Responsibility to Protect
- A Legal Principle in International Law?

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Abstract

The principle responsibility to protect (R2P) was first coined in the International Commission on Intervention and State Sovereignty’s report in 2001 as a response to the many cases of genocide, ethnic cleansing, mass internal displacement of populations and humanitarian crises that occurred in the 1990s. The principle establishes the idea that states have an inherent responsibility to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. The principle further suggests that the international community, through the Security Council, should take timely and decisive collective action when national authorities manifestly fail to protect their populations from said crimes. The principle is a controversial subject and has given rise to considerable discussion in the international debate. Ultimately, the controversy surrounding R2P is between two integral pillars of international law: the prohibition of the use of force on the one hand and the respect for human rights on the other. Despite many efforts and discussions, the meaning and scope of R2P is subject to a great deal of ambiguity. R2P has been chosen as the subject for this study in order to find out if the concept has conveyed any legal implications. The chosen subject is of significance because it seeks to identify the possible legal implications that follow from R2P and to clarify some parts of the ambiguity that surrounds the principle. The purpose of this thesis is to attempt to answer the question of whether R2P has become an accepted legal principle in international law. The thesis answers the research question through examining the current legal status of the R2P doctrine, in terms of its inherent first and third pillars.

The study presents a brief historic development of humanitarian intervention throughout the twentieth century and how it evolved into the R2P doctrine. The study further accounts for a description of the principle and its key material documents underpinning it, and particularly focuses on the Libyan and Syrian conflicts that arose in 2011, as they suffice as relevant examples for the R2P principle. The findings of the study are provided mainly through an analysis of relevant international treaties although emphasis is also placed on state practice. The study concludes that R2P has not yet become an accepted legal principle in public international law due to the lack of consistent state practice and intention, and rather positions R2P as a source of soft law.
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<th>Abbreviation</th>
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<tbody>
<tr>
<td>BRICS</td>
<td>Brazil, Russia, India, China and South Africa</td>
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<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IHL</td>
<td>International humanitarian law</td>
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<td>ISIL</td>
<td>Islamic State of Iraq and the Levant</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>P3</td>
<td>France, the United Kingdom and the United States</td>
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<td>P5</td>
<td>The five permanent members of the UN Security Council; China, France, Russia, the United Kingdom and the United States</td>
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<td>R2P</td>
<td>Responsibility to protect</td>
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<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNAMIR</td>
<td>United Nations Assistance Mission for Rwanda</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSMIS</td>
<td>United Nations Supervision Mission in Syria</td>
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<td>US</td>
<td>United States of America</td>
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1 Introduction

1.1 Background

During the 1990s the world was faced with a series of humanitarian crises, cases of genocide, ethnic cleansing and mass internal displacement of populations. When the United Nations (UN) failed to effectively act to prevent the mass atrocities committed against the civilians in Rwanda and Srebrenica, the question of humanitarian intervention for human protection purposes became a heavily debated topic in the international debate. The genocides and massacres of Rwanda and the Balkans raised the question of when, if ever, it is allowed for states to take coercive military action against another state for the protection of civilians at risk of mass atrocity crimes. After the North Atlantic Treaty Organisation’s (NATO) unauthorised intervention in Kosovo in 1999, the controversy of humanitarian intervention reached its culmination in the international debate. The unauthorised intervention raised questions regarding the legitimacy of external humanitarian intervention in a sovereign state. By the end of the 1990s, the tension between humanitarian intervention for human protection purposes and the respect for the principle of sovereignty of states became a major topic in the international debate.

It was in light of these discussions that the International Commission on Intervention and State Sovereignty (ICISS) was formed with the aim to find a political common ground on how to approach the issue of humanitarian intervention. In 2001, the Commission released its report “The Responsibility to Protect”\(^1\), coining the term ‘responsibility to protect’ (R2P) and setting the intellectual groundwork for R2P. By virtue of the principle of sovereignty, all states are equal and independent and enjoy territorial integrity and the right to freedom from external interferences. The ICISS report ultimately offered a shift in the understanding of sovereignty and implied that states have a responsibility to protect the basic human rights of their citizens. Instead of understanding sovereignty as a state’s right to operate in whichever manner it desires, the Commission outlined sovereignty as the state’s responsibility to ensure the protection of its populations’ human rights. The principle of R2P implies that states have a responsibility to protect their populations from grave human rights violations. However, if a state proves itself unwilling or unable to protect its population, the doctrine proposes that the international community has a subsidiary responsibility to protect the populations at risk – and in extreme cases – with the use of coercive military action. At the 2005 UN World Summit, R2P was unanimously endorsed and adopted by the UN member states in the World Summit Outcome Document\(^2\). In the Outcome Document, the member states agreed that they have an inherent responsibility to protect their citizens from genocide, war crimes, crimes against humanity and ethnic cleansing. Furthermore, the member states expressed their preparedness to take timely and decisive collective action, should another state be manifestly failing to

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\(^1\) Report of the International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, December 2001, Published by the International Development Research Centre, Ottawa, Canada.

protect its citizens from the four atrocity crimes. The framework of R2P consists of three pillars as outlined in the former UN Secretary-General Ban Ki-moon’s report “Implementing the Responsibility to Protect”\(^4\). According to the report, the first pillar of R2P establishes states’ responsibility to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. The second pillar concerns the commitment of the international community to assist states to protect their populations. Lastly, the third pillar of R2P entails the responsibility of the international community to respond in a timely and decisive manner when another state is manifestly failing to protect its population. It is within the third pillar of R2P that humanitarian intervention may be justified to help protect populations at risk.

Last year the principle reached its 15-year anniversary but the controversy surrounding humanitarian intervention still remains intact. The conflicts in Libya and Syria, arising in 2011 as a consequence of the ‘Arab Spring’ are examples of recent and partly ongoing conflicts where calls for R2P have been made. NATO’s military intervention in Libya in 2011 is an illustrative example of when R2P has successfully been invoked and implemented. But as the conflict in Syria proceeds into its sixth year, the UN has as of yet not managed to effectively intervene against the atrocities being committed to avert the human suffering. The contrasting outcomes in terms of the UN’s response in regard to the Libyan and Syrian conflicts suggest that the issue of humanitarian intervention remains a controversial subject. Despite the formal UN endorsement of the principle, R2P remains a debated and disputed subject among many states and scholars. Ultimately, at the very heart of the controversy surrounding R2P lies the dilemma between the respect for state sovereignty and the protection of civilians from mass atrocity crimes. Without a doubt, the controversy and most sensitive part of R2P lies in its third pillar, that is allowing resort to the use of force in the most extreme cases.

1.2 Objective and research question

The third pillar of R2P expresses that the international community, acting through the Security Council, should take timely and decisive collective action when national authorities are manifestly failing to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. R2P as a norm has proven to be a contested issue enclosed with ambiguity regarding its legal status and meaning. R2P as the subject of the study has been selected because of its significance and relevance to the ongoing conflict in Syria. To address some of the ambiguity surrounding R2P, as well as to examine its potential legal implications, is particularly significant in order to draw a constructive conclusion of the UN


\(^4\) Report of the UN Secretary-General, Implementing the responsibility to protect, A/63/677, 12 January 2009, United Nations General Assembly.
Security Council’s actions and inactions regarding the ongoing conflict in Syria. The problem regarding R2P is ultimately one between two integral pillars of international law: the prohibition of the use of force on the one hand and the respect for human rights on the other. In light of this dilemma, this study aims to examine whether R2P forms part of positive international law and to assess the legal status of the principle. The main research question is thus whether R2P has become an accepted legal principle in international law. The answer to this question is sought in the first place with respect to the principle’s first and third pillars.

The study will attempt to answer the research question by positioning R2P in the formally recognised sources of international law as defined in Article 38(1) of the Statute of the International Court of Justice (ICJ Statute). I will attempt to anchor the first and third pillars of R2P in the primary sources of international law in order to assess the legal status of R2P and whether it has reached the status of a legal principle. The purpose of evaluating the legal status of R2P is to understand to what extent, if any, legal implications emerge from the R2P doctrine.

1.3 Delimitations

As mentioned above, the framework of R2P consists of three pillars. This study will exclusively focus on the first and third pillars of R2P in order to answer the research question. Considering that most of the controversy surrounding R2P concerns its third pillar, the analysis will accordingly chiefly focus on this question, namely the responsibility to protect in relation to the use of force. Moreover, the thesis will refer to R2P as a norm, principle and doctrine interchangeably.

Further, this thesis will be delimitated to the scope of R2P as endorsed at the 2005 Summit outcome rather than the wider scope of R2P as suggested in the ICISS report. The ICISS report proposed that any “large scale loss of life, actual or apprehended”5 may justify a military intervention for human protection purposes. At the World Summit is was however unanimously agreed that R2P’s scope only subsumed the four atrocity crimes mentioned above. The scope as agreed per the Outcome Document has been selected in this study as it can be considered to constitute a superior material source to the ICISS report, because of the unanimous agreement of more than 170 Heads of State and Government present at the Summit, which suggests that states regard only the four atrocity crimes as falling within the scope of R2P. Since the scope agreed per the Outcome Document suggests a wider recognition, it is therefore more conducive to proceed from this scope as the point of departure.6

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5 ICISS, p. 32.
6 See e.g. statements of Brazil, UN Doc. A/63/PV.97, p. 12; Morocco, UN Doc. A/63/ PV.98, p. 13; China, UN Doc. A/63/PV.98, p. 13; Pakistan, UN Doc. A/63/PV.98, p. 3; Singapore, UN Doc. A/63/PV.98, p. 7; Sweden (speaking on behalf of the EU), UN Doc. A/63/ PV.97, p. 4; France, UN Doc. A/63/PV.97, p. 9.
1.4 Method and material

This study will apply the traditional legal method of analysing the formally recognised sources of public international law as defined in Article 38(1) of the ICJ Statute in order to answer the objective and the research question. Article 38(1) of the ICJ Statute lists international treaties, customary international law and general principles of law as the primary sources of law, and judicial decisions and doctrine as the subsidiary sources of law. A balance between the use of primary and subsidiary sources of international law will be pursued in the study. The thesis will analyse the objective and research question through a de lege lata perspective, i.e., to identify the actual status of R2P in contemporary international law. Because the general discourse on R2P and the practice of states tend to diverge, the study aims to disclose the legal status of R2P de lege lata. The thesis will analyse international treaties, UN Security Council resolutions, judgments and advisory opinions of the International Court of Justice (ICJ), UN documents and reports, academic doctrine and articles, and foremost, the statements and practice of states. State practice is conducive in formulating and identifying legal norms of customary international law and is especially conclusive in answering the research question. The practice of states even outside the UN context will be particularly emphasised in this study, as state practice is inconsistent with the general discourse and the formal UN endorsement of the R2P principle. The chosen methodology is relevant because the thesis will chiefly focus on international agreement and customary international law as sources of law.

The material used will consist of both primary and subsidiary sources of international law. As for the primary sources, international treaties such as the Charter of the United Nations7 (UN Charter), the Convention on the Prevention and Punishment of the Crime of Genocide8 (Genocide Convention), the Geneva Conventions9 and their Additional Protocols10 and the Rome Statute of the International Criminal Court11 (Rome Statute) will be analysed. Furthermore, the practice and statements of states as well as Security Council and General Assembly resolutions will be used and analysed. Especially the framing of the international community’s reactions and responses to the recent conflicts in Libya and Syria will be analysed as they are regarded as “test cases” for the R2P doctrine. As for the subsidiary sources, judgments and advisory opinions of the ICJ, along with non-binding UN documents and reports, academic literature and articles will be interpreted for the study. The non-binding report of the ICISS, published in 2001, along with the 2005 World Summit Outcome

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9 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
Document will be presented and examined as they constitute the starting point for R2P as well as its most important intellectual groundwork. The thesis will also present the views of some of the leading scholars on the subject for further interpretation of the primary and secondary sources of international law presented in the study. Said material has been selected as it offers the analysis both a comprehensive depiction and a sense of variation.

1.5 Outline

The thesis is essentially divided into three key segments. Following this introductory chapter, chapter 2 will present a brief definition of fundamental principles underpinning international law relevant to the R2P doctrine and to the study. These include the principles of sovereignty, non-intervention and the prohibition of the use of force. This will be followed by a general historic overview of humanitarian intervention in international law throughout the twentieth century. Subsequently, the development from humanitarian intervention to the responsibility to protect will be presented, including a definition of the R2P doctrine. Thereafter, the key intellectual groundworks for R2P will be presented. To conclude chapter 2, the various criticisms that surround R2P will be presented. Chapter 3 will present how the doctrine of R2P has been utilised in practice through a thorough presentation of the Libyan and Syrian conflicts that arose in 2011. The intentions and practice of the international community will be presented and analysed. Lastly, the objective of chapter 4 is to define the legal context of the R2P doctrine in positive international law. This will be conducted through a presentation of the sources of international law. Chapter 4 will furthermore analyse the legal basis of R2P through relevant international treaties and customary international law. This section will focus on the four atrocity crimes inherent to the R2P doctrine as well as an assessment of the prerequisites of customary international law. Chapter 4 will attempt to answer the research question. The thesis will end with a concluding appraisal of the study in chapter 5.
2 From humanitarian intervention to the Responsibility to protect

2.1 General concepts of international law

Fundamental principles such as sovereignty, non-interventionism and the prohibition of the use of force are concepts which are closely interlinked and overlap in international law. This section will shed light on these fundamental and principal concepts that are embedded in the UN Charter as well as in international law.

2.1.1 The principle of sovereignty

Sovereignty and equality of states are fundamental principles of public international law. The principle of the sovereignty of states is guaranteed through Article 2(1) of the UN Charter, and is also one of the underlying principles of the UN. In international law, the term sovereignty means that all states are inherently independent and equal, having uniform legal personality. A sovereign state further has the territorial and political jurisdiction and power over its geographical territory. An important aspect of sovereignty is the principle of non-intervention. The principle of non-intervention prohibits states from intervening in another state’s internal and external affairs; every such action is considered illegal under international law. The Friendly Relations Declaration adopted by the UN General Assembly in 1970, stipulates that:

“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”

Although the principle of sovereignty is still of significance in both international relations and international law, its initial definition and scope has shifted and become somewhat eroded in recent years. Concepts such as human security and human rights have arisen and are today given more attention and significance than ever before. State sovereignty today entails more than just a right – it entails a responsibility to protect the population as well. This therefore results in a dual responsibility for states to first of all respect other states as sovereign and equal, and to secondly, respect human rights and protect one’s own population.

2.1.2 The prohibition of the use of force

The prohibition of the threat or use of force by states, is enshrined in Article 2(4) of the UN Charter and is regarded as one of its cornerstones. The meaning of the phrase ‘force’ is the

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14 Ibid, see the Principle Concerning the Duty Not to Intervene in Matters Within the Domestic Jurisdiction of any State.
15 ICISS, p. 8.
use of force through military means.\textsuperscript{16} The prohibition of the use of force not only constitutes one of the pillars of modern international law but is also universally accepted as a peremptory norm of customary international law.\textsuperscript{17} Article 2(4) of the UN Charter lays down that all member states must refrain from the threat or use of force against the territorial integrity and political independence of other states. In the \textit{Nicaragua v. United States} judgment regarding military and paramilitary activities in Nicaragua, the ICJ referred to the characterisation of the prohibition of the use of force by the International Law Commission and by Nicaragua as a customary international law that has become \textit{jus cogens}.\textsuperscript{18}

However, the prohibition of the use of force has an important exception, namely the right to self-defence. The right to self-defence is laid down in Article 51 of the UN Charter, expressing that each state has the right to individual or collective self-defence if an armed attack occurs against them. Furthermore, Article 42 in conformity with Article 39 of the Charter lay down the right of the Security Council to authorise military interventions. In order for a Security Council intervention to be legitimate according to Article 39, there must be at hand a threat to peace, a breach of peace or an act of aggression. When the Charter was initially drafted, civil wars were not intended to fall within the Article’s scope. However, the Security Council has since expanded the scope of Article 39 since civil wars often have consequences that reach outside of a state’s borders.\textsuperscript{19}

### 2.2 Humanitarian intervention

To understand the development of the R2P framework and why it is enclosed with such controversy in international law and international relations, Davide Rodogno argues that it is important to observe the historical consensus and outlook that have enclosed humanitarian intervention since the end of the First World War at the very least.\textsuperscript{20} There exists no one definition of the concept humanitarian intervention. Humanitarian intervention in terms of forcible measures, includes the use of force through military means against another state, influenced by ‘moral humanitarian’ considerations, in order to protect that nations’ citizens from inhumane treatment.\textsuperscript{21} These moral considerations are often motivated by the objective to protect civilians from grave and systematic human rights violations and violations of international humanitarian law (IHL) as well as averting possible consequences of such humanitarian catastrophes.

\textsuperscript{16} Bring, Mahmoudi & Wrange, pp. 158-161.  
\textsuperscript{18} International Court of Justice (ICJ), \textit{Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Nicaragua v. United States)}, 27 June 1986, para. 190.  
\textsuperscript{19} Wolfrum (ed.), Use of Force, Prohibition of, para. 1-3.  
Prior to the First World War, there was no general prohibition against use of military force in interstate relations. Interventions and wars were in fact a regular feature of international relations throughout the nineteenth century. The term ‘humanitarian’ had a derogatory meaning and was generally used as a term in relation to anti-slavery campaigns. The term ‘humanitarian’ however gradually evolved into the idea of saving strangers and helping civilian populations.\textsuperscript{22} The aftermath of the First World War however resulted in the collapse of the former European order and brought about major changes on the outlook of war and its effects in society. In 1920, the League of Nations was established as an effort to prevent potential future interstate wars. The League of Nations was thus the first international organisation whose attempt and mission was the maintenance of world peace. In Article 10 of the Covenant of the League of Nations\textsuperscript{23}, the term ‘external aggression’ was introduced as the illegal usage of violence by a state against another. Per Article 10 of the Covenant, signatory states agreed to respect the territorial integrity and political independence of all member states and preserve themselves against external aggression. Further, the signatory states agreed to settle any potential disputes through peaceful means.\textsuperscript{24}

The provisions of the Covenant of the League of Nations however gave rise to some problematic situations. In the event of a dispute, in which state parties initially had undertaken pacific measures to resolve the dispute – but without success – it was then up to at least one of the parties to proceed to take military action. This evidently meant that the parties’ right to resort to force in international relations remained in a few defined situations.\textsuperscript{25} This inconvenience was adjusted in Paris in 1928 when the General Treaty for the Renunciation of War\textsuperscript{26}, also called the Kellogg-Briand Pact, was drafted, in which the signatory states pledged not to use war for the solution of international controversies. Once again, the state parties agreed that the settlement or solution of all disputes or conflicts should be sought through peaceful means. A crucial reservation was however made by the signatory states, in which the right to self-defence was recognised.\textsuperscript{27} Up until the end of the Second World War, an intervention claiming to be ‘humanitarian’ was thus hugely frowned upon and interventions conducted on the basis of humanitarian considerations were regarded as strictly unjustified and illegitimate.\textsuperscript{28} The prosperity of the new-found international order introduced by the League of Nations were however not long-term. The gross human rights violations and horrors of the Second World War disintegrated the international standards of the Kellogg-Briand Pact.

The gross and pervasive human rights violations committed by the Nazis during the Second World War shaped the subsequent debate on humanitarian intervention. After the Second World War, the UN and its foundational treaty, the UN Charter, were established to prevent

\begin{footnotes}

\footnote{22} Rodogno, pp. 19-21.
\footnote{23} League of Nations, Covenant of the League of Nations, 28 April 1919.
\footnote{24} Brownlie, p. 730.
\footnote{26} General Treaty for the Renunciation of War (Kellogg-Briand Pact), Paris, 27 August 1928.
\footnote{27} Crawford, J., \textit{Brownlie’s Principles of Public International Law}, 8\textsuperscript{th} edition, (2012), Oxford University Press, United Kingdom, p. 745.
\footnote{28} Rodogno, pp. 25-30.
\end{footnotes}
similar events from being perpetuated in the future, thereby establishing a new international legal order. By prohibiting the use of force and protecting the sovereignty of the member states, the drafters of the Charter envisioned that peace would be promoted. The UN Charter is by far the most important document for the regulation of international peace and security as it is binding on all of its member states. The Charter is often described as a “living instrument” in the sense that its contents and interpretation is in constant evolution on the grounds of the conduct of its member states. Ratified in 1945, the Charter reflects the experiences and lessons learned from the Holocaust. The UN Charter institutionalised protection of human rights and called for the “universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. The declaration and promotion of human rights in the Charter led to the establishment of the civil, political, economic, social and cultural rights inherent to all individuals, as well as the establishment of two key documents adopted by the UN General Assembly (UNGA) in 1948: the Universal Declaration of Human Rights and the Genocide Convention. The protection of human rights consequently became mainstreamed into the international legal order through the establishment of the UN Charter.

The Cold War era, following the aftermath of the Second World War was heavily characterised by the maintenance of international order and the prohibition of the use of force by one state against another. In the event of a collision between the maintenance of international order and the plight for justice and human rights, the maintenance of order prevailed. Article 2(4) of the UN Charter expressly affirms the prohibition of the threat or use of force by one state against another and was regarded as a solid norm of customary international law throughout the Cold War era. Only two exceptions were made to the prohibition, namely the UN Security Council’s right to authorise the use of force to maintain or restore international peace and security, and the right of states to self-defence.

Today, as the basis for humanitarian intervention is not included in any international convention, the legality of an intervention must be sought through the principles of the UN Charter. As mentioned, the Charter establishes the fundamental principles of sovereignty and equality of all states, the principle of non-intervention, the obligation to settle disputes through peaceful means and the prohibition of the use of force. At the same time, the Charter lays down that the promotion of human rights are vital goals of the Charter. These goals and

29 Eisner, p. 195.
30 See Article 1 of the UN Charter.
31 Eisner, p. 197.
33 See Article 55(c) of the UN Charter.
34 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
37 Wolfrum (ed.), Humanitarian Intervention, para. 3; Eisner, p. 199.
principles places humanitarian intervention in a “dynamic tension” and does not fully clarify the status of humanitarian intervention in the scheme of the UN Charter.\(^{38}\) Hence, for a humanitarian intervention to be justified under existing international law, it must be uniform and consistent with the principles mentioned above. If that is not the case, then at the very least, it must be justifiable according to an established exception to the principles.\(^{39}\) However, based on a *bona fide*-interpretation of international custom and the purposes of the UN Charter, it is possible to argue that a military intervention based on humanitarian and democratic considerations can be permissible.\(^{40}\) According to Chapter VII of the UN Charter, the Security Council has the authority to take decisions that become directly binding towards the member states. If the resolutions taken are executable, they become directly applicable in regard to the member states.\(^{41}\) The Security Council further has the authority to intervene in a state’s affairs for humanitarian purposes, should international peace and security be threatened.\(^{42}\)

### 2.3 Towards a responsibility to protect

This section describes the circumstances that led to the development of the term ‘responsibility to protect’ and how the framework of R2P as a concept has evolved and developed since its initiation.

#### 2.3.1 East Pakistan 1971

Although the Cold War era is known for being greatly characterised by the principle of non-intervention and the idea that every act of military interference in another state’s affairs constituted an offence – interventions on humanitarian grounds did nonetheless occur. The Indian intervention in East Pakistan is one such example.

In March 1971, the Pakistani civil war broke out as a result of the armed liberation struggle that was taking place in East Pakistan. Political tensions between East and West Pakistan were rooted in the 1947 partition of India by the United Kingdom. Since the creation of Pakistan in 1947, as two separate geographical sections of land separated by 1,000 miles, East Pakistan had been politically and economically governed by West Pakistan. In the general elections of December 1970, the Awami League, an opposition party in East Pakistan, gained a majority of seats in the National Assembly. When the leader of the Awami League demanded more autonomy for the East and made a declaration of emancipation, West Pakistani forces entered East Pakistan in March 1971, resulting in the full control of the country and sparking a brutal civil war. West Pakistani forces committed gross human rights violations against unarmed civilians, causing millions to seek refuge in neighbouring India. The West Pakistani forces burned villages and perpetuated massacres and rape, specifically targeting the minority Hindu

\(^{38}\) Eisner, p. 199.
\(^{39}\) Wolfrum (ed.), Humanitarian Intervention, para. 10.
\(^{40}\) Bring & Mahmoudi, p. 17.
\(^{41}\) Bring, Mahmoudi & Wrange, p. 21.
\(^{42}\) See Articles 39; 42 of the UN Charter.
population. An estimated one million people were killed during the reign of West Pakistan and an estimated ten million people fled to India to seek refuge. India urged that measures be taken to restore peace in the region but following the bombardment of ten Indian military airbases in December 1971, India undertook a military intervention in East Pakistan.\(^{43}\)

Although disagreements remain in terms of India’s intent, the intervention was claimed to have humanitarian considerations by various scholars. Many have argued that the Indian intervention could be justified on humanitarian grounds, as the intervention was undertaken primarily to ensure the termination of mass murders and displacement as well as the fact that India’s intervention did in fact halt the widespread atrocities. India however did not choose to justify their military intervention on humanitarian grounds but instead justified the intervention by claiming its right to self-defence. India argued that they had a right to self-defence following the attack on their military airbases earlier in December 1971.\(^{44}\) The international community’s reactions to India’s intervention in East Pakistan were clear yet cautious. When the international community gathered at the UNGA meeting in December 1971, they expressed their concern at the hostilities between India and Pakistan and urged that both parties withdraw their troops and establish an immediate ceasefire. The international community emphasised in particularly the prohibition of the use of force in Article 2(4) of the UN Charter but were unwilling to pass any judgment or refer to India’s actions as an act of aggression.\(^{45}\)

2.3.2 Uganda 1978-1979

Tanzania’s intervention in Uganda in 1979 serves as yet another example of when the use of force by one state against another allegedly was justified by humanitarian considerations during the Cold War.\(^{46}\)

The former Ugandan president Idi Amin’s rule was characterised by repression and brutality against the civilian population. Amin’s regime initially specifically targeted certain ethnic groups in the country but the violence progressively became widespread and indiscriminate. During Amin’s eight year presidency, between 100,000 and 500,000 people were killed. The murder of civilians and gross human rights violations were reported and criticised by several international non-governmental organisations. When the Tanzanian president Julius Nyerere condemned the violence and brutality of Amin’s regime, tension between the two states arose. In October 1978, the tensions increased when the Ugandan armed forces and rebels from the Ugandan army fought on Tanzanian territory in the region of Kagera. The Ugandan army subsequently took control over the Kagera region, resulting in a state of occupation. Amin went on to announce the annexation by Uganda of the Kagera region. Tanzanian president Nyerere stated that Amin’s annexation of the Kagera region amounted to an act of war and

\(^{43}\) Eisner, pp. 201-203.
\(^{44}\) Dunne & Staunton, pp. 42-43.
\(^{45}\) UN General Assembly, 2793 (XXVI), Question considered by the Security Council at its 1606th, 1607th and 1698th meetings on 4, 5 and 6 December 1971, 7 December 1971, para. 1; Eisner, pp. 201-203.
responded with a military intervention in November 1978 in order to push the Ugandan troops back to the border. The Ugandan troops however made further attempts in December and January to annex the region, to which Nyerere responded with a military intervention of Kampala this time.  

The Ugandan troops are known to have violated the territorial integrity of Tanzania on several occasions and though the actions of Nyerere constituted clear violations of international law, few states condemned or even debated the actions of the Tanzanian government. In fact, the Tanzanian intervention in Uganda was neither discussed in the Security Council nor in the General Assembly. Thus the international community seemed to accept – at least tacitly – the legitimacy of the Tanzanian intervention. The Tanzanian government did not use humanitarian claims to justify its intervention but like India, rather referred to their right of self-defence. Although the Tanzanian intervention in Uganda led to the fall of Amin’s rule and even though the intervention was considered to be justified based on humanitarian considerations by many, Tanzania claimed its actions to be “defensive counter-attacks”.

These cases illustrate the reluctance among states to justify their military interventions on humanitarian grounds despite the fact that there were clear humanitarian concerns present in both examples. The ideological gap during the Cold War resulted in states’ unwillingness to justify the use of force as the “saving of strangers” albeit the presence of gross human rights violations and humanitarian catastrophes. Thus, the consensus that existed during the Cold War was that military intervention in another state was harmful in relation to the international order.

After the end of the Cold War, the world was faced with a multitude of humanitarian crises, cases of genocide, ethnic cleansing and mass internal displacement of populations which led to the urgent calls to review the collective security under the UN system. The 1990s has been described as the “golden era” of humanitarian intervention due to the many interventions undertaken and justified on terms of humanitarian considerations. During this period, the UN also established that internal situations in a state, if related to widespread violations of human rights or an occurring of a humanitarian crisis, could constitute a threat to international peace. Ultimately, the 1990s can be considered the “transition period” from humanitarian intervention towards the responsibility to protect. In contrast to the Cold War, the 1990s allowed for normative developments to take place for the prevention and halting of mass atrocities.

47 Dunne & Staunton, p. 45.
49 Dunne & Staunton, pp. 42-45.
51 Dunne & Staunton, p. 40.
53 Dunne & Staunton, p. 39.
2.3.3 Rwanda 1994

Alongside the Holocaust, the Rwandan genocide is regarded as one of the gravest violations of human rights in the twentieth century. During the period April - July 1994, a widespread massacre took place in Rwanda killing an estimated 800,000 to one million people. Somewhere between 75-85% of the Rwandan Tutsis were killed in the genocide. The background to the conflict and genocide was the intermittent violence and struggle for power between Hutu and Tutsi, the two largest ethnic groups in the country. What sparked the 1994 genocide was the shooting of a plane, in which the Hutu regime’s president Juvenal Habyarimana was killed. Mass killings and ethnic cleansing of the Tutsi began instantaneously the same day.\(^\text{54}\)

The international community was not quick to react and has later received major criticism for its failure and inability to act. Eventually, the UN sent the United Nations Assistance Mission for Rwanda (UNAMIR) peacekeeping troops to Rwanda. UNAMIR’s mandate was to arrange a ceasefire but it failed in doing so. Instead, the peacekeeping mission’s personnel was targeted and attacked, which resulted in the withdrawal of UNAMIR soldiers by the contributing countries. This resulted in a vastly reduced strength from 2,548 to only 270 UNAMIR soldiers. Many saw this as the lack of political will while others claimed that the countries who in fact did have enough military resources, did not want to sacrifice their soldiers and peacekeeping personnel in order to protect the population in Rwanda.\(^\text{55}\)

2.3.4 Srebrenica 1995

The Srebrenica genocide is one of the largest massacres in Europe since the Holocaust. Many criticised the UN for not only acting wrongfully but also for breaking its promise to protect the civilians against the genocide. In 1992 the republic of Bosnia and Herzegovina (Bosnia) declared its independence from Yugoslavia. The following years were marked by violent conflicts between Serbs, Croatians and Bosniaks (Bosnian Muslims). The Bosnian Serb forces targeted and killed both Croatian and Bosniak civilians, mainly boys and men, during the next several years. Only two days after the United States and the European community recognised Bosnia’s independence, the Bosnian Serb forces attacked Sarajevo as well as other Bosniak-dominated areas in eastern Bosnia. The Bosnian Serb army targeted Bosniak civilians, who ultimately were driven from the regions and forcibly displaced. By 1995, the Bosnian government had gained control over three towns in eastern Bosnia in which the UN had previously declared those areas as “safe areas”.\(^\text{56}\) The UN had declared that these safe areas were to be disarmed, protected and free from attacks by international peacekeeping troops.\(^\text{57}\)


On 11 July 1995, Bosnian Serb forces entered Srebrenica, a town in eastern Bosnia, and proceeded to separate the Bosniak population from the Bosnian Serbs. Women and girls were placed on buses and sent to Bosnian-held territory, many of which were brutally raped and sexually assaulted. Bosniak men and boys were beaten and thereafter killed immediately or sent to mass killing camps. The Bosnian Serb forces killed an estimated 8,000 boys and men, while more than 20,000 civilians were forcibly displaced in the course of only a few days. The Bosnian Serb forces committed acts of genocide and ethnic cleansing.

2.3.5 Kosovo 1999

During the 1990s, the situation for Kosovar Albanians in the Federal Republic of Yugoslavia (FRY) worsened as the conflict escalated due to intensified persecution of Kosovar Albanians by the Belgrade regime. The hostilities continued to escalate resulting in casualties on both sides. In March 1998, the Security Council adopted resolution 1160, in which it condemned the excessive violence from both sides of the conflict and issued an arms embargo against the FRY.\(^{59}\) Albeit the adoption of resolution 1160, the conflict continued to worsen. Six months after the adoption of the resolution, the Security Council once again assembled and adopted resolution 1199, in which they estimated that more than 230,000 Kosovar Albanians had been forcibly displaced.\(^{60}\) Resolution 1199 did however not manage to authorise a military intervention against the FRY. In October 1990, as a reaction to the so-called Racak massacre, where 45 civilian Kosovar Albanians had been murdered, NATO threatened with air bombardments if the situation did not stabilise. China and Russia however, threatened to use their veto powers in the case that any potential resolutions would propose the authorisation of the use of force. In March 1999, NATO started a three-month military intervention against the FRY as an attempt to evict the Belgrade forces out of Kosovo. NATO claimed that the purpose of the intervention and the attacks were to prevent a humanitarian catastrophe in Kosovo.\(^{61}\)

NATO’s unauthorised military intervention led to a wave of criticisms and raised questions about the legitimacy of military intervention for humanitarian purposes.\(^{62}\) Advocates of the intervention claimed that NATO had acted justly and saw a moral obligation to intervene since the Security Council was indecisive. Those who opposed the military intervention argued that the intervention constituted an unacceptable violation of state sovereignty and claimed that NATO’s intervention did more harm to the conflict. According to most international lawyers and commentators, the intervention was illegal because it lacked the requisite of Security Council authorisation. Albeit NATO’s intervention was successful at

2.4 From humanitarian intervention to a responsibility to protect

Following the humanitarian tragedies in Rwanda and the Balkans, major discussions emerged regarding the question of how the international community should frame its response when civilians’ human rights are grossly and systematically violated by a state or its national authorities. By the end of the decade, the tension between humanitarian intervention on the one hand and the principle of sovereignty on the other, became a major topic in the legal and political debate. The controversy of humanitarian intervention ultimately reached its culmination after NATO’s military intervention in Kosovo. The unauthorised military operation raised many questions regarding the legitimacy of humanitarian intervention in a sovereign state.

As a reaction to the humanitarian catastrophes in the 1990s, the former UN Secretary-General Kofi Annan argued that the Security Council had a moral duty to act on behalf of the international community when gross and systematic atrocities occur somewhere in the world.\footnote{Breakey, p. 13; ICISS, pp. vii-1.} He emphasised the need of states to take action against threats of gross human rights violations and other large-scale acts of violence targeted against civilians. During his mandate as Secretary-General, Annan continued to express his concerns and stated the following:

\begin{quote}
“But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”\footnote{Annan, K.A., \textit{We the Peoples - The Role of the United Nations in the 21st Century} (Millennium Report of the Secretary-General), March 2000, United Nations Department of Public Information, New York, United States, p. 48.}
\end{quote}

Annan advocated a new understanding of sovereignty and proclaimed that sovereignty implies a responsibility and not just power.\footnote{Annan, K.A., \textit{Reflections on Intervention}, 26 June 1998, 35th Annual Ditchley Foundation Lecture, para. 6.} Annan emphasised that the international community’s role included a range of measures to protect populations at risk in another state. He argued that the international community should undertake diplomatic and humanitarian efforts when mass atrocities are at risk. Despite Annan’s many attempts to establish a common ground in the defence of human rights and in the upholding of the Charter’s principles, the response to his statement “sovereignty as responsibility” was cold by the international community. The reactions to Annan’s position on humanitarian intervention were unarguably distant and aloof. It was against Annan’s urges that the Canadian government set up the International Commission on Intervention and State Sovereignty to address the question of humanitarian
intervention. The membership of the Commission consisted of an expert group of international actors.

2.4.1 Defining R2P’s normative structure

The core idea of R2P rests on three elements. The first element of R2P is a shift in the understanding of sovereignty, from previously focusing on “sovereignty as control”, to instead focusing on “sovereignty as responsibility”. This shift indicates that sovereignty is not to be understood as the state’s right to operate in whichever manner it desires but rather the state’s responsibility to ensure the protection of its populations’ fundamental rights. The second element of R2P’s core is the notion of subsidiary responsibility of the international community. If a state proves itself unwilling or unable to fulfil its responsibilities, the responsibility to protect proceeds to the international community. Indisputably, the primary responsibility to protect the population lays on the state itself, and only on the international community once the state has proven itself inadequate. This secondary responsibility thus ensures and focuses on the protection needs of the people rather than the rights and privilege of interveners. Finally, the third element concerns the way an intervention may be initiated and conducted. The intervention must be consistent with international law and in general, the primary and foremost agent for invoking R2P is the Security Council. Instead of using the term ‘humanitarian intervention’, it was “cleverly repackaged” into the newly coined term ‘responsibility to protect’ with the intention to give intervention on humanitarian considerations a renewed status in international relations.

2.4.2 The ICISS report

The term R2P was first introduced in 2001 in the ICISS report “The Responsibility to Protect”. The aim of the report was to establish a broader understanding of humanitarian intervention for human protection purposes and to offer a new political common ground on how to approach the issue of humanitarian intervention as well as to move towards actions. There were in particular three questions concerning humanitarian intervention that were raised in the report, namely the question of whether there is a right of intervention, and when it is to be exercised, and finally, the question of under whose authority an intervention should be undertaken. The Commission placed a higher priority on human security and human rights than state sovereignty. Evidently, the report established a clear shift in focus from the rights of states to the responsibility of states. The ICISS report saw the need to re-characterise and re-

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68 Breakey, p. 13.
70 ICISS, pp. 13-14.
71 Ibid, p. 13; Breakey, p. 12.
72 ICISS, p. 13.
74 ICISS supra note 70.
75 Ibid, p. 2; Evans, 2009, pp. 18-19.
76 ICISS, p. vii.
define sovereignty, to ultimately go from “sovereignty as control” to “sovereignty as responsibility”.77

The norm responsibility to protect ultimately established the principle that states have a responsibility to protect its own population from grave atrocities. If the national authorities fail or are unwilling to protect its population, the responsibility to protect falls on the international community. The report thus established two basic and core principles of the R2P doctrine. The first element is that state sovereignty implies a primary responsibility to protect its populations. Once the state has proven itself unwilling or unable to protect its own population, the principle of non-intervention yields to the principle of R2P, and the responsibility to protect the population secondarily proceeds to the international community.78 In other words, the ICISS report reaffirms the principle of non-intervention as the main rule and the responsibility to protect as the exemption.

The report further focused on R2P through three key aspects: the responsibility to prevent, react and rebuild. The responsibility to prevent falls primarily on the sovereign state itself. The state has the foremost responsibility to protect its population and to prevent large-scale loss of life. The prevention of large-scale loss of life is the most important dimension of R2P.79 The responsibility to react however, is triggered once prevention attempts fail or are neglected from the sovereign state. The core of the responsibility to react lies primarily in non-interventionist measures such as sanctions and diplomatic actions, and military interventions only in extreme cases. The responsibility to rebuild includes not leaving a state in such a condition where hostilities and violence continue to threaten the population, after the military intervention.80

The Commission emphasised that military intervention should only be undertaken in “extreme cases”, once coercive measures such as political, diplomatic, economic or judicial measures have been exhausted, thus resulting in a sturdy set of threshold conditions before intervention is sought.81 The Commission further emphasised that for a military intervention to ever be defensible at all, the circumstances in a state must be grave. Examples of such grave and exceptional circumstances include the complete breakdown of order in a state, or when civil conflict and repression are so violent that the population is threatened with atrocities like genocide, ethnic cleansing or large scale loss of life. The violence must be so severe that it “shocks the conscience of mankind” and ultimately may impose a threat to international peace and security.82

The ICISS report further laid down six criteria for legitimating a military intervention against another state: right authority, just cause, right intention, last resort, proportional means and reasonable prospects. Once the circumstances in a state have become shocking and severe,
there is a ‘just cause’ to intervene against another state to halt or avert the mass killings according to the Commission. The criterion of ‘right intention’ implicates that the primary purpose of the intervention must be to halt or avert human suffering. To overthrow dictators or regimes or to occupy territory cannot be legitimate objectives for an intervention. The ‘last resort’ criterion implies that every other peaceful measure must have been undertaken before an intervention is sought. Military intervention is only ever acceptable once all possible diplomatic, political, economic, judicial or targeted sanctions have been exhausted. The proportionality criterion suggests that the duration and intensity of the intervention should be the minimum necessary to ensure human protection for the suffering populations. Additionally, an intervention is only legitimate when the chances for success in halting or averting the mass atrocities are reasonable and somewhat foreseeable. Similarly, if the violence and circumstances in a state are likely to worsen, an intervention is not justified. Neither is an intervention justified if the military action is likely to trigger a larger conflict. Lastly, the sixth criterion of ‘right authority’ implies that a military intervention is legitimate if the rightly authoritative agent conducts it. According to the UN Charter, the Security Council has the primary responsibility for international peace and security and thus too is the right agent for military intervention according to the sixth criterion in the ICISS report. The report’s sixth criterion is harmonious with Article 42 of the UN Charter, which declares that the Security Council has the authority to sanction a military intervention. The authority of the UN is underpinned not by its coercive mandate but its legitimacy of authority under the Charter. Thus, the ICISS report argues that “collective intervention blessed by the UN” is regarded as legitimate. According to the sixth criterion, authorisation by the Security Council must always be sought by interveners before they carry out the military intervention.

The Commission further identified the veto power enjoyed by the permanent members (P5) of the Security Council as potentially problematic. The Commission argued that the members’ use of their veto power might prevent the Council from acting promptly and resolutely when needed, to halt or avert humanitarian crises. The report stated that it is “unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern”. The Commission went on to suggest that the permanent members follow a certain code of conduct for the use of the veto regarding actions that are imperative to halt in order to avert significant humanitarian catastrophe.

Most Western states regarded the ICISS report as an ambitious and innovative attempt in reaching a global consensus on the notion of humanitarian intervention. The report was however criticised and met with scepticism by various non-Western states who mainly argued that the report only designated with liberal international discourse. Moreover, when the ICISS report was presented and discussed at the Security Council’s annual retreat in 2002, the

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83 Ibid, pp. 32-37.
84 Ibid, pp. 48-51.
86 Ibid, p. 51.
87 Amnéus, pp. 202-203.
permanent members expressed some concerns with the text lending no definite conclusions to be reached.\textsuperscript{88}

### 2.4.3 The 2004 High-Level Panel Report

In September 2003, as a reaction to the unauthorised invasion of Iraq by the United States, United Kingdom and their allies, former Secretary-General Annan formed the High-Level Panel on Threats, Challenges and Change. Annan called for member states to strengthen the UN in order to advance development, security and promotion of human rights. The mandate of the Panel was to examine contemporary global challenges and threats to international peace and security and to offer recommendations on how to collectively respond to these challenges.\textsuperscript{89} In December 2004, the High-Level Panel released its report "A More Secure World: Our Shared Responsibility" where the Panel endorsed the "emerging norm that there is a collective international responsibility to protect" populations from genocide, ethnic cleansing, serious violations of international humanitarian law and other large-scale killing.\textsuperscript{90} The Panel endorsed the principle responsibility to protect, stating that:

> "There is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of every State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease."\textsuperscript{91}

The Panel further acknowledged that there is a growing acceptance that the international community in fact does have a subsidiary responsibility to protect populations from said human rights violations when a state is unable or unwilling to protect its own population. The Panel however stressed that the international community’s subsidiary responsibility to protect involved peaceful means and only allowed the use of force as a last resort, when authorised by the Security Council.\textsuperscript{92}

The High-Level Panel furthermore identified five “legitimacy criteria” that should be used to determine whether an intervention is justified. The Panel recommended the following criteria to be considered before any use of force: seriousness of threat, proper purpose, last resort, proportional means and balance of consequences.\textsuperscript{93} The criterion of ‘seriousness of threat’ implied that the threat of harm or actual human suffering must be clear and serious and involve genocide or other large-scale killing, ethnic cleansing or serious violations of international humanitarian law in order to justify the use of military force. The ‘proper purpose’ criterion implied that the primary purpose of an intervention must always be to halt or avert the threat at hand. The third criterion, ‘last resort’, meant that every other non-


\textsuperscript{90} Ibid, p. 66, para. 203; Cater, & Malone, pp. 121-122.

\textsuperscript{91} HLP, 2004, supra note 89, p. 65, para. 201.

\textsuperscript{92} Ibid, pp. 65-66, para. 201-203.

\textsuperscript{93} Ibid, p. 61, para. 3; p. 67, para. 207.
military option must have been sought before considering military force. As to the criterion of ‘proportional means’, the Panel emphasised that the scale, duration and intensity of the proposed military action be at the minimum necessary to meet the threat at hand. Finally, the criterion of ‘balance of consequences’ underlined that there must be a reasonable chance that the military operation is successful in meeting the threat. The criteria recommended by the Panel thus closely resembled the criteria set forth in the ICISS report. The Panel urged that their criteria be formally adopted in declaratory resolutions by the General Assembly and Security Council and thereby put R2P on the agenda for UN reform with the intention that R2P could strengthen the UN Charter’s collective security system.94

2.4.4 The 2005 World Summit

During the UN World Summit in 2005, R2P was heavily discussed by Heads of State and Government and was also affirmed in paragraphs 138-140 of the World Summit Outcome Document. During the Summit, the states agreed that there is an inherent responsibility that lies with the national authorities of states to protect its citizens.95 The scope of the human protection purposes for the people were explicitly defined and more confined than the scope of the ICISS report’s human protection purposes. At the Summit, the scope of the R2P for human protection purposes were confined to genocide, war crimes, crimes against humanity and ethnic cleansing, i.e., the gravest crimes against international law. Nonetheless, the states accepted their responsibility and pledged that they will act in accordance with it. All the states present affirmed that the international community, through the UN, has a responsibility to use “appropriate diplomatic, humanitarian and other peaceful means” in accordance with the UN Charter to help protect populations.96 The states declared that they were prepared to take collective action in a “timely and decisive manner, through the Security Council”97, should a state manifestly fail to protect its own population.98

The content of the document differed in several ways from the ICISS report. First of all, it was agreed at the Summit that an intervention only may occur if there is an explicit mandate from the Security Council. In contrast to the ICISS report, the Outcome Document did not allow regional bodies within the UN to authorise a military intervention. Furthermore, the scope of R2P was limited in the Outcome Document. The Heads of State and Government explicitly limited R2P’s scope to the four atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing, instead of opting for the Commission’s broader scope of any large-scale loss of life. The document also limited the triggers for the reaction to intervene, from states being “unwilling or unable” to protect their populations, to states “manifestly failing” to protect their populations.99

95 A/RES/60/1, para. 139.
96 Ibid, para. 139.
97 Ibid.
98 Ibid, para. 138-139.
99 Breakey, p. 16.
The Outcome Document was formally and unanimously agreed by more than 170 Heads of State and Government present at the meeting. The Outcome Document was then adopted by the General Assembly, and resulted in the resolution 60/1. The affirmation of R2P at the World Summit thus gave rise to both an authoritative and a narrowed downed version of R2P than that of the ICISS report.\textsuperscript{100} Reaching a consensus on R2P at the Summit was however not an easy task. The states Algeria, Belarus, China, Cuba, Egypt, Russia, India, Iran, Jamaica, Libya, Pakistan and Venezuela were opposed to the inclusion of R2P altogether in the Outcome Document. The United States (US) also voiced extensive reservations against R2P, calling it a moral principle rather than a legal norm. The United States urged that it would be best to restrict military intervention in situations of mass atrocities to the Security Council alone. The US altogether opposed that the international community should have a collective responsibility to intervene.\textsuperscript{101}

The reactions to the Outcome Document were mixed. The document was praised by numerous scholars who claimed it to be a positive development of the definition of sovereignty, giving the term a broader scope than just implying rights and entitlements for states. Many considered the passage about R2P in the paragraphs 138-139 as a promising step in the establishment of R2P and as a starting point of R2P’s transformation from an idea to a principle. The agreement was seen by many as a turning point for humanitarian intervention. Several advocates of the norm noted that the Outcome Document represented a “worldwide acceptance” of the responsibility to intervene in response to mass violations of basic human rights.\textsuperscript{102} Several advocates further regarded the paragraphs as resolute commitments by the world leaders regarding R2P’s stand in international politics.\textsuperscript{103} According to the Secretary-General and the High-Level Panel, the language of the Outcome Document did however fall short of what they had requested, as no mention was made of R2P as an obligation for states.\textsuperscript{104} The former Secretary-General and the Panel had expected the Document to phrase the responsibility to protect as an “emerging norm of international law”.\textsuperscript{105} The critics claimed that the Outcome Document was a diluted version of what the Commission had anticipated to achieve with their report and that there were no possibility to practically offer any protection to threatened or suffering populations.\textsuperscript{106} Although the language of the Outcome Document was somewhat different from that of the ICISS report, the core underlying ideas remained unchanged.\textsuperscript{107}

\textsuperscript{100} Ibid.
\textsuperscript{101} Evans, 2009, pp. 20-21.
\textsuperscript{102} Pattison, pp. 3-4.
\textsuperscript{104} Badescu, p. 108; Bellamy, 2009, p. 6.
\textsuperscript{105} Bellamy, 2009, p. 6.
\textsuperscript{106} Ibid; Badescu, supra note 104.
2.4.5 The Report of the Secretary-General

In 2009, former Secretary-General Ban Ki-moon published the report “Implementing the responsibility to protect” as a follow-up to the outcome of the Summit. In his report the Secretary-General referred to the operationalisation of R2P as “one of the cardinal challenges of our time”. The aim of the report was to develop a strategy as well as standards, processes, tools and practices for the R2P doctrine. The report reaffirmed that states have obligations under conventional and customary international law to protect their citizens from genocide, war crimes and crimes against humanity. The report stated that R2P was consistent with existing international law and that the goal was not to re-interpret the conclusions from the 2005 World Summit but to find ways of implementing R2P in practice. He argued that the paragraphs concerning R2P in the Outcome Document, simply clarifies the framework that already exists.

The report construed a three pillar-system for the implementation of R2P without any set sequence to be followed. The first pillar reiterated that states have a responsibility to protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing. This responsibility derives from state sovereignty and existing legal obligations on states, and not just from the principle of R2P. The second pillar concerned the commitment of the international community to assist states to protect their populations. The third pillar declared that the international community has a responsibility to respond “in a timely and decisive manner” when another state is failing to provide such protection for its population. According to the report, such a response could include both peaceful or coercive measures, in accordance with the UN Charter.

2.5 Critique of R2P

Despite R2P’s formal UN endorsement, the principle has been subject to an array of criticisms. A consistent critique of the principle is that R2P’s meaning and scope is vague and ambiguous. Likewise, the legal obligations on the international community that are said to follow from R2P are consequently argued to be vague. Ki-moon’s report stipulated that there exists no set sequence when moving between the three pillars of R2P. This indecisiveness augments the critique that R2P is a vague concept. The critics also tend to question R2P’s legal status and claim that R2P does not invoke any legal duties and that the concept rather is a set of moral or political obligations. Yet another critique of R2P is the question of its novelty. Many critics express the concern that R2P does not bring anything new to the table.

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109 Ibid.
110 Ibid., pp. 1-5.
111 Ibid., pp. 8-9.
112 Ibid., p. 2.
and that the Security Council has always had the authority to intervene in situations that pose a threat to international peace and security.\textsuperscript{114} A reoccurring critique of the principle is that it is just a means of legitimating military intervention. Both states and scholars argue that R2P is an eloquent tool for powerful states’ self-interested invasions cloaked with humanitarian considerations. Several states have in fact suggested that R2P has imperialistic features. In 2009, the president of the General Assembly expressed that R2P was “redecorated colonialism”.\textsuperscript{115} Finally, critics argue that R2P lowers the threshold on the acceptable use of force states may undertake to intervene in another state.\textsuperscript{116}

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\textsuperscript{114} Cf. Articles 39; 42 of the UN Charter.
\textsuperscript{115} International Coalition for the Responsibility to Protect (ICRtoP), \textit{Report on the General Assembly Plenary Debate on the Responsibility to Protect}, 15 September 2009, p. 3.
\textsuperscript{116} Bellamy, 2015, pp. 93-112; Breakey, pp. 23-27; Weiss, 2016, p. 66; Badescu, p. 112.
3 R2P in practice

This chapter presents the background to the Libyan and Syrian conflicts that emerged in 2011 as a consequence of the ‘Arab Spring’. This chapter further presents how the international community framed its response towards the humanitarian crises that arose from the conflicts. The two conflicts are examples of recent and partly ongoing conflicts that have arisen since the affirmations of R2P in the 2005 World Summit Outcome. The two cases share some similarities, namely the national authorities’ unwillingness to protect their populations, the events of mass atrocities and the call for R2P by the international community. Finally, the conflicts serve as examples of both action and inaction by the Security Council.

3.1 Libya

3.1.1 Background to the conflict

The ‘Arab Spring’ emerged in Tunisia in late 2010, as a reaction to an incident where a young man set himself on fire in protest of the Tunisian government.\(^\text{117}\) This gave rise to a wave of pro-democracy and anti-government protests and riots in the Middle East and Northern Africa, with the desire to change the government and to put an end to the ruling regimes in the countries.\(^\text{118}\)

The Arab Spring reached Libya in February 2011, only five days after the overturning of the Egyptian President Hosni Mubarak. Demonstrations and protests broke out in Libya and several people were killed in the unrest of the demonstrations. Eventually, the protests and riots quickly escalated into a widespread civil war. The Libyan president since 1969, Muammar al-Gaddafi, used lethal force against the peaceful and unarmed demonstrators and as a result killed over 230 people in the demonstrations, only in the month of February 2011. Gaddafi’s regime continued to deploy force through the use of teargas, automatic gunfire, snipers and aircraft against civilians.\(^\text{119}\) Furthermore, several reports from Tripoli described how dead bodies were left in the streets, and the sight of burnt-out cars and shops.\(^\text{120}\)

3.1.2 The Security Council’s initial reactions

The international community was quick to react to the situation taking place in Libya. The UN High Commissioner for Human Rights at the time, Navi Pillay, called for the immediate cessation of the grave human rights violations committed by Libyan authorities, which she

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claimed could amount to crimes of humanity. Furthermore, Pillay urged that an investigation into the violent suppression of protests take place.\textsuperscript{121}

The Security Council swiftly gathered and responded with resolution 1970, which was unanimously adopted on 26 February 2011.\textsuperscript{122} The Security Council expressed its grave concern at the situation in Libya, condemned the violence and use of force against civilians and recalled the Libyan authorities’ responsibility to protect its population. The Council also referred Gaddafi to the International Criminal Court (ICC) for war crimes. The Security Council demanded an immediate end to the violence and urged the Libyan authorities to respect human rights and international humanitarian law. The Council also authorised an arms embargo, urging all member states to prevent the supply, sale and transfer of arms to the Libyan authorities. Moreover, the Council authorised travel bans and the freezing of financial assets of several members of Gaddafi’s regime. The measures authorised in the resolution were all coercive yet peaceful.

3.1.3 Resolution 1973

Despite the passing of resolution 1970, the situation in Libya remained unchanged and Gaddafi and his regime continued to use violence and force against civilians. The civil war was rapidly escalating and worsening. Gaddafi went on to threaten with a massive and lethal armed conflict, were the United States or NATO to interfere in Libya’s relations with an armed intervention.\textsuperscript{123} The Security Council simultaneously gathered once again to discuss how to frame its renewed response at the worsening situation in Libya.

The Council recalled its former resolution, deploiring the failure of the Libyan authorities to comply with resolution 1970 and instead adopted resolution 1973.\textsuperscript{124} The Security Council went on to express its further concern at the worsening situation and the increase of violence against civilians. The Council repeated the responsibility of the Libyan authorities to protect its population. Resolution 1973 authorised member states to take all necessary measures to protect the civilian population in Libya as well as established a no-fly zone over Libyan territory to help protect the civilians. The measures authorised in resolution 1973 were both coercive and military.

Resolution 1973 was adopted by the Security Council with ten votes in favour, while member states Brazil, China, Germany, India and Russia chose to abstain from voting, stating that they favoured peaceful means in regard to resolving the ongoing conflict. The representatives of Russia went on to state that many questions had remained unanswered, namely as to how and


by whom the measures set forth in the provisions of the resolution would be enforced. The Chinese representatives declared that they had not blocked the passage of the resolution due to hefty requests from the Arab League and the African Union. The German representative stated that they had decided to abstain from voting because they saw great risks with the use of military force.  

Implementation of the resolution began on 19 March 2011 with a series of air and missile strikes by Britain, France and the United States against Gaddafi’s military and thereby, a full-blown military intervention was initiated in Libya. The Western allies later agreed that the military intervention would be led by the NATO coalition instead. The coalition received support from non-NATO members such as Qatar and the United Arab Emirates as well. As the civil war continued, with violent fights between the Libyan rebels and forces loyal to Gaddafi, NATO had managed to weaken the Gaddafi regime but not made any progress in terms of securing a resolution of the conflict. As the US President Barack Obama authorised its armed forces to begin a military action in Libya to protect Libyan civilians, he declared: “So we must be clear: Actions have consequences, and the writ of the international community must be enforced. (…) But make no mistake: Today we are part of a broad coalition. We are answering the calls of a threatened people”. The British Prime Minister David Cameron added: “So what we are doing is necessary, it is legal, and it is right. It is necessary because, with others, we should be trying to prevent him using his military against his own people”.

Gaddafi declared that Libya would exercise its right to self-defence under Article 51 of the UN Charter and referred to the Western allies’ attacks against Libya as “aggressive and mad behaviour”. In an open letter to Secretary-General Ki-moon, the French President Nicolas Sarkozy, and the British Prime Minister Cameron, Gaddafi added: “Libya is not yours. Libya is for the Libyans. The Security Council resolution is invalid. (…) You will regret it if you dare to intervene in our country.”

Three months into the conflict, Libya’s regime offered to talk to anti-government rebels and to agree on a ceasefire, as well as to move towards a constitutional government and to compensate victims of the conflict. The offered ceasefire was based on a proposal by the

130 Ibid.
131 Ibid.
African Union. However, the proposal was met with scepticism by the US and various European states as there was no mention of Gaddafi in the discussion and proposal of a ceasefire by the Libyan regime.\textsuperscript{132} The peace offer was therefore neglected and NATO forces continued to heavily bombard the capital Tripoli and managed to attack Gaddafi’s troops for the first time through air strikes, managing to destroy a radar station and a military checkpoint.\textsuperscript{133}

In the midst of the military intervention in Libya, France admitted to having armed Libyan rebel fighters, despite the arms embargo that was authorised in resolution 1970. The action was not in direct accordance with the UN mandate of resolution 1973, leading NATO to review the conduct of its military action in Libya. Resolution 1973 permitted member states to “take all necessary measures” to protect the civilian population in Libya. Although NATO had consistently declared it would not arm rebel fighters, France confirmed that it had dropped consignments consisting of machine guns, grenades and anti-tank missiles to rebels in Libya. France claimed that the weapons had been dropped for civilians to be able to defend themselves as a result of the worsening humanitarian and security situation.\textsuperscript{134} But not only France had channelled arms to rebel groups, countries such as Qatar had also supplied large amounts of arms and ammunition to rebel fighters. Furthermore, several key members of the NATO-led alliance had supported rebel groups with battleground leadership advice.\textsuperscript{135} The British Ministry of Defence acknowledged that the resolutions allowed for different interpretations but firmly insisted that they had not supplied any weapons to rebel fighters in Libya and went on to state:

“There is an arms embargo in Libya. At the same time, UN resolution 1973 allows all necessary measures to protect civilians and civilian populations from the threat of attack. We think that the UN resolution allows, in certain limited circumstances, defensive weapons to be provided. But the UK is not engaged in that. Other countries will interpret the resolution in their own way”.\textsuperscript{136}

Libyan rebel fighters’ operations were thus ambitious and successful in its attacks against Gaddafi’s regime, being backed by NATO. This was criticised from both Russia and China. The Russian foreign minister Sergei Lavrov claimed that NATO were taking sides in the rebellion to dislodge Gaddafi and that their actions helped recognise the rebels and their leaderships as the legitimate government of Libya instead.\textsuperscript{137} The Libyan rebels kept advancing against Gaddafi’s forces and with NATO’s air powers as assistance, Gaddafi’s regime kept weakening, only five months into the conflict. By 26 August 2011, the rebels had


\textsuperscript{135}Adams, supra note 134.

\textsuperscript{136}Hopkins, supra note 134.

managed to transfer the government from the city Benghazi to the capital Tripoli. Gaddafi himself was in hiding but issued audio messages saying he would never “leave the land of his ancestors”.

On 20 October, Gaddafi was found dead after eight months of civil war and after his 42 year-rule over Libya. It is unclear whether he was killed by NATO or Libyan rebels. Approximately ten days after the death of the Libyan dictator, NATO announced the end of its military operation in Libya. NATO’s Secretary-General declared that the intervention undertaken in Libya had come to its end and was a “successful chapter in NATO’s history”.

According to an investigation undertaken by the UN Human Rights Council’s International Commission of Inquiry on Libya, government forces specifically targeted and perpetuated widespread and systematic attacks against unarmed civilian protesters, committed war crimes and crimes against humanity. According to reports from the Human Rights Watch, Gaddafi’s forces targeted the civilian population with cluster bombs resulting in a high number of casualties of which the majority were women and children. Both government forces as well as Libyan rebel groups committed mass executions, torture, rape, enforced disappearances and arbitrary detentions. The government forces also prevented humanitarian aid from reaching the city Misrata by firing missile attacks and sinking some of the incoming ships into the harbour using sea mines.

3.1.4 Comments

The Security Council’s response was both swift and decisive – responding within a month of the outbreak of the civil war. The response of the international community was resolute. The international community swiftly condemned the Libyan authorities’ targeting of unarmed civilian protesters, imposed coercive sanctions on key personnel in Gaddafi’s regime and ultimately, called for the need of an intervention. Both resolutions 1970 and 1973 pronounced the responsibility of the Libyan authorities to protect its population. The resolutions expressly mentioned the R2P principle. In the international and academic debate, the resolutions were regarded as successful and official recognitions of R2P. The explicit reference to R2P in the resolutions on Libya are important to the principle’s normative development because of the nature of Security Council resolutions. The importance of the nature of Security Council

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142 A/HRC/19/68, pp. 6-16.
144 A/HRC/19/68, supra note 142.
resolutions is thus their legal force, unlike all previous manifestations of R2P.\textsuperscript{146} The Libyan conflict serves as a unique case in relation to the R2P principle – as it was the first time R2P was invoked in a Security Council resolution in relation to an ongoing conflict and because of the Council’s swift, decisive and coherent response. In fact, according to Alex Bellamy and Paul Williams, at least two factors proved determinant for the passing of resolution 1973. Firstly, Gaddafi’s unwillingness to observe the provisions set forth in resolution 1970 along with the growing concern that the Libyan forces would perpetrate massacres, reinforced the passing of resolution 1973. Additionally, the consistent calls for military action from both France and the UK bolstered the prospect of the resolution.\textsuperscript{147}

At the same time, the NATO-led military operation was met with a great deal of criticism by various Heads of State and Government and scholars. Following the military intervention, as the capital city steadily fell to rebel groups, the debate regarding the implementation of resolution 1973 shifted slightly among some member states. A few member states argued that NATO’s military operation was too far-reaching and that the intervention had been misused as a self-interested pursuit to overthrow Gaddafi. Member states Brazil, China, India, Russia, South Africa (BRICS) and the African Union and the Arab League criticised NATO and its allies for blatantly overstepping the UN mandate permitted by resolution 1973. For instance, India’s Ambassador to the UN claimed that NATO’s role in Libya had shifted from its initial purpose to protect the civilian population from mass atrocity crimes, to the overthrowing of Gaddafi and his regime.\textsuperscript{148} Similar claims were made by Brazilian representatives, who stated that R2P had been misused for objectives other than the protection of civilians.\textsuperscript{149} The military operation in Libya thus sparked the familiar criticisms of the notion of humanitarian intervention.\textsuperscript{150}

Despite the authorisation of an arms embargo in resolution 1970, states were nonetheless supporting rebel fighters with weapons, ammunition and battleground leadership advice. The aim of the authorisation of the arms embargo in resolution 1970 in the first place, was to prevent all sorts of arms trade between member states and Libyan authorities. Although military advisers were not in direct violation of resolutions 1970 and 1973, these countries undoubtedly became partisans to the Libyan conflict.

Resolution 1970, and especially resolution 1973, were regarded as pronounced and successful implementations of R2P despite the initial scepticism of the BRICS-countries and Germany. However, by the end of NATO’s intervention in Libya the military operation was flooded with reproaches stating that NATO had failed to protect the civilian population in Libya and instead acted outside of the UN mandate, and, ultimately, served as a means of removing

\textsuperscript{146} Badescu, p. 109.
\textsuperscript{148} Adams, p. 772.
\textsuperscript{150} United Nations Security Council, S/PV.6627, 6627th meeting, 4 October 2011, New York, p. 4; Adams, pp. 772-773; Reisman, p. 387.
Gaddafi from his power by arming rebel groups. Yet, what remains unique and remarkable in the Libyan conflict, is both the speed and robustness of the actions and responses framed by the international community. Hence, there does exist evidence to gather from the Libyan experience that R2P was successfully used as a framework to address atrocity crimes committed by a state’s national authorities against its civilian population. The case of Libya thus serves as a firm example of the implementation of R2P as a norm. Or as Simon Adams so well puts it:

“On 16 September 1999 former UN Secretary-General Kofi Annan, writing in The Economist, argued that, “when we read the UN Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them”. It was in keeping with this sentiment that R2P was adopted at the UN World Summit in 2005. It was not until March 2011, for the first time in its history, that R2P was invoked by the UN Security Council while imposing coercive military measures against a UN member state without its consent. It is no surprise, therefore, that the nature and conduct of the civilian protection operation in Libya continues to be subjected to forensic analysis.”

3.2 Syria

The ongoing armed conflict in Syria has at the time of writing caused the deaths of at least 470,000 people, forced 6.1 million people to internal displacement and 4.8 million people to seek refuge abroad. Both Syrian government forces as well as non-state armed groups have committed war crimes, crimes against humanity and serious violations of international humanitarian law. The conflict in Syria is an example of a complex and multifaceted humanitarian tragedy spilling into many other countries and involving participation from external actors.

3.2.1 Background to the conflict

The Arab Spring reached Syria in March 2011, when peaceful protests broke out in the city Daraa as a reaction to the detention of a group of young students for drawing anti-government graffiti. The demonstration turned violent as the Syrian security forces opened fire on the protesters. This event sparked a wave of peaceful protests and civilian uprising throughout Syria as protesters demanded greater freedom and an end to the government’s corruption. The demonstrators were met with serious lethal force by the Syrian security forces which ultimately resulted in further demonstrations across the country, the protesters now demanding the resignation of the Syrian president Bashar al-Assad. The Syrian security forces continued to use violence against civilians partaking in the protests while the Syrian president since 2000, publicly expressed that people had a right to peaceful protests. Assad claimed that his security forces were only targeting known terrorists and not civilians. In contrast to Assad’s statements however, his armed forces killed over 100 people in only one day, during Syria’s largest nationwide demonstration. As the violent situation in Syria kept escalating, the

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151 Adams, p. 779.
crisis eventually developed into a full-blown civil war between various armed rebel groups and the pro-Assad Syrian forces. In April 2013, the conflict became multifaceted, engaging external actors in the violent fighting. Hassan Nasrallah, leader of Hezbollah, confirmed Hezbollah’s presence and involvement in Syria, in support for Assad’s government. In June 2013, the United States declared their suspicion of the Assad regime’s use of chemical weapons in the conflict. The US Secretary of State, John Kerry, and the British Prime Minister Cameron condemned Assad’s use of chemical weapons and urged for a military response to be taken against Syria. By the end of 2013, the UN estimated that the Syrian conflict had resulted in the deaths of over 130,000 people and created a major displacement crisis.  

3.2.2 The international community’s reactions

The ongoing conflict in Syria has caused several international, regional and global actors to express their condemnation of the violence and especially the Syrian government’s targeting of civilians. The Security Council as well as the UK and France condemned the widespread violations of human rights and the use of violence against civilians by the Assad regime and demanded action to be taken against the Syrian government. Concurrently, Russia opposed any sort of foreign interference in Syria, resulting in no unanimity in the Security Council on how to respond to the crisis in Syria. In May 2011, the European Union, the United States and several Western countries responded with imposing sanctions on Assad’s regime. The sanctions imposed an arms embargo on Syria as well as the freezing of assets and travel bans on the Assad regime’s main officials.

Six months after the civilian uprising broke out in Syria, several Council members presented a draft resolution expressing deep concern at the deteriorating situation in Syria. The draft resolution called for the immediate termination of the Syrian government’s use of violence and violations of human rights. The draft further expressed the Syrian government’s responsibility to protect its population. The outcome of the resolution was however not met with enthusiasm by all of the Council members. Both Russia and China voted against the resolution, while Brazil, India, Lebanon and South Africa abstained from voting. The Russian representative made reference to Syria’s integrity and to the principle of non-intervention as well as mentioning the previously failed experiences from Libya as a deterrent. China expressed that the international community should fully respect Syria’s sovereignty, independence and territorial integrity. China’s representative further stated that whatever the Security Council’s response will be – it must be in conformity with the UN Charter and the principle of non-interference in the internal affairs of states.
Although no Security Council resolution seemed to be in sight in terms of authorising a military intervention in Syria, by March 2012 at least 49 countries had imposed targeted sanctions against the Assad regime’s key personnel as well as closed down their embassies in Damascus. In September 2013, the Security Council however managed to adopt resolution 2118, in which the Council expressed its deep outrage at the Syrian government’s use of chemical weapons and that the situation constituted a threat to international peace and security. Between 2012 and 2014 several resolutions were adopted by the Security Council. The resolutions inter alia established the United Nations Supervision Mission in Syria (UNSMIS), authorised the deployment of 30 military observers to Syria, urged that destruction of Syria’s chemical weapons stockpiles take place, demanded access to humanitarian aid throughout Syria, condemned the recruitment by the jihadist groups the Islamic State of Iraq and the Levant (ISIL) and the al-Nusra Front of foreign fighters, expanded the counter-terrorism framework and demanded peace talks and solutions to the Syrian crisis. During the same time, several draft resolutions were however again vetoed by China and Russia. In February 2014, the Security Council managed to adopt resolution 2139 in which the Council demanded that all parties to the conflict immediately put an end to all forms of violence, human rights abuses and violations of international humanitarian law. Resolution 2139 stressed that the primary responsibility to protect its population lies with the Syrian authorities but made no calls for an intervention.

The US has since September 2014 carried out air strikes on ISIL and other jihadist groups fighting in Syria. In September 2015, Russia proceeded to enter Syria and carried out its first air strikes. While claiming to only target ISIL, the West as well as Syrian opposition fighters stated that Russia in fact had targeted anti-Assad rebel groups. In October 2016, Russia vetoed yet another draft resolution tabled by France and Spain demanding an end to military flights over Aleppo. This was Russia’s fifth veto on a Syria resolution. China however, chose to abstain from voting for its first time instead of vetoing like it had previously done on all Syria resolutions alongside Russia.

Two months later, the Security Council managed to unanimously adopt resolution 2236, which welcomed and supported the efforts made by Russia and Turkey to end the violence in Syria. The resolution was drafted by Russia and initiated a nationwide ceasefire throughout Syria. The resolution also called for the full implementation of all relevant Security Council

159 Adams, p. 776.
resolutions, in particular resolutions 2254 and 2268, which demands all parties to end any attacks on civilians and civilian objects, endorses an inclusive and Syrian-led political process as the only sustainable solution for the crisis in Syria, welcomes the attempts to reach a ceasefire and calls on all member states to use their influence with the Syrian government and Syrian opposition to advance the peace process.\textsuperscript{165}

Both the Assad regime as well as several armed opposition groups have alliances with foreign actors and have received various forms of support. Russia’s long-standing relations with the Assad regime stems back to Bashar al-Assad’s father’s rule in the 1970s. Russia has both economic and geopolitical relations with the Assad regime and share common ideological views on many issues.\textsuperscript{166} Not only does Russia lease a key naval facility for its Black Sea fleet at the Syrian port of Tartous but also has forces at an air base in the port of Latakia.\textsuperscript{167} During the course of the conflict, Russia has provided the Syrian government’s armed forces support in the form of aircraft as well as troops fighting alongside the Syrian forces. Russia has consistently insisted that no foreign interference take place in Syria, instead stressing the sovereignty of Syria as well as continually mentioning the failure of NATO’s intervention in Libya as an argument against any interference in Syria.\textsuperscript{168} Iran has been involved in the Syrian conflict since 2013, supporting Assad through the presence of thousands of military advisers, special operation units and commanders.\textsuperscript{169} Iran has also provided the Assad regime with oil transfers, financial support and credit directly as well as through Hezbollah and various Shiite oppositional forces.\textsuperscript{170}

Rebel groups on the other hand have received substantial support from countries such as the US, the UK, France, Canada, Australia and Saudi Arabia. Saudi Arabia provides several Syrian opposition groups with substantial military and financial support. The US supports one of the main Syrian rebel groups by providing military assistance, and has also developed a specific program that trains and arms 5,000 rebel fighters.\textsuperscript{171}

The Syrian government has thus far failed to protect the population from mass atrocities and has instead targeted unarmed civilian protesters through widespread attacks and committed mass executions, war crimes and crimes against humanity such as torture, sexual and gender-based violence, enforced disappearances, as well as used chemical weapons against its civilian population. Furthermore, the Syrian government has hindered access to humanitarian aid, food, water, medical aid and electricity. Armed opposition groups have as well,


\textsuperscript{166} Momani & Hakak, pp. 907-908.

\textsuperscript{167} BBC News, supra note 162.

\textsuperscript{168} Momani & Hakak, p. 897.


\textsuperscript{171} BBC News, supra note 167.
committed war crimes and crimes against humanity such as mass killings, hostages, enforced disappearances, torture and sexual and gender-based violence.\textsuperscript{172}

As of February 2017, the conflict is still ongoing and an estimated 470,000 people have been killed. The Security Council has not managed to take any significant action against the violent conflict and humanitarian crisis in Syria, besides resolutions condemning the violence. While all parties to the conflict have perpetrated war crimes and various crimes against humanity, many scholars claim that it hugely unlikely that the ongoing violent conflict will be resolved by invoking R2P and a military intervention.\textsuperscript{173}

3.2.3 Comments

In 2011, in the midst of a surging military intervention in Libya, and the various criticisms surrounding it, many governments in the West were hesitant to intervene in Syria when the conflict started to escalate. After it was discovered that the Syrian government had used chemical weapons against its civilian population however, several states started to consider military intervention.\textsuperscript{174} These calls were nonetheless blocked by China and Russia. The BRICS-countries share a similar view on interventionism and have stated that the Security Council should not be prescribing how a country should reform itself politically.\textsuperscript{175} The BRICS-countries’ stance on humanitarian intervention thus resembles the familiar criticisms of humanitarian intervention. All in all, Russia has vetoed six Security Council resolutions on Syria, while China has vetoed five.\textsuperscript{176} China and Russia have vetoed resolutions that sought to impose sanctions, an arms embargo and travel bans upon the Syrian regime. Russia has repeatedly made reference to NATO’s military operation in Libya, calling it an example of eminent failure, whilst insisting that they won’t allow the Libyan experience be reproduced in Syria.\textsuperscript{177} By pronouncing such contentions, Russia has hence justified its many vetoes on a Security Council resolution on Syria.

Due to the hefty vetoes undertaken by China and Russia in a number of attempts to decrease the humanitarian catastrophe taking place in Syria, the UN has as of yet not succeeded in halting the humanitarian crisis or putting an end to the mass atrocity crimes. In fact, the atrocity crimes perpetrated by Assad’s government against its civilian population is being perpetuated with Russian-supplied weapons, despite several world leaders’ calls on Russia to end its support for the Assad regime. As a result of the alliance between Russia and the Syrian regime, Russia has not only armed Assad and supported him economically, diplomatically and militarily, but has also stalled every robust attempt to resolve the Syrian conflict. Consequently, Russia’s and China’s view on military intervention for humanitarian purposes along with the Russia’s ties to the Assad regime and its consistent resistance against any form


\textsuperscript{173} Reisman, pp. 386-387; Momani & Hakak, pp. 902-908.

\textsuperscript{174} Reisman, supra note 173.

\textsuperscript{175} Momani & Hakak, p. 899; Adams, p. 775.

\textsuperscript{176} UNSC Report, \textit{UN Documents for Syria}, supra note 161.

\textsuperscript{177} Reisman, p. 387; Adams, supra note 175.
of foreign interference in Syria has resulted in a deeply divided and irresolute Security Council.\textsuperscript{178}

The example of the Syrian conflict, in contrast to the Libyan experience, has significantly undermined R2P as a norm to address humanitarian crises and gross violations of human rights. Several scholars in fact share this view and claim that Security Council authorisation of a military intervention seemingly is very unlikely.\textsuperscript{179} Bessma Momani and Tanzeel Hakak present their position that the Syrian conflict has failed to become a successful case for R2P firstly due to the nature and the complexity of the Syrian conflict, and secondly, due to the allegations of NATO’s intervention in Libya as an eminent failure. In addition, the multifaceted interests and religious and geopolitical dimensions of the conflict with the involvement of regional powers like Russia, Iran, the United States and Saudi Arabia, further complicates the conflict and aggravates any attempts made by the Security Council to invoke R2P. Momani and Hakak hence argue that Syria has been one of the most challenging events in the history of R2P due to these circumstances.\textsuperscript{180}

Something that seems to be repeatedly enunciated in the Security Council resolutions is the affirmation of the protection of the sovereignty, independence and the territorial integrity of Syria. The Council emphasises respect for the sovereignty of Syria and makes no indication of a humanitarian intervention. Although R2P has not successfully been invoked, and as there seems to be no signs of an intervention for human protection purposes in sight in the near future, as the conflict is progressing into its sixth year, the international community’s pressure has led to the forcible delivery of humanitarian aid to the civilian population, the removal and destruction of the Syrian government’s arsenal of chemical weapons and the creation of the supervision mission UNSMIS and a momentary ceasefire.\textsuperscript{181}

\begin{itemize}
\item \textsuperscript{178} Adams, pp. 775-776.
\item \textsuperscript{179} Reisman, \textit{supra} note 173; Momani & Hakak, \textit{supra} note 173.
\item \textsuperscript{180} Momani & Hakak, pp. 904-908.
\item \textsuperscript{181} \textit{Ibid}; Reisman, \textit{supra} note 179.
\end{itemize}
4 Discussion. Setting the legal context of R2P

4.1 Sources of public international law

4.1.1 The Statute of the International Court of Justice

The formally recognised sources of international law are reflected in Article 38(1) of the ICJ Statute. The normative system of international law is derived from the four following sources listed in Article 38(1) of the ICJ Statute:

"a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Article 38(1) of the ICJ Statute mainly serves as a guidance for the ICJ in its decision-making. There does not exist a formal hierarchy between the sources listed in the provision, nor is the list exhaustive. In fact, during the preparatory work of the Statute, the Advisory Committee of Jurists stated that the order between the listed sources merely represented a logical order in which the sources would appear to a judge. International conventions, international custom and general principles of law are thus all equivalent sources of international law. International conventions, international custom and general principles of law are however regarded as primary sources of international law and may assume a higher rank than the following sources listed. According to Article 92 of the UN Charter, the ICJ is the primary judicial organ, which manifests why the ICJ Statute has gained its significant status in the determination of the sources of public international law.

4.1.1.1 International conventions

International agreement is known as being one of the most important sources of obligation for states in international law because of states’ express consent and wish to be bound by the provisions in the conventions. Conventions become binding on state parties by virtue of a state’s manifest of consent. Moreover, the maxim *pacta sunt servanda* binds state parties to a treaty. By consenting to a treaty, the state is accepting the norms and provisions in the treaty as the law.
4.1.1.2 International custom

Customary international law is generally determined through two elements, namely the
general conduct of states, and what states have accepted as the law. It is made up of two
components – one objective and one subjective. The objective element entails states’
consistent and actual conduct, known as *usus*. The subjective element implies states’
perception of a certain conduct as the law, known as *opinio juris sive necessitates (opinio
juris)*. The accumulation of these two elements give rise to the establishment of a customary
law.\(^{190}\)

The general rule is that customary international law is an optional law in the sense that two or
more states can agree that a certain customary law would not apply in relation between them.
However, there are some customary rules that are of peremptory character, meaning they
constitute *jus cogens*. *Jus cogens* norms are given their status due to the fact that they have
been accepted by the states as norms from which no derogation may be permitted. All states
are bound by norms of *jus cogens* character whether or not they have codified the norm in
their national legislation. States cannot agree between themselves to exclude such rules in
their relations. Examples of peremptory norms of public international law include the
prohibition of aggression, the prohibition of genocide and the prohibition of torture.\(^{191}\) In
conclusion, customary international law is a practice, i.e., a custom, enacted by states, that is
accepted as the law. Custom requires state conduct for some length of time and with some
consistency along with the conviction that this conduct is the law, i.e., *opinio juris*.

4.1.1.3 General principles of law

A general principle of law is a principle that is recognised and applied universally in legal
systems around the world. Such legal principles give rise to international legal obligations,
even if they are not actually codified in the judicial systems. Examples of general principles
of law include the maxims *pacta sunt servanda* and *ne bis in idem* as well as the general
principle of non-intervention.\(^{192}\)

4.1.2 State practice

State practice is the actual conduct of states in their international relations as well as their
statements regarding their actions and is conclusive for determining customary international
law.\(^{193}\) Sometimes a state’s actions and a state’s proclamations can diverge, which proposes
some difficulties in interpreting their practice. According to Sir Michael Wood and Omri
Sender, the actions of all branches of the government of a state, may be considered as state

\(^{192}\) *Ibid*, p. 31.
\(^{193}\) Oxford Public International Law (OPIL Database), Max Planck Encyclopedia of Public International Law [MPEPIL], Sir
Sender (ed.)].
practice, irrespective of if they are executive, legislative or judicial.\textsuperscript{194} In the field of public international law, state practice can amount to diplomatic correspondence, international and national judicial decisions, state legislation, the proceedings of international organisations and national parliaments, policy statements and press releases among other.\textsuperscript{195} The practice of states plays an important role in the domain of international law and can convey important information in for instance the interpretation of treaties or whether a certain rule has become customary international law. As previously mentioned, Article 38(1)(b) of the ICJ Statute mentions international custom as evidence of a general practice accepted as the law. But for a rule to be considered a custom, its subjective criterion of \textit{opinio juris}, i.e., a state’s conviction that the rule is required, must also be fulfilled. What counts as state practice differs depending on the rule concerned, and most notably, on the specific area of public international law. Wood and Sender argue that the identification of state practice may be particularly difficult in the area of international human rights law and international humanitarian law.\textsuperscript{196} Moreover, with the presence of 195 states, it can in general be quite challenging to construe and identify the rules of customary international law.\textsuperscript{197}

4.2 R2P – concept, principle or norm?

R2P is often described as a concept, principle and norm simultaneously. These various terms however, all convey a somewhat different meaning from one another. Different actors and agents refer to R2P differently. Many governments, whether they are proponents or opponents to R2P, refer to R2P as a concept. A concept is typically an “abstract idea”. In other words, when R2P is described as a concept, subsequently it means that R2P is a proposal or a suggested action but something that has not yet been fully developed. Actors who describe R2P as a concept, often claim that no consensus has been reached as to whether R2P has become a norm.\textsuperscript{198}

It is not uncommon to refer to R2P as a principle. A principle is in general a fundamental truth or proposition. When R2P is categorised as a principle, it firstly implies that it has gained the status of something having a common understanding. It secondly implies that R2P has gained sufficient consensus and can function as a bedrock for action.\textsuperscript{199} When the ICISS first published its report on R2P in 2001, it described R2P as an “emerging guiding principle” as they acknowledged that there at the time, existed no basis to claim the emergence of a new principle of customary international law.\textsuperscript{200}

But R2P is also described as a norm oftentimes. The majority of scholars refer to R2P as a norm when speaking of its status. Norms are shared understandings and collective values of

\begin{footnotes}
\item \textsuperscript{194} Ibid, para. 9.
\item \textsuperscript{195} Ibid, para. 21; Brownlie, pp. 6-7.
\item \textsuperscript{196} Wood (ed.) & Sender (ed.), para. 3.
\item \textsuperscript{197} Ibid, para. 1-4.
\item \textsuperscript{198} Bellamy, 2009, pp. 4-5; Durham & Wynn-Pope, p. 176; Badescu, p. 146.
\item \textsuperscript{199} Bellamy, 2009, p. 6.
\item \textsuperscript{200} ICISS, p. 15, para 2.24.
\end{footnotes}
standards of appropriate behaviour. In general, norms tend to encompass elements of both concept and principle. Further, norms reflect legitimate social purpose to this particular behaviour and shape the “preferences and identities of state and non-state actors”. The heart of the academic debate has centred around whether R2P is a norm or not and whether it is an emerging or an embedded one – and not – around whether R2P is a concept or a principle. Lastly, as Melissa Labonte points out, despite all nuances in the R2P academic commentary regarding its status, nobody has as of yet made the argument that R2P is not a norm.

4.2.1 Comments

Is the distinction between R2P as a concept, principle or norm at all an important matter? For the determination of its status in international law, I would like to argue that it has some importance. A concept, i.e., merely an abstract idea or a suggestion, has in my view no relevance in relation to legal implications. It is first when something becomes commonly recognised or there is a consensus about it that it can become legally relevant. Bellamy speaks of R2P as a concept prior to the R2P-affirmation in the 2005 World Summit, and refers to R2P as a principle after the Summit. By doing so, he shows that R2P acquired a shared understanding and a sufficient consensus at the 2005 Summit. Before the Summit, R2P thus required further elaboration and development. This is indeed a logical way of looking at it. After 2005, R2P was unanimously endorsed and outlined in the Outcome Document, which is a reflection of Heads of State and Government’s acknowledgement of the content of the principle as well as their commitment to act in accordance with the relevant provisions of the document.

Similar to many scholars, I share the common view of R2P’s lifecycle in the political debate. The common view on R2P’s emergence is that it started as an idea in the ICISS report and once the report was released, R2P was perceived as a concept. Thereafter, R2P evolved into a principle close to its adoption at the 2005 World Summit Outcome Document. After the unanimous agreement and adoption of the Outcome Document, R2P obtained the status of a norm. The fact that states accepted and agreed upon the content of R2P, and declared themselves willing to act in accordance with the writings, led to R2P becoming a norm. Consequently, R2P encompasses both the status of a principle and a norm.

4.3 R2P’s status in public international law

Once it is established that R2P is a norm and thus also encompasses elements of a principle – this leads to the question of what R2P’s status in international law is or may be. There is a difference between R2P as a principle or norm in the discourse of international relations, and

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204 Labonte, 2016, p. 135.
205 Bellamy, 2009, pp. 4-7; Breakey, p. 19.
206 Badescu, pp. 101-103; Bellamy, supra note 205.
R2P as a legal principle or norm in public international law. The following section will attempt to position R2P’s status in international law and answer the question of whether R2P has become an accepted legal principle in public international law.

4.3.1 What is a legal principle?

According to the Free Dictionary, a judicial doctrine is a principle underlying the formulation of jurisprudence.207 During the course of this thesis, I will refer to a judicial doctrine as a legal principle as they have the same meaning. Legal principles can either be enacted into law or not, but they are nevertheless characterised by their status as a “rule of law”. In other words, legal principles are a way of practice and bear the same weight as law without being codified as such. Oftentimes legal principles are underpinnings of existing laws and thus they conform to law.

4.3.2 General principles of law and principles of public international law

General principles of law are basic rules that are recognised and coexist simultaneously in several national legal orders around the world. General principles can be legally enacted or unwritten rules and can be prevalent in a treaty provision or become part of customary international law. The term ‘general principles of law’, stems back to the wording in Article 38(1)(c) of the ICJ Statute. Although general principles are often somewhat vague, they usually serve as a complement or simply as the filling of certain gaps between other rules in the legal system – meaning they must not necessarily have a subsidiary status in relation to enacted law. Oftentimes, enacted law and general principles in fact overlap, covering the same legal question. Therefore, treaty law does not always prevail over general principles of law. A general principle of law could influence how a written legal rule is to be applied. For instance, the ICJ has stated that the principles underlying the Genocide Convention, are “principles which are recognised by civilised nations as binding on states, even without any conventional obligation”.208 Hence, general principles are often applied in international courts’ and tribunals’ judgments. Examples of general principles of law include the legal maxims *pacta sunt servanda*, *res judicata*, good faith and the impartiality of judges.209 Undeniably, these maxims are prevalent in most national legal systems as binding norms.

Principles of public international law on the other hand, can be found in the UN Charter. These principles are recognised by the UN Charter and consequently, by all member states, and include the fundamental principles of the promotion of human rights and the prohibition of the use of force against other states.

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4.3.3 Comments

Public international law is horizontal in relation to the national legal systems, due to the fundamental principle of the sovereign equality of states. The legal system of public international law is not in all contexts a fully coherent and comprehensive legal order but nevertheless it consists of a set of collectively agreed principles and rules.\textsuperscript{210} Evidently, R2P does not constitute either a general principle of law or a principle of public international law but its basis in international law unarguably proves that it has legal relevance and implications of sorts.

4.4 Point of departure

As presented above, Article 38(1) of the ICJ Statute is used to determine the sources of international law. The article lists treaty law and customary international law as the primary sources of international law between which there exists no inherent hierarchical order. During the UN World Summit in 2005, Heads of State and Government agreed on R2P’s scope of application to include the crimes of genocide, war crimes, crimes against humanity and ethnic cleansing. Therefore, only these four atrocity crimes can trigger R2P through an action of “timely and decisive manner” by the Security Council. In the following, the international agreements that are directly relevant for the establishment of the legal status of R2P will be briefly addressed. This will be followed by a review of customary international law for the same purpose.

4.4.1 International agreements

4.4.1.1 The Genocide Convention

After the Second World War, discussions about how to prevent future atrocities and gross violations of human rights led to the adoption of the Genocide Convention. During the Nuremberg trials that took place after the war, the term genocide was however not used in neither the prosecutions nor the judgments and instead, war criminals were convicted of crimes against humanity.\textsuperscript{211} The Genocide Convention declares that genocide is a crime under international law whether committed in time of peace or in time of war and obliges states to prevent and punish the crime of genocide at all times. The convention further obliges states to criminalise genocide in their national legislation. Notably, the convention does not explicitly prohibit states from \textit{de facto} committing the act of genocide but the ICJ has stipulated that within the obligation to prevent lays also a prohibition of committing the crime itself.\textsuperscript{212} The act of genocide is recognised as an internationally accepted rule of customary international


\textsuperscript{211} Engdahl & Hellman, p. 27.

law having the character of *jus cogens*. This means that it is a peremptory rule from which no derogation is accepted. Intrinsically, according to Article 34 of the Vienna Convention, a treaty is binding only on state parties, and does not create any obligations on states that have not consented to a treaty.\(^{213}\) But due to the non-derogable nature of the crime of genocide and because it is a fundamental principle recognised by all civilised nations, the Genocide Convention is binding on non-signatory states as well.\(^{214}\)

In the *Bosnia v. Serbia* case regarding the application of the Genocide Convention, the ICJ found that Serbia had failed to prevent and punish the crime of genocide in Srebrenica. In the judgment, the ICJ extended states’ obligation to prevent and punish the crime. The Court found that in addition to the provision to refrain from engaging in genocide, the convention imposes upon states an extraterritorial obligation to prevent “persons or groups not directly under their authority from committing an act of genocide.”\(^{215}\)\(^{216}\) In other words, the Court construed the convention in such a way that states have an obligation to, as far as possible, “employ all means reasonably available” in order to prevent genocide.\(^{217}\) Hence, the obligation to prevent genocide is not territorially limited and applies to genocides committed outside of a state’s own borders. While the Court noted that the obligation is not territorially limited by the convention, it simultaneously stated that the matter of the territorial scope of each particular obligation arising under the convention remains imprecise because the issue has not been ruled upon *res judicata*.\(^{218}\)

R2P as defined in the 2005 Summit Outcome Document may be triggered with respect to the crime of genocide, which means that in extreme cases a humanitarian intervention may be justifiable for the protection of the civilian population in a country. The duty to prevent genocide according to R2P, is thus entrenched in the provisions of the international Genocide Convention.\(^{219}\) It is however of significance to note that the scope and applicability of the Genocide Convention is much narrower than that of R2P.\(^{220}\) The Genocide Convention does not expressly mention the use of force as a means to prevent genocide. In the *Bosnia v. Serbia* case where the ICJ construed the far-reaching duty to prevent genocide as the employment of “all means reasonably available” suggests a wide responsibility but it is questionable if it entails the use of force as it would be in direct conflict with Article 2(4) of the UN Charter. According to Article 103 of the UN Charter, in the event of a conflict between obligations under the UN Charter and obligations under other international agreements, the UN Charter prevails. In addition, the lack of clarity regarding the territorial limits of the convention leads to some confusion when arguing that states have an obligation to protect populations from genocide under R2P. Although it could be argued that R2P imposes on states a responsibility to protect populations from genocide at all times, deduced from the provisions of the

\(^{214}\) ICJ, 28 May 1951, *supra* note 207.
\(^{216}\) *Ibid*, para. 162-166.
\(^{217}\) *Ibid*, para. 430.
\(^{219}\) Breakey, p. 23.
\(^{220}\) Badescu, p. 176.
convention – the Court however did not necessarily find this to be the case under the Genocide Convention in the *Bosnia v. Serbia* case.\textsuperscript{221}

4.4.1.2 The Geneva Conventions and the Additional Protocols

International humanitarian law is known to be one of the oldest branches of international law and is concerned with the law of armed conflict.\textsuperscript{222} IHL deals with the regulation of the methods and means used in warfare and with humanitarian problems arising from armed conflicts. The founder of the International Red Cross, Henry Dunant, initiated the codification of the laws of war by establishing the first Geneva Convention of 1864. The framework of IHL is comprised of treaties and customary international law. The core treaties of IHL are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 which are universally ratified.\textsuperscript{223} Many of the provisions of IHL are recognised as principles of customary international law, in which many of them also constitute norms of *jus cogens*. Hence, many of the provisions are to be observed by all states whether they are signatory states to the treaties or not.\textsuperscript{224}

War crimes are included in the scope of R2P and constitute serious violations of IHL. References to the prohibition of war crimes can be found in a number of international instruments, such as the Geneva Conventions, the Charter of the International Military Tribunal (IMT Charter)\textsuperscript{225}, the Rome Statute and the Hague Convention of 1907\textsuperscript{226}. For the most of the time however, war crimes are regarded as serious violations of the Geneva Conventions and their Additional Protocols, as well as the laws and customs of war.\textsuperscript{227} The ICISS report firmly argued for R2P’s basis in international humanitarian law and in the Geneva Conventions and the Additional Protocols.\textsuperscript{228} The Fourth Geneva Convention of 1949 and the First Additional Protocol of 1977 are especially relevant when arguing for R2P’s basis in international humanitarian law in general terms. The common Article 1 to the four Geneva Conventions imposes on the contracting parties an obligation to respect and to ensure respect for the conventions in all circumstances. Article 89 of the First Additional Protocol states that “in situations of serious violations of the Geneva Conventions or the Protocols, the contracting states “undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”\textsuperscript{229}. International humanitarian law thus offers some room for collective actions undertaken by the international community in cooperation

\textsuperscript{221} Durham & Wynn-Pope, *supra* note 218.


\textsuperscript{224} Durham & Wynn-Pope, pp. 175-177; Gasser (ed.), *supra* note 222; International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 79.


\textsuperscript{226} International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.


\textsuperscript{228} ICISS, p. 16, para. 2.26.

\textsuperscript{229} ICRC, AP (I), 1977, Article 89.
with the UN. In terms of the third pillar of R2P – military intervention for human protection purposes – IHL and its framework offers limited support.\(^ {230} \)

### 4.4.1.3 The Rome Statute

There exists no specific international convention for the criminalisation of crimes against humanity in international law. However, crimes against humanity are prohibited under customary international law and are furthermore recognised as a norm of *jus cogens*. Crimes against humanity were first criminalised in the IMT Charter in 1945 following the Second World War. In the IMT Charter, crimes against humanity were defined as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population in both times of war and peace. Persecutions on political, racial or religious grounds were also described as crimes against humanity.\(^ {231} \)

The Rome Statute prohibits crimes against humanity along with the crimes of genocide and war crimes. Although the Rome Statute is not yet considered customary international law, it provides a useful range of descriptions. Article 7 of the Rome Statute describes crimes against humanity as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack”.\(^ {232} \) Article 7(1)(a-k) of the Statute further lists murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, enforced disappearance of persons, apartheid or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, as acts amounting to crimes against humanity.\(^ {233} \)

### 4.4.1.4 The UN Charter and the question of threat to the peace

The UN Charter is universally ratified and represents an international consensus on norms regarding the international legal order. Although both the principles of sovereignty and non-intervention represent cornerstones of the Charter and are deeply enshrined in international law and in the international affairs between states, the concept of sovereignty has evolved and shifted its focus from the rights of states to the responsibility of states.\(^ {234} \) The UN Charter does not explicitly mention a ‘responsibility to protect’, but as the Charter has been described as a “living instrument” by which it is open to interpretation in light of humanitarian needs,
Article 39 of the Charter may permit the invocation of R2P to maintain or restore international peace and security. According to Article 39 of the UN Charter, the Security Council is the relevant organ to determine the existence of any threat to the peace and decide what measures should be taken for the maintenance or restoration of international peace and security. As the majority of conflicts today are intrastate, the Security Council has since the end of the Cold War been broadening the definition of the term ‘threat to the peace’ in accordance with the Charter’s Article 39. Today, the term ‘threat to the peace’ is used not only to describe interstate wars but also civil wars, terrorism, internal oppression and violations of human rights.235

The Security Council has the power to take binding collective measures under Chapter VII of the Charter. If the Council determines that a situation constitutes a threat to international peace and security according to Article 39, the Council can choose between imposing non-military enforcement measures such as economic or diplomatic sanctions according to Article 41, or military enforcement measures under Article 42.236 According to Article 39, in conjunction with Article 42, the Council has the power to impose military intervention if a situation constitutes a threat to international peace and security or if a civil war or grave violations of human rights are prevalent.

Both non-interference and promotion of human rights are cornerstones and vital goals of the UN Charter.237 Douglas Eisner argues that because the Charter supports both the promotion of human rights and the protection of sovereignty, “it is impossible to determine definitively the legal status of humanitarian intervention” based on the UN Charter. As Eisner points out, the Charter on the one hand promotes human rights, but on the other hand limits the possibility of using force to protect those rights. Eisner argues that the classical and dominant view of the Charter is that “sovereignty supersedes human rights, and thus the Charter outlaws humanitarian intervention”.238 In conclusion, there does exist evidence that the Charter provides support for both proponents and opponents of humanitarian intervention in light of R2P’s third pillar. In other words, the UN Charter has resources both for and against humanitarian intervention for human protection purposes.239

4.4.1.5 Comments

There does exist legal obligations in relation to states to protect their populations from genocide, according to Article 1 of the Genocide Convention. Thus, this obligation on states to prevent the crime of genocide provides a strong legal foundation for R2P.240 With regard to war crimes, these violations are also prohibited under the four Geneva Conventions and their Additional Protocols. R2P’s reference to the responsibility to protect populations from war

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236 See Articles 39; 41; 42 of the UN Charter.
237 See Article 1 of the UN Charter.
238 Eisner, pp. 199-200.
239 Breakey, pp. 20-21.
240 Ibid, p. 23.
crimes thus has substantial legal basis too. The lack of treaty obligations on states regarding crimes against humanity as a distinct category of international crime on the other hand, provides the R2P framework with its weakest legal link. Albeit crimes against humanity do not have legal bearing in international law on their own, they are nonetheless spelled out in Article 7 of the Rome Statute. Furthermore, many of the examples listed in the article, such as torture\textsuperscript{241}, slavery\textsuperscript{242} and enforced disappearance of persons\textsuperscript{243} are covered in separate international conventions. Albeit these separate conventions may not be ratified by a given state or recognised as customary international law, their mere existence nonetheless strengthens R2P’s legal position in international law.\textsuperscript{244} Lastly, ethnic cleansing also falls under R2P’s framework of protection purposes. Ethnic cleansing is the act of forcibly expelling an ethnic group from a certain geographic area, in order to create an ethnically homogenous composition in the area. Ethnic cleansing is however not a crime as such under international law but may legally fall under any of the three atrocity crimes.\textsuperscript{245} Furthermore, ethnic cleansing is recognised as serious violations of various international law and human rights provisions.

Conclusively, states do have legal obligations stemming from treaty law to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. Consequently, there exists extensive evidence of R2P’s basis in treaty law in the field of international law. Furthermore, the UN Charter includes provisions which permits the Security Council to take responsive actions against a situation that constitutes a threat to international peace and security. In other words, there does exist provisions in the Charter that enables the invocation of the third pillar of R2P by the UN.

4.4.2 Customary international law

Customary international law is determined through the general conduct of states, and what states have accepted as the law, known as \textit{opinio juris}. The conduct of states must show a high extent of continuity and prevalence as well as a high degree of unanimity in the actions of a substantial number of states. The certain consistent conduct of only a few states is thus not sufficient – the conduct must be widespread.

4.4.2.1 The atrocity crimes

In addition to being non-derogable crimes under treaty law, the acts of genocide and crimes against humanity are also prohibited under customary international law. War crimes become peremptory norms of international law when the acts seriously violate the basic rules of

\begin{footnotesize}
\textsuperscript{241} UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.
\textsuperscript{242} League of Nations, Convention to Suppress the Slave Trade and Slavery, 25 September 1926.
\textsuperscript{244} Durham & Wynn-Pope, p. 187.
\end{footnotesize}
international humanitarian law. States thus have legal obligations springing from both treaty law as well as customary international law to protect their populations from genocide and crimes against humanity. The fact that the atrocity crimes within the R2P framework have substantial underpinnings in international law from either conventional or customary international law, or both, further strengthens R2P’s legal basis in public international law.

4.4.2.2 The 2005 World Summit Outcome Document

At the 2005 World Summit, member states unanimously endorsed R2P in the Outcome Document. The member states agreed that they have an inherent responsibility to protect their citizens from genocide, war crimes, crimes against humanity and ethnic cleansing. Further, the member states agreed that the international community has a responsibility to use appropriate peaceful means to assist other states in protecting their citizens from said atrocity crimes. Ultimately, this assistance is to be exercised through the UN. Finally, all states agreed on their preparedness to take collective action in a timely and decisive manner, through the Security Council, if a state fails to protect its population. This affirmation and endorsement of R2P was unanimously agreed by the more than 170 member states present at the Summit. The agreement was then unanimously adopted by the General Assembly in resolution 60/1, which expressly declares that within each state’s responsibility to protect its population from the four atrocity crimes, lies the responsibility to prevent such crimes from occurring, as well as their incitement. Resolution 60/1 further clarifies the international community’s collective responsibility to act through stating that such actions should be dealt with on a case-by-case basis.246

Cristina Badescu argues that the endorsement of R2P in the universal forum of the 2005 World Summit has contributed to the “heaviest normative weight to R2P’s trajectory thus far”.247 Other advocates of R2P have claimed that the principle became customary international law as of the unanimous adoption of the Outcome Document. They regarded the affirmation of R2P as a resolute commitment by world leaders, expressing the desire to be bound by, and act in accordance with R2P.248 Resolutions adopted by the General Assembly are however not legally binding on member states but rather fill the purpose of being recommendations to the member states.249 A General Assembly resolution can therefore, as such, not create legal obligations for member states. The argument of resolution 60/1 constituting customary international law is in my opinion rather an exaggeration. However, the legal implications and influence of UNGA resolutions should not be undermined. UNGA resolutions may in fact have the potential to greatly influence international law, as they represent a “world opinion”, shared and endorsed by many member states.250 After all, the UNGA is represented by most of the states in the world and when an issue is widely endorsed

246 A/RES/60/1, para. 138-139.
247 Badescu, p. 106.
249 See e.g. Articles 10-13 of the UN Charter.
and affirmed it is not completely void of legal implications. The affirmation of R2P at the 2005 Summit, is an expression of the international community’s political will and opinion. UNGA resolutions can impact both political and diplomatic dimensions, as well as influence and persuade states and world leaders to act in a certain way and fulfil certain conduct.\textsuperscript{251} This pressure on states to live up to a certain conduct can potentially over time evolve into a coherent state practice, thus resulting in the emergence of new customary international law. This will, expressed by member states at the Summit, therefore must create some legal implications of sorts. The unanimous recognition of R2P as a norm implying duties on states falls short of being an expression of \textit{opinio juris} due to the lack of coherent state practice. The endorsement of R2P as agreed per the 2005 Outcome Document cannot therefore amount to \textit{opinio juris}, but is rather an expression of the political will, intentions and opinions of the member states.

Conclusively, the Outcome Document of the 2005 World Summit cannot amount to customary international law as neither of the prerequisites of international custom are fulfilled. This is expressed through the inconsistent and divided practice of states regarding R2P as shown per the examples of the Libyan and Syrian conflicts as well as the lack of \textit{opinio juris} among states regarding the R2P principle. However, I do find the Outcome Document to have some legal relevance and implications. The fact that R2P was endorsed by such a large number of states and although heavily opposed succeeded to become unanimously adopted, cannot be devoid of implications.\textsuperscript{252} The expressed political will and ambitions of the member states create consequences in international law, albeit not of legally binding character. I would consequently argue the Outcome Document to constitute soft law.

Soft law are norms that lack binding force but nonetheless create legal effects.\textsuperscript{253} Soft law can contribute to international law as a means of shaping and developing binding norms.\textsuperscript{254} As we have seen, R2P’s scope for human protection purposes is substantially rooted in existing international law. The Outcome Document, as an instrument of soft law, thus can have the potential to strengthen the legal bedrock that R2P already has acquired in contemporary international law. Not seldom, instruments of soft law do in fact play a role in international law and more often than not, these soft law instruments underpin principles and norms that already exist in international law.\textsuperscript{255}

4.4.2.3 State practice

The practice of states makes up one of the prerequisites of a certain norm’s status as customary international law. Following the conflicts in Libya and Syria arising from the Arab Spring, no coherent or consistent state practice can be identified. In fact, the two different conflicts have given rise to divergence regarding the reactions of the Security Council. On the

\textsuperscript{251} Ibid.
\textsuperscript{252} Evans, 2009, pp. 20-21.
\textsuperscript{254} Ibid, para. 26-28.
\textsuperscript{255} Ibid, para. 26-37; Crawford, pp. 12-15.
one hand, the Security Council managed to act, both swiftly and unanimously, to intervene against the Libyan regime’s lethal targeting of civilian protesters. On the other hand, the ongoing Syrian conflict is now in its sixth year while no impactful progress has been made to avert the suffering of civilians. In fact, almost half a million people have been killed so far as a result of the conflict.256 The international community’s response was both clear and resolute in the case of Libya, where the resolutions leading up to the NATO-led intervention expressly mentioned R2P. The Syrian conflict on the other hand has led to Security Council standstill, where the Council is heavily divided. In the Libyan example, neither China nor Russia used their veto power to block any of the foreign interferences in Libya. Instead, China and Russia abstained from voting. As Bruce D. Jones outlines it, abstentions from permanent members is a means of allowing the Security Council to proceed. In the case of Libya, China and Russia thus allowed the use of military force by NATO, but without their express endorsement.257 Hence, an abstention from a P5-member state expresses a discontent and disapproval. The UN authorised military intervention in Libya with the United Kingdom’s, France’s and the United States’ prominent role, managed to arm rebel groups and overthrow Gaddafi. When it was discovered that the Assad regime had used chemical weapons against its civilian population – which constitutes a grave atrocity crime that can motivate Security Council authorisation of military intervention according to the R2P doctrine – the Council was afflicted by paralysis. The Security Council could neither agree on far-reaching measures such as military force, nor could it agree on less restrictive measures such as targeted sanctions, an arms embargo or referral of Assad and his regime to the ICC.258 Instead, every attempt made by the US, the UK and France to avert the situation in Syria was blocked by China and Russia. The different outcomes surely spark the question of whether Libya or Syria was the exception.

Today, six years after NATO’s intervention in Libya, the country is still not a democracy, and is experiencing political deadlock, economic crisis and deteriorating security.259 It seems very likely, as many critics of R2P’s third pillar argue, that the Libyan experience is stopping any robust action from being taken in the ongoing conflict in Syria.260 By many critics of the R2P principle, the NATO-led intervention was seen as an overstepping and misuse of the Security Council mandate, where powerful states were using the R2P doctrine in order to overthrow autocratic leaders. In fact, those who oppose R2P’s third pillar, often emphasise the need for respect for the principle of sovereignty and territorial integrity of a state, along with the prohibition of the use of force. The fear that powerful states will interfere through military means based on self-interest and instead destabilise the violent situation in a state, is thus still widespread among many states. The BRICS-countries have continuously and repeatedly stated that the UN should not interfere in a country’s internal affairs on how it should

256 HRW, World Report 2017, Syria, supra note 152.
politically reform itself.\textsuperscript{261} Gareth Evans, one of the co-chairs of the International Commission on Intervention and State Sovereignty and co-authors of the ICISS report, has referred to the BRICS-countries’ firm opposition of the third pillar of R2P as the “mid-life crisis” of R2P. Evans argues that the BRICS-countries’ attitude seems to have been that they should “not give the P3 members what they want, because if you give them anything they will take everything”\textsuperscript{262}. The BRICS-countries’ stance is however a plausible viewpoint, given the fact that the NATO-alliance managed to overthrow and kill Gaddafi, which was not part of the mandate. As Evans puts it regarding the Libyan intervention, “unless and until there is some recognition of what went wrong there, it will be extremely difficult ever again to secure an un-vetoed majority vote for tough action”\textsuperscript{263}. Furthermore, the prohibition of the use of force constitutes a fundamental cornerstone of the UN Charter and given its character as a \textit{jus cogens} norm of customary international law, it is comprehensible that states still regard humanitarian interventions as questionable and illegal.

As mentioned, state practice is one determining factor of whether a rule or principle is considered customary international law. This state practice must be repeated in a consistent manner over some length of time.\textsuperscript{264} With some 195 states in the world, it is undoubtedly difficult to identify state practice as the view and practice of states regarding R2P is very diverging.\textsuperscript{265} There exists a rather distinct fragmentation between the two camps. In general, countries in the Global South tend to question R2P while Western states have the tendency to endorse the principle of R2P.\textsuperscript{266} The question of whether state practice, alone, has the ability to undermine R2P as a legal principle in international law, can be answered affirmative in my opinion. As the foundation of international law rests on the sovereignty and equality of states, where legal obligations derive from states consenting to them in accordance with the legal maxim \textit{pacta sunt servanda} along with their conviction that it is the law, then a lack of state practice suggests that states do not want to be bound by R2P. Consequently, the lack of consistent state practice hinders the affirmations and endorsements of R2P in the World Summit Outcome Document from becoming incorporated in any way into positive international law.

The tensions and dilemma between military intervention for the protection of civilians against grave human rights violations on the one hand, and the respect for the constitutional pillars and long-standing principles of sovereignty, territorial integrity and the prohibition of the illegal use of force on the other hand, lend no coherence or continuity to the practice of states. The continued support for the principle of sovereignty and the territorial integrity of states, is still well embedded and have been repeated in the Security Council resolutions on Syria. There is in fact a clear pattern in all the resolutions on Syria – they all affirm the protection of the sovereignty, independence and the territorial integrity of Syria. The language is clear – the

\begin{footnotesize}
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\item \textsuperscript{261} Momani & Hakak, p. 899; Adams, p. 775; UNSC Report, \textit{UN Documents for Syria}.
\item \textsuperscript{262} Evans, 2013, \textit{supra} note 258.
\item \textsuperscript{263} \textit{Ibid}.
\item \textsuperscript{264} Brownlie, p. 7.
\item \textsuperscript{265} Wood (ed.) & Sender (ed.), para. 1-4.
\item \textsuperscript{266} Website of ICRtoP.org, \textit{Responsibility to Protect: Engaging Civil Society}, http://www.responsibilitytoprotect.org/files/responsibility%20to%20protect%20powerpoint%20presentation.pdf, Accessed online 2017-02-11.
\end{itemize}
\end{footnotesize}
principle of sovereignty of the state is still emphasised while no mention of a collective responsibility of the international community or intervention for human protection purposes is made. Although R2P has not successfully been invoked in the resolutions on Syria – and a military intervention for the protection of the population seems rather unlikely, as many scholars have put it – the pressure of the international community has however led to the forcible delivery of humanitarian aid to the civilian population, the removal and destruction of the Syrian government’s arsenal of chemical weapons and the creation of the UN supervision mission UNSMIS and a momentary ceasefire.

The different outcomes in the cases thus results in an ambiguity surrounding the third pillar of R2P. As long as a permanent member of the Security Council has self-interests to pursue in a specific case and close relations with a state where grave atrocities are committed against the population, it seems unlikely that the Council’s response will involve military force of any sort.\textsuperscript{267} Whether the Council will be able to invoke R2P in cases of mass atrocity crimes perpetrated in a country, is thus subject to the Council members’ political discretion. The Libyan conflict has been described as a “test case” for R2P, as it was the first time that R2P was expressly mentioned in the Council resolutions.\textsuperscript{268} The Libyan case thus is an example of where R2P’s third pillar was successfully invoked. In the aftermath of the Libyan intervention, former Secretary-General Ki-moon attested in favour of R2P the following:

“In 2011, history took a turn for the better. The responsibility to protect came of age; the principle was tested as never before. The results were uneven, but at the end of the day, tens of thousands of lives were saved.”\textsuperscript{269}

The responses to the Syrian conflict on the other hand, have significantly undermined R2P as a legal norm to address grave atrocity crimes and humanitarian crises. Although the atrocities committed by the Assad regime have been internationally acknowledged, the Syrian example illustrates the normative persistence of the principle of non-interference among states. One distinct observation can however be noted as regards the question of R2P in practice: irrespective of the Security Council’s action or inaction, it is to be expected that criticism will persist either way.

4.4.2.4 Comments

There exists evidence that states have legal obligations to protect their populations against genocide, war crimes, crimes against humanity and ethnic cleansing based on customary international law. The first pillar of R2P is thus well entrenched in existing customary international law. In terms of the third pillar of R2P, customary international law however offers no support. The prohibition of the use of force in addition to the principle of

\textsuperscript{267} Reisman, pp. 386-387; Momani & Hakak, pp. 904-908; Evans, 2013.
\textsuperscript{268} Doyle, p. 679; Momani & Hakak, p. 905.
sovereignty are principles that are both long-standing and well established under customary international law. These norms of *jus cogens* therefore prevail over the R2P principle.

As for the affirmations of R2P at the 2005 World Summit, these are neither legally binding provisions nor constitute customary international law as there is no expressed *opinio juris* or coherent state conduct regarding the content in paragraphs 138-139 of the Outcome Document. As long as the commitments in the 2005 Outcome Document are not implemented in a consistent manner, these commitments constitute nothing more than mere political declarations. The absence of a consistent conduct and pronounced will in terms of R2P, indicates that the support and upholding of the principle of sovereignty and the prohibition of the use of force still prevails over the R2P principle. Similar concerns are voiced against R2P as was raised against humanitarian intervention formerly. In conclusion, these factors together prove that no customary international law has been established regarding R2P yet. As the ICISS report as well as the High-Level Panel on Threats, Challenges and Change however pointed out, it may be possible that R2P is an emerging guiding principle of customary international law.270

### 4.5 Analysis and concluding remarks

In international law, it is naturally more straightforward to identify as well as see the evolution of treaty law than of customary international law. As has been shown accordingly, there does exist substantial evidence for a legal basis of the first pillar of R2P – the responsibility of the states to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. In regard to the third pillar of R2P it is somewhat more problematic as the prohibition of the use of force under the UN Charter – which in the event of a conflict between international norms, prevails – surfaces as an obstacle.

Several states have expressed that R2P does not create new legally binding norms but that the obligations set forth within the R2P principle already exist and are rooted in international instruments such as inter alia human rights law, refugee law and international humanitarian law.271 Other states have described R2P as a mere “political or moral commitment” and that R2P is neither part of international law nor a legally binding commitment.272 The legal pertinence of R2P has further been subject to debate among various scholars. R2P has been described as soft law, a non-binding political concept, an emerging legal norm on its way to becoming binding law and a general principle of international law, among other.273 Both the

ICISS report and the High-Level Panel as well as scholar Thomas Weiss describe R2P as an emerging principle of customary international law. Edward Luck, former Special Adviser to the UN Secretary-General, has described the practice of the Security Council regarding the resolutions on Libya as an indication of the existence of opinio juris.

Thus, many advocates for R2P regard the principle as a norm de lege ferenda. Those actors who oppose the R2P principle on the other hand stress the need for more substantial agency in terms of customary international law. Moreover, states who oppose R2P tend to emphasise the non-binding effects of UNGA resolutions.

Since the principle of R2P is not, as such, explicitly incorporated into any legally binding international instrument, it lacks the credibility of being a legal rule. But the elements of R2P’s first pillar are however reinforced by other international conventions as well as customary international law. In terms of treaty law, the first pillar of R2P is well entrenched in existing international legal norms deriving from treaties in the fields of international human rights law, international humanitarian law, international criminal law, as well as from customary international law. The legal basis of the third pillar of R2P in international law on the other hand, is more dubious. In terms of international instruments, the prohibition of the use of force, enshrined in Article 2(4) of the UN Charter is legally binding on all member states and constitutes a long-standing international custom. The prohibition of the use of force is one of the foundational pillars of international law and prevails over any other international agreement in the event of a norm conflict. There is neither any customary international law backing the third pillar of R2P, as there is a lack of consistent state practice.

Few states deny their responsibility to protect their citizens from mass atrocious crimes such as genocide, war crimes and crimes against humanity. States also tend to agree on the notion that if military force is needed, the best organ to exercise this power is the Security Council. This was also reaffirmed in paragraph 139 of the Summit Outcome Document. In conclusion, there does not exist any legal basis in either treaty law or customary international law for states’ right to resort to military force or military intervention. However, given that this responsibility falls within the purposes of the Security Council, there is legal basis for the Council to authorise a military intervention where states are legally bound to respect the resolution. The Council expressly has the power to sanction a military intervention for human protection purposes according to Article 39 and in combination with Articles 41 and 42 of the UN Charter.

The elements of the first pillar of R2P are, as shown, anchored in existing international law. The third pillar on the other hand is more dubious as state practice is inconsistent and divergent. If both pillar one and three are to be read together, the positive legal status of R2P in public international law, as a whole, thus amounts to soft law, or an emerging legal

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276 See e.g. statement of Peru, A/63/PV.101, p. 1.

277 See e.g. A/63/PV.97; A/63/PV.98; A/63/PV.101.
principle in my opinion, but cannot claim to be an accepted legal principle yet. International law is formed by states and when a norm becomes a legal principle, this creates legal obligations and rights for states. State consent, intent and acceptance of a certain norm or occurrence is thus not only crucial but also an underlying factor for the creation of a new legal principle. There is no binding international instrument nor any consistent state practice to uphold the argument that R2P has become an accepted legal principle in international law yet.  

4.5.1 R2P as soft law?

The principle of R2P cannot as such be devoid of legal character however. More than 170 states present at the 2005 World Summit reaffirmed, endorsed and declared their willingness and readiness to assist the UN, should another state be “manifestly failing” to protect their population from mass atrocities – meaning R2P must exist as something more than merely a political declaration as many actors have argued.  

Soft laws are found in for instance the recommendations of General Assembly resolutions and in the resolutions of High-Level Panels. In general, soft laws often have the character of being predecessors to future legal obligations through their manifestation of states’ political will and they offer guidance in the legal interpretation of existing rules. Jennifer Welsh and Maria Banda argue that the legal relevance and status of R2P in fact, constitutes soft law as the implications of R2P in the Outcome Document are open-ended but more significantly controversial. R2P as a source of soft law in the realm of international law is both defined and influenced by existing legal principles. Badescu suggests that the Outcome Document, even as a non-binding text, includes normative declarations that could contribute toward the development of international treaties by framing principles for future agreements. As previously argued, Badescu too, emphasises the role of the Summit Outcome Document as a means of politically pressuring dissident states into conforming behaviour. Badescu goes as far as to stating that the non-binding norms set forth in the Outcome Document may lead to the creation of customary international law, just like the UN Convention on the Law of the Sea which is an example of soft law that became absorbed into international law. The Convention on the Law of the Sea started as a US-declaration in 1945 but because countries started to apply the same doctrine of extending sovereign control to cover all natural resources of their continental shelf, the declaration became incorporated into international law within the span of only ten years. 

279 See e.g. statements of Singapore, A/63/PV.98, p. 7; Brazil, UN Doc. A/63/PV.97, p. 13; Cameroon, UN Doc. A/63/PV.101, p. 15; China, A/63/PV.98, p. 24; Guatemala, A/63/PV.97, p. 14; Morocco, A/63/PV.98, p. 13; The Netherlands, UN Doc. A/63/PV.97, p. 26; Venezuela, A/63/PV.90, p. 3.
281 Ibid.
283 Badescu, pp. 130-134.
4.5.2 Is R2P something novel?

The legal content of R2P regarding a state’s obligation to protect its populations from genocide, war crimes and crimes against humanity is as suggested derived from both treaty-based and customary international law. While the crime of ethnic cleansing is not specifically criminalised in any convention, the crime may fall within the framework of one of the other three crimes mentioned above. As the former Secretary-General Ki-moon outlined in his report in 2009, the four atrocity crimes that underpin R2P are “firmly embedded in pre-existing treaty-based and customary international law”.284 Many scholars, as well as Heads of State and Government however, argue that R2P does not establish any legal news.285 I cannot concur with this view. It is true that when paragraph 138 of the Outcome Document is read on its own, it amounts to nothing more than an assertion of already established and accepted principles and practice under international law. But when read with its subsequent paragraph, namely the proclamation of the international community’s subsidiary responsibility, R2P amounts to something novel.286 The reference to the four atrocity crimes in the R2P framework, I would suggest, underpins the principle’s consistency with general precepts and pre-existing rules in international law. As a matter of fact, by building upon established peremptory norms, R2P offers an opportunity to strengthen and improve the implementation of existing legal obligations to protect populations from said crimes.287 The Outcome Document’s narrower reference to the international crimes genocide, war crimes, crimes against humanity and ethnic cleansing, rather than the wider scope endorsed by the ICISS report, both defines and outlines its legal scope, lending more predictability and clarity to the principle within the realm of international law. The ICISS report suggested that instances involving “large scale loss of life”, be it actual or apprehended, could trigger events for military intervention.288 I see strength in the more restricted version of the World Summit Outcome Document as it relates to predictable and existing legal concepts and language that international lawyers, practitioners and judges are familiar with, through the language of various international treaties and judgments. In contrast to the suggestions made by the ICISS report, the Outcome Document requires the actual commitment of the crime, and not merely the threat.289 These conditions strengthen R2P, as Badescu again so well points out, by making it more difficult for states to escape their responsibilities.290 Furthermore, the terminology used in the Outcome Document refers to states’ “manifested failure” to protect their citizens, while the ICISS report talks about states being “unwilling or unable” to protect citizens. I regard the phrasing in the Outcome Document as more progressive as it depicts a more objective standard that is congruent with the prevailing language used in international law in general.291 In this way, R2P is underpinned and strengthened by the conditions of both

284 Ibid; A/63/677, p. 5, para. 3; p. 12, para. 8.
286 Labonte, 2016, p. 142.
287 Badescu, p. 133.
288 ICISS, p. 32.
289 Cf. ICISS, p. 32; A/RES/60/1, para. 139.
290 Badescu, supra note 283.
predictability and comprehensibility and aids the clarity, implementation and legitimacy of already existing legal norms.

As shown above, there is an inconsistency and ambiguity surrounding R2P and the legal status of the doctrine’s third pillar.292 Although the first pillar of R2P is reinforced in existing international law through comprehensive treaties and customs – R2P as a whole cannot yet be considered a legal principle. R2P thus entails legally binding elements, and as Anne Peters outlines it, R2P is partly based on existing international law. Peters argues that R2P is not superfluous, as many state representatives have suggested. She argues that R2P “pulls pre-existing norms together and places them in a novel framework”, to which, I must agree. She outlines R2P as a novel construct which “innovatively uses pre-existing legal principles as building blocks for a new edifice”, thus lending R2P some added legal value.293 Overall, states seem to endorse the first pillar of R2P while divergence characterises its third pillar.294 In general, in the statements of Heads of State and Government held at General Assembly meetings and debates, more references are made to R2P’s first pillar than of its third pillar, which has the tendency to reinforce the vagueness and ambiguity that surrounds the doctrine.295 In conclusion, R2P is not an accepted legal principle as it is neither subject to codification nor sufficiently bears a coherent state practice or proclaimed will.296 Not so surprisingly, states that discard R2P altogether raise similar concerns against the doctrine as the concerns that were raised against humanitarian intervention, formerly.297 To conclude, the prevailing view among many states is that a military intervention for human protection purposes without the permission of the Security Council is still illegal. The principles of sovereignty and territorial integrity of states, as well as the prohibition against the use of force, too, prevail. Ultimately, there still exists no unanimity among states as to R2P’s content and scope.298

4.5.3 The future of R2P in international law?

Then “what is the potential of the principle of R2P?”, may one ask. I have suggested that R2P as of now, merely constitutes soft law or an emerging legal principle, but cannot as of yet be considered to constitute an accepted legal principle. The future of R2P mostly depends on the future actions or inactions of states, and more so, on the members of the Security Council. Several actors have argued that for R2P to become truly ingrained into international law, the drafting and adoption of a binding agreement on R2P is needed.299 I am of the opinion that the elements of R2P are sufficiently embedded and anchored in international law and has the potential of constituting an effective legal principle. The formal UN endorsement of R2P

292 See e.g. statements of Morocco, A/63/PV.98, p. 12; Venezuela, A/63/ PV.99, p. 5.
294 See e.g. statement of Peru, A/63/PV.101, pp. 1-2.
295 See e.g. A/63/PV.101, pp. 1-15.
297 See e.g. statements of Brazil, A/63/PV.97, p. 13; Egypt, A/63/PV.97, p.5; Kenya, A/63/PV.101, p. 15; Serbia, A/63/PV.101, p. 13.
298 Evans, 2009, p. 18.
299 Badescu, p. 134.
provides the foundation for taking action, when political will exists – but so long the commitments articulated by the international community are not implemented in a consistent manner, these commitments regarding R2P constitute nothing more than mere political intentions. Instead, my attention is focused on what I perceive as the real hindering factor: the permanent members of the Security Council whose main purpose is to maintain international peace and security. Instead of the creation of new binding instruments on R2P, I suggest that attention is devoted to the veto powers of the P5. Because so long as the permanent members of the Security Council are free to exercise their veto power in situations of self-interest or conflict of interests or due to other political or economic discretion, the implementation of R2P will remain at random and continue to be arbitrary and selective as the examples of Libya and Syria has clearly shown. Noteworthy, neither the Outcome Document of the 2005 World Summit nor the former Secretary-General Ki-moon’s report addressed this obstacle. Perhaps this should be the next item on the agenda for R2P, so as to avert future human suffering, be it small-scale or large-scale, and prevent Security Council paralysis, like the case of Syria so well has shown.
5 Concluding Appraisal

The framework of the R2P doctrine is controversial because it embarks upon the very sensitive issues of state sovereignty, the principle of non-intervention and the use of force. As Badescu puts it, “the key idea behind R2P is that egregious human rights abuses are no longer a matter of sovereign concern, but belong to the international domain”.\(^{300}\) Ramesh Thakur and Thomas Weiss have voiced that R2P may possibly be “the most dramatic normative development of our time – comparable to the Nuremberg trials and the 1948 Convention on Genocide in the immediate aftermath of World War II”.\(^{301}\) R2P challenges previous assumptions of sovereignty as rights belonging to states and instead expresses sovereignty as inherent responsibilities belonging to states, or as Thakur and Weiss put it: “sovereignty no longer implies the license to kill”.\(^{302}\) Today, human rights have become a mainstream part of international law, and the principle of R2P implies that if a state is unwilling or unable to protect its own population from mass atrocity crimes, the responsibility of protection falls on the international community through the UN.\(^{303}\) All the same, R2P has not yet become an accepted legal principle in public international law as it still requires a level of unanimity and coherent state practice before it can be claimed to have become customary international law. Rather, R2P can be understood as still being an expression of soft law.

Due to its still somehow defected legal content, the same concerns and criticisms are raised against R2P as were formerly raised against the notion of humanitarian intervention in the post-war order. Hence, R2P ultimately epitomises the problem between respect for sovereignty and non-interventionism on the one hand, and protection of human rights from mass atrocity crimes on the other – both of which are core values within the UN Charter. The R2P doctrine indubitably fails as a means of offering effective protection for civilians at risk of gross human rights violations. The outcome is evidently that the principles of sovereignty and non-interference are still profoundly embedded in international law and prevail over the promotion and protection of human rights – or as Weiss depicts it: “R2P has changed the discourse but not political calculations.”\(^{304}\) The promotion of human rights thus reaches its end point in contemporary international law once it intrudes on the principle of sovereignty of states or includes the use of force against another state. The biggest obstacle to overcome is however not to supersede the pillars of the Charter or to place the principles in a dichotomy – but rather to create means of conduct for the Security Council – in order to effectively identify and respond to “the most extreme cases” of mass atrocity crimes committed by a state or its national authorities.

\(^{300}\) Ibid, p. 130.
\(^{302}\) Ibid.
\(^{303}\) ICISS, p. 6.
\(^{304}\) Weiss, 2016, p. 67.
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