.4 The Libyan Crisis and the Responsibility to Protect

According to some, the intervention in Libya marked a turning point in the development of the R2P regime of interventionism. It was the first test how the concept of the R2P endorsed at the 2005 World Summit functions in practice and thus could serve as an assessment of the R2P regime in general. It was believed by many that Libya was a point where R2P will “either triumph or die”.²⁸⁵ The intervention was undoubtedly justified as the SC acted accordingly from a legal point of view: Article 42 of the UN Charter authorises the SC to use force in case of

²⁸⁰ Bosnia and Herzegovina, Colombia, Gabon, Lebanon, Nigeria, Portugal, South Africa, France, the United Kingdom, and the United States voted in favour. While Russia, China, Brazil, India and Germany abstained from voting.

²⁸¹ Resolution 1973, (2011), see paras. 4, 6, 13, 17 & 19

²⁸² Williams, P. D., & Bellamy, A. J. (2012). Principles, politics, and prudence: Libya, the responsibility to protect, and the use of military force. *Global Governance*, 18, p.275, pp. 273-297

²⁸³ Nanda, V. P. (2013). The future under international law of the responsibility to protect after Libya and Syria. *Michigan State International Law Review*, vol. 21(1), p. 13, pp. 1-42

²⁸⁴ Charbonneau, L., (2011). U.N. ends mandate for NATO operations in Libya. Reuters, 27 October 2011 Available at <https://www.reuters.com/article/us-libya-un-idUSTRE79P6EC20111027> Last accessed 27/03/2023.

²⁸⁵ The Lessons of Libya, The Economist, 19 May 2011. Available at <https://www.economist.com/international/2011/05/19/the-lessons-of-libya> Last accessed 27/03/2023.

threat to international peace and security. However, it is imperative that the motive of the intervention is examined in order to determine whether the action of the international community fits within the framework of the R2P. What then was the aim of Resolution 1973?

The clarity and the immediacy of the threat to the civilian population was the first key factor that influenced international action in Libya.²⁸⁶ The civilian protection agenda of the R2P was prioritised in the UNSC Resolution 1973 on the use of force in Libya. The condemnations of violence against protesters by UN bodies and Regional Organisations reiterating the need to protect civilian in Libya was a testimony to the normative understanding of the R2P. Buttressed by the support and recommendations of these regional organisations, non-coercive measures were taken alongside military action to halt these violations. The risk of mass atrocity crimes was clearly identified by senior UN officials during February and March 2011, and crystallized as Gaddafi forces surrounded the town of Benghazi.²⁸⁷ It was subsequently confirmed by Gaddafi's own statements that "officers have been deployed in all tribes and regions so that they can purify all decisions from these cockroaches", and that "any Libyan who takes arms against Libya will be executed". Such explicit threats of violence were highly unusual and created a clear and urgent need for international action.²⁸⁸ In justifying the preconditions for intervention under the R2P, it could be said that the just cause threshold of actual or imminent occurrence of irreparable harm to humans such as large-scale loss of life, genocide or ethnic cleansing or other serious violations of international humanitarian law was met. Thus, inaction on the path of the international community could have led to a disaster that would once again leave a stain on the conscience of the international community like was the case of the 1994 Rwandan genocide.

Moreso, another trigger for the forceful intervention in Libya, was the failure of peaceful measures adopted under Resolution 1970 to halt atrocities committed against civilians. Despite all the sanctions meted on the regime, they continued to attack protesters. In referring to the R2P criteria of proper authority had been preserved as intervention in the Libyan case can be legally justified. The UNSC accorded the necessary prior authorization that was required for any military intervention to take place.

²⁸⁶ Bellamy, A. J., & Williams, P. D. (2011). The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect. *International Affairs*, 87(4), p. 840, pp. 825-850.

²⁸⁷ Garwood-Gowers, A. (2012). China and the "Responsibility to Protect": The implications of the Libyan Intervention. *Asian Journal of International Law*, 2(2), p. 10, pp. 1-10

²⁸⁸ *Ibid*

3.2 Côte d'Ivoire

3.2.1 Background to the Conflict in Côte d'Ivoire

The political crisis in Côte d'Ivoire erupted into full-scale conflict in 2010. The crisis escalated following the disagreements over results of the November 2010 Presidential elections between the incumbent President, Laurent Gbagbo and his contender, Alassane Ouattara. Both claimed to have won and formed opposing governments. Their rivalry spurred a full-scale civil military conflict in early March 2011, after months of growing political violence. After the November run-off election, Ouattara was declared winner by the Ivorian Independent Electoral Commission (IEC) indicating that he had won the election with a 54.1% vote share, against 45.9% for Gbagbo. The international community including the US results as legitimate and demanded that Gbagbo cede the presidency to Ouattara.²⁸⁹ Discontented with the results Gbagbo rejected the IEC proclamation and petitioned the Ivorian Constitutional Council on accounts that the election was rigged. The Council reviewed the results and annulled over 600,000 votes proclaiming Gbagbo president, with 51.5% of votes against 48.6% for Ouattara. Despite pressure from the international community on Gbagbo to relinquish power, he refused by claiming that he has been duly elected. The electoral standoff plunged the already volatile country into another round of violent conflict leading to thousands of deaths and gross human rights abuses. This reignited armed confrontations between the loyalists of the two presidential candidates which further spurred attacks on UN peacekeepers in the country. The international community used diplomatic and financial efforts, sanctions, and a military intervention threat to pressure Gbagbo to step aside.²⁹⁰

As the fighting ensued, the Gbagbo government accused the United Nations Operation in Côte d'Ivoire (UNOCI) of arming the New Forces rebels allied with opposition leader Alassane Ouattara and described them as an “agent of destabilization” contributing to the further division of the Ivorian people and ordered them to immediately leave the country.²⁹¹ He further banned their aircraft from flying through the airspace of Ivory Coast. The UNSC rejected the order and instead it extended the mandate of the UNOCI to June 30th, 2011, and authorised an increase of the size of the mission. As of March 2011, the UN reports more than 462 deaths since mid-December 2010, and notes that the death toll from the post electoral violence continues to rise.²⁹²

²⁸⁹ Cook, N. (2011). *Côte d'Ivoire Post-Gbagbo: Crisis Recovery*, Washington, DC: Congressional Research Service, p.1

²⁹⁰ *Ibid*

²⁹¹ Marco Chown Oved, “Gbagbo Orders UN Peacekeepers to Leave Ivory Coast,” Associated Press, December 18, 2010 Available at <https://www.sandiegouniontribune.com/sdut-gbagbo-orders-un-peacekeepers-to-leave-ivory-coast-2010dec18-story.html> Last accessed 05/04/2023.

²⁹² United Nations: UN News, “Death toll from post-electoral violence in Côte d’Ivoire rising”, UN reports, March 24, 2011. Available at <https://news.un.org/en/story/2011/03/370162> last accessed 05/04/2023.

An estimated 1 million people have been forced to leave their homes during to the ensuing violence between the supporters of both presidential claimants.²⁹³ In early April 2011, pro-Gbagbo forces indiscriminately attacked UN troops in Abidjan, triggering a response from the international force.

3.2.2 International Response to the Conflict in Côte d'Ivoire

The increasing acts of atrocity committed by supporters from both sides triggered the response of the UNOCI and France who had to find answers to questions about the most effective ways to protect civilians. Acting under the UNSC mandate to prevent the use of heavy weapons against civilians, UN forces launched a military offensive against pro-Gbagbo troops. This highly complex situation which posed a threat to the civilian population, prompted the international community being led by the UN and French forces mandating them to protect civilians. However, very little consensus was reached on measures that should be taken to resolve the conflict while ensuring that the civilian protection agenda is not compromised.

Attacks against UN peacekeepers by pro-Gbagbo militants aimed at interfering with their capacity with providing protection to the Ouattara government, prompted the SG Ban, to criticise such actions. He warns: “any attack on UN forces will be an attack on the international community and those responsible for these actions will be held accountable. Any continued actions obstructing and constricting UN operations are similarly unacceptable. UNOCI will fulfil its mandate and will continue to monitor and document any human rights violations, incitement to hatred and violence, or attacks on UN peacekeepers. There will be consequences for those who have perpetrated or orchestrated any such actions or do so in the future”.²⁹⁴

The UN human rights expert, Navi Pillay reported the commission of crimes such as enforced disappearances, arbitrary detentions and executions and acts of sexual violence may have occurred in relation to the presidential elections. She declared further that, under such circumstance crimes such as enforced disappearance may amount to crimes against humanity.²⁹⁵

²⁹³ United Nations: UN News, “Up to 1 million people driven from homes by violence in Côte d'Ivoire”, UN reports, March 25th, 2011. Available at <https://news.un.org/en/story/2011/03/370292-1-million-people-driven-homes-violence-cote-divoire-un-reports> Last accessed 05/04/2023.

²⁹⁴ United Nations: UN News, “UN chief underlines warning against attacking peacekeepers in Côte d'Ivoire” 19 December 2010. Available at <https://news.un.org/en/story/2010/12/362532> Last accessed 05/04/2023.

²⁹⁵ UNHRC, Report of the High Commissioner; and U.N. Office of High Commissioner for Human Rights (OHCHR), “Côte d'Ivoire: UN Experts Deeply Concerned with Gross Human Rights Violations Which May Amount to Crimes Against Humanity,” December 31, 2010. Available at <https://www.ohchr.org/en/press-releases/2010/12/cote-divoire-un-experts-deeply-concerned-gross-human-rights-violations-which> Last accessed 05/04/2023.

The killing of seven unarmed women in Abobo, Abidjan on March 3, 2011,²⁹⁶ promoted a stronger international response, as President Obama and other top U.S. officials condemned the shootings and called for the perpetrators of this and other violence to be held to account for their actions.²⁹⁷ Similarly, France called for a UN inquiry into the ongoing political violence in Côte d'Ivoire.²⁹⁸

With the increasing need to protect civilians, diplomatic efforts were made by regional organisations to resolve the crisis. The Economic Community of West African States (ECOWAS) on its path, swiftly accepted the results declared by IEC, hence legitimising Ouattara's victory. It took a step further by suspending Côte d'Ivoire's participation in the organization until further notice and called on Gbagbo to relinquish the presidential seat.²⁹⁹ ECOWAS is applauded for its prompt response to the crisis to prevent Côte d'Ivoire from resurging into conflict. It also indicated the regional organisation's keen interest in ensuring that democratic values are upheld in the country guaranteeing a return of peace and stability in the region. The AU Peace and Security Council (PSC) endorsed the December 7 ECOWAS decision on Côte d'Ivoire and decided "to suspend the participation of Côte d'Ivoire in all AU activities, until such a time the democratically elected President effectively assumes State power".³⁰⁰ Initially, the AU responded to the crisis through the initiation of its many mediations attempts which unfortunately showed itself to be powerless in this affair.³⁰¹ Failure of these diplomatic measure led to the creation of the AU High-Level Panel by the PSC. The panel reaffirmed Ouattara's win and laid out a range of recommendations for resolving the conflict. These included "support for a national unity government headed by Ouattara", the assurance of a dignified exit for Gbagbo; restructuring of some state institutions including the military, electoral commission and the constitutional council as well as the establishment of a truth,

²⁹⁶ Pauline Bax & David Smith, "Ivory Coast on brink of civil war as seven women killed at protest march" March 3, 2011. Available at <https://www.theguardian.com/world/2011/mar/03/ivory-coast-women-killed> Last accessed 05/04/2023.

²⁹⁷ The White House, "Statement by President Barack Obama on the Violence in Cote d'Ivoire", March 9, 2011. Available at <https://obamawhitehouse.archives.gov/the-press-office/2011/03/09/statement-president-barack-obama-violence-cote-divoire> Last accessed 05/04/2023.

²⁹⁸ Radio France Internationale (RFI), "France calls for Côte d'Ivoire inquiry after women killed", March 4, 2011. Available at <https://www.rfi.fr/en/africa/20110304-france-calls-cote-divoire-inquiry-after-women-killed> Last accessed 05/04/2023.

²⁹⁹ "Regional body ECOWAS deepens integration in Cote d'Ivoire and beyond" Available at <https://oxfordbusinessgroup.com/reports/cote-divoire/2017-report/economy/stronger-together-regional-body-ecowas-has-deepened-local-integration> last accessed 05/04/2023.

³⁰⁰ Communiqué: The Peace and Security Council of the African Union (AU), at its 252nd meeting, held on 9 December 2010, adopted the following decision on the situation in Côte d'Ivoire *Ref: PSC/PR/COMM.1(CCLII)*, p.1. Available at <https://www.peaceau.org/en/resource/90-organ-peace-security-council?&year=&p=63> Last accessed 05/04/2023.

³⁰¹ Banégas, R. (2011). Post-election crisis in Côte d'Ivoire: The Gbonhi war. *African Affairs*, 110(440), p.2, pp. 1-12

justice and reconciliation commission based on the Ouagadougou Political Agreement”.³⁰² Although these recommendations were relevant in resolving the conflict, it was repeatedly rejected by Gbagbo, asserting that they were unacceptable because they were not in accordance with the Constitutional Council’s ruling in favour of Gbagbo’s election.³⁰³ However, the implementation of these recommendation could only be possible after the forceful removal of Gbagbo from office.

3.2.3 An Analysis of the Conflict in Côte d’Ivoire and the Responsibility to Protect

The power struggle between Gbagbo and Ouattara led to increased violence resulting in the death of hundreds of civilian. The efforts of regional organisations such as the AU and ECOWAS in protecting civilians outrightly failed and this prompted the use of more aggressive measures by the UNSC. In this light, Resolution 1975 was unanimously passed on March 30, authorising the UNOCI to ‘use all necessary means’ to ensure civilian protection and prevent the recurrence of mass atrocities. This resolution provided a legal basis for international intervention to protect civilians. Nevertheless, although the Resolution purported a clearly defined mandate for the protection of civilians, many critics were of the view that recognising Ouattara as the legitimate president fuelled controversies surrounding the principle of the R2P. Orchestrating for a regime change was clearly not a part of the mandate of Resolution 1975, thus, perceived as overstretching the UNSC mandate, which raised concerns about the hidden agenda of intervention by western liberal states in third world countries. Some argued that “it is a smokescreen used by ‘great powers’ to reward or punish perceived allies or enemies”.³⁰⁴ In an attempt to overthrow the Gbagbo regime and claim his position as the legitimately elected president of the country, pro-Ouattara forces launched several military attacks across the country. These attacks of course were not without atrocities amounting to human rights violations. Interestingly, the intervening states overlooked these atrocities demonstrating their willingness to support the new regime regardless, while conveniently focused on calling out the Gbagbo regime for committing human rights atrocities. This selective approach portrays their unwillingness to prosecute both sides and hampers on the application of the R2P in punishing perpetrators of mass atrocities. As this point, it is hard to not agree with critics of this concept that the R2P remains a powerful tool in the hands of powerful states to protect their interest in former colonised territories. For instance, Mamdani believes that the R2P is nothing more than

³⁰² Cook, N. (2011). *Côte d'Ivoire Post-Gbagbo: Crisis Recovery*, Washington, DC: Congressional Research Service, p.38

³⁰³ Reuters, “Gbagbo Camp Rejects AU Plan for Ivorian Crisis,” March 10, 2011. Available at <https://www.reuters.com/article/us-ivorycoast-idUSTRE72943G20110310> Last accessed 05/04/2023.

³⁰⁴ ERAMEH, N. I., & Ologe, U. (2021). Cote d'Ivoire: Responsibility to Protect, Electoral Violence and the 2010 Crisis. *Conflict Studies Quarterly*, (35), p. 13, pp. 3-17.

an effort to recolonize failed states in Africa by powerful states and the legitimization of their desire to punish weak states without being held accountable.³⁰⁵

Following the passage of Resolution 1975, UNOCI, along with French forces under the Operation Licorne mandate, launched an attack against Gbagbo which eventually led to his arrest. This action was interpreted by many as biased as force was used only against Gbagbo army. The UNOCI was accused of not being neutral in the execution of their mandate as their support for one party to the conflict further heightened the controversies surrounding the intervention. However, the SG Ban Ki-Moon denied these allegations noting that the need for self-defence was imminent in the face of such attacks to protect human rights, thus aligns with the scope of the mandate. Nevertheless, although they were operating under the authority of the SC, the Gbagbo regime denied recognising them as interveners operating under a legitimate authority with the aim of restoring peace and stability in the country. On the contrary they were seen as intruders instigating chaos and instability. This narrow perception prompted the indiscriminate attack in April 2011, against the UNOCI personnels in Abidjan. In response to this, a military offensive attack was launched against Gbagbo fighters. Consequently, the impartiality and neutrality of the R2P was questioned with detrimental effects on its universal acceptance.³⁰⁶

Notwithstanding these contradictory positions, the application of the R2P in Côte d'Ivoire was not without its merits. It is counted as one of the successful cases for halting human rights violations and restoring stability in the country. The adoption of diplomatic measures and other non-coercive measures in resolving the crisis in Kenya for instance shows that such measures are still relevant and effective. However, the complexities of each conflict differs and will greatly determine the most appropriate measures to be employed by the UNSC in resolving it. The Ivorian crisis could be classified as one of such conflicts, therefore the use of force was very instrumental in protecting the vulnerable civilians whose life had been endangered by political greed of its leaders. Nevertheless, condemning the actions of all parties to the conflict while maintaining a neutral stance and cooperating with the Ivorian Constitutional Council would perhaps have eased the possibility of its future application in cases like Syria and Myanmar,³⁰⁷ in which the UNSC has remained silent in the face of mass atrocities committed against civilians.

³⁰⁵ Mamdani, M. (2009). *Saviors and Survivors: Darfur, politics, and the war on terror*. New York: Pantheon

³⁰⁶ ERAMEH, N. I., & Ologe, U. (2021). Cote d'Ivoire: Responsibility to Protect, Electoral Violence and the 2010 Crisis. *Conflict Studies Quarterly*, (35), p. 13, pp. 3-17

³⁰⁷ *Ibid.*

3.3 Ukraine

3.3.1 Russia's Grounds for Invading Ukraine and its misuse of the principle

After the Cold war, Russia has provided several ideological, normative, legal as well as political rationale for its military intervention in former soviet countries. This has contributed to international debates surrounding military intervention and the use of force in international law and has heightened the need for the clarification of these concepts. Russia's interpretation of international law since the early 1990's has been geared towards thwarting universal principles that are human-centric. Russia has particularly manipulated the principle of non-intervention as a shield against foreign intervention in the domestic affairs of a state. It explicitly condemned NATO's intervention in Kosovo in 1990, as a violation of international norms under the guise of humanitarian reasons. As a strong believer in the principle of non-intervention, Russia viewed the actions of NATO as a violation of state sovereignty and kicked against the rationale for the use of force in Kosovo. Throughout the development of these principles and the most recent which is the R2P, Russia has not shown much willingness in supporting SC Resolutions adopted for the purpose of military intervention. The Western-led humanitarian interventions in Iraq 2003, Georgia 2008 and Libya 2011, was criticised by Russia and they questioned the establishment of global norms which in its opinion were set by the West. As a result, Russia's position on global norms with regards to military intervention strongly contradicts those of Western powers.

Surprisingly, in the years that followed, Russia has distorted these principles, twisting them to justify its intervention in the domestic affairs of countries such as Estonia and Kazakhstan, and its outright act of aggression against Ukraine.³⁰⁸ Additionally, it has distorted the idea of Russian citizenship to defend its aggressive influence and use of force against other nations. In mid-2000's following a series of uprisings in Georgia, Ukraine and Kyrgyzstan, Russia's developing understanding of the principle R2P served as a bed rock for its future implementation. In its foreign policy, Russia enacted a series of laws and policies design to protect ethnic Russians abroad from alleged discrimination. Based on Russia's unfounded legal claims that ethnic Russians in post-Soviet countries are vulnerable groups who need protection from hostile governments, they have outrightly engaged in actions that violate norms of international law and interpreted them to serve their self-interest. This was the argument Russia put forth to justify its military intervention in Georgia in 2008. However, following the adoption of the R2P in 2001

³⁰⁸Heather Ashby, (2022). How the Kremlin Distorts the 'Responsibility to Protect' Principle. In response to Russia's misuse of the principle, the U.N. should consider how to prevent future manipulations as a pretext for military aggression. *United State Institute of Peace*. Available at <https://www.usip.org/publications/2022/04/how-kremlin-distorts-responsibility-protect-principle> Last accessed 22/04/2023.

and Ukraine's Orange Revolution in 2004, Russia has widely misused this principle to justify its military intervention in the sovereign state of Ukraine.

Russia's invasion of Ukraine was evident in the months preceding the actual use of force against the sovereign state. The massive build-up of troops and stationing of heavy military equipment along the Ukraine borders between October and November 2021, demonstrated Russia's intentions. By February 2022, an estimated 19,000 troops encircled Ukraine, and this brought along waves of suspicions and fear of another threat to international peace and security. Nevertheless, President Putin dismissed these accusations and justified that their naval build-up along the Black Sea was a previously scheduled exercise.³⁰⁹ In his speech in February 2022, President Putin criticised Western influence in Ukraine whose presence has reduced the country into a puppet regime. He notes that NATO expansion has reached Russia's borders and its military infrastructures in these areas poses a threat to their national security. He referred to the situation in Donbass as one of "horror and Genocide" orchestrated by the Ukrainian government against the inhabitants of this community.³¹⁰ As a result, "they are fighting for their elementary right to live on their own land, to speak their own language, and to preserve their culture and traditions".³¹¹ Emphasizing that military force remains the only justifiable measure to protect these people. Based on this, he immediately recognised the independence and sovereignty of the Donetsk people's Republic and the Lugansk People's Republic.

3.3.2 Ukraine and the Responsibility to Protect

Russia's approach was marked by hesitations and reservations from the beginning of the discussion on the R2P.³¹² Russia's scepticism about the concept of the R2P was first evident during the Libyan crisis in 2011 where it abstained from voting. In the view of President Putin, the concept is a western oriented norm and therefore, the West cannot be trusted in its implementation citing the case of Libya. Moreover, Russians also asserted that R2P's credibility has been seriously damaged by the West's use of it as a cover for military intervention in circumstances where they had covert objectives in mind.³¹³ Its lack of enthusiasm for the R2P continued immediately after the Libyan intervention as alongside its ally China, they blocked R2P measures in Syria.

³⁰⁹ Britannica, T. Editors of Encyclopaedia (2018, February 1). Mukacheve. Encyclopedia Britannica. <https://www.britannica.com/place/Mukacheve> Accessed 12 April 2023.

³¹⁰ Address by the President of the Russian Federation on February 21, 2022. Available at <http://www.en.kremlin.ru/events/president/news/67828>

³¹¹ *Ibid*

³¹² Baranovsky, V., & Mateiko, A. (2016). Responsibility to protect: Russia's approaches. *The International Spectator*, 51(2), p. 49, pp. 49-69.

³¹³ Doğançhan Dağı (2022). Revisiting The Libya Intervention and The Idea(L) Of Responsibility to Protect, *Transatlantic Policy Quarterly*, Vol. 20(2), p. 132.

The failure of the R2P to protect civilians in Ukraine may be the end of the principle. Was the principle set up to fail? What has happened to the UN's commitment in 2001 and their show of willingness in the past to use force to protect civilians from genocide, war crimes, crimes against humanity and ethnic cleansing? This and many more questions have been raised questioning the relevance of the R2P following the war in Ukraine since February 2022. Despite the many pleas from the Ukrainian president, Volodymyr Zelensky for military support to protect his people from the claws of Russia's aggression, the international community has remained indifferent. That notwithstanding, the world leaders have taken a clear stance of this as they refuse to intervene militarily. Citing the failure of the UN to prevent atrocities in Syria, Yemen, Myanmar, Somalia and elsewhere and now in Ukraine, demonstrates the shallow application of the principle.

Russia's flagrant violations of international law in Ukraine raises several challenges for the international community. A plethora of discussions have emerged making suggestions on how the international community should react in the face of mass atrocities crimes committed in Ukraine by the Russian Federation. The resistance of the west to militarily intervene in Ukraine is clearly not the desired solution in this case as the situation highlights the limits of the R2P principle.³¹⁴ Despite the current situation in Ukraine, military intervention authorised by the SC is almost impossible. This implies that the R2P cannot be applied in Ukraine. Russia being one of the permanent members of the SC with a veto power, will veto every resolution aimed at authorizing armed intervention.

As Russia continues to violate norms of international law, the role of the UNSC in the face of such gross atrocities in the 21st century remains questionable. One maybe tempted to think that the SC has again become paralysed under these circumstances. Interestingly, the rules seem to apply differently to major world powers. Thus, it is almost impossible to apply the concept of the R2P to a major power like Russia, even when it is completely justified to do so. Although there are no legal obstacles for the international community to exercise collective self-defence in Ukraine, there is a lack of political will by nations to engage in any conflict with Russia. Also, there is a fear that armed intervention may intensify the war on a continental scale and run the risk of a nuclear war between world superpowers. It is this fear that has continues to hinder the possibility of an armed intervention in Ukraine. Moreso, although the concept has been applied in Ukraine through the non-armed intervention using diplomatic, economic and political

³¹⁴ Rebecca Barber, (2022) Does the 'Responsibility to Protect' Require States to go to War with Russia? Just Security. available at <https://www.justsecurity.org/80833/does-the-responsibility-to-protect-require-states-to-go-to-war-with-russia/> Accessed 12/04/2023.

sanctions, it has proven inadequate under these circumstances. Should the international community fold its hands and watch another Rwanda and Srebrenica unfold, simply because the perpetrator of such heinous crimes has a veto and is a major world power. The researcher holds the view that, the use of veto in cases of gross human rights violations has watered down the effectiveness of the veto system of the UN.

The political commitment made by the UN to protect vulnerable populations and the reality of civilians caught in the middle of a conflict both seem to be unrealistic in the ongoing Russia-Ukraine war. This failure reveals that state sovereignty has been upheld and given greater priority over the need to intervene for the purpose of human protection.³¹⁵ The researcher is therefore of the opinion that, the international community does not seem to have learnt from the consequences of their past inaction in the face of gross human rights violations. After critically analysing the implementation of the R2P in practice, the author agrees with other critics of the doctrine that, it is a tool used by powerful states to intervene in weaker states. The question that begs for an answer is how does the Libyan crisis differ from that of Russia-Ukraine? Is the R2P indeed a hollow promise whose time may never come.

³¹⁵ Obasesam Okoi., (2022). Ukraine and the Failure of the Responsibility to Protect Norm, *E-international Relations*, p.3, pp.1-3. Available at <https://www.e-ir.info/2022/09/05/ukraine-and-the-failure-of-the-responsibility-to-protect-norm/>

CHAPTER FOUR

CHALLENGES ENCOUNTERED IN THE IMPLEMENTATION OF THE RESPONSIBILITY TO PROTECT

This chapter discusses the challenges faced in the implementation of the R2P. The focus is on the difficulties in realizing the objectives of the R2P through the UN SC. The UNSC has the power to decide on important security issues affecting the world. It is therefore responsible for acting collectively when atrocity crimes are occurring or imminent and all other preventive measures have failed. However, the structure of the UNSC has remained largely unchanged since its founding in 1946, stirring debates among members about the need for reform. This work also highlights the veto power of the permanent members of the SC as the root of the ineffectiveness of the SC and it goes further to examine the ways in which this power is used to thwart international action in the face of mass atrocities. The lack of political will is a major drawback to the implementation of the R2P. The implications will be seen in the discussion below.

4.1 The Legal Structure for the Implementation of the Responsibility to Protect

Lack of a clear legal framework has made it challenging for R2P to be applied consistently across all cases when it comes to handling massive civil conflicts.³¹⁶ Since it serves more as a political tool to pressure States into action, the principle itself lacks legal standing. For instance, if a state fails to act in the face of atrocities, there are no clear legal sanctions that can be employed to deter such inaction. The obligation of states to protect their citizens from harm is a well-grounded principle in international law, therefore the R2P doctrine has not on its own been any to create any legal obligation. However, its adoption has greatly contributed in creating human rights protection awareness as well as increasing its relevance in international law.

The emergence and the evolution of the R2P doctrine have been greatly welcomed since 2001. However, many scholars have directed their efforts on finding a legal basis for the R2P. Thus, since the R2P concept includes three pillars—respect, remedy and react—the legal basis of the first two ‘obligations’ was found in the evolution of human rights law, as a shared understanding within international society, able to generate a sense of obligation or adherence in the international community; while the third pillar was referred to the UN Charter and its security

³¹⁶ Iyi, J. M. (2016). Humanitarian intervention and the AU-ECOWAS intervention treaties under international law: towards a theory of regional responsibility to protect. *Springer*. <https://link.springer.com/book/10.1007%2F978-3-319-23624-7>

system, as the first Report in 2001 suggested.³¹⁷ There are not so many controversies surrounding the first and the second pillar of the doctrine as they have been conceived as a reinterpretation of human rights obligations already existent in international law. Thus, the R2P is established as a duty for states and the international community embedded in already existing human rights legal framework of international law and therefore binding upon them. The responsibility to prevent on its path is perceived as an extension of the first pillar and is more concerned about its effectiveness.

A range of controversies relating to the third pillar: reacting to atrocities calls for a progressive approach which is open to debate. The way in which it is promoted and applied are characteristic of broader pathologies in the international system concerning the abuse of power, structural inequalities and unrepresentative norms and institutions.³¹⁸ This is evident in the practice of the UNSC whose application of the concept has been inconsistent in the last two decades. Although, the implementation of the R2P doctrine reached its breaking point in the Libyan case, until now, the SC has proceeded on a case-by-case basis, inevitably depending on the interests of its current members and particularly of its five permanent members. Consequently, the lack of an obligation to intervene, and the inconsistencies in the procedure for implementing the R2P doctrine demonstrate the absolute lack of an emerging binding norm under the third pillar.³¹⁹ Moreso, the practice of the UN and of states does not suggest the emergence of a clear rule on R2P different from obligations already existing in international law framework. Therefore, it is relatively difficult to build such an obligation (responsibility to react) on the basis of the 2001 ICISS Report and the UN framework as suggested by the R2P doctrine.³²⁰ In conclusion, this doctrine does not have a strong legal basis under the UN framework.

4.2 Membership Representation in the UNSC and the Use of Veto

The imbalance in the representative structure of the UNSC poses an impediment to the practical implementation of the R2P.³²¹ The UNSC is composed of fifteen members, five of which are permanent members and have the power to veto substantive decisions of the Council and the other ten non-permanent members of the SC are elected by the General Assembly for two-year

³¹⁷ Borgia, F. (2015). The Responsibility to Protect doctrine: between criticisms and inconsistencies. *Journal on the Use of Force and International Law*, 2(2), p.236, pp. 223-237.

³¹⁸ Newman, E. (2013). R2P: Implications for world order. *Global Responsibility to Protect*, 5(3), p.249, pp. 235-259.

³¹⁹ Borgia, F. (2015). The Responsibility to Protect doctrine: between criticisms and inconsistencies. *Journal on the Use of Force and International Law*, 2(2), p.236, pp. 223-237

³²⁰ *Ibid*

³²¹ Morris, J., & Wheeler, N. (2016). The Responsibility Not to Veto. In *The Oxford Handbook of the Responsibility to Protect*. Oxford University Press, p. 38-68

terms; with five members elected each year.³²² They are tasked with the responsibility of taking important decision affecting security issues in the world. Nonetheless, since the inception of the UN ‘more than 50 United Nations Member States have never been Members of the Security Council’.³²³ The UN was, of course, designed by the United States, the United Kingdom, and the Soviet Union, which reserved significant competencies for themselves: most notably, the veto powers of the P5, described by Gerry Simpson as a form of “legalised hegemony”.³²⁴ The power of the SC in the new era is particularly evident with respect to two features of its constitutional competencies: the Council’s exclusive power under Chapter VII of the UN Charter to authorise the use of force and its veto power. The decision-making process of the SC is questionable in that, the applicability and the scope of Chapter VII remains a matter for the Permanent members to interpret.

The underlying task of the Commission was to find the best possible way to improve the performance of the SC and not to side-line it.³²⁵ In light of this, R2P has not changed the rules governing the use of force or its power to authorise corrective action.³²⁶ put another way it does create any legal obligations to act.³²⁷ According to Adams Simon, the R2P as an established international norm does not aim at imposing new legal obligations but rather serves as a political tool to initiate actions to protect those who been designated to die.³²⁸ Thus, the only effected change is the context in which the SC makes it decisions.³²⁹ Therefore, collective action is not required unless it is decided upon by the permanent members.³³⁰ Apart from minor procedural rules, there are no rules that the permanent members of the SC must abide by, so whether they choose to intervene in a particular situation or not depends entirely on their individual interests. Their power therefore constitutes a ‘discretionary entitlement’, which is why the SC’s response to the conflicts is inconsistent.³³¹ To this end, a guarantee of their common interest is the

³²² Five permanent members: China, France, Russian Federation, the United Kingdom, and the United States, and ten non-permanent members elected for two-year terms by the General Assembly (with end of term year): Albania (2023), Brazil (2023), Ecuador (2024), Gabon (2023), Ghana (2023), Japan (2024), Malta (2024), Mozambique (2024), Switzerland (2024), United Arab Emirates (2023).

³²³ United Nations Security Council. Available at <https://www.un.org/securitycouncil/content/current-members> Last accessed 28/03/2023.

³²⁴ Simpson, G. (2004). *Great powers and outlaw states: unequal sovereigns in the international legal order* (Vol. 32). Cambridge University Press, p.68

³²⁵ ICISS Report (2001), p. xii

³²⁶ Bellamy A (2015) *The Responsibility to Protect*. Oxford: Oxford University Press, p. 13

³²⁷ Hehir, A. (2013). The permanence of inconsistency: Libya, the Security Council, and the Responsibility to Protect. *International Security*, 38(1), p.152, pp. 137-159.

³²⁸ Konigs, T, Nozawa, J and Teeuwen, E (2013) An Interview with Dr Simon Adams, *Utrecht Journal of International and European Law*, 29(76), pp. 109-112

³²⁹ Hehir, A. (2016). Assessing the influence of the Responsibility to Protect on the UN Security Council during the Arab Spring. *Cooperation and Conflict*, 51(2), p.168, pp. 166-183.

³³⁰ Hurd, I. (2008). After anarchy: legitimacy and power in the United Nations Security Council. Princeton University Press, p.191

³³¹ Berman, F. (2007). Moral versus legal legitimacy. *The price of peace*, p. 161, pp. 157-176.

ultimate determinate in application of the R2P in any crisis.³³² The structural composition of the UNSC in itself is a major barrier to the effective implementation of the R2P. The power disparity between the permanent and the non-permanent members makes it hard for them to come a consensus even in the face of imminent danger to international peace and security, as the permanent member remain the ultimate decision makers in such a case.³³³ Their broad powers is evident in their ability to dictate the adoption of UN Resolutions.

Moreso, the veto powers of the permanent members, often downplays the capacity of the international community to take timely and decisive decisions in the face of mass atrocities. The exercise of their veto power determines the success or failure of a situation that requires intervention. The practice of the veto power over the last decades by the permanent member of have proved ineffective in achieving the original goal of the organization, which was to advance global peace and security.³³⁴ According to Richard Butler, Former Australian Permanent Representation to the UN:

“The Permanent Five have behaved in ways... that suggest that they see the power that they hold as rightful and free, to be exercised by them in whatever manner they choose. They have the idea that they have a power that they can use to protect and extend their own individual national interest. This selfish outlook is often not consistent with the purpose and principles of the Charter.”³³⁵

Being created after WWII by the victorious powers, the SC does not meet modern geopolitical realities. Regardless of the circumstances, the permanent members of the UNSC are endowed with the power to veto resolutions.³³⁶ In times of crisis when civilians need protection, this privilege can be regarded as the main contributor to global instability and indiscriminate responses.³³⁷ The Responsibility to react to mass atrocity crimes under Pillar three of the R2P, predominantly lies in the hands of the SC, which implies that the R2P and veto power are inseparable.³³⁸ This veto hasn't changed much since 1945, which raises the possibility of impasse and puts obstacles in the way of R2P initiatives.³³⁹ The contestation surrounding pillar

³³² Hehir, A. (2013). The permanence of inconsistency: Libya, the Security Council, and the Responsibility to Protect. *International Security*, 38(1), p.152, pp. 137-159

³³³ *Ibid*

³³⁴ Loisele, M. E. (2020). The penholder system and the rule of law in the Security Council decision-making: Setback or Improvement. *Leiden Journal of International Law*, 33(1), pp.139-156

³³⁵ Morris, J., & Wheeler, N. (2016). The Responsibility Not to Veto. In *The Oxford Handbook of the Responsibility to Protect*. Oxford University Press, p. 41, pp. 38-68

³³⁶ Hardeep Singh Puri, (2016). Perilous Interventions: The Security Council and the Politics of Chao, (New York, NY: HarperCollins Publishers) pp. 65-153.

³³⁷ Dorosh, L., & Ivasechko, O. (2018). The UN Security Council Permanent Members' Veto Right Reform in the Context of Conflict in Ukraine. *Central European Journal of International & Security Studies*, 12(2), pp. 157-185

³³⁸ Illingworth, R. (2020). Responsible Veto Restraint: A Transitional Cosmopolitan Reform Measure for the Responsibility to Protect. *Global Responsibility to Protect*, 12(4), p.386, pp. 385-414.

³³⁹ *Ibid*

three is intrinsically tied to the use of veto power undermining the international responsibility to respond to mass atrocities. In the view of Erskine, the decision of the SC not to act or their inability to act in response to a R2P crisis equates to the Council's failure to meet its moral responsibility.³⁴⁰ Grover also argues that the failure of the Council to act on R2P crisis also makes the Council complicit in atrocity crimes.³⁴¹

As far as Syria is concerned, the failure of the international community to take steps to address the situation is itself an 'act of aggression' against the sovereignty of the Syrian State.³⁴² In response to the double veto by Russia and China in May 2014 relating to the Syrian crisis, a coalition of NGO's (including the International Coalition for R2P and the Global Centre for R2P) claimed that: 'today's use of the veto by Russia and China... is a shameful illustration of why voluntary restraint on the use of the veto in mass atrocity situations is essential to the Council's ability to live up to the UN Charter's expectation'.³⁴³ The launching the "Restrain the Veto" campaign in 2015 by the Global Centre for R2P, asserting that the P5 must refrain from vetoing a draft SC resolution designed to stop the commission of mass atrocity crimes. They believed it would improve the implementation of the R2P.³⁴⁴ Russia alone has vetoed 17 SC Resolutions on Syria since the start of the conflict in Syria in 2011,³⁴⁵ undermining the legitimacy of the SC and shielding the Assad regime from accountability for its gross human rights abuses. China an ally to Russia has vetoed 10 SC (as of July 2020) Resolutions meant to address the war crimes and crimes against humanity committed against the Syrian people. In 2014 following Russia's invasion of the Crimean Peninsula, the UNSC drafted a resolution that declared a planned Sunday referendum on secession in Crimea illegal. Unfortunately, the SC couldn't push through in stopping Russia's annexation of Crimea due to the sole vote against its resolution by Russia. The situation of the current Russian-Ukraine war is not any different as Russia once again blocks SC action on Ukraine on 26 February 2022. 'Russia vetoed a UNSC resolution on Friday that would have demanded that Moscow immediately stop its attack on Ukraine and withdraw all troops, a move several Council members said was deplorable, but

³⁴⁰ Erskine, T. (2019). Coalitions of the willing' and the shared responsibility to protect. *The State and Cosmopolitan Responsibilities*, p.104.

³⁴¹ Grover, S. (2015). R2P and the Syrian crisis: when semantics becomes a matter of life or death. *The International Journal of Human Rights*, 19(8), p. 1118, pp. 1112-1128.

³⁴² *Ibid*

³⁴³ Global Centre for the Responsibility to Protect, Joint NGO Statement on the Use of the Veto, 22 May 2014. Available at <http://s156658.gridserver.com/publications/306> last accessed 29/03/2023.

³⁴⁴ Global Centre for the Responsibility to Protect, Security Council Veto Restraint, 2015. Available at <https://theconversation.com/the-campaign-to-restrain-the-un-security-councils-veto-is-wrongheaded-and-pointless-38875> last accessed 29/03/2023.

³⁴⁵ As of July 21, 2022. Available at <https://sy.usembassy.gov/remarks-at-a-un-general-assembly-meeting-following-russias-veto-of-a-un-security-council-resolution-on-the-syria-cross-border-humanitarian-mechanism/#:~:text=Rather%20than%20scaling%20aid%20up,Security%20Council%20resolutions%20on%20Syria>. Last accessed 29/03/2023.

inevitable'.³⁴⁶ In September 2022, seven months later, the UNSC drafts a new resolution calling for the immediate and unconditional reversal of Russia's illegal attempt to annexe four regions of Ukraine with a ceremony held in Moscow as such action poses a threat to international peace and security. Once more, motivated by its interest in Ukraine, Russia vetoes a SC resolution denouncing attempted annexation of Ukrainian regions.³⁴⁷ Unfortunately, the UNSC must receive the unanimous consent of all the permanent members to implement any resolution, but this is frequently prevented by personal interests. This demonstrates unequivocally that the veto power is still used to stall any action that would be credible in war-torn nations and, if left unaddressed, would act as a barrier to the R2P's implementation.

The permanent members of the SC in keeping with both their 1945 and 2005 commitment, refrain from using their veto in relation to R2P situations, since at the end of the WWII they agreed not to exercise their veto to thwart the purposes of the UN, and 60 years later the R2P effectively became one of such purpose.³⁴⁸ The then SG, Kofi Annan's *Report on High-Level Panel on Threats, Challenges and Change* echoed the ICISS proposal, urging that the use of veto be restricted to 'matters where vital interest are genuinely at stake' and requesting the permanent members to commit themselves to refrain from using their veto in cases of genocide and widespread human rights.³⁴⁹ In his 2009 Report *Implementing the Responsibility to Protect*, UNSG Ban Ki-moon emphasized the need for permanent members of the SC to refrain from using or threatening to use their veto power in cases of blatant failure to uphold R2P obligations.³⁵⁰ However, these calls does not seem to have yielded much positive results as the international community has been unable to halt human rights abuses in Syria, Yemen just to name a few.

4.3 Lack of Political Will

The 'age of strict national sovereignty' began to gradually fade away during the 1990's when for instance the UN Resolution authorising the no-fly zone over Iraq-Kurdistan was justified as a 'right to intervene'.³⁵¹ Then UN Secretary General Boutros Boutros-Ghali declared "the time of absolute state sovereignty... has passed".³⁵² Evidently, sovereignty is no longer a challenging

³⁴⁶ United Nations, UN News Global Perspective Human stories, February 2022. Available at <https://news.un.org/en/story/2022/02/1112802> Last accessed 29/03/2023.

³⁴⁷ United Nations, UN News Global Perspective Human stories, February 2022. Available at <https://news.un.org/en/story/2022/09/1129102> Last accessed 29/03/2023.

³⁴⁸ Morris, J., & Wheeler, N. (2016). The Responsibility Not to Veto. In *The Oxford Handbook of the Responsibility to Protect*. Oxford University Press, p. 62, pp. 38-68

³⁴⁹ United Nation 2004, p. 82

³⁵⁰ UN Doc A/63/677 12 January 2012.

³⁵¹ Ignatieff, M. (1999). *The Warrior's Honor: Ethnic War and the Modern Conscience*. Great Britain: Vintage Publishing, p.91

³⁵² Weiss, T.G. (2007). *Humanitarian Intervention: Ideas in Action*. UK: Polity Press, p.91

factor to the implementation of the R2P as it is expected to be. Rather, the fundamental problem holding humanitarian intervention, and later R2P, back was the sheer absence of motivation and ethical will.³⁵³

Political will is often cited as a determining factor in realising the R2P principle in practice. Thus, following the establishment of the 2005 World Summit Outcome Document, many scholars believed the lack of political will was and remains a major barrier intervention for humanitarian purposes. As noted by Bellamy, political will remains one of the major inhibitors of armed intervention as most states are concerned about the wellbeing of their citizens and thus reluctant to spend money and potentially risk the lives of their soldiers to save strangers from mass atrocities- “the basic political fact that no state wanted to pay the price associated with saving strangers”.³⁵⁴ The failure of the UN to prevent or halt the 1994 Genocide resulted from the persistent lack of political will of member states to act which in turn affected the decision making of the SC. In his Annual Report to the General Assembly, Kofi Annan identified the absence of political will as the fundamental barrier to the intervention in Rwanda in 1994. He pointed out the major obstacles to the inaction of the international community; reluctance of member states to risk the lives of their troops, chronic lack of resources and perceived lack of vital interest in the conflict.³⁵⁵ In the same vein, Wheeler asserts that international reluctance to intervene did not derive from any misplaced respect for Rwanda’s sovereignty, but rather from a “lack of political will” in the international community to act. Wheeler perceives the failure of the UN World Summit Outcome to tackle the issue of political will as having placed serious limits on the significance of the agreement in the R2P context.³⁵⁶ Aidan Hehir explained that “political will is the variable upon which the entire utility of R2P is now predicated”.³⁵⁷ The co-chair of the ICISS report, Gareth Evans, recognised that “without the exercise of political will, by the relevant policy makers at the relevant time, almost none of the things for which this book has argued will actually happen”.³⁵⁸ Moreso, in the High-Level Panel Report, the Secretary General

³⁵³ *Ibid*, at p. 51

³⁵⁴ Bellamy, A. J. (2010). *Global Politics and the Responsibility to Protect: From Words to Deeds*. Routledge. P.4, pp. 1-196

³⁵⁵ Annan K (1999), *Preventing war and disaster: a growing global challenge*, New York: United Nations Department of Public Information, p. 21

³⁵⁶ Wheeler N J (2005), *A Victory for Common Humanity? The responsibility to protect after the 2005 World Summit*, Paper presented to a conference on ‘The UN at Sixty: Celebration or Wake?’ Faculty of Law, University of Toronto, Canada, 6-7 October, p. 9

³⁵⁷ Hehir, A. (2012). *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention*. China: Palgrave Macmillan, p.53

³⁵⁸ Evans, G. (2006). “From Humanitarian Intervention to the Responsibility to Protect” *Wisconsin International Law Journal* 24(3), p. 703–722.

emphasized the failures of the UNSC in terms of the “willingness to act in defence of the common peace”.³⁵⁹

According to Thakur, the failure of an intervention during the Rwandan genocide was due to a failure of “civic courage” and “collective conscience”,³⁶⁰ while the UN inquiry pointed to a “lack of resources and political commitment”³⁶¹ and finally the ICISS report described it as “a failure of international will”.³⁶² The ICISS regarding the Kosovo intervention acknowledged that NATO intervened under the guise to “manipulate external intervention to advance their political purposes”.³⁶³ As Kofi Annan commented, “we had learnt nothing from Rwanda”.³⁶⁴ Despite the significance placed on political will as a determinant in mounting effective R2P responses, states have chosen not to undertake them. Thus, the unwillingness of the international community to respond to mass atrocity crimes in the Democratic Republic of Congo (DRC), East Timor, Darfur, Somalia, Sri Lanka, North Korea, Syria, Yemen, Bahrain and the most recent case of Ukraine creates doubts in the minds many whether the protection of civilian remains paramount in the concept of the R2P or it is simply another political tool used by the powerful states to foster their national interest.

4.4 Conclusion

This thesis began by providing a detailed overview of the historical evolution and conceptual frameworks of the concept of the R2P as well as its legal underpinnings. The R2P was conceived in order to be a bridge over the barrier that many people had assumed state sovereignty placed to humanitarian intervention. The Westphalia concept of state sovereignty confers on state the exclusive authority over the people and resources within their legal jurisdiction, free from intervention by outside actors. However, in the decades following the establishment of the UN, sovereignty has undergone an evolution whereby, it is no longer seen as a barrier to military intervention where a state perpetrates egregious human rights abuses against its own citizens. Gross human rights violations were acknowledged to no longer be an internal matter of a state where they posed a threat to international peace and security as a result of the international community's universal recognition of human rights. Human rights concerns therefore transcend national borders and are not the sole domain of the state in question.

³⁵⁹ Thakur, R. (2006). *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*. Cambridge: *Cambridge University Press*, p. 302

³⁶⁰ *Ibid*, at p. 245

³⁶¹ Bellamy, A.J. (2011). *Global Politics and the Responsibility to Protect: From Words to Deeds*. New York: *Routledge*, p.4

³⁶² ICISS (Report of the International Commission on Intervention and State Sovereignty), 2001. *The Responsibility to Protect*, p.1

³⁶³ *Ibid*

³⁶⁴ Hehir, A. (2012). *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention*. China: *Palgrave Macmillan*, p.120

Throughout the 1990's, although the concept of state sovereignty and the principle of non-intervention remained at the forefront of the international debate, some scholars and practitioners have argued that there is a duty to intervene in humanitarian crises, especially to provide victims with humanitarian aid. Pointing to the shameful inaction of the international community amidst mass atrocities in the Rwandan genocide in 1994 and the unilateral intervention by NATO to try and halt mass atrocities in Kosovo in 1999, these actions damaged the ideals and credibility of the UN. Thus, the inability of the UNSC to act decisively in the face of humanitarian crisis in the 1990's triggered the international debate which focused on how the international community should react to protect civilians against systematic human rights abuses within a sovereign state. The idea of the R2P was developed in 2001 in response to a call by Kofi Annan, the former UNSG, urging the international community to come to an agreement on when military intervention is appropriate.

R2P originated in the international community's failure to adequately respond to gross human rights violations. The report sought to forge a new international consensus on how to react to widespread human rights violations as well as new ways to reconcile the seemingly incompatible ideas of intervention and state sovereignty. The Report articulates the assertion that "sovereignty implies responsibility". This responsibility primarily lies on the state to protect its population, but where a state defaults on this solemn responsibility owing to the lack of will or capacity or it was itself complicit to the commission of the atrocities, the responsibility shifts to the international community to act in its place to protect the vulnerable population. Thus, military intervention for the purpose of human protection is justified in the event of large-scale loss of life. Nevertheless, in order for the use of force to be considered as legitimate under these circumstances, it should be authorised by the UNSC as it is the most appropriate body to take necessary measures to maintain international peace and security.

The R2P has quickly evolved over the years since its inception from a non-legally binding idea to an internationally accepted political commitment by states to provide protection to vulnerable civilian population facing gross human rights violations. The doctrine's legal content, which is illustrated by the various legal characteristics of its pillars, is still debatable despite its enormous political value. It is often misinterpreted and abused as there are complications in understanding it in practice. Moreso, as the case of Syria illustrated, the possibility of abuse exists and continues to hinder the ability of the international community to fully respond to egregious human rights violations. While the implementation of the R2P in the Libyan case is often seen as successful, disagreement ensued among the SC members over the implications of Resolution 1973 immediately after its adoption. Many have questioned whether the R2P idea was used to

achieve more than just civilian protection in Libya—namely, a desire for a regime change. Some critics perceived that the civilian protection agenda was used as a pretext for an unlawful intervention, which goes far beyond the mandate given by Resolution 1973. Thus, it was rather difficult to decipher between the motive of saving the civilian population from the motive of changing the regime in the case of Libya. Russia and China who had abstained from voting, voiced their regrets claiming that the NATO forces had overstepped their mandate. Russia raised concerns on how the rules of engagement would be and the limits of the use of force in enforcing a no-fly zone. China on its path noted that parts of the Resolution were unclear making it difficult to point out its implementation mandate. However, the motive of the intervention is what needs to be determined whether the aim of the intervention was to save the civilian population from atrocities, thus promoting and strengthening the principle, or whether the Libyan scenario, as some would say, gave R2P a “bad name”.³⁶⁵ Unlike the Libyan case, the SC has been unable to authorise a military intervention in Syria in spite of the gross human rights violations committed by the Assad regime against the civilian population. Russia and China vetoed all SC draft Resolution as they called for the respect of the principle of non-intervention in the internal affairs of Syria. Referring to excessive use of force by NATO in Libya, these two states blocked intervention in Syria on the ground that, foreign intervention had a hidden agenda aside the need to save the civilian population from mass atrocities.

In summary, the evolution of R2P from the 1990s to the present portrays the numerous challenges, failures as well the successes that the international community has encountered in the face of humanitarian catastrophes. What was seen in 2001 as a global agreement to halt mass atrocities committed against the civilian population has rapidly developed into a powerful tool within a short period of time.³⁶⁶

4.5 Findings

This thesis made the following findings:

We found that under international law, a right to intervene is non-existent. This is anchored in the traditional principle of state sovereignty and non-intervention as guiding principles to interstate relations. The drafter of the UN Charter understood that they needed to limit the use of armed force as it was obviously the most reasonable thing to do to achieve international peace and security. In their quest for this, they wanted to outlaw the use of force in almost all situations leaving very limited options for states. Hence, the prohibition of the use of force enshrined in

³⁶⁵ Mohamed, S. Syria, (2012), ‘The United Nations, and the Responsibility to Protect’. In *American Society of International Law Proceedings*, Vol. 106, p. 223.

³⁶⁶ Sihvo, O. (2013). Master’s Thesis: The Responsibility to Protect and Protection of Civilians: Enhancing the Protection Capacity through Interaction, p. 95

Article 2(4) of the UN Charter and the principle of non-intervention contained in Article 2(7), leaves no room for humanitarian intervention. To this end, there was no provision in the UN Charter permitting states to take either unilateral or collective military action in the interest of human rights. While collective action remains lawful under Article 42 of the Charter, there is no international law principle that makes unilateral intervention lawful. One of the main problems surrounding the need to intervene for humanitarian purposes remains the fact that, it is not explicitly provided for as one of the exceptions to the use of force in the UN Charter. As a result, most of the controversies surrounding intervention are rooted in the principle of non-intervention backed by the concept of state sovereignty. However, these controversial sections regulating the use of armed force under international law has witnessed a growing compromise between the respect for sovereignty and non-intervention, with the need to intervene in exceptional circumstances. This thesis argues that, although most writers recognised that the right to humanitarian intervention existed, there is no legal justification for such right. Nevertheless, the UNSC has authorised the use of force under Chapter VII to protect civilians from gross human rights violations. Even though, the use of force authorised by the Council is legal, these actions based on human rights protection have been subject to a lot of criticism resulting to inconsistencies in its application. As the international community continues to regret its inaction in the face of gross human rights violations in Rwanda, they came to a consensus that there was need to reconceptualise and adopt a new approach to avert such happenings in the future. This thesis therefore concludes by noting that, human rights protection is vital for the furtherance of international peace and security; to this end the international community through the UNSC cannot turn a blind eye and abstain from intervening to alleviate human suffering.

This thesis also found out that, a state has the primary responsibility to protect the human rights of its population and failure to discharge this responsibility can justify external military intervention. Tyrannical and oppressive governments can no longer hide behind the veil of sovereignty to commit mass atrocities. The strict application of the notions of sovereignty may act as an impediment to the protection of human rights and may also present a threat to international peace and security. In contemporary international law, states can no longer act in any manner as they wish or disregard international legal norms under the guise of state sovereignty. Thus, where a state fails to protect its population from gross human rights violations or in itself a perpetrator, it loses its sovereign right and invites external military intervention. Consequently, sovereignty is no longer a barrier to armed intervention for the protection of human rights. This work reiterates that, human rights are peremptory norms of international law from which no derogation is permitted and therefore incumbent upon states to respect them.

Moreover, this thesis found that the concept of the R2P is a way forward for intervention for the protection of human rights despite its current legal status and the challenges to its application. Although it remains non-binding on states, the R2P has been widely accepted as an emerging international legal norm. Nevertheless, the practical application of the R2P has been challenging as there has not emerged an effective and consistent state practice. While the primary purpose of intervention should be the need to avert or halt human rights abuses, this is not often the case in practice as powerful states are often driven by their own national interest. The implementation of the R2P in Libya has raised serious worries regarding its credibility and its ability to set precedence for customary international law. There has already been some implications on subsequent policy and practice on intervention. The Syrian case and the inaction of the UNSC in the face of gross violations against civilians is evidence of this gap. The reluctance of the UNSC members to act and condemn the violence is seemingly linked with the apparent failure of the enforcing states in Libya to act fully in accordance with the mandate and shared normative standards. This thesis highlights that in addition to the disproportionate and indiscriminate use of force, there is a potential for abuse whether unilateral or sanctioned by the UNSC. For instance, the case of Kosovo in 1999 and the Libyan case in 2011 respectively. The bombing of Ghaddafi's private residence by NATO armed forces leading to the death of his son and three grand-children was criticised by many as such an act was clearly outside the civilian protection agenda of Resolution 1973. The above-mentioned cases are clear examples of how the R2P can be abused by powerful states. This thesis also found out that the inconsistency in the implementation of the concept of the R2P to avert human rights abuses jeopardizes the universal acceptance and legal recognition of the doctrine. This inconsistency is often linked to several reasons: financial, political will or power politics. Therefore, there is need for its precise normative character to be clearly defined and for the criteria for its legality to be met and applied to the letter. In all, this principle imposes a duty on the international community to take action in the face of atrocities, only where the concerned state fails to do so.

4.6 Recommendations

The double standards in the application of the R2P undermines the legitimacy of the concept. So many questions have been asked why intervention was carried out in Libya and not in Syria, and even more disturbing in the ongoing war in Ukraine. The selective approach in the application of R2P has raised concerns over this double standard by powerful states. The UNSC must not be biased in its application and must objectively analyse if a particular case qualifies as a R2P case or not. Although, the fear that a military intervention may spark a nuclear war between Russia and the West eventually leading to a third World War is substantial, however,

the author still thinks that application of international legal norms is often thwarted to protect the interest of powerful states. However, it remains undeniable that, the civilian protection agenda must triumph over all other interest of the intervening states, be it economic or political interest. The author proposes that, threshold for military intervention should be clearly defined so it becomes easily identifiable when there is a need to intervene.

With regards to the veto power of the permanent members of the SC, efforts geared towards its reform has been virtually impossible. There is need for a SC reform to be more reflective of the growing UN membership. The unrepresentative structure of the UNSC hinders the effective application of the doctrine of the R2P as many still remain in doubts if the great powers can intervene purely on humanitarian grounds without any ulterior motives. Africa for example is the largest continent in the world yet it does not have a permanent seat on the SC. The use of the R2P in halting gross and systematic violations in the Russian-Ukraine war seems to be far-fetched so long as Russia retains its veto power on the SC. The researcher is of the opinion that Russia be stripped off its veto power for being a perpetrator and violator of the underlying principles and norms of international law. Such a sanction will help to deter other UNSC members from engaging in actions that blatantly goes against the aims of the UN Charter. In general, the author is of the opinion that the UNSC be restructured and proposes that the veto system be eliminated in cases that requires a military intervention on humanitarian grounds. Instead, the majority voting system should be used.

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