The Meaning of the Responsibility to Protect: An Analysis of the R2P Principle in International Law, 2001-2013

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THE MEANING OF THE

RESPONSIBILITY TO PROTECT:

AN ANALYSIS OF THE R2P PRINCIPLE

IN INTERNATIONAL LAW, 2001-2013

Dissertation by

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Submitted to the Faculty of Indiana University Maurer School of Law

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Doctor of Juridical Science

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Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

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March, 2015
For my loving mother, father, my husband, two sisters, two brothers, and my two lovely children, Wimeth and Wohaan, for all the support and encouragement given in my life.
ACKNOWLEDGEMENTS

I would like to express my deepest gratitude to my advisor, Professor David Fidler, for his patience, motivation, enthusiasm, immense knowledge, and continued support. This thesis would not have been completed without his guidance, which helped me during all of the research and writing. I could not have imagined having a better advisor and mentor for my SJD study.

Besides my advisor, I would like to thank the rest of my thesis committee: Professor Christiana Ochoa and Professor Timothy Waters. I would also like to extend my sincere gratitude to Professor Lisa Farnsworth of the Graduate Legal Studies Department of the Maurer Law School for the encouragement given throughout this process. My special appreciation goes to Ms. Lara Gose, for her encouragement and kindness throughout the process. Many thanks to Dean Lesley Davis of Graduate Legal Studies Department, Mr. William Morris and Mr. Christopher Ziegler, who helped me as well.

Last but not least, I would like to thank my loving parents, two elder sisters, and two elder brothers. They were always supporting me and encouraging me with their best wishes. My very special thanks go to my loving husband Wimal, who always there cheering me up and stood by me through both the good and bad times. Finally, I thank to my loving children, Wimeth and Wohaan, for their patience during this entire period.
The thesis analyzes the first decade of experience with the principle of the responsibility to protect (R2P), in order to evaluate the status of the R2P principle in contemporary international law. The R2P principle is an important topic because its meaning, as well as its effect, continues to be debated in international law. The thesis examines state practice within the United Nations and beyond after the articulation of the R2P principle in 2001. The analysis includes detailed case studies relevant to R2P: Darfur, Libya, Côte d’Ivoire and Syria. The thesis argues that the R2P principle has not significantly changed international law because state practice continues to exhibit serious disagreements about and problems with the substance and implementation of the R2P principle. These disagreements and problems are most explicit in the context of international law on military intervention to address long-scale atrocities. Further, the controversies surrounding the R2P principle mirror the same disagreements in international law concerning humanitarian intervention before the R2P principle emerged, demonstrating that the R2P principle has not changed international law in any significant way.
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<tr>
<td>AMIS</td>
<td>African Union Mission in Sudan</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>BRICS</td>
<td>Brazil, Russia, India, China, and South Africa</td>
</tr>
<tr>
<td>CPA</td>
<td>Comprehensive Peace Agreement</td>
</tr>
<tr>
<td>DPA</td>
<td>Department of Political Affairs</td>
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<tr>
<td>DPKO</td>
<td>Department of Peacekeeping Operations</td>
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<tr>
<td>EC</td>
<td>European Council</td>
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<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>FPI</td>
<td>Ivorian People’s Front</td>
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<td>G-77</td>
<td>Group of 77</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<tr>
<td>IDPs</td>
<td>Internally Displaced Persons</td>
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<tr>
<td>JEM</td>
<td>Justice and Equality Movement</td>
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<tr>
<td>KLA</td>
<td>Kosovo Liberation Army</td>
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<tr>
<td>LAS</td>
<td>League of Arab States</td>
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<tr>
<td>LTTE</td>
<td>Liberation Tigers of Tamil Elam</td>
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<tr>
<td>MINUCI</td>
<td>United Nations Mission in Côte d’Ivoire</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>NAM</td>
<td>Non-Aligned Movement</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>OCHA</td>
<td>Office for the Coordination of Humanitarian Affairs</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<tr>
<td>OIC</td>
<td>Organization of Islamic Conference</td>
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<tr>
<td>PBC</td>
<td>Peacebuilding Commission</td>
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<tr>
<td>PNU</td>
<td>Party of National Unity</td>
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<td>RDR</td>
<td>Rally of Republicans</td>
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<td>RN2V</td>
<td>Responsibility Not to Veto</td>
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<td>R2P</td>
<td>Responsibility to Protect</td>
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<td>RPF</td>
<td>Rwandan Patriotic Front</td>
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<td>RRP</td>
<td>Regional Response Plan</td>
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<td>Responsibility While Protecting</td>
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<td>SHARP</td>
<td>Syrian Humanitarian Response Plan</td>
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<td>SLA</td>
<td>Sudan Liberation Army</td>
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<td>Syrian National Council</td>
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<td>SPLM</td>
<td>Sudan People’s Liberation Movement</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UNAMID</td>
<td>United Nations and African Union Mission in Darfur</td>
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<td>UNAMIR</td>
<td>United Nations Assistance Mission in Rwanda</td>
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<td>UNAMIS</td>
<td>United Nations Advance Mission in Sudan</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Program</td>
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<td>UN Habitat</td>
<td>United Nations Human Settlement Program</td>
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<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commission for Refugees</td>
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<td>UNICEF</td>
<td>United Nations International Children’s Emergency Fund</td>
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<tr>
<td>UNMIK</td>
<td>UN Interim Administration Mission in Kosovo</td>
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<tr>
<td>UNMIS</td>
<td>United Nations Mission in Sudan</td>
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<tr>
<td>UNOCI</td>
<td>United Nations operation in Côte d’Ivoire</td>
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<tr>
<td>UNSMIL</td>
<td>United Nations Support Mission in Libya</td>
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CHAPTER 1

INTRODUCTION: THE RESPONSIBILITY TO PROTECT AND
INTERNATIONAL LAW

1.1 From Humanitarian Intervention to the Responsibility to Protect: Impact on
International Law

After the crimes of the holocaust had become internationally identified, the world vowed such crimes would never happen again. However, since 1945 the international community repeatedly witnessed many incidents of genocide or other large-scale atrocities. In a report to Member States of the United Nations (UN), Secretary General Ban Ki-Moon described the “responsibility to protect” (R2P) as an “idea whose time has come,” and he presented a comprehensive plan for operationalizing R2P within the UN system. The R2P principle seeks to ensure that the international community never again fails to act in the face of genocide and other gross forms of human rights abuses.

The R2P principle was initially introduced by the International Commission on Intervention and State Sovereignty (ICISS) in 2001. Thereafter, the R2P principle was adopted by heads of state and governments at the UN’s World Summit in 2005. Therefore, R2P should be understood as a solemn promise made by leaders of every country to all people who are threatened by mass atrocities. The R2P principle, in fact, was introduced as a remedy to controversies involving humanitarian intervention, and it was intended to move the international community past the controversies that international law experienced with humanitarian

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intervention. As Kofi Annan stated, by reconciling the principle of sovereignty with human rights, the R2P principle constitutes the most comprehensive and carefully-considered response to the dilemma of humanitarian intervention.4

The R2P principle primarily highlights sovereignty as responsibility.5 The principle stipulates, first, that states have an obligation to protect their citizens from mass atrocities; second, that the international community should assist them in doing so; and, third, that, if the state in question fails to act appropriately, the responsibility to take action falls to the larger community of states.6 The primary responsibility for protecting its own people from mass atrocity crimes lies with the state itself. State sovereignty implies responsibility, not an authority to kill. But when a state is unwilling or unable to halt or avert such crimes, the wider international community then has a collective responsibility to take whatever action is necessary.7 R2P primarily emphasizes preventive action before taking any coercive measures. These prevention efforts include various forms of assistance for states struggling with crises.

Since its inception, there has been substantial attention paid to the R2P principle. Nevertheless, the place of the R2P principle in international law continues to be controversial and surrounded by disagreements. There are divergent perspectives on whether and now the R2P principle has affected contemporary international law. To date, there is very little consensus on various aspects of the R2P principle among scholars as well as states. One of the main questions about the R2P principle is whether it is a new and different concept from humanitarian intervention that existed before R2P emerged. Many scholars view R2P as the most

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5 Id. ¶ 2.30.
6 Id.
7 Id.
comprehensive framework for approaching humanitarian intervention ever put forth. 8 Others claim that it merely legitimizes the status quo by relying on the Security Council as the primary authorizing body. 9 As Welsh notes, much of the criticism of the ICISS report on the R2P principle mirrors the preexisting debate about humanitarian intervention. 10 Some argue that a simple change in language from “humanitarian intervention” to “responsibility to protect” does not circumvent the necessity of resolving debates that have always existed regarding humanitarian intervention. 11 There are also significant fears that the R2P principle is simply a cover for legitimating the neo-colonialist tendencies of major powers. 12 In particular, a fundamental problem is that, no matter what criteria are established for a justifiable intervention, the decisive factors will always be authority, political will, and operational capacity. 13

Stedman, however, argues that R2P is a new concept because it has succeeded in creating a new legal duty for the international community to protect victims in foreign countries by providing a basis “for legitimizing coercive interference in the domestic affairs” of states that are unable to protect their own people. 14 Evans, an Australian international policymaker, former politician and pioneer architect of the R2P principle, supports the argument that the R2P principle has taken international law beyond older controversies of humanitarian intervention. He argues that traditional humanitarian intervention narrowly focuses the debate on outsiders, rather

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11 Id.
than considering the urgent needs of those insiders suffering from harm.\textsuperscript{15} Evans expressly rejects the claim that the R2P principle is just another name for humanitarian intervention and argues that they are very different concepts.\textsuperscript{16} According to Evans, the very core of the traditional meaning of “humanitarian intervention” is nothing more than coercive military intervention for humanitarian purposes. But “the responsibility to protect” is about much more than that.\textsuperscript{17} Evans notes that, as every relevant document from the ICISS report to the 2005 World Summit Outcome Document makes clear, R2P is about taking effective preventive action at the earliest possible stage of a conflict.\textsuperscript{18} According to Molier, the R2P principle replaced the concept of humanitarian intervention at the beginning of the 21\textsuperscript{st} century, but, from a legal point of view, nothing has changed because military intervention for human protection purposes without the authorization of the Security Council is still illegal.\textsuperscript{19}

Further, there are claims that the R2P principle reflects existing international law and is not a new or different idea. Bellamy and Reike argue that R2P has not resolved the dilemmas that appeared with humanitarian intervention.\textsuperscript{20} According to Bellamy and Reike, paragraphs 138-140 of the 2005 World Summit Outcome Document reveal that the R2P principle does not transform the international legal framework.\textsuperscript{21} Contarino, Lucent and Rosenberg note that

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} Gareth Evans, \textit{The Responsibility to Protect: An Idea Whose Time Has Come and Gone?} 22 INT’L REL. 286 (2008), available at http://ire.sagepub.com/content/22/3/283.full.pdf.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{20} Alex J. Bellamy & Ruben Reike, \textit{The Responsibility to Protect and International Law}, in \textit{THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW} 81 (Allex J. Bellamy, Sara E. Davis & Luke Glanville eds., 2011).
\item \textsuperscript{21} Id. at 83.
\end{itemize}
\end{footnotesize}
various strands of international law were already pointing towards the obligations to save strangers and that the R2P principle is not anything new.\textsuperscript{22}

At the time of the publication of the R2P report, experts on the ICISS were clear: the international obligations of R2P were not part of international law.\textsuperscript{23} Rather, R2P was described by the ICISS specifically as an emerging principle grounded in a miscellany of legal foundations growing out of state practice and the Security Council’s own practice.\textsuperscript{24} The ICISS noted, however, that, if the Security Council gave credence to R2P and its doctrinal basis, a new rule of customary international law might eventually be recognized.\textsuperscript{25}

However, Evans argues that the R2P principle has already reached the status of an international legal norm, indicating that the whole of R2P has reached a tipping point.\textsuperscript{26} He cites several events that have contributed to its status as an international legal norm. Most notably, Evans cites the inclusion of R2P in the 2005 World Summit Outcome Document. Evans further claims that the April 2006 Security Council adoption of the Resolution on the Protection of Civilians in Armed Conflict contains an express reaffirmation of the World Summit conclusions relating to R2P. For Evans, approval of these documents by most members of the international system indicates that a critical mass of states has accepted the principle of R2P as part of international law.\textsuperscript{27}

\textsuperscript{23} ICISS, supra note 2, ¶¶ 6.17, 6.18.
\textsuperscript{24} Id.
\textsuperscript{25} Id., ¶ 6.17.
\textsuperscript{27} Id.
Welsh and Banda argue that, although the R2P principle does not create formal legal obligations, it may influence the way in which states understand their duties as members of the international community.\(^{28}\) Strauss, arguing that R2P has not yet achieved international legal status, states that even the General Assembly resolution that gave effect to the global consensus on the R2P principle in 2005 is a non-binding recommendation for Member States, rather than a statement of international law, and that such resolutions cannot create new law by themselves.\(^{29}\) Alvarez argues that conceiving of the R2P principle in terms of a legal norm is dangerous because that would involve redefining sovereignty, enabling self-interested coercive intervention, and expanding the scope of potential interference into the domestic affairs of states.\(^{30}\)

There are also many views about the substantive content of the R2P principle. There is a lack of clarity around who, precisely, bears the international responsibility to protect. The ICISS spoke of an international responsibility to protect.\(^{31}\) While the international community as a whole is said to be responsible, which international actor bears the responsibility to protect in the final analysis remains uncertain. For a political theorist like Pattison, this ambiguity in the ICISS report is highly unsatisfactory. According to Pattison, whether the Security Council should authorize military intervention or if, alternatively, any other actor should authorize such an intervention is not clear.\(^{32}\) As Pattison notes, though the ICISS report largely succeeded in changing the nature of the debate on humanitarian intervention, its appeal to the international


\(^{31}\) See generally ICISS, *supra* note 2.

community is a very general one.\footnote{33} Beyond claiming that the Security Council should ideally authorize any forceful action to relieve mass humanitarian suffering, it did not clarify which particular agent bears the responsibilities associated with R2P.\footnote{34} Tan frames this problem with R2P as an “imperfect duty” which has not been assigned to one specific agent.\footnote{35} As Tan points out, there is a lack of clarity in identifying a responsible agent, even in an informal way, such as the widely accepted norm of “the most legitimate intervener to act,” which leaves room for other actors to join when necessary.\footnote{36} Tan asserts the existence of positive state obligations to protect populations from mass atrocities within another state's jurisdiction, but the law remains unclear as to which states have that obligation to act in precise circumstances.\footnote{37} Also, paragraph 139 of the World Summit Outcome Document places the responsibility to protect firmly within the UN and, more specifically, the Security Council. By allocating R2P clearly to the Security Council, the World Summit Outcome Document does not identify any new legal obligations on the part of states to prevent or react to atrocities.

As Pattison notes, if the word "responsibility" is going to be used, then responsibility must rest somewhere, and must mean something.\footnote{38} Pattison identifies the morally important qualities of potential interveners.\footnote{39} In taking up the challenge of assigning the international responsibility to protect, Pattison does not offer a sustained treatment of the questions that have preoccupied most normative theorists on humanitarian intervention. For example, in identifying who should intervene, Pattison privileges those agents who currently have the capacity to deliver

\begin{thebibliography}{9}
\footnote{33} Id.
\footnote{34} Id.
\footnote{35} Kok-Chor Tan, The Duty to Protect, in HUMANITARIAN INTERVENTION 84 (Terry Nardin & Melissa Williams eds., 2006).
\footnote{36} Id.
\footnote{37} Louise Arbour, The Responsibility to Protect as a Duty of Care in International Law and Practice, 34 INT’L STUD. REV. 445 (2008).
\footnote{38} PATTISON, supra note 32, at 284.
\footnote{39} Id. at 9.
\end{thebibliography}
humanitarian outcomes through military action. Thus, the question of who exactly bears the international responsibility to protect is still being debated.

The ICISS describes the responsibility to prevent as the single most important dimension of the R2P principle. If the overarching goal of the R2P principle is to save lives, the focus should be on prevention, not on reaction. In a critique of the ICISS’s stance on prevention, Weiss and Hubert argued that it is preposterous to set prevention as the single most important priority. Weiss and Hubert continued that, “most of the stammering about prevention and rebuilding is a superficially attractive but highly unrealistic way to try and pretend that we can finesse the hard issue of what essentially amounts to humanitarian intervention.” For Weiss and Hubert, the prevention and rebuild duties are the worst threats to the R2P’s conceptual clarity. Bellamy states that, despite stressing the critical importance of conflict prevention, the ICISS did not make concrete proposals other than the call to centralize the world’s conflict prevention efforts and to develop a capacity in relation to early warning. The ICISS avoided explicit discussion of the single most pressing dilemmas in relation to the responsibility to prevent, which is the question of how to translate early warning signs into a commitment to act and a consensus on how to act.

The R2P principle and its conceptual approach are surrounded with many disagreements. There is no apparent consensus in the literature about whether the R2P principle has changed international law. The various disagreements in the existing literature about the R2P principle and its application to gross human right violations are a clear manifestation of the disputed place

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40 ICISS, supra note 2.
42 Id.
43 Id.
44 ALEX BELLAMY, THE RESPONSIBILITY TO PROTECT 54 (2009)
45 Id.
of R2P within contemporary international law. These debates involve not only the conceptual aspects of the R2P principle, but also its application to situations involving gross human rights violations. Given the disagreements and confusion in existing literature, it is important to continue to ask whether R2P has changed international law in connection with states, as well as the international community’s, responses to humanitarian crises.

This thesis, in answering this question, undertakes a close examination of state practice within the UN and beyond that occurred after the articulation of the R2P principle in 2001. Although the existing literature on the R2P principle is voluminous, it does not contain the kind of detailed examination of state practice on multiple case studies extending over the course of more than a decade. The thesis, therefore, aims to situate the debates surrounding the R2P principle into an analytical framework. To achieve this task, the thesis focuses on state practice during major humanitarian crises in the first decade after the inception of the R2P principle. The analysis includes detailed case studies relevant to R2P: Darfur, Libya, Côte d’Ivoire and Syria. In analyzing the R2P principle and its international legal impact, the thesis focuses on customary international law as states have not, to date, incorporated R2P in any treaty.

Further, the thesis will examine different approaches that have been proposed to intensify the importance of the R2P principle in international law. The thesis critically analyzes: (1) the French proposal of the concept of the “responsibility not to veto” (RN2V), which provides that the five permanent members of the Security Council should agree not to use their veto power to block action in response to genocide and mass atrocities that a majority vote of the Security Council would otherwise approve; and (2) the Brazilian proposal of the “responsibility while protecting” (RWP), which highlights the need for stringent limitations on the use of military force authorized under the R2P principle by the Security Council. Further, RWP calls for
Security Council oversight and authority over ongoing military operations approved by the Security Council.

The thesis argues that the R2P principle does not represent a significant change in international law because too many disagreements about the substance and implementation of the R2P principle continue to exist. The analysis of state practice identifies the disagreements that exist among UN Member States on the application of the R2P principle in humanitarian crises. These disagreements are more evident in the context of the legal authorization of military intervention to protect civilians from mass atrocities. Further, the controversies surrounding the R2P principle mirror the same disagreements that affected international law concerning humanitarian intervention before the R2P principle emerged, demonstrating that the R2P principle has not changed contemporary international law in any significant way. These disagreements on the content and application of R2P in state practice indicate the international community’s failure to resolve fundamental controversies in international law about handling humanitarian crises.

1.2 Humanitarian Crises and International Law

There have been many man-made humanitarian crises throughout history, and interventions by one state in the affairs of another have always been an issue that the international community has had to confront. The historical evolution of humanitarian intervention indicates that controversies have arisen in the convergence of bodies of international legal rules: sovereignty, non-intervention, international law on the use of force, international human rights, and international humanitarian law. Ever since the Peace of Westphalia that ended Europe’s wars of religion in the 17th century, the principle of sovereignty has evolved to become the core principle of international relations. Until the 20th century, there were no international
legal rules governing the use of force, and, thus, states could go to war for any reason. Most of the humanitarian crises that occurred during this period were related to interventions made in connection with religious purposes or pretexts.

Humanitarian crises during the late 18th century and the 19th century were heightened by increased tension between state sovereignty and the unlimited right to use force. European states considered themselves as civilized nations that had the sovereign right to make interventions against uncivilized nations. During this period, there were many interventions carried out under the justification of humanitarian intervention, such as: the 1827 French, British, and Russian intervention in Greece; the French intervention in Syria in 1860 to protect Christian population from the Ottoman Empire; Russian intervention in Bosnia, Herzegovina, and Bulgaria in 1877, which were all under the Ottoman Empire; and the Cuban invasion by the United States in 1898. Although these interventions were justified as humanitarian, those were moral and political justifications, and had no legal impact in a context where states could legally resort to force for any reason. The 19th century also marked major developments in the laws of warfare. The creation of International Committee of the Red Cross (ICRC), the 1864 Geneva Convention, and the Hague Conventions, adopted at the end of the century, all tried to regulate the conduct of warfare to make it more humane.

Disputes between the major powers began to increase at the end of the 19th century and beginning of the 20th century. These included: the outbreak of the 1884 Sino-French War; the 1898 Spanish-American War; the 1898-1900 joint great-power intervention in China; the 1904 Russian-Japanese War; the Japanese intervention in Manchuria in 1931; the Italian intervention in Ethiopia; and the German intervention in Bohemia and Moravia in Czechoslovakia in 1938. These conflicts were justified as humanitarian interventions, which show, in some cases, a
tendency to abuse the humanitarian intervention concept. Nevertheless, these justifications were again simply moral and political in nature and not legal justifications. After World War I, and with the Versailles Treaty and Kellogg-Briand Pact, international law began to move towards restricting the use of force. However, the development of an international human rights regime after World War II created a dynamic where humanitarian intervention began to confront the protection of sovereignty and the prohibition on the use of force. Yet, these new developments were weak and not yet sufficient to clarify whether humanitarian intervention had a place in international law.

The UN Charter affirmed the principles of state sovereignty and non-intervention in international law, and a system of collective security emerged in the UN. The UN system was supposed to help avert man-made humanitarian crises. The UN Charter laid down provisions prohibiting the use of force. However, the UN Charter permits the use of force: (1) where the Security Council determines that the situation creates a threat to international peace and security and authorizes the use of force, and (2) when the use of force is necessary in self-defense. In addition to these permitted uses of force, the development of international human rights law under the UN Charter strengthened the humanitarian intervention concept. The 1948 Universal Declaration of Human Rights and subsequent human rights conventions qualified the principles of sovereignty and non-intervention and raised the potential need for military interventions to address large-scale humanitarian abuses. However, none of these instruments created legal obligations on states to engage in humanitarian interventions.

There were a number of humanitarian crises that occurred during the Cold War period. Nevertheless, state practice during the Cold War period demonstrated great reluctance by states to justify the use of force under the humanitarian intervention concept. India’s intervention in
Pakistan in 1971, Vietnam’s intervention in Cambodia in 1979, and Tanzanian intervention in Uganda in 1979 were all ultimately justified under self-defense. Therefore, despite the developments of international human rights norms during the Cold War period, state practice did not demonstrate great willingness to claim international law permitted humanitarian intervention.

With socio-political changes after the Cold War, especially with the disappearance of the bi-polar system, international human rights law and international humanitarian law gained greater attention. The relationships in international law between sovereignty, the prohibition of the use of force, human rights, and humanitarian intervention turned more volatile and became the main source of controversies in the 1990s, especially in humanitarian crises in Rwanda and Kosovo. The international community’s failure to respond adequately during the genocide in Rwanda in 1994 raised questions about how to protect civilians from atrocities more effectively in the future.46 Although UN Member States were aware of the mass atrocities in Rwanda, none made serious efforts to prevent or stop those atrocities. The UN could not take any action to stop atrocities without the support of its members. The UN and the international community were criticized for their collective failure to take timely and adequate actions to stop mass killings in Rwanda. Nevertheless, Rwanda involved no violations of international law because states did not use military force without Security Council authorization. Rwanda rather was considered a massive moral failure in terms of the legitimacy of the international community. Rwanda involved a situation where the efforts of the international community were considered legal in terms of use of force but illegitimate as a response to genocide.

A different situation occurred in the Kosovo crisis. NATO’s bombing of Serbia in 1999 to prevent ethnic cleansing in Kosovo occurred without the authorization of the Security Council,

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and created controversy on the conditions under which states could use force to protect civilians from mass atrocities.\textsuperscript{47} Kosovo involved a use of force without Security Council authorization - considered by many as illegal - but the intervention was otherwise viewed as a legitimate action to stop ethnic cleansing or, in other words, NATO actions were considered illegal but legitimate.

In the wake of the controversies in Rwanda and Kosovo, the international community began to search for a new consensus on the legitimacy and legality of action, including military intervention, to protect civilians from mass atrocities. In 1999, the UN Secretary General Kofi Annan challenged the international community to develop a way forward on reconciling the principles of maintaining sovereignty and protecting fundamental human rights when faced with humanitarian crises.\textsuperscript{48} Annan followed-up this challenge in the 2000 Millennium Summit Report by again asking UN members to look at the perceived tension between sovereignty and human rights in humanitarian crises.\textsuperscript{49} This desire to find a new avenue to legally and legitimately justify humanitarian intervention led to the ICISS report and the inception of the R2P principle.

1.3 Emergence and Application of the R2P Principle

Responding to Annan’s challenge, Canada formed the ICISS in 2000. In its 2001 report entitled \textit{The Responsibility to Protect}, the ICISS developed the R2P principle.\textsuperscript{50} Through its report, the ICISS tried to distinguish the R2P principle from the prior international law on humanitarian intervention in several ways. First, the report emphasized that the R2P idea looks at intervention from a different perspective than the concept of humanitarian intervention. The ICISS stressed that the R2P principle addresses the dilemma of intervention from the perspective of

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\textsuperscript{47} Id.
\textsuperscript{48} ALEX BELLAMY, RESPONSIBILITY TO PROTECT: FROM WORDS TO DEEDS 15 (2011).
\textsuperscript{50} ICISS, supra note 2.
of those who need support rather than from the interests and perspectives of those who carry out humanitarian intervention.\footnote{Id. ¶ 1.40.}

Second, the ICISS sought to bridge the gap between intervention and sovereignty by introducing the complementary concept of responsibility, under which responsibility is shared by both the national state and the broader international community. The ICISS recognized that the main responsibility to protect resides with the state whose people are directly affected by conflict or massive human rights abuses, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.\footnote{Id. ¶ 2.30.} Third, the ICISS expanded the conceptual parameters of the notion of intervention, declaring that an effective response to mass atrocities requires not only reaction, but also ongoing engagement to prevent conflict and rebuild after the event.\footnote{Id. ¶ 2.29.}

Thus, the R2P principle as presented by the ICISS report consists of three responsibilities: the responsibility to prevent, react and rebuild.\footnote{Id.} The ICISS report presented the responsibility to prevent as the single most important aspect of the R2P principle, directed at addressing the direct causes of conflict that put human security at risk. The responsibility to react consists of a wide gamut of measures, including economic, political and diplomatic tools, with the very last resort being military intervention. The responsibility to rebuild focuses on the post-conflict recovery, reconstruction and reconciliation of a state and aims at preventing potential recurrences of humanitarian crises.

The responsibility to react is the most difficult aspect of the R2P principle. The ICISS stressed the importance of taking all measures short of military action. It stated that, wherever
possible, coercive measures short of military intervention ought first to be examined, including various types of political, economic and military sanctions.\textsuperscript{55} The decision to intervene by military means to protect people should only occur when a state is unable or unwilling to discharge its primary responsibility, and should be limited to extreme cases that genuinely “shock the conscience of mankind,” or situations that present such an obvious and imminent danger to international security that they call for coercive military intervention. Coercive measures are to be conducted only when all other preventative action has been exercised.\textsuperscript{56}

In order to identify cases that demand coercive measures, the ICISS proposed a set of criteria that must be fulfilled before a decision to intervene is taken. A “just cause” threshold must be met, involving the danger of a large-scale loss of life or large-scale ethnic cleansing. Consequently, the ICISS formula for humanitarian intervention legitimizes anticipatory measures in response to clear evidence of probable large-scale killing, as explained in the report, in order to avoid the morally untenable position of having to await the beginning of genocide before being able to stop it.\textsuperscript{57} Four precautionary principles for military intervention are also included in the criteria, which demand (a) a right intention, (b) last resort, (c) proportional means, and (d) reasonable prospects of achieving the intended results.\textsuperscript{58}

The ICISS report acknowledges that the Security Council is the appropriate body to authorize military interventions.\textsuperscript{59} But, if the Security Council rejects a proposal or fails to deal with a proposal within a reasonable time, the ICISS report proposes alternative options.\textsuperscript{60} The matter could, in such situations, be considered in the General Assembly under the “Uniting for

\textsuperscript{55} Id. ¶ 4.3.  
\textsuperscript{56} Id. ¶ 4.13.  
\textsuperscript{57} Id. ¶¶ 4.18-4.27.  
\textsuperscript{58} Id. ¶ 8.28.  
\textsuperscript{59} Id. ¶ 6.28.  
\textsuperscript{60} Id. ¶¶ 6.29, 6.31.
Peace” procedure, or, if that fails, by a regional organization, subject to seeking Security Council authorization under Chapter VII of the UN Charter. Furthermore, the ICISS report warns that, if the Security Council fails to discharge its responsibility to protect in “conscience-shocking situations crying out for action,” the Security Council should take into account that it is unrealistic to expect concerned states to rule out other means or forms of action to meet a humanitarian emergency. However, the ICISS does not explicitly entrust the responsibility of military intervention to any entity outside the Security Council. Nevertheless, although the possibility of coalitions of states willing to take action under the R2P principle is not exactly recommended, the ICISS did not explicitly rule out such a coalition in situations where all other responsible actors fail to act.

Another critical factor is that the five permanent members of the Security Council have divergent geopolitical interests and ideologies, and, so, where some permanent members see a need for intervention, others might exercise their veto because they have different interests at stake, disagree about the need for military intervention, or worry about military intervention turning into “regime change.” To address this problem, the French Minister of Foreign Affairs, Hubert Védrine, proposed a concept of the “responsibility not to veto” (RN2V), during the preliminary discussions of the R2P principle. Védrine first proposed a new “code of conduct” for the five permanent members in the context of the R2P principle. The concept of RN2V proposes that the five permanent members of the Security Council should agree not to use their veto power to block action in response to genocide and mass atrocities which would otherwise pass by a majority. The ICISS supported the idea that a permanent member of the Security Council

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61 Id.
62 Id. ¶¶ 6.39, 6.40.
63 Id.
Council should not exercise its veto where: (1) there is majority support on the Security Council for intervention; (2) genocide or mass atrocities have occurred; and (3) a permanent member does not have “vital security interests” at stake.\(^6\) However, as Blätter and Williams note, RN2V would not be adopted as a formal procedural rule, but as an informal rule that would prevent interventions from being unjustifiably blocked.\(^6\) The responsibility element of the concept implies that, when gross human rights abuses and mass atrocities are occurring, the five permanent members of the Security Council should not use the veto to achieve political goals.

As developed by the ICISS, the R2P principle is based upon the concept of human security, and focuses attention on the human needs of those seeking protection. The ICISS claimed that this approach differed from previously contested arguments in international law about the legitimacy of humanitarian intervention, which the ICISS argued focused more narrowly on the rights of outsiders to intervene than privileging the urgent needs of the insiders suffering from harm.\(^6\) In essence, the ICISS argued that the R2P principle was broader than humanitarian intervention as previously debated in international law and, thus, was novel and different. As such, the ICISS claimed that it had distinguished the R2P principle from earlier arguments of international law that permitted humanitarian intervention.

After the release of the ICISS report in 2001, interest in the R2P principle increased among the international community, the Security Council, the Secretary General, non-government actors and academics. The UN has attempted to advance and apply the R2P principle in many instances. One of the important steps was the adoption of the 2005 World Summit Outcome Document, which recognized the responsibility of each individual state to

\(^6^\) ICISS, *supra* note 2, ¶ 6.21.

\(^6^\) *Id.*, ¶¶ 6.13, 6.20; Ariela Blätter & Paul D. Williams, *The Responsibility Not to Veto*, 3 GLOBAL RESP. TO PROTECT 301 (2011).

\(^6^\) ICISS, *supra* note 2, ¶ 2.28.
protect its population from mass atrocities. The World Summit Outcome Document made reference to the R2P principle in its paragraphs 138 and 139 and attempted to create a political consensus on R2P.

The UN has also made numerous attempts to advance and apply the R2P principle since the adoption of the 2005 World Summit Outcome Document. On April 28, 2006, the Security Council unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict (POC). Resolution 1674 contained the first official Security Council reference to R2P by reaffirming the provisions of the R2P principle within paragraphs 138 and 139 of the World Summit Outcome Document. It also noted the Security Council’s readiness to address gross violations of human rights because mass atrocities may constitute threats to international peace and security. On June 28, 2006, the Security Council held its first open debate on the protection of civilians in armed conflict. During this debate, many governments reacted positively to the R2P reference in Resolution 1674.

At the end of August 2007, the UN Secretary General appointed Edward Luck as Special Adviser to focus on the R2P principle. Luck's primary role was to focus on the conceptual development of, and consensus building around, R2P and to assist the General Assembly in its ongoing consideration of the principle. Luck’s responsibilities as Special Adviser included developing clarity and building consensus for the R2P principle, as well as assisting the General Assembly continue its consideration of the R2P principle. Throughout the end of 2008, Luck tried to garner political support of the Member States, key agencies within the UN, and civil society towards the better implementation of the R2P principle.

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70 U.N. Secretary-General, SG/A/1120, BIO/3963 (Feb. 21, 2008).
UN Secretary General Ban Ki-moon’s report “Implementing the Responsibility to Protect,” was released on January 12, 2009, which outlined measures and actors involved in operationalizing, or implementing, the R2P principle.71 The first General Assembly informal, interactive debate on R2P started on July 23, 2009. Noting that the concept of R2P as endorsed in 2005 was not to be renegotiated, presenters stated that the scope of the principle should remain limited to the four crimes: genocide, crimes against humanity, war crimes, and ethnic cleansing.72 The first General Assembly resolution on R2P was adopted in October 2009, and it took note of the Secretary General’s report of January 2009.73 Resolution 1894, adopted by the Security Council in November 2009, recognized that states have the primary responsibility to protect their population and reaffirmed the provisions on R2P within paragraphs 138 and 139 of the World Summit Outcome Document.74

UN Secretary-General Ban Ki-moon released a report on “Early Warning, Assessment and the Responsibility to Protect” on June 14, 2010.75 This report identified the capacities and gaps of exiting early warning mechanisms and the insufficient level of information and analysis sharing. The Secretary-General next released another report on June 27, 2011, entitled, “The Role of Regional and Sub-Regional Arrangements on Implementing the Responsibility to Protect.”76 The report emphasized that the Security Council and regional and sub-regional organizations lend legitimacy to each other. The report highlighted the role that regional and sub-regional organizations play in protecting populations from mass atrocities. Another report of the

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71 U.N. Secretary General, Implementing the Responsibility to Protect, A/63/677 (Jan.12, 2009).
75 U.N. Secretary General, Early Warning, Assessment and the Responsibility to Protect, U.N. Doc. A/64/864 (July 14, 2010).
Secretary General was released on July 25, 2012, entitled, “Responsibility to Protect – Timely and Decisive Response,” and it discussed the broad range of non-coercive and coercive tools available and the role of actors at the international, regional, national and local levels in its implementation. This report emphasized the importance of preventing crimes, but noted that, in cases in which preventive measures proved inadequate and the threat to populations remained imminent, the international community has a responsibility to take collective action to protect civilians.

Despite all the attention and efforts by the UN to sustain the momentum that R2P generated, such efforts have failed to produce clarity about R2P’s impact on international law. Although the R2P principle was intended to move international law past the controversies that international law experienced with humanitarian intervention, the R2P principle itself still faces many unresolved conflicts and controversies. One of the primary issues with the R2P principle is whether it has changed the pre-R2P humanitarian intervention impasses. The R2P principle is designed to include more than just coercive military intervention for humanitarian purposes. Compared to previous articulations of humanitarian intervention, the R2P principle provides a more holistic and integrated approach to conflict prevention, the avoidance of human rights abuses, and protection against mass atrocities. Notwithstanding the R2P principle’s inclusion of responsibilities to prevent and rebuild, however, the crux of the principle focuses on the issue of military intervention. Indeed, the majority of the ICISS report is devoted to the responsibility to react. The R2P principle was intended to move international law past the controversies involving the use of force for humanitarian intervention. However, the development of R2P during its first decade suggests that the controversies about the use of military force remain.

Moreover, during the first decade after R2P’s inception, one of the most debated questions was when to invoke the R2P principle. The ICISS set the R2P principle’s threshold for action as the potential for large scale loss of life or ethnic cleansing, but the 2005 World Summit Outcome Document restricts the application of R2P to four specific crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.\textsuperscript{78} Even so, questions arose about whether the principle should cover other calamities, such as HIV/AIDS, climate change, or response to natural disasters. This debate involved arguments that extending the R2P principle to these areas would undermine the 2005 consensus and stretch the concept beyond either recognition or operational utility.

Further, under the ICISS report, the R2P principle consists of three responsibilities: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.\textsuperscript{79} However, paragraphs 138 and 139 of the World Summit Outcome Document only retained the prevention and reaction aspects of the R2P principle. It does not specify responsibility to rebuild as a part of R2P, even though it addresses post-conflict rebuilding elsewhere. Whether all three responsibilities form part of R2P is still debated. Therefore, while it is not clear when to invoke the R2P principle, it is also not clear as to which responsibility should be invoked under R2P.

Additionally, there are many questions regarding the substantive content of the R2P principle. Under the R2P principle, what actions states should take in exercising the responsibilities to prevent, react and rebuild are not clear. The ICISS report, as well as the World Summit Outcome Document, provides that prevention is the single most important dimension of R2P. Under the ICISS, the state has the duty to take “all measures to prevent genocide which

\textsuperscript{78} ICISS, \textit{supra} note 2, ¶ 6.17.

\textsuperscript{79} \textit{Id.}, ¶ 2.29.
were within its power, but the ICISS also offered the more restrained suggestion that states must “employ all means reasonably available to them.” However, it is not exactly clear what states are supposed to do to prevent atrocities or whether there are any limitations in taking preventive measures. Further, under R2P, the international community is required to assist other states in exercising their responsibility towards their citizens. The extent of any assistance given to states is still an open question under the principle. The international community has the responsibility to take actions using peaceful means to protect populations when a state manifestly fails to protect its population from atrocities. However, there is no clear indication of what kind of peaceful measures should be taken and to what extent those measures should be taken. The responsibility to react also presents the question of what military actions should be carried-out in any intervention in cases where there are gross humanitarian violations. The responsibility to rebuild aspect of R2P also faces substantive questions as it is not clear from the ICISS report what should be rebuilt.

Further, there are issues regarding how R2P works procedurally across the responsibilities to prevent, react and rebuild. Under R2P, it is not clear who takes the decisions, where decisions happen or how decisions are made regarding the responsibilities to prevent, react and rebuild. Under the responsibility to prevent, it is not clear who should take the decision on how to assist states in carrying-out preventive measures. The responsibility to react raises questions as to who should take the decision on the use of peaceful means and how to use the peaceful means in assisting the host state. Other issues include who bears the responsibility to carry-out military intervention under the R2P principle, and how they carry-out such interventions. The ICISS report, as well as the World Summit Outcome Document,

80 Id., ¶¶ 4.23, 4.32.
acknowledges that the Security Council is the appropriate body to authorize military interventions. But there is an issue whether regional organizations and individual states also have the authority to undertake military intervention under R2P. Therefore, it is not clear who decides to authorize the use of military force. The responsibility to rebuild aspect of R2P also faces the question of who should be involved in rebuilding post-conflict settings and how rebuilding should occur.

Another critical issue with the R2P principle is the ability of the five permanent members of the Security Council to use their veto power. They may use their veto power against application of the R2P principle, even in cases involving gross human rights violations. While the RN2V concept is embedded in the ICISS report, the World Summit Outcome Document does not specifically address the RN2V concept. There are two main doubts regarding the RN2V’s goal of expanding the protection of civilians. First, RN2V implicitly favors military action over non-military responses to human rights abuses. Second, RN2V regulates the veto based on the seriousness of abuses rather than any characteristic of the proposed intervention. As a result, inappropriate interventions are too easy to authorize. The five permanent members of the UN will not agree to accept the RN2V for fear of lowering their political influence and power within the UN.

Further, there are many issues regarding the implementation of the R2P principle. For example, there is a question of how to implement preventive measures and how to monitor such implementation mechanisms. Also, there are no clear guidelines on how to implement international assistance in support of preventive measures in a host state. Effective preventive measures can also be highly intrusive, and therefore do not avoid the problem of states’
sensitivities about sovereignty. Developing countries have already expressed concern that any monitoring of R2P-related crimes might place a category of states under permanent surveillance. Further, the implementation of military intervention must be supported with adequate financial funding, as well as troop contributions. However, there are no mandatory rules which compel any member of the international community to support such decisions. There are also concerns regarding lack of intra-departmental and inter-agency coordination within the UN. The track record of collaboration and resource-sharing between the UN and regions should raise questions about the likelihood of fulfilling R2P-related aspirations.

1.4 Focus on State Practice and Roadmap for the Analysis

The R2P principle, its substantive content and implementation are surrounded by many disagreements. The various disagreements in the existing literature about the R2P principle are clear manifestations of the principle’s disputed place within contemporary international law. This thesis examines the disagreements and debates surrounding the R2P principle in order to provide more clarity from the perspective of international legal analysis. To achieve this task, the thesis focuses on state practice during humanitarian crises in the first decade after the inception of the R2P principle.

The thesis analyzes state practice in two basic ways: (1) by providing an overview of the application of the R2P principles since its emergence in 2001; and (2) by exploring more closely four case studies on the application of the R2P principle. The overview of the application of the R2P principle analyzes a range of R2P-related events that occurred after 2001, including humanitarian crises in: Darfur (2004), Kenya (2007), Burma (2008), Georgia (2008), Gaza (2008), Sri Lanka (2009), Libya (2011), Côte d’Ivoire (2011), and Syria (2013). The in-depth analysis of four case studies involving gross human rights violations provides the basis for
examining state practice in more detail: Darfur, Libya, Côte d’Ivoire, and Syria. The four case studies are important because they represent humanitarian crises in which the R2P principle featured prominently as an issue. In analyzing the case studies, the thesis will concentrate on state practice within the UN, but will also include, where relevant, state practice outside the UN. These four cases span the first decade of the R2P principle’s existence, beginning with the Darfur crisis and concluding with the on-going crisis in Syria. The case studies also include variations on key aspects of the R2P debate, with, for example, two case studies involving Security Council authorization of military force and two case studies marked by the Security Council’s failure to act.

Analyzing whether the R2P principle has changed international law must proceed through an analysis of customary international law because, to date, states have not expressly incorporated the R2P principle in treaty law. However, since many resolutions adopted by the Security Council include R2P language, analyzing the relationship between the R2P principle and the UN Charter is important. Even though the analysis of the status of the R2P principle in contemporary international law is based on customary international law, custom remains a controversial source of international law in many areas of international relations. Not only is there disagreement about the components of state practice and opinio juris, but there is also controversy about how custom-formation works. However, the thesis does not attempt to resolve these debates with customary international law as a source of international law. Instead, the thesis applies the traditional requirements for the formation of customary international law to case studies, and analyzes whether the R2P principle has changed the international law from what existed in the pre-R2P era.
Chapter 2 describes how the principles of sovereignty, non-intervention, international law on use of force, human rights, and international humanitarian law generally developed in the pre-R2P period and then converged in the post-Cold War period in controversial ways that led to the creation of the R2P principle. This chapter also analyzes the international legal background of humanitarian intervention against which the thesis will compare state practice after the inception of the R2P principle in 2001. The essential objective of this chapter is to describe international law on humanitarian intervention before publication of the ICISS report.

Chapter 3 discusses the emergence and evolution of the substantive content of the R2P principle from its inception through recent developments. It discusses in detail the articulation, content, and interpretation of the principle in both the ICISS report of 2001 and the 2005 World Summit Outcome Document.

Chapter 4 provides an overview of a number of prominent humanitarian crises that involved reference to, and uses of, the R2P principle from 2001 to 2013. This chapter also analyzes the UN’s efforts and activities to advance R2P. By analyzing key developments concerning the R2P principle, this chapter identifies the elements and problems associated with R2P. Ultimately, analyzing how R2P was used or not used since 2001 will help shed light on how state practice and UN activities have affected the relationship between the R2P principle and international law.

Chapters 5-8 of the thesis address state practice regarding the R2P principle, primarily within the UN, as a critical aspect of determining whether such practice has made the R2P principle part of international law. Chapters 5-8 examine in detail the Darfur, Libya, Côte d’Ivoire and Syria case studies, all of which involved arguments about, or application of, the R2P
principle. These four case studies have significantly, yet differently, contributed to the debate about the meaning and impact of the R2P principle in international law.

Chapter 9 synthesizes the analysis of the R2P principle in international law. The chapter highlights findings and conclusions from previous chapters, and integrates them to show that the R2P principle has not changed international law.
CHAPTER 2

HISTORY OF HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW

2.1 Introduction

The controversy about humanitarian intervention in international law that led to the development of R2P arose from the convergence of the principles of sovereignty and non-intervention; international law on use of force; human rights; and international humanitarian law. This chapter describes how all these areas of international law came together in the post-Cold War period to create the problems that led to the creation of the R2P principle. This chapter also analyzes the international legal background of humanitarian intervention against which the thesis will compare state practice after the inception of the R2P principle in 2001. The objective of this chapter is to analyze the status of international law on humanitarian intervention at the time of the introduction of the ICISS report.

2.2 Humanitarian Intervention and International Law Prior to the Establishment of the United Nations

This section discusses the historical development of the humanitarian intervention concept during the 17th, 18th and 19th centuries. The objective is to understand the emergence of the humanitarian intervention idea and the problems associated with it in international law before the establishment of the UN. More specifically, the analysis pays close attention to the development of doctrinal issues over time and the state practice associated with such developments. This section also analyzes whether humanitarian intervention was connected with any right or obligation in international law for a state to engage in the use of force.
2.2.1 Humanitarian Intervention and International Law from the 17th Century to the End of the 19th Century

The first historical phases of humanitarian intervention issues are dominated by the principles of sovereignty and non-intervention and the lack of any international legal rules restricting the use of force. One of the fundamental international legal principles is state sovereignty. State sovereignty is the foundation of inter-state relations. By the mid-17th century, sovereign equality was embedded in the Peace of Westphalia following the end of the Thirty Years’ War that had raged over Europe. As Glanville notes, by the 17th century, states enjoyed unfettered rights to self-government and non-intervention in internal affairs.1 In the Westphalian system, the ultimate holder of legal authority and power is the state.

The idea of state sovereignty developed with the rise of positivist thinking in the 17th century. Scholars in the 17th century, such as Jean Bodin and Thomas Hobbes, regarded sovereignty as a final political authority. The positivist idea that states need not account for their actions in their territories is most forcefully expressed by Hobbes, who regarded sovereignty as “absolute, unified, inalienable, and based upon a voluntary but irrevocable contract.”2 He argued that a state cannot harm a citizen, any more than a master could injure his slave.3 In Leviathan, Hobbes emphasized the immunity of the sovereign from legal accountability.4 According to Bodin, sovereignty is the highest, absolute, and continuous power over the citizens.5 Therefore, during the 17th century, sovereignty was regarded as absolute power within a state. According to

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3 Id.
4 Id.
Fodéré, intervention in internal affairs for any reason was illegal because it constituted a violation of the independence of states.⁶

Natural law ideas that developed during the 17th century took a different view that interventions into the affairs of others states could be justified and legitimate. During this period, interventions did happen and were based on Christian beliefs and the religious notion of the self-respect of man.⁷ Using such religious ideas, Thomas Aquinas stated well before the 17th century that a sovereign state has the right to intervene in the internal affairs of another state when that state greatly mistreats its subjects.⁸ These religious notions became the basis for natural law arguments justifying interventions into the affairs of sovereign states. According to Grotius, the law governing every human society should be informed by a principle of humanity.⁹ If a sovereign, although exercising his rights, ill-treats his own population, the right to intervene may be lawfully exercised.¹⁰ Under this perspective, a sovereign may take up arms to punish a nation which is guilty of an enormous transgression against natural law.

During this period, international law had no regulations governing when a state could resort to force, meaning states could go to war for any reason. Although the use of force was not restricted by any legal rules during this period, some jurists tried to identify limitations on the use of force by states. By the mid-17th century, Grotius recognized the principles of sovereignty and non-intervention and the lack of positive rules restricting a state’s rights to wage war. However, according to Grotius, states had a duty to observe the rules of warfare regardless of the

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⁷ Id. at 206.
⁸ Id. at 214.
¹⁰ Id.
reasons they were waging war. Grotius further advocated a just war theory, which prescribes when war is morally justifiable. Grotius explained the right conduct in war, or *jus in bello*, and under this notion, acts of war should be directed only towards enemy combatants, and not towards civilians. Grotius identified: (1) limits on war taken from the just war theory, and (2) a right of intervention concerning a state’s significant mistreatment of its people. Grotius managed to identify both authority and responsibility in his approach to sovereignty and war. However, Grotius’ approach was heavily dependent on natural law, which was not necessarily the same as the law of nations in the 17th century. During this period, the law of nations was still a fluid mixture of positivist and natural law thinking, yet, in state practice, the actual law of nations did not seem to reflect all the ideas of Grotius.

During the 19th century, there was a clear tension between sovereignty and the unlimited right to wage war, in which weaker states were vulnerable to the interests of more powerful states. There was a strong reflection of sovereignty and non-intervention in international law. Many liberals in new democracies sought to defend the non-intervention norm, expecting that it would discourage autocratic states from intervening to preserve monarchical rule. However, the “standard of civilization” was an exception for the strong adherence to sovereignty and non-intervention during this period. The imperialists believed that only civilized Western powers were sovereign, and the rest of the globe was considered uncivilized. As Strang states, the Western standard of civilization was used to evaluate non-Western polities. In its relations with

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11 *Id.* bk.3, ch.11.
12 *Id.* bk.3.
13 *Id.*
15 *Id.*
Western nationals, a civilized state had all the freedoms including the freedom of trade and the freedom of internal politics.\textsuperscript{16}

In addition, there was an agreement among some states that intervention might be used for debt collection and to save populations from suffering.\textsuperscript{17} Western states increasingly permitted interventions to protect Christian populations within the Ottoman Empire. In fact, the term “humanitarian intervention” appears to have been first introduced and used during this period.\textsuperscript{18} One of the first humanitarian interventions took place in 1827 when France, Britain, and Russia intervened in order to prevent massive bloodshed in Greece, then under Ottoman occupation.\textsuperscript{19} The 1827 Treaty of London signed between the three powers illustrated the specific humanitarian grounds on which they justified their intervention.\textsuperscript{20} Also, France intervened militarily in Syria in 1860 to protect the Christian population from slaughter at the hands of the Ottoman Empire.\textsuperscript{21} Though French troops stayed on and became an occupying force, this case was widely accepted as a case of humanitarian intervention to save the Christian population.\textsuperscript{22} Another example of intervention that was justified in the name of humanity was the Russian intervention in Bosnia, Herzegovina and Bulgaria in 1877, which were all under Ottoman rule.\textsuperscript{23} The Cuban invasion by the United States in 1898 was also justified on humanitarian grounds.\textsuperscript{24} Addressing the United States Congress in 1898, President William

\begin{thebibliography}{99}
\bibitem{16} \textit{Id.}.
\bibitem{17} \textit{Id.} at 86.
\bibitem{18} \textit{Id.} at 24.
\bibitem{20} \textsc{Simon Chesterman, Just War or Just Peace: Humanitarian Intervention and International Law} 29 (2001).
\bibitem{22} \textsc{Ian Brownlie, International Law and the Use of Force by States} 339, 340 (1963).
\bibitem{23} \textit{Abiew, supra} note 21, at 50.
\bibitem{24} \textit{Brownlie, supra} note 22, at 430.
\end{thebibliography}
McKinley emphasized that “the purpose of the intervention was in the name of humanity and to put an end to the barbarities, bloodshed, starvation and horrible miseries now existing there.”

These interventions made to protect civilian populations were important for later developments of international human rights law and international humanitarian laws as well. However, although these interventions were justified on humanitarian grounds, these justifications had no direct legal implications. Such interventions did not need a legal justification when states could use force for any reason, which makes the justifications essentially moral or political in nature. The 19th century, therefore, saw no real changes with states having the right in international law to use of force without restriction. Episodes of humanitarian intervention based largely on moral and political reasoning echoed the natural law thinking used by Grotius, but they did not really affect international law on sovereignty and the use of force or create any serious notion of universal human rights.

However, the law of armed conflict developed in the 19th century, which began the process of creating legal responsibilities on how states waged war. This era marked the start of a process for turning just war theory concepts of *jus in bello* into international law. Prior to the 1860s, customary rules of warfare were largely determined by monarchs and commanders, or agreed on between belligerents with a view to satisfy their desires and convenience. After witnessing the devastation at the Battle of Solferino in 1859, a decisive battle in the second Italian war of independence, Swiss social activist Henry Dunant published his book, *A Memory of Solferino*, in 1862. This book and its ideas led to the establishment of the International Committee of the Red Cross (ICRC) in Geneva. The ICRC led the development of the 1864

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25 ABIEW, *supra* note 21, at 54.
Geneva Convention, the first codified international treaty that covered the sick and wounded soldiers on the battlefield. The Geneva Convention contained ten articles designed to ensure that all soldiers wounded on the battlefield - regardless of the side they were on - were taken care of without distinction. The Convention provided rules to protect both the medical personnel and the medical facilities treating the wounded. The Geneva Convention centered on the needs of war victims. All these rules aimed to protect humanitarian values in the midst of wars.

The 1863 Lieber Code was another set of rules related to *jus in bello*. President Abraham Lincoln issued the Code as instructions for the Union armies fighting in the American Civil War and, as such, the Code did not have the status of a treaty. This Code was the first official, comprehensive codified regulations for military activities during armed conflict. The ICRC, Geneva Convention, and Lieber Code are important to the story of humanitarian intervention in international law because they mark the start of developments in international law on armed conflict, which later evolves into international humanitarian law.

Towards the end of the 19th century, the Hague Conventions were adopted stipulating the way wars should be conducted. The Hague Conventions of 1899 and 1907 are international treaties and declarations negotiated at two international peace conferences at The Hague in the Netherlands. The Hague Conventions of 1899 consisted of three main treaties and three additional declarations that addressed the rules governing wars on land. These documents included the rules governing the treatment of prisoners of war, the prohibition of using poisons,

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28 Id.
29 Id. at arts. 5, 7.
32 Id.
the prohibition of killing enemy combatants who have surrendered, the prohibition of looting towns or other places, and attacking or bombarding undefended towns or habitations. Along with the 1864 Geneva Convention, the Hague Conventions were among the first formal statements of the laws of war and war crimes in international law. These rules limited the state’s right in international law concerning how wars are fought.

These developments marked a change in international law on armed conflict that emphasized both authority to wage war and responsibility for how wars are fought. Nevertheless, disputes between the major powers began to increase towards the later part of the 19th century and the beginning of the 20th century. Among these were the outbreak of the 1884 Sino-French War, the 1898 Spanish-American War, the 1898-1900 joint great-power intervention in China, and the 1904 Russian-Japanese War. With these incidents, the relationship between sovereignty, non-intervention, the use of force, and conduct during war became more complicated and controversial.

2.2.2 Humanitarian Intervention and International Law in the First Half of the 20th Century

In contrast to the 19th century, where international legal changes occurred mainly with respect to the law of war, the 20th century witnessed more comprehensive changes in international law relevant to humanitarian intervention. The first half of the 20th century involved attempts to restrict the right of states to use force. Developing such restrictions created a doctrinal need for a legal justification for using force for humanitarian purposes, as opposed to formulating just a political or moral justification. However, during the first half of the 20th

33 Id.
century, neither international human rights law nor international humanitarian law developed enough to provide a legal basis for humanitarian intervention.

In practice, however, the efforts to restrict the use of force were not successful during this period. One such effort occurred in the Covenant of the League of Nations, which introduced a limited restriction on the sovereign right to resort to war.\textsuperscript{34} The Covenant required states to guarantee their people freedom of conscious and religion.\textsuperscript{35} It further prohibited the slave trade and required states to secure and maintain fair and human labor conditions.\textsuperscript{36} Especially with the development of minority rights, the Covenant sought to restrict sovereignty within a state’s own territory, which raised questions about the legitimacy of outside interference or intervention in a state’s affairs for humanitarian reasons associated with protecting certain populations from persecution.

However, the Covenant did not prohibit the use of force by states. Instead, members of the League agreed that, if any dispute was likely to lead to an armed conflict, they would submit the issue either to arbitration or to inquiry by the Council of the League. Further, they agreed that, in no case, would they resort to war until three months after either an award by the arbitrators or the report by the Council.\textsuperscript{37} Thus, the Covenant established procedural mechanisms to encourage states to have a “cooling off” period and to try to resolve disputes peacefully before commencing hostilities. Nevertheless, once the procedural safeguards laid down in the Covenant were exhausted, a state could still legally resort to war.

\textsuperscript{34} League of Nations Covenant arts. 1, 8, 11.
\textsuperscript{35} Id. art. 22.
\textsuperscript{36} Id.
\textsuperscript{37} Id. arts. 11, 12.
A different effort occurred in 1928, with the General Treaty for the Renunciation of War signed on August 27, 1928, commonly called the Kellogg-Briand Pact. This Pact went beyond the Covenant with respect to the use of force.\textsuperscript{38} This treaty represented the first attempt to outlaw war, as the parties condemned any recourse to war for the solution of international controversies and renounced war as an instrument of foreign policy in their relationships with each other.\textsuperscript{39} This prohibition bans a use of force undertaken for any reason except in self-defense, and this prohibition effectively banned using force for humanitarian purposes. The Kellogg-Briand Pact’s purpose was not really connected to humanitarian intervention as an issue because it aimed to regulate the use of force more comprehensively as a feature of international relations. However, the Pact had no impact on state behavior after its adoption. The Kellogg-Briand Pact failed to prevent the outbreak of World War II.

Although the Covenant and the Kellogg-Briand Pact both attempted to restrict a state’s right to use force, the use of force during the first half of the 20\textsuperscript{th} century revealed how the idea of humanitarian intervention could be severely abused. States using force during this period often appealed to humanitarian justifications, in particular to protect minority rights. Japan invaded Manchuria in September 1931, and initially characterized the intervention as necessary to protect Japanese nationals from violence carried out by Chinese military forces.\textsuperscript{40} Under this pretext, Japan declared a new state of Manchukuo in 1932 and embarked on a full-scale war with China, which dragged on until the end of World War II.\textsuperscript{41} Although Japan tried to rationalize its invasion on humanitarian reasons, the Japanese invasion of Manchuria was regarded as blatant
aggression. Similar events occurred in October 1935 when Italy invaded Ethiopia, and when Germany annexed Bohemia and Moravia in Czechoslovakia in March 1939. Like the Japanese in China, Italy and Germany rationalized their actions as humanitarian intervention. However, many saw such humanitarian justifications as abusive under both international law and natural law. This potential for abuse of humanitarian justifications in the use of force also threatened sovereignty and non-intervention in international law.

2.3 Humanitarian Intervention and International Law during the Cold War

The promulgation of the UN Charter following World War II created a set of principles and norms to govern the international system. There were major developments concerning humanitarian intervention during this period: international legal rules on the use of force (especially Articles 2(4) and 51 of the UN Charter), the robust authority given to the Security Council to authorize the use of force, the development of international human rights law, and the continued evolution of international humanitarian law. During the latter half of the 20th century, these changes raised a major international legal debate on whether states could use force when atrocities occurred in other states.

2.3.1 Doctrinal Developments

During the Cold War, tensions emerged in international law between strong support for maximalist interpretations of sovereignty and non-intervention, restrictive rules on the use of force, and the emergence of responsibilities under international human rights law and

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42 Id.
43 Id. at 61, 62.
44 Id. at 62.
international humanitarian law. This section examines these tensions in each of these areas of international law.

### 2.3.1.1 International Law on Sovereignty and Non-intervention

The complimentary principles of state sovereignty and non-intervention support the idea that each state is a sovereign actor capable of deciding its own policies, internal organization, and independence. These principles played a key role in the evolution of the international order, and there is no doubt that they became well-established in international law. During the Cold War, the most vigorous supporters of sovereignty and non-intervention policy were developing countries, mostly newly independent states emerging from colonial rule, often strongly supported by socialist states.

The principle of non-intervention is recognized in the UN Charter, which provides in Article 2(7) that:

[N]othing 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.45

State practice at the UN during the Cold War demonstrated support for a maximalist interpretation of the UN Charter's prohibition of intervention. This view was reflected in UN General Assembly resolutions, such as the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,

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45 U.N. Charter art. 2, para. 7.
adopted in 1965. This declaration reads in part that “no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any state.”\textsuperscript{46} This general prohibition of intervention was reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the UN Charter adopted by the UN General Assembly in 1970.\textsuperscript{47}

2.3.1.2 International Law on the Use of Force

The principles of sovereignty and non-intervention in the internal affairs of states are directly linked to the question of the use of force. The restrictions on the use of force in international law have an influence on the legality and legitimacy of humanitarian intervention. The prohibition of the threat or use of force was laid down in Article 2(4) of the UN Charter, which provides that:

\begin{quote}
[A]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.\textsuperscript{48}
\end{quote}

Article 51 of the UN Charter provides for the right of states to use force in self-defense, including collective self-defense, in response to an armed attack:

\begin{quote}
[N]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be
\end{quote}

\textsuperscript{48} U.N. Charter art. 2, para.4.
immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.\textsuperscript{49}

Further, Chapter VII of the UN Charter empowered the Security Council to authorize UN members to use force to address a threat to international peace and security.

The presence of these rules in the UN Charter creates the legal necessity for an exception to the prohibition on the use of force for military action for humanitarian purposes. As this chapter previously described, the absence of effective restrictions on the use of force in international law before World War II meant that a legal justification for using force for humanitarian purposes was not required under treaty and customary international law. Under the Charter, the clearest legal justification for using force for humanitarian purposes would come from a decision of the Security Council.

Beyond that, controversies emerged, for example, about the precise scope of the prohibition of the use of force under the UN Charter. The question is whether the language of Article 2(4) should be construed as a strict prohibition, or whether unilateral use of force without Security Council authorization should be allowed, especially when the goal is to protect human rights and purposes not otherwise inconsistent with the objectives of the UN. This debate focused on whether states with genuine humanitarian motives can act collectively to protect civilian populations without violating Article 2(4) in cases where the Security Council fails to take an effective action in protecting civilian populations from mass atrocities.

\textsuperscript{49} Id. at art. 51.
Some scholars interpret the UN Charter to permit humanitarian intervention without Security Council approval. Tesón states that humanitarian intervention supports the overall purpose of the UN Charter because the preservation of human rights is one of the Charter’s primary objectives.50 He also states that humanitarian intervention does not violate Article 2(4) of the UN Charter because such an intervention impairs neither the territorial integrity nor the political independence of the targeted state.51 Mackinlay and Chopra argue that, in cases where UN approval of the use of military force is extremely difficult to obtain, humanitarian intervention should be legal.52 Fonteyne states that humanitarian intervention remains legal under the UN Charter as the drafters of the UN Charter did not explicitly ban humanitarian intervention, although they had the opportunity to do so.53 Other scholars, such as Hathaway and Shapiro, argue that Article 2(4) permits individual and collective self-defense, but bars all other forms of intervention without express Security Council authorization.54 For Koh, this “per se illegal” rule is plainly overbroad. Koh does not believe humanitarian intervention is illegal under international law.55 For Koh, a nation could lawfully use or threaten the use of force for genuinely humanitarian purposes, even without Security Council authorization. However, commentators advocating the illegality of humanitarian intervention argue that state practice does not support the legality of humanitarian intervention.56 They argue that states that intervened in the past usually did so for their own political gain, not with any humanitarian

51 Id.
53 Fonteyne, supra note 6, at 258.
55 Id.
motives. According to Brownlie, the Security Council has a monopoly on the use of force except in cases of self-defense as specified in Article 51 of the UN Charter.

2.3.1.3 International Law on Human Rights

Under the UN Charter, the Security Council can authorize the use of force to address grave violations of human rights when the Security Council decides that such violations represent a threat to international peace and security. However, another debate emerged about whether the development of international human rights law provided a legal justification for use of force for humanitarian purposes in the absence of Security Council authorization. Human rights qualify and limit the principles of sovereignty and non-intervention by (a) obligating states to respect the rights of individuals, and (b) giving states an interest in how other states treat their citizens. Therefore, human rights create the responsibility to go with the authority the principle of sovereignty creates. The UN Charter provided initial principles for the protection of human rights. The preamble of the Charter re-affirms faith in fundamental human rights, in the dignity and worth of human person, and in the equal rights of men and women. One of the purposes of the UN Charter is “promoting and encouraging respect for human rights.” In accordance with Article 55, UN Member States reaffirm a commitment to promoting universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of any kind. Further, under Article 56 of the UN Charter, all members of the UN “pledge themselves to take

58 BROWNLIE, *supra* note 22, at 342.
59 U.N. Charter pmbl.
60 Id. at art. 55.
joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55."

International legal protection for human rights has undergone dramatic development since the founding of the UN in 1945. The international human rights movement was strengthened on December 10, 1948, when the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR). Adoption of the UDHR further highlighted the need to respect the fundamental human rights of every person. The preamble of UDHR emphasizes that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The UDHR includes the complete range of civil and political rights, as well as economic, social and cultural rights. It is generally agreed that many provisions of the UDHR gained formal legal force by becoming part of customary international law.

In addition to the UDHR, other international instruments were adopted which aimed to protect human rights. One such effort was the International Covenant on Civil and Political Rights (ICCPR), which was adopted in 1966 by the UN General Assembly and entered into force in 1976. This Covenant sets out, in much greater detail than the UDHR, a variety of rights and freedoms. It imposes obligations on each state party to respect and ensure to all individuals, within its territory and subject to its jurisdiction, the rights recognized in the Covenant without distinction of any kind. Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the UN General Assembly in 1966 and entered into force in

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61 Id. at art. 56.
63 Id. at pmbl.
65 Id. at art. 2.
1976. It elaborates upon most of the economic, social and cultural rights provided for under the UDHR. These two Covenants, together with the UDHR, constitute the International Bill of Human Rights.

Apart from these instruments, there are also many treaties and declarations clarifying specific obligations pertaining to particular human rights. These include, among others, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In addition, there are also regional human rights systems, which include the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples Rights.

Importantly, some of these human rights are considered as having gained the status of customary international law, and some fundamental human rights are recognized as *erga omnes* norms, or obligations owed to the international community as a whole. Therefore, a state may no longer plead the principles of sovereignty and non-intervention as a bar to intervention by the international community to protect those human rights. Some commentators argue that, when a government commits egregious human rights abuses against its citizens, and when international
organizations fail to prevent these abuses, the international community has the right of humanitarian intervention to address those abuses.\footnote{See generally Richard B. Lillich, \textit{Forcible Self-Help by States to Protect Human Rights}, 53 IOWA L. REV. 325 (1967).}

This idea of contingent sovereignty suggests that statehood itself is legally dependent on acceptable government behavior, and the failure of a government to meet certain minimum standards invalidates its claim to non-interference. Therefore, these claims suggest that, under international law, a state, group of states or an organization can use force against another state when a state abuses its sovereign power and violates human rights. However, international law does not generally impose obligations on states to undertake humanitarian interventions, even in cases of large-scale violations of human rights. Nevertheless, the UN Charter’s inclusion of human rights provides the legal counterweight to the principles of sovereignty and the prohibition on the use of force found in the Charter. The other legal counterweight emerges from developments in international humanitarian law.

\textbf{2.3.1.4 International Humanitarian Law}

Similar to the development of human rights law, international humanitarian law developed more significantly in the post-World War II period, including for non-international armed conflicts, which linked with the emergence of international human rights law, in supporting the need for humanitarian intervention in certain circumstances. The development of international humanitarian law contributed to advocacy for humanitarian intervention in contexts not involving Security Council authorization.

One of the main developments during the Cold War was the 1948 Convention on Prevention and Punishment of the Crime of Genocide, which set limits on behavior during an
armed conflict. Another major development occurred with the adoption of the four Geneva
Conventions of 1949: the Geneva Convention for the Amelioration of the Condition of the
Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of
the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; the
Geneva Convention Relative to the Treatment of Prisoners of War; and the Geneva Convention
Relative to the Protection of Civilian Persons in Time of War. The four Geneva Conventions
were supplemented by two further agreements: the Additional Protocols of 1977 relating to the
protection of victims of armed conflicts. Additional Protocol I expands protection for the civilian
population and military and civilian medical workers in international armed conflicts. Additional
Protocol II extends similar but more limited protections during non-international armed conflicts.

The development of international humanitarian law during the Cold War connected with
the emergence of human rights law to support a claim that international law permitted
humanitarian intervention in response to large-scale atrocities, even in the absence of a Security
Council resolution. In other words, the convergence of international humanitarian law and
international human rights law produced, in the limited context of large-scale atrocities, an
international legal right to resort to force to stop the atrocities from continuing. This right acts as
a customary exception to the Charter prohibition on the use of force not dependent on the right of
self-defense or an authorization from the Security Council. Under these claims, substantively the
violations have to be large-scale and, procedurally, the use of force has to be the last resort and is
subject to all rules regulating the use of military force.

These arguments in favor of humanitarian intervention generated controversy. Often the
right of humanitarian intervention was criticized as an attempt to legitimize political interference
Many but not all states rejected the idea of humanitarian intervention, and international legal scholars disagreed over the legality of humanitarian intervention. While some scholars recognized the lawfulness of the right to humanitarian intervention, others maintained that unilateral humanitarian intervention violates Article 2(4) of the UN Charter and the principles of state sovereignty and non-intervention. Some who wished to support humanitarian intervention to halt mass atrocities and protect civilians worried about the consequences of authorizing a right to engage in humanitarian intervention as a matter of law.

2.3.2 State Practice

The legality of the use of force for humanitarian purposes in the absence of Security Council action arose on a number of occasions during the Cold War. India gained independence from Great Britain in 1947. As Great Britain withdrew from India, two separate nations came into existence: India and Pakistan. Pakistan was also geographically divided into East and West. In 1970, West Pakistan gained political and economic control of East Pakistan. This development created unrest in East Pakistan. In the meantime, general elections were held in Pakistan in December 1970 in which the Awami League, an opposition party in East Pakistan, won a majority of seats in the National Assembly and demanded more autonomy for the East. In opposition to the outcome of this election, the central government of Pakistan postponed the convening of the National Assembly indefinitely. As unrest in East Pakistan escalated, Mujibur

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70 Verwey, supra note 56, at 357.
71 Id.
74 Id.
75 Id.
Rahman, the leader of the Awami League, issued a Declaration of Emancipation on March 23, 1971.\textsuperscript{76}

On March 25, 1971, Pakistani government forces attacked East Pakistan and began the indiscriminate killing of unarmed civilians, in particular the minority Hindu population.\textsuperscript{77} As the crisis worsened, relations between India and Pakistan became tense. On December 3, 1971, India attacked Pakistan and formally recognized East Pakistan as the independent state of Bangladesh on December 6, 1971.\textsuperscript{78} India initially justified the intervention into East Pakistan on humanitarian grounds.\textsuperscript{79} The Indian representative to the UN stated that India had pure motives and its intention was to rescue the people in East Pakistan from their suffering.\textsuperscript{80} This claim was rejected by a number of states, including the United States, Argentina, Tunisia, China, and Saudi Arabia.\textsuperscript{81} These countries argued that principles of sovereignty and non-interference should take precedence and that India had no right to meddle in what they viewed as an internal matter.\textsuperscript{82} In response, the Indian delegation later justified its action as lawful self-defense.\textsuperscript{83}

Some commentators argued that India’s change of justification from humanitarian to self-defense meant India acknowledged that humanitarian intervention was not legal.\textsuperscript{84} Frank and Rodley did not consider the Bangladesh case one that constitutes the basis for a definable, workable, or desirable new rule of international law which, in the future, would make certain

\begin{flushright}
76 Id.
79 Country Guide: Pakistan, supra note 73.
81 Id.
\end{flushright}
kinds of military interventions permissible.\textsuperscript{85} State practice concerning India’s military intervention did not support the idea that international law permitted the use of force for the purpose of humanitarian intervention.

Vietnam’s military intervention in Cambodia and overthrow of the Pol Pot regime in 1979 was another case initially justified on humanitarian grounds. The Communist Party of Kampuchea (Khmer Rouge) took control of Cambodia in April 1975.\textsuperscript{86} In the process of restructuring Cambodia, and in an attempt to wipe out foreign influence, the Khmer Rouge killed millions of Cambodians.\textsuperscript{87} A special rapporteur for the UN concluded that the Cambodian crisis was the worst violation of human rights since the Nazi era.\textsuperscript{88} The war between Vietnam and Cambodia began with clashes along the land and sea borders of the two countries. After more mass killings by the Khmer Rouge, Vietnam invaded Cambodia on December 25, 1978, and took control of Phnom Penh on January 7, 1979.\textsuperscript{89} Later, Vietnam justified its invasion as self-defense from Cambodian attacks that started from a border dispute between the two nations.\textsuperscript{90}

However, international reaction to the invasion of Cambodia by Vietnam was hostile to Vietnam’s claimed justifications. The UN General Assembly called for the withdrawal of all foreign forces from Cambodia and accepted the credentials of the Khmer Rouge delegation at the UN, rather than the credentials from the Vietnam-supported People’s Republic of Kampuchea.\textsuperscript{91} The UN also did not agree with Vietnam’s claim of self-defense. As Chesterman notes,

\textsuperscript{86} \textit{Khmer Rouge History}, CAMBODIA TRIBUNAL MONITOR, \url{http://www.cambodiatribunal.org/history/cambodian-history/khmer-rouge-history/} (last visited Apr. 9, 2014).
\textsuperscript{89} Khmer Rouge History, \textit{supra} note 86.
\textsuperscript{90} Steven R. Ratner, \textit{The Cambodia Settlement Agreements}, 87 \textit{Am. J. Int’l L.} 1, 3 (1993).
Vietnam’s concern with Cambodia was only partly humanitarian in origin. This episode also provides little evidence that state practice supported the idea that international law recognized a right to use force for humanitarian purposes.

A claim of humanitarian intervention was initially raised by Tanzania in 1979 when it attacked Uganda and overthrew Idi Amin. Amin’s regime committed mass atrocities and human rights violations against civilians in Uganda during its eight years of power from 1971 to 1979.92 The Ugandan regime killed thousands of civilians, and episodes of rape, torture, and other inhuman and degrading violence against civilians was discovered and reported by Amnesty International as evidence of the brutality of Amin’s regime.93 Amin’s regime not only massacred its own civilians, but also attacked neighboring Tanzania. In October 1978, Ugandan troops invaded Tanzania and occupied the Kagera salient, an area located between Uganda and Tanzania that borders the Kagera River.94 In response to this act, on November 15, 1979, Tanzania launched an offensive against Uganda and toppled Amin.95 Tanzania later justified its intervention as self-defense from Ugandan aggression.96 After the intervention, the Tanzanian leader stated that the war between Tanzania and Uganda was caused by the Ugandan army’s aggression against Tanzania, and there was no other cause.97 Except for a few countries, such as Kenya, Libya, Nigeria, and Sudan, the Ugandan intervention by Tanzania was tolerated by other states.98 This intervention was not discussed in any UN organs. The Secretary General was involved only at a later stage in an effort to mediate a ceasefire. The Organization for African

94 Teson, supra note 50, at 179.
95 Id. at 180.
97 AREND & BECK, supra note 84, at 124.
98 MURPHY, supra note 40, at 106.
Unity (OAU), despite non-intervention provisions in the OAU Charter, never condemned the intervention. 99

Tanzania’s intervention in Uganda is widely perceived as producing a desirable result and as a victory for human rights. According to Tesón, humanitarian considerations were prominent in this intervention and, in general, Tanzania’s action was accepted by the international community. 100 Tesón concluded that it was a genuine instance of humanitarian intervention. However, some commentators, like Ronzitti, rejected the claim that Tanzania was acting legally. 101 Similarly, Burrows stated that the Tanzanian intervention was illegal under international law. 102 She stated that Tanzania’s action would have been legal only if Tanzania had obtained Security Council approval. 103 In terms of state practice, Tanzania’s actions fall somewhere between its humanitarian and self-defense justifications. Chesterman suggested that it can be said with confidence only that “the action was not condemned,” and he concluded that “there is little evidence of opinio juris beyond an affirmation of the right of self-defense.” 104

As seen from these cases, the debates focused on humanitarian intervention and the use of force. The cases did not involve atrocity or conflict prevention efforts or post-conflict rebuilding strategies. The international community did not accept humanitarian intervention as a justification for the unilateral use of force with respect to these episodes. State practice illustrates great reluctance on the part of states during the Cold War to defend the use of force on the basis of humanitarian intervention. This situation makes sense analytically because international

99 Id. at 106.
100 Tesón, supra note 50, at 165.
103 Id.
104 Chesterman, supra note 20, at 79.
human rights law and international humanitarian law were still developing in this period, making it legally risky to claim that international law clearly permitted the use of force for humanitarian purposes. Thus, humanitarian intervention as an exception to the prohibition on the use of force was not widely supported by state practice.

2.4 Humanitarian Intervention and International Law in the Early Post-Cold War Period

There were many political changes during the early post-Cold War period. The Soviet Union disappeared, the bi-polar superpower competition ended, and East-West ideological rivalry vanished. The political space created by the end of the Cold War created more room for the development of international human rights law and international humanitarian law. Developments in the post-Cold War era concerning humanitarian intervention suggest a change in attitudes, specifically in increasing challenges to state sovereignty and the principle of non-intervention. International humanitarian law also developed during this period, with the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as creation of the International Criminal Court. The Security Council was actively engaged in taking actions in various crises and, in fact, began to authorize a number of interventions for humanitarian purposes, such as in Haiti and Somalia. With these developments, the dynamics in international law between sovereignty and non-intervention, the prohibition on the use of force, human rights, and humanitarian law became more volatile and led to controversies in the 1990s, especially with respect to crises in Rwanda and Kosovo that led the international community to look for a new strategy to guide international responses to atrocities.
2.4.1 Rwanda

In the early 1990s, the world was confronted with a serious humanitarian situation in Rwanda. Although the world witnessed dire human rights and humanitarian violations in Rwanda, not one state responded to the crisis in a timely and effective manner. There was great reluctance among UN Member States to respond to the Rwandan crisis. This reluctance to respond among the Member States on the Security Council led to a failure of the international community to react effectively to the Rwandan crisis. The Rwandan situation raised many questions, including who bears the responsibility to protect innocent victims of humanitarian atrocities, such as those in the Rwandan genocide. Although the UN had some responsibility to respond to the crisis, the UN was powerless without state desire or interest to take any action. Edward Luck, the Special Advisor to the UN Secretary General on R2P, stated later that “the genocide in Rwanda in 1994 was a very important piece of R2P.” Thus, in order to understand the significance of the Rwandan crisis in the development of the R2P principle, it is important to analyze the Rwandan conflict and the various responses of the international community.

When the 1990s began, the Rwandan government was led by members of the Hutu tribe. The opposition Rwandan Patriotic Front (RPF), a Ugandan-based rebel group composed mostly of Tutsi refugees, invaded northern Rwanda on October 1, 1990, in an attempt to defeat the Hutu-led government. This power struggle exacerbated ethnic tensions in the country.

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105 STEVEN HOOK & JOHN SPANIER, AMERICAN FOREIGN POLICY SINCE WORLD WAR II 262 (2007).
Continuing ethnic strife resulted in the Tutsi rebels’ displacing and killing large numbers of Hutus in the north, while Tutsis were killed by Hutus in the south.\textsuperscript{109}

There were plenty of early warnings of these mass atrocities. On March 27, 1992, the Belgian Ambassador in Kigali, Johan Swinner, warned the Belgian government that a secret group of Hutus was planning the extermination of all Tutsis in Rwanda with the goal of resolving, once and for all, the ethnic problem.\textsuperscript{110} Further, in a press conference organized by the Belgian Senate, Professor Filip Reyntjens explained the ways in which the Hutu death squads were organized.\textsuperscript{111} By 1993, the year before the massacre took place, many human rights organizations were actively reporting on Rwanda. In March 1993, for example, Human Rights Watch and the International Federation of Human Rights issued a report of mass killings in Rwanda.\textsuperscript{112} Further, after his mission to Rwanda in April 1993, B. W. Ndiaye, the UN Special Rapporteur on Summary, Arbitrary, and Extrajudicial Executions, informed the UN Human Rights Commission that the massacres of Tutsis constituted genocide under the Genocide Convention.\textsuperscript{113}

As the violence in Rwanda intensified, the international community took some efforts to prevent further escalation of atrocities. The international community pressed the Hutu-led government of Juvénal Habyarimana to sign the Arusha Accords in 1993, which led to a ceasefire and were intended to end the Rwandan conflict.\textsuperscript{114} In order to implement the Arusha Accords between the Rwandan government and the RPF, the UN established the United Nations

\textsuperscript{109} Id.
\textsuperscript{110} FREDERIK GRUNFELD & ANKE HUIJBOOM, THE FAILURE TO PREVENT GENOCIDE IN RWANDA: THE ROLE OF BYSTANDERS 69 (2007).
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{114} Id.
Assistance Mission for Rwanda (UNAMIR) on October 5, 1993, through Security Council Resolution 872. Its mandate included:

[E]nsuring the security of the capital city of Kigali; monitoring the ceasefire agreement, including establishment of an expanded demilitarized zone and demobilization procedures; monitoring the security situation during the final period of the transitional Government's mandate leading up to elections; assisting with mine-clearance; and assisting in the coordination of humanitarian assistance activities in conjunction with relief operations.

UNAMIR’s authorized strength was 2,500 personnel, but it took approximately five months for the mission to reach that level. From the beginning of the mission, UNAMIR Commander General Romeo Dallaire argued that UNAMIR required heavy weapons and a minimum of 4,500 well-trained and well-supplied troops. Although the capabilities for preventing mass atrocities were severely limited, General Dallaire further insisted on having a clear mandate to use force to stop the killing of civilians. However, the United States and the United Kingdom were opposed to the authorization of 4,500 troops.

The assassination of Habyarimana in April 1994 set off a violent reaction, during which Hutu groups conducted mass killings of Tutsis. These mass killings had reportedly been planned by members of the Hutu tribe, many of whom occupied positions at top levels of the Hutu-led government. These killings of Tutsis were supported and coordinated by the national

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116 Id.
119 Id.
120 Rwanda Profile, supra note 108.
121 Rwanda: A Brief History of the Country, supra note 106.
government, as well as by local military, civil officials, and the mass media.122 According to Human Rights Watch, this genocidal slaughter of Tutsis by Hutus took tens of thousands of lives while displacing many more Rwandans.123

With this genocidal slaughter, the international community felt the need to react to stop such atrocities. Considering the scale of violence, some Member States of the UN expressed the belief that UNAMIR forces lacked the strength to stop the mass atrocities. However, the United States and some other states were not willing to send their own troops.124 The United States was not willing to change UNAMIR’s mandate, and it assumed that the troop-contributing nations had only committed to a peacekeeping mission.125 In fact, UNAMIR was weakened from the outset by resistance from some Member States on the Security Council. Rather than acceding to the request made by General Dallaire for increased troop support in the wake of the massacres, the Security Council decided to reduce UNAMIR to a token force of 270 troops.126 Although the Secretary General backed a plan which called for the deployment of 5,500 soldiers to Rwanda, it was opposed by some Member States.127 Further, after the killing of 10 Belgian soldiers, Belgium withdrew its contingent.128

Only on May 17, 1994, was the Security Council able to adopt Resolution 918, which imposed an arms embargo against the Rwandan government and authorized UNAMIR’s expansion to include: (a) actions to secure the safety of displaced persons and refugees; and (b)

123 Id.
125 Id.
ongoing security during the distribution of humanitarian aid. On June 8, 1994, the Security Council adopted Resolution 925, which noted that acts constituting genocide had been carried out in Rwanda. On June 22, 1994, the Security Council adopted Resolution 929 and authorized France to take control of the Rwandan situation with a view towards improving security and protecting displaced persons, refugees, and civilians at risk. However, France did not intervene until the latter stages of the mass killings, which ended primarily because of the RPF’s military victory. The French were not willing to risk their soldiers. In fact, at the height of the crisis, the Security Council ordered UNAMIR to withdraw, rather than sending additional troops to stop the genocide.

The main reason for this decision was that some Member States felt they had no core national interests at stake in Rwanda. Nor did states believe they had any obligation under international law to respond. The reluctance of some Member States, in particular, the United States and the United Kingdom, to send a stronger UNAMIR force created the impression that nothing could be done effectively. This unwillingness of states to react with military force in Rwanda is a clear indication that international law imposes no such obligation. Despite massive atrocities in Rwanda, neither the Security Council nor individual states seemed interested in using force for humanitarian purposes.

Much criticism was levied at the exceedingly slow and tardy actions of the international community in Rwanda. Wheeler argued that “the point is not that lives were saved, but that more lives could have been saved had France selected military means that were appropriate to its
humanitarian claims.” 134 However, referring to controversies concerning humanitarian intervention during the Cold War, Finnemore stated that “no significant constituency was claiming that intervention in Rwanda for humanitarian purposes would have been illegitimate or an illegal breach of sovereignty.” 135 Finnemore emphasized that Rwanda caused a shift in the burden to act. 136 According to Finnemore, after Rwanda, the international community understood that it had not just a right to intervene, but a duty to intervene. 137 However, there was no obligation for states to intervene and, thus, no legal duty existed to intervene, only a moral duty. The Rwandan crisis never tested the question whether states have a right under international law to use force for humanitarian reasons without Security Council authorization.

Following the end of the main killings in 1994, UNAMIR was faced with many challenges to rebuild Rwanda, maintain a fragile peace, stabilize the government, and most importantly, care for displaced persons in camps within Rwanda, Zaire, Tanzania, Burundi, and Uganda. 138 The large camps around Lake Kivu in the north-west of Rwanda were holding hundreds of thousands of displaced civilians, as well as creating enormous security, health, and ecological problems. 139 Following the genocide in Rwanda, the entire UN system was prepared to help stabilize the situation. The UN took a number of efforts to protect human rights and rebuild Rwanda's judicial system. The UN undertook refugee-oriented humanitarian assistance programs and the establishment of the International Criminal Tribunal for Rwanda began to

134 WHEELER, supra note 83, at 239.
135 FINNEMORE, supra note 82, at 79.
136 Id.
137 Id. at 80.
138 Id.
prosecute alleged perpetrators of the genocide.\textsuperscript{140} The UN also entrusted that its peacekeepers worked to deliver security, mine clearance, refugees settlement and infrastructure rebuilding.\textsuperscript{141} However, when the new Rwandan government declared that UNAMIR had failed in its mission, the Security Council withdrew UNAMIR’s mandate on March 8, 1996.\textsuperscript{142}

Given the UN and international community’s failure to respond to the Rwandan crisis in a timely and adequate manner, Secretary General Kofi Annan stated that, although both human rights and sovereignty should always enjoy support, in places where crimes against humanity occur no legal principle should ever serve as a shield.\textsuperscript{143} However, he added, when all peaceful measures were exhausted, the Security Council had a duty to act to protect civilians from mass atrocities.\textsuperscript{144} The UN appointed an Independent Inquiry to assess the UN’s role in the Rwandan crisis and found that the UN had failed to protect the Rwandans from genocide.\textsuperscript{145} It noted that the lack of capacity, including resources for the UN peacekeepers, to face these challenges, as well as an inadequate mandate for UNAMIR, were primary reasons for the failure.\textsuperscript{146} The UN and other international actors failed to recognize and respond to early warning signs. Therefore, the failure of the international community to respond effectively to the Rwandan crisis became a normative assertion about the moral responsibility of the international community to protect civilian populations. However, this moral duty neither justifies humanitarian intervention nor imposes any legal obligation on states to act. Therefore, such a moral duty does not change international law on responding to humanitarian crises.

\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{144} Id.
\textsuperscript{146} Id.
2.4.2 Kosovo

The UN and the international community were criticized for their collective failure to take timely and adequate actions to stop mass killings in Rwanda. The international community was then criticized for the use of unauthorized, excessive force in Kosovo. In the 1990s, in particular, after the international community’s failure in Rwanda, a general acceptance emerged among some UN Member States regarding a “right to intervene” in order to protect civilian populations from mass atrocities. However, this right was not controversial if the Security Council authorized intervention, and whether the right existed outside Security Council authorization remained controversial. Some Member States on the Security Council accepted the idea that they had a responsibility to protect human rights.147 However, the international community realized the perilous nature of this right to intervene when they faced the crisis in Kosovo. The unauthorized NATO intervention in Kosovo heightened the discussion on the right to humanitarian intervention and led the international community to commence a review process which, in turn, led to the creation of the R2P principle.

The Kosovo conflict lasted from 1998 until 1999. It was fought by the Federal Republic of Yugoslavia forces, the Kosovo Albanian rebel group known as the Kosovo Liberation Army (KLA), and NATO.148 After its formation, the KLA began its first campaign in 1995 by attacking Serbian law enforcement in Kosovo. In June 1996, the KLA accepted responsibility for targeting the Kosovo police.149 The KLA continued its attack against Kosovo law enforcement

personnel. In 1998, attacks targeting Yugoslav authorities in Kosovo resulted in the increased presence of Serb paramilitaries and regular forces.¹⁵⁰

As the conflict intensified, the international community tried to take some preventive efforts to stop mass atrocities. The Security Council adopted Resolution 1160 on March 31, 1998, imposing an arms embargo and economic sanctions on Kosovo.¹⁵¹ The Member States also reached a broad agreement that the situation in Kosovo constituted a threat to international peace and security. However, China abstained on the resolution, stating that the Kosovo crisis should be treated as an internal matter and that the international community should not intervene.¹⁵² The Security Council then adopted Resolution 1199 on September 23, 1998, and called for the immediate withdrawal of Serbian forces from Kosovo.¹⁵³ Under Resolution 1199, which was voted on under Chapter VII of the UN Charter, the Security Council emphasized the deteriorating situation in Kosovo as a threat to international peace and security.¹⁵⁴ The resolution demanded that the Milosevic regime and Kosovo Albanians cease hostilities in order to avert a humanitarian catastrophe.¹⁵⁵

The United States extended its full support to this resolution.¹⁵⁶ However, Russia and China were reluctant to vote for Resolution 1199.¹⁵⁷ Russia was categorically against the use of force by NATO to stop the atrocities against the Kosovo Albanians. Sergey Lavrov, the Russian Ambassador to the UN, stated that the Security Council should not authorize military force or sanctions, which would destabilize the Balkans region and which would also result in long-term

¹⁵⁰ Id.
¹⁵⁴ Id.
¹⁵⁵ Id.
adverse consequences throughout Europe.\textsuperscript{158} China did not believe that the situation in Kosovo was a threat to international peace and security. The Chinese Ambassador argued that Resolution 1199 would adversely affect the possibilities for a peaceful settlement of the conflict.\textsuperscript{159} Speaking later at the UN General Assembly, Chinese Ambassador Qin Hu Asun condemned the NATO air campaign, stating it “amounts to a blatant violation of the UN Charter and of the accepted norms of international law.”\textsuperscript{160}

By end of March 1999, Yugoslav government forces began a campaign of retribution targeting KLA sympathizers as well as political opponents in a drive which left thousands of combatants and civilians dead and produced hundreds of thousands of refugees.\textsuperscript{161} After the failure of attempted diplomatic solutions, some states felt the need to react with more serious measures. NATO intervened and claimed Kosovo was a humanitarian war.\textsuperscript{162} However, Yugoslav forces continued to commit atrocities.\textsuperscript{163} In order to stop the widespread violence, on March 24, 1999, NATO launched Operation Allied Force, an air campaign that targeted Serb military positions and Serb leadership in Belgrade. The NATO-led bombings lasted until June 11, 1999, when Milosevic agreed to “end all violence in Kosovo, withdraw all Serb forces, and submit to an international presence under UN auspices.”\textsuperscript{164} The war ended with the Kumanovo

\textsuperscript{159} Id. at 3.
\textsuperscript{160} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Loomis & Rice, supra note133, at 78.
Treaty as Yugoslav forces agreed to withdraw from Kosovo in order to make way for an international presence.\textsuperscript{165}

Following the NATO bombing of Kosovo, thousands of Albanian refugees returned. Therefore, after the NATO intervention, the international community realized the need to rebuild Kosovo and, in 1999, by adopting Resolution 1244, the Security Council took measures to establish the UN Interim Administration Mission in Kosovo (UNMIK). The Mission was mandated to help ensure conditions for a peaceful and normal life for all inhabitants of Kosovo and advance regional stability in the Western Balkans. Among its priorities, the Mission aimed to promote security, stability and respect for human rights in Kosovo and in the region. In furtherance of its goals, UNMIK continued its constructive engagement with Pristina and Belgrade, other communities in Kosovo, as well as regional and international actors. Under UNMIK, the UN Human Settlements Program (UN Habitat) resumed the daunting task of rebuilding the municipal governments in the region, establishing who owns which property in the process. Kosovo declared independence on February 17, 2008, and its sovereignty has been recognized by more than 100 UN Member States.

Nevertheless, a report by Amnesty International asserts that the UNMIK failed to rebuild Kosovo.\textsuperscript{166} According to Amnesty International, UNMIK failed to comply with international legal standards concerning the right to fair trial.\textsuperscript{167} Amnesty International reported that “hundreds of cases of war crimes, crimes against humanity, including rapes and enforced disappearances, as well as other inter-ethnic crimes, remain unresolved seven years after the UN began its efforts to rebuild the Kosovo judicial system. Hundreds of cases have been closed, for


\textsuperscript{166} Amnesty Int’l, Justice Failed in Kosovo, AI Index EUR 70/001/2008 (Jan. 30, 2008).

\textsuperscript{167} \textit{Id.}
want of evidence that was neither promptly nor effectively gathered. Relatives of missing people report that they have been interviewed too many times by international police and prosecutors new to their case, yet no progress was ever made.”

Clearly, Kosovo raised the issue of humanitarian intervention in the Balkans. The bombing campaign against Milosevic and Serbia in support of the Kosovar Albanians was carried out without Security Council authorization and remains controversial today. Initially, the United States and its NATO allies sought a Security Council resolution that specifically authorized the use of force. However, this effort proved impossible because of strong opposition from both Russia and China. Despite this resistance, the United States and its allies were determined to undertake collective action through NATO.

NATO leaders offered many reasons in support of the alliance’s intervention. Highlighting the importance of preventing genocide, Bill Clinton, President of the United States, stated that NATO’s action was a result of the “moral revulsion at the killing in Kosovo and to prevent genocide in the heart of Europe.” Emphasizing humanitarian considerations as the main impulse of the action, French President Jacques Chirac asserted that the action was justified due to the horrific humanitarian crisis. Tony Blair, the British Prime Minister, commended the United States’ vision to see the international impact of instability, chaos, and racial genocide in Kosovo and emphasized his support for the U.S.-led air campaign against the Milosevic

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168 Id.
170 Wheeler, supra note 83, at 260.
171 Id.
174 Catherine Guicherd, International Law and the War in Kosovo, 41 SURVIVAL 28 (1999).
regime.\textsuperscript{175} German Chancellor Gerhard Schroder maintained a favorable stance with regard to NATO’s air strikes and stated that, in reference to UN Resolution 1199, NATO was indeed acting within the framework of the United Nations.\textsuperscript{176} The NATO air campaign was the first time that German military forces participated in combat since World War II.

UN Secretary General Kofi Annan agreed that there are times when the use of force may be legitimate in the pursuit of peace.\textsuperscript{177} Traub quotes the Secretary General as saying “when you look at the Declaration of Human Rights, the principle behind intervention in Kosovo was quite legitimate. The fact that the council couldn’t come together doesn’t make it not legitimate.”\textsuperscript{178} According to Bellamy, Secretary General Annan’s view accurately reflected the popular sentiment in international society.\textsuperscript{179}

The question whether NATO could legally use force without UN authorization was extensively debated during the crisis in Kosovo. Bellamy stated that, subsequent to NATO’s action in Kosovo, there has been growing acceptance of the idea that intervention can be legitimate in humanitarian emergencies.\textsuperscript{180} Rice and Loomis observed that “NATO violated the law, but acted in accordance with the spirit of the UN Charter.”\textsuperscript{181} The United States characterized atrocities in Kosovo as a humanitarian tragedy and, thus, justified NATO action as a moral imperative to end the killing of ethnic Albanian civilians. This moral justification however, did not mean it is legally justified. Therefore, a view emerged that, if humanitarian

\textsuperscript{176} Guicherd, \textit{supra} note 174, at 27.
\textsuperscript{177} IVO DAALDER & MICHAEL O’HANLON, \textit{WINNING UGLY: NATO’S WAR TO SAVE KOSOVO} 127,128 (2000).
\textsuperscript{179} Bellamy, \textit{supra} note 169, at 219.
\textsuperscript{180} \textit{Id}.
\textsuperscript{181} Rice & Loomis, \textit{supra} note 133, at 80.
intervention is not possible with the authorization of the Security Council, then military action may still be morally justified in order to avoid or end cases of humanitarian disasters.\textsuperscript{182}

The need to protect civilian populations from mass atrocities has been generally recognized by the international community, even before the Rwandan crisis. NATO’s intervention in Kosovo was also justified by the need to protect civilian populations from mass atrocities. Western allies, namely the United States, United Kingdom, and France, supported humanitarian intervention to protect civilian populations from mass atrocities. However, China and Russia did not accept any type of foreign intervention in sovereign states. Instead, they called for the peaceful resolution of crises through political dialogue. Therefore, there was a division in the international community between those who supported humanitarian intervention and those who opposed it. Ultimately, the international community felt the need to create a new concept that represented a significant departure from prior concepts of humanitarian intervention, which ultimately led to the inception of the R2P principle.

\textbf{2.5 Conclusion}

The historical development of humanitarian intervention as an issue in international law has been dominated by the principles of sovereignty and non-intervention. These developments demonstrated a difficulty in coexistence between the doctrine of sovereignty and humanitarian intervention. They more often confronted than partnered. Interventions made during 17\textsuperscript{th} or 19\textsuperscript{th} century by larger states against the weaker states for political and religious reasons were justified for humanitarian reasons. Nevertheless, these justifications were moral and political rather than legal in nature, because if a state can legally use force for any reason, then it can use force for

humanitarian purposes without violating any international legal rules. In the 20th century, the international community made efforts to restrict the use of force, which reinforced the principles of sovereignty and non-intervention against humanitarian intervention. Other developments in international law, mainly related to minority rights enshrined in treaties after World War I, supported the idea of humanitarian intervention to some extent. Nevertheless, these developments were weak and did not counterbalance the convergence of the principles of sovereignty and non-intervention and attempt to restrict the use of force by states.

The developments in international law during the 20th century made humanitarian intervention a controversial, yet critical, issue that required high-level political attention. The controversies and disagreements during the 20th century created by the developments of international human rights law and international humanitarian law challenged the principles of sovereignty and non-intervention and the rules on the use of force. The principles of sovereignty and non-intervention were integrated into the UN Charter. International legal rules on the use of force were included in the UN Charter and the authority given to the Security Council became a central feature of international law. The link between human rights violations and threats to international peace and security was widely recognized by the international community, and humanitarian intervention authorized by the Security Council did not create much international legal controversy. Thus, the authority of the Security Council under Chapter VII of the UN Charter is unhindered in situations where internal crises produce humanitarian catastrophes, with or without cross-border repercussions.

However, if intervention was not authorized by the Security Council, its legality under international law became more controversial. Nevertheless, the UN Charter’s inclusion of human rights norms and the convergence of international humanitarian law and international human
rights law provided sufficient justification for elements of the international community to argue international law permitted humanitarian intervention to protect civilian populations from mass atrocities. However, state practice during the Cold War involved reluctance to defend the uses of force on the basis of humanitarian intervention.

With the political and social changes in post-Cold War period, international human rights and international humanitarian law received more attention. The relationships in international law between sovereignty and non-intervention, the prohibition on the use of force, human rights, and humanitarian law became more unstable. These circumstances formed the source of the controversies in the 1990’s, especially the crises in Rwanda and Kosovo. The international community did not violate international law on the use of force in Rwanda, nevertheless it was considered a massive failure of the legitimacy of the actions of the international community. In other words, its actions were legal but illegitimate. By contrast, NATO’s intervention in Kosovo without Security Council authorization was considered illegal, but was otherwise viewed as legitimate action to stop mass atrocities. In other words, the intention was widely believed to be illegal but legitimate. Given this situation, and with the increased unrest around the world, there was a great desire to move international law on humanitarian intervention to where such intervention is both legal and legitimate. As the next chapter analyzes, the R2P principle emerged to address this challenge.
CHAPTER 3

THE EVOLUTION OF THE R2P PRINCIPLE:
THE ICISS REPORT AND THE WORLD SUMMIT OUTCOME DOCUMENT

3.1 Introduction

The R2P principle arose as an effort to move international law beyond the problems associated with humanitarian intervention in the 1990s. As Chapter 2 analyze, there has been a longstanding debate about humanitarian intervention in international law and, in particular, concerning the right of states to intervene militarily in another state, without Security Council authorization, in order to prevent or stop gross violations of fundamental human rights and international humanitarian law. What underlies the debate is an apparent tension among the values of ensuring respect for fundamental human rights, respect for the norms of sovereignty and non-intervention, and the prohibition on the use of force by states.

Since its inception in 2001, substantial attention has been paid to the R2P principle, both within and outside the UN. As a direct result of the UN Secretary General’s reports and other debates analyzed in this chapter, the UN has made a significant effort to make the R2P principle a guiding force. Nevertheless, the R2P principle continues to be controversial and is plagued by disagreements. There has been a lack of consensus among UN Member States on the R2P principle. Also, the scope and substantive aspects of R2P have not been made clear. One of the primary issues encountered by the R2P principle is whether it has altered any of the pre-R2P issues concerning humanitarian intervention and international law.

Therefore, in order to answer questions about the R2P principle, it is important to have a better understanding of the events that occurred with its inception. Such an analysis is critical in determining whether R2P represents a change in contemporary international law. The Report of
the International Commission on Intervention and State Sovereignty (ICISS) and the 2005 World Summit Outcome Document provide the context in which the R2P principle was created. Thus, this chapter describes the background to the formation of the ICISS, the ICISS report, and the World Summit Outcome Document, with an emphasis on how the ICISS report and the World Summit Outcome Document articulated the substantive components of the R2P principle.

3.2 The ICISS Report

As Chapter 2 observed, the international community’s failure to respond adequately during the genocide in Rwanda in 1994 raised questions about how to protect civilians more effectively from mass atrocities in the future.¹ With the Rwanda tragedy still fresh, NATO attacked Serbia in 1999 to prevent ethnic cleansing in Kosovo, but it did so without the authorization of the Security Council. As Welsh notes, this action re-ignited the controversy about the conditions under which states could use force to protect civilians from mass atrocities.² In the wake of the Rwanda and Kosovo controversies, many in the international community began to search for a new consensus on the legitimacy of state action, including military intervention, to protect civilians from mass atrocities.

In 1999, UN Secretary General Kofi Annan challenged the international community to develop a way to reconcile the two respective principles of maintaining sovereignty and protecting fundamental human rights when faced with humanitarian crises.³ Annan followed-up this challenge in the 2000 Millennium Summit Report by again asking UN members to look at the perceived tension between sovereignty and human rights in humanitarian crises, while keeping in mind three issues: (1) how to prevent strong states from using humanitarian intervention as a cover

² Id.
³ ALEX BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 2 (2009).
to engage in undue interference in the affairs of weaker states; (2) how to address efforts by rebel movements to employ violent tactics in order to try to attract outside intervention into a conflict; and (3) how the international community avoids selectively applying the principle of humanitarian intervention.4

3.2.1 Introduction to the ICISS Report

In response to Annan’s challenge, Canada formed the International Commission on Intervention and State Sovereignty (ICISS) in 2000. In its 2001 report entitled The Responsibility to Protect, the ICISS developed the R2P principle.5 The ICISS tried to distinguish the R2P principle from prior international law on humanitarian intervention in several ways. Primarily, the report emphasized that the R2P principle approaches intervention from a fundamentally different perspective than prior concepts of humanitarian intervention. According to the ICISS, the distinctive feature is that the R2P principle addresses the problems associated with humanitarian intervention from the perspective of the people who suffer from mass atrocities rather than the states that want to intervene.6

Second, the ICISS report introduced a concept of responsibility with a view to remedy the controversy between intervention and sovereignty. Under this notion, responsibility is shared by the state and the international community. The ICISS recognized that the main responsibility to protect human lives resides with the state whose people are directly affected by conflict or massive human rights abuses. The international community can interfere only if the state is unable or unwilling to fulfill this responsibility, or the state is itself the perpetrator.7

6 Id. ¶ 1.40.
7 Id. ¶ 2.30.
Third, the ICISS expanded the conceptual parameters of the concept of intervention, declaring that an effective response to mass atrocities requires not only reaction, but also engagement to prevent conflict and rebuild after the event.\(^8\) Thus, the R2P principle, as presented by the ICISS report, consists of three responsibilities: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.\(^9\)

The ICISS report is perceived as innovative in several ways.\(^10\) The R2P principle is based upon the concept of human security and consequently tries to merge two requirements: the need for a broader security perspective and the need for the international community to make humanitarian interventions under certain circumstances that warrant measures to protect human life and security. It further introduces a change of terminology; rather than the highly controversial “right to humanitarian intervention,” the ICISS report uses “responsibility to protect.”

According to the ICISS report, the R2P principle comprehends an integrated approach where prevention and rebuilding are included. Thus, the R2P principle, as proposed by the ICISS report, strongly emphasizes three responsibilities and not just the military aspects of humanitarian intervention. The ICISS report presented the responsibility to prevent as the single most important aspect of the R2P principle, directed at addressing the direct causes of a conflict that put human security at risk. The responsibility to react consists of a wide gamut of measures, including economic, political, and diplomatic tools, with the very last resort being military intervention. The responsibility to rebuild focuses on post-conflict recovery, reconstruction, and reconciliation within a state, and aims at preventing potential recurrences of humanitarian crises.

\(^8\) Id. ¶ 2.29.
\(^9\) Id.
3.2.2 Responsibility to Prevent

Of the three responsibilities, the ICISS report identifies the responsibility to prevent as the most important, stating that “prevention options should always be exhausted before intervention is contemplated and resources must be devoted to it.”\textsuperscript{11} The ICISS report points out that “state sovereignty implies responsibility,” and the primary responsibility to protect its population lies with each individual state.\textsuperscript{12} The internal responsibility of a state to protect refers to “the safety and lives of citizens and promotion of their welfare.”\textsuperscript{13} More specifically, the ICISS report indicates that “internal war, insurgency, repression, and state failure” are examples of instances where a population may suffer serious harm.\textsuperscript{14} Further, the ICISS report presented the responsibility to prevent as the focus point on the direct causes of a conflict that put human security at risk.

Prevention is considered more inexpensive than reaction and rebuilding. As Bellamy points out, it may be motivated by a wish to move guiding principles away from focusing mostly on intervention to a more preventive, morally responsible perspective.\textsuperscript{15} The Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD) has defined the importance of conflict prevention as “actions undertaken to reduce tensions and to prevent the outbreak or recurrence of violent conflict. Beyond short term actions, it includes the notion of long-term engagement.”\textsuperscript{16} UN Secretary General Kofi Annan published a report on the Prevention of Armed Conflict in June 2001.\textsuperscript{17} There, Annan called on the international community to move

\begin{footnotesize}
\begin{enumerate}
\item ICISS, supra note 5.
\item Id. ¶ 2.29.
\item Id. at xi.
\item Id.
\item Id.
\item BELLAMY, supra note 3, at 98.
\end{enumerate}
\end{footnotesize}
“from a culture of reaction to a culture of prevention,” a call that was advanced by the ICISS.\textsuperscript{18} Annan further stated that “both short-term and long-term political, diplomatic, humanitarian, human rights, developmental and institutional measures should be employed in a comprehensive prevention strategy.”\textsuperscript{19} His report elaborated on how the UN system could offer assistance to states. The report stressed that preventive action, in order to be most effective, should be initiated at the earliest possible stage of a conflict cycle.\textsuperscript{20} One of the principal aims of preventive action should be to address the deep-rooted socio-economic, cultural, environmental, institutional, and other structural causes that often underlie political conflicts.\textsuperscript{21}

As stated in the ICISS report, for prevention to be effective, there has to be knowledge of the fragility of the situation.\textsuperscript{22} Under the ICISS report, the first element of the responsibility to prevent is developing more robust early-warning systems. The ICISS stressed that the UN should implement the recommendations of the Report of the Panel on the United Nations Peace Operations, which called for a more effective collection and assessment at UN headquarters and the establishment of an early-warning capacity within the UN Secretariat.\textsuperscript{23} Further, ICISS highlighted the need of greater regional involvement in early warning efforts.\textsuperscript{24}

The ICISS report also included measures to address both the root causes and direct causes of internal conflicts and other man-made crises putting populations at risk.\textsuperscript{25} A distinction was drawn between “root cause prevention efforts” and “direct prevention efforts.”\textsuperscript{26} While direct measures were to deal with the immediate causes of a conflict in order to avoid parties resorting to

\begin{itemize}
\item \textsuperscript{18}Id. ¶ 4; ICISS, \textit{supra} note 5, ¶ 3.42.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} ICISS, \textit{supra} note 5, ¶ 3.9.
\item \textsuperscript{24} ICISS, \textit{supra} note 5, ¶ 3.17.
\item \textsuperscript{25} Id. at xi.
\item \textsuperscript{26} Id. ¶¶ 3.18-3.24.
\end{itemize}
more coercive measures, the root cause measures are aimed at addressing the underlying causes of deadly conflict.\textsuperscript{27}

However, the ICISS report did not distinguish between conflict prevention and mass atrocity prevention. Throughout the ICISS report, the commission discussed conflict prevention rather than genocide or mass atrocity prevention. The arguments are seemingly based on the supposition that mass atrocities can be averted by preventing conflicts. In certain aspects, the ICISS report indicated even broader conceptions of what should be prevented, such as “man-made crises” and “human security-threatening situations.”\textsuperscript{28} According to Bellamy, the ICISS’s wide scope of prevention constitutes a major problem, and much conceptual work remains to be done on prevention in the context of R2P.\textsuperscript{29} However, Evans does not see the need for this kind of theoretical work. Rather, he sees the prevention of mass atrocity crimes as an extension of effective conflict prevention.\textsuperscript{30} In his opinion, effective prevention starts with identifying situations that have the potential to generate mass atrocity crimes. Since so many of these crimes occur during war, it is important to focus on the potential for conflict in general, and to then prevent the outbreak, continuation, or recurrence of conflict.\textsuperscript{31}

The ICISS report stated that the prevention of deadly conflict and other forms of man-made catastrophe is, as with all other aspects of the R2P principle, first and foremost the responsibility of sovereign states, including the communities and institutions within them.\textsuperscript{32} This internal responsibility of the individual states to prevent mass atrocities is deeply entrenched in existing international law. Under international human rights law, states have a duty to protect individuals from human rights violations. These duties are defined in various international treaties in different

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} Id. ¶¶ 3.18-3.43.
\item \textsuperscript{28} Id. ¶ 2.32.
\item \textsuperscript{29} Bellamy, \textit{supra} note 3, at 102.
\item \textsuperscript{30} Gareth Evans, \textit{The Responsibility to Protect}, 80 FOREIGN AFF. 81 (2002).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} ICISS, \textit{supra} note 5, ¶ 3.2.
\end{itemize}
\end{footnotesize}
contexts. These obligations of an individual state are clearly stated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).\(^{33}\) As Milanovi points out, the responsibility of a state to protect its own populations from mass atrocities is derived from a state’s responsibilities under human rights, humanitarian law, and international criminal law, both through treaty and customary law.\(^{34}\) Some of these norms have acquired *jus cogens* or peremptory status, such as the prohibition on torture, which is an act that could constitute both a war crime and a crime against humanity. Arguably, some of these responsibilities are owed to the international community as a whole, as *erga omnes* obligations. For example, the prohibitions on genocide and torture are considered *erga omnes* obligations.\(^{35}\) Therefore, an individual state’s responsibility to prevent human rights violations within the state represents a long-standing and continuing obligation in international law.

Further, according to the ICISS report, conflict prevention is not merely a national or local issue, but involves an international responsibility of states to assist other states in their conflict prevention efforts.\(^{36}\) The responsibility of the international community to help prevent human rights violations in another state is clearly specified under international law.\(^{37}\) In fact, the Convention on the Prevention and Punishment of the Crime of Genocide includes the international community’s undertaking to prevent occurrences of genocide.\(^{38}\) Therefore, the concept of the


\(^{36}\) ICISS, *supra* note 5, ¶ 3.3.


international community’s responsibility to help prevent human rights violations in another state already existed and is not a new idea created by the ICISS.

Although the ICISS report emphasized the importance of international assistance in implementing the responsibility to prevent, this responsibility does not create a right of another state to receive such assistance. Failure to extend assistance does not produce any violation or sanction. Therefore, the ICISS report did not specifically create or propose any new right or obligation under international law for states in the international community.

Further, the ICISS report identified the vital role of the UN in conflict prevention.39 In Chapter IV of the UN Charter, Member States confer primary responsibility for the maintenance of international peace and security on the Security Council.40 Arguably, the UN Charter places the responsibility to prevent threats to international peace and security squarely on the shoulders of the Security Council. However, both the UN Charter and the ICISS report do not prohibit individual states taking preventive actions without Security Council authorization, in particular peaceful actions.

Additionally, the ICISS report did not clearly specify the scope of the responsibility to prevent. There is a lack of clarity when the responsibility to prevent should be invoked or what specific actions states should take in exercising this responsibility. The report did not specify who, precisely, bears the international responsibility to prevent. Moreover, the international processes in which decisions are made to invoke the international community’s responsibility to prevent, or how to implement and monitor the responsibility to prevent with consistency, are also not clearly indicated in the ICISS report.

39 ICISS, supra note 5, ¶ 3.5.
Many commentators have criticized the ICISS report’s discussion on the responsibility to prevent for failing to identify a clear agenda for preventing mass violence against civilians.\textsuperscript{41} Weiss and Hubert, for example, argued that it is preposterous to set prevention as the single most important priority.\textsuperscript{42} They state that “most of the stammering about prevention and rebuilding is a superficially attractive but highly unrealistic way to try and pretend that we can finesse the hard issue of what essentially amounts to humanitarian intervention.”\textsuperscript{43} For Weiss and Hubert, the prevention and rebuilding duties are the worst threats to the R2P’s conceptual clarity.\textsuperscript{44} Bellamy argued that, despite stressing the critical importance of conflict prevention, the ICISS did not make concrete proposals other than the call to centralize the world’s conflict prevention efforts and to develop a greater capacity in relation to early warning.\textsuperscript{45} The ICISS, Bellamy continued, avoided an explicit discussion of the single most pressing dilemma in relation to the responsibility to prevent, which is the question of how to translate early warning signs into a commitment to act and a consensus on how to act.\textsuperscript{46} Further, although the responsibility to prevent has generated these conceptual and practical questions, it has received nowhere near the attention that has been focused on the responsibility to react.

\textbf{3.2.3 Responsibility to React}

The ICISS report formulated the responsibility to react as follows: where a population suffers serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to


\textsuperscript{42} THOMAS WEISS & DON HUBERT, \textit{THE RESPONSIBILITY TO PROTECT, RESEARCH, BIBLIOGRAPHY, BACKGROUND} 367 (2001).

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} BELLAMY, \textit{supra} note 3, at 54.

\textsuperscript{46} \textit{Id.}
the international responsibility to react. The responsibility to react consists of a wide variety of measures, including economic, political, and diplomatic tools. The very last measure under the responsibility to react would be military intervention.

The responsibility to react is the most controversial aspect of the R2P principle. The ICISS stressed the importance of identifying and utilizing measures short of military action. It stated that, wherever possible, coercive measures short of military intervention ought to be examined first, including various types of political, economic and military sanctions. The decision to intervene by military means to protect people, when a state is unable or unwilling to discharge its primary responsibility, should be limited to extreme cases that genuinely “shock the conscience of mankind,” or situations that present such an obvious and imminent danger to international security that they call for coercive military intervention. The bottom line is that coercive measures should be conducted only when all non-military actions have been exercised.

In order to identify cases that require coercive measures, the ICISS proposed criteria that must be fulfilled before a decision to intervene with military force is taken. By introducing these threshold criteria, the ICISS intended to differentiate the responsibility to react from pre-R2P humanitarian intervention concepts. These six precautionary principles are:

(a) **Just Cause**: the action must be taken in response to actual or intended large scale loss of life or large scale ethnic cleansing;

(b) **Right Authority**: the authority to take action must be legitimate;

(c) **Right Intention**: the primary purpose of taking action must be to halt or avert human suffering;

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47 ICISS, supra note 5, ¶2.29, 4.1.
48 Id. ¶4.3.
49 Id. ¶4.13.
50 Id.
51 Id. ¶¶4.18-4.27.
(d) *Last Resort*: all other prevention and peaceful means to resolve the crisis must be exhausted;

(e) *Proportional Means*: the scale, duration, and intensity of the military intervention must be the minimum necessary to secure the humanitarian objective in question; and

(f) *Reasonable Prospects*: military intervention must be able to achieve the intended results.\(^5\)

With these threshold criteria on the use of force, the ICISS intended to change the general approach of the responsibility to react towards a more holistic, victim-focused approach. However, although the responsibility to react aimed to protect the civilian population from mass atrocities, the six criteria focus on the intervener not the victims.

In addition, none of these criteria, stipulated in the ICISS report, are new to the use of military force. For example, the Indian epic called “Mahabharata” offers one of first written discussions of criteria of proportionality, just means, just cause, and fair treatment of captives and the wounded.\(^5\) Further, it has been suggested that the ICISS report’s criteria are a reformulation of the concept of *Just War* introduced by Augustine of Hippo and Thomas Aquinas, and, as Chapter 2 described, used by Grotius.\(^5\) According to Bugnion, the *Just War* components of *jus ad bellum* and *jus in bello* limit the use of force by a state or the international community in cases where a violation of state sovereignty and territorial integrity occur.\(^5\) As Robinson notes, the *jus in bello* includes criteria of proportional means and non-discrimination, while *jus ad bellum* includes

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52 Id. ¶ 8.28.
criteria of just cause and right intention.\textsuperscript{56} Therefore, the six criteria stipulated by the ICISS report are not new concepts to international law applicable to the use of military force.\textsuperscript{57}

Another issue regarding the responsibility to react includes uncertainty about its scope. The ICISS report did not specify when the responsibility to react should be invoked under the R2P principle. The means of measuring imminent danger within a country are unclear. While the international community may perceive a situation as imminent, local authorities may grasp it differently. Further, the ICISS report provided no clear guideline as to when the international community should end actions taken under the responsibility to react.

Further, it is not clear who bears the responsibility to carry-out military intervention under the R2P principle. The ICISS spoke of an international responsibility to react.\textsuperscript{58} While the international community as a whole is responsible, the question of which international actor, whether regional organizations and individual states, bears the responsibility to react in the final analysis remains uncertain. However, the ICISS report did not indicate any consequences for the failure to carry-out such a duty. Therefore, the responsibility to react component of R2P in the ICISS report did not propose or create a new obligation under international law.

The ICISS report specifically acknowledged that the Security Council is the appropriate body to authorize military interventions under the responsibility to react.\textsuperscript{59} The ICISS did not entrust the power to authorize military intervention to any entity other than the Security Council. Nevertheless, if the Security Council fails to deal with a humanitarian crisis within a reasonable time, the ICISS report proposed alternative options.\textsuperscript{60} For example, the matter could, in such situations, be considered in the General Assembly under a “Uniting for Peace” procedure. Or, if

\textsuperscript{56} PAUL F. ROBINSON, JUST WAR IN COMPARATIVE PERSPECTIVE 59, 118 (2003).
\textsuperscript{58} ICISS, supra note 5, ¶¶ 2.29, 4.1.
\textsuperscript{59} Id. ¶ 6.28.
\textsuperscript{60} Id. ¶¶ 6.29, 6.31.
that fails, a regional organization may consider reacting to a potential crisis, subject to that organization seeking Security Council authorization under Chapter VII of the UN Charter.\textsuperscript{61}

Furthermore, the ICISS report warned that, if the Security Council fails to discharge its responsibility to protect populations in “conscience-shocking situations crying out for action,” the Security Council should take into account that it is unrealistic to expect concerned states to rule out other means or forms of action to meet the humanitarian emergency.\textsuperscript{62} Thus, ICISS report left open the possibility of unilateral action in such circumstances:

[I]f the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.\textsuperscript{63}

Therefore, although the possibility of a coalition of states willing to take action under the R2P principle is not exactly recommended, the ICISS did not explicitly rule it out in situations where the Security Council fails to act.\textsuperscript{64}

For a political theorist like Pattison, this vagueness in the ICISS report is highly unsatisfactory. According to Pattison, exactly who, whether the Security Council or any other actor, should authorize military intervention is not clear.\textsuperscript{65} As Pattison notes, though the ICISS report largely succeeded in changing the nature of the debate on humanitarian intervention, its appeal to the international community was a very general one.\textsuperscript{66} Beyond claiming that the Security Council should ideally authorize any forceful action to relieve mass humanitarian suffering, the

\begin{itemize}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.} ¶¶ 6.39, 6.40.
\item \textsuperscript{63} \textit{Id.} ¶ 6.28.
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{James Pattison, Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?} 284 (2010).
\item \textsuperscript{66} \textit{Id.}
\end{itemize}
report does not clarify which particular agent bears the responsibilities associated with R2P. If the word "responsibility" is going to be used, then responsibility must rest somewhere and must mean something.\(^67\) Pattison identifies the morally important qualities of potential interveners.\(^68\) He takes up the challenge of assigning the international responsibility to protect, but does not offer a sustained treatment of the questions that have preoccupied most normative theorists on humanitarian intervention. In identifying who should intervene, Pattison privileges those agents who currently have the capacity to deliver humanitarian outcomes through military action.

Tan frames this problem with R2P as an “imperfect duty,” or one which has not been assigned to any specific agent.\(^69\) As Tan points out, there is a lack of clarity in identifying a responsible agent, not even in an informal way, such as the widely accepted norm of “the most legitimate intervener to act,” which leaves room for other actors to join when necessary.\(^70\) Tan asserts that states have positive obligations to protect populations from mass atrocities within another state's jurisdiction, but the law remains unclear as to which states have that obligation and under what precise circumstances.\(^71\)

Another critical matter is the lack of clear guidance on implementing the responsibility to react. The five permanent members of the Security Council have divergent geopolitical interests and ideologies. Where some permanent members see a need for intervention, others might exercise their veto as they have different interests at stake, disagree about the need for military intervention, or worry that military intervention will turn into “regime change.” To address this problem, the French Minister of Foreign Affairs, Hubert Védrine, proposed the concept of the “responsibility

\(^{67}\) Id.
\(^{68}\) Id. at 98.
\(^{69}\) Kok-Chor Tan, The Duty to Protect, in HUMANITARIAN INTERVENTION 84 (Terry Nardin & Melissa Williams eds., 2006).
\(^{70}\) Id.
\(^{71}\) Louise Arbour, The Responsibility to Protect as a Duty of Care in International Law and Practice, 34 INT’L STUD. REV. 445 (2008).
not to veto” (RN2V), during the preliminary discussions of the R2P principle. Védrine first proposed a new “code of conduct” for the five permanent members in the context of the R2P principle. The concept of RN2V proposes that the five permanent members of the Security Council agree not to use their veto power to block action in response to genocide and mass atrocities which would otherwise pass by a majority. The ICISS supported the idea that a permanent member of the Security Council should not exercise its veto where: (1) there is majority support on the Security Council for intervention; (2) genocide or a mass atrocity has occurred; and (3) a permanent member does not have “vital security interests” at stake. However, RN2V would not be adopted as a formal procedural rule, but as an informal rule that would prevent interventions from being unjustifiably blocked. The responsibility element of the concept implies that, when gross human rights abuses are occurring, the five permanent members of the Security Council ought not use the veto for only narrow political calculation.

Therefore, although the ICISS report identified six criteria to be followed in the use of force, it did not create any new right to intervene. Similar criteria concerning the use of force were already in place during pre-R2P humanitarian intervention. Also, the ICISS report did not create a new obligation to use force to protect populations from mass atrocities. While the ICISS report did not expressly include any such positive duty, it also did not identify penalties for failure to act on any affirmative duty. Moreover, the scope of the responsibility to react remains unclear. As presented by the ICISS, the R2P principle did not bridge the long-standing divide among states on the use of force. However, although the responsibility to react does not legalize the use of force for

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73 ICISS, supra note 5, ¶ 6.21.  
74 Id. ¶¶ 6.13, 6.20; Ariela Blätter & Paul D. Williams, The Responsibility Not to Veto, 3 GLOBAL RESP. TO PROTECT 301 (2011).
humanitarian ends, the ICISS report left open the possibility of unilateral action if the Security Council failed to make a decision on use of force.

3.2.4 Responsibility to Rebuild

The “responsibility to rebuild” is an important part of the R2P principle because it requires intervening actors to establish a clear and effective post-intervention strategy. The ICISS report pointed to the responsibility to rebuild as an inherent and indispensable component of R2P that ranges from prevention to reaction, and from reaction to rebuilding, all of which aim at preventing future mass atrocities. According to the ICISS report, essential recovery, reconstruction, and reconciliation assistance should be provided after a military intervention. Such assistance should address the causes of the specific harm that the intervention was designed to halt or avert. This objective requires obtaining sufficient funds and resources for peace-building, as well as close cooperation with local people.

The ICISS report established three interlinked post-intervention responsibilities for intervening parties. First, the intervention force should provide basic security and protection for all members of the state in which the intervention takes place. This duty also means that, after the initial objectives of an intervention are met, the intervening military forces are obliged to prevent revenge killings and even “reverse ethnic cleansing.” This task must include disarmament, demobilization, reintegration, and rebuilding of new national armed forces and police, with the integration, as far as possible, of elements of formerly competing armed factions.

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75 ICISS, supra note 5, ¶ 5.3.
76 Id. at xi.
77 Id. ¶ 5.8.
78 Id.
The second responsibility pertains to achieving justice and reconciliation between the parties to the conflict. As the ICISS report pointed out, making transitional arrangements for justice during an operation and also restoring a properly functioning judicial system, including both the courts and police, is of critical importance.\textsuperscript{79} Justice and reconciliation must be integrated into the peace-building strategy, pending the re-establishment of local institutions.\textsuperscript{80} There should be proper mechanisms to assist the return of refugees and this requires the adoption of nondiscriminatory property laws and ending discriminatory policies. The question of establishing social and political sustainability must also be addressed. In accordance with the R2P principle, “external support for reconciliation efforts should be conscious of the need to encourage this cooperation, and dynamically linked to joint development efforts between former adversaries.”\textsuperscript{81}

The final peace-building responsibility relates to encouraging economic growth and sustainable development. It stipulates that intervening parties end any coercive economic measures they may have applied to the country before or during the intervention and not prolong punitive sanctions.\textsuperscript{82} They must transfer development responsibility and project implementation to local leadership and local actors as soon as possible. The peace-building responsibility must also facilitate development work in conjunction with security efforts.\textsuperscript{83}

The ICISS report defined the responsibility to rebuild as a “post-intervention” responsibility to provide, particularly after a “military intervention,” full assistance with recovery, reconstruction, and reconciliation, all of which addresses the causes of the harm the intervention was designed to halt or avert.\textsuperscript{84} The ICISS report highlighted the importance of a post-intervention

\begin{footnotes}
\item[\textsuperscript{79}] \textit{Id.} \textsuperscript{¶} 5.13.
\item[\textsuperscript{80}] \textit{Id.}
\item[\textsuperscript{81}] \textit{Id.} \textsuperscript{¶} 5.18.
\item[\textsuperscript{82}] \textit{Id.} \textsuperscript{¶} 5.19.
\item[\textsuperscript{83}] \textit{Id.} \textsuperscript{¶} 6.21.
\item[\textsuperscript{84}] \textit{Id.} \textsuperscript{¶} 3(C) (Syn.).
\end{footnotes}
strategy in order for a military intervention to be contemplated.\textsuperscript{85} As Schnabel notes, the rebuilding activities have to take place after prevention efforts have failed and reaction has started to take place.\textsuperscript{86} Therefore, according to the ICISS report, rebuilding efforts need to follow-up any military intervention. However, even before any military intervention has taken place, the international community can take steps to rebuild and facilitate peace-building efforts in a state. Thus, it is not clear whether rebuilding or peace-building efforts should be taken before or after military intervention.

Further, the ICISS report remained vague in terms of the specific objectives and target goals relating to post-conflict rebuilding commitments. The report stated that “ensuring sustainable reconstruction and rehabilitation will involve the commitment of sufficient funds, resources and close cooperation with local people, and may mean staying in the country for some period of time after the initial purposes of the intervention have been accomplished.”\textsuperscript{87} However, it does not define what precise actions should be taken in order to achieve these rebuilding goals.

Moreover, the ICISS report did not specify who should decide to undertake rebuilding efforts, where decisions happen, or how such decisions are being made. The report suggested that activities dedicated to rebuilding a society after a humanitarian catastrophe need to be both achieved and sustained by the local actors themselves.\textsuperscript{88} But the question is: who decides when a society is supposedly able to take responsibility for their future?

Additionally, the ICISS report did not identify or propose any legally binding obligation for states to support rebuilding efforts. The report recognized the international community’s poor

\textsuperscript{85} Id. ¶ 5.3.
\textsuperscript{87} ICISS, \textit{supra} note 5, ¶ 5.2.
\textsuperscript{88} Id. ¶ 5.31.
reaction towards rebuilding and stated that “too often in the past the responsibility to rebuild has been insufficiently recognized, the exit of the interveners has been poorly managed, the commitment to help with reconstruction has been inadequate, and countries have found themselves at the end of the day still wrestling with the underlying problems that produced the original intervention action.”

Furthermore, the ICISS report itself seemed to doubt whether a truly effective and sustainable post-conflict rebuilding effort is viable. The report stated that:

[T]here is always likely in the UN to be a generalized resistance to any resurrection of the “trusteeship” concept, on the ground that it represents just another kind of intrusion into internal affairs. But “failed states” are quite likely to generate situations which the international community simply cannot ignore, as happened - although there the intervention was less than successful - in Somalia. The strongest argument against the proposal is probably practical: the cost of such an operation for the necessarily long time it would take to recreate civil society and rehabilitate the infrastructure in such a state.

The report further stated that genuine concern exists about the willingness of governments to provide those kinds of resources, other than on a very infrequent and ad hoc basis.

This problem clarifies the generally weak interest that intervening nations have towards post-conflict rebuilding efforts. The ICISS report itself acknowledged that the R2P principle cannot guarantee the successful and continuous implementation of post-conflict rebuilding. Therefore, the ICISS report was itself uncertain about its proposal on the responsibility to rebuild.

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89 Id. ¶ 5.2.
90 Id. ¶ 5.24.
91 Id.
92 Id. ¶ 5.29.
It insisted on the importance of engaging in rebuilding efforts while, at the same time, expressing uncertainties about the responsibility of, and the continued support from, the international community.

3.2.5 Summary on the ICISS Report

The ICISS attempted to develop a political consensus on the questions surrounding humanitarian intervention. By reformulating the humanitarian intervention problem in terms of R2P, the ICISS report gained considerable international attention and made R2P part of international political and legal rhetoric. It packaged three responsibilities - prevent, react, and rebuild - within one principle. However, when analyzing the ICISS report, the relationship between the R2P principle and humanitarian intervention involves more overlap than separation. The ICISS report itself reflected the problems associated with the pre-R2P humanitarian intervention. This similarity, in turn, cast doubts whether the R2P principle represented a conceptual change from pre-existing international law.

Most importantly, the continuum of prevention, reaction, and rebuilding responsibilities suffers from uncertainties in the scope of each responsibility. The report did not specify when to invoke the responsibility to prevent, react, or rebuild. Although mass atrocities are claimed to be the trigger to invoke these responsibilities, the level of mass atrocities is not clear. Also, the report did not specify what actions states must take in exercising the responsibilities to prevent, react, and rebuild. The ICISS report did not indicate how R2P works procedurally across the responsibilities to prevent, react, and rebuild. There is no clarity on who takes the decisions, where decisions happen, or how decisions are to be made regarding R2P. Further, the ICISS report was silent on the implementation of R2P. Interestingly, as Chapter 2 analyzed, pre-R2P humanitarian intervention debates in international law suffered from similar uncertainties.
In addition, the ICISS report assigned the primary responsibility to protect populations to the state, which was a concept already embedded in international law. The ICISS report also described the international community’s responsibility to assist individual states to exercise their respective responsibility to prevent. However, the ICISS report did not impose any legal penalties on the international community for any failure to assist a state to realize its responsibility to prevent. Therefore, the ICISS report did not impose any new responsibility on the international community. Similarly, the six criteria that should be satisfied under the responsibility to react find their roots in pre-R2P humanitarian intervention, Just War, and international legal concepts of *jus ad bellum* and *jus in bello*.

Notably, the ICISS report did not strongly argue that military intervention without Security Council approval was legal, meaning that the ICISS did not resolve this controversy from the pre-R2P humanitarian intervention era. Also, the R2P principle, as stipulated by the ICISS report, did not advocate for any new right to intervene or any new obligation to react with military force under international law.

The ICISS claimed to have developed a truly global product, yet the report was still criticized as being limited to liberal international discourse. The incidents that have occurred since the inception of the R2P principle in 2001 revealed the international community’s uncertainty towards the R2P principle. The manner in which the United States and its allies pursued the war on terror after 9/11 and waged war in Iraq starting in 2003 produced hesitation by many countries to embrace the R2P principle. While the ICISS report has met with much approval and praise from many Western and liberal states, Weiss states that, “when the dust from the World Trade Center and the Pentagon settled, humanitarian intervention became a tertiary

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issue.” Despite its problems, the ICISS report has continued to inform the developing agenda for the R2P principle.

3.3 The World Summit Outcome Document

In September 2003, the R2P idea was taken-up at the debate on UN reform where Member States discussed strengthening the UN through institutional reform and renewing the organization's focus on peace, security, human rights, and development. The Member States also discussed ways of better equipping the UN to handle emerging issues in the 21st century. The report of the UN High-level Panel on Threats, Challenges and Change entitled “A More Secure World: Our Shared Responsibility,” stated that “there is growing acceptance that sovereign states have the primary responsibility to protect their own citizens from catastrophes. However, when they are unable or unwilling to do so, the responsibility should be taken up by the wider international community. This international community’s responsibility includes prevention of atrocities, response to violence, and rebuilding shattered societies.” The UN High-level Panel referred to an emerging norm of collective responsibility of the international community, which encompassed a right to intervene in states experiencing humanitarian catastrophes.

In March 2005, the UN Secretary General’s report on “In Larger Freedom: Towards Development, Security and Human Rights for All” nurtured the idea that the security of humanity and that of states are indivisible and that threats faced by humanity can only be solved through

98 Id.
collective action. Further, the report referred to the idea of collective responsibility and accepted the idea of R2P by stating that R2P should be embraced whenever necessary.

The central challenges to the R2P principle, prior to the 2005 UN World Summit, came from Russia, China, and the United States. The United States refused to accept a new obligation to intervene by the international community. The Ambassador of the United States to the UN, John R. Bolton, stated in August 2005 that “the responsibility of the other countries in the international community is not of the same character as the responsibility of the host state; that the Security Council was not legally obliged to protect endangered civilians; and that the commitment to R2P should not preclude the possibility of action absent authorization by the Security Council.”

Russia and China had their own reasons for opposing the R2P principle, namely their worries that the principle could lead to increased humanitarian intervention by states. Both countries insisted that all issues relating to military intervention be referred to the Security Council, and each of them continued to support a dominant role for the Security Council. For China, the concept of humanitarian intervention is a myth, and actions of humanitarian intervention pose serious problems for international law and international relations. Thakur noted that the Chinese delegation took the hardest line against intervention and in defense of sovereignty. Russia contended that the UN already had a criterion to address humanitarian


100 Id. ¶ 172.


103 Id.


105 THAKUR, supra note 102, at 268.
crises, and R2P risked undermining the UN Charter.\textsuperscript{106} Rice and Loomis, in discussing when it was legitimate and appropriate to use force in international affairs, pointed out that conversations in small groups of experts, such as the ICISS, cannot be generalized to serve as indicators of governmental attitudes.\textsuperscript{107}

During the negotiations at the World Summit, European countries supported the R2P principle and its appropriate application. European countries emphasized the lack of political will and reduced enforcement capacity as two factors that inhibited effective international action.\textsuperscript{108} The European Union supported military intervention for humanitarian protection in Africa.\textsuperscript{109} The European Union emphasized its support for humanitarian intervention in cases of genocide and ethnic cleansing.\textsuperscript{110} Norway insisted on international interference when states ignore their respective responsibility towards their citizens.\textsuperscript{111}

Prior to the World Summit, the Non-Aligned Movement (NAM) and the Group of 77 (G-77) articulated strong reservations about R2P. According to Bellamy, India argued that the Security Council was already empowered to act in humanitarian emergencies and that the failure to act in the past was caused by a lack of political will, not a lack of authority.\textsuperscript{112} Malaysia’s view

\textsuperscript{106} Id.
\textsuperscript{108} Id. at 86.
\textsuperscript{109} DAVID MEPHAM & ALEXANDER RAMSBOOTHAM, SAFEGUARDING CIVILIANS: DELIVERING ON THE RESPONSIBILITY TO PROTECT IN AFRICA 58 (2007).
\textsuperscript{111} Id.
\textsuperscript{112} Bellamy, \textit{supra} note 104, at 152.
was that R2P was identical to humanitarian intervention.\textsuperscript{113} Jamaica stressed the importance of the integrity and the sovereignty of all Member States.\textsuperscript{114}

Latin American states were initially hostile towards the R2P principle. Cuba interpreted the R2P principle as a “right to intervention crafted by an economic and military dictatorship of a super-power seeking to impose its own model of society.”\textsuperscript{115} According to Thakur, most Latin American countries were strongly opposed to R2P, especially as Latin American countries have been frequently subjected to various forms of intervention by the United States.\textsuperscript{116} In expressing his resentment towards R2P, Venezuelan President Hugo Chavez stated:

Let’s not allow a handful of countries to try to reinterpret, with impunity, the principles of International Law to give way to doctrines like ‘preemptive war’. How do they threaten us with preemptive war? And the now so called ‘responsibility to protect,’ but we have to ask ourselves who is going to protect us, how are they going to protect us?\textsuperscript{117}

However, some Latin American countries expressed support for the R2P principle. Peru, for example, emphasized the importance of the R2P principle, stating that Member States of the UN

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\textsuperscript{114} Stafford Neil, Permanent Representative of Jamaica to the U.N., Chairman of the Group of 77, Statement at the G.A. Debate on the Report of the Secretary-General entitled In Larger Freedom: Towards Development, Security and Human Rights For All (April 6, 2005), www.g77.org/Speeches/040605.htm.
\textsuperscript{115} Quoted in Christine Gray, \textit{A Crisis of Legitimacy for the UN Collective Security System?} 56 INT’L & COMP. L. Q. 167 (2007).
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must be ready to protect peoples of nations who are unable or unwilling to comply with states’ obligations.\textsuperscript{118}

African states were reluctant to interfere in the internal affairs of other states and even had a self-imposed ban on peacekeeping.\textsuperscript{119} However, the African Union (AU) Charter highlighted regional responsibility in the event that a Member State is unwilling or unable to prevent mass atrocities. Article 4(h) states, “the Union shall function in accordance with these principles: the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”\textsuperscript{120} Under Article 4 of the AU Charter, Bellamy observed, the AU need not defer a matter to the Security Council in humanitarian emergencies and, thus, the AU has created an institutional mechanism that permits the kind of regional arrangements stipulated by the R2P principle.\textsuperscript{121} However, the AU has been reluctant to undertake or even endorse forceful intervention even where it has been necessary. While the leadership of the AU helped to push forward the R2P principle during the 2005 World Summit, some African countries expressed reservations and rejected the R2P principle, describing it as the same concept as humanitarian intervention and insisting that states should refrain from supporting any actions that interfere in the internal affairs of other states. Tanzania was hesitant to prioritize mass atrocities above the daily suffering that many Africans endure due to poverty.\textsuperscript{122} South Africa was also anxious about the lack of international consensus on core R2P principles.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{119} Paul D. Williams, The Responsibility to Protect, Norm Localization and African International Society, 1 GLOBAL RESPONSIBILITY TO PROTECT 399 (June 2009) (last visited Dec. 23, 2013).
\item \textsuperscript{120} A. U. Charter art. 4(h).
\item \textsuperscript{121} Bellamy, supra note 104, at 158.
\end{itemize}
With all these diverse attitudes, the final version of the World Summit Outcome Document was a compromise text that sought to bridge the different positions. 124 African states opposed to the R2P principle, together with Russia, China, and other Asian states, in particular India, placed responsibility to react squarely in the realm of the Security Council. 125 The different positions that the states adopted prior to the World Summit Outcome Document did not change after its adoption. The delegations of Russia and China continued to insist on the importance and uniqueness of the Security Council. China, in discussing the protection of civilians in armed conflict, stated that the Security Council should approach the R2P principle with caution and expressed its belief that expanding the R2P principle was inappropriate and would lead to abuse. 126 Therefore, it was clear that before and after the adoption of the World Summit Outcome Document, there was no clear and unanimous agreement among UN Member States on the R2P principle.

3.3.1 Introduction to the World Summit Outcome Document

The R2P principle was embedded in paragraphs 138-139 of the World Summit Outcome Document. 127 Paragraph 138 primarily asserted the individual state’s responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity. Next, the paragraph emphasized that the international community should, as it deems appropriate, encourage and help states to exercise their responsibility and support the UN in establishing an early warning capability. 128

125 Bellamy, supra note 104, at 166.
128 Id. ¶ 138
Paragraph 139 stated that the international community, through the UN, has the responsibility to protect populations by appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VII of the UN Charter. This paragraph also asserted that the international community is prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case-by-case basis, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Moreover, the same paragraph stated that “the UN General Assembly members are committed to help states build capacity to protect their populations and to assist those which are under stress before crises and conflicts break out.” Importantly, paragraphs 138 and 139 of the World Summit Outcome Document mentioned only the prevention and reaction aspects of the R2P principle. It would seem that the World Summit Outcome Document omitted the responsibility to rebuild the ICISS report included in the R2P principle. However, paragraphs 97-105 provided the framework and mechanism for a Peacebuilding Commission to address rebuilding. Therefore, the World Summit Outcome Document underscored the three responsibilities: to prevent, to react, and to rebuild, as the ICISS report did.

3.3.2 Responsibility to Prevent

Similar to the ICISS report, the World Summit Outcome Document emphasized the individual state’s primary responsibility to protect its own populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and their incitement. Under long-standing

\footnotesize{129 Id. ¶ 139.
130 Id.
131 Id.
132 Id. §§ 97-105.
133 Id. §§ 138, 139.
134 2005 World Summit Outcome Document, supra note 127, ¶ 138.}
international law, states have the primary responsibility to prevent atrocities and protect civilians from imminent or ongoing atrocities within their respective territories. This consensus reflects well-established principles of international law and is not a source of disagreement about the R2P principle. This obligation of every state is deeply embedded in existing international law, including principles which are considered *jus cogens*. Therefore, the World Summit Outcome Document did not identify or propose any new obligation of the host state to protect its own population by preventing the four crimes emphasized in the Document.

Again, similar to the ICISS report, the World Summit Outcome Document spelled out the international community’s responsibility to assist a state in fulfilling its responsibility to prevent atrocities in its territory. The ICISS report indicated that the responsibility of the host state to protect its population under the R2P principle shifts to the international community in cases where the state is “unable or unwilling” to protect its citizens. However, the World Summit Outcome Document limited this responsibility to cases when the host state is “manifestly failing” to protect its citizens. The World Summit Outcome Document incorporated a higher threshold before the international community could take action. The World Summit Outcome Document stated that the international community should, as appropriate, encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capability. However, similar to the ICISS report, paragraph 138 of the World Summit Outcome Document did not specify the scope of the international community’s responsibility in assisting a host state. When the international community should assist a host state, the specificities of such assistance, and who exactly takes the decision and coordinates for the international community, is not clearly defined in the World Summit Outcome Document. Paragraph 138 also did not identify or advocate

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137 *ICISS, supra* note 5, ¶ 2.25; World Summit Outcome Document, *supra* note 127, ¶ 139.
for any new right of a state to receive such assistance from the international community. Failure to extend such assistance would not, thus, violate any legal obligation for the international community under paragraph 138 of the World Summit Outcome Document.

Further, the World Summit Outcome Document stated that the international community, through the UN, assumes responsibility for helping to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The ICISS included the same idea by stating that, whenever possible, coercive measures short of military intervention ought to be examined first, including various types of political, economic, and military sanctions. However, under the World Summit Outcome Document, this responsibility is to be exercised through the use of appropriate diplomatic, humanitarian, and other peaceful means in accordance with Chapters VI and VIII of the Charter. Most importantly, by explicitly referring to UN Charter provisions, the World Summit Outcome Document intended to follow existing principles of the UN Charter and did not attempt to change existing international law.

3.3.3 Responsibility to React

The World Summit Outcome Document stated that, when a state manifestly fails in its protection responsibilities and peaceful means are inadequate, the international community should be prepared to take stronger measures, including the collective use of force authorized by the Security Council under Chapter VII. Paragraph 139 merely refers to heads of governments’ preparedness to take such actions. This approach clearly indicates that the decision to take more forceful action has been left to the individual states and is non-mandatory. Paragraphs 138 and 139 did not describe any legal consequences for failure to take a decision on the use of force. Further,

138 ICISS, supra note 5, ¶ 4.25.
139 World Summit Outcome Document, supra note 127, ¶ 139.
140 Id. ¶ 139.
states should be prepared to take actions only on a case-by-case basis through the Security Council, making it a non-systematic duty. Thus, the World Summit Outcome Document did not recognize or propose new legal rights or obligations concerning use of military force for humanitarian intervention.

The ICISS report specified the need to satisfy the prerequisites of the Just War threshold, which includes the six criteria discussed above, before undertaking military intervention in cases of “serious and irreparable harm occurring to human beings, or imminently likely to occur,” including “large-scale loss of life” or “large-scale ethnic cleansing.” However, the World Summit Outcome Document, taking a narrower approach, restricted these grounds to the more limited situations of “genocide, war crimes, ethnic cleansing, and crimes against humanity.”141

Although the World Summit Outcome Document granted the decision making choice to Member States, similar to the ICISS report, it did not define the scope of collective military measures. When exactly the responsibility to react can be invoked, precisely what actions should be taken when implementing the reaction measures, who takes the decision, or how decisions are taken or, at least, how the reaction measures will be implemented are not addressed in the World Summit Outcome Document. Similar ambiguity on the use of force existed in pre-R2P humanitarian intervention. Although advocates of the R2P principle tried to differentiate it from the earlier humanitarian intervention concept, failure of both the ICISS report and the World Summit Outcome Document to address these pressing issues indicates that the R2P principle had not broken cleanly away from the problems connected with humanitarian intervention.

However, in contrast to the ICISS report, the military aspect of the R2P principle in the World Summit Outcome Document did not include discussion of criteria. Evans calls this omission

141 ICISS, supra note 5, ¶ 4.19; World Summit Outcome Document, supra note 127, ¶ 139.
is disappointing.142 Yet, the World Summit Outcome Document required the enforcement action be in accordance with Chapter VII of the UN Charter.143 The World Summit Outcome Document placed the responsibility to protect by military means under the Security Council by primarily funneling action through it to act under Chapter VII.144 Therefore, only Security Council-authorized military action was accepted by Member States. This outcome indicates that the World Summit Outcome Document was not intended to grant authority to take military action under a newly created international legal regime.

Further, although paragraph 139 included preparedness to take “collective actions,” the World Summit Outcome Document omitted any explicit statement on the possibilities of either regional organizations or coalitions of the willing engaging in humanitarian interventions by military means. The World Summit Outcome Document is silent on the question of what would happen if the Security Council fails to act. The World Summit Outcome Document did not recognize a new right to intervene in the absence of Security Council authorization, but neither did it explicitly prohibit unilateral intervention without such authorization.

The World Summit Outcome Document urged the General Assembly to continue considering the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the UN Charter and international law.145 As Stahn noted, this language was inserted in paragraph 139 in deference to states that felt R2P was not yet sufficiently clear in conceptual terms and needed further consideration in the General Assembly before acceptance and implementation.146 As Stahn observed, requesting the General Assembly to further consider R2P, in light of the UN Charter

143 World Summit Outcome Document, supra note 127, ¶ 139.
144 Id.
145 Id.
146 Stahn, supra note 124, at 110.
provisions and international law, suggested that the R2P principle, as specified in the World Summit Outcome Document, reflected existing international law and was nothing new.

### 3.3.4 Responsibility to Rebuild

The World Summit Outcome Document gave less prominence to the responsibility to rebuild. It did not include any explicit reference to the responsibility to rebuild in paragraphs 138 or 139. Instead, the post-intervention responsibility was addressed by proposing a separate Peacebuilding Commission (PBC), which would help countries rebuild after conflict.

The PBC was established in December 2005 by the General Assembly and the Security Council acting concurrently.\(^{147}\) Being an intergovernmental body with 31 Member States, the PBC seeks to facilitate and provide advice on post-conflict peace building efforts. In order to achieve this purpose, it provides short and medium-term engagement between the international community and countries that have recently emerged from conflicts.

The PBC is mandated:

[T]o bring together all relevant actors to rationalize resources and to advise on and propose integrated strategies for post-conflict peace building and recovery; to focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and to support the development of integrated strategies in order to lay the foundation for sustainable development; to provide recommendations and information to improve the coordination of all relevant actors within and outside the UN; to develop best practices; and to help to ensure predictable financing for early recovery activities and to extend the period of attention given by the international community for post-conflict recovery.\(^{148}\)

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The PBC convened its first session in July 2006, with Burundi and Sierra Leone on the Commission’s agenda. The PBC has since expanded its agenda to include the Central African Republic (2007), Guinea-Bissau (2008), Liberia (2010), and Guinea (2011). However, in order to place a country on the PBC’s agenda, the concerned state government’s consent is required. Further, if a government decides that it needs assistance from the PBC, it can request such assistance from the UN Secretary General or be referred to the PBC by the Security Council, the General Assembly, or the Economic and Social Council (ECOSOC).

In January 2009, Secretary General Ban Ki-moon recognized the PBC as an important tool under the R2P principle, not only in post-conflict reconciliation and rebuilding efforts, but also as a tool of prevention. Given the non-controversial nature of the PBC, Member States not only supported its efforts, but also welcomed strengthening the PBC. During General Assembly debate on R2P in July 2009, several Member States recommended strengthening the PBC as a more dynamic step in implementing R2P. Benin, Palestine, and many other countries identified the PBC as an instrument that implements the responsibility to prevent. Uruguay stated that the PBC achieved important work in terms of early recovery and assistance to consolidate the state and

promote economic and social development in post-conflict situations. Ecuador requested that the international community extend its collective support towards the PBC and its work.

However, the World Summit Outcome Document did not recognize an obligation on Member States to support the PBC. The PBC operates in three principal configurations to marshal resources to be placed at the disposal of the international community. These resources are generated from the top 15 providers of assessed contributions to the UN budget, as well as voluntary contributions to UN funds. Therefore, the PBC does not operate according to any new legal obligation for Member States to participate in rebuilding states emerging from conflicts.

3.3.5 Summary on the World Summit Outcome Document

Similar to the ICISS report, the World Summit Outcome Document recognized the responsibility of each individual state to protect its population from mass atrocities. Both documents also recognized the responsibility of the international community to encourage and help states exercise this responsibility and build a capacity to protect their populations, as appropriate. Moreover, both the World Summit Outcome Document and the ICISS report recognized the international community’s dual responsibility to use force if a state failed to protect its population, as well as rebuild in post-conflict situations.

By adopting the World Summit Outcome Document, UN Member States politically elevated the R2P principle. However, whether the R2P principle, as stipulated in the paragraphs 138 and 139 of the World Summit Outcome Document, was able to overcome the problems

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associated with the pre-R2P humanitarian intervention, and, thus, change existing international law is doubtful.

Although paragraph 138 of the World Summit Outcome Document assigned the primary responsibility to protect to the state, it was a concept already rooted in international law. Also, paragraphs 138 and 139 did not impose any legal penalties on the international community for failing to exercise the responsibility to prevent. Therefore, the World Summit Outcome Document did not advocate any new responsibility for the international community.

Further, paragraphs 138 and 139 of the World Summit Outcome Document did not specify the scope of the continuum of prevention, reaction, and rebuilding responsibilities. Although paragraph 138 stated that genocide, war crimes, ethnic cleansing, and crimes against humanity trigger the application of R2P, it did not specify the severity of atrocities that triggered R2P. Also paragraphs 138 and 139 did not indicate how R2P would work procedurally across the responsibilities to prevent, react, and rebuild. The pre-R2P humanitarian intervention debates also suffered from similar uncertainties and, thus, the World Summit Outcome Document failed to address these dilemmas in humanitarian intervention.

Particularly, paragraph 139 of the World Summit Outcome Document placed R2P under the Security Council and called for collective action in cases of genocide, crimes against humanity, ethnic cleansing, and war crimes. However, no mandatory obligation was imposed on the international community to take collective action. Although paragraph 139 called for action through the Security Council, it did not, at the same time, prohibit unilateral intervention in cases where the Security Council failed to respond. Paragraph 139 also did not advocate any new right to intervene in the absence of Security Council authorization.

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155 World Summit Outcome Document, supra note 127, ¶ 139.
The 2005 World Summit Outcome Document attempted to create a political consensus on the R2P principle. UN Member States unanimously adopted the World Summit Outcome Document in 2005, but the consensus was shallow. The World Summit Outcome Document could not overcome a fear by many countries that R2P could possibly undermine the long-standing principles of sovereignty and non-intervention.

3.4 Conclusion

There are, undoubtedly, a plethora of unanswered questions regarding the R2P principle. Yet, R2P represents a noteworthy step forward for the international community in so far as it clearly articulates an integrated approach to protecting populations from mass atrocities. This chapter analyzed two of the most important documents in the short history of the R2P principle in order to examine whether they reflect any substantive doctrinal changes from pre-R2P international law.

Both the ICISS report and the 2005 World Summit Outcome Document presented three responsibilities under the R2P principle: prevent, react, and rebuild. However, neither document could overcome uncertainties in the scope of each of the three responsibilities. Neither document specified when to invoke the responsibility to prevent, react, or rebuild. Although the World Summit Outcome Document stated that genocide, ethnic cleansing, crimes against humanity, and war crimes trigger these responsibilities, the parameters or the level required to elicit the responsibility is not clear.

Also, neither document specified what actions states must take in exercising the responsibilities to prevent, react, and rebuild. Not only did the documents lack clarity on how R2P works procedurally across the responsibilities to prevent, react, and rebuild, but also they did not provide clear guidance on who takes the decisions, where decisions happen, or how decisions are
to be made regarding R2P. These very same issues characterized pre-R2P humanitarian intervention debates as well.

Both the ICISS report and the World Summit Outcome Document allotted the primary responsibility to protect civilian populations to the state, which was a concept already embedded in international law. Both documents described the international community’s responsibility to assist individual states to exercise their respective responsibility to prevent. However, they did not impose any legal penalties on states for failure to enforce the responsibility to prevent. Therefore, neither document imposed any new legal obligations in international law.

In terms of the responsibility to react, neither document vigorously supported the idea that military intervention without Security Council approval was legal, meaning that they did not resolve this controversy from the pre-R2P humanitarian intervention era. Neither the ICISS report nor the 2005 World Summit Outcome Document advocated for any new right to intervene or any new obligation to react with military force.

Given this background, the emergence of the R2P principle does not, therefore, provide a clear legal break from old problems. Instead, it upholds prior treaty, customary international law and best practices by restating pre-established commitments under international law relating to the use of force, human rights, and humanitarian protection. Therefore, as described in these two seminal documents, the R2P principle does not create new rights or obligations for states in terms of the responsibilities to prevent, to react, or to rebuild.

Both the ICISS report and the 2005 World Summit Outcome Document attempted to develop a political consensus on questions surrounding humanitarian intervention. Although the 2005 World Summit Outcome Document was able to obtain support from over 150 states, considerable disagreements existed among the Member States on R2P. China, Russia, countries of
G-77, and members of NAM were cautious about the R2P principle and did not condone any type of foreign intervention which would violate state sovereignty and territorial integrity. These countries did not agree to advocate any new right to intervene under R2P. Conversely, the United States, United Kingdom, and the Western block did not want to limit themselves to the decisions of the Security Council on the use of force. These countries reserved the right to use unilateral force when and where necessary. Therefore, both documents failed to bridge the political divide between sovereignty and the humanitarian intervention through R2P.

In analyzing the ICISS report and the World Summit Outcome Document, the relationship between the R2P principle and the earlier concept of humanitarian intervention appears to involve more overlap than separation. Both documents reflected the problems associated with pre-R2P humanitarian intervention. This similarity, in turn, raises doubts on whether the R2P principle changed existing international law. In fact, the ICISS report noted that there had not yet been a sufficiently strong basis to claim the emergence of the new principle in customary international law.\textsuperscript{156} It should be noted that the UN Secretary General also considered paragraphs 138 and 139 of the World Summit Outcome Document to be firmly anchored in well-established principles of international law.\textsuperscript{157} Moreover, the Secretary General noted that the R2P principle does not alter, but reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the UN Charter.\textsuperscript{158} The commitment undertaken by the Member States through the World Summit Outcome Document did not create new human rights or additional obligations on states, but merely provided a framework to guide the international community to respond in crisis situations.

\textsuperscript{156} ICISS, \textit{supra} note 5, ¶ 2.24.  
\textsuperscript{158} Id.
However, although analysis of these important R2P documents was necessary, it is not sufficient to conclude that R2P has not changed international law. Therefore, it is important to make an objective assessment of state practice, as well as UN activities, since 2001, in order to understand precisely what such practices and actions tell us about the R2P principle in contemporary international law.
CHAPTER 4

OVERVIEW OF THE R2P PRINCIPLE IN HUMANITARIAN CRISSES AND UN
ACTIVITIES, 2001-2013

4.1 Introduction

The International Commission on Intervention and State Sovereignty (ICISS) introduced the R2P principle in 2001 with a view to remedying controversies associated with the concept of humanitarian intervention.¹ Since then, many events related to the R2P principle have unfolded in and outside the UN. During this period from 2001 to 2013, a variety of actors referred to, or tried to implement, the R2P principle in a number of different situations, which increased attention paid to the R2P principle. While both the UN and the international community tried to use R2P in many conflict situations, the UN also made other efforts to utilize and sustain the interest that R2P was generating. However, state practice after 2001 did not clarify that R2P resolved the pre-R2P humanitarian intervention controversies and did not, thus, reflect change in international law.

This chapter analyses briefly a number of prominent humanitarian crises that involved reference to, and uses of, the R2P principle from 2001 to 2013. This chapter also analyzes the UN’s efforts and activities to advance R2P. By analyzing key developments concerning the R2P principle, this chapter identifies the elements and problems associated with R2P. Ultimately, analyzing how R2P was used or not used since 2001 will help shed light on how state practice and UN activities have affected the relationship between the R2P principle and international law.

¹ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, REPORT 2001: THE RESPONSIBILITY TO
4.2 Humanitarian Crises and the R2P Principle

Several humanitarian crises that occurred from 2001 to 2013 gained prominent international attention. This section briefly analyzes important humanitarian crises from this period and prompted appeals to, or uses of, R2P in state practice. By doing such an analysis, this section intends to examine how states initiated the use of the R2P principle in actual humanitarian crises during this formative period of the principle.

4.2.1 Darfur (2004): An Inauspicious Start

The crisis in Darfur was the first major humanitarian crisis that emerged after the ICISS articulated the R2P principle. This crisis erupted in 2003, when the Sudanese government backed the Janjaweed militias, comprised of Sudanese Arab tribes, in responses to an uprising with a campaign of mass killing and displacement.2

Initially, the African Union (AU) made efforts to solve the crisis in Darfur. By mid-2004, the AU had established a small monitoring mission in Darfur, consisting of some 60 monitors, and 300 troops with a limited mandate to protect civilians.3 A critical restriction on the AU mission was its mandate because it was limited to observing the situation on ground. Tragically, the AU mission failed to halt the mass killings and displacement of the civilian population in Darfur.4 However, there were no explicit indications that this AU action invoked or involved the R2P principle.

The UN also took a number of measures to prevent further escalation of violence in Darfur.5 On July 30, 2004, the Security Council adopted Resolution 1556, demanding that the

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2 Amnesty Int'l, Looming Crisis in Darfur, AFR 54/041/2003 (July 1, 2003).
government of Sudan disarm the Janjaweed militias and apprehend and bring to justice militia leaders and members who violated human rights and international humanitarian law in the Darfur region.⁶ Although this resolution did not mention the R2P principle, the “responsibility to protect” language was mentioned during the debate of the resolution.⁷ The debate was initiated by the Philippines, which expressed that Sudan had failed in its duty to protect its citizens and that international action was warranted.⁸ The United States, the United Kingdom, Germany, Chile, and Spain invoked the language of Sudan’s “responsibility to protect” the population in Darfur. However, these states did not explicitly suggest that the responsibility should pass from the Sudanese government to the Security Council.⁹

The Sudanese government failed to comply with Resolution 1556, and therefore, on September 18, 2004, the Security Council adopted Resolution 1564.¹⁰ The resolution threatened the imposition of sanctions against Sudan if it failed to comply with its obligations to stop mass atrocities and protect civilians. It also requested the Secretary General to establish an International Commission on Inquiry to investigate violations of human rights in the region.¹¹

Further action was taken when Secretary General Kofi Annan exercised powers pursuant to Security Council Resolution 1564 and appointed an International Commission of Inquiry on Darfur on January 25, 2005.¹² After a thorough investigation, the Commission of Inquiry established that the government of the Sudan and the Janjaweed were responsible for serious violations of international human rights and humanitarian law arising to crimes under international

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⁸ Id.
⁹ Id.
law. The Commission of Inquiry also identified a number of senior government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Referring to the international community’s responsibility to protect civilian populations from mass atrocities, the report of the Commission of Inquiry stated that “the international community cannot stand idle by, while human life and human dignity are attacked daily and on so large a scale in Darfur. The international community must take on the responsibility to protect the civilians of Darfur and end the rampant impunity currently prevailing there.”

By the terms of the January 2005 Comprehensive Peace Agreement (CPA), which was entered into by the government of Sudan and the Sudan People’s Liberation Movement, the United Nations Mission in Sudan (UNMIS) was established with a limited mandate by Security Council Resolution 1590. However, the humanitarian situation in Darfur continued to deteriorate, meaning the UNMIS was ineffective in protecting the Sudanese population.

Given the escalation of human rights violations, the Security Council adopted Resolution 1593 and referred the situation in Darfur to the International Criminal Court (ICC). Further, the Security Council adopted Resolution 1672 on April 25, 2006, placing sanctions on individual Sudanese officials responsible for crimes against humanity in Darfur. However, these measures were also inadequate to stop escalation of violence or protect population in Darfur.

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13 Id.
14 Id. ¶ 644.
15 Id. ¶ 569.
On August 31, 2006, the Security Council adopted Resolution 1706, in which the deployment of 17,300 UN peacekeepers to Darfur was authorized.\(^{20}\) This resolution referred to paragraphs 138 and 139 on R2P in the 2005 World Summit Outcome Document.\(^{21}\) Khartoum considered Resolution 1706 to be inappropriate interference into Sudan’s internal affairs.\(^{22}\) The delegations of China, Qatar, and Russia abstained on the vote, stating that the resolution lacked consent from Sudan.\(^{23}\) Although Resolution 1706 authorized the deployment of UN troops, no troop deployment took place until July 31, 2007, when the adoption of Resolution 1769 authorized a deployment of an UN and AU mission in Darfur (UNAMID).\(^{24}\)

Despite all its efforts to curtail the humanitarian violations, the UN was unable to stop the atrocities and protect the civilians in Darfur. The impact of the UN’s peacekeeping and rebuilding work by UNAMID still cannot be judged because Darfur continues to face a seemingly endless assortment of problems. UNAMID’s efforts remain hampered by lack of resources and support. The UN could not take adequate preventive efforts to stop atrocities in Darfur. In spite of having full knowledge of the crisis in Darfur, the UN could not react in a timely or adequate way. Even today, the UN still cannot stop atrocities in Darfur or carry-out effective peacebuilding efforts with any realistic likelihood of long-term success.

The road to applying R2P in Darfur has been extremely circuitous, even tortuous. One reason was a lack of agreement among UN Member States whether the Darfur crisis should even be on the Security Council’s agenda. China, Russia, and Pakistan highlighted Sudan’s sovereignty, political independence, and territorial integrity.\(^{25}\) While these countries opposed international

\(^{21}\) Id. pmbl., ¶ 3.
\(^{23}\) Id.
interference in Darfur, they backed action by the AU. However, the United States, United Kingdom, and other countries supported international intervention and insisted on actions by the Security Council concerning the Darfur crisis. However, these countries did not seek any legally binding obligation to protect the population in Darfur. Those Member States, which insisted on discussion and action in Darfur, did not take unilateral or collective action in Darfur to protect the population, and no one accepted responsibility for the failure to protect.

As the detailed case study on Darfur in Chapter 5 will further demonstrate, UN Member States could not agree on whether or when to invoke the R2P principle, what action should be taken, or who should be responsible for implementing such decisions in Darfur. Similar problems regarding the behavior of the Security Council formed part of pre-R2P humanitarian intervention debates. In R2P terms, the Member States failed to recognize their responsibilities to respond to atrocities outside their own territories. This lack of political will and actions resulted in the international community’s failure to implement R2P in Darfur in a timely and effectively manner.

Many scholars and critics have described the failure to address the atrocities in Darfur effectively as a failure of the R2P principle. However, according to Evans, the R2P principle itself did not fail in Darfur; rather, it was the international community that failed to implement the R2P principle in Darfur. Under this view, this failure was not due to any inherent flaw in the R2P principle but was directly traceable to political and situational problems encountered among Member States in implementing it. Despite the failure by the international community to mount a timely and adequate response in Darfur, the crisis represented the first test of the R2P principle and

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26 Id.
is, therefore, important in analyzing the R2P principle in international law. Chapter 5 will explore the Darfur crisis in more detail.

4.2.2 Kenya (2007): Fulfilling the Responsibility to Prevent

The December 2007 election in Kenya between Mwai Kibaki, the president of Kenya representing the Party of National Unity (PNU), and the opposition leader, Raila Odinga, representing the Orange Democratic Movement (ODM), was fiercely contested.\(^{29}\) Kenya has 48 tribes, with three of them - the Kikuyu, the Luo, and the Luhyia - comprising almost 65% of the population.\(^{30}\) PNU supporters are usually from the Kikuyu, Embu, and Meru tribes, while ODM supporters are typically from the Luo, Luhya, and Kalenjin tribes.\(^{31}\) Kibaki won the election by a two percent margin. ODM immediately accused the government of manipulating the election, and this accusation was later confirmed by national and international observers.\(^{32}\) Widespread violence erupted, and the violence continued for months. Thousands of people were killed, and many more were displaced. Kenya, once seen as a model for African democracy and stability, lurched into violence with deleterious human, political, and economic consequences.\(^{33}\)

The diplomatic response to the ethnic violence that erupted in the aftermath of the December 2007 election in Kenya involved references to, and use of, the R2P principle. World leaders attempted to exert diplomatic pressure on the Kenyan government. The United States Secretary of State Condoleezza Rice and British Foreign Secretary David Miliband issued a joint statement urging Kenya’s political leaders stop the violence and pledged diplomatic and political


\(^{30}\) *Id.*

\(^{31}\) *Id.*

\(^{32}\) *Id.*

resources to help end the crisis and support reconciliation.\textsuperscript{34} In the first days of the post-election violence, a coordinated diplomatic effort by the UN (with Kofi Annan as the UN envoy), the Kenyan government, and various ethnic groups helped reached a power-sharing agreement which prevented a possible long-term campaign of mass atrocities. Under the agreement, Kibaki would maintain the presidency, while Odinga would become the prime minister. The prime minister has considerable powers and can only be dismissed by parliament. The cabinet positions in the government were split between the ODM and PNU, and both the president and the prime minister had to agree before a minister could be removed from office. Two deputy prime minister portfolios were also created with each party appointing one. Finally, the newly-formed cabinet agreed to work out a new constitution that would address some of the long-standing grievances within Kenyan society that inflamed the post-election violence.\textsuperscript{35} Progress has been slow, and implementation of the agreement has taken longer than anticipated. The Kenyan political leaders delayed the much-needed constitutional reform. At the same time, however, it is a promising sign that violence has not erupted again in Kenya.

Based on this successful diplomatic intervention, Annan later observed that: “I saw the crisis in the R2P prism with the Kenyan government’s inability to control the situation or protect its people. I knew that if the international community did not intervene, things would go hopelessly wrong. The problem is when we say ‘intervention,’ people think military, when in fact that’s the last resort. Kenya is a successful example of R2P at work.”\textsuperscript{36} It was widely acknowledged that the UN-led diplomatic efforts prompted the two Kenyan leaders to come to an agreement.\textsuperscript{37}


\textsuperscript{36} ALEX BELLAMY, \textit{GLOBAL POLITICS AND THE RESPONSIBILITY TO PROTECT: FROM WORDS TO DEEDS} 54 (2011).

\textsuperscript{37} Id. at 55.
The tools employed by the international community were not coercive, but instead offered the type of support that the Kenyan government needed to reach a practical resolution. Initially, the UN had sent Kofi Annan to help mediate a settlement. The regional and the international community gave unified support to this approach. In addition, the international community, in particular, the United States and the United Kingdom, applied pressure on Kenya’s political elite by threatening the possible imposition of criminal liability on those who fostered violence. Moreover, those countries also threatened the government of Kenya with possible embargoes on foreign aid and investment. This early intervention was supported by the highest levels of international politics and helped to avert another possible mass atrocity.

In the Kenyan situation, the responsibility to prevent was effectively fulfilled by the international community. In particular, there was a show of political will in support of effective measures. Therefore, the international responses to the Kenyan crisis, unlike those in Darfur, proved that implementation of R2P can serve its purpose.

4.2.3 Burma (2008): Controversy over the Scope of R2P’s Application

In May 2008, the devastating Cyclone Nargis hit the Irrawaddy delta region of Burma, leaving many Burmese severely affected. Foreign humanitarian workers and foreign aid missions sought to enter the country to lend assistance to the recovery, but the Burmese authorities obstructed the entrance of these organizations. This behavior caused intense debates in the international community on whether the crisis in cyclone-struck Burma could be considered a R2P situation.

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38 Id.
39 Id.
40 Joanna Harrington, R2P and Natural Disasters, in THE ROUTLEDGE HANDBOOK OF THE RESPONSIBILITY TO PROTECT 141, 142 (W. Andy Knight & Frazer Egerton eds., 2012).
41 Id. at 142.
In response to Cyclone Nargis and the subsequent resulting humanitarian emergency, French Foreign Minister Bernard Kouchner proposed that the Security Council invoke R2P to authorize the delivery of aid, even without Burma’s consent. Kouchner’s call was supported by Javier Solana, the European Union’s High Representative for the Common Foreign and Security Policy, who stated that the international community should use all possible means to support and get financial and other aid to victims of Burma’s cyclone. When the European Union met to discuss the French proposal to invoke R2P, France’s Junior Minister for Human Rights, Rama Yade, told reporters that “we have called for the responsibility to protect to be applied in the case of Burma.” The possibility of forceful intervention was reiterated by French Ambassador to the UN, Jean-Maurice Ripert, who claimed that France “could send men” to Burma because the French navy was in the vicinity conducting operations off the cost of Burma.

Kouchner’s proposal was rejected by China, India, and ASEAN, all of which argued that the R2P principle did not apply to natural disasters. The British government rejected Kouchner’s argument as “incendiary” and also agreed that R2P did not apply to natural disasters. The British did not want to bind themselves to an obligation by extending the R2P principle to natural disasters. Many humanitarian organizations, including the UN Office for Coordination of Humanitarian Affairs, also criticized Kouchner's interpretation of R2P. Edward Luck, Special Adviser on R2P to the UN Secretary-General, noted that the R2P principle did not apply to the humanitarian aid controversy in Burma because placing restrictions on the delivery of aid does not

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47 Id.
constitute one of the four crimes stipulated by the R2P principle: genocide, war crimes, crimes against humanity and ethnic cleansing.\(^\text{48}\)

It is doubtful whether the R2P principle should have applied to the humanitarian emergency in Burma, especially since the World Summit Outcome Document does not expressly apply the R2P principle to natural catastrophes. During the negotiation of the World Summit Outcome Document, UN Member States could not agree on such a reference in paragraphs 138 and 139.\(^\text{49}\) Although the ICISS report had recommended that a clause on natural catastrophes be included, the World Summit Outcome Document did not reveal any agreement that the R2P principle applied to natural disasters.\(^\text{50}\)

Proponents of applying the R2P principle to the situation in Burma attempted to connect R2P with the broad concept of human security.\(^\text{51}\) However, there was no agreement within the international community whether to equate the R2P principle with all human security concerns. Many developing countries feared that the R2P principle could be expanded so far that it would become an excuse for states to interfere in their domestic affairs. Therefore, many countries, including both proponents and critics of the R2P principle, could not agree whether to apply the R2P principle to the Cyclone Nargis crisis in Burma.

### 4.2.4 Georgia (2008): A Controversial Attempt to Appeal to the R2P Principle

In August 2008, Georgia’s government launched a military attack against South Ossetia aimed at reinstating the constitutional order.\(^\text{52}\) Russia, which had troops in the region as part of a joint peacekeeping mission, responded to the attacks by sending forces into South Ossetia and,

\(^{48}\) Edward Luck, Special Adviser on R2P to the UN Secretary-General, Address to the United States Senate Committee on Foreign Relations: International Disaster Assistance: Policy Options (June 17, 2008).

\(^{49}\) \textit{Id.}


\(^{51}\) Burma-Cyclone Nargis, Joint Communiqué, \textit{supra} note 42.

\(^{52}\) Bellamy, \textit{supra} note 46, at 151.
soon thereafter, launched attacks across Georgia. The Russian troops routed the Georgian army. Later, a French-brokered ceasefire led to the cessation of hostilities, and Russia recognized the independence of South Ossetia and another breakaway province, Abkhazia. Among the justifications offered by Russia for its intervention in Georgia was the claim that its action was consistent with the R2P principle. The Russian leadership claimed that the attacks by Georgia amounted to genocide, which warranted intervention on the basis of R2P.

However, Bellamy noted that R2P advocates generally saw the Russian argument as an obvious case of misappropriating the R2P principle, and he cited three reasons for this view, a view shared by the New York-based Global Center for R2P. First, protection of a state’s own citizens residing outside its territory is more likely to be considered within the purview of the right to self-defense rather than falling under the responsibility to protect. Second, the scale of Russia intervention into Georgia was disproportionate to the goal of protecting the people of South Ossetia. The R2P principle is applicable within the borders of the state that has the responsibility to protect the population within its territory. As stated in paragraph 139 of the World Summit Outcome Document, when and if the state fails to uphold its responsibility, either due to an inability or unwillingness, then the responsibility becomes one in which the international community acts collectively. Third, the R2P principle does not provide justification for the use of force in the territory of another state without the approval of the Security Council.

The Russian military operations in Georgia were also not carried out in accordance with the terms of the 2005 World Summit Outcome Document. To comply with these terms, evidence was

54 Id.
56 BELLAMY, supra note 36, at 56.
57 Id.
58 Id.
first required that civilian populations were threatened by mass atrocity crimes. Russia should have worked through the UN and first used appropriate diplomatic means to help protect those people assumed to be at risk. Force should only have been considered as a last resort, and with the approval of the Security Council. The Russian government had not satisfied these prerequisites.

It is unclear whether the threat to Russian citizens located in Georgia qualified as actual or imminent mass atrocities on a scale relevant to the R2P principle, or even whether the actual threat warranted military force. At what point the responsibility to react should be invoked, and at what level military measures should be taken in implementing the R2P principle, are questions that still cause problems for the R2P principle. Similar uncertainty over when force could be used existed in the pre-R2P debates about humanitarian intervention. Russia’s invocation of R2P in its attempt to justify its military actions in Georgia only served to further highlight uncertainties and aggravate controversies over the R2P principle.

4.2.5 Gaza (2008): Another Dispute About When R2P Applies

On December 26, 2008, responding to attacks by Hamas, Israel launched an air and land attack on Hamas in Gaza. This attack was carried out by Israel upon the expiration of a six-month ceasefire brokered by Egypt between Hamas and Israel.59 Hamas responded by launching rockets into southern Israel. As the crisis unfolded, the World Council of Churches and Oxfam International reminded the parties of their responsibility to protect civilians.60

The R2P principle was applied to this crisis, most notably by Richard Falk, UN Special Rapporteur on the Occupied Palestinian Territories, but also by others who claimed that crimes committed in Gaza had reached the threshold warranting R2P application. As the International

60 Id.
Coalition for the Responsibility to Protect noted, indiscriminate killings of civilians and the use of civilians as human shields led several states and civil society organizations to accuse both Israel and Hamas of committing war crimes.\textsuperscript{61} The main question was whether the Gaza conflict met the R2P threshold to trigger an international response. In addition, as the international community is deeply politicized on the crisis in Gaza, questions arose whether invoking R2P would have improved the protection of civilians.

The UN took several steps to resolve the crisis in Gaza. In a mission mandated by the President of the Human Rights Council in April 2009, Richard Goldstone found evidence of serious violations of international human rights and humanitarian law committed by Israel during the Gaza conflict, violations which amounted to war crimes and possibly crimes against humanity.\textsuperscript{62} The fact-finding mission also found evidence that Palestinian armed groups committed war crimes, as well as possible crimes against humanity, in their repeated launching of rockets and mortars into southern Israel.\textsuperscript{63} The Goldstone report presented to the Human Rights Council recommended that the Security Council adopt a resolution requiring both Israel and Hamas to launch independent domestic investigations and report on the findings of these investigations and the prosecutions of any perpetrators.\textsuperscript{64} The report also recommended that, if investigations were not underway within six months in either Israel or the territory controlled by Hamas, the Security Council should refer the situation to the ICC.\textsuperscript{65}

\textsuperscript{63} Id. ¶ 35, 36.
\textsuperscript{64} Id. ¶ 1969.
\textsuperscript{65} Id. ¶ 1968.
On November 2, 2009, the General Assembly endorsed the Goldstone Report with a vote of 114 in favor to 18 against, with 44 abstentions. The resolution called upon the governments of Israel and the Palestinians to undertake independent and internationally credible investigations into the serious violations of international humanitarian and international human rights law reported by the fact-finding mission. The resolution also requested that Secretary-General Ban Ki-moon transmit the Goldstone report to the Security Council and report back to the General Assembly.

The question whether R2P applied in Gaza was discussed both within and outside the UN. At the 2009 General Assembly debate on R2P, several governments raised the issue of Gaza. Qatar highlighted the importance of prioritizing the protection of civilians under foreign occupation and also stressed the focus on civilian protection required under the R2P principle. The Iranian delegation pointed out R2P’s selective application and highlighted that the R2P principle tends to apply situations where it best suits Western interests. Palestine stated that the R2P principle required the Security Council to take steps to protect vulnerable populations on a non-selective basis. Criticizing the double standard demonstrated by certain Western states, Palestine joined Iran in its disappointment over the seemingly selective basis of the R2P principle’s application. Palestine pointed out that those who called for interventions in other crises situations had not called for R2P application to safeguard the civilian population in Gaza.
In the case of the ongoing Gaza conflict, neither the UN nor the international community has taken effective and timely action under the R2P principle. The political division on whether R2P applied to the crisis in Gaza deepened the political and legal uncertainty about when the R2P principle is activated.

4.2.6 Sri Lanka (2009): Yet Another R2P Application Controversy

Sri Lanka had been experiencing a crisis and domestic armed conflict between the government and the Liberation Tigers of Tamil Elam (LTTE) since 1984. This conflict intensified at the beginning of 2009, creating a humanitarian catastrophe, which came to an end by mid-2009. According to the proponents of R2P, the large number of civilian deaths produced by the military actions that ended the conflict signaled the failure of the government of Sri Lanka to protect its population, and led to calls for the international community to step in. However, the UN experienced controversy on the application of R2P to the Sri Lankan situation.

Many R2P advocates argued the government of Sri Lanka failed to fulfill its primary responsibility to protect its populations from mass human rights violations. Such a failure, advocates contended, required a R2P response. Mexico’s Permanent Representative to the UN was among the many delegates who voiced a concern about Sri Lanka’s responsibility to protect its population. Writing in the Washington Post, James Traub, Director of the Global Center for Policy, described Sri Lanka as exactly the kind of cataclysm that states vowed to prevent when they adopted R2P. Russia and China, however, took the opposite position and maintained that the

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Sri Lankan situation was a domestic issue which did not warrant international intervention.\(^7\) Despite many calls for the application of R2P, Sri Lanka successfully resisted attempts to have the matter placed on the Security Council’s agenda as an R2P issue.

A panel of experts established by UN Secretary General Ban Ki-moon criticized the UN for its grave failure in handling the situation in Sri Lanka during the final stages of the conflict.\(^8\) The panel worked for eight months, reviewed about 7,000 documents, including internal UN exchanges with the government of Sri Lanka. In November 2012, Ban himself issued the panel’s report in which he acknowledged the failure of the UN system to meet its responsibilities to respond to the human rights violations in Sri Lanka.\(^9\) “The United Nations system failed to meet its responsibilities,” the Secretary General concluded in releasing the report on accountability issues stemming from the final months of the 2009 war in Sri Lanka.\(^10\)

The report was particularly critical of the Security Council’s failure to respond to the crisis: “In particular, the Security Council was deeply ambivalent about even placing Sri Lanka on its agenda, a situation that was not already the subject of a UN peacekeeping or political mandate; while at the same time no other UN Member State mechanism had the prerogative to provide the political response needed, leaving Sri Lanka in a vacuum of inaction.”\(^11\) The report added that UN action in Sri Lanka was not supported by the majority of Member States. “In the absence of clear Security Council backing,” the report stated, “the UN’s actions lacked adequate purpose and direction. Member States failed to provide the Secretariat and UN Country Team with the support required to fully implement the responsibilities for protection of civilians that Member States had.

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\(^9\) Id.
themselves set for such situations.” According to the report, a number of UN senior staff at its New York headquarters chose not to speak up about the Sri Lankan government’s and LTTE’s “broken commitments and violations” of international law as they thought this non-confrontational approach would be the only way to increase UN humanitarian access.

The UN has acknowledged its own failure to adequately or on a timely basis implement the R2P principle in Sri Lanka, which again raises doubts about the UN’s leadership in defining and implementing R2P. The situation in Sri Lanka also reflected clear political divisions on whether the R2P principle applied to Sri Lanka. Some Member States called for the Sri Lankan crisis to be defined and addressed as a R2P situation; other Member States clearly refused. As a whole, UN Member States did not behave as if R2P was a legally binding obligation. This political division regarding the applicability of the R2P principle, together with the UN’s failure to address adequately the issues through an R2P approach, amplified doubts about whether R2P formed part of international law.

4.2.7 Libya (2011): The Security Council Acts under R2P

Muammar Gaddafi, who came to power in a successful coup in 1969, ruled Libya until 2011. Gaddafi’s regime ruled the country with a totalitarian fist and was criticized internationally for its human rights violations. After the 1988 bombing of PanAm Flight 103 over Lockerbie, Scotland, the UN imposed severe sanctions against Libya until the regime acknowledged

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84 Id. ¶ 79.
85 Id. ¶ 75.
responsibility for the Lockerbie bombing.88 These sanctions brought significant hardships to the Libyan people. Aggravating the unrest in Libya, Gaddafi forces killed prisoners in Abu Salim prison to regain control of an internal situation in 2006, and all attempts to aid and assist the victims were mocked by Gaddafi.89 The regime appointed a commission ostensibly to inquire into the Abu Salim massacre but, typical of the Gaddafi regime, the findings were never revealed.90 Subsequent protests that took place were fiercely suppressed by the Gaddafi regime with extremely disproportionate violence.91 Gaddafi and his son threatened the protesters and urged regime supporters to attack and kill them.92

Given the situation in Libya, the regional organizations took a number of measures to prevent further escalation of violence and help the Gaddafi regime protect its population. The AU, the Organization of Islamic Conference (OIC), and League of Arab States (LAS) strongly criticized and condemned all forms of human rights violations in Libya and called for a mediated solution to the conflict.93 In fact, the LAS moved to suspend Libya’s membership in the organization.94 Given this crisis situation in Libya, the Security Council unanimously adopted Resolution 1970 on February 26, 2011, which recalled Libya’s “responsibility to protect,” referred the situation to the ICC, and imposed financial sanctions as well as an arms embargo.95

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90 Id.
91 Id.
92 Barbara Plett, Libya Protests: UN Security Council Condemns Crackdown, BBC News (Feb. 23, 2011),
93 Alex Bellamy, Libya and the Responsibility to Protect: The Exception and the Norm, 25 ETHICS & INT’L AFF. 263, 266 (2011); Paul D Williams, Briefing: The Road to Humanitarian War in Libya 2011, 3 GLOBAL RESP. TO PROTECT 248, 251 (2011).
94 Williams, supra note 93, at 251.
Despite imposition of several non-military measures by the Security Council, the threat to civilians continued in Libya. Therefore, the Security Council adopted Resolution 1973 on March 17, 2011. Resolution 1973 marks the first time the Security Council linked an authorization to use military force with the R2P principle. The resolution authorized UN Member States, acting nationally or through regional organizations or arrangements, to take all necessary measures to protect civilians under threat of attack in Libya, specifically those civilians in Benghazi. The resolution noted the failure of all prior diplomatic measures against Libya. The Security Council stressed the need to explore other possible solutions in Libya. The Security Council demanded that the Libyan authorities comply with the state’s primary obligations under international law to take all measures to protect civilians, meet their citizens’ basic needs, and ensure the rapid and unimpeded passage of humanitarian assistance.

Following passage of Resolution 1973, a coalition of states spearheaded by the United States, France, United Kingdom, and NATO commenced military action. A short time later, NATO announced that it would take over all military aspects of Resolution 1973. The increased attacks by NATO struck the Gadafi’s family compound and killed Gadafi’s youngest son and three of his grandchildren. Russia immediately criticized NATO’s attack as a disproportionate and excessive use of force. On August 22, 2011, some five months after NATO’s initial military intervention, Tripoli was liberated, and Gaddafi was executed.

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97 Id. ¶ 4.
98 Id. ¶ pmbl.
99 Id. ¶ 2.
100 Id. ¶ 3.
102 Id.
On September 16, 2011, the Security Council adopted Resolution 2009, and established the United Nations Support Mission in Libya (UNSMIL), which took the task of rebuilding efforts in post-Gaddafi Libya. The peacebuilding efforts taken by UNSMIL have been far from successful as it has not been able to restore peace in the country. While Libya continues to be wracked by violence and economic stagnation, the post-Gaddafi militias are in the spotlight as never before.

The Libyan intervention raised many questions regarding the R2P principle. First, the Security Council was careful in framing the Libyan crisis in terms of the R2P principle. Security Council Resolution 1973 stood Libya apart from previous cases of humanitarian intervention (e.g., Kosovo) conducted without Security Council authorization of military force. However, there was no unanimity within the Security Council for military intervention in Libya. Although the Security Council adopted Resolution 1973, members of the Security Council were significantly divided on the resolution. The Security Council members which abstained during the vote on the resolution (i.e., Germany, India, Brazil, Russia, and China) highlighted the importance of exhausting all peaceful means prior to using military force. They further stated that many questions had not been answered in the resolution, including how the authorized military measures would be enforced, who would enforce them, and what the limits on the military engagement would be. In fact, they believed the need to use military force had not yet been reached in Libya. China stated that it had not blocked the action with a negative vote out of consideration for the wishes of the LAS and the AU. India insisted on giving more time to the Gadhafi regime to stop its

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107 Id. at 4, 5, 6, 8, 10.
108 Id. at 6.
109 Id. at 10.
Russia stated that it would not support Resolution 1973 because non-military measures, it asserted, had not yet been exhausted. Therefore, although Resolution 1973 authorized military intervention to protect the civilians in Libya, some Security Council members did not believe they were subject to a legal obligation to take action under the R2P principle.

The Libyan crisis also raised uncertainty about the mandate granted under Resolution 1973, especially how it invoked the R2P principle. The resolution “authorized the Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libya.” This broad mandate did not specify any specific parameters. For example, what constitutes a threat of attack? At what exact point should Member States take all necessary measures to protect populations, after 100 deaths, 1,000 deaths? What are the limits of military actions taken to uphold the R2P principle?

Most importantly, the issue of regime change became highly controversial after NATO’s intervention took place in Libya. Once under way, NATO interpreted the broad mandate given under Resolution 1973 as permitting regime change in Libya. This strategy was highly criticized by the Member States of the Security Council. Although Russia and China had not used their veto power to waylay Resolution 1973, they later regretted not using the veto when they had the opportunity to do so.

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110 Id. at 5.
111 Id. at 8.
114 Id.
Although NATO, with the UN mandate, acted in a timely and successful way in overthrowing Gadhafi, the UN could not restore peace and security in Libya. The UN is still unable to prevent human rights violations and killings in Libya. Therefore, the “success” of the R2P principle in Libya is still open to debate. Given the importance of, and the controversies created by, the use of the R2P principle in Libya, this thesis further analyzes the Libyan case study in Chapter 6.

4.2.8 Côte d’Ivoire (2011): Another Military Intervention Authorized by the Security Council under R2P

The post-independence power struggle in the 1960s in Côte d’Ivoire was exacerbated by debates over nationality laws and eligibility conditions for elections. From independence in 1960 until his death in 1993, Felix Houphouët-Boigny served as president. In 1993, Henri Konan Bedie became president, but was overthrown by the country's first military coup in December 1999 in which Robert Guéï assumed control of the country. Laurent Gbagbo challenged Guéï during the presidential election held in October 2000, which in turn led to civil and military unrest. Following a public uprising, Guéï was promptly replaced by Gbagbo. Meanwhile, the opposition leader, Alassane Ouattara, was disqualified from contesting elections by the country's Supreme Court, because of his alleged Burkinabé nationality. While Gbagbo continued to hold political power in the country, competition for the presidency in Côte d'Ivoire between Gbagbo and Ouattara continued throughout 2002 to 2010. During this period, government forces were able to secure the control of the main city, Abidjan, but rebel forces took control of the northern

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116 Id.
117 Id.
118 Id.
119 Id.
part of the country. Unrest escalated during the 2010 presidential elections. While the Constitutional Council of Côte d'Ivoire declared Gbagbo the winner of the 2010 election, the UN declared Ouattara the winner of the presidential elections. With these events, the already existing violence worsened in the country, quickly creating the potential for atrocities involving civilians.

Given the inability of the government of Côte d'Ivoire to control the crisis after presidential election held in 2000, the regional bodies, such as the Economic Community of West African States (ECOWAS) and the AU made efforts to resolve the crisis in Côte d'Ivoire. In addition, after the efforts by ECOWAS and the AU to break the stalemate were unsuccessful, the French government stepped in to resume the negotiations.

In order to prevent further violence in Côte d'Ivoire, the Security Council adopted Resolution 1479 on May 13, 2003. This resolution established the UN Mission in Côte d’Ivoire (MINUCI) and mandated the mission to complement the peace efforts of ECOWAS. In June 2003, 26 military liaison officers were authorized by the Security Council for initial deployment in Côte d'Ivoire under Resolution 1479. As the situation in Côte d’Ivoire continued to pose a threat to regional and international peace and security, the Security Council adopted Resolution 1528 on February 27, 2004. This resolution established the UN Operation in Côte d’Ivoire (UNOCI), effective as of April 4, 2004, with a mandate to facilitate the implementation of the 2003 peace agreement signed by each of the parties to the conflict in Côte d'Ivoire.

121 Côte d'Ivoire Profile, supra note 115.
122 Bellamy & Williams, supra note 120, at 830.
123 Id. at 830.
126 Id. ¶ 4; Côte d'Ivoire Background, supra note 124.
128 Id. ¶ 1.
resolution, UNOCI took over the mission assignment from MINUCI. The Security Council authorized UNOCI to use all necessary means within its capabilities and areas of deployment to protect civilians in Côte d'Ivoire.

In response to escalating Ivorian post-election violence in 2010, the Security Council unanimously adopted Resolution 1975 on March 30, 2011. The resolution cited “the primary responsibility of states to protect civilians,” called for the immediate transfer of power to Ouattara, and reaffirmed the mandate of the UNOCI to “use all necessary means to protect life and property.” Resolution 1975 also authorized targeted sanctions against Gbagbo and his close supporters. As a result, UNOCI and the French troops used military force to help Ouattara’s forces oust Gbagbo from power and change the regime in Côte d’Ivoire.

Although the UN and French operation successfully removed Gbagbo from power, there was no clear strategy for post-intervention reconstruction and rebuilding in the country. Although the UN has spent financial and other resources on rebuilding efforts in Côte d’Ivoire, progress has been alarmingly slow. The UNOCI and Ouattara’s government are still unable to restore peace and justice in Côte d’Ivoire.

The UN and the regional bodies were actively involved in resolving the conflict in Côte d’Ivoire from its early stages. Although many have claimed that the UN and French actions in Côte d’Ivoire amounted to a successful implementation of R2P, many questions about R2P were raised.

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129 Côte d’Ivoire Background, supra note 124.
130 S.C. Res. 1528, supra note 127.
132 Id. ¶ 6.
133 Id. ¶ 12.
135 Id.
by the intervention. As Bellamy and Williams note, the episode in Côte d’Ivoire highlighted some of the unresolved challenges regarding the politics of the R2P principle.136

Although Resolution 1975 authorized UN Member States take all necessary means to protect civilians, Bellamy and Williams claimed that the use of force under the R2P principle by UN peacekeepers and French troops “blurred the lines between civilian protection and regime change.”137 Therefore, although the military intervention in Côte d’Ivoire was carried out with the authorization of the Security Council, its primary purpose was seemingly a politically motivated overthrow of Gbagbo. The Security Council resolution provided no indication that UN Member States meant to have a legal right to use force to engage in regime change in order to protect civilians. In fact, UN Member States were cautious about the intentions behind the Security Council’s authorization of military intervention under Resolution 1975. During the vote on the resolution, India and China insisted that UN peacekeepers use the mandate only to the extent necessary to protect civilians.138 India stated that the UNOCI should not get involved in a civil war, but carry out its mandate with impartiality while ensuring the safety and security of peacekeepers and civilians.139

Although UN and French troops ousted Gbagbo in the military intervention and temporarily prevented post-election violence, they were not able to restore peace and justice in the country, nor properly carry out any rebuilding efforts. The UN has allocated significant resources, financial and otherwise on the rebuilding efforts in Côte d’Ivoire. However, rebuilding progress has been inadequate. Despite all efforts by the UN and regional entities, the crisis in Côte d'Ivoire

136 Bellamy & Williams, supra note 120, at 837.
137 Id.
139 Id. at 3, 6.
continues to produce gross human rights violations. Given the importance and controversial nature of the application of the R2P principle in Côte d’Ivoire, this thesis analyzes the crisis in Côte d’Ivoire more in-depth in Chapter 7.

4.2.9 Syria (2013): A Major Crisis for the R2P Principle’s Credibility

The next humanitarian crisis that arose in the period under review and put the R2P principle in the spotlight was the emergence of civil war in Syria. Syrian President Bashar al-Assad and many of the Syrian governing elite belong to the Alawite minority group, while the majority of Syrians are Sunni Muslims. The Shabiha militia, predominantly from Alawite minorities, enjoyed many privileges and supported the Assad regime. There are many opposition groups in Syria who rebelled against the Assad regime starting in 2011. The Syrian National Council (SNC) is the most significant opposition group in Syria, which is also considered as the umbrella group with a Sunni majority.

Initial protests in Syria occurred in the middle of February 2011, calling for the abolition of emergency law, legalization of a multi-party political system, release of political prisoners, and the removal of corrupt local officials. As the conflict spread to nearly every city in Syria, the government responded to the unrest and repealed the emergency laws. Severe anti-government protests broke-out in the middle of March 2011 in the southern province of Dar’a, after a group of children accused of painting anti-government graffiti on public buildings were detained and tortured by government forces. Syrian armed forces responded violently by attacking protesters

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140 Côte d’Ivoire Profile, supra note 115.
143 Syria Profile, supra note 141.
144 Id.
145 Id.
and firing at a funeral procession. Continuous protests also erupted in other cities including Damascus, Homs, Hama, and Idlib. This crisis situation continued throughout Syria, and Assad’s forces retaliated against the protesters with extreme brutality. On December 28, 2011, the Syrian forces opened fire on thousands of anti-government protesters in Hama, killing many civilians. On March 2012, the main opposition group, the SNC, formed a military council to organize and unify all armed resistance.

In addition, there were concerns regarding the involvement of Iran, Russia, and Hezbollah in the Syrian civil war. British Foreign Secretary William Hague said that Iran and its militant Lebanese ally, Hezbollah, were "propping up" Syrian President Bashar al-Assad and giving him increased support. He highlighted that, since November 2012, the regime had been able to go on the offensive not because it was stronger, but because those backing it - Iran, Russia, and Hezbollah - were directly helping it either through weapons, planning operations, or financial assistance. During a June 30, 2013, ministerial meeting, the European Union and the Gulf Cooperation Council condemned Hezbollah’s involvement in the conflict and reiterated the need to find a political settlement.

On the other hand, the Syrian rebels were supported by Saudi Arabia, Turkey, Qatar and the United States.

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147 Id.
148 Id.
149 Id.
Given the escalation of violence, in April 2011, the Member States of the Security Council considered a press statement proposed by the EU.\(^{153}\) However, the statement could not be issued because there was no agreement on the content among Member States. Russia and Lebanon objected to the content of the statement, stating that such a press statement would be an undue interference in the internal affairs of Syria.\(^{154}\)

In October 2011, the United Kingdom, France, and Portugal tabled a draft resolution at the Security Council proposing an arms embargo and setting up a new sanctions committee.\(^{155}\) However, the resolution could not be adopted because of Russian and Chinese vetoes.\(^{156}\) Brazil, India, Lebanon, and South Africa abstained during the vote.\(^{157}\) Again, on February 4, 2012, proposed Resolution S/2012/77 on Syria could not be adopted because of Russian and Chinese vetoes.\(^{158}\) On July 19, 2012, another draft resolution under Chapter VII of the UN Charter was introduced at the Security Council.\(^{159}\) The resolution was cosponsored by the delegations of France, Germany, Portugal, United Kingdom, and the United States. This resolution was also vetoed by Russia and China, while Pakistan and South Africa abstained.\(^{160}\) Russia reiterated its position that it would not accept any resolution that threatened sanctions.\(^{161}\) However, none of these resolutions referred to the R2P principle.

The Security Council has been divided over how to respond to the Syrian crisis. The Member States have also been divided on how to interpret the crisis situation. Key objections


\(^{154}\) Id.


\(^{157}\) Id.


\(^{161}\) Id.
against proposed resolutions stressed the importance of non-intervention in internal affairs and emphasized opposition to using force to effect regime change. As permanent members of the UN Security Council, both Russia and China had vetoed three resolutions designed to respond to the Syrian crisis.

Given threats of external intervention, Assad’s government threatened to unleash chemical and biological weapons if the country faced a foreign attack.\(^{162}\) In August 2012, the Syrian military restarted chemical weapons testing at a base on the outskirts of Aleppo.\(^{163}\) The unrest in Syria continued throughout this period and, on August 21, 2013, a chemical attack occurred in the opposition-controlled and disputed area of Ghouta, in Damascus.\(^{164}\) The area was struck by rockets containing chemical agents, believed to have been sarin.\(^{165}\) Hundreds were allegedly killed in the attack. A team of UN chemical weapons inspectors confirmed that the nerve agent sarin was used in the attack on Ghouta.\(^{166}\) UN Secretary General Ban Ki-moon told the Security Council that he believed the attack constituted a war crime.\(^{167}\)

With alleged chemical weapons possession and use by the Assad regime, the United States, United Kingdom, and France openly declared their readiness to take military action against the
Assad regime, even without Security Council authorization. In fact, throughout the Syrian crisis, these countries believed Assad was the main cause for the Syrian crisis and demanded that Assad step down.

The legal position of the United Kingdom’s threats of military action against Syria was set out in a government note dated August 29, 2013. According to this note, the UK government asserted that military intervention is permissible under international law in exceptional circumstances where the UN Security Council is unwilling or unable to act in order to avert a humanitarian catastrophe, subject to three conditions: the need to have sufficient evidence of large-scale humanitarian distress which requires urgent assistance; absence of any alternative other than the use of force if lives are to be saved; and the proposed use of force be proportionate to the situation.

The British Foreign and Commonwealth Office’s official response to questions posed by the House of Commons Foreign Affairs Committee on the legality of humanitarian intervention without Security Council authorization reconciled the British legal position on the use of force in Syria with R2P as specified in the 2005 World Summit Outcome Document. However, it recognized that the World Summit Outcome Document had not addressed the question of

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171 Id.

unilateral intervention.\textsuperscript{173} It reiterated that unilateral use of force to address humanitarian catastrophes is permitted under international law, even if the Security Council does not authorize such action.\textsuperscript{174}

After the chemical weapons attacks in Ghouta, the United States threatened to take military action without Security Council authorization.\textsuperscript{175} The United States position on the use of force in Syria was not based on humanitarian intervention or R2P. The United States justified the potential use of force as a response to the Syrian government’s use of chemical weapons.\textsuperscript{176} The United States had not abandoned the option of using force without Security Council authorization, and President Obama stated that he decided the United States should take military action against Syria, but that he would seek authorization from Congress before taking action.\textsuperscript{177}

As the threat of military action hung in the air, Russia and the United States brokered a Syrian chemical weapons destruction plan. Both Russia and the United States transmitted to the Security Council a framework for the elimination of Syrian chemical weapons agreed to in Geneva on September 14, 2013.\textsuperscript{178} On September 27, 2013, the Member States of the Security Council unanimously adopted Resolution 2118 demanding verification and destruction of the chemical weapons stockpiles in Syria.\textsuperscript{179} The resolution also called for the full implementation of the September 27, 2013, decision of the Organization for the Prohibition of Chemical Weapons

\textsuperscript{173} Id. at 3.
\textsuperscript{174} Id. at 4.
(OPCW), which contained special procedures for the expeditious and verifiable destruction of Syria’s chemical weapons.\textsuperscript{180}

Despite the rising death toll, increased internally-displaced persons, and worsening refugee problems, the Security Council has been paralyzed over Syria, unable to agree to serious measures to alleviate the human suffering. Although the legal positions of the United States and United Kingdom permitted the unilateral use of force, and, thus, openly threatened the Assad regime with military intervention, there was no indication or political willingness for such use of unilateral force once the chemical weapons destruction plan emerged. Given the Security Council’s failure to protect civilian populations, there have been claims that the R2P principle failed in Syria.\textsuperscript{181} The prominence of the Syrian civil war in debates about the R2P principle requires more detailed attention, which Chapter 8 of this thesis undertakes.

### 4.3 Other UN Activities Relevant to the R2P Principle

Section 4.2 examined a number of humanitarian crises between 2001 and 2013 that affected the R2P principle. In addition to being involved in responding to these crises, UN bodies were also involved in other R2P-relevant activities after the 2005 World Summit. This section briefly analyzes these activities, which include resolutions adopted by the Security Council, the work of the Special Advisor to the Secretary General on R2P, debates in the General Assembly, and reports from the Secretary General.

\textsuperscript{180} Id. ¶ 3.

4.3.1 Security Council Resolution 1674 (2006) on Protecting Civilians in Armed Conflict

On April 28, 2006, the Security Council unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict. Resolution 1674 contained the first official Security Council reference to R2P, and it “reaffirmed the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” The resolution also underscored the Security Council’s readiness to address gross violations of human rights, especially those mass atrocities that may constitute threats to international peace and security.

The resolution received broad support within the Security Council during its six months of debate. China called for a renewed focus on the root causes of conflict. However, some Security Council members criticized the resolution and argued that the World Summit Outcome Document only committed the General Assembly to deliberate about R2P. Russia stated that it was clearly premature to advance R2P in Security Council documents. Recalling the 2005 World Summit Outcome Document, Russia stressed the requirement of a detailed discussion at the General Assembly on R2P before addressing its implementation. Egypt stated that civilian protection efforts should not compel Member States to flout the UN Charter and criticized Kofi Annan for supporting preventive measures without highlighting the necessity of the host state’s consent.

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183 Id. ¶ 4.
186 Id. at 18.
187 Id.
188 Id. at 6.
However, during the vote on the resolution, the new non-permanent members of the Security Council - Slovakia, Qatar, Ghana, Congo, and Peru - voiced their support for the R2P principle.189

During the Security Council open debate on the protection of civilians in armed conflict held on June 28, 2006, many governments reacted positively to the R2P reference in Resolution 1674.190 Some governments commented on the connection Resolution 1674 made between the protection of civilians in armed conflict and the R2P principle.191 More governments expressed their support for the R2P principle and urged the Security Council to consider ways to operationalize it. Briefing the Security Council on the situation of the protection of civilians around the world, Jan Egeland, the UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator, used the R2P framework to highlight the Security Council’s obligation to take predictable action to protect civilians under threat and referred to the Security Council's reaffirmation of R2P in Resolution 1674.192

Apart from the reference to paragraphs 138 and 139 of the World Summit Outcome Document, Resolution 1674 emphasized the importance of preventing armed conflicts and their recurrence. It identified the steps needed to prevent atrocities. It stressed the “need for a comprehensive approach towards preventing atrocities through promoting economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law, and respect for, and protection of, human rights.”193 Further, the resolution highlighted the primary responsibility of states to protect their populations, in particular, the need to maintain security for civilian refugees and internally displaced persons (IDPs).

193 S.C. Res. 1674, supra note 182, ¶ 2.
Therefore, the resolution, in addition to reiterating the responsibility of states to protect their citizens, emphasized the responsibility states have to protect refugees and IDPs.

Most importantly, the resolution called for the international community to support each state’s responsibility to protect its own population, refugees, and other persons protected under international humanitarian law. The resolution requested all states comply with applicable international law, as well as with the decisions of the Security Council. However, the resolution did not create any legal obligation for states to comply with it provisions. The resolution, therefore, merely re-iterated long-standing obligations each state has under international law to protect its own population during armed conflict.

Interestingly, Resolution 1674 only discussed states’ and the international community’s responsibility to prevent harm to civilian populations during armed conflict. It did not discuss other, more contentious issues concerning the R2P principle. For example, it did not address how the responsibility to react should be implemented in protecting civilians in an armed conflict or the responsibility to rebuild after armed conflicts end. Therefore, although the Security Council referred to the R2P principle in the context of protecting civilians in armed conflicts, it failed to address controversial issues regarding the responsibilities to react and rebuild.

4.3.2 Special Advisor to the UN Secretary General on R2P

At the end of August 2007, the UN Secretary General appointed Edward Luck as a Special Adviser to focus on the R2P principle, and Luck served in this capacity until July 2012.194 Luck's primary task was to focus on the conceptual development of R2P, as well as consensus building.

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194 U.N. Secretary-General, SG/A/1120, BIO/3963 (Feb. 21, 2008).
and assisting the General Assembly in its ongoing consideration of R2P.\footnote{Special Adviser with a Focus on the Responsibility to Protect, ICRtoP, http://www.responsibilitytoprotect.org/index.php/edward-luck-special-adviser-with-a-focus-on-the-responsibility-to-protect.} Luck undertook a broad consultative process to develop proposals for consideration by the UN Member States.\footnote{Id.} He attempted to broaden the support for R2P and encouraged developing countries in Asia and Africa to voice their support for the R2P principle during UN debates.\footnote{Id.} In August 2008, the Stanley Foundation published a policy brief by Luck entitled “The United Nations and the Responsibility to Protect.”\footnote{Edward C. Luck, The United Nations and the Responsibility to Protect, THE STANLEY FOUN. (Aug. 2008), available at http://www.stanleyfoundation.org/publications/pab/LuckPAB808.pdf.} The report contained recommendations to advance the R2P principle. In the brief, Luck argued that Member States currently agreed upon the goals of the R2P principle but not on the means to achieve them.\footnote{Id.} The brief represented Luck’s efforts in operationalizing the R2P principle within the UN system. Throughout 2008, Luck spent much of his efforts on trying to consolidate the support of Member States and civil society for the R2P principle.

Luck worked closely with the Office of the Special Advisor on the Prevention of Genocide, Francis Deng, to develop a revised mechanism to implement R2P within the UN system. Even though these two Special Advisors played an important role in coordinating with other UN organs in promoting the R2P principle, they were not tasked to fill perceived gaps associated with R2P. The Special Advisors were primarily focused on garnishing much needed political will to accept and implement the R2P principle. However, they were not successful in achieving this goal. Some countries, including China, Russia, and countries of Group of 77 and Non Aligned Movement (NAM) were not willing to accept R2P as a principle that affected their sovereignty and territorial integrity. On the other hand, other countries, in particular the United States, United Kingdom, and European democracies, insisted on the need for intervention in crisis situations to protect civilian
populations. The Special Advisors were not able to bridge this divide in their individual and collaborative efforts. Unfortunately, the Special Advisors were not tasked to address long-debated issues associated with R2P, including when to invoke the R2P principle; what actions are required of states when invoking R2P; how R2P works procedurally across the responsibilities to prevent, react, and rebuild; and how to implement the R2P principle successfully in conflict situations.

4.3.3 UN Secretary General’s Report on Implementing R2P (2009)

UN Secretary-General Ban Ki-moon’s report on “Implementing the Responsibility to Protect” was released on January 12, 2009.200 This report outlined measures and actors involved in implementing the R2P principle.

The Secretary General urged the General Assembly to take the first step by carefully considering the strategy for implementing the R2P principle described in the report. He requested that Member States take note of his report to help inform the General Assembly’s consideration of the R2P principle.201 Further, he insisted that “the task ahead is not to reinterpret or renegotiate the conclusions of the World Summit Outcome Document, but to find ways of implementing its decision in a fully faithful and consistent manner.”202

Most importantly, the report tried to address the actual implementation of R2P, which is a critical aspect of the principle. According to the report, the ways in which the R2P principle can be implemented are identified in paragraphs 138 and 139 of the World Summit Outcome Document and are consistent with existing international law: (a) the primary responsibility rests with the state itself; (b) the international community may provide assistance if requested by the states concerned;

201 Id. ¶ 71.
202 Id. ¶ 2.
(c) the Security Council may take measures in a manner consistent with Chapters VI, VII, and VIII of the UN Charter.203

The report also highlighted the international community’s responsibility to assist states in fulfilling their responsibilities to their populations.204 The report enumerated several steps, such as: (a) encouraging states to fulfill this responsibility; (b) helping states exercise this responsibility; (c) helping states build their capacity to protect and assisting states under stress before crises and conflicts break out.205 These measures have to be taken with the consent and cooperation of the state. However, the report failed to define more precise guidance on implementation of the R2P principle, such as when the international community should take the above measures, what level of assistance should be extended by the international community, or what happens when a state refuses assistance.

Further, the report identified the international community’s responsibility to react in a timely and decisive manner to states experiencing mass atrocities.206 The report cited two steps outlined in the 2005 World Summit Outcome Document. The first is the responsibility to use peaceful means to protect populations.207 The second is a wide range of non-peaceful measures that may be used if two conditions are satisfied: (1) if peaceful means are inadequate; or (2) state authorities fail to protect their own populations. The report outlined measures that the international community could use prior to the exercise of non-peaceful measures. These measures include diplomatic sanctions, economic sanctions, and restraint by the five permanent members of the Security Council from using their vetoes in situations where there is a manifest failure to protect

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203 Id. ¶ 11.
204 Id. ¶¶ 28-48.
205 Id. ¶ 28.
207 Id. ¶ 49, 2005 World Summit Outcome, supra note 50, ¶ 138.
populations from mass atrocities. Further, when exercising non-peaceful measures, the international community should take actions through the Security Council under Chapter VII of the UN Charter. By requiring action be taken through the Security Council, the report operationalized R2P by grounding it in existing international law.

Although the report was well received by UN Member States, it was met with much criticism. Welsh argued that the report’s focus on capacity building may have been a prudent strategy for securing a buy-in from reluctant states, but came at the cost of overlooking questions about how resources will be mobilized in non-peaceful efforts to protect vulnerable populations, especially after more peaceful means have failed. Further, Welsh noted that the Secretary General clearly favored prevention over reaction because he believed preventive measures were more likely to be integrated into a state’s domestic affairs. Thakur argued that the report ignored many key questions that required urgent clarification, such as when should R2P be activated as an international responsibility; who makes these decisions; and on what basis should such decisions be made. Thakur asserted that “we seem to be recreating the 2005 consensus instead of operationalizing and implementing the agreed collective responsibility.”

4.3.4 General Assembly’s First Interactive Debate on R2P (2009)

Based on the UN Secretary General’s 2009 report on Implementing R2P, the General Assembly’s first informal, interactive debate on R2P started on July 23, 2009, and continued from

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209 Id. ¶¶ 49-51.
210 Jennifer Welsh, Turning Words into Deeds? The Implementation of the Responsibility to Protect, 2 GLOBAL RESP. TO PROTECT 155 (2010).
211 Id. at 156.
213 Id.
July 24-28, 2009. The debates were preceded by a presentation by UN Secretary General Ban Ki-Moon about his report on implementing R2P. Ban endorsed the concept of "sovereignty as responsibility," indicating that sovereignty and responsibility are “mutually reinforcing principles.” The Secretary General reiterated that his report seeks to position the R2P principle squarely within the UN’s domain and within the UN Charter. He highlighted the responsibility to prevent as the most important element of the R2P principle. Ban articulated the hope that states will strengthen their respective capacities for early warning and prevention in order to ensure an early and flexible response in country-specific situations. Force should only be utilized as a last resort and in conformity with the relevant provisions of the UN Charter.

The General Assembly debate on R2P provided an opportunity for UN Member States to have a dialogue on how they intended to fill the gaps in preventing mass atrocities. Generally, Member States included practical examples of how governments were already at work in enhancing R2P in their own regions and at national levels. Member States also raised concerns regarding the veto power of the five permanent members of the Security Council and stressed the need to come to a consensus in the event of mass atrocity crimes.

At the international level, UN Member States recommended strengthening the early warning systems by bolstering the offices of the Special Advisors on the Prevention of Genocide

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216 Id.


and on R2P. 219 The Member States also suggested establishing an inter-agency mechanism within the UN to assess early warning monitoring information. 220 The Member States also proposed that the work of the Peacebuilding Commission be linked to the preventative aspects of the R2P principle, emphasizing that the lack of post-conflict reconstruction makes the return to conflict nearly inevitable. The Member States also stressed the need to increase support for political processes at the regional and sub-regional level, as well as strengthening existing structures and creating regional standby forces for rapid response. 221

Generally, there was constructive involvement by countries that had been skeptical about the R2P principle. However, some delegations expressed caution about R2P. Emphasizing that the R2P principle as endorsed in 2005 was not to be renegotiated, a number of Member States maintained that the scope of the principle should remain limited to the four crimes. 222 Benin and Lesotho noted the need for specifying the term “clear threats to international peace and security” in order to invoke the R2P principle. 223 Chile expressed its concerns that some countries may misuse R2P to justify coercive, unilateral interventions. 224 Chile also highlighted the risk posed by selective application of R2P. 225 Sudan called for the General Assembly to be the sole body to

221 Gary Quinlan, Permanent Representative of Australia to the U.N., Statement at the G.A. Debate on the Responsibility to Protect (July 24, 2009), http://responsibilitytoprotect.org/Australia_ENG (1).pdf.
224 Heralso-Oz, Permanent Representative of Chile to the U.N., Statement at the G.A. Debate on the Responsibility to Protect (July 23, 2009), http://www.responsibilitytoprotect.org/Chile_ENG_SP.pdf.
225 Id.
authorize the use force and stated that assigning the Security Council to control R2P is equivalent to “giving the wolf the responsibility to adopt a lamb.”

The Chinese perspective on R2P had not changed from its previous stance. China noted that the implementation of the R2P principle should not contravene the principles of state sovereignty and non-interference in internal affairs. The delegation of China added that:

[T]he 2005 World Summit Outcome Document gave a very prudent description of the R2P principle and the document strictly limited the scope of its application to four serious international crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity. However, experience in the past few years shows that there is still controversy over the meaning and implementation of the R2P principle. The government of a given state has the primary responsibility to protect its own citizens. The international community can provide assistance, but the protection of its citizens ultimately depends on the government of the state. This is in keeping with the principle of state sovereignty. Although the world has undergone profound and complex changes, the basic status of the purposes and principles of the UN Charter remains unchanged.

Therefore, even though there was a positive reply from most UN Member States towards the R2P principle, the General Assembly debate on R2P did not clarify or resolve controversies associated with the R2P principle.

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226 The Permanent Representative of Sudan to the U.N., Statement at the G.A. Debate on the Responsibility to Protect (July 29, 2009), http://www.responsibilitytoprotect.org/Sudan_ENG.pdf.
228 Id.
4.3.5 UN Secretary General’s Report on Early Warning, Assessment, and R2P (2010)

UN Secretary-General Ban released a report on “Early Warning, Assessment and the Responsibility to Protect” on July 14, 2010. The report mentioned the lessons learned in the 1990s. The report noted the findings by the UN Independent Inquiry on Rwanda, which stated that “there was not sufficient focus or institutional resources for early warning and risk analysis” at headquarters and that there was “an institutional weakness in the analytical capacity of the United Nations.” Given this conclusion, in order to strengthen the UN early warning capacity, the report called for improvements in “its capacity to analyze and react to information” and in the flow of information within the UN system and to the Security Council, including on human rights issues. The report highlighted the situation of Srebrenica, and stated that the lack of sufficient information sharing was “an endemic weakness throughout the conflict.”

The report, however, noted that, over the past decade, there had been several efforts within the UN system to address some of these gaps, at least in specific issue areas. Therefore, focusing on the present capabilities of the UN system, the report found no shortage of information. The Department of Political Affairs (DPA), the Office for the Coordination of Humanitarian Affairs (OCHA), the Inter-Agency Standing Committee, the Department of Peacekeeping Operations (DPKO), the United Nations International Children’s Emergency Fund (UNICEF), the Office of the High Commissioner for Human Rights (OHCHR), and the United Nations High Commission

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229 U.N. Secretary General, Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary General, U.N. Doc. A/64/864 (July 14, 2010).
230 Id. ¶ 7.
231 Id.
232 Id.
233 Id.
234 Id. ¶ 8.
for Refugees (UNHCR) all possessed information analysis capabilities and early warning mechanisms.  

However, the report identified several major information gaps, including insufficient information sharing and analysis among the UN branches and Member States. It also identified a need for assessment tools and increased capacity to ensure both efficiency and system-wide coherence in developing responses to R2P situations under Chapter VI, VII, and VIII of the UN Charter. The report outlined the importance of the “two-way flow of information” between the UN and regional and sub-regional organizations that can help close the identified gaps. Here, the report highlighted the need to develop responses to R2P situations within the UN Charter framework and, thus, was not intended to create a new international legal framework for R2P’s implementation. The suggestions in this report seem to focus on processes rather than the substantive problems with R2P.

The report called for an informal, interactive dialogue to be held in the General Assembly in 2011 on the role of regional and sub-regional organizations in implementing R2P. Furthermore, the report proposed new internal procedures to expedite and regularize the process by which the UN considers its response to situations of genocide, war crimes, crimes against humanity, and ethnic cleansing. The report concluded by stating that, while “early warning does not always produce early action, however, such early action is highly unlikely without early warning.” Early action must be well-informed, which emphasizes the need for sophisticated early warning and assessment capabilities.

235 Id. ¶ 9.
236 Id. ¶ 10.
237 Id.
238 Id. ¶ 14.
239 Id. ¶ 18.
240 Id. ¶ 19.
4.3.6 UN Secretary General’s Report on the Role of Regional and Sub-Regional Arrangements on Implementing R2P (2011)

Secretary-General Ban released a report on June 27, 2011, entitled, “The Role of Regional and Sub-Regional Arrangements on Implementing the Responsibility to Protect.”241 The report emphasized the need for the Security Council and regional and sub-regional organizations to support and lend legitimacy to each other in implementing R2P. The report highlighted the role that the regional and sub-regional organizations perform in protecting populations from mass atrocities. It recognized the advantage regional organizations have in preventing as well as reacting to mass atrocities. Further, the report established the need for more collaboration among these actors, including the areas of best practices and lessons learned, peer review, early warning information analysis, and coordination on sanctions or punitive measures.242

The report emphasized that regional and sub-regional arrangements can assist state capacity-building in preventing mass atrocities structurally and operationally.243 The report defined structural prevention as changes in domestic contexts that reduce conditions which cause mass atrocity crimes, whereas operational prevention relates to more directly forestalling imminent threats. The report noted the importance of having a full range of preventive tools at the international community’s disposal that can be used to respond to crises early and with greater flexibility.244

The report highlighted the importance of collaboration between regional and sub-regional arrangements and other UN organs, such as the Security Council and the Peacebuilding

242 Id. ¶ 7.
243 Id. ¶ 21.
244 Id. ¶ 24.
However, the report does not impose or identify any legally binding obligation on regional and sub-regional organizations to assist states or collaborate with the UN. The Secretary-General requested that Member States consider long-term discussions between the Security Council and regional and sub-regional organizations in line with their respective commitments to collective action as stipulated in paragraphs 138 and 139 of the World Summit Outcome Document.

The Secretary General’s report on the Role of Regional and Sub-Regional Arrangements on Implementing R2P only addressed preventive efforts. It did not deal with how regional and sub-regional entities should implement responsibility to react measures. Neither does it discuss issues regarding the scope of R2P. Therefore, apart from encouraging states to protect their own population and regional and sub-regional entities to prevent mass atrocities, the report did not address critical issues associated with the R2P principle.

4.3.7 UN Secretary General’s Report on the Responsibility to Protect - Timely and Decisive Response (2012)

Another report from the UN Secretary General, entitled “Responsibility to Protect - Timely and Decisive Response,” was released on July 25, 2012. It discussed the broad range of non-coercive and coercive tools available and the role of actors at the international, regional, national, and local levels in implementing these tools. The report emphasized the importance of preventing mass atrocities, but noted that, in cases in which preventive measures proved inadequate and the threat to populations remained imminent, the international community had a responsibility to take collective action to protect civilians. The report emphatically stated that there

245 Id. ¶¶ 22, 38.

is never a question of whether R2P applies to a situation, but how best to implement the principle.247

Primarily, the report emphasized the state’s responsibility to do everything possible to prevent the commission of these crimes and violations on its territory, or under its jurisdiction, and to stop them whenever they occur.248 The report noted that “the state responsibility may entail an element of response, such as suppressing incendiary rhetoric targeting a minority group, or disrupting arms shipments that may be used to commit genocide, war crimes, ethnic cleansing and crimes against humanity.”249 However, the report focused on the international responses to help states to prevent atrocities. It discussed the international community’s commitment to help states build capacity to protect their populations and assist those which are under stress, and to do so before crisis and conflicts break-out.250 It also emphasized the importance of gathering information, in particular, through a commission of inquiry. However, the report did not discuss any legal consequences of the international community’s failure to extend such assistance.

The report highlighted the preference for addressing situations first with the appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter.251 The report noted the non-coercive responses stipulated in Chapter VI of the UN Charter, including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.252

The report asserted that, only after exhausting all non-coercive measures, Member States should take timely and decisive collective action in accordance with the UN Charter to protect

247 Id. ¶ 13.
248 Id. ¶ 11.
249 Id.
250 Id. ¶ 12.
251 Id. ¶ 22.
252 Id. ¶¶ 23,24.
populations. Such collective measures may be authorized by the Security Council, under Articles 41 and 42 of the Charter. The report named some possible coercive measures, but added that, under Chapter VII of the UN Charter, only the Security Council can authorize the use of force. Toward this end, the report specifically stated that “the coercive military force can be utilized in various forms, through the deployment of United Nations-sanctioned multinational forces for establishing security zones, the imposition of no-fly zones, the establishment of a military presence on land and at sea for protection or deterrence purposes, or any other means, as determined by the Security Council.” However, the Security Council’s failure to respond to a crisis in a timely and adequate manner does not give rise to any breach of a legal obligation. Therefore, both the responsibility to prevent and the responsibility to react are categorized squarely within the UN Charter, and, thus, R2P creates no new rights or obligations under international law. In fact, the report clearly stated that the R2P principle is a concept based on fundamental principles of international law as set out, in particular, in existing international humanitarian, refugee, and human rights law.

In regards to UN peacekeeping missions, the report described their usual deployment as based on the principle of receiving the consent of the host state. The report stated that peacekeeping missions have a broad range of mechanisms aimed at supporting peaceful political transitions and building a host nation’s capacity to protect civilians. Thus, the report identified the responsibility to rebuild as part of peacekeeping missions. However, since they are mandated under Chapter VII of the UN Charter to protect civilians, peacekeeping missions may use force as a measure of last resort in situations where civilians are under imminent threat of physical harm.

253 Id. ¶ 31.
254 Id. ¶ 32.
255 Id. ¶ 9.
256 Id. ¶ 16.
257 Id.
While the report addressed a wide range of issues, it failed to address key issues that surround the R2P principle. Although the report highlighted the international community’s responsibility to assist host states in its responsibility to protect civilian populations, the report made clear that R2P created no new legally binding rights or obligations. The report clearly specified the Security Council as the only body that could authorize the use of force, yet it did not address the situation where the Security Council failed to take a decision. Therefore, overall, the report offered nothing new concerning R2P.

4.3.8 UN Secretary General’s Report on the Responsibility to Protect: State Responsibility and Prevention (2013)

On July 9, 2013, UN Secretary-General Ban published his fifth report on R2P, “State Responsibility and Prevention.”258 The report focused on the responsibility of states to protect their populations by developing the necessary national capacity to build societies resilient to mass atrocities. The report identified, in varying degrees, six risk factors in situations where atrocities were committed. It discussed preventive measures available to governments, with over 40 examples that have been implemented by Member States.259 The report also outlined targeted measures, such as establishing early warning mechanisms or designating an atrocities prevention or R2P focal point to prevent atrocities.260

However, the report indicated that these outlined measures are not new. Many states had already implemented these policy options. Therefore, the report introduced nothing new to the responsibility to prevent. Rather, the report, to some extent, attempted to clarify the scope of the responsibility of individual states in protecting their populations.

259 Id. ¶¶ 12-29.
260 Id. ¶ 31.
4.4 Conclusion

From its inception in 2001 until 2013, the R2P principle has become ubiquitous in debates and responses to humanitarian emergencies. The R2P principle has also encountered political resistance from the beginning. However, whether R2P has remedied problems associated with pre-R2P humanitarian intervention debates, and represents a change in international law, is doubtful.

First, the ICISS report did not clarify when to invoke the R2P principle. However, after the 2005 World Summit Outcome Document, a consensus emerged that the R2P principle should be applicable to four crimes, namely: genocide, war crimes, ethnic cleansing, and crimes against humanity. In practice, even within the consensus on these four crimes, states have contested when the R2P principle applies. Efforts to apply R2P beyond these four crimes have been widely rejected by a majority of Member States. In the case of Burma, for instance, some states argued for the application of the R2P principle to cases where a government fails to provide or permit humanitarian relief in the wake of natural disasters. Opponents of the application of the R2P principle in Burma argued that crimes against humanity are defined under international law to encompass a host of inhuman acts which intentionally cause great suffering to any civilian population, especially when there is prior knowledge of the action and/or attack.\textsuperscript{261} These opponents claim that restricting life-saving humanitarian aid to victims of a natural disaster does not rise to the level of crimes against humanity and, therefore, does not trigger R2P.\textsuperscript{262} Further, Russia appealed to R2P to justify its military action in Georgia. In that case, Russia’s claim of civilian abuse by the Georgian government in South Ossetia was not factually verified, and there was no agreement on such a claim among other Member States. The rejection of R2P’s application to the Burma and Russia-Georgia incidents reinforced the general consensus that the application of

\textsuperscript{261} Bellamy, \textit{supra} note 46, at 152.

\textsuperscript{262} \textit{Id.}
R2P should be confined to the four crimes specified in the 2005 World Summit Outcome Document.

Moreover, the incidents that occurred from 2001 to 2013 describe strong support for the position that only the Security Council can authorize the use of military force under the responsibility to react. Except in the case of Russia’s use of force in Georgia, no incidents occurred during the period under review where any state used force under R2P without Security Council authorization. However, neither the ICISS report nor the 2005 World Summit Outcome Document expressly addressed whether international law permitted the unilateral use of force to address mass atrocity. Neither did either document prohibit such unilateral use of force without Security Council authorization. Although Russia, China, and many other states stressed the need for the Security Council to authorize the use of force under R2P, some states, in particular the United States and United Kingdom, justify the unilateral use of force under international law as a response to humanitarian atrocities.

In addition, there was no agreement among the Member States on what actions, if any, should be taken when R2P is actually invoked. For example, the use of force in Côte d’Ivoire and Libya raised doubts about how, and to what extent, the use of force should be carried out. In both cases, criticisms were leveled against the excessive use of force. Excessive use of force under the responsibility to react is also one of the apparent reasons behind the unwillingness of Security Council members to take action in Syria.

There has been a clear emphasis on the state’s primary responsibility to protect its populations from mass atrocities. In fact, this responsibility is grounded in long-standing international law. However, the ICISS report and the 2005 World Summit Outcome Document emphasized the international community’s responsibility to assist other states in their conflict-
prevention efforts. The responsibility of the international community to help prevent human rights violations in another state is clearly specified under international law. In fact, the Convention on the Prevention and Punishment of the Crime of Genocide noticeably specified the international community’s undertaking to prevent occurrences of genocide. Therefore, the concept of the international community’s responsibility to help prevent human rights violations in another state already existed in international law and is not a new idea introduced by the R2P principle. On the other hand, state practice did not demonstrate any desire to create or impose legal obligations on states to provide assistance to other states to help with the responsibility to prevent, to participate in actions under the responsibility to react, or contribute to the responsibility to rebuild.

There was also no consistency in the application of the R2P principle in various other crises that occurred during this period. Although some cases have been identified as possible cases of mass atrocities, there were political refusals to apply the R2P principle. This variation suggests that R2P remains heavily dependent on political decisions of states rather than on the operation of legal principles. For example, there was no consensus among the Member States on whether to invoke R2P in Sri Lanka. In fact, the UN acknowledged its own failure in meeting its responsibilities in Sri Lanka. A similar situation was seen in the R2P controversies connected to Gaza. The political decisions on the application of R2P in different crises were influenced by disagreements over state sovereignty and the use of force.

A similar political division over sovereignty and the use of force existed under the pre-R2P humanitarian intervention debate. The four crimes identified in the 2005 World Summit Outcome

263 ICISS, supra note 1, ¶ 3.3.
Document as cases in which R2P should be exercised are similar to the emphasis on grave and systematic violations of human rights as the required trigger for pre-R2P humanitarian intervention. Although many countries emphasize the requirement for Security Council authorization of the use of force, some Member States continue to argue that international law includes the right to use force for humanitarian purposes without Security Council authorization. This disagreement also characterized pre-R2P debates in international law about humanitarian intervention. Moreover, there is no consensus on what actions should be taken when states exercise the responsibility to react, and similar problems arose with humanitarian interventions before articulation of the R2P principle.

Both Chapters 3 and 4 indicate that the emergence and evolution of the R2P principle have not changed international law from what existed before the R2P principle appeared in 2001. The analysis has mentioned what problems associated with the R2P principle also formed part of the controversies in international law about humanitarian intervention. To further explore the use of the R2P principle after its articulation in 2001, the next chapters analyze in detail, four case studies: Darfur, Libya, Côte d’Ivoire, and Syria.
CHAPTER 5

DARFUR

5.1 Introduction

This chapter is the first of four chapters that critically analyze key R2P case studies. These case studies probe at a deeper level of detail how state and other actors used the R2P principle. To achieve this objective, the case studies analyze state practice within and beyond the UN regarding the responsibilities to prevent, react, and rebuild. By doing so, the case studies examine how the R2P principle has been applied and what problems have emerged from this application. Ultimately, the case studies help determine whether state practice reveals if the R2P principle represents a change in international law.

This chapter focuses on violence and atrocities in Darfur, the first major humanitarian crisis that developed after the ICISS articulated the R2P principle in 2001. The challenges faced in Darfur were urgent and critical, yet the international community failed to take timely action in response to mass atrocities in Darfur. This tragic failure to respond was much criticized and considered by many to be a significant failure in terms of the R2P principle.

5.2 Background to the Crisis in Darfur

Darfur is situated at the western corner of Sudan and shares borders with Chad in the west, Libya in the northwest, and the Central African Republic in the southwest.1

Known as the homeland of the Fur ethnic tribe, Darfur is home to many other ethnic tribes as well. In addition to the Fur, the Masalit and Zaghawa are the other main black African ethnic groups. Other large ethnic groups in Darfur are of Arab or migrant Arab descent and include the Rizeigat, Mahariya, Iraqat, and Beni Hussein tribes. The northern part of Darfur is dominated by the traditional camel-herding Nordic Abbala tribe, while the eastern and southern parts are inhabited by the cattle-herding Baggara tribe. Thus, Darfur consists of an incredibly diverse variety of tribes and smaller ethnic groupings.

Once an independent Muslim sultanate, Darfur was ruled by the Daju and the Tunjur tribes from 1856 to 1916. After 1916, Darfur was incorporated into the Sudan, which was already under British rule. Under British rule, Darfur was marginalized and lacked sufficient infrastructure, economic, or educational development to cope with the advances in other parts of the country. Sudan gained independence in 1956. A small elite in Khartoum, who had gained wealth and power, ruled Sudan and further marginalized Darfur with a divide-and-rule strategy that suppressed any potential opposition.

In the mid-1980s, the economically deprived population in the north of Darfur faced extreme hardships because of a drought that started in the mid-1970s. All attempts

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2 Ibrahim Fouad, Introduction to the Conflict in Darfur/West Darfur, in EXPLAINING DARFUR 12 (Agnes van Ardenne-van der Hoeven, Mohamed Salih, Nick Grono, and Juan Mendez eds., 2006).
3 Id.
4 Id.
6 Id.
7 Id.
at agricultural cultivation were rendered impotent by the drought. The drought conditions caused thousands of Darfuris to walk across the country to Khartoum seeking food. Declaring them as refugees from Chad, the Sudanese government trucked them to Kurdufan, where there was no food or water for them to survive and, as a result, most of them died. In the meantime, an Arab militia, later called the Janjaweed, was formed with the blessing of the government in Khartoum, and it fought against local African farmers to gain access to more pastures.

From 1987 to 1989, local tribes fought with Arab-origin groups for water and grazing land. These conflicts deepened the division among non-Arab tribes and Arab-origin groups. The Arab-origin groups with the support of government-backed Rizaiqat militiamen attacked many non-Arab ethnic villages. The Sudan Liberation Army retaliated against one of these attacks against ethnic Dinka villages in western Bahr al-Ghazal and killed Rizaiqat militiamen. In March 1987, Rizaiqat militiamen and Arab townspeople attacked a Dinka village in al-Da’ien and killed thousands of ethnic Dinka as apparent revenge for Sudan Liberation Army’s killing of Rizaiqat militiamen.

Omar Hassan al-Bashir, supported by the Arab militia, came to power in Sudan in 1989. The government of Sudan started implementing policies that created a binge of hatred against African tribes in Darfur and caused Arab militias to further arm themselves. The enactment of new administrative boundaries by the government of

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9 Id.
Sudan in 1993 frustrated African farmers in Darfur even more. By 2001, more local tribesmen joined local paramilitaries to fight against Janjaweed militias.\textsuperscript{11}

Although tensions and violence in Darfur were increasing, these problems remained localized because western Sudan was politically and economically sidelined by the central government in Khartoum.\textsuperscript{12} However, two rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) began launching continuous attacks against the Sudanese government in early 2003.\textsuperscript{13} The aim of the SLA and JEM was to force the government of Sudan to address economic issues and political problems experienced by non-Arabs in Darfur.\textsuperscript{14} The government’s response was a series of brutal attacks against ethnic African tribes. The government launched attacks against civilians using both conventional military forces and Arab militias.\textsuperscript{15} By late 2003, the escalating violence was not limited to Darfur, but extended to neighboring regions as well. While ground attacks were carried-out by the militia, the government’s Air Force launched aerial bombardments, including with cluster bombs. The government-backed Janjaweed militia, which was largely composed of fighters of Arab background, together with government military, paramilitary, and police personnel, employed genocidal tactics against civilians, including aerial bombing, shelling, ground attacks, kidnapping, torture, and extra-judicial executions.\textsuperscript{16}

\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id’t Crisis Group, \textit{supra} note 11.
\textsuperscript{16} Human Rights First, \textit{supra} note 8.
By the end of 2004, the situation in Darfur worsened when the government decided to withdraw local police and other officials, ostensibly claiming the inability to guarantee their safety. With the removal of the local police and all vestiges of legal protection, the Janjaweed filled the power vacuum with its own atrocities. Comparing the Darfur atrocities with those that occurred in Rwanda, observers claimed Darfur was “Rwanda in slow motion.”

Darfur was characterized by the UN, as well as most Western states, as the most serious humanitarian emergency in the world. According to the BBC, tens of thousands of deaths were reported, and many more Darfur citizens fled their homes. Constant harassment by the government of Sudan meant virtually all humanitarian work was either prohibited or diminished to the point of total ineffectiveness. The humanitarian situation in Darfur deteriorated into tragedy, and the livelihood of the population was devastated. It was clear that the harm was serious enough to merit an international response, including with possible military intervention, and there was an urgent need to stop human suffering.

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17 Id.
18 Scott Straus, Rwanda and Darfur: A Comparative Analysis, 1 GENOCIDE STUDIES AND PREVENTION 41, 45, 46 (July 2006).
19 Paul Williams & Alex Bellamy, The Responsibility to Protect and the Crisis in Darfur, 36 SEC. DIALOGUE 127 (2005).
21 Human Rights First, supra note 8.
5.3 Darfur, the Genocide Question, and the R2P Principle

For many analysts, Darfur represented an important test case for R2P, a test which the R2P principle is generally reckoned to have failed. Many experts argue that the R2P principle failed to generate sufficient political will to mount and sustain a robust response, including the deployment of appropriately mandated peacekeepers to protect the Darfur civilian population. Others took the criticism farther and argued that the R2P principle itself has its own inherent shortcomings. Critics of R2P argued that the attention paid to the R2P principle caused outside actors to focus on the conditions for the deployment of peacekeepers, rather than the conflict’s underlying causes.

As the violence and massacres continued in Darfur, much attention focused on whether the crisis should be called “genocide.” According to Jamal Jaafary, Senior Research Assistant with the Public International Law and Policy Group in Washington, D.C., whether genocide was committed in Darfur received such attention because, from a legal point of view, applying the term genocide to a crisis situation is not simple. Eric Reeves, an advocate for Darfur, added that a finding of genocide would have been a political hazard for the Security Council and for states. Explaining the importance of

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22 David Mepham, Darfur: The Responsibility to Protect 46 (2007); Cristina Bedescu & Linnea Bergholm, Responsibility to Protect and the Conflict in Darfur: The Big Let-Down, 40 SEC. DIALOGUE 287 (2009).
23 Mepham, supra note 22, at 46; Lee Feinstein, Darfur and Beyond: What is Needed to Prevent Mass Atrocities 84 (2007).
26 Scott Straus, Darfur and the Genocide Debate, 84 FOREIGN AFF. 123 (Jan. 2005).
the genocide question in Darfur, John Hefferman, a Senior Communications Associate with Physicians for Human Rights, explained that there is no need for genocide to occur in order to take action under R2P. However, he stated that, in order to apply the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), it was important whether genocidal acts were committed in Darfur.

Whether crimes of genocide had been committed in Darfur is important for R2P analysis because genocide is one of the crimes stipulated in both the ICISS report and the 2005 World Summit Outcome Document that justifies the international community to take action under the R2P principle. Of the four crimes widely recognized as within the R2P principle, genocide is considered the most serious. Identifying a crisis as genocide heightens the responsibility of the international community to act. If genocide had occurred in Darfur, then there was a clear failure of the Security Council and states to implement R2P. Also, those states that are parties to the Genocide Convention have international legal obligations to respond.

Therefore, under both the R2P principle and other international legal rules, determining whether the acts of genocide have occurred increases the pressure for the international community to mount some response. Thus, whether the “genocide question” distracted the international community from applying the R2P principle to the atrocities in Darfur, and whether the controversy in Darfur involved genocide, played into the ambiguity about when thresholds are crossed concerning the four crimes that R2P

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29 Int’l Coalition for the Responsibility to Protect, supra note 27.
30 Id.
addresses. These concerns need further analysis in order to understand how the genocide question affected the politics of the R2P principle in the Darfur crisis.

In 1944, a Polish-Jewish lawyer, Raphael Lemkin, described Nazi policies of organized murder, including the brutal and systematic destruction of European Jews as genocide. He formed the word "genocide" by combining geno-, from the Greek word for race or tribe, with -cide, derived from the Latin word for killing. In proposing this new term, Lemkin had in mind "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." In 1945, the International Military Tribunal held at Nuremberg, Germany, charged Nazis leaders with “crimes against humanity” and the word “genocide” was included in the indictment.

The Genocide Convention, adopted in 1948, identified five characteristics of genocide: “(1) killing members of a particular ethnic group; (2) causing serious bodily or mental harm to members of the group; (3) forcibly transferring children of a group to another group; (4) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction; and (5) imposing measures intended to prevent births within the group.”

The Genocide Convention’s definition of genocide subsequently informed international legal efforts against this problem. For example, the Rome Statute

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32 Id.
33 Id.
34 Id.
establishing the International Criminal Court (ICC) in 1998 defines the crime of genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: “(1) killing members of the group; (2) causing serious bodily or mental harm to members of the group; (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (4) imposing measures intended to prevent births within the group; (5) forcibly transferring children of the group to another group.”

With the escalation of violence in Darfur, Nicholas Kristof, a columnist for the New York Times, published a number of articles claiming that the crimes carried out in Darfur were nothing less than genocide. Secretary of State Colin Powell used the word “genocide” in reference to Darfur. The U.S. House of Representatives also adopted a resolution labeling the Darfur crisis as genocide. Citing the Genocide Convention, the resolution called for the Bush administration to consider multilateral or unilateral intervention to prevent genocide. However, interpreting U.S. international obligations differently, Secretary of State Powell stated that, in addition to providing humanitarian relief, the United States had already pressured the government of Sudan to stop abuses and that merely applying the “genocide” label would not create legal obligations to

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40 Alex J. Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, 19 ETHICS & INT’L AFF. 31 (Sept. 2005).
provide more assistance or apply more pressure. Interestingly, however, in June 2009, General Scott Gration, President Barack Obama’s Special Envoy for Sudan, concluded that the situation in Darfur was not genocide.

According to Straus, the proponents of applying the “genocide” label to the Darfur crisis highlighted two points: “first they claim the events that occurred in Darfur met the general standard for genocide: the violence targeted ethnic groups and such violence was systematic and intentional, also those acts received government support; and, second, they claim that under the Genocide Convention, using the term triggers an international intervention to halt the violence.”

The UN International Commission of Inquiry on Darfur, appointed by the UN Secretary General to determine whether genocide had occurred in Darfur, concluded in 2005 that “it had found a pattern of mass killings and forced displacement of civilians that did not constitute genocide, but that represented serious crimes that should be sent to the ICC for prosecution.” The Commission alleged that, although genocide had not been committed, "it should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region," and that "international offenses such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide." While the Commission said that no evidence of

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41 Id.
43 Straus, supra note 26, at 128, 129.
organized governmental acts of genocide existed, it suggested some government officials and other people might have acted "with genocidal intent." The Commission strongly suggested that the Security Council should refer the Darfur atrocities to the ICC. It said the crimes in Darfur met the jurisdictional terms of the 1998 treaty that created the court.

Some Member States supported the Commission’s recommendation, while China, Russia, and several other states invoked the primacy of the responsibility of the state. These countries argued that it would be premature to take collective action in Darfur, as the government of Sudan had not manifestly failed to exercise its responsibility to protect the people in Darfur. The Bush administration had frequently pushed for action against Sudan, charging that Sudan’s involvement in violence against black African tribes amounted to genocide. At the same time, the United States initially objected to referring the atrocities in Darfur to the ICC, opposition rooted in the Bush administration’s position on the ICC.

So far, the Holocaust and Rwanda are the only two incidents that are generally recognized as genocidal events. Other occurrences in Armenia, Bosnia, Cambodia, or the Democratic Republic of Congo are documented as mass killings but not universally described as genocide. However, although hundreds of thousands of civilians were killed, tens of thousands were displaced in camps, and their infrastructure and livelihoods were destroyed, the international community could not agree whether to frame Darfur as

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46 Id. ¶ 520.
47 Id. ¶¶ 647, 648.
48 Straus, supra note 26, at 123.
49 Id.
50 Id.
genocide and take timely action to halt what was labeled as the worst humanitarian
disaster on the planet.\textsuperscript{51} Thus, this controversy about whether genocide occurred in
Darfur caused problems for the application of the R2P principle in Darfur.

5.4 The Application of the R2P Principle in International Responses to the Darfur
Crisis

After it erupted, regional and international entities addressed the Darfur crisis in
various ways. The African Union (AU) undertook several measures to try to prevent mass
killings, and the UN adopted a number of resolutions urging all parties involved in the
conflict to take the necessary steps to prevent and end the violations of human rights and
international humanitarian law. Some of the resolutions highlighted the responsibility of
the government of Sudan to protect its citizens. Other resolutions tried to garner
international support to solve the conflict diplomatically. In addition to monitoring the
situation in Darfur throughout the conflict, the UN established peacekeeping forces, with
the goal of ending the mass atrocities and safeguarding civilian lives.

Despite all the measures taken by the AU and the UN, they failed to protect
civilians or solve the Darfur crisis. Therefore, how the AU and the UN responded to the
Darfur crisis is worth analyzing to understand how state practice handled the R2P
principle during this crisis.

\textsuperscript{51} Id.
5.4.1 Responsibility to Prevent

From the beginning of the crisis in Darfur, the UN and the international community acted to prevent atrocities. The AU supported a number of measures, including ceasefire agreements and negotiations, to bring peace to Darfur. The UN also made various attempts, which included, for example, the adoption of resolutions calling for the cessation of violence and threatening to take more stringent actions to prevent further escalation of violence in Darfur.

As stipulated by the ICISS report and the 2005 World Summit Outcome Document, the primary responsibility to prevent atrocities is with the individual state. The ICISS report points out that “state sovereignty implies responsibility,” and the primary responsibility to protect its population lies with each individual state.\footnote{INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, REPORT 2001: THE RESPONSIBILITY TO PROTECT, ¶ 2.29 (2001), available at http://responsibilitytoprotect.org/ICISS%20Report.pdf.} Similarly, the World Summit Outcome Document spells out the international community’s responsibility to assist a state in fulfilling its responsibility to prevent atrocities in its territory.\footnote{2005 World Summit Outcome Document, ¶ 138, G.A Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).}

As Jan Pronk, Special Representative of the Secretary General for the Sudan and head of UN peace support operations, stated, the government of Sudan had the primary responsibility for protecting the population of Darfur and ending the crisis.\footnote{U.N. SCOR, 59th Sess., 5027th mtg. at 3, U.N. Doc. S/PV. 5027 (Sept. 2, 2004).} Bellamy argues that Pronk implied that the crisis had barely gone beyond the first level of responsibility identified by the ICISS.\footnote{Bellamy, supra note 40, at 46.} Pronk further argued that, “if the government is
unable to fully protect its citizens by itself, then it should request and accept the assistance from the international community.”  

Therefore, the government of Sudan bore the responsibility to prevent mass atrocities against its populations and protect them from such violence.

For years, the AU made efforts to seek an international and political solution to the crisis in Darfur. The first agreement which sought to end the Darfur crisis was the N’Djamena Humanitarian Ceasefire Agreement, signed on April 8, 2004, between the government of Sudan, the SLA, and the JEM. This pact, however, was rushed and not fully accepted by AU Member States. The agreement allowed the AU to deploy ceasefire monitors and troops for the protection of the civilian population. Under this agreement, by mid-2004, the AU established a small monitoring mission (AMIS) consisting of some 60 monitors and 300 troops. The mission’s goal was to monitor and observe compliance of the parties to the humanitarian ceasefire agreement signed in N’Djamena, contribute to the improvement of the general security situation in Sudan, provide a secure environment for the delivery of humanitarian relief and the safe return of refugees, and protect the civilian population in Darfur.

Attempting to implement the mandate with a limited number of troops and resources was a challenge for AMIS, and, rather than protecting civilians, AMIS had to protect its personnel from rebels and the Janjaweed militia. Therefore, AMIS could not

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58 Bellamy, supra note 40, at 40.
59 Darfur Peace Agreement, supra note 57.
60 Max W. Matthews, Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur, 31 B.C. INT’L & COM. L. REV. 145 (2008).
achieve its objectives for many reasons, including, but not limited to, AMIS’ restricted mandate and acts of violence directed against it. Another major drawback with the AMIS effort was the limited number of troops and the inadequate financing of this military force. The AMIS force was too small and, because there was no proper mechanism for raising money, it was grossly underfunded by the AU. The African countries that deployed troops could not afford the cost of the deployment. Financial support for AMIS was far from adequate, and the necessary financial and logistical resources were not available for AMIS to carry out a successful mission.\footnote{World is Responsible for Ending Terrible Violence in Sudan, Annan Says, U.N. NEWS CENTER (Sept 24, 2004), http://www.un.org/apps/news/story.asp?cr=&cr1=&newsid=12044#.UqqShzKA1dg.} The AU effort, however well-intended, did not have sufficient strength to undertake its mandate, and these factors hindered the effective performance of AMIS.\footnote{Matthews, \textit{supra} note 60, at 145; Alex de Waal, \textit{Darfur and the Failure of the Responsibility to Protect}, 83 ROYAL INST. INT’L AFF. 1041 (2007), available at http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2007/83_61039-1054.pdf.}

AMIS failed in its responsibility to prevent further atrocities and to protect civilians in Darfur. Given this failure, UN Secretary General Kofi Annan stated that the world’s peacekeeping strategy in Darfur was not working and that AMIS had failed to protect civilians.\footnote{UN Admits Sudan Policies Failing, INNER PRESS SERVICE (Dec. 22, 2004), http://www.ipsnews.net/2004/12/politics-un-admits-sudan-policies-failing/; Bellamy, \textit{supra} note 40, at 44.} Therefore, it was clear that, with regard to AMIS, the responsibility of the international community to prevent violence against civilians in Darfur had failed.

While AMIS struggled to protect civilians in Darfur, the Security Council adopted Resolution 1547 on June 11, 2004, establishing the UN Advance Mission in the Sudan (UNAMIS).\footnote{S.C. Res. 1547, U.N. Doc. S/Res/1547 (June 11, 2004).} The resolution was based on the recommendation of Secretary General
Annan, and aimed to strengthen the peace efforts of AMIS. The UNAMIS was mandated to facilitate interactions with the parties concerned and to prepare for the introduction of an envisaged UN peace support operation. The Secretory General also appointed Pronk as his Special Representative for the Sudan and head of UNAMIS. Pronk was responsible for leading the UN peacemaking support to the AU-mediated discussions on the conflict in Darfur. Special Representative Pronk and UNAMIS were deeply engaged in Darfur over the subsequent months, particularly in supporting the AU and its mission in Sudan, by participating in the Abuja peace talks, and establishing a UN assistance cell in Addis Ababa, Ethiopia, which supported deployment and management of UNAMIS.

However, during the adoption of Resolution 1547, some UN Member States refused to discuss the Darfur situation. The conflict in Darfur proved a very contentious issue among the Member States on the Security Council. Some Member States, such as Pakistan, China, and Algeria, and countries with close ties to Sudan, were not in agreement with any Security Council discussion concerning Darfur. The Sudanese did not want the Darfur crisis to be a UN issue either. Abdallah Baali, the Algerian Ambassador to the UN, conceded there was "disagreement about whether or not we should address the situation concerning Darfur, but we got a letter from the Secretary General last week saying we cannot ignore the western part of Sudan, and so we reached

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66 UNMIS Background, supra note 65.
68 UNMIS Background, supra note 65.
71 Id.
72 Id.
an agreement to include it.” 73 Pakistan reminded the Security Council that Sudan is an important member of the AU and has all rights and privileges under the UN Charter, including sovereignty, political independence, unity, and territorial integrity. 74 As a result, Pakistan, China, and Russia argued that the scale of human rights violations in Darfur was not sufficient to declare that Sudan failed in performing its responsibility towards its population. 75 In essence, they defended the behavior of the government of Sudan. The views of these Member States also clearly indicated their anxiety over possible intervention against a sovereign state.

As a response to the escalating crisis in Darfur, the Security Council adopted Resolution 1556 on July 30, 2004, assigning additional tasks to UNAMIS. 76 The resolution, adopted under Chapter VII of the UN Charter, demanded that the government of Sudan disarm the Janjaweed militias, apprehend and bring to justice its leaders and their associates who incited and carried out violations of human rights and international humanitarian law, as well as other atrocities in Darfur. The resolution highlighted the government of Sudan’s primary responsibility to protect human rights while maintaining law and order and protect its population within its territory. Further, it declared that all parties to the conflict in Darfur are obliged to respect international humanitarian law. 77 It also called on the government to fulfill all the commitments made in the joint communiqué issued by itself and the UN Secretary General on July 3, 2004, particularly by facilitating international humanitarian relief by means of a moratorium on all restrictions that might hinder the provision of assistance and access to the affected

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73 Id.
75 Id.
77 Id. ¶ 1.
populations. It requested the government in Khartoum, among other measures, to advance an independent investigation, in cooperation with the UN, of human rights violations and international humanitarian law.

The resolution also requested the Secretary General to consider further actions, including measures under Article 41 of the UN Charter, in the event of non-compliance. According to Article 41, the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, including complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. Endorsing the deployment of international monitors by the AU, the resolution also urged the international community to support those efforts by providing personnel and other assistance, including financing, supplies, transport, vehicles, command support, communications, and headquarters support.

Resolution 1556 was adopted by 13 votes in favor to none against, with 2 abstentions (China, Pakistan), and many states expressed support for immediate action to stop atrocities in Darfur. During the vote on Resolution 1556, the United States favored possible sanctions, including an arms embargo and travel ban on identified officials of the government of Sudan. However, Pakistan opposed any threat of sanctions against

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78 Id. ¶ 1, 16.
79 Id. ¶ 1, 14.
80 Id. ¶ 6.
81 Id. ¶ 2.
Sudan and argued that such actions would violate Sudanese sovereignty. The Arab League, China, and Russia also opposed any sanctions against Sudan. These Member States believed that the primary responsibility of safeguarding the Darfur population remained with the government of Sudan. They also feared that any discussion on Darfur in the Security Council would lead to possible military intervention.

Given Sudan’s failure to comply with earlier resolutions, the Security Council, on September 18, 2004, adopted Resolution 1564. Recalling prior Resolutions 1502 (2003), 1547 (2004), and 1556 (2004), Resolution 1564 threatened the imposition of sanctions against Sudan if it failed to comply with its obligations on Darfur. An international inquiry was also established to investigate violations of human rights in the region.

During the vote on Resolution 1564, Algeria, China, Pakistan, and Russia abstained. These four countries expressed reservations about the threat of sanctions. They were skeptical about the legitimacy of enforcement measures against Sudan. Algeria argued that the Security Council should respect Sudan’s sovereignty. Russia, China, and Pakistan opposed the sanctions, stating that the situation in Darfur had improved. Brazil voted in favor of the draft on the understanding that the resolution

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84 Id.
85 Id.
88 Id.
89 Bellamy, supra note 40, at 46.
91 Id.
could save lives. Brazil also expressed its belief that the Security Council’s excessive use of Chapter VII ran the risk of misleading all parties, including international public opinion, to think that a peaceful resolution and diplomatic measures were not among the steps proposed by the Security Council.92

Speaking after the vote, the representative of the United States, who had co-sponsored the text along with Germany, Romania, and the United Kingdom, said that:

[T]he government of Sudan had failed to fully comply with Resolution 1556. This text reflected the wishes of some delegations to recognize that the government of Sudan had met some of its humanitarian obligations. But nobody should be under the illusion that the government of Sudan had done so voluntarily. It had done so with great reluctance and long delays, under significant pressure from the international community.93

Bellamy noted that the resolution was, in fact, toned down to secure adoption by the Member States of the Security Council, but, importantly, the United States did not oppose the Security Council’s assumption of the responsibility to protect the people of Darfur.94

On November 19, 2004, the Security Council unanimously adopted Resolution 1574 at a meeting in Nairobi, Kenya.95 Recalling Resolutions 1547 (2004), 1556 (2004), and 1564 (2004), the resolution expressed its concern about the growing insecurity and violence in Darfur and highlighted the government of Sudan’s responsibility to protect its population. The resolution offered nothing new from previous resolutions and reiterated

92 Id.
93 Id.
94 Bellamy, supra note 40, at 17.
its call for the government and rebel groups to respect human rights. The resolution welcomed political efforts to resolve the conflicts in Sudan and reiterated its readiness to establish a mission to support the implementation of a comprehensive peace agreement.\footnote{Press Release, Security Council Nairobi Meeting Welcomes End of Year Peace Pledge by Parties to Sudan Conflict, U.N. Press Release, SC/8249 (Nov. 19, 2004).} The resolution extended the mandate of UNAMIS for additional three months until March 10, 2005.

On January 9, 2005, the government of Sudan and the Sudan People’s Liberation Movement (SPLM) signed a Comprehensive Peace Agreement (CPA), in which an interim period was established.\footnote{The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People’s Liberation Movement (Jan. 9, 2005), available at \url{http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf}.} The CPA was meant to end the Sudanese Civil War between forces in north and south Sudan, develop democratic governance countrywide, and share oil revenues. The CPA further set a timetable by which South Sudan would have a referendum on its independence. However, the CPA did not address the conflict in Darfur. On March 24, 2005, the United Nations Mission in Sudan (UNMIS) was established with a limited mandate under Security Council Resolution 1590.\footnote{S.C. Res. 1590, U.N. Doc. S/Res. 1590 (Mar. 24, 2005); \textit{Mission Background, THE U.N. MISSION IN SUDAN}, \url{http://unmis.unmissions.org/} (last visited Nov. 14, 2013).} Under this resolution, the Security Council established UNMIS for an initial period of six months with up to 10,000 military personnel, as well as an appropriate civilian component, including up to 715 civilian police personnel.\footnote{S.C. Res. 1590, ¶ 1, U.N. Doc. S/Res. 1590 (Mar. 24, 2005).} Further, the resolution requested UNMIS closely liaise with AMIS with a view towards expeditiously reinforcing the effort to foster peace in Darfur.\footnote{Id. ¶ 2.}
However, Resolution 1590 did not involve deployment of UNMIS in Darfur and invited the Secretary General to investigate the type of assistance UNMIS could provide to AMIS.\textsuperscript{101} During the negotiations of the resolution, the Security Council remained divided on the question of whether UNMIS could be redirected to Darfur.\textsuperscript{102} While the United States sought direct authorization of UNMIS to deploy in Darfur, some Member States including China, Russia, and Algeria opposed this idea.\textsuperscript{103}

Human rights violations and atrocities continued throughout 2005 and into 2006, and the UN took a number of actions aimed to help prevent violence and protect civilian lives in Darfur. Security Council Resolution 1674 was adopted unanimously on April 28, 2006, reaffirming Resolutions 1265 (1999) and 1296 (2000) concerning the protection of civilians in armed conflict, and Resolution 1631 (2005) on co-operation between the UN and regional organizations.\textsuperscript{104} Referring to the R2P principle, Resolution 1674 reaffirmed the provisions of the 2005 World Summit Outcome Document regarding the responsibility to protect populations against genocide, war crimes, ethnic cleansing, and crimes against humanity.\textsuperscript{105} The Security Council highlighted the importance of preventing armed conflicts through a comprehensive approach involving economic growth, eradication of poverty, sustainable development, national reconciliation, good governance, democracy, the rule of law, and respect for human rights.\textsuperscript{106} Referring to the responsibility to prevent all forms of violence committed against civilians in armed

\textsuperscript{101} \textit{Id.}
\textsuperscript{102} Bellamy, \textit{supra} note 40, at 50.
\textsuperscript{103} \textit{Id.}
\textsuperscript{105} \textit{Id.}, ¶ 4.
conflict, in particular women and children, the resolution stressed the importance of employing all feasible measures to prevent such violence.107

Given the limited mandate and the resources allocated to UNMIS, the Security Council adopted Resolution 1679 in 2006, in which UNMIS was authorized to take over the limited peacekeeping operations of AMIS.108 Invoking the R2P principle, Resolution 1679 recalled Resolution 1674, specifically the protection of civilians in armed conflict.109 The resolution stressed the R2P principle more than previous resolutions by emphasizing the requirement to focus on the reconstruction and development of Darfur. In the resolution, the Security Council expressed concern over the consequences of the prolonged conflict on the civilian population in Darfur and reiterated that all parties had to end the violence immediately.110

There was also a concern that the conflict might affect the rest of Sudan and neighboring Chad, with the Security Council noting the deteriorating relations between the two countries. The Security Council applauded political efforts, led by the AU, to resolve the crisis in Darfur. Furthermore, the efforts of AMIS were welcomed, despite exceptionally difficult circumstances. The Security Council envisaged a follow-on UN operation in Darfur with African participation.111 The resolution also requested that, within a week of any assessment mission returning from assignment, Secretary General Annan submit recommendations on the mandate, structure, strength, cost, and potential

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109 Id. pmbl.
110 Id.
111 Matthews, supra note 60, at 137.
participants of the anticipated UN operation in Darfur.\footnote{112} After the adoption of Resolution 1679, China said it would not support any further resolutions against Sudan under Chapter VII authority, unless approval of the government of Sudan was first obtained.\footnote{113}

On April 30, 2007, the Security Council unanimously adopted Resolution 1755 extending the UNMIS mandate until October 31, 2007.\footnote{114} Despite many efforts by the UN to bring peace and stability in Darfur, violence continued between the government of Sudan and rebel groups. By the end of 2007, the number of internally displaced persons (IDPs) within Darfur spiked to more than 2.4 million.\footnote{115} In the meantime, the November 2008 ceasefire offer by the Sudanese leader was rejected by rebel groups.\footnote{116} As the violence continued, in March 2010, the government of Sudan and JEM signed a ceasefire agreement in which President Bashir declared the cessation of Darfur’s war. However, clashes between government forces and rebel groups continued in Darfur.\footnote{117}

For its part, UNMIS has continued to support the implementation of the CPA by providing logistical support to the parties, monitoring and verifying their security arrangements, and offering assistance in a number of areas, including governance, rescue, and development.\footnote{118} On July 9, 2011, the mandate of the UNMIS formally ended

\footnote{112} S.C. Res 1679, supra note 108, ¶ 3.
\footnote{116} Id.
\footnote{117} Id.
\footnote{118} Bellamy, supra note 40, at 44.
following the conclusion of the 78-month interim period set up by the government of Sudan and SPLM during the signing of the CPA on January 9, 2005.\textsuperscript{119}

However, UNMIS failed to achieve the targeted results for the same reasons that undermined AMIS. These included, but were not limited to, the restricted mandate of UNMIS, disturbing activities by rebel groups, and a deficiency of resources, including a lack of troop contributions.\textsuperscript{120} The entire UNAMIS and UNMIS’ preventive efforts in Sudan were based on the consent of the government of Sudan and, therefore, it functioned under this constraint. Without the consent or cooperation of the government of Sudan, neither UNAMIS nor UNMIS could effectively support the responsibility to prevent. As a result, UNMIS faced numerous obstacles in implementing its mandate and the government of Sudan paid no interest in cooperating with it.\textsuperscript{121}

In particular, UNMIS had a limited role in providing the necessary security for civilians, so that, from the start of UNMIS’ operation, security in Darfur remained unsettled.\textsuperscript{122} The warring parties did not have a positive attitude or trust towards UNMIS, and they did not have confidence that UNMIS could provide security. UNMIS had no robust mandate to punish violators or effectively enforce the law, which resulted in less respect and credibility for UNMIS.\textsuperscript{123} Moreover, countries that pledged troops did not fulfill their pledges, while those which offered troops failed to meet the deployment

\textsuperscript{119} Id. at 43.
\textsuperscript{120} Id. at 48.
\textsuperscript{122} Id. at 12.
\textsuperscript{123} Id. at 15.
plans. These problems slowed down UNMIS’ plans for protecting civilians. In addition, financial contributions were slow, and UNMIS was regularly underfunded.  

Throughout the entire crisis, China and Russia maintained the importance of respecting the primacy of Sudan’s sovereignty. Both countries behaved in ways that significantly limited the mandate of UNMIS. For example, China opposed UNMIS’ human rights budget, while Russia delayed sending radio broadcasting equipment that it had pledged. In terms of other Security Council members, France was more focused on the effects of displaced persons in nearby countries, such as Chad, than the problems within Darfur itself. The United States and the United Kingdom, meanwhile, insisted that the Security Council impose sanctions against the government of Sudan.

These divisions within the Security Council, accompanied by various other factors, such as absence of a status-of-forces agreement and other constraints imposed by the government of Sudan, delayed the deployments under UNAMIS and later UNMIS. The slow, non-committal, and inadequate response by the international community marked an abject failure to prevent atrocities against the civilian population in Darfur under the R2P principle.

5.4.2. Responsibility to React

The international community, in particular the UN, took a number of measures concerning Darfur invoking the responsibility to react under R2P with a view to

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124 Id. at 19, 20.
125 Id.; Bellamy, supra note 40, at 50.
126 Van Der Lijn, supra note 121, at 15.
127 Id. at 32.
128 Id. at 20; Bellamy, supra note 40, at 45.
protecting civilians from further atrocities. This section analyzes the UN’s implementation of the responsibility to react, which includes the Secretary General’s appointment of the Commission of Inquiry into the Darfur situation, referral of the matter to the ICC, and imposition of sanctions against Sudan.

5.4.2.1 Commission of Inquiry

The situation in Darfur worsened towards the end of 2004 and the beginning of 2005, and, as analyzed above, UNMIS failed to protect the population in Darfur. In his monthly report on Darfur to the Security Council, Secretary General Annan noted, in November 2004, the cease-fire breaches by all parties, a failure to disarm militias, and an escalation of violence in Darfur. Given the rapid escalation of violence, Pronk, the Special Representative of the Secretary General to Sudan, noted the importance of deploying international peacekeepers into the region in order to stabilize the situation.

The Secretary General, acting pursuant to Security Council Resolution 1564, appointed an International Commission of Inquiry, which assembled in Geneva and began its work on October 25, 2004. The Commission presented its report on Darfur to the Security Council on January 25, 2005. The Commission took as its starting point two irrefutable facts regarding the situation in Darfur: “firstly, according to UN estimates there are 1.65 million internally displaced persons in Darfur and more than 200,000 refugees from Darfur in neighboring Chad; secondly, there has been large-scale

destruction of villages throughout the three states in Darfur.” 133 The Commission conducted independent investigations to establish additional facts and gathered extensive information on multiple incidents of violations affecting villages, towns, and other locations across North, South, and West Darfur. The conclusions of the Commission were based on the evaluation of the facts gathered or verified through its investigations.

Based on a thorough analysis of the information it gathered, the Commission established that the government of the Sudan and the Janjaweed militia were responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. 134 In particular, the Commission found that government forces and affiliated militias were conducting indiscriminate attacks, including the killing of civilians, torture, enforced disappearances, destruction of villages, rape, and other forms of sexual violence, pillaging, and forced displacement throughout Darfur. These acts were conducted on a widespread and systematic basis, and, therefore, amounted to crimes against humanity. 135

Interestingly, as discussed above, despite the findings of “widespread and systematic” violence against the people of Darfur, the Commission concluded that the government of Sudan had not committed genocide. 136 According to the Commission, although gross violations of human rights had been perpetrated by the government and militias under its control, a finding of genocide required clear and convincing evidence of two elements: first, the actus reus consisting of killing, or causing serious bodily or

133 Id. pmbl.
134 Id.
136 Id. ¶ 459.
mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and second, on the basis of a subjective standard, the existence of a protected group being intentionally targeted by the authors of criminal conduct.\footnote{Id. ¶ 500.} The Commission concluded that the crucial element of genocidal intent was missing, at least as far as central government authorities were concerned. However, the Commission also recognized that, in some instances, individuals, including government officials, might have committed acts with genocidal intent.\footnote{Id.}

Bellamy noted that the Commission’s report ignited debate about where to prosecute accused war criminals.\footnote{Bellamy, supra note 40, at 17.} The European Union, including the United Kingdom, argued that the matter should be referred to the ICC.\footnote{Id.} Although Nigeria insisted on having an AU tribunal, the European Union rejected this proposal.\footnote{Id.} However, the United States argued that the Security Council should create a special tribunal in Arusha, Tanzania, to indict and prosecute war criminals from the conflict in Darfur.\footnote{Peter Heinlein, UN Security Council Deadlocked Over Darfur, VOICE OF AMERICA (Mar. 18, 2005), available at www.voanews.com/english/2005-03-18-voa10.cfm.}

\subsection*{5.4.2.2 Referral to the International Criminal Court}

The Rome Statute provides provisions to use the ICC instead of having to set up new ad-hoc tribunals in situations where mass atrocities have taken place outside the Rome Statute system and no domestic investigation of these crimes was taking place. Under the Rome Statute, the Security Council can refer situations in which genocide, crimes against humanity, war crimes, or crime of aggression appear to have been
committed in any state, regardless whether it has ratified the Rome Statute, under Chapter VII of the UN Charter.\textsuperscript{143} Under Chapter VII, the Security Council has the authority to determine the existence of any threat to the peace, breach of the peace, or act of aggression, make recommendations, or decide what measures shall be taken, in order to maintain or restore international peace and security.\textsuperscript{144}

On March 31, 2005, the Security Council adopted Resolution 1593. It referred the situation in Darfur to the ICC and requested all Member States to co-operate fully.\textsuperscript{145} The delegations of Algeria, Brazil, China, and the United States abstained on the vote on the resolution. Sudan, which is not a state party to the Rome Statute, refused to recognize the court's jurisdiction, stating that "the ICC has no place in this crisis at all."\textsuperscript{146}

Following the vote on Resolution 1593, the United States, although it abstained, extended its strong support for penalizing those responsible for crimes and atrocities in Darfur and ending the climate of impunity.\textsuperscript{147} Highlighting the importance of serving justice in Darfur, the United States noted that the violators of international humanitarian law and human rights must be held accountable. However, the United States also expressed its fundamental objection to the ICC exercising jurisdiction over the nationals of a state that is not party to the Rome Statute, including its government officials. Expressing its disagreement on referring the Darfur crisis to the ICC, the United States

\textsuperscript{143} A/CONF.183/9, \textit{supra} note 36, ¶ 13.
\textsuperscript{144} U.N. Charter art. 39.
\textsuperscript{147} \textit{Id.}
said a better mechanism would have been Security Council creation of a hybrid tribunal in Africa.148

Abstaining on the vote, Algeria stated that the AU was best equipped to carry out a tribunal because it could provide peace, while also satisfying the need for justice.149 While it preferred a regional solution to the problem, Brazil agreed with the resolution, but objected to the United States’ view on the selective jurisdiction of the Court.150

Explaining its abstention on the vote on Resolution 1593, China noted that it had followed the situation in Darfur closely and supported a political solution.151 Like the rest of the international community, China deplored deeply violations of international humanitarian law and human rights and believed that the perpetrators must be brought to justice. China expressed its disagreement with referring the Darfur crisis to the ICC without the consent of the government of Sudan. China preferred that the perpetrators stand trial in Sudanese courts, which had recently begun to take action against people involved in human rights violations in Darfur. In addition, as China is not a party to the Rome Statute and has major reservations regarding some of the Statute’s provisions, China found it difficult to endorse the Security Council authorization of that referral.152

Consequently, the ICC issued arrest warrants for Sudanese President Omar al-Bashir in March 2009 and again in July 2010, and he faces 10 counts of war crimes,
crimes against humanity, and genocide in the decade-old Darfur conflict. Contrary to the Commission of Inquiry, the ICC’s pre-trial chamber said that there were legal grounds to believe President al-Bashir was responsible for three counts of genocide against the Fur, Masalit, and Zaghawa ethnic groups, including genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting conditions of life meant to destroy each target group. But, the ICC prosecutor has not been able to arrest al-Bashir. The ICC also issued arrest warrants for defense minister Abdel-Rahim Mohamed Hussein, acting North Kordofan governor Ahmed Haroun, and militia leader Ali Kushayb, all of whom remain at large. Even though Security Council Resolution 1593 referred the Darfur crisis to the ICC, it did not impose any obligations on UN members to provide assistance in arresting the individuals sought by the ICC. Therefore, referring the crisis to the ICC has not served the purpose of Resolution 1593, and makes this referral an ineffective step in fulfilling the responsibility to react.

5.4.2.3 Imposition of Sanctions

The Security Council was never able to authorize military intervention in Darfur, but it continuously followed the situation in Darfur and often debated the imposition of non-military sanctions. Bellamy noted that the sanctions debate was complicated by two
inter-related debates: “first, there was a debate about whether to refer the case of Darfur to the ICC. Second, the conclusion of the peace agreement for the south of Sudan initiated a debate about whether the UN force created to police the peace agreement would be a Chapter VI or Chapter VII mission, and whether it would also deploy in Darfur.”\textsuperscript{157} According to Bellamy, in both debates, the United States attempted to further its case for stronger measures to protect civilian populations in Darfur.\textsuperscript{158}

On March 29, 2005, the Security Council adopted Resolution 1591, which imposed sanctions against Sudan over Darfur.\textsuperscript{159} The resolution expressed its deep concern for the security of humanitarian workers and their access to population in need. The resolution also condemned the continued violations of the N’Djamena Ceasefire Agreement by all sides in Darfur.\textsuperscript{160} The resolution established a committee consisting of all members of the Security Council to identify individuals who threaten the peace and stability in Darfur and violate international humanitarian or human rights law.\textsuperscript{161} The resolution placed travel embargoes and asset freezes on those individuals identified by the committee.\textsuperscript{162} During the vote on the resolution, Algeria, Russia, and China abstained and stated their objections to the use of international sanctions. They expressed their belief that the resolution failed to recognize the progress made by the government of Sudan.\textsuperscript{163}

\textsuperscript{157} Bellamy, supra note 40, at 49.
\textsuperscript{158} Id.
\textsuperscript{161} S.C. Res 1591, supra note 159, ¶ 3.
\textsuperscript{162} Id.
\textsuperscript{163} U.N. Press Release, SC/ 8346, supra note 160.
The Security Council adopted Resolution 1672 on April 25, 2006, placing sanctions on those individual Sudanese officials responsible for crimes against humanity in Darfur. The Security Council imposed travel and financial sanctions on four Sudanese individuals for their involvement in the Darfur conflict. Sanctions on individuals are one of the reactive measures short of military force included within the R2P principle. China, Qatar, and Russia abstained during the vote on Resolution 1672 as they had reservations about the application of sanctions to the individuals concerned.

5.4.2.4 Peacekeeping and the Use of Force

The Security Council, by its Resolution 1590 of March 24, 2005, established UNMIS to support implementation of the Comprehensive Peace Agreement signed by the government of Sudan and the SPLM, and to perform certain functions relating to humanitarian assistance and the protection and promotion of human rights. However, UNMIS was not provided with peacekeeping troops for Darfur until the adoption of Security Council Resolution 1706 on August 31, 2006, in which the deployment of 17,300 UN peacekeeping troops to Darfur was mandated. Acting under Chapter VII of the UN Charter, the Security Council authorized UNMIS to use any means it deemed necessary to protect civilians. The resolution referred to paragraphs 138 and 139 of the World Summit Outcome Document. The Security Council also decided that UNMIS’

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166 Id.
168 Id. pmbl., ¶ 3.
mandate would, among other things, support implementation of the N’Djamena Humanitarian Ceasefire Agreement.\textsuperscript{169}

The mandate of Resolution 1706 met resistance from Khartoum, which delayed the deployment of the peacekeeping force. Sudan, refusing to participate at the Security Council session, expressed its strong objection to the resolution, and China, Qatar, and Russia abstained.\textsuperscript{170} While expressing their support for the content of the resolution, they stated that the resolution lacked the consent from Sudan.\textsuperscript{171} This situation demonstrated certain Member States’ reluctance to authorize the use of force as a non-consensual means to protect civilians.

However, the deployment of troops in Darfur required the consent of the government of Sudan, and the lack of this consent blocked implementation of the R2P principle.\textsuperscript{172} The R2P framework encourages the international community to work with the government of the country where the mass atrocities are taking place, especially because the state has the primary responsibility of protecting its own citizens.\textsuperscript{173} Although the Security Council authorized peacekeepers to use force to protect civilians, it never materialized because of the Sudanese opposition to the peacekeepers. In fact, some Member States, such as China and Russia, abstained on resolutions that referred to Darfur. Similar anxiety over the use of force against sovereign states could be seen during pre-R2P humanitarian intervention debates as well.

\textsuperscript{169} Id.
\textsuperscript{172} Elvir Camdzic & John Weiss, Darfur: Where Is the Will? SAN FRANCISCO CHRON. 9 (Sept. 20, 2006).
\textsuperscript{173} ICISS Report, supra note 52, ¶¶ 3.3, 3.4; 2005 World Summit Outcome, supra note 53, ¶¶ 138–139.
5.4.3 Responsibility to Rebuild

The international community, in particular the UN, took a number of measures invoking the responsibility to rebuild in connection with Darfur. This section analyzes UN’s efforts in rebuilding Darfur.

The ICISS report defined the responsibility to rebuild as a post-intervention obligation to provide, particularly after a military intervention, full assistance with recovery, reconstruction, and reconciliation, all of which should address the causes of the harm the intervention was designed to halt or avert. The rebuilding activities have to take place after prevention efforts have failed and reaction has started to take place. According to the ICISS report, rebuilding efforts need to follow-up any military intervention and not be stand-alone activities.

In Darfur, no military intervention took place. The Member States could not agree on an effective arms embargo or asset freeze against the government of Sudan. However, the Security Council authorized deployment of a UN peacekeeping mission with the aim of restoring necessary security conditions for the safe provision of humanitarian assistance; facilitating full humanitarian access throughout Darfur; helping the government protect civilians; monitoring, observing compliance with, and verifying the implementation of various ceasefire agreements; and contributing to a secure environment for economic reconstruction and development.

174 ICISS Report, supra note 52, ¶ 3(C) (Syn.).
With the objective of restoring peace and justice in Darfur, the Security Council adopted Resolution 1769 on July 31, 2007. Acting under Chapter VII of the UN Charter, and with the consent of Sudan, the resolution authorized the establishment of an AU-UN hybrid mission in Darfur (UNAMID).\textsuperscript{176} Comprised of 19,555 military personnel, 6,432 police, 3,772 police personnel, and 19 police units with up to 140 personnel, UNAMID was mandated to protect internally displaced persons (IDPs), civilians, and humanitarian workers by any means necessary.\textsuperscript{177} UNAMID was also authorized to assist in the peace process, monitor agreements, and promote human rights and the rule of law.\textsuperscript{178} Resolution 1769 reflected acceptance of the responsibility to rebuild by emphasizing the need to focus on finalizing preparations for reconstruction and development.\textsuperscript{179} Resolution 1769 emphasized there was no military solution to the conflict in Darfur. From 2008 to 2013, the Security Council adopted various resolutions extending the UNAMID mandate.\textsuperscript{180}

While many countries supported the peacekeeping efforts in Darfur through UNAMID, others expressed opposition to exerting pressure or imposing sanctions on Sudan. China emphasized that the purpose of the UNAMID resolutions was to authorize the hybrid operation, rather than exert pressure or impose sanctions.\textsuperscript{181} China requested

\begin{footnotes}
\footnotetext[177]{\textit{Id.}}
\footnotetext[178]{\textit{Id.}}
\footnotetext[179]{\textit{Id.} at ¶ 20.}
\end{footnotes}
all parties abide strictly by the tripartite approach between the UN, the AU and the
government of Sudan and avoid misinterpretation of the mission. China’s insistence
highlighted the division between protecting sovereignty and the use of force, which was
also a concern during the pre-R2P humanitarian intervention controversies. Russia
pointed out that peace could only be achieved through a comprehensive political
settlement.\textsuperscript{182} Russia expressed its hope that the UNAMID operation would help move
that process forward, while also assisting with protection of the vulnerable, in full
recognition of Sudan’s sovereignty.

UNAMID formally took over the mission from AMIS on December 31, 2007.
Despite efforts by UNAMID, the situation in camps with IDPs worsened and insecurity
loomed inside the camps. Humanitarian workers could not assist IDPs because they were
also subjected to brutal attacks by government-backed militia. Even though violence
erupted again in 2008, the government of Sudan claimed the conflicts were tribal
skirmishes. The attacks by the JEM in West Darfur in early 2008 were aggravated when
Sudan supported the attempted coup d’état in Chad in February 2008. Throughout 2008
and 2009, fears of battles between the JEM and the Sudanese government continued.
However, by the end of 2009, the violence lessened, though low-level violence and
insecurity continued in Darfur.\textsuperscript{183} UNAMID could neither adequately protect the
civilians, nor could it contribute to security for humanitarian assistance or the promotion
of human rights and the rule of law. Thus, UNAMID could not successfully support for
the rebuilding process in war-torn Darfur.

\textsuperscript{181} Press Release, Security Council Authorizes Deployment of the United Nations - African Union Hybrid
\textsuperscript{182} Id.
\textsuperscript{183} Human Rights First, \textit{supra} note 8.
Although high expectations were placed on UNAMID, it was not given adequate attention and support. Despite the enormous expenditure of resources in the operations, UNAMID’s capacity was deployed very slowly, and the overall resources remained insufficient. By January 2008, only approximately one-third of the anticipated force was on the ground in Darfur, and equipment and training were woefully underfunded. \(^{184}\)

Although the government of Sudan consented to the establishment of UNAMID, it emphasized its demand that African troops and police be sent to Darfur. However, countries which pledged troops and other resources cited opposition by the government of Sudan, arguing that it continuously undermined the intentions and actions of the international community. \(^{185}\) The government of Sudan, in fact, objected to the deployment of Scandinavian engineers in Darfur. \(^{186}\) Therefore, UNAMID was not able to carry out its expected tasks in Darfur, which undermined the fulfillment of the responsibility to rebuild.

UNAMID was dependent on international donor contributions for everything for finance, military personnel, military equipment, training, and infrastructure. Although the Security Council takes the decisions about establishing, maintaining, or expanding a peacekeeping operation, the financing of UN peacekeeping operations is the collective responsibility of all UN Member States. Every Member State is legally obligated to pay their respective share towards peacekeeping in accordance with the provisions of Article 17 of the UN Charter. \(^{187}\) The General Assembly apportions peacekeeping expenses based on a scale of assessments under a formula that Member States themselves have

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\(^{184}\) Van Der Lijn, supra note 121, at 15.
\(^{185}\) Id.
\(^{186}\) Id.
\(^{187}\) U.N. Charter art. 17.
established and, under this formula, the five permanent members of the Security Council are required to pay a larger share because of their special responsibility for the maintenance of international peace and security.\textsuperscript{188} The approved budget for UNAMID for the period of July 1, 2013 - June 30, 2014 is estimated at $1,335,248,000, and the Member States are obligated to contribute their respective amount.\textsuperscript{189} Continued and uninterrupted funding is important for UNAMID to operationalize and help rebuild Darfur. However, the UN Peacekeeping Fund has not allocated resources to Darfur rebuilding efforts.\textsuperscript{190}

UNAMID also depended on the government of Sudan’s assistance in terms of logistics and access. Even at times when UNAMID’s peacekeeping forces were supposed to be on the ground, there was no effective cooperation with the Sudanese government.\textsuperscript{191} Sudan continuously obstructed UNAMID deployment by objecting to non-African troops, with the exception of troops from China and Pakistan.\textsuperscript{192} Sudan obstructed other areas of needed cooperation, including on small, seemingly inconsequential matters, such as port access, landing rights, flight restrictions, or monitoring and reporting status.\textsuperscript{193} More seriously, Sudanese forces attacked UNAMID personnel repeatedly throughout the first quarter of 2008. UNAMID was not even given a mandate to disarm the Janjaweed or other militia. Thus, UNAMID simply monitored the government’s disarmament

\textsuperscript{190} *Sudan Profile*, PEACEBUILDING FUND, http://www.unpbf.org/countries/sudan/ (last visited July 6, 2014).
\textsuperscript{191} G.A. Res. 68/21, at 15.
\textsuperscript{192} Id. at 11.
\textsuperscript{193} Id.
exercises. In addition, JEM rebels rejected any Chinese troop assistance despite a Chinese offer of logistical support.

UNAMID is still unable to secure civilian protection, and life is still very harsh for millions of people who have been displaced by the conflict in Darfur. In fact, UNAMID itself has come under attack by rebel forces and government-backed militia. The roads in Darfur are not safe for aid organizations, and humanitarian flights to Darfur have been restricted. Many international not-for-profit organizations have pulled out for their own security. The already difficult situation on the ground has more recently been exacerbated by an accelerating civil war in neighboring Chad, where most of the refugee camps are located.

Again, the international community, through UNAMID, has failed to protect the civilians in Darfur from mass atrocities in its peacekeeping and rebuilding efforts, largely for the same reasons that meant AMIS, UNAMIS, and UNMIS failed in their missions. UNAMID could not perform its tasks because of a severely restricted mandate, a woeful lack of financial and military contributions, and a lack of effective planning. Most importantly, the division and rancor among the Member States on the Security Council were also a factor in the failure of the international community to fulfill the responsibility

194 Van Der Lijn, supra note 121, at 18, 19.
199 *The Situation in Sudan and the Conflict in Darfur*, supra note 197.
to rebuild in Darfur. After more than a decade of the Darfur crisis, the international community has been unable to protect the civilians in Darfur or engage in effective rebuilding efforts, meaning the international community has failed to shoulder its responsibilities under the R2P principle.

Although the conflict in Darfur had become less severe by 2013, the region remains volatile. As the violence in Darfur continued in varying degrees, people could not return home and rebuild their lives. The rival tribes reportedly renewed festering antagonisms over minerals in northern Darfur, displacing civilians when fighting broke out over a mine.\textsuperscript{200} According to the International Rescue Committee, over 1.4 million people in Darfur still live in refugee camps.\textsuperscript{201} Some 300,000 remain in camps across the border in eastern Chad, reluctant to return home because of ongoing insecurity, loss of property, and fear of oppression. These refugees remain dependent on humanitarian aid for survival, but, as the world's interest in Darfur continues to fade, thousands more Darfuris are fleeing new violence.\textsuperscript{202} Darfur remains subject to ongoing violence, and, thus, faces an uncertain tomorrow, where the international community still appears unable to find a way forward.

\textbf{5.5 Conclusion}

The crisis in Darfur represented the first test of the R2P principle. Since the beginning of the conflict in 2003, Darfur has been associated with the R2P principle, and many states in the international community have sought an active role in addressing the

\textsuperscript{201} Int'l Rescue Committee, \textit{Darfur Crisis 10 Years On}, http://www.rescue.org/darfur-crisis-10-years (last visited Nov. 12, 2013).
\textsuperscript{202} Id.
crisis. As described previously, on several occasions the Security Council used the R2P principle as a guide in adopting resolutions and taking action. Resolutions 1672, 1674, 1679, 1706, and 1769 all referred to the R2P principle in highlighting the importance of protecting civilians from mass atrocities and human rights violations.\(^{203}\) Notwithstanding these resolutions and subsequent actions to quell the crisis, however, the UN could not develop or support effective prevention, reaction, or rebuilding efforts in Darfur.

### 5.5.1 Responsibility to Prevent

Under the ICISS report and the 2005 World Summit Outcome Document, the primary responsibility to protect civilian population rests with the individual state.\(^{204}\) However, state practice during the Darfur crisis revealed disagreement on whether Sudan had fulfilled the responsibility to protect the civilian population in Darfur. The view of the United States, the United Kingdom, and like-minded states was that the government of Sudan had failed in its responsibility to prevent atrocities and protect its civilians, and this failure then triggered the international community’s responsibility to protect the civilian population in Darfur. However, other countries, such as Russia, China, India, and Pakistan argued that the extent of human rights violations in Darfur was not sufficient to prove Sudan was failing to uphold its responsibility towards its population.\(^{205}\) The reluctance of these countries to accept the government of Sudan’s inability to stop atrocities revealed their emphasis on state sovereignty, non-intervention, and territorial integrity.

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204 ICISS, supra note 52, ¶ 2.29; 2005 World Summit Outcome Document, supra note 53, ¶ 138.
However, the UN made a number of efforts to fulfill the responsibility of the international community to prevent atrocities and protect the civilian population in Darfur. These efforts demonstrated that the international community recalled the disturbing failures in Rwanda and other crises. This state practice, at least in the UN context, revealed that states were making efforts to fulfill their preventive responsibility to stop atrocities in Darfur. Nevertheless, these UN activities did not embrace the framework of R2P.

However, the UN’s efforts in taking preventive actions in Darfur were not supported by some states, especially those which argued that the Sudanese government had not failed in its responsibility to protect civilians. China and Russia were the main obstructionists, along with Algeria and Pakistan, which at times held rotating seats on the Security Council. These countries had been known for their faithful support of the Sudanese leadership, and they have remained obstinate in their position on any intervention in Sudan. However, abstentions on certain resolutions that proposed preventive measures to stop further escalation of violence in Darfur meant that those states did not block actions to prevent atrocities in Darfur. If they were not actually interested in preventing such violence, those states could have vetoed the resolutions that intended to prevent atrocities in Darfur. In turn, their abstentions on those resolutions represented an acceptance that atrocities were, in fact, committed in Darfur. Therefore, such abstentions could be interpreted as those states choosing to follow the responsibility not to veto (R2NV) concept for political and moral reasons. This possibility does not mean, however, that this behavior affected international law.
5.5.2 Responsibility to React

State practice in Darfur revealed no general agreement among Member States on whether genocide had occurred in Darfur. While Russia, China, and likeminded countries as well as the International Commission of Inquiry on Darfur, claimed that Sudan had not committed genocide, the United States and allies described the violence in Darfur as genocide. Despite well-reported mass atrocities in Darfur, the reluctance of some states to accept that genocide has been committed in Darfur revealed unwillingness by those states to take military action against a sovereign state. Alternatively, this reluctance also reveals a willingness to uphold sovereignty and non-intervention, even in cases of mass atrocities. The Darfur crisis, therefore, has not apparently changed international legal thinking in the area of sovereignty. As a result of this tug-of-war between Member States, the UN could not offer timely or effective intervention in Darfur. This inability to take timely intervention in Darfur was also a result of the controversy about whether Security Council authorization is required on the use of military force for humanitarian purposes. Again, there was no agreement among Member States on this issue.

Although the Security Council could not reach an agreement on whether genocide had been committed in Darfur, it still imposed non-military sanctions against Sudan with a view of stopping further violence and protecting the civilian population. There was also disagreement among Member States on whether accused war criminals should be referred to the ICC or to a regional body to be prosecuted. In fact, a number of Member States abstained on the ICC referral.206 They abstained on the grounds of sovereignty, non-

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intervention, and the territorial integrity of Sudan. However, these abstentions again revealed the recognition of a negative obligation not to block R2P-based actions or states’ willingness to follow the RN2V concept. Also, state practice on ICC referral suggests a synergy between the R2P principle and international criminal law. Non-opposition to the ICC referral, therefore, suggests not only states’ acceptance of mass atrocities being committed in Darfur, but also a limitation of sovereignty and non-intervention in cases of such atrocities being committed by states.

5.5.3 Responsibility to Rebuild

As a result of continued resistance from the Sudanese government, the efforts of the UN in deploying peacekeeping mission in Darfur were delayed. In fact, the deployment of troops to Darfur required the consent of the government of Sudan, and the failure of Sudan to give its consent blocked the peacekeeping deployment. There was general agreement among UN Member States regarding the requirement that Sudan consent to such a deployment, and this agreement again revealed a wide acceptance of state sovereignty and territorial integrity.

Although a formal military intervention had not taken place in Darfur, the Security Council established UNAMID to restore peace and justice, a move which Member States unanimously supported. Under the ICISS report, the responsibility to rebuild is triggered only after military intervention has taken place. However, the Member States’ support for UNAMID’s rebuilding efforts revealed that there was general agreement that rebuilding could take place even without military intervention. Some

208 Camdzic & Weiss, supra note 172, at 9.
209 ICISS, supra note 52, ¶ 5(C) (Syn.).
Member States, however, insisted that all parties strictly abide by the terms of the resolution and avoid any misinterpretation. This state practice cast uncertainty over the role of UNAMID operations in Darfur. UNAMID operations were carried out slower than expected because, on one hand, it had to depend on international donor contributions and, on the other hand, it had to depend on the government of Sudan’s logistical assistance. Despite efforts by UNAMID, neither the security nor economic situations in Darfur have improved. UNAMID has, therefore, failed in its efforts to protect civilian population in Darfur. Thus, state practice in Darfur on the responsibility to rebuild suggests that this responsibility has had the least impact of the three R2P responsibilities. In fact, this state practice was anticipated in the ICISS report’s deep skepticism about political support for post-conflict rebuilding efforts.

Although the R2P principle became a leading way to discuss humanitarian crises, state practice throughout the Darfur crisis revealed deep disagreements about the R2P principle, which in turn produced a failure under all three responsibilities of R2P. The UN has still not been able to achieve its intended goals of protecting the civilian population and bringing peace to Darfur, as there has been no consensus on many vital issues among the Security Council members. The Member States could often not reach agreement on whether or when to take preventive efforts, or when to intervene in order to protect civilians, or even what actions, if any, the UN should take in response to the Darfur conflict.

Although the Security Council was restricted in taking actions in Darfur without the consent of Sudan, it still managed to take some actions. However, it did so only on the basis of abstentions from Member States that disagreed with the actions that the
Security Council was willing to take. Therefore, many scholars and critics have argued that Darfur constituted a failure of the R2P principle.\textsuperscript{210} Grono stated that the international community failed to speak with one unified voice, and that this failure demonstrated one of the challenges facing the international community as it attempts to operationalize R2P.\textsuperscript{211} However, Evans noted, “while the R2P principle had not failed in Darfur, the international community had failed to implement the R2P principle in Darfur as there is no clear guideline on the use of force under the R2P principle.”\textsuperscript{212}

The Member States failed to recognize their fundamental responsibilities to respond to atrocities outside their own respective territories and, in particular, they were not willing to consider a right to take military action against Sudan. While many parties have worked towards applying the principle, the ongoing violence in Darfur has revealed many of the weaknesses in R2P. These failures are not only due to inherent problems that may exist in the R2P principle but can also be traced to political and situational problems encountered in its implementation. The Darfur crisis revealed the divide among Member States on state sovereignty and intervention, as well as the uncertainties about the scope of taking actions against sovereign states, all of which were problems which had already been associated with pre-R2P humanitarian intervention. In fact, the states were divided on whether R2P was triggered at all in Darfur. The state practice in Darfur suggests that not much has changed with the advent of R2P. Thus, the Darfur crisis demonstrated the R2P principle had not changed international law.

\textsuperscript{212} Gareth Evans, \textit{The Responsibility to Protect: An Idea Whose Time Has Come and Gone?} 22 Int’l Rel. 291-293 (2008), \textit{available at} http://ire.sagepub.com/content/22/3/283.full.pdf23.
CHAPTER 6

LIBYA

6.1 Introduction

The uprising in the Libyan Arab Jamahiriya (Libya) caught the attention of the international community in 2011. The challenges faced in Libya were urgent, critical, potentially deadly, and involved limited options to protect civilian lives in Libya. After the Gaddafi regime refused to comply with diplomatic efforts to solve the crisis, the Security Council eventually decided to authorize the use of military force. This authorization to use military force constituted the first time the Security Council authorized military action under R2P, which makes the Libyan crisis a seminal event in the history of R2P.

With a view to protecting civilian populations in Libya, and framing its response in terms of the R2P principle, the Security Council adopted Resolution 1970 on February 26, 2011.¹ The resolution condemned the use of lethal force by the Gaddafi regime against protesters participating in the Libyan civil war, and imposed a series of international sanctions in response. Nearly three weeks later, on March 17, 2011, the Security Council adopted Resolution 1973, which authorized military intervention in Libya under the R2P principle.² The North Atlantic Treaty Organization (NATO) responded to this authorization. However, the use of military force under the R2P principle in Libya caused great controversy that damaged the principle in the Security Council and beyond.

The military intervention in Libya sparked tense arguments about the scope, meaning, and implementation of Resolution 1973. One of the key controversies that erupted was about

how and why NATO used force under the Security Council authorization and, more specifically,
how this application of military force adversely affected perspectives about the R2P principle. In
particular, the use of force to effect regime change in Libya took a high toll on R2P. In addition,
there have been serious problems with post-intervention rebuilding in Libya. In contrast to the
Darfur crisis, which has widely been considered a disaster for the R2P principle, the Libyan case
study concerned a humanitarian crisis in which the R2P principle played a more prominent, but
still very controversial role. Thus, this chapter analyzes the state practice connected to the Libyan
crisis within and beyond the UN under the responsibilities to prevent, react, and rebuild, in order
to determine how this crisis affects the relationship between the R2P principle and international
law.

6.2 Background to the Conflict in Libya

Libya was initially a part of the Roman Empire and, through the centuries, was invaded
by a series of rulers and empires. Finally, in 1959, Libya gained its independence from Italy.\(^3\)
Ten years later, Colonel Muammar al Gaddafi led a successful coup and came to power.\(^4\)
Gaddafi rejected the political party system and ruled the country with a new system called
Jamahiriya, or a state of masses, which combined elements of communism and capitalism.\(^5\) In
1977, Gaddafi declared a people’s revolution in the Great Socialist People’s Libyan Arab
Jamahiriya and led the country to totalitarianism.\(^6\)

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\(^4\) Id.; Libya: Timeline of Key Events since February 2011, INTEGRATED REGIONAL INFO. NETWORKS (Apr. 8, 2011),
\(^5\) Libya Profile, supra note 3; Libya: Timeline of Key Events Since February 2011, supra note 4.
\(^6\) Id.
The Gaddafi regime was infamous for its human rights violations and abuses. Human rights organizations, including Human Rights Watch (HRW) and Amnesty International (AI), frequently criticized the Gaddafi regime for the systematic repression of any party or person opposing the regime. Gaddafi, in effect, refused to allow any freedom of expression, stripped away any semblance of freedom of association and assembly, banned independent political activities, and detained political activists and opponents. The Gaddafi regime did whatever it wanted, all the while thumbing its nose at the international community. In 1996, for example, the forces of the Gaddafi regime apparently killed prisoners in Abu Salim prison to regain control of an internal situation, and all attempts to aid and assist the victims were mocked by Gaddafi. The regime appointed a commission to inquire into the Abu Salim massacre but, typical of the Gaddafi regime, the findings were never revealed.

This continuous suppression by the Gaddafi regime eventually produced a series of protests in 2011, and these protests linked with the Arab Spring movement that toppled governments in Tunisia and Egypt. The first of these protests originated against the regime in Libya’s second largest city, Benghazi. The demonstration was initiated by members of the “Abu Salim Families Organizing Committee,” calling the Gaddafi regime to account for the deaths of the Abu Salim prisoners in 1996. These protesters, and others throughout Libya, also demanded respect for human rights and freedom in Libya. On February 17, 2011, the protesters started a second round of demonstrations against the regime, and Gaddafi used extremely

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10 Id.; *Libya Profile*, supra note 3.
disproportionate violence to quell the gathering of protestors.\textsuperscript{12} The death toll increased as the protests moved into neighboring cities. The regime imposed media blackouts and internet outages, and the international community, including a large number of Libyans living and studying abroad, could not piece together a picture of the crisis.\textsuperscript{13}

Saif al Islam, Gaddafi’s son, threatened all those civilians who spoke of a possible civil war. He declared that “rivers of blood” would flow over Libya if the violence did not stop.\textsuperscript{14} In his speech of February 22, 2011, Gaddafi referred to the protesters as “cockroaches and rats” and urged his supporters to attack them. Anyone who took-up arms against Libya, Gaddafi warned, would be executed.\textsuperscript{15} By February 24, 2011, the insurgents increased their violent activities, and the crisis turned into internal armed conflict.\textsuperscript{16} On February 25, 2011, Gaddafi delivered yet another speech and ordered his factions to continue their fight against the dissidents.\textsuperscript{17} Kinsman described Gaddafi’s threats to protestors as “chillingly similar to radio broadcasts before the massacre in Rwanda.”\textsuperscript{18} Gaddafi said, “We will march to cleanse Libya, inch by inch, house by house, home by home, alley by alley, person by person, until the country is cleansed of dirt and scum.”\textsuperscript{19} On February 26, 2011, former Minister of Justice Mustafa Abdul Jalil formed an

\textsuperscript{12} Id.
\textsuperscript{13} Id.
interim opposition government called the National Transitional Council. At that time, thousands of civilians had been massacred, while tens of thousands of Libyans had fled to neighboring Egypt and Tunisia. This escalation of violence by the Gaddafi regime warranted international attention.

6.3 Application of the R2P Principle in International Responses to the Libyan Crisis

The dramatic death toll early in the crisis was an ominous gauge of the brutality to come, and drew instantaneous attention to the crisis and the Gaddafi regime’s behavior from individual states and regional and international actors. After the crisis erupted in Libya, the international community, primarily the African Union (AU), League of Arab States (LAS), Organization of the Islamic Conference (OIC), European Union (EU), and the UN launched several diplomatic measures in a bid to bring the crisis to a rapid but peaceful conclusion. When peaceful measures failed, the use of military force authorized by the Security Council prevented further atrocities and led to Gaddafi’s overthrow. However, this use of force generated much criticism and controversy. In addition, the UN could not restore peace and security in Libya after the military intervention.

6.3.1 Responsibility to Prevent

The government of Libya had the primary responsibility to prevent mass atrocities and protect its population. However, Gaddafi’s regime governed the country and carried-out these atrocities and, therefore, the Libyan government’s responsibility to protect its population was

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20 Kinsman, supra note 18.
indeed not fulfilled. Therefore, the responsibility to prevent atrocities and protect the civilian population in Libya became the responsibility of the international community.

The EU took many preventive efforts to stop the escalation of violence in Libya. The first response came from Catherine Ashton, the Vice-President of the European Commission and High Representative of the Union for Foreign Affairs and Security Policy, who condemned the human rights violations in Libya. In a declaration issued on behalf of the EU, Ashton urged Libyan authorities to refrain from further use of violence and stated that the EU “condemns the repression against peaceful demonstrators and deplores the violence and death of civilians.”22 On February 20 and 22, 2011, the EU decided to interrupt any dialogue on an EU-Libya framework agreement and terminate ongoing cooperation contracts.23 Highlighting the importance of saving the lives of the people in Libya, European Council (EC) president, Herman Van Rompuy, stated that the EU “should not be patronizing, but should also not shy away from using its political and moral responsibility.”24 Finally, on March 11, 2011, the EU urged Gaddafi to step down.25 Additionally, as the situation further deteriorated, the EU voted to resume its humanitarian work by May 22, 2011, by opening a liaison office in Benghazi.26

Much of the international community, including the regional and sub-regional friends of Libya, condemned the Libyan atrocities. The AU, OIC, and LAS strongly criticized and condemned all forms of human rights violations in Libya and called for a mediated solution to

23 Id.
the conflict.\textsuperscript{27} In fact, the LAS moved to suspend Libya’s membership in the organization.\textsuperscript{28} On February 22, 2011, the LAS condemned the Gaddafi regime and its human rights violations and suspended the delegation of Libya from participation in Arab League meetings.\textsuperscript{29} On the same day, the OIC requested that Libyan authorities immediately cease all violations.\textsuperscript{30} On February 23, 2011, the Peace and the Security Council of the AU expressed its intention to deploy a mission to Libya to assess the situation on the ground and condemned the Gaddafi regime’s excessive use of force and human rights violations.\textsuperscript{31} Although the AU, OIC, and LAS sought to use diplomatic and political measures in response to the crisis in Libya, these non-coercive preventive efforts were not successful in stopping the escalation of violence.

The UN system also took number of preventive efforts to stop human rights violations and further atrocities in Libya. The first of such responses were made by Navi Pillay, the UN High Commissioner for Human Rights. In a press release on February 18, 2011, Pillay expressed her serious concerns about the situation in Libya and affirmed that the protection of civilians should be the principal consideration in maintaining the rule of law.\textsuperscript{32}

Following Gaddafi’s ominous “inch-by-inch” speech on February 22, 2011, Francis Deng, the UN Secretary General’s Special Advisor on Genocide, and Edward Luck, Special Advisor on the Responsibility to Protect, condemned the attacks against the civilian population and noted

\textsuperscript{27} Alex Bellamy, \textit{Libya and the Responsibility to Protect: The Exception and the Norm}, 25 ETHICS & INT’L AFF. 263, 266 (2011); Paul D Williams, \textit{Briefing: The Road to Humanitarian War in Libya 2011}, 3 GLOBAL RESPONSIBILITY TO PROTECT 248, 251 (2011).
\textsuperscript{28} Williams, supra note 27, at 248, 251 (2011).
that such attacks amounted to crimes against humanity. Further, the two Special Advisors reiterated the 2005 pledge in the World Summit Outcome Document by Member States to protect civilian populations from genocide, ethnic cleansing, war crimes, and crimes against humanity.\footnote{Press Release, UN Secretary General’s Special Advisor on Prevention of Genocide, Francis Deng and Special Advisor on the Responsibility to Protect, Edward Luck, On the Situation in Libya, U.N. Press Release (Feb. 22, 2011).}

In the meantime, some members of Libya’s mission to the UN renounced Gaddafi, calling him a genocidal war criminal responsible for mass shootings in Libya.\footnote{Colin Moynihan, \textit{Libya’s U.N. Diplomats Break with Qaddafi}, N.Y. \textit{TIMES} (Feb. 21, 2011), http://www.nytimes.com/2011/02/22/world/africa/22nations.html?_r=0.} Ibrahim Dabbashi, the Deputy Permanent Representative of Libya to the UN, called for Gaddafi to step down.\footnote{\textit{Id.}; Plett, supra note 15.} Further, Dabbashi said that the Security Council’s statement was “not strong enough,” but still “a good message to the regime in Libya about stopping the bloodshed.”\footnote{Moynihan, supra note 34; Plett, supra note 15.} At the same time, Abdul Mohammed Shalqam, the Ambassador and the Permanent Representative of Libya to the UN, distanced himself from Dabbashi’s remarks, calling Libya's ruler “my friend.”\footnote{Moynihan, supra note 34.}

In a press release issued on February 22, 2011, the Security Council condemned the Libyan authorities for their violent campaigns against protesters and called on the Libyan authorities to end the violence immediately, respect human rights, honor international humanitarian law, and carry out its responsibility to protect the people in Libya.\footnote{Press Release, Security Council, Libya, U.N. Press Release SC/10180-AFR/2120 (Feb. 22, 2011).} The Security Council used R2P language to caution the Gaddafi regime and endorsed the position that the government of Libya has the primary responsibility to protect its population.
On February 24, 2011, the Human Rights Council convened a special session on the situation of human rights in Libya.\textsuperscript{39} In her introduction to the session, the High Commissioner for Human Rights, Navi Pillay, stated that the Libyan violence was shocking and brutal.\textsuperscript{40} A statement to the Human Rights Council by All Special Procedures Mandate Holders expressed the concern that “several hundred people have died, many others have been detained, thousands are injured and human suffering continues to rise.”\textsuperscript{41} During this session, the Human Rights Council adopted Resolution S-15/1 by consensus without a vote.\textsuperscript{42} The resolution called on the government of Libya to, “among other things, immediately release all arbitrarily detained persons, stop attacks against civilians, cease intimidation, persecution and arbitrary arrests of individuals, ensure the safety of all civilians including citizens of third countries, cease blocking internet and telecommunications networks and to respect the popular will, aspirations and demands of the people.”\textsuperscript{43} The resolution requested the Human Rights Council to dispatch an independent, international commission of inquiry to Libya to investigate all alleged violations of international human rights law in the country.\textsuperscript{44} Further, in an unprecedented move, on March 1, 2011, the General Assembly suspended Libya’s membership on the Human Rights Council.\textsuperscript{45}

Despite many diplomatic and non-forceful multilateral actions, the Libyan authorities remained adamant. They did not respond to any of the multilateral diplomatic measures taken by


\textsuperscript{43} Id. ¶¶ 2, 3.

\textsuperscript{44} Id. ¶ 11.

the Security Council, other UN bodies, and regional organizations intended to prevent further violence against civilians. In the meantime, Gaddafi’s forces continued their murderous campaign, violating human rights and international humanitarian norms.

6.3.2 Responsibility to React

Despite the numerous efforts by the international community to prevent mass atrocities, large-scale human rights violations against civilian population in Libya continued. All diplomatic and non-coercive measures to stop these violations taken by regional as well as international actors failed to persuade the Libyan government to fulfill its responsibility to prevent. In light of this failure, the international community decided to react with more forceful measures against the Libyan government.

6.3.2.1 Responses Not Involving the Use of Force: Sanctions and Referral to the International Criminal Court (ICC)

Given continued human rights violations in Libya, and following on the heels of Human Rights Council’s Resolution S-15/1, the Security Council unanimously adopted Resolution 1970, which highlighted the government of Libya’s failure to meet its primary responsibility to protect its civilian populations.46 Citing the deplorable and systematic violation of human rights, the resolution affirmed that these violations amounted to crimes against humanity and called for an immediate end of all forms of hostilities and human rights violations. The resolution demanded safe passage for humanitarian and medical supplies and medical personnel into affected areas. Most importantly, the resolution imposed a set of coercive measures including an arms embargo, a travel ban on the Gaddafi family and key Libyan officials, and the freezing of their overseas

The resolution further called for a progress review within 120 days. Lastly, the Security Council also decided to refer the situation in Libya to the International Criminal Court (ICC) for further review.

By imposing non-military coercive measures and referring the situation to the ICC, the Security Council intended to send a strong message to Libyan authorities to halt the violence. However, Member States were not yet willing to endorse more coercive measures against Libya. In response to Security Council Resolution 1970, Libya stated that the resolution was premature and that it be suspended until alleged claims could be confirmed. The Russian delegation stated that: “A settlement of the situation in Libya is possible only through political means. In fact, that was the purpose of the resolution, which imposes targeted, clearly expressed, restrictive measures with regard to those guilty of violence against the civilian population. However, it does not enjoin sanctions, even indirect, for forceful interference in Libya’s affairs, which could make the situation worse.” Bolivia stressed that the consensus reached to suspend Libya from the Human Rights Council should not be used to promote “unjustified interventions” against sovereign States, and Bolivia warned against the selective application of any resolutions against States with a “different orientation” from the major powers.

Lebanon stressed the importance of affirming the sovereignty and territorial integrity of Libya. China supported the resolution, taking into account the special circumstances in Libya, but highlighted the importance of

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47 Id. ¶¶ 9, 10.  
48 Id. ¶ 25.  
49 Id. ¶ 4.  
53 Id.
affirming Libyan sovereignty. Although the resolution was adopted unanimously, there was no indication that Security Council members favored using force rather than imposing non-coercive restrictive measures. Those Member States historically opposed to the use of force against sovereign states for humanitarian reasons expressed doubt that the international community had a right to use force.

In addition to the Security Council’s actions against the Libyan authorities, other regional organizations called on the Security Council to take immediate action to stop atrocities in Libya. In a statement on March 7, 2011, the Gulf Cooperation Council called on the Security Council to take all measures necessary to protect civilians, including enforcing a no-fly zone over Libya. On March 12, 2011, the LAS called on the Security Council to bear its responsibilities and take necessary measures to impose a no-fly zone immediately on Libyan military aviation and also to establish a no-fire zone. Although the AU endorsed the LAS call for an establishment of a no-fly zone, it did not call for military intervention in Libya. In fact, there was no indication that AU Member States felt obliged to take any such measures to stop atrocities by the Gaddafi regime and protect civilian populations in Libya.

The human rights violations and mass atrocities in Libya drastically escalated during the weeks following the adoption of Resolution 1970. The Libyan authorities failed to uphold their responsibility to protect the population in Libya. Not only did Libyan authorities ignore the

54 Id.
55 Williams, supra note 27, at 252.
58 Libya Profile, supra note 3.
multilateral efforts of the international community to solve the crisis, but they also failed to comply with Resolution 1970.

6.3.2.2 The Authorization to Use Military Force

On March 17, 2011, Gaddafi announced his intention to attack Benghazi. He warned the rebels that his troops were coming to hunt rebels house by house and room by room and that they would show no mercy or pity.59 At this point, the international community began to focus its attention on possible military intervention.

The Security Council met on March 17, 2011, to discuss the situation and decide on a possible action to stop the ongoing mass atrocities in Libya. During this meeting, the Security Council adopted Resolution 1973, which was tabled by the United States, the United Kingdom, France, and Lebanon.60 The resolution authorized the Member States, acting nationally or through regional organizations or arrangements, to take all necessary measures to protect civilians under threat of attack in Libya, specifically those civilians in Benghazi. The resolution recognized the important role of the LAS in the maintenance of both international peace and regional security.61 The Security Council requested that LAS Member States cooperate with UN Member States to implement a no-fly zone over Libya.62 The resolution noted the failure of all prior diplomatic measures against Libya, and the Security Council stressed the need to explore other possible solutions to the Libyan crisis. The Security Council demanded that Libyan authorities comply with their obligations under international law to take all measures to protect

61 Id. ¶ 5.
62 Id.
civilians, meet their citizens’ basic needs, and ensure the rapid and unimpeded passage of humanitarian assistance.\textsuperscript{63} Resolution 1973 also requested that all states deny permission to any Libyan commercial aircraft to land in or take off from their territories, unless a particular flight had been approved in advance by the committee established to monitor sanctions imposed by Resolution 1970. Resolution 1973 further strengthened the asset freeze and arms embargo established by Resolution 1970.

Resolution 1973, adopted under Chapter VII of the UN Charter, authorized military intervention in three separate ways. First, military force could be used to “protect civilians and civilian populated areas under threat of attack in Libya.”\textsuperscript{64} Second, the Security Council established a no-fly zone and a ban on all flights over Libyan airspace. The Security Council also authorized Member States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the flight ban.\textsuperscript{65} Third, the resolution strengthened the arms embargo by authorizing Member States to use all measures commensurate to the situation.\textsuperscript{66} According to Resolution 1973, the purpose of granting authority to “take all necessary measures” was to force the Libyan authorities to cease violation of human rights and humanitarian law.\textsuperscript{67} In fact, the resolution considered Gaddafi’s widespread and systematic attacks against the Libyan civilian population as possible, even likely, crimes against humanity.\textsuperscript{68}

Despite the Security Council’s decision to authorize military intervention to halt the atrocities in Libya, the Member States of the Security Council were significantly divided on

\begin{itemize}
\item \textsuperscript{63}Id. ¶ 3.
\item \textsuperscript{64}Id. ¶ 4.
\item \textsuperscript{65}Id. ¶¶ 6,8.
\item \textsuperscript{66}Id. ¶ 8.
\item \textsuperscript{67}Id. pmbl. ¶ 7.
\item \textsuperscript{68}Id.
\end{itemize}
Resolution 1973. During the vote on Resolution 1973, ten Member States - France, the United Kingdom, the United States, Bosnia and Herzegovina, Colombia, Gabon, Lebanon, Nigeria, Portugal, and South Africa - voted in favor of the resolution, while five Member States - China, Russia, Brazil, Germany, and India - abstained. The ten Member States which voted for Resolution 1973 were clear that the resolution was based on humanitarian considerations. Speaking after the vote, the Member States which voted in favor of the resolution agreed that strong action was necessary to protect civilians from further harm. Colombia stated that “it was convinced that the purpose of Resolution 1973 was humanitarian in nature and conducive to bringing about conditions that would lead to the protection of civilians under attack, from a regime that had lost all legitimacy.” On the other hand, China and the Russia, explaining their abstentions, prioritized peaceful means of resolving the conflict and stated that many questions had not been answered in regards to provisions of the resolution, including how and by whom the authorized military measures would be enforced and what the limits of the military engagement would be. These delegations, however, noted that the resolution included a sorely needed ceasefire, which they had called for earlier. China stated that it had not blocked the action with a negative vote in consideration of the wishes of the LAS and the AU. By abstaining from the vote on the resolution, those five Member States reaffirmed their long-standing opposition to the use of force for humanitarian purposes.

It is important to note that the call for military action by regional organizations in the Libyan case played a major role in the Security Council’s decision. Security Council Resolution 1973 reiterated the collective condemnation of the Gaddafi regime by the LAS, the AU, and the

70 Id.
These regional organizations criticized Libya for serious violations of human rights and international humanitarian law. The resolution supported the March 12, 2011, decision of the Council of the LAS to call for the imposition of a no-fly zone over Libyan air space and the creation of safe areas in places exposed to shelling.

Statements by UN Member States also referred to a call for action by these regional organizations against Libya. The representative of the United Kingdom stated that the LAS was particularly clear in its demands, including the imposition of a no-fly zone. The United Kingdom welcomed the fact that the Security Council had acted swiftly and comprehensively in response to the appalling situation in Libya and to the appeal of the Arab League. The representative of the United States stated that the LAS had called on the Security Council to take more stringent measures than what Resolution 1970 proposed. Resolution 1973 was, in fact, an answer to that request and a strong response to the deteriorating situation in Libya. Statements by Russia and China specifically demonstrate that these two countries had not vetoed Resolution 1973 and had, therefore, acted in consideration of the wishes of the LAS and AU.

Following the passage of Resolution 1973, military action was commenced by a coalition of states spearheaded by the United States, France, the United Kingdom, and NATO. On March 22, 2011, NATO agreed to enforce the arms embargo against Libya in response to the Security Council’s call to prevent the supply of arms and related materials to Libya. Towards this end, NATO ships operating in the Mediterranean immediately began blocking the shipment of

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72 Id. pmbl. ¶ 13.
74 Id. at 11.
75 Id. at 8, 9.
weapons and mercenaries to Libya by sea. On March 24, 2011, NATO announced that it would take over all military aspects of Resolution 1973. NATO began enforcing the Security Council-mandated no-fly zone over Libya to prevent the Gaddafi regime from launching further airstrikes against Benghazi or other places. Attacks by NATO struck the Gaddafi’s family compound and killed Gaddafi’s youngest son and three grandchildren. On August 22, 2011, some five months after NATO’s initial military intervention, Tripoli was liberated.

NATO countries strongly believed that the only way to protect civilian populations in Libya was to get rid of the Gaddafi regime. Therefore, NATO decided that, absent a complete military victory, the protection of civilians in Libya could not be achieved. NATO forces, thus, increased their attacks against Libyan government forces beginning in October 2011. On October 20, 2011, Gaddafi was overthrown and assassinated. After several more days of fighting, NATO concluded its operation in Libya.

During the military operations in Libya, at least 18 UN Member States that were non-NATO countries supported NATO as the organization carried out its tasks. In the Libyan operations, NATO flew more than 26,000 sorties, of which 42 percent were strike sorties which damaged or destroyed approximately 6,000 military targets. At its peak, NATO utilized the efforts of more than 10,000 servicemen and women, 21 NATO ships in the Mediterranean, and

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82 Id.
83 Id.
more than 250 aircrafts of all types. By the end of the operation, NATO had hailed over 3,000 vessels at sea and boarded 300 ships for inspection. Eleven vessels were denied transit to their next port of call.\textsuperscript{84}

The Security Council authorized military intervention in Libya through Resolution 1973 on the basis of the R2P principle. The Security Council authorization of military force in Libya presumptively satisfied the criteria discussed by the ICISS report for military intervention under the responsibility to react. As stipulated in the ICISS report, military action against a state should satisfy six conditions: just cause, right authority, right intention, last resort, proportional means, and reasonable prospects.\textsuperscript{85} However, a number of states raised questions about the use of military force against Libya.

Most of the Member States in the Security Council agreed that the situation in Libya was deteriorating and that the Libyan authorities were causing a large scale loss of life, including the systematic killing of members of rebel groups, in order to diminish or eliminate rebel presence in particular areas of Libya.\textsuperscript{86} Even the delegations which abstained on Resolution 1973 expressed concern about the alarming human rights violations in Libya.\textsuperscript{87} Some Member States, however, claimed that there was little compelling evidence to prove allegations against the government of Libya.\textsuperscript{88} India insisted on making an objective analysis of the situation on the ground. It expressed dissatisfaction at taking military action with relatively little credible information.\textsuperscript{89}

\textsuperscript{84} Id.
\textsuperscript{86} U.N. SCOR, 66\textsuperscript{th} Sess., 6498\textsuperscript{th} mtg., U.N. Doc. S/PV.6498 (Mar. 17, 2011).
\textsuperscript{87} Id. at 8, 10.
\textsuperscript{88} Id. at 5, 6.
\textsuperscript{89} Id. at 6.
The Member States which abstained during the vote on Resolution 1973 also expressed skepticism about the intention behind the use of force against Libya.\textsuperscript{90} They highlighted the importance of having a common object: protecting civilians in Libya. Even China and Russia recognized the need to protect the civilians in Libya.\textsuperscript{91} Brazil stated that its abstention “should in no way be interpreted as condoning the behavior of the Libyan authorities or as a disregard for the need to protect civilians and respect their rights and that Brazil remained unconvinced that the use of force will lead to the realization of the common objective – the immediate end to violence and the protection of civilians.”\textsuperscript{92} This skepticism was heightened when the interveners made it clear that they were not going to halt their military campaign in Libya until Gaddafi was no longer in power.\textsuperscript{93} Concurrently, the rebels, with whom NATO had closely worked, refused to engage in any negotiations or peace deals with the government of Libya unless Gaddafi vacated office.

Some Member States claimed that the Security Council failed to take all reasonable actions to solve the crisis in Libya before authorizing military intervention.\textsuperscript{94} According to those Member States, the need to use military force had not yet arisen in Libya. Russia, for example, contended that “the quickest way to ensure robust security for the civilian population and the long-term stabilization of the situation in Libya is an immediate ceasefire.”\textsuperscript{95} China insisted that it could not support the resolution because the provisions of the UN Charter on the peaceful resolution of conflicts were not being respected. China would not support “the use of force when

\begin{itemize}
\item \textsuperscript{90} Id. at 6.
\item \textsuperscript{91} Id. at 8, 10.
\item \textsuperscript{92} Id. at 6; Bellamy & Williams, \textit{supra} note 51, at 844.
\item \textsuperscript{94} U.N. Doc. S/PV.6498, \textit{supra} note 86, at 6.
\item \textsuperscript{95} Id. at 8.
\end{itemize}
non-military means were not exhausted."\textsuperscript{96} Under the UN Charter, the Security Council determines when forceful measures are required. According to international law under the Charter, there is no legal sense for China to claim Charter principles are being violated by the Security Council exercising its legal authorities. The Security Council is given the legal power to decide when peaceful measures have failed and forceful ones are required. India stated that non-coercive measures were not given adequate time to work before military intervention was authorized and stressed the need to allow more time for diplomatic and non-coercive measures to work.\textsuperscript{97} Those Member States which abstained on the vote on Resolution 1973 also pointed out that adequate efforts had not been made to peacefully resolve the conflict in Libya.\textsuperscript{98}

Although Resolution 1973 authorized the use of force to protect civilian populations in Libya, some Member States were cautious about the possible misuse of the mandate granted under the resolution. They raised questions about the adequacy of information with regard to the Libyan situation, as well as the true intention of NATO countries, which spearheaded military intervention against Libyan regime. Under these circumstances, Russia, China, and like-minded Member States stressed that the authority under Resolution 1973 should strictly be used only against legitimate targets and for limited ends.\textsuperscript{99}

\textsuperscript{96} Id. at 10.  
\textsuperscript{97} Id. at 6.  
\textsuperscript{98} Id.  
\textsuperscript{99} Id. at 6, 8, 10.
6.3.2.3 The “Regime Change” Controversy

As the NATO mission progressed into mid-May, arguments were raised that civilians could not be protected without a military victory over Gaddafi.\(^{100}\) Some coalition members hoped for a regime change as the preferred outcome of the Libyan intervention. The United States, the United Kingdom, and France made it clear that they wanted Gaddafi out of power.\(^{101}\) They strongly believed that Gaddafi should be removed from office in order to protect the civilian population in Libya. However, despite NATO’s military success against Gaddafi, a number of UN Member States significantly criticized NATO for its use of force against Libya. These criticisms included accusations that NATO exceeded the mandate contained in Resolution 1973.

After a military intervention has been initiated, it should not use more force than necessary to accomplish the stated humanitarian objective, and it should be conducted in strict compliance with international humanitarian law.\(^{102}\) The use of force should be proportional to achieve the stated objective. Under long-standing rules of international humanitarian law, the use of military force should only attack legitimate military targets, be proportional, and minimize collateral damage to civilians. However, under R2P, the use of force should be proportionate to the objective of protecting the civilian population. The ICISS report states that the scale,

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\(^{101}\) Barack Obama, President of the United States, David Cameron, Prime Minister of the United Kingdom, and Nicholas Sarkozy, President of France, *Libya’s Pathway to Peace*, Joint Op-Ed, White House Office of the Press Secretary (Apr. 14, 2011).

duration, and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.  

As the Libyan military intervention progressed, Germany, India, and Brazil warned the Security Council that military intervention could result in a more hazardous situation than what already existed in Libya. Therefore, Russia, China, and other like-minded states insisted that only a limited use of force was necessary to protect the civilian population. Further, India highlighted the need to ensure that any military measures would mitigate, not exacerbate, an already difficult situation for the people of Libya.

The issue of regime change became highly controversial after NATO acted under Resolution 1973 in Libya. According to Pattison:

[T]he first problem concerns the possibility of mission creep. Extending the mandate of NATO and thus changing a regime by use of force was not accepted by the international community at large. A regime change cannot be reasonably expected under a humanitarian intervention as it could cause many casualties. Making regime change the primary objective would be also morally problematic as it would most likely fail to meet several of the other qualities that are important for the permissibility of an intervention.

While Russia and China had not used their veto power against Resolution 1973, they later regretted not using it when they had the opportunity to do so. According to China and Russia,
Western states could not be trusted to stay within the limits of a given R2P mandate to use military force.\textsuperscript{109} BBC correspondent Barbara Plett, quoting the Permanent Representative of India to the UN, Hardeep Singh Puri, referred to NATO as the “armed wing” of the Security Council, as India believed that NATO’s role in Libya had moved from protecting civilians in Benghazi to overthrowing the government in Tripoli.\textsuperscript{110} The AU also highlighted the requirement that all stakeholders involved in the implementation of Resolution 1973 act with the sole objective of the protection of civilians.\textsuperscript{111}

There was a lack of agreement among the Member States on the parameters and limits of the mandate to use military force given under Resolution 1973. During the negotiations of Resolution 1973, Member States expressed doubts about what military intervention under the R2P principle entailed.\textsuperscript{112} During the adoption of Resolution 1973, China, Russia, and India, for example, clearly stated that the mandate given under the resolution should not be extended to implement any agenda for regime change.\textsuperscript{113} India stated that it did not have clarity about details of the military measures, including what countries would participate and with what assets, and exactly how these measures would be carried out.\textsuperscript{114} Brazil stated that it was “not convinced that the use of force as provided for in operative paragraph four of the resolution will lead to the realization of the common objective which is the immediate end of violence and the protection of civilians.”\textsuperscript{115} Resolution 1973, which mandated the use of force in Libya to protect civilians, did

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{109}] Yun Sun, \textit{Syria: What China Has Learned From Its Libya Experience?} 152 \textsc{Asia Pacific Bull.} (Feb. 27, 2012), http://www.eastwestcenter.org/sites/default/files/private/apb152_1.pdf.
\item[\textsuperscript{112}] Bellamy & Williams, \textit{supra} note 51, at 843.
\item[\textsuperscript{113}] U.N. Press Release SC/ 10200, \textit{supra} note 69.
\item[\textsuperscript{114}] U.N. Doc. S/PV.6498, \textit{supra} note 86, at 5, 6.
\item[\textsuperscript{115}] Id.
\end{itemize}
\end{footnotesize}
not offer any guidelines on how to interpret, or who would interpret, the Security Council’s mandate to use force under the R2P principle and this vagueness was highlighted by India, China, and Russia.\footnote{U.N. Press Release SC/ 10200, supra note 69.} Generally, any Security Council-authorized use of force is subject to the laws of armed conflict and international humanitarian law, which regulate the use of military force in armed conflict whether the reasons behind the use of force are legal or illegal.

Supporting Resolution 1973, the United States stated that the Security Council had responded to the Libyan peoples’ cry for help with the clear purpose of protecting them.\footnote{Id.} The United States further stated that Resolution 1973 was adopted because the Gaddafi regime did not positively respond to the earlier resolutions and continued gross and systematic violations of most fundamental rights of the Libyan people.\footnote{Id.} The United Kingdom stated that the Libyan regime had ignored the previous resolutions of the Security Council, and was on the verge of assaulting Benghazi.\footnote{Id.} France stated that the Libyan people had been trampled under the feet of the Gaddafi regime and earlier measures had not been enough to stop Gaddafi’s atrocities. Stressing the international community’s call to protect civilian population in Libya, France stated that little time was left to take decisive action as each hour and day passed increased the weight on the international community’s shoulders.\footnote{Id.} In a press conference held on December 14, 2011, UN Secretary General Ban Ki-moon stated that “Security Council Resolution 1973 was strictly enforced within the limits, within the mandate. This military operation done by the NATO forces was strictly within 1973 and there should be no misunderstanding on this.”\footnote{Louis Charbonneau, \textit{U.N. Chief Defends NATO from Critics of Libya War}, REUTERS (Dec. 14, 2011), http://www.reuters.com/article/2011/12/14/us-libya-nato-un-idUSTRE7BD20C201111214.} The Secretary General emphasized that the international community had collectively advanced the R2P
principle in Libya, and that these actions represented an important victory for justice and international law.\textsuperscript{122}

However, during the May 2011 Security Council meeting on protection of civilians in armed conflict, India again raised the question about the parameters of the use of force as mandated under Resolution 1973.\textsuperscript{123} The delegation asked “who watches the guardians?” India voiced suspicion about the manner in which the humanitarian imperative of civilian protection was interpreted in the actual action on the ground.\textsuperscript{124} During this meeting, China stated that the original intention of Resolutions 1973 was to put an end to violence and to protect civilian population in Libya and opposed “any attempt to wilfully interpret the resolution or to take actions that exceed those mandated by the resolution.”\textsuperscript{125} Voicing a similar view, Russia stated that it was not clear how and by whom the intervention measures would be enforced and what the limits of any subsequent intervention would be.\textsuperscript{126}

The Libyan intervention, thus, sparked disagreement over the scope of the authority to use force under Resolution 1973. While a change in a state’s regime has often been the consequence of military intervention, the intervention in Libya was the first case of a Security Council-mandated operation that engaged in change of a regime. Thus, one of the main criticisms levelled against NATO’s military action was that it used the mandate granted not to save the civilian population, but to carry out regime change in Libya. However, Resolution 1973 did not refer to a regime change, but emphasized that a solution to the crisis must respond to the

\textsuperscript{124} Id.
\textsuperscript{125} Id. at 20.
\textsuperscript{126} Id. at 9.
legitimate demands of the Libyan people. It was doubtful whether such demands of the Libyan population could be fulfilled while Gaddafi remained in power. While the Security Council refrained from any explicit reference to overthrow the Gaddafi regime, it took a number of other measures against the Libyan regime. In a previous action, Resolution 1970, the Security Council decided on a travel ban and asset freeze, specifically aimed at Gaddafi and his family, and the Council also referred the Libyan situation to the ICC. In Resolution 1973, the Security Council further expanded the scope of financial sanctions against Libyan authorities. These measures indirectly supported the struggle against the Gaddafi regime by Libyan opposition groups.

Although Resolution 1973 specifies the goal that any authorization to use force is only to protect civilian and populated areas, it does not explain what means may be employed to achieve that intended goal. In other words, while there was disagreement over regime change in Libya, there was another dispute – what is required in the use of force to “protect civilians” within the meaning of R2P? These disagreements sharpened the political and legal focus on the military aspect of the responsibility to react, revealing very little consensus on this issue. In fact, this broad mandate did not specify any clear parameters: for example, how force authorized by the Security Council could be implemented by Member States; when exactly a specified actor could take all necessary means to protect the civilians in Libya; what actions should be taken in protecting the Libyan civilian populations from mass atrocities; what were the limits of such actions; and who monitored the actions?

Resolution 1973 did not expressly include the goal of changing the regime in Libya. Nevertheless, the resolution authorized the military means to achieve the objective of the
Security Council mandate to protect civilian population.\textsuperscript{127} In particular, when the conflict escalated, it became clear that civilians could not be protected while Gaddafi remained in power. However, regime change was not strictly necessary for the protection of the civilian population. Nevertheless, after all possible means to end atrocities and protect the population proved pointless, UN Member States considered it necessary to take action to change the Libyan regime in order to protect the civilian population.\textsuperscript{128}

This assertion supported the claim that the safety of civilians could not be guaranteed if the Gadhafi regime continued its relentless attacks against the civilian population.\textsuperscript{129} The United States, the United Kingdom, and France supported this assertion. On April 14, 2011, United States President Barack Obama, French President Nicolas Sarkozy, and British Prime Minister David Cameron published a joint article in several newspapers.\textsuperscript{130} The three state leaders pledged that NATO would protect civilians and stated that “so long as Gadhafi is in power, NATO must maintain its operations so that civilians remain protected and the pressure on the regime builds.”\textsuperscript{131} They acknowledged that “the duty and mandate under Security Council Resolution 1973 are to protect civilians and not to remove Gadhafi by force.”\textsuperscript{132} Nevertheless, they claimed that “it is impossible to imagine a future for Libya with Gadhafi in power” and that a genuine transition from dictatorship to an inclusive constitutional process could only really begin when Gadhafi had resigned.\textsuperscript{133} While these states argued that the mandate of Resolution 1973 did not

\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
include the removal of Gadhafi, they also stated that NATO would maintain its operations and increase the pressure on the regime as long as Gadhafi was in power.

However, numerous political actors as well as commentators rejected the idea of regime change through military intervention. Amr Moussa, the Secretary-General of the LAS, pointed out that the Security Council authorized only the protection of civilians and not regime change. Naiman stated that the Security Council never approved a military mission to overthrow the Libyan government. In fact, Russia and China, along with many other states, refused to interpret Resolution 1973 as supporting regime change. Ulfstein and Christiansen argued that, although NATO actions to protect civilians were clearly within the mandate, operations aimed at overthrowing Gadhafi violated the mandate and were an illegal use of force. This overstepping of the mandate undermined the credibility of R2P. Sands stated that it was becoming increasingly hard to justify strikes on the Libyan leader's forces as protective. He asserted that “military attacks on Gaddafi could only be justified if it could be shown to be related to the objective of protecting civilians.” According to Sands, it is difficult in international law to argue for a pre-emptive use of force to protect civilians from a possible threat that might arise in the future. Pre-emption is a major problem because it is seen as a slippery slope, and rightly so.

135 Robert Naiman, Surprise War for Regime Change in Libya is the Wrong Path, FOREIGN POL’Y FOCUS (Apr. 4, 2011), http://tinyurl.com/3hwe7nv.
138 Id.
Regime change through the use of military force is a far-reaching measure that goes against many basic concepts of international law, such as sovereignty, territorial integrity of states, and non-intervention. Therefore, interpreting Resolution 1973 to grant authorization to change the Libyan regime is difficult. However, the mere fact that force was used to protect civilian population and, at the same time, contributed to the ouster of Gadhafi does not necessarily render NATO attacks illegal. Gadhafi was the supreme commander of all Libyan armed forces and he and his commanders attacked civilians in Libya. Therefore, targeting Gadhafi cannot be illegitimate under Resolution 1973, or under humanitarian law.\textsuperscript{139}

6.3.2.4 The “Responsibility While Protecting” Proposal

After the Libyan intervention, the R2P principle was met with much criticism. Although NATO claimed the Libyan intervention a success because it eliminated threats to civilian population and did so well within the parameters of R2P, Brazil, China, India, Russia, and South Africa (BRICS), and like-minded countries believed the Libyan mission had gone beyond the Security Council mandate in ousting the Gadhafi regime.\textsuperscript{140} The controversy over “regime change” under Resolution 1973 stimulated efforts to find a compromise solution to retain needed political will for applying the R2P principle in humanitarian crises. The regime change controversy revealed two fundamental disagreements among Member States: (1) a disagreement over whether, in authorizing military force for R2P purposes, the authorized force is subject to substantive limitations or restrictions beyond those imposed by international humanitarian law; and (2) a disagreement about post-authorization oversight of the use of military force authorized

by the Security Council. In this context, in November 2011, Brazil proposed the “responsibility while protecting” (RWP) concept with an aim to address both problems. In particular, the RWP proposal provides a framework and guidelines for actions taken after the Security Council provides a mandate for military intervention.

The RWP concept was first introduced by the Brazilian President, Dilma Rousseff at the 66th General Assembly in September 2011. She highlighted the importance of conflict prevention rather than forceful interventions, and underscored that the use of force should be implemented as a last resort. She also praised the Security Council for its role in conflict prevention. President Rousseff’s introduction of RWP was followed by a Brazilian concept note in November 2011. This concept note clarifies the substance of the initiative and suggests complimenting R2P via the key principles of the RWP idea. Primarily, the concept note sets forth that, before responding to a crisis with the use of force, it must be clear that the state’s primary responsibility to protect its population has not been met and all international efforts to prevent the crisis have been exhausted. However, even after meeting these preliminary criteria, the RWP proposal suggests that a differentiation should be made between military and nonmilitary coercion, avoiding the “precipitous use of force.”

The Brazilian concept note further states that all peaceful means have to be exhausted before authorizing any use of force, and a comprehensive and judicious analysis of the possible

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143 Id.
145 Id. ¶ 6, 7.
146 Id. ¶ 6.
consequences of military action must also be conducted.\textsuperscript{147} This latter condition is key in creating post-conflict rebuilding efforts. Further, the RWP concept note suggests that any use of force must be authorized by the Security Council.\textsuperscript{148} While RWP highlights that an intervening state has the responsibility to follow both the “letter and spirit” of the UN mandate, RWP also stresses the importance of the Security Council in ensuring the accountability of the interveners.\textsuperscript{149} In order to achieve this objective, the RWP proposal suggests that the Security Council should implement enhanced security procedures enabling it to monitor the interpretation of resolutions.\textsuperscript{150} In addition, the Brazilian concept note states that the use of force must be proportional.\textsuperscript{151} It argues that use of force must be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict.\textsuperscript{152} In fact, the Brazilian concept note states that “the use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent.”\textsuperscript{153}

During the open debate on the protection of civilians in armed conflict on November 9, 2011, in which the RWP concept note was introduced, Brazil stressed the importance of aiming for a high level of responsibility and accountability while protecting civilian populations.\textsuperscript{154} Further, Brazil stated that both R2P and RWP should evolve together. Brazil further stated that:

> [O]ur collective point of departure should resemble the Hippocratic principle of \textit{primum non nocere} - first, do no harm - with which doctors are so well acquainted. That must be

\textsuperscript{147} Id. ¶ 11(b).
\textsuperscript{148} Id. ¶ 11(c).
\textsuperscript{149} Id. ¶ 11(d).
\textsuperscript{150} Id. ¶ 11(h).
\textsuperscript{151} Id. ¶ 11(f).
\textsuperscript{152} Id. ¶ 11(d).
\textsuperscript{153} Id. ¶ 11(e).
\textsuperscript{154} U.N. GOAR, 66\textsuperscript{th} Sess., 6650\textsuperscript{th} mtg. at 15, U.N. Doc. S/PV.6650 (Nov. 9, 2011).
the motto of those who are mandated to protect civilians. It would also be most unfortunate, ultimately unacceptable, if a United Nations mission established with the aim of protecting civilians were to cause greater harm than that that it was enacted to prevent.\textsuperscript{155}

Although RWP proposes limitations on the use of military force, Brazil clarified that those are mere guidelines.\textsuperscript{156} However, Brazil posited that these guidelines must be followed from the beginning of the authorization to use force until suspension of such authorization by a new resolution.\textsuperscript{157}

Further, during the February 2012 informal debate on RWP, Brazil argued that order between the responsibilities to prevent, react, and rebuild should be logical and based on political prudence.\textsuperscript{158} Brazil, however, stated that this sequencing does not mean the establishment of an arbitrary check-list.\textsuperscript{159} It emphasized that this procedure, as proposed in the RWP concept, should not be perceived as a means to prevent or unduly delay authorization of military action in situations established in the 2005 World Summit Outcome Document: genocide, war crimes, ethnic cleansing, and crimes against humanity.\textsuperscript{160} During this meeting, Brazil highlighted the importance of care and caution when using military force.\textsuperscript{161}

\textsuperscript{155} Id. at 16.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Antonio de Aguiar Patriota, Minister of External Relations, Statement at the UN Informal Debate on Responsibility While Protecting (Feb. 21, 2012), http://cpdoc.fgv.br/sites/default/files/2012%20-%20Pronunciamento%20do%20Ministro%20de%20Aguiar%20Patriota%20debate%20sobre%20RWP%20ONU.pdf.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
Since Brazil proposed its concept note, RWP has gained much attention and been subjected to a great deal of discussion within the UN as well as in various other fora. In his report on *Responsibility to Protect: Timely and Decisive Response*, the UN Secretary General Ban Ki-moon welcomed the RWP concept and stated that the new RWP concept provides a useful pathway for continuing dialogue about ways of bridging different perspectives and forging strategies for timely and decisive responses to crimes and violations relating to R2P.\(^{162}\) The RWP idea has been welcomed by many delegations as a dynamic addition to the R2P principle. Two delegations, in particular, India and South Africa, have signaled a strong interest in the RWP concept.

However, not everyone has extended support for the RWP concept. The United States argued that RWP manifestly fails to follow what it describes.\(^{163}\) According to the United States, “appropriate decision-making in R2P requires not just ‘temporal’ considerations but a comprehensive assessment of risks and costs and the balance of consequences.”\(^{164}\) The United States further stated that, even in situations where forceful action is required, the possible role of diplomacy should not be eliminated.\(^{165}\) The German Permanent Representative to the UN, Peter Wittig, stated that the Brazilian RWP approach lacked a precisely-defined concept of its own.\(^{166}\) He further cited the prescription of step-by-step guidelines, the mandatory exhaustion of all peaceful means, and the introduction of exceptional circumstances as time consuming, overly

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\(^{163}\) Representative of the United States Mission to the UN, Statement at the UN Informal Debate on Responsibility While Protecting (Feb. 21, 2012), http://usun.state.gov/briefing/statements/184487.htm.

\(^{164}\) *Id.*

\(^{165}\) *Id.*

\(^{166}\) Peter Wittig, Permanent Rep. of Germany to the UN, Statement at the UN Informal Debate on Responsibility While Protecting (Feb. 21, 2012), http://cpdoc.fgv.br/sites/default/files/2012%20-%20Germany.pdf.
qualifying triggers for the use of force.\footnote{Id.} Therefore, in his estimation, the RWP concept limits the scope for timely and decisive solutions in situations of extreme gravity.\footnote{Id.} According to Luck, RWP proposes strict requirements for the use of force, requirements which cannot always be justified.\footnote{Edward C. Luck, Special Adviser to the United Nations Secretary General on the Responsibility to Protect, Statement at the UN Informal Debate on Responsibility While Protecting (Feb. 21, 2012), http://cpdoc.fgv.br/sites/default/files/2012%2002%2021%20Statement%20-%20Edward%20Luck.pdf.}

Indeed, RWP suggests guidelines that already exist in the R2P concept. The ICISS report proposed criteria that must be fulfilled in a decision to intervene with military force is taken.\footnote{ICISS, supra note 85, ¶¶ 4.18-4.27.} These six precautionary principles are: (a) \textit{Just Cause}; (b) \textit{Right Authority}; (c) \textit{Right Intention}; (d) \textit{Last Resort}; (e) \textit{Proportional Means}; and (f) \textit{Reasonable Prospects}.\footnote{Id. ¶ 8.28.} Both the ICISS and the 2005 World Summit Outcome Document made clear these requirements for Security Council authorizations to use force under R2P. Also, both documents emphasize the need to exhaust all peaceful means to resolve a crisis before taking any decision to undertake military intervention. In fact, the responsibility to prevent is considered the most important aspect of R2P. Neither document authorized interveners to use excessive force, but rather force that is proportional to the situation. Further, states that use military force are bound by international humanitarian law and the laws of arms conflict, and thereby are required to use appropriate means in military interventions. The RWP guideline on proportionality of force is already embedded in international law. Therefore, there is hardly anything new introduced by the RWP concept.

Under RWP guidelines, it is very unlikely that Western states, in particular, the United States, the United Kingdom, France, and like-minded countries will agree to abide by these
guidelines. For instance, the United States and the United Kingdom threatened Syria with the use of force even without Security Council approval and, in fact, they did not justify their threat to use of force under the R2P principle. On the other hand, if all RWP suggested guidelines are met, then the permanent Security Council members should not have to make use of their veto. However, it is very unlikely that these Security Council members would agree to jeopardize their veto power. Moreover, the RWP concept does not address who decides whether the guidelines are met. Use of force decisions are mostly politically motivated, and any decision to authorize military intervention will be made on a case-by-case basis. It is questionable whether RWP’s one-size-fits-all approach will be suitable for present day crises. Importantly, if the Security Council follows the RWP criteria, then it may begin to create a legal duty to intervene. If there is such a legal duty to intervene, then the failure to intervene also should have legal consequences, to which RWP does not provide an answer.

However, RWP is not a hopeless concept. Indeed, RWP guidelines would generally result in the justifiable use of military force. Also, RWP could help to improve the transparency of any decision-making process on the use of military force. In these regards, the RWP concept not only advances the R2P principle, but also improves states’ concern about the use of force. It creates a new political standard for states in productive discussions on advancing R2P. Despite these positive aspects, the RWP concept has not been able to offer a solution to the existing controversies about R2P. Nor has it been able to offer anything new to existing international law on the use of military force.
6.3.3 Responsibility to Rebuild

The NATO military intervention in Libya led to the fall of the Gaddafi regime, and many hailed this intervention as a successful implementation of the R2P principle. Bellamy and Williams noted that the R2P principle proved to be robust in the Libyan crisis:

[T]he international community’s response to the crisis in Libya reflected a new politics of protection and had four principle characteristics: first, the Security Council had framed this crisis in terms of human protection; second, the Security Council had demonstrated the willingness to authorize the use of military force for protection purposes even without the consent of the host state; third, the regional stakeholders had become important gatekeepers influencing the Security Council and; finally, the international community had exhibited a commitment to working through the Security Council to fashion a response to a human protection crisis.

This positive perspective, however, usually does not include analysis of the third aspect of R2P - the responsibility to rebuild. As specified in the ICISS report, the responsibility to rebuild is a vital element of the R2P principle. However, the 2005 World Summit Outcome Document did not discuss responsibility to rebuild in its discussion on R2P, and, instead, it proposed creation of the Peacebuilding Commission later in the document. The responsibility to rebuild is an

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173 Bellamy & Williams, supra note 51, at 847.
important part of the R2P principle because, for example, it requires that intervening actors establish and implement a clear post-intervention strategy to rebuild.175

The main function of an intervention involving military force should be to provide security and protection for civilians of the state in which the intervention is taking place. The intervening forces are obliged to prevent mass atrocities.176 However, in Libya, post-Gaddafí political instability meant the international community could not prevent large-scale violence in Libya. The abundance of weaponry in the country made it easy for Gaddafí loyalists’ to engage in a killing campaign. In addition, the climate of fear in post-conflict Libya made it difficult for groups to relinquish their arms, which complicated post-Gaddafí efforts to prevent significant political instability in Libya.

In addition, the responsibility to rebuild requires post-conflict efforts to achieve justice and reconciliation between parties. According to the ICISS report, external support for reconciliation efforts should encourage this cooperation through joint development efforts between former adversaries.177 Generally, administering punishments for war crimes and crimes against humanity committed in the civil war were needed, but punishing for past violence in Libya incited more violence.

According to the ICISS report, the responsibility to rebuild entails a responsibility to encourage economic growth and sustainable development.178 After the fall of the Gaddafí regime, the EU lifted its sanctions on ports, oil firms and banks, but the removal of the sanctions

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175 ICISS, supra note 85, ¶¶ 5.1, 5.2.
176 Id. ¶ 5.8.
177 Id.
178 Id. ¶ 5.19.
did not immediately help the recovery of Libya’s economy.\textsuperscript{179} Virtually all economic activities, especially oil production, witnessed a dramatic decline in 2011.\textsuperscript{180} Oil is the driving force of the Libyan economy, and oil and gas production account for 65 percent of the country’s Gross Domestic Product (GDP), 96 percent of exports, and 98 percent of government revenues.\textsuperscript{181} There was some recovery in 2012, and oil production recovered faster than expected. However, the economy has not reached a point of sustained economic growth. In fact, by 2013, the economy only just got back to what it was prior to the uprising.\textsuperscript{182} In addition, the interim government has failed to develop an economic vision or structure.\textsuperscript{183} It has not done much to improve economic policies and enact reforms because politics continue to overshadow the economy.\textsuperscript{184}

On September 16, 2011, the Security Council adopted Resolution 2009, establishing a support mission in Libya (UNSMIL).\textsuperscript{185} Under the resolution, UNSMIL was authorized for an initial period of three months: later, its mandate was extended through Security Council resolutions.\textsuperscript{186} As specified in Resolution 2009, UNSMIL was tasked with helping Libyan national efforts to restore public security, promote the rule of law, foster inclusive political dialogue and national reconciliation, and embark on constitution-making and electoral processes.\textsuperscript{187} The UNSMIL mandate also included assisting national efforts to extend state

\textsuperscript{180} \textit{Id}.
\textsuperscript{181} \textit{Id}.
\textsuperscript{182} \textit{Id}.
\textsuperscript{183} \textit{Id}.
\textsuperscript{184} \textit{Id}.
\textsuperscript{187} S.C. Res. 2009, \textit{supra} note 185, ¶ 12.
authority, strengthen institutions, restore public services, support transitional justice, and protect human rights, particularly those of vulnerable groups.\textsuperscript{188} The UN Peacebuilding Fund extended its support to UNSMIL to ensure inclusive, transparent and peaceful legislative elections through its rapid response capacity.\textsuperscript{189} In order to address the important liquidity shortage the country was facing, in February 2012 the UN Peacebuilding Fund approved a Joint UNSMIL, United Nations Development Program (UNDP), UN Women Civic Education and Dialogue project amounting to US$ 1.9 million.\textsuperscript{190} The project aimed at empowering women and youth to meaningfully participate in the July 2012 elections. In September 2012, the Peacebuilding Fund approved a second joint project amounting to US$ 0.5 million to allow South-South exchanges in critical peace and state building areas, including transitional justice, constitution reform, women and youth empowerment, amongst others.\textsuperscript{191}

The UNSMIL mandate also included taking immediate steps to initiate economic recovery and coordinate support that may be requested from other multilateral and bilateral actors, as appropriate.\textsuperscript{192} In support of these objectives, the Security Council also partly lifted, through the resolution, the arms embargo and the asset freeze targeting entities connected to the previous regime imposed on Libya under Resolution 1970.\textsuperscript{193} The Security Council emphasized its intention to keep the no-fly zone imposed by Resolution 1973 under review.\textsuperscript{194} However, UN spokesman Eduardo Del Buey stated that UNSMIL was not a peacekeeping mission.\textsuperscript{195} He

\textsuperscript{188} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} S.C. Res. 2009, supra note 185, ¶ 12.
\textsuperscript{193} Id. ¶ 14, 15.
\textsuperscript{194} Id. ¶ 20.
observed that “UNSMIL is there to assist the Libyan authorities to help them create the necessary institutions to govern the country and ensure the respect of fundamental rights for all.” However, he added that the government of Libya has "the main responsibility of disarming and integrating the militias."

By end of 2013, a total of 205 UNSMIL international staff members, government-provided personnel, and national staff members had been deployed, with 175 in Tripoli, 14 in Benghazi, 3 in Sabha, 1 in New York, and 12 at the Global Service Centre in Brindisi, Italy. In Resolution 66/263, the General Assembly approved an amount of $36,039,100 for UNSMIL for 2012. In Resolution 67/246, the General Assembly approved an additional amount of $50,637,200 for 2013. The entire amount approved for UNSMIL for biennium 2012-2013 was $86,676,300. In addition, the Security Council has taken a number of measures to release Libyan assets that were frozen during the crisis. Billions of dollars under Gaddafi were frozen by the Security Council in March 2011, following his brutal crackdown on protesters. However, by December 2011, the sanctions against the Central Bank of Libya and its subsidiary, the Libyan Foreign Bank, were lifted, clearing the way for the return of more than $40 billion to help the new Libyan government to rebuild the country.

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196 Id.
197 Id.
201 S.C. Res. 104, supra note 198, ¶ 77.
203 Id.
United Kingdom also announced that they would be unblocking most Libyan assets that they froze during the crisis.\textsuperscript{204}

Despite the resources allocated, UNSMIL has not been able to achieve its objectives. Libya has staggered into its worst political and economic crisis since the defeat of Gaddafi two years ago. Despite Libya’s political transformation, including the swearing in on November 14, 2011, of Libya’s first democratically constituted government, events have continued to illustrate the volatility and precariousness of the situation there.\textsuperscript{205} The post-intervention challenges faced by Libya have been further aggravated by tribal and regional tensions. The security situation remains tenuous and continues to be the predominant concern for the Libyan authorities and people.\textsuperscript{206} More than ever, civilians are regularly targeted by renegade militias. In June 2013, protests against militia were met with gunfire, and a number of protestors were shot dead, and many others were wounded.\textsuperscript{207} Rule by local militia is also spreading chaos around Tripoli.\textsuperscript{208} The ethnic Berbers, whose militia led the assault on Tripoli in 2011, temporarily took the parliament building in Tripoli in 2013.\textsuperscript{209} Government authority in Libya is disintegrating in all parts of the country, fuelling doubts of claims of R2P success in Libya in 2011.

Despite efforts of the Libyan authorities and UNSMIL to end torture and ensure the proper functioning of the criminal justice system, torture and other mistreatment of civilians has

\textsuperscript{204} Id.
\textsuperscript{206} Id.
\textsuperscript{208} \textit{Libya Profile}, supra note 3.
\textsuperscript{209} Id.
been an on-going and widespread concern in many detention centers throughout Libya.\textsuperscript{210} Detainees are frequently held without access to lawyers and infrequent access to families. The vast majority of an estimated 8,000 conflict-related detainees are still being held without due process.\textsuperscript{211} According to UNSMIL, since late 2011, there have been 27 cases of death in custody, where evidence suggests that torture was the cause of death.\textsuperscript{212}

Further, foreign diplomats have also come under attack in Libya. The EU Ambassador’s convoy was attacked, and the French embassy has also been bombed.\textsuperscript{213} In September 2013, militia members stormed the U.S. consulate building in Benghazi, resulting in the death of four Americans, including Ambassador Chris Stevens.\textsuperscript{214} This tense situation arose as a result of the arrest of Al-Libi, an alleged al-Qaeda operative from his Tripoli home and charging him for 1998 bombings at the U.S. Embassy in Kenya.\textsuperscript{215}

As the security and economic situations in Libya were continuously deteriorating, on December 9, 2013, Tarik Matri, the Special Representative of the Secretary General and the Head of UNSMIL, insisted on creating a sustained dialogue between the government and the main armed militia.\textsuperscript{216} UNSMIL has been supporting the efforts of both the new government of

\begin{footnotes}
\footnote{211}{\textit{Id}.}
\footnote{212}{\textit{Id}.}
\footnote{213}{Patrick Cockburn, \textit{Special Report: We All Thought Libya Had Moved-on - It Has, But into Lawlessness and Ruin},\ THE INDEPENDENT (Sept. 3, 2013), http://www.independent.co.uk/news/world/africa/special-report-we-all-thought-libya-had-moved-on--it-has-but-into-lawlessness-and-ruin-8797041.html.}
\footnote{214}{\textit{US Moves Marines to Italy as Situation in Libya Become Tense}},\ RT USA (Oct. 8, 2013), http://rt.com/usa/italy-marines-libya-raid-896/.}
\footnote{215}{\textit{Id}.}
\footnote{216}{\textit{Precarious Security Situation in Libya Shows Need for Dialogue with Militias - UN Envoy}, supra note 205.}
\end{footnotes}
Libya and the Libyan people to guarantee the success of the democratic transition in the country, a process which has been under way since the fall of the Gaddafi regime.\textsuperscript{217}

Given the present status of post-Gaddafi Libya, the UN and the international community have failed to meet their responsibility to rebuild after the military intervention. Although UNSMIL, which was not established as a peacekeeping force, was deployed immediately after the fall of the Gaddafi regime, it failed to establish basic security and protection for the civilians in Libya. It also failed to achieve any semblance of justice and reconciliation between parties involved in the conflict. Further, UNSMIL could not stabilize the economic situation in Libya. Therefore, the responsibility to rebuild Libya has not been successfully upheld, and this reality creates more doubts about claims of success for the R2P principle in Libya.

\textbf{6.4 Conclusion}

The international community responded to the Libyan government’s failure to prevent mass atrocities against its population by first employing a broad range of non-coercive measures, such as diplomatic efforts, economic sanctions, a travel ban and arms embargo, and the referral of the case to the ICC. When it became clear that these non-coercive measures failed to stop the mass atrocities, the Security Council authorized the use of force in order to protect civilian population. Ongoing debates over NATO’s objectives, as well as the scope of the mandate of military intervention, demonstrate that the implementation of the R2P principle, specifically in Libya’s case, is of a concern.

\textsuperscript{217} \textit{Id.}
6.4.1 Responsibility to Prevent

Regional organizations and the UN agreed that the responsibility to protect the Libyan population from mass atrocities was with the Libyan government. Similarly, during the Darfur crisis, regional and international actors agreed that the state had the responsibility to protect its population. Specifically, there was a general understanding in the international community that the Libyan government had failed to protect its own civilian population. Most importantly, in both the Darfur and Libyan crises, state practice reflected the obligations of sovereign states to their own people. However, during the Darfur crisis, some Member States were reluctant to agree that the Sudanese government failed to protect its civilian population.²¹⁸

Nevertheless, during the Libyan crisis, Member States agreed that the Libyan government had failed to protect its population. This consensus led the international community to take preventive actions against the Libyan regime. Early preventive action by the UN and regional actors was intended to prevent further atrocities in Libya and give mediators time to secure a peaceful resolution. Although such preventive efforts were not successful, the state practice in Libya suggests, at least within the UN context, that the international community was trying to fulfill their responsibility to prevent atrocities. The preventive efforts by regional and international bodies concerning Libya revealed that the international community had responsibilities that cannot be blocked by the invocation of sovereignty to prevent atrocities.

6.4.2 Responsibility to React

The Security Council decision to take non-coercive measures and then authorize military intervention in Libya was supported with both political will and operational capacity. Resolution 1970, which imposed non-coercive measures and referred the situation to the ICC, was adopted unanimously. Although disagreements existed, a similar situation unfolded in the Darfur crisis, where the situation was referred to the ICC, even though several Member States abstained. State practice in Libya and Darfur on ICC referral, in fact, suggests a synergy between the responsibility to react and international criminal law. International criminal law prohibits certain conduct, such as genocide, war crimes, crimes of aggression, and crimes against humanity. Similarly, the R2P principle recognizes a state’s responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing. Therefore, referring the situations in both Darfur and Libya to the ICC emphasized that the doctrines of sovereignty and non-intervention are not absolute in cases of mass atrocities.

The actions taken by the Security Council under Resolution 1973 were the first with regard to military intervention under the R2P principle. Resolution 1973 was not actively opposed by Member States. The authorization in Resolution 1973 made Libya stand apart from previous cases of humanitarian intervention conducted without Security Council approval, such as Kosovo. Although the Security Council had endorsed the principle previously, it was in the Libyan crisis that R2P was first implemented by the Security Council through military intervention. The Security Council was careful to frame the Libyan crisis in terms of the R2P principle. Every decision made by the Security Council regarding the Libyan crisis, including all sanctions and the authorization to use military force, was grounded in R2P. The Member States’
reaction to the Libyan crisis appeared shaped and structured by and through the R2P principle. Although there was a need to protect the civilian population from mass atrocities in Darfur, there was no apparent interest by states or regional organizations to engage in military intervention in Darfur. The Security Council decisions regarding the Darfur crisis were not grounded in R2P and, in fact, during the Darfur crisis, Member States did not embrace the R2P principle.

Resolution 1973 meant that Member States, which had otherwise defended state sovereignty and territorial integrity, were not opposed to military actions against the Libyan regime in order to stop mass atrocities. The lack of a veto in the Security Council raises the question whether this behavior could be considered as acceptance of the RN2V. However, the controversy over regime change after the Security Council authorization of the Libyan intervention made future RN2V behavior much more unlikely.

The regime change controversy that followed NATO’s implementation of the Security Council’s authorization of the use of force in Libya centered on the mandate created by the Security Council. Under international law, the Security Council has the power to authorize the use of force. However, the controversy was not about the Security Council’s legal authority to authorize the use of force, but it was about what Security Council authorized. This is different to what happened in the Darfur crisis. Given the regime change controversy, certain Security Council members with veto power are unlikely to support further use-of-force authorizations by the Security Council without tighter parameters and continuous Security Council oversight. On the other hand, the United States is unlikely to accept such tighter conditions. Therefore, as can be seen in the Syrian crisis, it is unlikely that the Security Council would authorize military force
for humanitarian purposes. This, in turn, raises the long-standing question whether a state can use force for humanitarian purposes without Security Council authorization.

6.4.3 Responsibility to Rebuild

Similar to the ineffective rebuilding process in Darfur, the inadequate and slow rebuilding efforts in post-conflict Libya have met with criticism. Immediately after the fall of the Gaddafi regime, NATO concluded its operations. UNSMIL, which was created to restore peace, justice and rehabilitation, as well as rebuild, has been unable to bring normalcy to the lives of the Libyan people. While Libya remains wracked by violence and economic stagnation, the post-Gaddafi militias are in the spotlight as never before.219 The UN and the international community have not been able to stabilize the country. Therefore, although NATO intervention was successful in ousting Gaddafi and changing the regime in Libya, post-conflict rebuilding efforts have not been able to bring much-awaited peace and stability to the country.

The relatively little attention given by the international community to the responsibility to rebuild in both Darfur and Libya suggests that this responsibility has had the least impact of R2P’s three responsibilities. As noted earlier, there was deep skepticism expressed in the ICISS report about the responsibility to rebuild aspect of R2P. The ICISS report itself seemed to doubt whether a truly effective and sustainable post-conflict rebuilding effort could be viable.220 State practice in Darfur and Libya reflects non-acceptance by states of legal obligations under the responsibility to rebuild, which is exactly the situation under international law before R2P came along. This situation, therefore, affirms the ICISS’s skepticism about the responsibility to rebuild.

219 Cockburn, supra note 213.
220 ICISS, supra note 85, ¶ 5.24.
The Libyan case illustrates how humanitarian intervention under R2P emerges when a state fails to fulfill its responsibilities as a sovereign. In Libya, the grave human rights violations gave the Security Council the necessary leverage to authorize the use of force, and NATO recognized the Security Council as the legitimate authority to authorize intervention. However, NATO’s use of force in Libya was declared illegitimate by many states because of NATO’s alleged abuse of the mandate to change the Libyan regime, and certain Member States distanced themselves from the use-of-force authorized by the Security Council. The defining R2P feature of the Libyan crisis - the Security Council’s authorization of the use of force - ultimately became the most damaging aspect of this crisis for the R2P principle.
CHAPTER 7
CÔTE D’IVOIRE

7.1 Introduction

Heightened violence and tensions by October 2010 placed Côte d’Ivoire on the list of conflicts for which the international community was compelled to find a solution. However, unlike many other humanitarian crises, UN peacekeepers were already in Côte d’Ivoire at the height of the crisis, though not initially with a mandate to use force to protect civilians. As explained below, the UN established the United Nations Operations in Côte d’Ivoire (UNOCI) in 2004 with the support of French soldiers already stationed there.

An upsurge of violence occurred during and after the presidential election in Côte d’Ivoire in 2010. With a view to protecting civilian populations in Côte d’Ivoire, and framing its response in terms of the R2P principle, the Security Council adopted Resolution 1975 on March 30, 2011. The resolution authorized UNOCI to use all necessary means to protect civilian populations under imminent threat of physical violence in Côte d’Ivoire.

The Security Council adopted Resolution 1975 shortly after it authorized the use of force for R2P purposes in Libya in Resolution 1973. However, this authorization to use force in Côte d’Ivoire sparked serious disagreements about UNOCI’s implementation of Resolution

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3 Côte d’Ivoire Background, supra note 1.
5 Id. ¶ 6.
1975. The use of force by UNOCI under Security Council authorization ignited controversies about UNOCI’s use of force to effect regime change in Côte d’Ivoire, which connected to similar problems with the implementation of Resolution 1973 in Libya. Individually and collectively, the Libya and Côte d’Ivoire controversies damaged the R2P principle. There were also problems with post-intervention rebuilding in Côte d’Ivoire. This chapter analyzes how the international community invoked the R2P principle in its responses to the crisis in Côte d’Ivoire and how these R2P-based responses affect the relationship between the R2P principle and international law.

7.2 Background to the Conflict in Côte d’Ivoire

The West African country of Côte d'Ivoire shares borders with Liberia, Guinea, Mali, Burkina Faso, Ghana, and Gulf of Guinea. Côte d'Ivoire is made up of several distinct tribes, including the Baoule, Bete, Senoufou, Agni, Malinke, Dan, and Lobi tribes. In 1842, the French obtained territorial concessions from local tribes, and the country became a French colony until it achieved independence on August 7, 1960. However, even after achieving independence from France, Côte d'Ivoire maintained strong links with France through bilateral defense agreements.

From independence until his death in 1993, Felix Houphouët-Boigny served as president. The first contested presidential election was held in October 1990, and Houphouët-Boigny won with 81% of the vote, beating Laurent Gbagbo of the Ivorian

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8 Id.
9 Id.
Popular Front (FPI). In 1993, Henri Konan Bédié became president following the death of Houphouët-Boigny. President Bédié was overthrown by the country's first military coup in December 1999, and General Robert Guéï assumed control of the country. As a result, the majority of foreign aid and assistance to the country terminated.

The post-Boigny power struggle was exacerbated by debates over nationality laws and eligibility conditions for elections. Laurent Gbagbo challenged Guéï during the presidential election held in October 2000, which in turn led to civil and military unrest. Following a public uprising, Guéï was replaced by Gbagbo. The heated disagreements over the presidential election in 2000 resulted in violent clashes between forces loyal to Guéï and Gbagbo. An opposition leader, Alassane Ouattara, was disqualified from contesting the 2000 election by the country's Supreme Court because of his alleged Burkinabé nationality. In August 2002, Ouattara’s Rally of Republicans (RDR) opposition party was given four ministerial posts in Gbagbo’s government.

Many encouraging efforts towards national reconciliation in Côte d'Ivoire were disrupted by an armed uprising in September 2002. On September 18-19, 2002, a large number of disgruntled members of the armed forces took up arms against the Côte d'Ivoire government. This uprising was, in fact, the sixth attempted coup against the government in the space of less than three years. The uprising began with the government decision to demobilize hundreds of soldiers against their will. Although government troops were able

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11 Id.
12 Id.
13 Côte d’Ivoire Profile, supra note 6.
14 Id.
to control the uprising and secure the main city, Abidjan, they were unable to secure control of the northern part of the country, and rebel forces loyal to Ouattara acquired control of the northern cities of Bouake and Korhogo. Against this backdrop of political strife, violence continued in Côte d'Ivoire. More than 100 children and staff at the International Christian Academy, a missionary boarding school, were counted among those caught in the fighting. Following the request of the United States Ambassador to Côte d'Ivoire, Arlene Renetto, United States Special Forces were dispatched to the country to save those who were caught in fighting, including the children at the missionary school.

In addition, under defense agreements signed between France and Côte d'Ivoire on August 24, 1961, to ensure that France would protect Côte d'Ivoire, France deployed a military contingent to the country in September 2002. The civilian unrest and political competition for power in Côte d'Ivoire between Gbagbo and Ouattara continued from 2002 to 2010.

The crisis took a turn for the worse with the 2010 presidential election. The election results led to a tense situation in the country. On December 2, 2010, the head of the Ivorian Commission Électorale Indépendante (CEI) announced provisional results showing that Ouattara had won the election, yet final election results were postponed for days. Given the delay to the official announcement of the election results, the

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15 Id.
16 Id.
19 Bellamy & Williams, supra note 10, at 830.
Constitutional Council stated that the CEI had no authority to announce election results.\textsuperscript{21} According to the Constitutional Council, the passing of the deadline meant that only the Constitutional Council was authorized to announce decisions regarding election results.\textsuperscript{22} With this claim, the Constitutional Council announced that the results in seven northern regions were cancelled, and Gbagbo had won the election.\textsuperscript{23} After Gbagbo was sworn in as the president, Ouattara had himself sworn in as the president in Côte d’Ivoire.\textsuperscript{24}

Ouattara had the support of the UN and many other countries. In response to Gbagbo’s demand that French troops leave the country, the UN spokesperson stated that the UN did not consider Gbagbo to be the president and that UNOCI peacekeepers would continue to support and protect both Ouattara and Ivorian citizens.\textsuperscript{25} Although Gbagbo had been sworn in as the president in Côte d’Ivoire, only Angola and Lebanon recognized Gbagbo as the president.\textsuperscript{26} The United States, African Union (AU), European Union (EU), Economic Community of West African States (ECOWAS), and the UN recognized Ouattara as the duly elected president. These events sparked violence across the country, quickly creating the potential for large scale atrocities among the civilian population.

Between December 2010 and March 2011, a series of violent events occurred between Gbagbo's militias and Ouattara's supporters, mainly in Abidjan, where both sides

\textsuperscript{22} \textit{Id}.
\textsuperscript{23} \textit{Constitutional Body Names Gbagbo Ivory Coast Election Winner}, \textit{AFP} (Dec. 3, 2010), http://www.google.com/hostednews/afp/article/ALeqM5h1lqqW8eeecnVcdL82ggEDWQRli0Q?docId=CNG.a5fe0e83ef9f72426ce88f122d81b07.751.
\textsuperscript{24} \textit{Id}.
had large numbers of supporters.\textsuperscript{27} On December 16, 2010, clashes between Gbagbo’s forces and Ouattara’s supporters in Abidjan and Yamoussoukro resulted in many more deaths.\textsuperscript{28} Atrocities in Côte d’Ivoire continued, and, in January 2011, a series of clashes broke out between two rival groups in Duékoué.\textsuperscript{29} Heavy fighting broke out in western Côte d’Ivoire by the end of February 2011.\textsuperscript{30} Gbagbo’s supporters carried out a number of attacks targeting foreign business centers and the UN office in Abidjan in March 2011.\textsuperscript{31} By mid-March 2011, Gbagbo had reportedly banned all French and UN aircraft from Ivorian airspace.\textsuperscript{32} Gbagbo’s forces continued to attack pro-Ouattara’s forces, and, by March 28, 2011, Gbagbo’s forces launched a country-wide military offensive where hundreds of civilians were killed in the Duékoué massacre. However, both pro-Ouattara and pro-Gbagbo forces were accused of having participated in this massacre.\textsuperscript{33}

7.3 Application of R2P in International Responses to the Côte d’Ivoire Crisis

From the beginning of the Ivoirian crisis, thousands of civilians have been killed in the midst of clashes between pro-Gbagbo and pro-Ouattara forces, and many more have been displaced and sought refuge in neighboring countries.\textsuperscript{34} As the crisis worsened, the

\textsuperscript{27} Marco Chown Oved, \textit{At least 20 Killed in Ivory Coast Clashes}, ASSOCIATED PRESS (Dec. 16, 2010), http://www.boston.com/news/world/africa/articles/2010/12/16/ivory_coast_march_over_vote_turns_violent_3_dead/.
\textsuperscript{28} \textit{Id.}
\textsuperscript{30} \textit{Id.}
\textsuperscript{34} \textit{Id.}
international community offered varying responses under the R2P principle with a view to halting further atrocities in Côte d'Ivoire.

7.3.1 Responsibility to Prevent

Both the ICISS report and the World Summit Outcome Document recognize the responsibility of a state to protect its own population. Both documents hold that, when the state is unable or unwilling to fulfill this responsibility, or if the state itself is the perpetrator, it becomes the responsibility of the international community to act to protect civilians. Accordingly, the government of Côte d'Ivoire had the primary responsibility to protect its population from mass atrocities. There was a disagreement about who was the lawful leadership of the government in Côte d'Ivoire. However, it was Gbagbo who governed most parts of the country and participated in these atrocities and, therefore, the government’s responsibility to protect the population was not being fulfilled. Also, Gbagbo’s government could not stop the atrocities or violence carried out by Ouattara’s forces. As a result of the government’s failure to protect its population, the responsibility to prevent atrocities and protect the civilian population in Côte d'Ivoire became the responsibility of the international community.

Responding to the crisis that followed the September 2002 armed uprising in Côte d'Ivoire, ECOWAS convened a meeting on September 29, 2002, in which a contact group was established to promote dialogue between the opposition rebels and the government of

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36 ICISS, supra note 35, ¶ 2.30.
Côte d'Ivoire. This contact group was comprised of Ghana, Guinea-Bissau, Mali, Niger, Nigeria, and Togo, together with the AU. The contact group agreed to put in place an immediate arrangement to deploy ECOWAS peacekeeping troops to Côte d'Ivoire. ECOWAS mandated the troops to monitor a proposed ceasefire, ensure the disengagement of insurgents from the areas that had fallen under their control, and disarm the rebel groups. After much effort, the Ivoirian government and the Patriotic Movement of Côte d'Ivoire (MPCI) signed a ceasefire agreement on October 17, 2002. In accepting the cessation of hostilities, Gbagbo requested that France assign forces to monitor the ceasefire and help in the deployment of the ECOWAS troops.

On the basis of the ceasefire agreement, negotiations between the government and MPCI resumed on October 24, 2002, in Lomé, under the auspices of the President of Togo, Gnassingbe Eyadema. The Lomé talks stalled as the MPCI insisted on the resignation of Gbagbo. The MPCI also insisted on a review of the Ivoirian Constitution and holding new presidential elections. ECOWAS’ effort to break the political stalemate was unsuccessful, and the French government made new efforts to resume peace negotiations. A round-table meeting of Ivorian political parties was held in Linas-Marcoussis, France from January 15-23, 2003. This meeting resulted in the signing of the Linas-Marcoussis Agreement on January 23, 2003, by Ivorian political parties. Provisions in the agreement

37 Côte d'Ivoire Background, supra note 1.
38 Id.
40 Côte d'Ivoire Background, supra note 1.
41 Id.
42 Id.
43 Id.
included, among other things, the creation of a government of national reconciliation to be led by a prime minister appointed by the president.\footnote{Id.}

As early as 2003, the UN also took a number of steps to prevent the escalation of the Ivorian crisis. After endorsing the Linas-Marcoussis agreement, the Security Council adopted Resolution 1464 on February 4, 2003.\footnote{S.C. Res. 1464, U.N. Doc. S/Res/ 1464 (Feb. 4, 2003).} This resolution reaffirmed the Security Council’s commitment to the sovereignty, territorial integrity, and unity of Côte d'Ivoire. Resolution 1464 reinforced the importance of non-interference and regional co-operation. The resolution noted the decision by ECOWAS to deploy a peacekeeping force to Côte d'Ivoire and supported the organization’s efforts to promote a peaceful settlement of the conflict.\footnote{Id. pmbl.} The resolution condemned violations of human rights and international law in the country, welcomed the deployment of ECOWAS and French forces, and authorized ECOWAS and French forces under Chapter VII and Chapter VIII of the UN Charter to use necessary measures to guarantee protection and freedom of movement for Ivorian civilians.\footnote{Id. ¶ 8.} However, this was not an authorization to use military force, nor did the resolution make any references to R2P.

As the crisis in Côte d'Ivoire continued, progress towards breaking the stalemate was made at a meeting in Accra in March 2003, with the 10 signatories to the Linas-Marcoussis Agreement.\footnote{Côte d'Ivoire Background, supra note 1.} During this meeting, Gbagbo agreed to appoint a committee to oversee several disputed government positions. On March 10, 2003, Gbagbo issued an
order delegating authority to the prime minister to implement the work program set out in the Linas-Marcoussis Agreement, but limited only for a six-month period.49

In another step intended to prevent further violence in Côte d'Ivoire, the Security Council adopted Resolution 1479 on May 13, 2003.50 This resolution established the UN Mission in Côte d’Ivoire (MINUCI) and mandated the mission to observe and facilitate the Linas-Marcoussis Agreement and to complement the operations of ECOWAS and French peacekeeping forces, respectively. In June 2003, 26 military liaison officers were authorized by the Security Council for initial deployment in Côte d'Ivoire under Resolution 1479.51 On November 13, 2003, the Security Council unanimously adopted Resolution 1514.52 The resolution extended the mandate of MINUCI until February 4, 2004.53 By the end of November 2003, a UN multi-departmental assessment mission visited Côte d’Ivoire in order to examine the possibility of transforming ECOWAS forces into a UN peacekeeping force.54 However, none of these resolutions made reference to R2P.

Despite many preventive efforts by the French government and regional and international organizations to find solutions to the conflict in Côte d’Ivoire, rebels launched an armed attack in December 2003 on the state television building in Abidjan killing 19 people.55 In light of this development, the UN Secretary General expressed his hope that Member States on the Security Council would give full consideration to the pressing call

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51 Id. ¶ 4; Côte d’Ivoire Background, supra note 1.
53 Id. ¶ 1.
54 Côte d’Ivoire Background, supra note 1.
55 Id.
by ECOWAS’ leaders for an increase in the troop strength of MINUCI, as well as its transformation into a UN peacekeeping mission.  

As the situation in Côte d’Ivoire continued to pose a threat to regional and international peace and security, and acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 1528 on February 27, 2004. This resolution established the UN Operation in Côte d’Ivoire (UNOCI), effective as of April 4, 2004, with a mandate to facilitate the implementation of the 2003 peace agreement signed by each of the parties to the conflict in Côte d'Ivoire. In accordance with the resolution, UNOCI took over the peacekeeping mission from MINUCI and ECOWAS. The Security Council authorized UNOCI to use all necessary means within its capabilities and areas of deployment to protect civilians in Côte d'Ivoire. The resolution further mandated UNOCI to coordinate with French forces to re-establish trust between all Ivorian political factions. The resolution also authorized French forces to use all necessary means to support UNOCI’s efforts to protect civilians. However, the actions taken by France, ECOWAS, and the Security Council under Resolution 1528 did not involve any references to, or uses of, the R2P principle.

Despite a robust mandate, UNOCI was not successful in preventing the conflict in Côte d'Ivoire from escalating. In November 2004, the Côte d'Ivoire air force launched an attack on rebels, and French forces entered the fray after nine of their soldiers were killed.

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58 Id. ¶ 1.
59 Côte d’Ivoire Background, supra note 1.
60 S.C. Res. 1528, supra note 57.
61 Id. ¶ 6.
62 Id. ¶ 16.
by an air strike. Violent anti-French protests ensued in the country. As a result, on November 15, 2004, the Security Council unanimously adopted Resolution 1572. The resolution imposed an arms embargo on the country and threatened further sanctions if Ivorian parties did not comply with their political commitments. Again, this resolution did not make any reference to R2P.

As the conflict worsened in Côte d'Ivoire from 2005 to 2010, the Security Council adopted many other resolutions, primarily extending the mandate of UNOCI, calling for parties to cease the violence, and renewing both arms and financial embargos on the country. As described above, the 2010–11 political crises in Côte d'Ivoire began after Gbagbo, the president of Côte d'Ivoire since 2000, was proclaimed the winner of the election of 2010, the first election in the country in 10 years. The election results led to severe tension and violence throughout the country. The country’s Constitutional Council, which consisted of Gbagbo supporters, declared the results of seven northern departments unlawful and reported that Gbagbo had won the elections with 51% of the vote, instead of the 54% winning margin for Ouattara as reported by the Electoral Commission. Despite the inauguration of Gbagbo, the UN recognized Ouattara as the true winner of the

65 Id. ¶ 7.
68 Côte d’Ivoire, supra note 7.
The Security Council, in a press statement, stated that Ouattara had won the November election and was the rightful president of Côte d’Ivoire.\(^{69}\) In doing so, the Security Council dismissed the validity of the Ivoirian Constitutional Council’s decision. The situation became even more controversial once the UN Secretariat and Security Council declared Ouattara as Côte d’Ivoire’s legitimate president, enabling UNOCI to reject demands by Gbagbo’s *de facto* regime. These events raised the grave possibility of a civil war, resulting in many thousands of refugees fleeing the country.\(^{71}\) The crisis escalated as Ouattara's forces began a military offensive. Ouattara’s forces gained control of most of the country including Abidjan.\(^{72}\)

With both Gbagbo and Ouattara laying claims to the presidency, the bitter political divisions in the country led to increased violence in Côte d'Ivoire.\(^{73}\) The international community took a number of diplomatic measures short of military actions to resolve the crisis in Côte d'Ivoire. In the aftermath of the violence following the 2010 election, the AU sent Thabo Mbeki, former President of South Africa, to mediate the conflict.\(^{74}\) On January 25, 2011, the President of Malawi and the AU Chairperson traveled to Côte d’Ivoire to hold negotiations with Gbagbo and Ouattara.\(^{75}\) ECOWAS also took a greater interest in solving the crisis via diplomatic means, including setting up a high-level delegation to attempt


\(^{72}\) *Id.*

\(^{73}\) *Côte d'Ivoire Background*, supra note 1.


mediation. However, all these negotiation efforts were not successful at stopping the violence and atrocities in Côte d'Ivoire.

In the international community’s engagement in the Côte d’Ivoire crisis, civilian protection was interpreted as a core goal. Therefore, in his criticism of UN action in Côte d’Ivoire, former South African President, Thabo Mbeki, argued that the UN had overstepped its authority by overriding the Ivoirian Constitutional Council, that UN Secretary General Ban Ki-moon had exceeded his mandate by declaring Ouattara to be the winner of the elections, and that UNOCI had fallen short of its mandate by failing to prevent or stop ceasefire violations by rebels, and by failing to protect civilians in Duékoué. The source of these failings, he maintained, lay in the abandonment of impartiality by the UN and the undue influence exerted by France.

West African leaders warned that they would not hesitate to use force even without Security Council authorization, if Gbagbo refused to cede power. The AU suspended Côte d'Ivoire from the organization and also called on Gbagbo to step aside, threatening to use military force if Gbagbo did not comply with international norms. Threatening Gbagbo to cede power seemed to be grounded in democracy norms rather than protection of civilians in Côte d'Ivoire. Therefore, West African leaders and AU deviated from their core objective of protecting civilians and, instead, engaged in an attempt to change political power in Côte d'Ivoire. However, Gbagbo continued to ignore the international outcry to

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76 Id.
78 Id.
80 Id.
81 Côte d'Ivoire: Briefing on AU and ECOWAS, supra note 75.
stop the violence, and ECOWAS suspended Côte d'Ivoire from all its decision-making bodies.\(^8^2\) In the meantime, the AU dispatched to Abidjan a delegation of presidents from African states to negotiate directly with Gbagbo.\(^8^3\) The U.S Department of State announced that, in order to protect civilians, the United States was discussing the possibility of expanding UN forces in Côte d'Ivoire.\(^8^4\) Additionally, the United States and the EU imposed a travel ban and an asset freeze on Gbagbo and some of his close associates.\(^8^5\) France and the United Kingdom rejected ambassadors appointed by Gbagbo and indicated that they would only accept credentials from Ouattara’s envoys.\(^8^6\)

On December 23, 2010, the UN Human Rights Council held a special session on the situation in Côte d'Ivoire and adopted Resolution S-14/1 condemning the ongoing human rights violations.\(^8^7\) At this session, speaking on behalf of the AU, Nigeria expressed deep concern about the deteriorating human rights situation in Côte d’Ivoire.\(^8^8\) However, Russia deplored the efforts of both the UN and the Human Rights Council in trying to enforce the election results in Côte d’Ivoire.\(^8^9\) Expressing a similar notion, China demanded respect for the sovereignty and territorial integrity of Côte d’Ivoire and called

\(^8^2\) Id.

\(^8^3\) Id.


\(^8^5\) Id.

\(^8^6\) *Côte d'Ivoire: Briefing on AU and ECOWAS*, supra note 75.

\(^8^7\) Human Rights Council, U.N. Doc. A /HRC/Res/S-14/1, Situation of Human Rights in Côte d'Ivoire in Relation to the Conclusion of the 2010 Presidential Election, 14\(^{th}\) Special Sess. (Dec. 23, 2010),


upon all parties to solve the crisis through diplomatic measures.\(^90\) The concerns of Russia and China highlighted the still-perceived tension over any intervention in violation of sovereignty and territorial integrity. These Member States did not believe that regional organizations, the UN, or any other international actor had a right to intervene in a sovereign state in violation of that state’s territorial integrity, especially to enforce the outcome of an election.

In December 2010, the Special Advisers to the UN Secretary General on the Prevention of Genocide and R2P issued a joint statement expressing “grave concerns” about the situation in Côte d’Ivoire and highlighted their worries about the incitement of atrocities, soberly reminding all parties of their responsibility to protect.\(^91\) In a letter to the Security Council dated January 7, 2011, the Secretary General emphasized the potential risk to civilians in Côte d'Ivoire.\(^92\)

On January 10, 2011, the Security Council issued another statement extending its support towards AU and ECOWAS efforts to find a peaceful solution to the crisis.\(^93\) Further, on January 19, 2011, the Security Council adopted Resolution 1967 authorizing the deployment of an additional 2,000-person military contingent to UNOCI.\(^94\) In late

January 2011, Secretary General Ban Ki-moon publicly called on Gbagbo to step down and highlighted the importance of refraining from any further attacks against Ouattara.95

Human Rights Watch reported that pro-Gbagbo forces were using excessive force in response to largely peaceful demonstrations, resulting in at least 25 deaths since February 21, 2011, including seven women killed on March 3, 2011, when security forces opened fire with a mounted machine gun and a larger unidentified weapon against thousands of women demonstrators.96 Human Rights Watch also implicated Gbagbo and several of his close allies in crimes against humanity as defined by the Rome Statute.97 By the end of April 2011, reportedly 900 deaths had been confirmed as a result of conflict and revenge attacks in Abidjan and western Côte d’Ivoire.98 According to a UNOCI report, at least 1,012 persons, including 103 women and 42 children, were killed in post-election violence in the regions of Moyen Cavally and Dix-Huit Montagnes.99

Although world leaders sent Gbagbo a clear message to step down and cease violence, Gbagbo was not willing to surrender to such appeals. The international community criticized Gbagbo’s followers for large-scale abuses and violence. As Gbagbo refused to participate in any negotiations, the AU called for the Security Council to take more forceful actions.100 Meanwhile, Human Rights Watch reported that Ouattara’s forces killed hundreds of civilians, raped more than 20 alleged Gbagbo supporters, and burned at

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97 Id.
98 Id.
100 Bellamy & Williams, supra note 10, at 834.
least 10 villages in Côte d'Ivoire's far western region. On March 25, 2011, ECOWAS made a formal request to the Security Council to strengthen the UNOCI mandate to enable the mission to use all necessary means to protect life and property and to facilitate the immediate transfer of power to Ouattara. This request also sought to “adopt more stringent international targeted sanctions” against Gbagbo and his associates.

7.3.2 Responsibility to React

Given the dire human rights situation in Côte d'Ivoire, the Security Council adopted Resolution 1975 on March 30, 2011. Resolution 1975 was the second Security Council resolution invoking the R2P principle to authorize military force, the first being Resolution 1973 on Libya adopted on March 17, 2011. Resolution 1975 condemned the gross human rights violations committed by supporters of both Gbagbo and Ouattara and cited the primary responsibility of the state to protect its population. The resolution recognized Ouattara as the president and condemned Gbagbo’s refusal to negotiate a solution. The resolution authorized UNOCI to use force to protect civilians, including preventing the use of heavy weapons against civilians.

Although Resolution 1975 was unanimously adopted by the Security Council, there were different perspectives on the resolution. Member States offered different interpretations of UNOCI’s mandate under the R2P-based authorization to use military

103 Id.
105 Id.
106 Id. ¶ 1.
107 Id. ¶ 6.
force included in Resolution 1975. Some Security Council members, such as India, China, and Russia, had a restrictive interpretation and were particularly concerned that UNOCI had abandoned impartiality by singling out Gbagbo’s forces but not Ouattara’s forces, especially as both sides had breached the ceasefire and massacred civilians. China expressed its deep concern about the continuing deterioration of security in Côte d’Ivoire and stated that any UN peacekeeping operations should strictly abide by the principle of neutrality. India cautioned that UN peacekeepers cannot be made instruments of regime change and UNOCI should not become a party to a Ivorian political dispute. Further, India also stated that UNOCI should not get involved in a civil war, but should carry out its mandate with impartiality, while ensuring the safety and security of peacekeepers and civilians. These statements demonstrate that some Member States did not support the use of force in order to dispose Gbagbo and put Ouattara in power.

However, the United Kingdom stated that the resolution did not alter UNOCI’s robust mandate under which UNOCI was already authorized to use all necessary means to protect civilians, but that the resolution did reaffirm UNOCI’s role in protecting civilians and preventing the use of heavy weapons against civilians. The United States welcomed a strong resolution that sent a signal to Gbagbo and his followers to reject violence and respect the will of the Ivorian people. The United States also urged the Security Council to support and work with Ouattara.

108 Bellamy & Williams, supra note 10, at 837.
109 Id.
111 Id.
112 Id.
113 Id.
As a result, UNOCI and French helicopters assaulted military camps of Gbagbo supporters and destroyed heavy weapons and weapons stockpiles to stop imminent threats. After Gbagbo still refused to cede power, UNOCI and French attack helicopters bombed the presidential compound on April 10, 2011. On the same day, Ouattara’s forces, backed by UNOCI and French forces, captured Gbagbo. In the meantime, the Security Council renewed the arms and diamond sales embargo, which had been in place since 2004-2005, for another year. In May 2011, Ouattara was inaugurated as president and, by November 2011, Gbagbo had been arrested and handed over to the ICC in The Hague to face charges of crimes against humanity. Côte d’Ivoire is not a party to the ICC. However, in April 2003, Gbagbo’s government submitted a declaration under article 12(3) of the Rome Statute, the ICC’s founding treaty, accepting the court’s jurisdiction at the beginning on September 19, 2002. Ouattara accepted ICC jurisdiction in December 2010 and again in May 2011. In October 2011, the judges of the ICC authorized the prosecutor to open an investigation in Côte d’Ivoire for crimes committed since November 28, 2010. In February 2012, the court extended this authorization to crimes committed in Côte d’Ivoire since September 19, 2002.

Through Resolution 1975, the Security Council mandated UNOCI to take all necessary measures to protect civilians in Côte d’Ivoire on the basis of the R2P principle.

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114 Bellamy & Williams, supra note 10, at 837.
115 Id.
117 Côte d’Ivoire Background, supra note 1.
119 Id.
120 Id.
121 Id.
There was a general agreement among Member States that the UNOCI mandate to protect civilians in Côte d’Ivoire had satisfied the six criteria stipulated for the use of force in the ICISS report: just cause, right authority, right intention, last resort, proportional means and reasonable prospects. However, some Member States criticized UNOCI and French forces for undertaking regime change through the Resolution 1975 mandate.

The primary criticism leveled against UNOCI was that it used the R2P mandate given by the Security Council to oust Gbagbo from power rather than protecting civilians in Côte d’Ivoire. A military intervention under the R2P principle should not use more force than necessary to protect civilians. Under Resolution 1975, the use of force had been limited to protect civilians and, unless force was considered necessary to protect civilians and prevent more atrocities, there could not be any intention to remove Gbagbo by force from his presidential compound or from the country. The use of force by UNOCI and French troops lasted approximately seven days, from April 4-11, 2011, until Gbagbo was arrested. UNOCI and French helicopters launched attacks on Gbagbo’s camps in Abidjan, justifying them as preventive strikes. On April 10, UNOCI and French troops attacked Gbagbo’s residence where Gbagbo’s wife and close associates were captured by

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122 ICISS, supra note 35, ¶ 4.1.
125 Bellamy & Williams, supra note 10, at 835.
127 Id.
Ouattara’s forces. By ousting Gbagbo through military operations, UNOCI and French troops eventually exceeded their mandated task.

Bellamy and Williams claimed that the use of force under the R2P principle by UNOCI and French troops “blurred the lines between civilian protection and regime change and raised questions about the proper implementation of the R2P principle, the proper interpretation of Resolution 1975, and the place of neutrality and impartiality in UN peacekeeping.” However, Edward Luck, the Special Advisor to the Secretary General on R2P, rejected the idea of any connection between the R2P principle and regime change. In his statement to the Council of Foreign Relations, Luck stated that “the goal of R2P is not to involve itself in regime change, but to protect the civilian populations. However, in some cases the only way to protect the population is to change the regime, but certainly it is not the goal of R2P per se.” Thus, a legitimate question arose as how to protect civilians from government-sponsored mass atrocities without ousting the leaders of the same government. Bellamy, quoting Luck’s statement, expresses a fundamental dilemma “in situations where a state is responsible for committing genocide, war crimes, ethnic cleansing and/or crimes against humanity, how can the international community exercise its responsibility to protect populations without imposing regime change?”

Although Resolution 1975 was unanimously adopted, some Member States of the Security Council had insisted that UNOCI’s mandate should only be used to protect the

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128 Id.
129 Id.
130 Bellamy & Williams, supra note 10, at 837.
civilian population. Some Member States also expressed their dissatisfaction with UNOCI overstepping the mandate under Resolution 1975 during the Security Council’s debate on the protection of civilians in armed conflicts in May 2011. The Chinese delegation stressed that there must be no attempt at regime change or taking sides in a civil war by any party under the guise of protecting civilian populations. India highlighted the need to avoid any political motives in any decisions to intervene and stressed that the response of the international community must be proportional to the threat, involve the use of appropriate methods, and make adequate resources available to accomplish these goals. India also noted the importance of applying protection to civilians in a uniform manner and added that intervention be mandated only in cases where there is an actual verifiable threat to international peace and security. In this context, India asked the Security Council “who watches the guardians?” Consistent with Russia’s position throughout the crisis, Russian Foreign Minister Sergei Lavrov questioned the legality of the air strikes and suggested that the UN peacekeepers may have overstepped their mandate. Taken together, these statements indicated a refusal to recognize that Resolution 1975 authorized the use of force for reasons beyond protection of civilians.

However, in response to these criticisms, Secretary General Ban Ki-moon argued that “in line with its Security Council mandate, UNOCI has taken this action in self-defense

133 Bellamy & Williams, supra note 10, at 837.
135 Id. at 20.
136 Id. at 9, 10.
137 Id.
and to protect civilians.”¹³⁹ Also, the United States, the United Kingdom, France, and like-minded countries justified the actions of UNOCI and French troops. The United Kingdom expressed its strong support for UNOCI’s mandate to protect the civilian population as well as to prevent the use of heavy weapons against civilians.¹⁴⁰ The United States stated that UNOCI had responded robustly to neutralize the use of heavy weapons against civilians in Côte d’Ivoire.¹⁴¹ France highlighted the importance of the Security Council’s involvement in instances of grave violations of humanitarian law, war crimes, and crimes against humanity.¹⁴² Commending its action in Côte d’Ivoire, France stated that UNOCI had shown determination in preventing civilian casualties and should be a reference for all UN missions.¹⁴³

There was a clear division among the Member States of the Security Council about the scope of authorized military force under Resolution 1975. While some states claimed UNOCI and French troops exceeded the mandate of protecting the civilian population, others stated that UNOCI and French troops acted in accordance with Resolution 1975. Above all, the actions of UNOCI and French forces engaging in regime change in Côte d’Ivoire raised much concern. The same controversy occurred in NATO’s use of force in Libya. However, Brazil did not make reference to Côte d’Ivoire when introducing the RWP concept in light of what happened in Libya. Nevertheless, it made clear that RWP was being introduced to remedy the controversies that occurred, so far, in using force in humanitarian interventions under R2P. Therefore, although the Security Council authorized

¹⁴¹ Id. at 14, 15.
¹⁴³ Id.
the use of force in Côte d’Ivoire under the R2P principle, the controversies that surrounded UNOCI’s military force revealed deep controversies about the responsibility to react under the R2P principle.

7.3.3 Responsibility to Rebuild

Although UNOCI and French forces ousted Gbagbo, the unrest in Côte d’Ivoire has not ended, and rebuilding the country experienced major problems. The UN took a number of measures to help rebuilding efforts. The UN Secretary General declared Côte d’Ivoire eligible to receive support from the Peacebuilding Fund on June 19, 2008. Since that time, the Peacebuilding Fund provided a total allocation of over $18 million to help create the conditions for sustainable peace in the country. A total of $8.5 million was provided prior to the November 2010 crisis, including $3.5 million to support continued political dialogue and $5 million for the “mille micro-projects” for youth at risk.

As the unrest continued in the country, UNOCI remained in Côte d’Ivoire not only to protect civilians, but also to help rebuild the country. The latest extension was Resolution 2112 in which the UNOCI mandate was unanimously extended until June 30, 2014. Resolution 2112 authorized UNOCI to use all necessary means within its capabilities and areas of deployment to carry out its mandate. The resolution stated that the protection of civilians shall remain the priority of UNOCI. It further instructed UNOCI to put a renewed focus on supporting the government and the collection of weapons with the objective of gradually transitioning security responsibilities from UNOCI to the Ivorian government. Throughout this period, UNOCI assisted with the welfare and

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145 Id. ¶ 7.
146 Id. ¶ 8.
stability of refugees and other displaced persons.\textsuperscript{147} Further, UNOCI continued to “monitor and investigate human rights violations across the country, while providing human rights training courses to improve the situation.”\textsuperscript{148} UNOCI also supported an electoral process with a view towards a speedy democratic transition in Côte d’Ivoire. UNOCI assisted the government in creating disarmament, demobilization, and reintegration. So far, UNOCI has disarmed and demobilized 1,194 former combatants and collected 861 weapons.\textsuperscript{149} Some former combatants have been assigned work roles in prisons and vocational training institutions.\textsuperscript{150}

Despite improved security supported by UNOCI’s rebuilding activities, the human rights violations and humanitarian situation in Côte d’Ivoire remains frightening.\textsuperscript{151} Although a Truth and Reconciliation Commission was established in 2011, it has not resumed its work.\textsuperscript{152} In the two years since Ouattara’s inauguration as president, the government has made little progress in addressing the root causes of the country’s political and military violence.\textsuperscript{153} Ivorian authorities and the ICC have not arrested or prosecuted any of Ouattara’s supporters who committed post-election crimes.\textsuperscript{154} In fact, no charges have been brought against anyone and no investigations against anyone from the forces that fought for Ouattara have been initiated. Disarmament, demobilization, and reintegration of ex-combatants have not been completed and, thus, they continue to pose a threat to the
country’s stability. Throughout 2012 and 2013, national insecurity intensified, and pro-Gbagbo armed rebels launched seemingly coordinated and well-organized attacks against military installations.\footnote{Id.} In July 2013, a convoy of the National Authority for Disarmament, Demobilization, and Reintegration was attacked on a stretch of road between the towns of Ferkessedougou in the north and Kong in the northwest.\footnote{Côte d'Ivoire: UN Mission Strongly Condemns Attack on Disarmament Convoy, U.N. NEWS CENTER (July, 02, 2013), http://www.un.org/apps/news/story.asp?NewsID=45327&Cr=unoci&Cr1=#.UsUC8TKA1dg} Tensions and rivalries between communities still remain high in the western part of Côte d’Ivoire.\footnote{Id.} UNOCI called on competent Ivorian authorities to take all measures to identify the attackers and bring them before the law.\footnote{Id.} Internally displaced civilian populations could not build their houses and still live with host families. Those who have returned home are still struggling to rebuild their lives.\footnote{Id.} Many Ivorian refugees who fled to neighboring countries have returned, but there is a continuing need to ensure their reintegration.\footnote{Id.}

In addition to the UN’s efforts in rebuilding Côte d’Ivoire, individual countries as well as financial institutions helped Ouattara’s government in its rebuilding efforts. France has offered financial assistance worth about $578 million, consisting of €350 million loan in support of budgetary aid, focused civil servant salary payments and funding of emergency social expenditure.\footnote{Nicolas Cook, Côte d’Ivoire Post-Gbagbo: Crisis Recovery, CONGRESSIONAL RES. SERVICE 6 (Apr. 20, 2011), available at https://www.fas.org/sgp/crs/row/R21989.pdf.} The EU has offered €180 as a grant-based recovery package to support basic social spending, including for health, water, sanitation, and agriculture rebuilding efforts.\footnote{Id.} The World Bank also offered $100 million for various...
programs in support of rebuilding Côte d’Ivoire. In addition to this support, the International Monetary Fund (IMF) has also offered $74 million to support rebuilding efforts.163

Despite all these efforts, neither UNOCI nor the Ouattara government has been able to bring peace and stability to the country, raising serious questions about fulfilling the responsibility to rebuild in the R2P principle. These questions exist despite financial and other commitments from UNOCI remaining high. Initially, through Security Council Resolution 1528 of February 2004, the UN allocated 6,910 total uniformed personnel, including 6,240 troops, 200 military observers, 120 staff officers, and 350 police officers.164 The present strength of UNOCI includes 9,915 total uniformed personnel, including 8,481 troops, 187 military observers, 1,247 police, 409 international civilian personnel, 772 local staff, and 154 United Nations Volunteers.165 For the biennium 2012-2013, UNOCI was appropriated $584,487,000.166 However, during the UN Administrative and Budgetary Committee meeting on May 10, 2012, Côte d’Ivoire’s representative expressed concern over the inadequacy of the proposed budget.167 He noted that proposed budget cuts for disarmament, demobilization and reintegration, and security sector reform in Côte d’Ivoire were a negative sign.168

165 Côte d’Ivoire Background, supra note 2.
168 Id.
Given the present situation in Côte d’Ivoire, the UN has, thus far, been unable to fulfill the responsibility to rebuild in Côte d’Ivoire. Although the UNOCI mandate was extended with a view to stabilizing the country, it has failed to establish basic security and protection for civilians in Côte d’Ivoire. It has not achieved justice and reconciliation between parties involved in the conflict, nor stabilized the economic situation in Côte d’Ivoire. Therefore, the responsibility to rebuild Côte d’Ivoire has not yet been effectively upheld, which causes doubts about claims that Côte d’Ivoire constitutes a success for the R2P principle.

7.4 Conclusion

During the crisis in Côte d’Ivoire, the R2P principle became a key aspect of the Security Council’s attempt to respond, in a timely and decisive manner, to mass atrocities. However, UN Member States faced difficulties in implementing R2P and protecting the civilian population in the Côte d’Ivoire crisis. This case study raises serious questions whether the Côte d’Ivoire crisis represents a success or failure for implementation of the R2P principle. These questions reinforce doubts that state practice reveals changes in international law on humanitarian crises attributable to the R2p principle.

7.4.1 Responsibility to Prevent

From the earliest stages of the conflict in Côte d'Ivoire, the international community was actively involved in finding a solution. The UN, together with ECOWAS, the AU, and EU, exercised a host of diplomatic efforts to bring the parties to a negotiated settlement. Similar to previous crises situations in Darfur and Libya, the government of Côte d'Ivoire was considered as having a greater responsibility in protecting its population from mass
atrocities. During the Darfur crisis, Member States had been reluctant to agree on the failure of the Sudanese government to protect its population. However, when the crisis in Côte d'Ivoire occurred, Member States agreed that the Ivorian government had failed to protect its population. Given this situation, the regional and international actors took a number of measures to prevent atrocities and protect the civilian population in Côte d'Ivoire. In fact, Member States repeatedly extended their support for international preventive efforts during the Ivorian crisis. Following a similar course as that taken in the Libyan crisis, the preventive efforts by regional and international bodies in Côte d'Ivoire suggested that the international community had taken a role that could not be blocked by sovereignty. In fact, the use of R2P during these crises has seen state practice reject any doctrine of absolute sovereignty in the preventive efforts undertaken.

Therefore, the international community’s efforts to prevent mass atrocities in Côte d'Ivoire were embraced, structured, and shaped through the R2P framework. Also, the regional and international community’s efforts to prevent atrocities in Libya, as well as in Côte d'Ivoire, suggested that states are at least trying to fulfill their preventive responsibility within the institutional context. However, as was the case with many examples of preventive diplomacy in the pre-R2P context, states are still not legally bound to adhere to any norm that requires intervention to prevent atrocities. Therefore, although preventive efforts by regional and international actors have been framed by and through R2P, it is doubtful these efforts have contributed to changes in international law.
7.4.2 Responsibility to React

Despite the efforts by regional and international entities to prevent mass atrocities, Gbagbo refused to engage in any meaningful negotiations with any of the parties and, in fact, looked suspiciously upon all regional and international efforts as interference in the internal affairs of his country. However, once Gbagbo failed to positively respond to the preventive efforts of the international community, the UN and some other Member States, in particular, the United States, the United Kingdom, and like-minded countries, called for Gbagbo to step down. In this context, Resolution 1975 took action to extend the UNOCI mandate to protect civilians in Côte d'Ivoire into the “regime change” area, and this development was the second such application with regard to the R2P principle. The Security Council framed Resolution 1975 in terms of the R2P principle. This pattern could not be seen in either regional or international community decisions in the Darfur crisis. However, decisions made by the Security Council to use non-forceful measures and military intervention in Libyan and Côte d'Ivoire crises were grounded in R2P. This continued state practice in grounding Security Council decisions in R2P proves that the R2P principle has come to frame how states think and talk about humanitarian intervention. During the Ivorian crisis, the R2P principle seemed to be widely recognized as a concept that needed to be adopted in cases of mass atrocities.

However, in an approach different from the Darfur and Libyan crises, the ICC reference was made in the Security Council resolution authorizing the use of force. In fact, Gbagbo was arrested and submitted to the ICC as a result of the Security Council-authorized use of military force. Although some Member States expressed their opposition
to the arrest of Gbagbo in the circumstances in which it occurred, none of them opposed the ICC reference in Resolution 1975. The continued state practice in Darfur, Libya, and Côte d'Ivoire of making an ICC reference as part of the responsibility to react, in fact, suggests a heightened synergy between R2P and international criminal law.

The military intervention in Côte d'Ivoire under Resolution 1975 was politically supported by both regional and international actors. In fact, the unanimous adoption of the resolution meant that Member States accepted the need to take military action in Côte d'Ivoire. A similar situation occurred in the Libyan crisis, where none of the Member States opposed Resolution 1973. This trend is different from the Darfur crisis, where there was no consensus among states or regional entities to take any forceful military measures. What happened in Libya and Côte d'Ivoire also raises a question whether this state practice could be considered acceptance of the RN2V approach in situations where mass atrocities are taking place. As happened in Libyan case, the Security Council’s decision to use force to protect the civilian population in Côte d'Ivoire revealed the Security Council’s ability to implement the responsibility to react.

One of the main controversies raised in the Côte d’Ivoire intervention, however, was UNOCI’s use of force to effect regime change. The same controversy also plagued NATO’s use of force in Libya. However, unlike NATO’s actions in Libya, the use of force in Côte d’Ivoire was directly carried out by UN forces. Therefore, the direction to use force to oust Gbagbo in Côte d’Ivoire must have come from UN organs. Indeed, Resolution 1975 recognized Ouattara as the president of Côte d’Ivoire, which raised questions of whether the ultimate goal was fostering regime change while protecting civilians.
However, Resolution 1975 did not specify any means or scope for the use of force in Côte d’Ivoire. Nor did the resolution specify how the mandate should be used, what measures should be taken in protecting civilians, what limitations should be placed on such actions, or who would monitor the actions. This lack of clarity on the scope of the use of force increased criticism against using the R2P principle to justify the use of military force. The same controversy about the limitations on the use of force authorized by the Security Council arose during the military intervention in Libya, and carried over to the military intervention in Côte d'Ivoire. As chapter 8 explores, the Syrian crisis reveals how damaging this “regime change” controversy has become for the R2P principle.

7.4.3 Responsibility to Rebuild

Rebuilding efforts after the military intervention in Côte d’Ivoire have been alarmingly slow. UNOCI and the Ouattara government are still unable to restore peace and justice in Côte d’Ivoire. Despite all the efforts by the international community, the crisis in Côte d'Ivoire has seen a sharp escalation in the number of human rights violations. Although military intervention by UN and French troops ousted Gbagbo and temporarily prevented post-election violence, these efforts were not able to restore peace and justice in the country, nor properly carry out any meaningful rebuilding efforts. This situation is, in fact, identical to the ineffective rebuilding efforts in Darfur and Libya. This continuity in state practice suggests that the responsibility to rebuild has had the least impact and attention of the three R2P responsibilities. Therefore, the failure to rebuild post-conflict Côte d’Ivoire suggests the need to re-examine rebuilding strategies, including the creation of a better institutional mechanism to achieve intended goals.
In summary, state practice in Côte d’Ivoire case study indicates that the R2P principle has not changed international law in any significant way. Although many efforts were made to prevent the crisis from escalating, such attempts at preventive diplomacy were frequent in humanitarian crises before articulation of the R2P principle. Further, state practice during the Ivorian episode does not contain any indication states intended to imbue the responsibility to prevent with any obligatory status in international law. Under the responsibility to react, state practice exposed the deep division among countries on using force authorized by the Security Council for R2P purposes. Although the “regime change” controversy has no antecedent in the pre-R2P period, the controversy does not support the notion that R2P has changed international law on humanitarian crises. In fact, the Libyan and Ivorian cases suggest R2P has adversely affected the use of Security Council power under international law to authorize military force in addressing large-scale atrocities. Finally, the Côte d’Ivoire case demonstrates the responsibility to rebuild in the R2P principle has not changed international law with respect to the challenges of rebuilding post-conflict societies.
CHAPTER 8

SYRIA

8.1 Introduction

By mid-March 2011, the worsening crisis in the Syrian Arab Republic (Syria) had rapidly become the center of regional and international attention. Since that time, Syria has experienced a major humanitarian crisis, which still continues. As of this writing, there is no indication that the fighting will end any time soon. The international community has not only failed to prevent mass atrocities in Syria, but has also failed to take effective or timely action to react effectively to ongoing mass atrocities. Given the politics that has characterized the Syrian crisis to date, the likelihood of effective international cooperation on rebuilding post-conflict Syria is also bleak.

The Syrian crisis involves multiple, serious problems that undermine the importance of the R2P principle in international relations and international law. The Syrian crisis has highlighted the controversy on whether a state can use force for humanitarian purposes without Security Council authorization, a long-standing international legal question that did not arise in the Darfur, Libya or Côte d’Ivoire crises. The use of force to effect regime change in Libya and Côte d’Ivoire also undermined the UN taking effective action in Syria. In fact, China and Russia refused to authorize the use of force for, among other rationales, reasons related to their positions on the abuse of Security Council authorization in the previous R2P crises of Libya and Côte d’Ivoire. Security Council members, at least, could not agree on humanitarian relief issues in the Syrian crisis. These disagreements illustrate many of the serious problems that the R2P principle has encountered during the Syrian crisis.

8.2 Background to the Conflict in Syria

Following World War I, France acquired the mandate in Syria and administered the country until its independence in 1946. Post-independence Syria lacked political stability, and, therefore, experienced a series of military coups during its first decades. In 1958, Syria united with Egypt to form the United Arab Republic. However, in September 1961, Syria and Egypt separated, and the Syrian Arab Republic was re-established. With a view to stabilizing the country, in November 1970, Hafiz al-Assad, a minority Alawite sect member of the socialist Ba'ath Party, seized power in a bloodless coup. Following the death of President Hafiz al-Assad, his son, Bashar al-Assad, was appointed as president by a referendum held in July 2000. In May 2007, Bashar al-Assad was re-appointed for his second term as president by a referendum.

President Assad and many of the governing elite belong to the Alawite minority group of Shia Muslims, while the majority of the Syrian population is Sunni Muslim. This sectarianism has been described as a characteristic feature of the Syrian conflict. The split between the ruling minority Alawite population and the country's Sunni Muslim majority is the sharpest sectarian division affecting the peace and stability of the country. The Syrian government also maintained and supported the Shabiha militia, which has enjoyed extensive privileges under the regime since the 1970s. The Syrian government used the Shabiha militia as a tool for cracking down on...

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2 Id.
3 Id.
4 Id.
6 Id.
7 Id.
8 Id.
10 Syria: History, supra note 5.
dissent.\textsuperscript{11} There are many opposition groups against the Assad regime, and, by end of 2012, they created several opposition organizations, including the Syrian National Council (SNC), an umbrella organization of exiled Syrians, and the Free Syrian Army (FSA), composed of Syrian military defectors and armed rebels.\textsuperscript{12} These rebel groups have called for the regime’s resignation since the fall of 2011. In particular, SNC called for regime change in Syria, rejected any dialogue with Assad regime, and requested international protection for the Syrian population.\textsuperscript{13}

Initial protests in Syria occurred in middle of February 2011, calling for the abolition of emergency law, legalization of a multi-party political system, release of political prisoners, and the removal of corrupt local officials.\textsuperscript{14} When the protests against the Syrian regime escalated in every city, the government forces retaliated against the unrest with violence to discourage protesters. By early March 2011, the Assad regime introduced new laws permitting the establishment of new political parties.\textsuperscript{15} Still, severe anti-government protests broke-out in mid-March 2011 in the southern province of Dar’a, after a group of children accused of painting anti-government graffiti on public buildings were detained and tortured by government forces.\textsuperscript{16} Syrian armed forces responded violently, attacking protesters and firing at a funeral procession.\textsuperscript{17} Protests also erupted in other cities, including Damascus, Homs, Hama, and Idlib.\textsuperscript{18} On March 30, 2011, Assad alleged that Syria was facing a conspiracy by imperialist forces and internal

\textsuperscript{11} Id.
\textsuperscript{13} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
conspirators who supported the imperialists’ efforts to destabilize the country. However, given the continuous protests, Assad swore in a new government on April 14, 2011, and lifted the state of emergency that had been in place since 1963. Assad also took measures to abolish the high security court of the country and recognized the right to peaceful protests while releasing hundreds of detainees.

As protests continued around the country, on April 26, 2011, thousands of government soldiers backed by tanks and snipers opened fire on civilians in Dar’a and two other locations. Armed security forces conducted house-to-house sweeps. Checkpoints were erected while electricity and other essential services were cut off. As the protests continued to spread across the country, the military reaction by the Assad regime became more violent. According to the UN High Commissioner for Human Rights (OHCHR), the Assad regime’s forces used artillery fire against unarmed civilians, implemented door-to-door arrest campaigns, executed raids against hospitals, and shot and arrested medical personnel.

By the end of 2011, protests escalated throughout the country, and Assad’s armed forces continued to retaliate against protesters with extreme brutality. On December 28, 2011, Syrian forces opened fire on thousands of anti-government protesters in the city of Hama, killing many civilians. Battles between official government forces, pro-Assad militias, and rebels continued in many cities, including in the Damascus suburbs. In the meantime, Assad held a referendum on

19 Id.
21 Id.
23 Id.
25 Syrian Uprising Timeline of Key Events, supra note 22.
a new constitution, a move that was perceived as a gesture to placate the opposition.\textsuperscript{26} The violence continued, however, as the government launched severe assaults which raged for weeks. In March 2012, the main opposition group, the Syrian National Council, formed a military council to organize and unify all armed groups.\textsuperscript{27} On the first anniversary of the start of the uprising, thousands of protesters marched in Damascus, and government retaliation resulted in the killing of thousands of protesters.\textsuperscript{28}

In mid-2012, Assad’s government threatened to unleash chemical and biological weapons if the country faced a foreign attack.\textsuperscript{29} This threat was Syria’s first acknowledgement that it possessed weapons of mass destruction. In August 2012, the Syrian military restarted chemical weapons testing at a base on the outskirts of Aleppo.\textsuperscript{30} By 2013, concrete evidence of chemical weapons use began to surface. In March 2013, both the government of Syria and the rebels accused each other of employing chemical weapons in an attack that killed dozens in the Aleppo province.\textsuperscript{31} France raised this matter at the Security Council on March 20, 2013, and the Secretary General stated that he would appoint a technical mission to investigate the allegations.\textsuperscript{32} A team of UN experts, appointed by the UN Secretary General, arrived in Syria on August 18, 2013, to launch a long-delayed investigation of allegations from both sides of the

\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
conflict that chemical weapons had been deployed.33 Just as the UN investigators arrived in Syria, news broke that a large chemical attack occurred on August 21, 2013, in the opposition-controlled and disputed area of Ghouta, Syria.34 The area was struck by rockets believed to have contained the chemical agent sarin. Hundreds were claimed to have been killed in the attack.35 A United States intelligence report cited by Secretary of State John Kerry showed evidence that the Assad regime had killed thousands of citizens in a chemical weapons attack.36 On September 9, 2013, a team of UN chemical weapons inspectors confirmed that the nerve agent sarin was used in an attack on Ghouta.37 Syria reportedly manufactured several types of chemical weapons, including sarin, tabun, the more potent nerve agent VX, and mustard gas.38 The Assad regime was later found to possess 1,300 tons of such chemical agents.39

The charges of chemical weapons’ use became a main component of the larger global debate about the Syrian conflict. Rebel forces also faced allegations of launching chemical attacks.40 The use of chemical weapons prompted strong international responses, including serious contemplation of military intervention without Security Council authorization.41 The United States and its allies expressed concern over the attacks and claimed that the use of

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35 Id.
36 Id.
41 Id.
chemical weapons violated international norms. The threat of chemical weapons initiated a series of warnings from the United States, United Kingdom, and France. These countries stated that the threat or use of chemical weapons would trigger a forceful response, possibly including military intervention.

The threat of chemical weapons along with increased suppression of civilians by the Syrian regime led the United States to declare its decision to provide arms to Syrian rebels in June 2013. In the same vein, France and Saudi Arabia also discussed providing limited military support to rebels. In September, the United States justified a limited military strike against Syria before the United States Senate Foreign Relations Committee. In fact, the United States openly declared the need for regime change in Syria. In response to the threats of a possible United States military strike against the Assad regime, Russia proposed that the Syrian government join the Chemical Weapons Convention. Syria acceded to the Chemical Weapons Convention on September 14, 2013. The Chemical Weapons Convention requires international monitoring of a country’s chemical arsenal and a commitment to destroy weapons.

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42 Id.
43 Obama Warns Syria over Chemical Weapons, EURO NEWS (Mar. 20, 2013), http://www.euronews.com/2013/03/20/obama-warns-syria-over-chemical-weapons/.
44 Id.
45 White House Plan to Arm Syrian Rebels Raises Fears of Terrorist Links, FOX NEWS (June 14, 2013), http://www.foxnews.com/politics/2013/06/14/assad-use-chemical-weapons-confirmed-us-officials-say/.
Syria joined the Chemical Weapons Convention, the United States and Russia announced a joint framework on destruction of Syrian chemical weapons that proposed a timeline for the elimination of such weapons and all related equipment and material, as well as on-site inspections.52

By end of 2013, the Syrian economy had drastically collapsed. This devastating economic situation affected more than half of the population and left them in extreme poverty. According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), by the end of 2013, the majority of the Syrian population lives in poverty.53 The increasingly dire economic situation also contributed to the refugee crisis that has affected the entire region. By the end of 2013, over 45 percent of Syrians have fled their homes, making them the largest population of refugees in the world.54 The UN High Commissioner for Refugees (UNHCR) reports that by the end of 2013, over nine million Syrians are displaced, 2.2 million had fled as refugees, and 6.5 million are internally displaced.55 The UN has estimated each of these two figures will increase by two million by the end of 2014.56

Despite this dire humanitarian situation, except for the agreement on destruction of chemical weapons, the international community has so far failed to take any action to protect the civilian population in Syria. Since the initial stages of the Syrian conflict, the international community was concerned about the mass atrocities committed by both the Assad regime as well as the rebels. However, the international community’s attention focused primarily on the use of

54 Id.
56 Id.
chemical weapons in Syria. Much criticism, therefore, has been leveled against the international community for its failure to effectively implement the R2P principle in the Syrian crisis.\textsuperscript{57}

### 8.3 Application of the R2P Principle in International Responses to the Syrian Crisis

The Syrian conflict has been widely discussed as another test case for the R2P principle in international law. From the initial stages of the crisis, there were many claims of mass atrocities carried out in Syria.\textsuperscript{58} Growing concerns about the deteriorating security situation in Syria brought R2P into the debates within the international community. The Independent International Commission of Inquiry on Syria established by the UN Secretary General on August 22, 2011, concluded that the government of Syria has manifestly failed in its responsibility to protect the population. The inquiry further stated that gross violations of human rights had been committed in Syria by both the government as well as the anti-government armed groups.\textsuperscript{59} These atrocities triggered controversies largely centered on the R2P responsibilities to prevent and react. With the Assad regime manifestly failing to protect Syrian population, the international community, regional organizations, and the UN took a number of diplomatic measures to help prevent further atrocities in Syria.

#### 8.3.1 Responsibility to Prevent

As the crisis in Syria was unfolding, the Security Council first discussed the situation during a meeting on Israel-Palestine negotiations on April 21, 2011, soon after Security


\textsuperscript{58} The Crisis in Syria, supra note 12.

Council’s actions on R2P in Libya and Côte d’Ivoire in March 2011. By end of March 2011, Syrian government forces shot protesters in Damascus and the southern city of Deraa who demanded release of political prisoners. These actions triggered days of violent unrest that steadily spread nationwide over the following months. The United States, United Kingdom, and France expressed their concern about the dire human rights situation in Syria. However, the Russian delegation stated that it did not wish to interfere in the internal affairs of any sovereign state.

In the face of the Syrian government’s harsh retaliation against the protests that escalated throughout the country, the Security Council held its first session on Syria on April 27, 2011, in which most delegates’ strongly condemned the human rights violations in Syria. The delegations stressed the need to help Syria in order to prevent further violence and civilian suffering. The United States Permanent Representative, Susan Rice, stated that the United States condemned in the strongest possible terms the abhorrent violence used by the government of Syria. The United Kingdom stressed the Syrian government’s responsibility to protect peaceful protesters and the need to stop violent repression of such protesters. They further highlighted that the protestors themselves must ensure that their actions are peaceful. While China and India expressed their concern about the incidents taking place in Syria, Russia stated that the current situation in Syria did not present a threat to international peace and security. The Member States of the Security Council considered issuing a press statement as proposed by

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61 Id. at 8, 15, 21.
62 Id. at 26.
64 Id. at 8.
65 Id. at 4.
66 Id. at 7, 8.
the EU. However, the statement, which stressed the Syrian government’s responsibility to prevent violence against their own people, could not be issued because there was no agreement among the Member States. In particular, Russia and Lebanon objected, stating that such a press statement would be undue interference into the internal affairs of Syria.

In response to mounting international unease about the deteriorating human rights situation in Syria, the Human Rights Council held a special session on April, 29, 2011, and it adopted Resolution 16/1. The resolution condemned the Syrian government’s attacks against the civilian population and expressed grave concerns about alleged deliberate killings, arrests, and instances of torture of peaceful protesters by Syrian authorities. The resolution called for the UN High Commissioner for Human Rights to urgently dispatch a fact-finding mission to investigate alleged human rights violations in Syria. Although Resolution 16/1 was adopted by a majority of votes of the Human Rights Council, notable opposition was raised by some Member States. China, Russia, Pakistan, and Malaysia voted against the resolution, while the delegations of Nigeria and Saudi Arabia abstained.

Pursuant to Human Rights Council Resolution 16/1, the High Commissioner for Human Rights established a fact-finding mission to investigate all alleged violations of international human rights law in Syria and to establish the facts and circumstances of such violations and of the crimes perpetrated, with a view to avoiding impunity and ensuring full accountability. Although no explicit reference was made to R2P, the fact-finding mission itself was to

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68 Id.
70 Id.
compliment the responsibility of the international community to prevent further atrocities in Syria. In May 2011, the fact-finding mission started its work, and the High Commissioner for Human Rights made a formal request to the government of Syria to cooperate with the mission.\textsuperscript{72} Despite repeated requests by the Human Rights Council, the Syrian government did not cooperate with the fact-finding mission. Nonetheless, the mission gathered credible, corroborated, and consistent accounts of violations from victims and witnesses.\textsuperscript{73}

As the Syrian government increased its suppression of the opposition, the Human Rights Council and some UN Member States put more pressure on the Syrian regime. In succeeding months, the United Kingdom, the United States, France, Germany, and Portugal made efforts to table a resolution at the Security Council condemning the Syrian government’s atrocities, efforts that failed in the face of resistance from Russia, China, Brazil, South Africa, and India.\textsuperscript{74} Although the resolution noted that the widespread and systematic attacks by the Syrian authorities against its people may amount to crimes against humanity under international law, it did not refer to R2P or the responsibility to prevent such atrocities. The Member States which resisted the resolution argued that the Syrian crisis was an internal matter and the Security Council should not dictate the nature of any reform program that the Syrian government should undertake.\textsuperscript{75} These Member States absolutely refused any external military intervention in Syria.\textsuperscript{76}

\textsuperscript{72} Id. at 6.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
Although the Syrian crisis was considered an internal matter by some Member States, violence in Syria began to creep across the borders into Turkey. In addition, Syrian refugees had become an international concern by the end of 2011. More than 2.5 million Syrians had fled their homes by the end of 2011, taking refuge in neighboring countries or within Syria itself. Absorbing the massive influx of refugees has been an huge challenge for Syria’s neighbors, with serious consequences for the stability of the entire region.

Given the escalation of violence and other humanitarian problems in Syria, Francis Deng, the Secretary General’s Special Advisor on the Prevention of Genocide, and Edward Luck, the Secretary General’s Special Advisor on R2P, issued a statement on Syria on July 21, 2011. Emphasizing that the atrocities in Syria amounted to the crimes against humanity, the Special Advisors urged the Syrian government to fulfill its responsibility to protect its civilian populations.

In August 2011, after much discussion, the Security Council adopted a presidential statement expressing grave concern about the deteriorating humanitarian situation in Syria and calling for unimpeded access for humanitarian workers. While reaffirming its strong commitment to the sovereignty, independence, and territorial integrity of Syria, the Security Council also stressed the importance of a Syrian-led political solution to the conflict. However,
neither the presidential statement nor any country statement made specific reference to R2P or the responsibility to prevent in particular.

Given the escalation of violence and unrest in Syria, the League of Arab States (LAS) issued its first condemnatory statement on Syria on August 7, 2011, and called on the government of Syria to immediately end the violence.83 However, the statement made no explicit reference to R2P. From the initial violence in March 2011 until August 2011, the LAS had not responded to the crisis in Syria. The reason for the LAS’ initial silence towards the crisis situation in Syria was related to other regional crises that occurred in the wake of the Arab Spring, including the political instability in Egypt after the overthrow of Mubarak and NATO’s Libyan operation, which kept Arab nations’ attention away from the Syrian crisis. Similarly, Persian Gulf countries were engaged with unrest in Bahrain, Yemen, and Saudi Arabia and were not willing to take any steps against Syria.

Given the continuous violence in Syria, the Independent International Commission of Inquiry on Syria was established on August 22, 2011, by Human Rights Council Resolution 17/1.84 The Commission had a mandate to investigate all alleged violations of international human rights law that had occurred in Syria since March 2011.85 The Commission was also tasked to establish facts and circumstances that may constitute such violations and other crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held

85 Id. ¶ 13.
Resolution 17/1 was adopted with 33 votes in favor, four against, and nine abstentions. China, Russia, Cuba, and Ecuador voted against the resolution. Explaining its vote after the adoption of the resolution, the representative of Russia stated that the resolution was one-sided and could further destabilize Syria. The Chinese delegation also expressed its concern about the resolution and stated that the Syrian crisis should be resolved through discussions and cooperation. Although the resolution made no reference to R2P or the responsibility to prevent, the votes against the resolution represented continued opposition to the taking of any diplomatic measures against Syria.

However, despite these refusals by some of UN Member States to take at least non-coercive measures against Syria, LAS foreign ministers held a special meeting on Syria on August 27, 2011, and proposed a 13-point plan which directed Assad to hold elections within three years. The president of the LAS met with Assad in September 2011 to discuss the proposal, and this meeting reached an agreement regarding the LAS’ proposals.

In October 2011, the United Kingdom, France, and Portugal tabled a draft resolution at the Security Council, proposing an arms embargo and setting up a new sanctions committee. The resolution in its preamble emphasized the Syrian government’s primary responsibility to

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86 Id.
89 Id.
protect its population.\textsuperscript{93} Given strong opposition from some Member States, the draft resolution was watered down during negotiations. Despite all the revisions, the resolution could not be adopted because Russia and China vetoed it.\textsuperscript{94} Brazil, India, Lebanon, and South Africa abstained on the resolution.\textsuperscript{95} Russia rejected the resolution and stated that it could not agree with accusations against the Syrian regime and deemed the threat of an ultimatum and sanctions against the Syrian authorities unacceptable.\textsuperscript{96} Russia added that the situation in Syria could not be considered in the Security Council separately from the Libyan experience and that a similar interpretation of the Security Council resolutions on Libya should not be a model for the future actions of NATO in implementing R2P.\textsuperscript{97} Russia suspected that excessive force would also be used in Syria as NATO did in Libya. Russia also stressed the importance of knowing how this particular resolution would be implemented.\textsuperscript{98} Russia asserted that a significant number of Syrians do not agree with the demand for regime change and would rather see gradual changes, believing that they have to be implemented while maintaining civil peace and harmony in the country.\textsuperscript{99}

China highlighted the importance of respecting Syria’s sovereignty, independence, and territorial integrity.\textsuperscript{100} China stated that, under the circumstances, sanctions, or the threat of sanctions, would not help to resolve the conflict in Syria and, instead, may further complicate the situation. The Indian delegation expressed a similar view and stated that all states have a responsibility to respect the fundamental rights of their people, address their legitimate

\textsuperscript{93} Id.
\textsuperscript{96} Id. at 3.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 5.
aspirations, and respond to their grievances through administrative, political, economic, and other measures. At the same time, India stressed states also have the obligation to protect their citizens from armed groups and militants. India further stated that the international community should give the Syrian government time to implement the far-reaching reform measures it announced.

The states that supported the draft resolution expressed regret at the Security Council’s failure to take action to prevent further atrocities in Syria. The United States was outraged that the Security Council had utterly failed to address an urgent moral challenge and a growing threat to regional peace and security. The United States representative, Susan Rice, expressed disappointment at the failure of the Security Council to take action to counter Assad’s brutal oppression. Rice further stated that, in failing to adopt the draft resolution, “the Security Council has squandered an opportunity to shoulder its responsibilities to the Syrian people and the crisis in Syria will stay before the Security Council, and the United States will not rest until the Security Council rises to meet its responsibilities.” Also expressing disappointment over the failure of the Security Council to adopt the resolution, the United Kingdom stated that the time for strong Security Council action was long overdue and that it has to shoulder its responsibilities and take tough actions.

In the meantime, the LAS, at an extraordinary session held in Cairo on October 16, 2011, adopted a resolution calling for a complete and immediate cessation of the acts of violence and
killing, and for an end to armed actions to deal with the crisis with a view to prevent more casualties in Syria. The resolution called on the LAS to establish an Arab Ministerial Committee under the chairmanship of Sheikh Jabr Al-Thani, the Prime Minister and Minister of Foreign Affairs of Qatar, to liaise with the Syrian leadership. Following this meeting on October 16, 2011, the Committee, led by Qatar with delegates from Egypt, Algeria, Sudan, and Oman, met with Assad on October 26, 2011, and conveyed the decisions of the LAS.

On October 30, 2011, Syria accepted the action plan proposed by the LAS and signed the plan on November 2, 2011. The action plan urged the Syrian authorities to: end all forms of acts of violence; free political prisoners; withdraw all military elements from cities and residential neighborhoods; and provide free access to the LAS agencies and international media to report on developments and monitor the situation. On November 3, 2011, Nabil el-Araby, the chief of the LAS, met with the Syrian National Council and informed its members of the LAS’ action plan.

However, the Syrian regime did not immediately comply with the proposals made by the LAS, and, in fact, failed to engage in a dialogue with opposition forces within the time frame given by the LAS. This willful inaction by the Assad regime triggered debates about the need for measures against Syria. On November 7, 2011, the LAS chief called for a meeting to assess

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Syria’s failure to comply with the agreed action plan.\textsuperscript{112} As a result, on November 12, 2011, the Ministerial Council of the LAS suspended Syria’s membership.\textsuperscript{113} This decision to suspend Syria from LAS membership was approved with 18 votes in favor. Yemen, Syria, and Lebanon voted against the decision, with Iraq abstaining. Following the suspension decision, the LAS adopted Resolution 7439 on November 16, 2011, which mandated the LAS send an observer mission to Syria.\textsuperscript{114} Although the resolution aimed to verify implementation of the LAS’ plan of action, to resolve the Syrian crisis, and to protect Syrian civilian populations, it made no explicit reference to R2P.

On November 22, 2011, the Social, Humanitarian, and Cultural Affairs Committee of the UN General Assembly adopted a resolution that called on the government of Syria to end all human rights abuses.\textsuperscript{115} The resolution was adopted with 122 Member States voted in favor, 13 against and 41 abstentions.\textsuperscript{116} It further urged the Assad regime to immediately implement the LAS’ November peace plan.\textsuperscript{117} The resolution did not create any new mechanisms or procedures, yet it meant to send a strong signal to Syria and its people that the ongoing human rights violations unfolding there must come to an end. A number of delegations highlighted Syria’s primary responsibility to protect its population and prevent atrocities against children and

\textsuperscript{114} League of Arab States, Res. 7439, Legal Status and Functions of the Observer Mission of the Arab League to Syria (Nov. 16, 2011).
\textsuperscript{117} Id.
women. Russia stated that the main co-sponsors of the resolution should remember that being an initial co-sponsor was not only a right, but also a responsibility.

In Resolution 7441 of November 24, 2011, the LAS again requested its Secretary General to deploy immediately the observer mission to Syria. Most importantly, on November 27, 2011, the Ministerial Council of the LAS proposed economic sanctions on Syria. The LAS’ proposed sanctions included a travel ban on some senior officials of the Assad regime, a freeze on Syrian government’s assets in Arab countries, a ban on transactions with Syria’s central bank, and an end of all commercial exchanges with the government of Syria.

In the meantime, the Commission of Inquiry established by the Human Rights Council pursuant to Resolution S-17/1 completed its task and prepared its first report on November 23, 2011. The report concluded that human rights violations were committed by Syrian military and security forces since the beginning of the protests in March 2011. The report further asserted that crimes against humanity were committed in different locations in Syria during the period under review. The report underscored the Syrian government’s responsibility to protect its population, provide victims with an effective remedy, and stop atrocities against population. It called upon the Syrian regime to put an immediate end to the ongoing, gross human rights violations, to initiate independent and impartial investigations of these violations, and to bring the perpetrators of these atrocities to justice. At the same time, the Human Rights

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118 Id.
119 Id.
120 League of Arab States, Res. 7441, The Developments of the Situation in Syria (Nov. 24, 2011).
121 Timeline of International Response to the Situation in Syria, supra note 112.
122 Id.
124 Id.
125 Id. ¶ 1.
126 Id. ¶ 24.
Council adopted Resolution S-18/1, which mandated the establishment of a Special Rapporteur on the human rights situation in Syria.\textsuperscript{127} The resolution was adopted by a vote of 37 in favor, four against, and six abstentions.\textsuperscript{128} The Russian delegation, which voted against the resolution, stated that the resolution exceeded the mandate of the Human Rights Council.\textsuperscript{129} Expressing similar sentiments, China stated that it could not accept any use of force which would threatens the territorial integrity of Syria.\textsuperscript{130}

The Syria situation was again discussed at the Security Council on December 12, 2011.\textsuperscript{131} During this meeting, Navi Pillay, the UN High Commissioner for Human Rights, stated that an estimated 5,000 people had been killed in Syria since March 2011, and many more civilians had been arrested and detained without trial.\textsuperscript{132} She noted that nearly 12,000 refugees had fled Syria and many more were internally displaced. She highlighted that the Syrian government had failed to uphold its responsibility to protect Syrian civilian populations and that the international community should undertake effective measures to protect the civilian population in Syria.\textsuperscript{133}


\textsuperscript{133} Id.
On December 19, 2011, the General Assembly adopted a resolution on Syria with 133 votes in favor, 11 against, and 43 abstentions.\(^\text{134}\) While Brazil voted in favor, India and South Africa abstained on the vote on the resolution.\(^\text{135}\) The resolution called for Syria to immediately cease all human rights violations, to protect its population, and to fully comply with their obligation under international human rights and humanitarian law.\(^\text{136}\)

In the meantime, given the pressure from regional and international actors, Syria signed a peace deal presented by the LAS in which Syria agreed to an Arab observer mission for an initial period of one month.\(^\text{137}\) The peace deal also served to initiate talks between the opposition and the government regarding the cessation of violence, release of political and opposition prisoners, and the withdrawal of Syrian troops from cities. China and Russia welcomed the peace deal and applauded the LAS’ involvement in the Syrian peace process, rather than bringing the issue to the Security Council.\(^\text{138}\)

However, Syrian opposition leaders criticized the agreement as a new time-wasting tactic by Assad's regime and, instead, called for foreign military intervention.\(^\text{139}\) They condemned the LAS’ monitors and regarded the mission as a farce, pointing to the continuation of violence against protesters in spite of the monitors’ presence.\(^\text{140}\) The United States reacted skeptically to Syria's agreement to allow the LAS to monitor Syrian compliance with the LAS peace agreement.

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\(^{136}\) G.A Res. 66/176, supra note 134, ¶ 5.


\(^{138}\) The Crisis in Syria, supra note 12.


\(^{140}\) Id.
designed to stop the violence in the country. The United States pointed out that it was uncertain whose observers would monitor and which cities they would observe.\textsuperscript{141} Moreover, the appointment of Mustafa al-Dabi to lead the LAS observer mission raised doubts about the reliability of the mission because al-Dabi had served as a Sudanese military commander and intelligence officer and was accused of being involved in war crimes in Darfur.\textsuperscript{142} Despite all these arguments, a LAS mission with 60 observers resumed its mission in Syria by late December 2011.\textsuperscript{143} After establishing contacts with both factions, al-Dabi stated that the situation in Homs was normal.\textsuperscript{144} Although much criticism was leveled against al-Dabi’s leadership, the mission remained in Syria. The mission’s report, presented to the LAS on January 22, 2012, criticized the Syrian government for its failure to implement the agreement and recommended an extension of the mission.\textsuperscript{145} However, Saudi Arabia opposed such an extension and decided to pull its monitors out of Syria.\textsuperscript{146} Following Saudi Arabia, other countries also withdrew their observers from the delegation.\textsuperscript{147}

By end of January 2012, the LAS acknowledged its failure at peace efforts in Syria and stated that the Syrian regime had failed to cooperate with the LAS.\textsuperscript{148} Given the continued violence in Syria, the LAS referred the situation to the UN and presented a peace plan which

\textsuperscript{143} Id.
\textsuperscript{144} \textit{Head of Syrian Monitors Reports Homs is Calm but Calls for Further Inquiry}, AL ARABIYA (Dec. 28, 2011) http://english.alarabiya.net/articles/2011/12/28/184952.html.
\textsuperscript{146} \textit{Saudi Arabia Withdraws Its Monitors from Syria; Arab League Calls for Power Transfer}, AL ARABIYA (Jan. 22, 2012), http://www.alarabiya.net/articles/2012/01/22/189842.html.
called on Assad to hand over power to his deputy.149 Except for Lebanon, this plan was supported by other Arab countries.150 Nevertheless, the countries supporting the plan failed to agree whether it should be submitted to the Security Council.

Throughout all these attempts at negotiation, the violence in Syria continued, and, again, UN Member States made another attempt at the end of January 2012 to address the Syrian crisis. During the Security Council discussion on the LAS’ peace plan, Morocco introduced a draft resolution under which the Security Council would fully support the LAS’ proposal.151 The draft resolution included the LAS’ goal of forming a new, national unity government, which required that Assad step aside as part of a democratic transition process, grant full authority to his deputy, and hold free elections under Arab and international supervision.152

During the negotiations on the resolution, Russia and China continued to oppose any action hinting at regime change, coercive measures, or other foreign interference in Syria, with the Russian representative warning that such an intervention could spark catastrophic civil war and destabilize the region.153 He stated that, instead of interfering in Syria, it was now more important than ever to encourage dialogue among Syrians. However, he made clear that Russia would not support a solution that might lead to regime change. China also opposed the threat of use of force, especially forcible regime change, to resolve the Syrian conflict.154

150 Id.
154 Id.
representative of India pointed out that neither repression nor outside intervention could fulfill the Syrian people’s aspirations to play a greater role in shaping their own destiny.\footnote{155}

Clarifying its position, the Chairman of the LAS Ministerial Council stated that there was no hidden agenda against the Syrian regime and that the sole objective was to stop the massive killing and repression, which had been condemned around the world. He stated that the LAS was not calling for military intervention or regime change in Syria.\footnote{156} The representative of Syria stated that said he found it strange to see Arab leaders calling for action against his country, which had sacrificed much for Arab causes and joining with other States that wished to destroy Syria through the dissemination of false facts. He further stated that Syrians themselves would resolve the historic challenges facing their homeland without outside intervention.\footnote{157}

A vote on Security Council Resolution S/2012/77 was held on February 4, 2012, yet it could not be adopted because of Russian and Chinese vetoes.\footnote{158} In contrast to previous draft resolutions on Syria, however, there were no abstentions, and the remaining thirteen states voted for the draft resolution.\footnote{159} Explaining the veto, Russia stated that the draft resolution sought to send an “unbalanced” message to Syria and that some influential members of the international community had been undermining the possibility of a peaceful settlement by advocating regime change.\footnote{160} China voiced concern that the approach outlined in the resolution would complicate the situation in Syria.\footnote{161} Other Member States, in particular the United States, the United

\footnote{155}Id.\footnote{156}Id.\footnote{157}Id.\footnote{158}Press Release, Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League’s Proposed Peace Plan Security Council, U.N. Press Release SC/10536 (Feb. 4, 2012).\footnote{159}Id.\footnote{160}Id.\footnote{161}Id.\footnote{156}Id.\footnote{157}Id.\footnote{158}Id.\footnote{159}Id.\footnote{160}Id.\footnote{161}Id.
Kingdom, and France, expressed their deep disappointment and anger about the outcome of the draft resolution.\textsuperscript{162}

Given the failure to adopt a resolution at the Security Council, on February 16, 2012, Saudi Arabia tabled a resolution at the UN General Assembly condemning the Syrian situation, and highlighting the importance of ending human rights violations.\textsuperscript{163} The Member States adopted the resolution with 137 votes in favor, 12 against and 17 abstentions. The resolution also expressed its support for the LAS peace plan and requested that UN Secretary General Ban Ki-moon appoint a special representative to Syria.\textsuperscript{164}

Given his successful mediation efforts in Kenya, Kofi Annan was appointed as the UN-LAS joint Special Envoy for Syria on February 23, 2012.\textsuperscript{165} The Special Envoy was to provide good offices aimed at bringing an end to all violence and human rights violations and promoting a peaceful solution to the Syrian crisis. The Special Envoy was guided in this endeavor by the provisions of General Assembly Resolution A/RES/66/253 and the relevant LAS resolutions.\textsuperscript{166} In rendering his duties as special envoy, Annan consulted Member States and engaged with all relevant parties within and outside Syria in order to end the mass atrocities and the humanitarian crisis in Syria.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.}
\end{itemize}
The Commission of Inquiry, established pursuant to Resolution S-17/1 on the situation in Syria, submitted its second report to the Human Rights Council on February 22, 2012. The report concluded that the government of Syria had manifestly failed in its responsibility to protect its people. Since November 2011, its forces committed more widespread, systematic, and gross human rights violations. The report further noted the abuses committed by anti-government groups, although not comparable in scale and organization to those carried out by the Syrian government.

During this session, the Human Rights Council discussed the situation in Syria. It adopted Resolution 19/1 with 37 in favor, three against, with three abstentions. The Human Rights Council condemned the escalating widespread, systematic, and gross violations of human rights committed by the Syrian authorities, as well as ongoing attacks against civilian populations in cities and villages. In his opening remarks, Nassir Abdulaziz Al-Nasser, President of the UN General Assembly, highlighted the dire image provided by the Commission of Inquiry of the situation on the ground in Syria. Al-Nasser also stated that the Syrian government had manifestly failed in its duty to protect its people. The UN High Commissioner for Human Rights, Navi Pillay, called for an immediate humanitarian ceasefire to end the fighting and bombardments and requested the Syrian authorities to cooperate fully with international mechanisms, including Kofi Annan as Special Envoy. She also requested that the Syrian government allow the Office of the High Commissioner for Human Rights to establish a field

169 Id. ¶ 126.
presence in Syria. However, Syria condemned the meeting and said that it was an effort to politicize the high-level segment of the Human Rights Council. Syria argued that the Human Rights Council was not an appropriate forum for such matters.

During this Human Rights Council session, some delegations, in particular China and Russia, expressed their concern about the appeals for regime change in Syria, and they rejected any attempt to undermine Syria's sovereignty and territorial independence. While expressing its concern at the loss of lives in Syria, Cuba rejected attempts to attribute responsibility for all of the violence to the Syrian regime. Cuba voiced concern at the appeals for regime change in Syria and questioned those who advocated the use of force and violence to resolve the conflict. Cuba rejected any attempt to undermine Syria’s sovereignty and territorial independence, and it demanded full respect for the principles of self-determination and sovereignty. China stressed the need for an inclusive political dialogue and stated that it could not approve an armed intervention or the imposition of so-called regime change in Syria. Russia stated that the politicization of the situation in Syria would not facilitate the resolution of the crisis. Venezuela expressed similar concerns and stated that it was unacceptable to justify foreign military aggression under the need to protect civilians. These concerns of these delegations demonstrated a strong opposition to any intervention or at least taking any preventive efforts to stop atrocities in Syria. They mainly suspected that such efforts would allow external intervention in Syria, which possibly would create another Libyan scenario, including Syrian regime change.

173 Id.
174 Id.
175 Id.
176 Id.
177 Id.
178 Id.
179 Id.
Other delegations stressed the Syrian government’s responsibility to protect its population and demanded that Assad step aside to allow for a peaceful political transition. For example, Norway emphasized Syria’s primary responsibility to protect its population and reiterated the request that Assad step aside in order to accommodate a political transition. Most importantly, Norway stated that all members of the Security Council had to assume their responsibility to protect the population of Syria. The United States stated that Assad must go.

Given the continued escalation of violence in Syria, the Security Council issued a press statement on March 21, 2012, deploring the deteriorating humanitarian situation in Syria and requesting Damascus to grant access to the Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator. In light of this statement from the Security Council, Secretary General Ban Ki-moon expressed hope that this development would mark a turning point in the international community’s response to the Syrian crisis.

On April 5, 2012, the Security Council adopted another presidential statement urging the government of Syria to adhere to its commitment to cease violence. On April 14, 2012, the Security Council unanimously adopted Resolution 2042, which emphasized the primary responsibility of the government of Syria to protect its population and authorized the deployment of 30 unarmed military observers to Syria to liaise with the parties and to begin to report on the implementation of a full cessation of armed violence in all its forms by all parties, pending the

180 Id.
181 Id.
 deployment of the mission. The resolution also requested proposals for a UN supervision mechanism in Syria to monitor a cessation of armed violence in all its forms by all parties. Although the Russian delegation stated that the text had become much more balanced through extensive negotiation, the Syrian representative said the text was still unbalanced as it did not place enough burdens on opposition groups. However, the Syrian government supported Annan’s mission and any measures that would restore the country’s stability. For his part, Annan pledged support for monitoring the ceasefire, while warning that the monitors must respect Syria’s sovereignty.

On April 21, 2012, the Security Council unanimously adopted Resolution 2043 and established the 300-person UN Supervision Mission in Syria (UNSMIS), to monitor the cessation of violence and implementation of the Special Envoy’s plan. Importantly, the Russian delegation indicated that the Syrian regime would cooperate with observers. However, Russia deplored any deviation from the mandate and stated that the Libyan model should always remain in the past.

On June 1, 2012, upon the request by the Permanent Representatives of Denmark, Kuwait, Qatar, Saudi Arabia, Turkey, the EU, and the United States, the Human Rights Council convened a special session on the deteriorating human rights situation in the Syria and recent

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186 Id. ¶ 5.
killings in El-Houleh. During the general debate, most Member States condemned the killings in El Houleh, with many delegations describing the atrocities as crimes against humanity. The Member States demanded that the Syrian Government cooperate with Special Envoy Annan and the Human Rights Council’s Commission of Inquiry, while several delegations stressed that the Security Council must immediately refer the situation in Syria to the International Criminal Court (ICC). However, some Member States stated that the events in El Houleh must not be used as a pretext for foreign intervention, a condition which would hold serious consequences for world peace. China called on the government of Syria to implement the plan of the Special Envoy and Security Council resolutions. China, however, decisively opposed any form of international intervention and regime change.

On June 7, 2012, Annan briefed the Security Council on the deteriorating situation in Syria, and, on June 15, 2012, UNSMIS suspended its activities. Following Annan’s briefing to the Security Council, Russia suggested a conference to establish a contact group on Syria. On July 19, 2012, a draft resolution under Chapter VII of the UN Charter was introduced at the Security Council, cosponsored by France, Germany, Portugal, the United Kingdom, and the United States. The resolution stressed the Syrian government’s primary responsibility to

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192 Id.
193 Id.
194 Id.
protect its population and prevent atrocities. It also authorized the Security Council act under Chapter VII of the UN Charter to demand verifiable compliance within 10 days of the resolution’s adoption. The resolution was once again vetoed by Russia and China, while Pakistan and South Africa abstained.\textsuperscript{197} Russia reiterated its position that it would not accept any resolution containing a threat of sanctions.\textsuperscript{198}

Given the continued failure of the Security Council to address the situation in Syria, the General Assembly adopted a resolution on August 3, 2012, deploiring the Security Council’s failure to act on Syria and calling for a peaceful political transition.\textsuperscript{199} On August 2, 2012, Kofi Annan resigned as UN-Arab League mediator in Syria. Annan pointed to the Syrian government’s refusal to cooperate in reaching a peaceful resolution to the conflict, the escalating military campaign of the Syrian opposition, and the lack of unity in the Security Council as causes for the continued crisis in Syria.\textsuperscript{200} On August 17, 2012, Lakhdar Brahimi was appointed as the Special Representative for Syria.\textsuperscript{201} Brahimi proposed an Eid al-Adha ceasefire, a proposal not implemented because of the escalation of violence in Syria.\textsuperscript{202}

During its next session, the Human Rights Council adopted Resolution 24/22 on the continuing grave deterioration of the human rights and humanitarian situation in Syria with 40 in

\textsuperscript{198} Id.
favor, one against, and six abstentions. The resolution condemned the use of chemical
weapons and the “gross, systematic and widespread violations of human rights” by the Syrian
authorities. The resolution, in less-specific language, deplored “any human rights abuses” and
violations of international humanitarian law by opposition armed groups.

Since the beginning of unrest in Syria, various UN organs have continued to hold
meetings and have informally considered many draft resolutions. As can be clearly seen, at least
one Member State had voted against most of the resolutions. The key objection mainly
emphasized non-intervention in internal affairs and the refusal to permit the use of force to
achieve regime change. Both Russia and China have significant economic and military relations
with Syria. As permanent members of the Security Council, each has vetoed three resolutions
designed to isolate the Assad regime. Russia says it remains committed to finding a peaceful
solution, but continues to provide the Assad regime with military support. Due to the substantial
differences of opinion among the Member States, the Security Council could not take any
significant preventive action on the Syrian crisis.

On September 19, 2013, in light of the newly proven charges of possession and use of
chemical weapons by the Syrian regime, Russia and the United States transmitted to the Security
Council their framework for the elimination of Syrian chemical weapons agreed in Geneva on
September 14, 2013. On September 24, 2013, Russian Foreign Minister Sergei Lavrov and the
United States Secretary of State John Kerry met on the sidelines of the General Assembly to

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203 Human Rights Council Res. 24/22, The Continuing Grave Deterioration of the Human Rights and
204 Id. ¶ 3.
2013 from the Permanent Representatives of the Russian Federation and the United States of America to the United
discuss a draft resolution on the destruction of the Syrian chemical weapons. On September 27, 2013, the Member States of the Security Council unanimously adopted Resolution 2118 demanding verification and destruction of the chemical weapons stockpiles in Syria. The resolution stated that the use of chemical weapons anywhere constituted a threat to international peace and security. The resolution also called for the full implementation of the September 27, 2013, decision of the Organization for the Prohibition of Chemical Weapons (OPCW), which contained special procedures for the expeditious and verifiable destruction of Syria’s chemical weapons. Specifically, the resolution prohibited Syria from using, developing, producing, otherwise acquiring, stockpiling, or retaining chemical weapons, or transferring them to other States or non-State actors, and also underscored that no party in Syria should use, develop, produce, acquire, stockpile, retain, or transfer such weapons. The resolution further called for the expeditious destruction of Syria’s chemical weapons program, with inspections to begin by October 1, 2013. The resolution also called for convening peace talks and endorsed the establishment of a transitional governing body in Syria with full exclusive powers.

Resolution 2118 opened a path for a peaceful solution to the Syrian crisis under the patronage of the Security Council. It averted the threat of unilateral military strikes by the United States and the United Kingdom. The resolution refers to the option of imposing measures under Chapter VII of the UN Charter, in the event Syria fails to implement the chemical weapons destruction plan. However, this reference does not per se authorize the use of force. Therefore, any military action by the United States and its allies without the Security Council’s

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206 Chronology of Events: Syria, supra note 32.
208 Id. ¶ 3.
209 Id. ¶ 2.
210 Id. ¶ 21.
authorization would have certainly not have been approved by the Security Council. Resolution 2118 does not provide for an automatic authorization to use force in the event that the disarmament process fails or the conflict in Syria escalates. A possible intervention would require yet another compromise within the Security Council. Therefore, Resolution 2118 shifted the debate on the use of force against Syria to collective security action, which is in line with the R2P principle. However, Resolution 2118 does not mention the international community’s responsibility to protect the Syrian population from mass atrocities, but refers solely to the threat to international peace and security posed by Syria’s possession and use of chemical weapons. Thus, the question of the international community’s responsibility to respond to other atrocities in Syria, which do not emerge from chemical weapons, remains unanswered.

Although Resolution 2118 formed part of the diplomatic solution to the chemical weapons’ problem, as Stahn points out, the resolution pays little attention to the accountability dimensions of the alleged use of chemical weapons. 211 The resolution addresses the use of chemical weapons primarily through disarmament obligations and enforcement measures under Chapter VII of the UN Charter. The resolution does not include any concrete options for the exercise of criminal jurisdiction, which prevents any referral to the ICC.

However, UN Secretary General Ban hailed the resolution’s passage as “the first hopeful news on Syria in a long time,” but said, even amidst that important step, “we must never forget that the catalogue of horrors in Syria continues with bombs and tanks, grenades and guns.”212 He said the plan to eliminate Syria’s chemical weapons was “not a license to kill with conventional

weapons.” Ban also stressed that the perpetrators of the chemical attacks in Syria must be brought to justice and stated a UN mission had returned to Syria to complete its fact-finding investigations.

In the debate that followed Resolution 2118, Member States of the Security Council praised the text for placing binding obligations on Assad’s regime, by requiring the regime to get rid of its “tools of terror.” U.S. Secretary of State Kerry said that the Assad regime bore the burden of meeting the terms of the resolution. At the same time, Sergey Lavrov, Minister for Foreign Affairs of the Russian Federation, emphasized that:

[T]he responsibility for implementing the resolution did not lay with Syria alone. The text had not been passed under the Chapter VII of UN Charter, nor did it allow for coercive measures. Violations of its requirements and use of chemical weapons by anyone must be carefully investigated. Violations must be hundred per cent proven. It contained requirements for all countries, especially Syria's neighbors, which must report on moves by non-State actors to secure chemical weapons.”

In October 2013, the Member States of the Security Council authorized the establishment of an OPCW-UN joint mission to support, monitor, and verify the destruction of the Syrian chemical weapons program by June 30, 2014. The OPCW-UN joint mission initiated

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213 Id.
214 Id.
215 Id.
216 Id.
217 Id.
preliminary inspections of Syria's chemical weapons arsenal on October 1, 2013. Under OPCW supervision, Syrian military personnel began destroying munitions. The destruction of the Syrian chemical production facilities were completed by October 31, 2013.

However, the destruction of chemical weapons themselves could not be completed by December 31, 2013, as planned. Yet, as international efforts continued to eliminate Syria’s chemical weapons program, a first consignment of priority chemical materials was removed from Syria on January 7, 2014. The chemicals were transported from two sites to the Syrian port of Lattakia and were loaded onto a Danish cargo ship. After loading the chemical weapons, the ship left for international waters and would remain at sea awaiting the arrival of further chemical materials at the Lattakia port. Sigrid Kaag, the Head of the UN team charged with destroying Syria's chemical weapons, briefed the Security Council on the progress as well as logistical and security challenges, confirming that the first quantity of chemical materials loaded onto a Danish ship on January 7, 2014, would be destroyed outside Syria. She highlighted this development as a first important step in an expected process of continued destruction of Syria’s chemical weapons.

219 Id.
222 Id.
223 Id.
225 Id.
Nevertheless, by end of January 2014, only about 4% of the chemical weapons declared by the Syrian government had been removed from Syria.  

Under the UN-backed chemical weapons destruction plan, the Syrian authorities are responsible for packing and safely transporting them to Lattakia. Syria's chemical weapons must be completely removed and destroyed by June 30, 2014. However, Syria has missed several deadlines to remove the chemical weapons, and it claimed it would miss the June 30, 2014, deadline to destroy its chemical arsenal, possibly by several months.

Despite efforts by the international community, violence continued across Syria. Bombing by helicopter gunships was reported in the town of Kafr Zeita in central Hama province in February 2014. Shelling was also reported in eastern Ghouta on the outskirts of Damascus, in the town of Mleiha. By the end of February 2014, hundreds of thousands of Syrian civilians had fled rebel-held parts of the city of Aleppo under heavy aerial bombardment by the Syrian government, which created one of the largest refugee flows of the entire civil war.

While the conflict in Syria is ongoing, international donors have already pledged nearly $2.4 billion to support humanitarian relief efforts that are urgently needed by UN agencies and

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229 Syria Army Captures Village in Hama Province, AL JAZEERA (Feb. 18, 2014), http://m.aljazeera.com/story/201421843521885341.
humanitarian partners which provide life-saving aid to millions of people affected in Syria, as well as in countries hosting Syrian refugees.\textsuperscript{232} Further, the Syria Humanitarian Response Plan (SHARP) and the Regional Response Plan (RRP) launched by UN agencies and partners called for $6.5 billion in aid efforts in 2014.\textsuperscript{233} However, this appeal for $6.5 billion in emergency funding for 2014 has been mostly ignored by Member States, leaving humanitarian relief efforts in Syria unlikely to gear-up during 2014. In addition, humanitarian efforts are failing in Syria because access to those who most need help is threatened, restricted, or denied by the Assad regime.\textsuperscript{234}

As the international community’s negotiations aimed at ending the war have stalled, attacks on Aleppo accelerated at the end of February 2014.\textsuperscript{235} U.S. Secretary of State Kerry restated the Obama administration’s criticism of Russia’s role in the escalating violence.\textsuperscript{236} He stated that Russia was undermining the prospects of a negotiated solution by “contributing so many more weapons” and political support to Assad.\textsuperscript{237} Kerry further states that Russia is, in fact, enabling Assad to double down on his efforts, which is creating an enormous problem.\textsuperscript{238} Since the international community’s efforts to prevent the escalation of violence in Syria have

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{232}] Id.
\item[\textsuperscript{233}] Id.
\item[\textsuperscript{235}] Id.
\item[\textsuperscript{237}] Id.
\item[\textsuperscript{238}] Id.
\end{itemize}
\end{footnotesize}
been unsuccessful, Kerry stated that the United States and its allies would be taking critical decisions on how to respond to the Syrian crisis.\textsuperscript{239}

8.3.2 Responsibility to React

Part of the motivation behind the R2P principle was to shift the legal debate from a right of humanitarian intervention to the international community’s collective responsibility to protect civilians when a state has manifestly failed to protect its population. It was clear that Assad’s regime had failed in this responsibility to prevent and, in fact, refused to protect the civilian population in Syria. On the other hand, preventive diplomatic measures taken by the international community since the Syrian crisis began have not produced results. Russia and China repeatedly argued that the Syrian crisis is an internal matter and that the civil war could be resolved only if the Assad regime is part of the negotiations. Both Russia and China rejected any military solutions for the Syrian crisis. However, the United States, United Kingdom, and France have constantly considered Assad as the principal cause for the atrocities in Syria, and these countries believed any political resolution, with or without coercive measures, should eventually lead to regime change.

Soon after the Syrian uprising in 2011, China’s policy on Syria was outlined by a Chinese foreign ministry spokesperson which stated that:

[S]yria is a country of major influence in the Middle East Region. China believes that when it comes to properly handling the current Syrian situation, it is the correct direction and major approach to resolve the internal differences through political dialogue and maintain its national stability as well as the overall stability and security of the Middle

\textsuperscript{239} \textit{id.}
East. The future of Syria should be independently decided by the Syrian people themselves free from external interference.240

Chinese policy towards the Syrian crisis remained consistent since early 2011.241 Throughout the Syrian crisis, China has not been amenable to any type of foreign intervention in Syria.242 Given the experience of the Libyan intervention and the extended use of the UN mandate by NATO to oust Gaddafi, China has opposed the use of force under R2P. China firmly called for a peaceful solution to the crisis through political dialogue and has constantly exercised its veto against UN resolutions on Syria. Throughout this period, China reaffirmed that its support for a resolution against Syria would not help improve the situation. China requested the international community to respect the independence, sovereignty, and territorial integrity of Syria.243 China does not support armed intervention or regime change in Syria, and it believes that the use of sanctions also does not help resolve this issue appropriately.244 In fact, China insists that, even to implement non-military measures, the principles of the UN Charter and the basic norms of international relations should be strictly observed.245 The Chinese perspective on intervening in internal affairs of other states has been re-iterated during the Syrian crisis, which in turn undermined the effective implementation of responsibility to react as part of protecting civilian population in Syria from mass atrocities.

242 Id.
243 Id.
245 Craven, supra note 244.
From the beginning of the Syrian crisis, Russia has appeared reluctant to directly criticize the Syrian regime, and, in fact, has opposed the application of international sanctions through the Security Council. Being Syria’s traditional partner, Russia actively extended political and weapons support to the Assad regime. During the crisis, Russia has maintained regular direct contact with the Assad regime. Throughout the Syrian crisis, Russia maintained the desire to avoid a repeat of the Libyan situation, where it believed the UN mandate was used for regime change. For example, Russia Foreign Minister Sergei Lavrov stated that “it is not in the interests of anyone to send messages to the opposition in Syria or elsewhere that if you reject all reasonable offers we will come and help you as we did in Liby. It’s a very dangerous position.” Russia continuously stated that the situation in Syria must be resolved by the Syrian themselves without outside interference. Russia categorically opposed any unilateral sanctions or use of force against Syria, stating that any such action against the Assad regime would reduce the opportunities for solving the Syrian crisis.

Due to Chinese and Russian vetoes, and disagreements among Security Council members on the imposition of sanctions against the Assad regime, the Security Council could not exercise the responsibility to react as part of trying to protect Syria’s civilian population. Various civil society organizations have expressed their disappointment over the Security Council’s failure to fulfill the responsibility to react against the Assad regime and protect the Syrian population. Simon Adams, Executive Director of the Global Centre for the Responsibility to Protect, stated that “action to stop crimes against humanity should not be held prisoner to sectional political

246 Marek Menkiszak, Responsibility to Protect Itself? Russia’s Strategy Towards the Crisis in Syria, FINNISH INST. INT’L AFF. 5 (May 2013).
interests and convenient alliances. This veto will cost lives in Syria. In preventing the UN from upholding its R2P, China and Russia have placed themselves on the wrong side of history. Today’s veto is a victory for impunity, inaction and injustice. The long-suffering people of Syria deserve better than this.”

Amnesty International (AI) claimed that countries that wielded their veto power to block resolutions have utterly failed in their responsibilities to protect the Syrian people. Malcolm Smart, AI’s Middle East and North Africa Director, stated: “it is shocking that after more than six months of horrific bloodshed on the streets and in the detention centers of Syria, the governments of both Russia and China still felt able to veto what was already a seriously watered down resolution.”

Don Kraus, CEO of Citizens of Global Solutions, an International Coalition for the Responsibility to Protect member, wrote in an op-ed for the Huffington Post that “there are clearly major human rights violations being committed in Syria. By using their veto power, Russia and China are not meeting their responsibility to protect and are also preventing the rest of the world from doing so. It is clear that the two governments have put national interests ahead of their international responsibility.”

While China and Russia were against any sanctions or intervention against the Syrian regime, the United Kingdom, the United States, and their allies favored the use of force in Syria. The United States, the United Kingdom and France threatened Syria with the use of unilateral force only after the Syrian chemical weapons attack in August 2013. Although the United States and the United Kingdom threatened Syria with possible unilateral force, neither countries

248 UN Security Council Fails to Uphold its Responsibility to Protect in Syria, INT’L COALITION FOR THE RES. TO PROTECT (Oct. 7, 2011).
249 Id.
251 Don Kraus, Russia and China: UN-Responsible on Syria, HUFF. POST (Oct. 6, 11), http://www.huffingtonpost.com/don-kraus/syria-united-nations-veto_b_997055.html.
justified their intervention claims in Syria on R2P. Both countries justified their push for use of unilateral military force against Syria on the basis of the use of chemical weapons by Syria. Thus, the threat to use unilateral military force was mainly about enforcing the prohibition on use of chemical weapons rather than fulfilling R2P.

The British government threatened the Assad regime with the use of unilateral force in order to halt the use and production of chemical weapons, and to protect civilian population. They justified their decision on the ground of humanitarian intervention without referring to R2P. The legal position on military action by the United Kingdom against Syria is set out in UK government’s note dated August 29, 2013: “under the doctrine of humanitarian intervention it would be lawful for the United Kingdom to use force against another state without a Security Council resolution authorizing the use of force, if the Security Council cannot agree to authorize the use force, and if other conditions are met.” The document goes on to list three conditions that would have to be met:

(1) There is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

(2) It must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved;

(3) The proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim.\textsuperscript{254}

On January 14, 2014, the British Foreign and Commonwealth Office submitted an official response to questions posed by the House of Commons Foreign Affairs Committee on the legality of humanitarian intervention without Security Council authorization.\textsuperscript{255} This document reconciled the British legal position with R2P as reflected in 2005 World Summit Outcome Document.\textsuperscript{256} As Goodman noted, the document highlighted three related prepositions:

(1) R2P and the 2005 World Summit Outcome Document involve political commitments aimed at the Security Council taking action;

(2) R2P as set out in the 2005 World Summit Outcome Document does not address the question of unilateral State action in the face of an overwhelming humanitarian catastrophe; and

(3) Unilateral humanitarian intervention is a lawful option when the Security Council fails to take action to stop an overwhelming humanitarian catastrophe.\textsuperscript{257}

The United Kingdom tried to argue that R2P and forceful humanitarian intervention compliment each other, when the Security Council failed to authorize the use of force. In such a situation, the United Kingdom’s position is that international law permits states to use force. Harold Koh agrees with former British Legal Advisor Sir Daniel Bethlehem, who stated that “in

\textsuperscript{254} Id.
\textsuperscript{257} Id.
in the case of the law of humanitarian intervention, an analysis that simply relies on the prohibition of the threat or use of force in Article 2(4) of the UN Charter, and its related principles on non-intervention and sovereignty, is overly simplistic. According to Koh, international law has not progressed since Kosovo. Koh criticizes the Russian and Chinese vetoes as an absolute bar to lawful action. Koh justifies humanitarian intervention in Syria even without Security Council authorization because of the catastrophic humanitarian situation in the country. For Koh, the “per se illegal” rule, or the illegality of humanitarian intervention without Security Council authorization, is plainly overbroad. Koh does not agree with humanitarian intervention as being treated as illegal under international law, except for self-defense. For Koh, a nation could lawfully use or threaten the use of force for genuinely humanitarian purposes, even absent Security Council authorization.

However, although articles 2(4) and 24(1) of the UN Charter give the Security Council a responsibility to act in cases where acts are a threat to international peace and security, it does not make that an exclusive responsibility of the Security Council. Under this view, the UN Charter does not answer the question whether a group of states with genuine humanitarian motives can act collectively with military force to protect civilian populations in cases where the Security Council fails to take an effective action in protecting civilian populations from mass atrocities. The United States, United Kingdom, and France kept open the option of the use of force for humanitarian purposes without the Security Council approval. After the Syrian chemical weapons attack in August 2013, these countries took a similar approach towards the

259 Id.
260 Id.
261 Id.
262 Id.
Syrian crisis as well. Thus, in the face of the use of chemical weapons by Syria and the Security Council’s failure to take action to protect the civilian population in Syria, the United States, United Kingdom, and France openly declared their readiness to take military action against the Assad regime, even without a Security Council resolution.\textsuperscript{263}

The United States’ position did not use humanitarian intervention or R2P as its justification for intended military action against Syria. Instead, the United States cited the Syrian government’s use of chemical weapons as a justification for its use of force.\textsuperscript{264} The legal position of the United States on the use of force without Security Council approval is seen in President Obama’s speech at the UN General Assembly in September 2013 when he stated that:

\begin{center}
\begin{quote}
[W]e live in a world of imperfect choices. Different nations will not agree on the need for action in every instance, and the principle of sovereignty is at the center of our international order. But sovereignty cannot be a shield for tyrants to commit wanton murder, or an excuse for the international community to turn a blind eye. While we need to be modest in our belief that we can remedy every evil, while we need to be mindful that the world is full of unintended consequences, should we really accept the notion that the world is powerless in the face of a Rwanda or Srebrenica? If that’s the world that people want to live in, they should say so and reckon with the cold logic of mass graves. But I believe we can embrace a different future. And if we don’t want to choose between inaction and war, we must get better - all of us - at the policies that prevent the
\end{quote}
\end{center}


breakdown of basic order. Through respect for the responsibilities of nations and the rights of individuals. Through meaningful sanctions for those who break the rules. Through dogged diplomacy that resolves the root causes of conflict, not merely its aftermath. Through development assistance that brings hope to the marginalized. And yes, sometimes - although this will not be enough - there are going to be moments where the international community will need to acknowledge that the multilateral use of military force may be required to prevent the very worst from occurring.  

Obama administration officials have said they would take action against the Syrian government, even without the backing of other countries or the UN, because diplomatic paralysis must not prevent a response to the alleged chemical weapons attack outside the Syrian capital. Before the chemical weapons destruction plan, the United States justified the use of force as a response to the Syrian government’s use of chemical weapons. However, even with the Syrian chemical weapons destruction plan underway, the United States has not retreated from the possibility of using force without Security Council authorization.

However, whether or not Security Council authorization was required to intervene and protect the civilian population in Syria, the use of chemical weapons should not have been the deciding factor. The international community’s focus was on chemical weapons, and this approach has undermined responding to the other serious crimes that have continued in Syria. However, with the Russian proposal to eliminate Syria’s chemical arsenal, the United States

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withdrew the threat of unilateral military intervention against Syria. On September 27, 2013, the Security Council was able to obtain consensus on Resolution 2118, which addressed the framework for the elimination of Syrian chemical weapons.\textsuperscript{268} Nevertheless, as stated by U.S. Senator John McCain, “by drawing a ‘red line’ on chemical weapons, President Obama gave the Assad regime a green light to use every other weapon in his arsenal with impunity.”\textsuperscript{269}

8.3.3 Responsibility to Rebuild

Of course, at this point, trying to predict rebuilding efforts in Syria may be imprudent. The international community remains dedicated to saving Syrians from further chemical weapons attacks. However, it is unlikely that chemical weapons removal alone will solve the underlying issues of this conflict. In fact, the international community has so far failed to protect the Syrian civilian populations from the atrocities of the Assad regime. The conflict in Syria is ongoing and is likely to continue for some time.\textsuperscript{270}

The Syrian crisis has resulted in a tragic impact on development performance in Syria through destroying economic, social, and human capital, with unbearable losses for the Syrian population. As a result of continued fighting, Syria’s economy has taken a devastating blow. About 75 percent of the manufacturing facilities in Aleppo are no longer operating.\textsuperscript{271} The total loss to the Syrian economy from the crisis by the end of 2012 is estimated at $ 48.4 billion.\textsuperscript{272}

\textsuperscript{268} S.C. Res. 2118, supra note 207.
\textsuperscript{269} Matt Williams, John McCain: Obama's Red Line on Syria Written in Disappearing Ink, THE GUARDIAN (May 5, 2013), http://www.theguardian.com/world/2013/may/05/john-mccain-obama-syria-red-line.
\textsuperscript{270} Amnesty Int’l, Syria: Failure to Uphold UN Resolution Requires Decisive Council Action (Apr. 30, 2014).
\textsuperscript{272} Rabie Nasser, Zaki Mehey & Khalid Abu Ismail, Socioeconomic Roots and Impact of the Syrian Crisis, SYRIAN CENTRE FOR POL’Y RES. (Jan. 2013).
Public and private investments were adversely affected by the crisis. The unemployment rate is also on the rise. By end of 2012, the unemployment rate had increased by 24.3%.

In addition to the economic impact, the Syrian crisis affected the lives of over 9 million people since the start of the crisis in 2011, including 6.5 million people who are now displaced.\textsuperscript{273} According to UN reports, as many as 2.5 million people are stranded in hard-to-reach areas, including in besieged towns where access to aid has been limited or non-existent.\textsuperscript{274} Some two million people have fled the country and are now living with host families and in refugee sites in Lebanon, Jordan, Iraq, Turkey and Egypt. The UN Humanitarian Chief Valerie Amos, who visited displaced families in Syria in January 2014, stated that Syria is the biggest humanitarian crisis the world faces.\textsuperscript{275}

Although the Syrian crisis has been ongoing for years, the UN Peacebuilding Commission has not discussed any post-conflict rebuilding strategies in Syria. In fact, no Member States have raised that issue in any serious way. If Assad prevails and remains in power, UN-backed rebuilding efforts would confront a number of obstacles, including lack of support from important Member States. In such a case, contributions from traditional donors, such as the United States, the United Kingdom, and the EU, would be highly unlikely. However, since the conflict is not over, and in light of how the conflict has unfolded, serious doubts have been raised about the likelihood of effective rebuilding efforts that will eventually take place in Syria.


\textsuperscript{274} \textit{Id.}

\textsuperscript{275} \textit{Id.}
8.4 Conclusion

The Syrian crisis, now recognized as one of the worst humanitarian tragedies of the 21\textsuperscript{st} century, has also been accepted as the most recent R2P controversy.\textsuperscript{276} The situation in Syria has not changed even after the implementation of the destruction of chemical weapons in the country. All discussions on confidence-building measures and allowing aid to affected areas ended without any success. The Geneva talks on a political resolution to the conflict and improving humanitarian conditions resumed on January 22, 2014, but ended without any agreement.\textsuperscript{277} This failure was due to the Syrian opposition groups and the international community’s pressure to oust Assad from power. The Syrian government refused to engage in any discussions on transition plans, and emphasized the need to fight against terrorism.\textsuperscript{278} The Syrian government continued its suppression against opposition groups and civilian populations living in rebel held areas.\textsuperscript{279} Clashes intensified between the rebel groups and made the situation even worse. In addition to the escalating violence in the country, Syria could not abide by the deadlines of the chemical weapons destruction plan.\textsuperscript{280} After missing the February 5, 2014, deadline for handing over all chemical weapons stockpiles, Syria accepted a new April 27 deadline.\textsuperscript{281}


\textsuperscript{278} Id.


Despite the development and use of R2P in Libya and Côte d’Ivoire, the Syrian crisis has so far demonstrated that R2P is still burdened by many unresolved problems. In fact, the R2P principle seems to have mattered very little in how this crisis has unfolded. Years have passed
since the Syrian crisis began and reactions to this crisis have been mixed, certainly far from anything resembling a consensus, let alone a clear international legal situation.

Analysis of the state practice during the Syrian crisis revealed disagreements on whether Syria had fulfilled its responsibility to protect its civilian population. The ongoing mass atrocities against civilians in Syria warrant the application of the R2P principle. However, China, Russia and other like-minded countries took the position that the Syrian crisis was an internal matter, which the Syrian government was capable of handling. Meanwhile, other members of the BRICS - Brazil, South Africa, and India - were also skeptical whether R2P had been triggered in Syria. It seems that these Member States were upholding the sovereignty and territorial integrity of Syria, despite well-reported mass atrocities. On the other hand, the United States, the United Kingdom, and like-minded countries demanded that the Syrian government stop atrocities against civilians. This same situation occurred during the Darfur crisis, where Member States could not agree whether Sudan had failed to protect its population. However, during the Libyan and Côte d’Ivoire crises, Member States eventually agreed that these respective states’ failed to protect their population. Similar to the Darfur crisis, state practice during the Syrian crisis thus revealed a greater recognition of sovereignty, territorial integrity, and non-intervention principles rather than R2P. However, in light of chemical weapons possessed and used by the Syrian regime, Evans stated that the proven use of chemical weapons would be a profound breach of Syria’s responsibility to protect.288

Nevertheless, throughout the Syrian crisis, the Security Council made a number of efforts to implement different preventive measures to protect civilians. Despite all such efforts, however, three Security Council resolutions were vetoed by Russia and China. Neither country

288 Gareth Evans, The Moral Case on Syria When the Law is Lacking, AUSTL. FIN. REV. 1 (Aug. 29, 2013).
was willing to impose any direct preventive measures, such as sanctions or air travel bans, claiming that such measures violated territorial integrity and state sovereignty. Member States objected to adopting the R2P framing in UN decisions, and not even a condemnatory statement could be agreed upon in the Syrian crisis. Although state practice in the Libyan and Côte d’Ivoire crises indicated that R2P influenced how states think and talk about humanitarian intervention, the state practice in the Syrian crisis did not reflect this influence. State practice of important countries during the Syrian crisis emphasized sovereignty, territorial integrity, and non-intervention even in the face of mass atrocities.

Since all preventive efforts by regional and international actors failed to stop Syrian atrocities, and in the light of Syria’s use of chemical weapons, the United States, the United Kingdom, and France favored the use of military force in Syria. However, neither the United States nor the United Kingdom justified their intervention claims in Syria on R2P. The United States justified its claim on the basis of the use of chemical weapons by Syria. This state practice, in fact, is a departure from the R2P framing. On the other hand, these countries were ready to use military force against Syria even without Security Council authorization. However, India, China, Russia and like-minded countries opposed such a unilateral military actions against Syria on the basis of non-intervention, sovereignty and the territorial integrity of Syria. This controversy also marked a return to the traditional controversy in international law on whether Security Council authorization is required to use force for humanitarian intervention purposes. During the crises in Darfur, Libya and Côte d’Ivoire, this controversy did not arise. Re-emergence of this traditional controversy in international law is a failure of R2P, especially to resolve this long-standing controversy in international law on the use of force.

Chinese and Russian vetoes suggested that these countries were working to protect an important regional ally. Although China and Russia did not block the use of force in Libya or Côte d’Ivoire, their vetoes on resolutions against Syria demonstrated their suspicion about a possible misuse of Security Council authority based on what happened in the Libyan and Côte d’Ivoire episodes. Despite the fact that many other countries favored such stronger international intervention, the Security Council failed to take any action because of Chinese and Russian vetoes, and this outcome suggests that the R2P’s close association with the Security Council needs to be re-thought.

However, the Security Council’s unanimous adoption of Resolution 2118 demanding verification and destruction of chemical weapon stockpiles in Syria demonstrated a positive sign of agreement among the UN Member States, at least regarding the production and usage of chemical weapons by Syria. Although Member States were united in acting to eliminate Syria’s chemical weapons, they were not ready to provide robust humanitarian assistance for victims in Syria. In fact, the UN reportedly failed to collect the targeted budget for much-needed humanitarian assistance for thousands of Syrians. Although the UN and many other non-governmental organizations have issued periodic reports on the crisis, none has provided a sustainable solution to the humanitarian crisis or relief efforts in Syria. The Security Council has not wielded real effort to address the needs of the trapped civilian population in Syria. The majority of the Syrian population, outside of government-controlled areas, has remained in urgent need of medical and humanitarian assistance. Even the main humanitarian relief providers, such as OXFAM, Red Cross and Red Crescent, and Save the Children are not present in areas of urgent need, in particular because of the security, safety, and access issues. The international relief efforts are delayed not only because of the bureaucratic hurdles, but also of
inaccurate needs assessment, and the absence of an effective Security Council mandate for cross-border relief. On the other hand, although states may support humanitarian relief efforts, how the Security Council might act with impact without the consent of the Syrian regime is not clear.

The ongoing humanitarian crisis in Syria poses major challenges to the R2P principle. As the Syrian crisis demonstrates, instances of mass atrocities and human rights violations, similar to historical atrocities in both Bosnia and Rwanda, still persist. One of the main reasons for the continuation of mass atrocities in Syria is inaction by Security Council. Apart from the R2P principle’s own uncertainties regarding its scope, the lack of real consensus between some Member States has further hindered decisive action under R2P to halt ongoing atrocities in Syria. The international community, thus, confronted the very familiar controversies about sovereignty and non-intervention and the need to protect civilian population from human rights violations. Simply stated, no consensus could be reached among the Member States on what response should be implemented to protect civilians in Syria. Similar uncertainties confronted pre-R2P humanitarian intervention context as well. Thus, state practice throughout the Syrian crisis revealed that R2P has not changed existing international law.
9.1 Introduction

This thesis analyzed whether the emergence and development of the R2P principle has changed international law on addressing large-scale atrocities. It answered this question by examining doctrinal aspects of international law and state practice on such humanitarian crises, before and after the R2P principle appeared in 2001. The international legal history on this issue involves the gradual convergence of the principles of sovereignty and non-intervention, the prohibition on the threat or use of force, international humanitarian law, and international human rights law. The international legal rules in each of these areas has changed over time, creating controversies in terms of the rights and obligations of states. These problems came to a head in the post-Cold War period in the international community’s reactions to the humanitarian crises in Rwanda and Kosovo. After these episodes, there was a great desire to change international law so that responses to large-scale atrocities could be both legal and legitimate. This desire led to the development of the R2P principle, which attempted to re-formulate how states approached humanitarian crises as a matter of international law. However, this thesis concludes that the R2P principle has not changed international law on humanitarian crises, leaving the international community facing essentially the same controversies that existed at the end of the 20th century.

In particular, state practice after the creation of the R2P principle exhibited the same controversies on humanitarian intervention evident in the pre-R2P era, especially with respect to the use of force for humanitarian purposes. State practice under the R2P principle’s “responsibility to react” has not resolved the long-standing controversy over the legality of
international law during the 20th century made humanitarian intervention an increasingly controversial issue. Developments after World War II set up the tensions that characterized this issue during the Cold War. On the one hand, the UN Charter re-emphasized the traditional principles of sovereignty and non-intervention, supplemented by a new prohibition on the threat or use of force by states. These rules led many to conclude that states could not use force for humanitarian reasons without authorization from the Security Council exercising its Chapter VII powers. On the other hand, international law began to reflect the importance of protecting civilians in armed conflict and respecting the human rights of people during peace. These rules informed arguments that, in the context of large-scale atrocities, the principles of sovereignty, non-intervention, and the prohibition on the use of force and the failure of the Security Council to act should not prevent states from taking action to mitigate or stop humanitarian tragedies.

The problems related to these two positions became clear during the Cold War. Although humanitarian intervention authorized by the Security Council did not create much doctrinal controversy, the Security Council was not a robust organ of the UN during the Cold War because of the overarching geopolitical conflict between the superpowers. As Chapter 2 discussed,
humanitarian interventions involving the use of force but not authorized by the Security Council were controversial in international law, both doctrinally and with how state practice unfolded. With the significant changes in international politics that happened in the early post-Cold War period, the relationships in international law between sovereignty and non-intervention, the prohibition on the use of force, human rights, and humanitarian law became more unstable and created heightened tensions in terms of rights and obligations concerning humanitarian crises. In these circumstances, the international community’s responses in the Rwandan and Kosovo crises created serious disagreements on the status of humanitarian intervention in international law. The international community’s actions in Rwanda, which did not violate international law on the use of force but were nonetheless considered morally illegitimate, and NATO’s use of force in Kosovo, considered by many to be illegal but legitimate, motivated leaders and experts to seek a better way to address large-scale atrocities in international law. The R2P principle became the answer to this challenge.

### 9.2.1 Doctrine: Controversy from the Convergence of Four Bodies of International Law

As noted above, the doctrinal case during the Cold War against international law recognizing a state’s right to use force to address humanitarian atrocities without Security Council authorization rested on the combination of the principles of sovereignty, non-intervention, and the prohibition on the threat or use of force. The only exception permitting the use of force for humanitarian reasons, as opposed to self-defense, was the Security Council’s power to authorize states to use force to address a threat to international peace and security. Developing countries, especially those emerging from colonial rule, and socialist states strongly backed this doctrinal understanding of international law.
However, the development of international human rights law during the Cold War provided a doctrinal justification for the use of force for humanitarian purposes in the absence of Security Council authorization. Following the establishment of the UN, the international legal protection for human rights underwent dramatic development. These developments included adoption of many international human rights instruments, such as the UDHR, ICCPR, and ICESCR. With the steady advance of international human rights law, support grew for the proposition that a state could no longer plead the principles of sovereignty and non-intervention as a bar to intervention by the international community when that state abuses its sovereign power and massively violates human rights.

Similarly, international humanitarian law developed significantly in the post-World War II period (e.g., the four Geneva Conventions of 1949), including in the context of non-international armed conflicts (e.g., Additional Protocol II of 1977). The evolution of international humanitarian law contributed to advocacy for humanitarian intervention against large-scale atrocities during armed conflicts, even in contexts not involving Security Council authorization. For many, international human rights law together with international humanitarian law supported the claim that international law permitted humanitarian intervention in response to large-scale atrocities, even in absence of Security Council action.

**9.2.2 State Practice: The Road to the Rwandan and Kosovo Crises and the Desire for Change in International Law**

Generally speaking, state practice during the Cold War demonstrated reluctance on the part of states using force at least in part for humanitarian purposes to justify their actions on a “doctrine” of humanitarian intervention. Instead, the preferred argument was self-defense, no
matter how weak the argument was in the context in question. This state practice supported those claiming international law did not recognize humanitarian intervention as an independent right to use force absent Security Council authorization. However, the controversy about whether such a right existed persisted throughout the Cold War, and increased in intensity with the further development of international human rights and humanitarian law.

After the Cold War ended, this controversy came to a head through the international community’s responses to the humanitarian crisis in Rwanda and Kosovo. The UN and the international community failed to take timely and decisive actions to address genocide in Rwanda. This failure did not involve, however, the violation of any international legal obligations on states to intervene or violation of the limits on the use of force imposed by international law. However, the international community’s response to genocide in Rwanda was widely considered a moral tragedy, even if it did not arguably violate international law. Concerning the Kosovo crisis, NATO intervened with military force without Security Council authorization, triggering the old debate about whether international law recognized humanitarian intervention as an exception to the prohibition on the use of force and the authority the Security Council to authorize states to use force. Many leaders and experts considered the NATO military intervention as a technically illegal but legitimate action to stop mass atrocities and protect civilians.

The Rwandan and Kosovo experiences encouraged leaders, such as UN Secretary-General Kofi Annan, to argue a better approach to large-scale humanitarian atrocities was needed. Annan challenged states and non-state entities to work towards strategies that would help the international community avoid illegitimate and illegal actions in responding to humanitarian atrocities. The ICISS took up this challenge and proposed the R2P principle as the
answer to the dilemmas the Rwandan and Kosovo crises highlighted concerning international law and humanitarian crises.

9.3 The R2P Principle: Key Doctrinal Elements Purporting to Represent Change in International Law that Did Not Change International Law

As conceived by the ICISS and explained in Chapter 3, the R2P principle consists of three responsibilities: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. The ICISS and proponents of the R2P principle claimed that the principle was different from what came before, especially in emphasizing that responses to humanitarian atrocities involve more than the question about the use of force. The claims that the R2P principle is new and different because of its three responsibilities becomes an important baseline for analyzing whether it has, in fact, changed international law.

9.3.1 Responsibility to Prevent

The responsibility to prevent is considered by many R2P proponents as the most important of the three responsibilities the ICISS identified. The R2P principle focuses on the responsibility of each state prevent atrocities. However, R2P’s responsibility to prevent did not represent a change in international law because pre-R2P international human rights law and international humanitarian law already required states to prevent atrocities. Failures by states to prevent atrocities in the pre-R2P period meant the international community got involved in efforts to prevent crises from getting worse, which meant sovereignty and non-intervention posed no bar to international efforts to prevent atrocities. For example, many efforts were made within and outside the UN to try to address atrocities in Rwanda and Kosovo peacefully, a pattern seen in humanitarian crises during the Cold War as well. Further, neither the ICISS report
nor the World Summit Outcome Document produced clarity on what international law requires in terms of prevention from states watching atrocities unfold in other countries.

9.3.2 Responsibility to React

The responsibility to react in the R2P principle attempted to confront the controversies in international law on humanitarian intervention, especially the controversy about the use of force for humanitarian purposes in the absence of Security Council authorization. While sovereignty and non-intervention remain important principles, the responsibility to react highlighted the international community’s responsibility to take action in cases of mass atrocities when prevention does not succeed. However, neither the ICISS report nor the 2005 World Summit Outcome Document resolved pre-existing disagreements about the use of force for humanitarian purposes. The ICISS report acknowledged the Security Council’s authority in this context, but, in convoluted language, left open the possibility that a state or group of states could legitimately and legally use force for humanitarian purposes without Security Council approval. The World Summit Outcome document only referred to the need to obtain Security Council authorization, which many viewed as a different way of avoiding the long-standing question the ICISS itself awkwardly tried to navigate. Therefore, the responsibility to react did not change international law doctrinally because (1) it reflected many pre-existing components of international law on the use of force and armed conflict, and (2) did not resolve the controversy over whether international law permits military intervention for humanitarian purposes without Security Council authorization.
9.3.3 Responsibility to Rebuild

The responsibility to rebuild attempted to address post-conflict rebuilding efforts, an issue that was not prominent in pre-R2P international legal discussions about responding to humanitarian atrocities. However, the ICISS report itself expressed skepticism about the willingness of states to accept sustained rebuilding responsibilities given the weak state practice that existed on this issue. Further, the ICISS report does not clearly state who or what has the responsibility to rebuild, leaving the scope and substance of this responsibility in doubt. The World Summit Outcome Document did not refer to the responsibility to rebuild when it addressed R2P. Instead, it addressed post-conflict rebuilding in another section and called for establishment of a UN Peacebuilding Commission. Thus, like the ICISS report, the World Summit Outcome Document identified the importance of post-conflict rebuilding but did nothing to illuminate the relationship between international law and a “responsibility to rebuild.”

9.4 R2P in Action from 2001 through 2013: No Change in International Law

Although the R2P principle was introduced to remedy pre-R2P controversies on humanitarian atrocities and international law, the state practice that followed 2001 ICISS report has failed to demonstrate any meaningful change in international law on humanitarian intervention. In Chapters 4-8, this thesis examined state practice both in general terms (Chapter 4) and in specific case studies (Chapters 5-8) in order to detect states changing their behavior in accordance with the R2P principle’s component elements. In terms of customary international law, the thesis tried to assess whether R2P was reflected in general and consistent state practice supported by a sense that R2P was legally binding on states. In treaty law terms, did state practice reflect governments interpreting the UN Charter according to the precepts of R2P? What
this thesis found was state practice that repeatedly resembled state practice from the pre-R2P era, indicating that R2P has not changed international law.

9.4.1 Responsibility to Prevent

State practice related to the responsibility to prevent reinforced each state’s long-standing international legal obligations to prevent atrocities in their territories - obligations grounded in pre-R2P bodies of international law on human rights and armed conflict. R2P-related references to the responsibility to prevent in state practice (e.g., as happened in Darfur, Libya, Côte d’Ivoire, and Syria) relied on this pre-existing law, indicating R2P did not change substantive obligations on preventing atrocities already part of international law. In cases where states failed to comply with these obligations, state practice reflected efforts inside and outside the UN to prevent atrocities from getting worse through various means not involving the use of force. However, these types of efforts were routinely made in similar situations in the pre-R2P period, as illustrated by efforts made in the Rwandan and Kosovo crises. This consistent pattern makes it difficult to conclude that R2P prompted any meaningful change in the quantity of prevention efforts or how states perceived international law in this prevention context. Further, most of the atrocity contexts analyzed in this thesis involved failed prevention efforts, which suggests that R2P did not significantly improve the quality of prevention activities the international community undertook.

9.4.2 Responsibility to React

State practice after the emergence of the R2P principle reflected the same controversies on humanitarian intervention as existed in the pre-R2P era. Even though there has not been another Kosovo-type controversy since R2P was formulated, the responsibility to react has not
resolved disagreements in international law about the use of force for humanitarian purposes without Security Council authorization. For example, Russia, China, and other countries have consistently argued that force can only be used under R2P with Security Council authorization. By contrast, the United States, United Kingdom, and their allies maintained that using force for humanitarian reasons without Security Council approval remained a legal option in limited atrocity situations, arguments most clearly seen during the Syrian crisis. These two positions also characterized the pre-R2P debate on international law and the use of force in humanitarian interventions. One attempt to avoid this problem was the RN2V proposal, which aimed at securing Security Council action and avoiding the controversy that emerges when the Security Council cannot respond effectively. Even though abstentions by Security Council members on votes involving R2P issues (e.g., Chinese and Russian abstentions in the authorizations to use force against Libya and Côte d’Ivoire) provides some evidence of RN2V in action, RN2V is not a rule of international law that changes the manner in which the Security Council functions under the UN Charter.

In addition, the “regime change” controversies that erupted after the Security Council authorized the use of force under R2P in the Libya and Côte d’Ivoire cases have overwhelmed the RN2V idea and threatened to return the Security Council to what it endured during the Cold War - the inability of the five permanent members to agree on authorizing the use of force for any reason. In this context, the RWP proposal has made no headway politically and does not constitute an international legal principle applicable to uses of force authorized by the Security Council. The arguments and counter-arguments reflected in the Syrian case study about whether international law permits states under R2P to use force for humanitarian purposes without
Security Council authorization are essentially what was debated during the Cold War and the immediate post-Cold War period about humanitarian intervention.

### 9.4.3 Responsibility to Rebuild

Of the three R2P responsibilities, the responsibility to rebuild was the one with the weakest linkages to pre-R2P international law, meaning this responsibility had the longest road to travel before it could change international law. The road is still long. State practice on the responsibility to rebuild reinforces the skepticism the ICISS report expressed in including this responsibility in the R2P principle. As this thesis shows, time and again the international community’s efforts at post-atrocity rebuilding have been inadequate, which reflects political unwillingness by states to provide sustained and sufficient support for rebuilding efforts. This unwillingness demonstrates that states do not believe that international law imposes any specific obligations on them to contribute meaningfully to rebuilding activities in post-atrocity societies.

### 9.5 Conclusion

When atrocities occur, international lawyers advising governments, working with the Security Council or advocating through non-governmental organizations, now frequently use the language and concepts associated with the R2P principle. In that sense, R2P has changed the rhetoric of international law concerning how the international community talks about humanitarian atrocities. State practice sharpened the R2P idea in narrowing its application to situations involving genocide, crimes against humanity, ethnic cleansing, and war crimes and rejecting its use in other situations, such as responding to humanitarian problems created by natural disasters. However, as this thesis demonstrates, neither the doctrinal aspects associated
with R2P nor the state practice under the principle reflect material change in international law relevant to addressing large-scale atrocities.

What started with a challenge from UN Secretary-General Kofi Annan to the international community to find a better way to calibrate sovereignty and the imperative to protect people from atrocities became, over the first decade of R2P’s existence, an idea that, according to UN Secretary General Ban Ki-moon, merely reflected long-standing principles and practices in international law and the UN. What changed between Annan’s future-looking challenge and Ban’s conservative perspective was not international law. Rather, this change reflects the realization that the turn-of-the-century optimism about resolving controversies associated with responding to atrocities lost credibility even as states and the UN talked more and more about R2P. The Syrian crisis - the latest major R2P episode - has involved both the failure of the international community to respond adequately (echoes of Rwanda) and controversies about the use of force without Security Council authorization (echoes of Kosovo). This observation captures how little things have changed since the two seminal events that prompted the R2P effort in the first place.
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