Brunel University London
School of Law

"RESPONSIBILITY TO PROTECT AND THE SYRIAN CONFLICT"

A Thesis Submitted

By Mahmoud Alhamad

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Professor Ben Chigara

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Abstract

The Syrian conflict begs only one question under international law, namely, what is the relevance to human security of the responsibility to protect principle (R2P)? If as is clear from all media reports during the conflict, a prima facie case for genocide, war crimes, ethnic cleansing and crimes against humanity can be made regarding this conflict, then the relevance of the strictures of international criminal law prohibiting these offenses; and of international human rights law and international humanitarian law generally are impugned? This dissertation evaluates the jus cogens quality of offenses committed during the Syrian conflict under the light of the R2P principle heralded as the bridge between non-intervention in the internal affairs of States; the sovereignty principle in order to ensure human security everywhere. The dissertation shows that although a conflict exists amongst the doctrines of state sovereignty, responsibility to protect, and human security, it remains implausible to assert that the R2P principle is defunct. It recommends the transfer to regional bodies of certain UN Security Council powers for promoting and ensuring human security to regional organisations such as the League of the Arab States in order to minimise abstraction of excess human suffering that is targeted by peremptory norms of international law.

List of Acronyms

CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOWAS	Economic Community of West African States
EP	European Parliament
EWAR2P	Early Warning, Assessment and the Responsibility to Protect
FSA	Free Syrian Army
GCR2P	Global Centre for the Responsibility to Protect
HCNM	High Commissioner on National Minorities
HLP	High-Level Panel
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IIFFM	Independent International Fact-Finding Mission
ILC	International Law Commission
ILO	International Labour Organisation
LAS	League of the Arab States
NATO	North Atlantic Treaty Organisation
NGOs	Non-governmental Organisations
ODM	Orange Democratic Movement
OPCW	Organisation for the Prohibition of Chemical Weapons
PKK	Kurdish Workers' Party
PNU	Party of National Unity
PoW	Panel of the Wise
R2P	Responsibility to Protect
RN2V	Responsibility Not to Vote
RPF	Rwandan Patriotic Front
RWP	Responsibility while Protecting
SALC	Southern Africa Litigation Centre
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda

UNHCR	UN High Commissioner for Refugees
UNHRC	United Nations Human Rights Commission
UNMIK	United Nation Interim Administration Mission in Kosovo
UNOCI	United Nations Operation in *Côte d'Ivoire*
UNPROFOR	United Nations Protection Force
UNSMIS	UN Security Council established the UN Supervision Mission in Syria
UNTAET	United Nation Transitional Administration in East Timor
VCLT	Vienna Convention on the Law of Treaties
YPG	Kurdish People's Protection Units

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Chapter One: Introduction

1.1 The Problem

The international law's foremost responsibility is to ensure international peace and security. In 1945, the peoples of the United Nations (UN) placed emphasis on the "unite [of their] strength to maintain international peace and security." For these ends, the UN corroborated the importance of employing international machinery to secure the human security of all peoples.[1] "Human beings should be able to lead lives of creativity, without having their survival threatened or their dignity impaired."[2] In this context, the idea of human security is invoked as "the keyword to comprehensively seizing all of the menaces that threaten the survival, daily life, and dignity of human beings and to strengthening the efforts to confront these threats."[3]

More recently, the UN has inaugurated the concept of human security to turn the focus from state security to individuals' security.[4] "The focusing of attention on individuals' and their communities rather than on the protection of the state *per se*."[5] This diagnosis enveloped "the new security discourse has enveloped the idea that the security of people needs to be placed ahead of other security concerns."[6] Controversies sponsored by a convergence of doctrines and rules of international law on the sovereign equality of states,[7] non-intervention,[8] the use of force,[9] international human rights,[10] and international humanitarian law suggest that international law remains primitive. It may need to develop firmer structures and more authoritative balances between its fundamental doctrines before it can begin to promise people

[1] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Preamble
[2] Amartya Sen, 'Why Human Security?' (Presentation, International Symposium on Human Security, Tokyo, 28 July 2000) 1; Sadako Ogata and Johan Cels, 'Human Security-Protecting and Empowering the People' (2003) 9 Global Governance 273, 273-276
[3] Amartya Sen, 'Why Human Security?' (Presentation, International Symposium on Human Security, Tokyo, 28 July 2000) 1; Sadako *Ibid*
[4] Sadako Ogata and Others, 'Human Security Now' (Final Report, Commission on Human Security, New York 2003) 4-10
[5] Benedict Chigara, "The ILO, harbinger and chief protagonist for the recognition and promotion of the inherent dignity of Sub-Saharan Africa labour", in Ademola Abass (ed.), *Protecting human security in Africa* (1st, Oxford University Press, New York 2010) 81
[6] Sadako Ogata and Johan Cels, 'Human Security-Protecting and Empowering the People' (2003) 9 Global Governance 273, 274; Lloyd Axworthy, 'Human security and global governance: Putting people first' (2001) 7:1 Global governance 19, 22-23
[7] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(1)
[8] Ibid, Art. 2(4)
[9] Ibid, Art. 2(7)
[10] Ibid, at the Preamble

around the globe that it will keep them safe from their own state sponsored insecurity when it occurs.[11]

The meaning and the added values of the concept of human security have been defined and explained in international law and by several practitioners in international affairs, in the fields of security and development. Yet, the practical usefulness and political relevance of human security remains questionable.[12] Similarly, Keane examines the principle of cultural property protection and highlights that "[e]very time the protection has increased, this increase has subsequently proven inadequate."[13] This raises new lines to analyse human security and its added values in the field of security that focus attention on individuals and integrate non-military mechanisms as means to apply security.

1.2 The R2P Principle as a Mechanism to Ensure Human Security

Throughout the last few centuries, states remained the central source of security. However, the state "often fails to fulfil its security obligations—and at times has even become a source of threat to its own people."[14] For that reason, the attention of the UN should be shifted from the security of the state to that of civilians. Human security enriches state security, improves human rights and enhances human development.[15] Human security is defined by the Commission on Human Security as the protection of the vital core of human lives in ways which improve human fulfilment and freedoms. "[H]uman security and state security are mutually reinforcing and dependent on each other. Without human security, state security cannot be attained and *vice versa*."[16]

Aspiring to bridge the *lacunae* between state sovereignty and human rights claims on the one hand, and the protestations of the human rights movement on the other, the International Commission on Intervention and State Sovereignty (ICISS) 2001 produced in the UN General

[11] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (1st, Brookings Institution Press, Washington D.C. 2009) 43-49
[12] Karen L O'Brien and Others, *Climate Change, Ethics and Human Security* (1st, Cambridge University Press, Cambridge 2010), 23-25; Auriane Botte, 'Redefining the responsibility to protect concept as a response to international crimes' (2015) 19:8 The International Journal of Human Rights 1029, 1034-1038
[13] David Keane, 'The Failure to Protect Cultural Property in Wartime' (2004) 14 DePaul-LCA Journal of Art. and Entertainment Law 1, 1
[14] Sadako Ogata and Others, 'Human Security Now' (Final Report, Commission on Human Security, New York 2003) 2
[15] Terry Nardin and Melissa S. Williams (ed.), *Humanitarian Intervention* (1st, New York University Press, New York 2006) 259-266; Botte (n 12)1035-1036; Richard Jolly and Deepayan Basu Ray, 'Human security—national perspectives and global agendas: Insights from national human development reports' (2007) 19:4 Journal of International Development 457, 458-461
[16] Human Security Unity, 'Human Security in Theory and Practice: Application of the Human Security Concept and the United Nations Trust Fund for Human Security' (Human Security Unit, Office for the Coordination of Humanitarian Affairs, United Nations 2009) at page 9; Sadako Ogata and Others, 'Human Security Now' (Final Report, Commission on Human Security, New York 2003) 4-9

Assembly 2005 World Summit Outcome (World Summit 2005). ICISS 2001 comprised of leading academics and policymakers. It was chaired by Sahnoun and Evans and funded by the Canadian government.[17] The ICISS Report included basic doctrines of the R2P in its landmark report of 2001 (ICISS Report 2001), which highlights that sovereign states have an onus to protect their own individuals from genocide, war crimes, ethnic cleansing and crimes against humanity.[18]

The R2P principle differs from traditional humanitarian intervention - and, in particular certain forms of humanitarian intervention (i.e. unauthorized, unilateral interventions) - as it is limited in nature and is arguably a narrow doctrine. This is best evidenced by the crimes which the R2P principle may respond to, genocide, war crimes, ethnic cleansing and crimes against humanity. Indeed, within expert and policy-making circles, many use the more conservative World Summit 2005 form of the R2P principle for the fear of undermining international support.[19]

On 25 October 2012, the UN General Assembly passed a resolution which defined "human security as an approach to assist Member states in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people."[20] Additionally, it calls for "people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people."[21]

Similarly, Chigara flagged the significant value of human security and defined the concept as a different pattern of security. He argued that the world is going through a different era in which the notion of security will change intensely. Additionally, he stresses that the International Labour Organisation (ILO) "has always focused on individuals' and minority groups' security as means ensuring national and world peace."[22] Thus, the main aim of a state's human security is the protection of its individuals against an extensive range of threats from

[17] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, Ottawa December 2001) at pages 11-16 [Hereinafter: ICISS Report 2001]; Canadian Centre for Foreign Policy, *Report from the Ottawa Roundtable for the International Commission on Intervention and State Sovereignty* (1st, Foreign Affairs and International Trade, Ottawa 2001) at page 6 [Hereinafter: Ottawa Roundtable Report 2001]; Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (1st, International Development and Research Centre, Ottawa 2001) 11-22
[18] ICISS Report 2001 at paras 2.14-2.15; Weiss (n 17) 341-343; Ottawa Roundtable Report 2001 7-8
[19] Alex J. Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20:2 Ethics & International Affairs 143, 149
[20] UNGA Res. 66/290 (25 October 2012) U.N. DOC. A/RES/66/290, at para. 3
[21] Ibid, at para. 3(b)
[22] Chigara (n 5) 81-83

states, communities and individuals.[23]

MacFarlane and Khong highlight that the R2P principle has placed human beings at the core of security. Adopting this view means that the state is no longer privileged over individuals. The R2P principle shifts the focus from state sovereignty to the human rights of people residing in those states.[24] State sovereignty under the R2P principle should no longer be absolute in applying the R2P principle to protect civilians from atrocity crimes during the times of armed conflicts.[25] This dissertation shows that the R2P principle is contingent on whether civilians are protected from massive human rights violations where the UN has a legitimate duty to intervene in the domestic affairs of a foreign state to protect foreign nationals.

1.2.1 In Defence of Human Security

The essential notion of human security is that states should participate in formulating and implementing potential strategies relating to the protection of individuals. Human security helps to identify weaknesses in the framework of protection and additionally it aims to improve and strengthen individual protection.[26] The structure of protection contributes to the improvement of responding to threats and supporting threatened people with the aim that a more stable environment is created.[27]

Respecting human rights is the spirit of protecting human security.[28] The Vienna Declaration of Human Rights (1993) focuses on the interdependence and universality of the human rights of all people.[29] Those rights – regardless of whether they are political, civil, social and economic – have to be backed expansively as proclaimed in the legally binding protocols and conventions resulting from the Universal Declaration on Human Rights (1948).[30]

Human security helps classify the rights at risk in a certain situation and addresses the

[23] Chigara (n 5) 81-92; Sadako Ogata and Others, 'Human Security Now' (Final Report, Commission on Human Security, New York 2003) 2; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 79-86
[24] S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (1st, Indiana University Press, Bloomington 2006) 242-253; Nardin (n 14) 89-92
[25] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras 138-139; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 American Journal of International Law 99, 107-116; Jonah Eaton, 'Norm, Determining the Meaning and Legal Status of the Responsibility to Protect' (2011) 32 Michigan Journal of International Law 765, 799; Christian Henderson, *The use of force and international law* (1st Cambridge University Press, New York 2018) 155; Nardin (n 14) 89-92
[26] Sadako Ogata and Others, 'Human Security Now' (Final Report, Commission on Human Security, New York 2003) 10-122
[27] Ibid
[28] Ibid, at page 4
[29] 'Vienna Declaration and Programme of Action' (12 July 1993) U.N. DOC. A/CONF.157/23, at para. 5; Brian Barbour and Brian Gorlick, 'Embracing The Responsibility to Protect: A Repertoire of Measures Including Asylum for Potential Victims' (2008) 20:4 International Journal of Refugee Law 533, 536-539; Botte (n 12)1032-1035
[30] UNGA, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), at the Preamble

question of how human security should be upheld and promoted. The concept of responsibilities and obligations supplements the recognition of the political and ethical significance of human security.[31] The mutually reinforcing the role of human rights and human security to be activated to implement the R2P principle to prevent and stop atrocity crimes in times of armed conflicts are studied.

The broad conceptions of human security are criticised and researchers find that it solely exercises in relabelling phenomena that have perfectly good names: hunger, disease and environmental degradation.[32] However, nowadays researchers demonstrate that the very breadth of the concept is its strength, allowing policymakers to adapt people-centred approaches that reflect their states' specific context, creating national subsets of human security.[33]

The concept of human security emphasises the individual as the referent of international security by integrating the independent issues of development and security. Furthermore, it also makes foreign individuals' security an international matter inextricably linked to every human being's security.[34] This dissertation emphasises protecting individuals as a key feature of the R2P principle to be applied internationally where the concern with individuals is the core issue. Moreover, the dissertation shows that state sovereignty is reflected by the state's responsibility to protect its individuals' rights.

Under the banner of R2P principle when human security is at stake, the use of force is recognised under a moral-ethical framework as not only acceptable, but also desirable.[35] In such cases, the human security agenda reverses the existing power relationships; that is, by securitising indicators of development, the weakest states are presented as continued threats to the most powerful ones. In short, the individual, not the state, is the referent, states are the guarantors of protecting populations and state sovereignty is seen as a responsibility depending upon a state's ability to protect their populations against an ever-growing list of increasingly noticeable ills.[36]

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[31] Sadako Ogata and Others, 'Human Security Now' (Final Report, Commission on Human Security, New York 2003) 2; Botte (n 12)1032-1035

[32] Ibid; Botte (n 12)1032-1035

[33] Bellamy (n 19) 151-152; Thakur (n 23) 79-88; Botte (n 12) 1032-1035

[34] MacFarlane (n 24) 242-253; Sadako Ogata and Others, 'Human Security Now' (Final Report, Commission on Human Security, New York 2003) 4-10; Botte (n 12)1032-1035

[35] Philip Cunliffe, 'Dangerous duties: power, paternalism and the 'responsibility to protect' 36 Review of International Studies 79, 94-96; Kanti Bajpay, 'The Idea of Human Security' (2003) 40:3 International Studies 195, 201-204; Bellamy (n 19) 151-152; Thakur (9) 79-88; MacFarlane (24) 242-253; Tara McCormack, 'Power and Agency in the Human Security Framework' (2008) 21 Cambridge Review of International Affairs 113, 114-119; Sadako Ogata and Others, 'Human Security Now' (Final Report, Commission on Human Security, New York 2003) at page 12

[36] McCormack (n 35) 114-119; David Chandler, 'Review Essay: Human Security: The Dog That Didn't Bark' (2008) 39 Security Dialogue 427, 437-438; Henderson (n 25); Nardin (n 14) 89-92

1.3 Limitations of the Implementation of the R2P Principle

1.3.1 Non-intervention

The status of the 'non-intervention' rule stems from its role in securing the political independence linked to the status of state sovereignty as the establishing political principle of the modern world.[37] The function of the principle of non-intervention was described by Vincent as "one of protecting the principle of state sovereignty."[38]

The non-intervention ground rule is not absolute and it is evident in Oppenheim's influential account that "intervention is dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things."[39] Without doubt, intervention is forbidden by international law, which "protects the international personality of the states."[40]

Article 2(7) of the UN Charter states that

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."[41]

Likewise, MacMillan highlights that states historically enjoyed autonomy within their territorial domain. Additionally, he stresses that states have long accepted restrictions on their autonomy across broad sectors including sovereign debt and human and minority rights and constitutional structures, whether through consent or coercion.[42]

Examining the International Court of Justice (ICJ)'s decision in the Case concerning

[37] John MacMillan, 'Intervention and the ordering of the modern world' (2013) 39:5 Review of International Studies 1039, 1042
[38] Raymond John Vincent, *Nonintervention and international order* (1st Princeton University Press, New Jersey 2015) 14
[39] *Case concerning Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Judgment of 27 June 1986, ICJ Reports 1986* at para. 115; Lassa Oppenheim, *International Law: A Treatise vol. 1.* (1st, Longman, Green, and Co., London 1905) 179–183
[40] Oppenheim (n 39) 179–183
[41] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(7)
[42] MacMillan (n 37) 1042-1045; Stephen D. Krasner, *Sovereignty: organized hypocrisy* (1st, Princeton University Press, Princeton 1999) 51-54

military and paramilitary activities in and against Nicaragua (Nicaragua case 1986),[43] the ICJ held by twelve votes to three, that

> "[t]he United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State."[44]

1.3.2 State Sovereignty

The ICISS Report attempts to illustrate the need for striking a balance between the traditional concept of state sovereignty and the respect for human rights protection.[45] The *de facto* aim of the report is to formulate a framework for improving the UN's response mechanisms of preventing and averting mass humanitarian crimes. These mechanisms should be seen by the UN Members as a set of guidelines in international law which can be applied in specific situations to prevent atrocities and lessen human suffering.[46] More specifically, these mechanisms should be applied without violating either the territorial integrity or political independence of a state where a state has failed to protect its own people.

Article 2(1) of the UN Charter provides that the UN shall act in accordance with "the principle of the sovereign equality of all its Members."[47] Furthermore, the principle of state sovereignty was clarified by the Arbitral Tribunal in the Islands of Palmas. The Tribunal showed that concerning territory, the territorial sovereignty between states is defined as independence. Independence is the right of a state to exercise the functions of a state on its territory.[48]

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[43] *Case concerning Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Judgment of 27 June 1986, ICJ Reports 1986* at para. 115

[44] Ibid, at para292(3); Marcelo Kohen, 'The principle of non-intervention 25 years after the Nicaragua judgment' (2012) 25:1 Leiden Journal of International Law 157, 158-162

[45] Anthony Lewis, 'The Challenge of Global Justice Now,' (2003) 132:1 Daedalus 5, 8; Cunliffe (n 35) 82-93; Botte (n 12) 1035-1036

[46] ICISS Report 2001 at paras 3.1-3.3; Ottawa Roundtable Report 2001 at pages 9-10; Weiss (n 17) at pages 27-28; Lewis (n 45) 8-10; Terry Nardin and Melissa S. Williams, *Humanitarian Intervention* (1st, New York University Press, New York 2006) 83-92; H.L.A. Hart, with a Postscript edited by Penelope a. Bulloch and Joseph Raz and with an Introduction and Notes by Lesile Green, *The concept of law* (3ed, Oxford University Press, Oxford 2012) 71-78

[47] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(1)

[48] *Island of Palmas case (Netherlands, USA) Judgment of 4 April 1928, RIAA Reports 1928 Volume II 829-871*, at page 838

It is argued by MacMillan (2001) that part of the rationale behind the R2P report "was to shift the balance between the military and non-military dimensions of intervention through an emphasis upon prevention and, through post-conflict stabilisation, the avoidance of a recurrence of mass human rights violations."[49] Likewise, the ICISS Report significantly notes that evolving international law has established restrictions on state sovereignty and that the concept of security has been extended beyond the security of the state to include human security as well.[50] Thus, sovereign authority seems to also carry with it the responsibility of protecting one's population rendering the two mutually interdependent.

Similarly, the World Summit 2005 acknowledged that a state's sovereignty is conditional on the treatment of its population. These are important milestones in the history of protecting civilians, the R2P principle, human rights, non-intervention and state sovereignty. The adoption of the World Summit 2005 by the UN General Assembly was something of a watershed moment for protecting civilians during times of armed conflicts. It marked the universal acceptance of the permissibility of intervention to protect civilians in certain circumstances. In particular, the World Summit 2005 asserts that the UN Security Council may authorise intervention and, in doing so, rejects absolute state sovereignty and non-intervention.[51]

State sovereignty is presented and discussed in the World Summit 2005 as a responsibility of a state to fulfil its obligations and responsibilities. The Summit states that only when the state is unable or unwilling to practice its role of implementing its responsibilities to protect its civilians from atrocity crimes, at this time, R2P can be implemented to help states to achieve their responsibility. Announcing the death of the R2P principle could not be accurate as state sovereignty is initially reasonability and the principle is recommended to be implemented only if the state fails to deliver its reasonability. However, the clear forbidden to intervene in internal affairs of a foreign state in international law lead some scholars to announce the death of the R2P principle.

The UN Charter (1945) itself is an example of an international commitment voluntarily dependent by UN Members. Precisely, the principle of states' sovereign equality is highlighted in Article 2(1) of the UN Charter about the act of the organisation of the UN and its Members

[49] MacMillan (2001) (n 37) 1055

[50] ICISS Report 2001 at para. 1.33; Canadian Centre for Foreign Policy, *Report from the Ottawa Roundtable for the International Commission on Intervention and State Sovereignty* (1st, Foreign Affairs and International Trade, Ottawa 2001 at pages 7-8; Weiss (n 17) 8-12

[51] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras. 138-139; Stahn (n 25) 99-102; Botte (n 12)1034-1038; *Case of the S.S. "Wimbledon" (United Kingdom, France, Italy & Japan v. Germany)* 17 August 1923, PCIJ Rep Series A No 1, at page 25; Hart (n 46)

in line with the principle of equality membership. The Article stipulates that "the Organisation is based on the principle of the sovereign equality of all its Members."[52]

In addition, by accepting a state as a member of the UN, the UN welcomes the signatory state as a responsible member of the UN. In return, by signing the UN Charter, the state admits the responsibilities of its membership in the UN. There is no dilution or transfer of state sovereignty.[53] However, "there is a necessary re-characterisation involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties."[54]

State practice shows that considering state sovereignty as carrying with it some degree of responsibility illustrates its significance. Firstly, state sovereignty as responsibility implies that state authorities are in charge of the responsibilities for protecting the safety and lives of civilians from mass atrocities. Secondly, state sovereignty indicates that national political authorities are responsible not only for civilians' rights internally but also for the relations with foreign states through the UN. Thirdly, state sovereignty as responsibility renders the agents of the state accountable for their actions; that is, they are responsible for their acts of commissions and omissions.[55] Depending on the previous three factors, state sovereignty is supported by the growing collective influence of international human rights norms as well as the growing influence in the international discussion about the notion of human security.

1.4 The Current Legal Position of the R2P Principle

The R2P principle has received significant international attention since the emergence of the ICISS Report 2001, followed by the World Summit 2005. The R2P principle has emerged as a core element of human security that focuses on the security of individuals as a central objective of national and international security policy. Secretary-Generals of the UN, especially Kofi Annan, have identified operationalising the R2P principle as one of their key priorities. Moreover, Edward C. Luck was appointed a special adviser to the UN Secretary-General on the doctrine.[56]

[52] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(1)
[53] ICISS Report 2001 at para. 2.14; Weiss (n 17) 129-138
[54] ICISS Report 2001 at para. 2.14; Ottawa Roundtable Report 2001 at pages 7-8; Weiss (n 17) 130-137
[55] ICISS Report 2001 at para. 2.14; Ottawa Roundtable Report 2001 at pages 7-8; Weiss (n 17) 130-137; Terry Nardin and Melissa S. Williams, *Humanitarian Intervention* (1st, New York University Press, New York 2006) 83-92
[56] Nicholas J. Wheeler and Frazer Egerton, 'The Responsibility to Protect: Precious Commitment or a Promise Unfulfilled' (2009) 1 Global Responsibility to Protect 114, 115

Some research and advocacy centres have also been set up, including in Accra, Brisbane, Madrid, New York and Oslo.[57] State officials, non-governmental organisations (NGOs), aid workers, and diplomats are increasingly using the language of the R2P principle in relation to conflict situations, and global worldwide public opinion (including in non-Western states) appear to support the doctrine.[58] This doctrine seems to have significant rhetorical and political force and is thus central to the improvement of the willingness and legitimacy of protecting civilians.

Despite the increased acceptance of the need to protect civilians during armed conflicts and the increased dissatisfaction with the state-centred notion of security as a suitable conceptual basis for considering human weaknesses nowadays and military interventions as acceptable responses to the R2P principle remains controversial.[59] Many state leaders, especially those in the developing world, fear that the state sovereignty, non-intervention will be violated under the R2P principle. They mainly seem to be concerned that the R2P principle will be used as a veil to engage in abusive intervention.[60] Other states are less concerned that they will be subject to intervention themselves, but are concerned about the potentially destabilizing effects of the R2P principle for their surrounding region(s) and that the R2P principle will weaken their state sovereignty.[61]

A limited version of the R2P principle, such as that agreed to at the World Summit 2005, where military intervention is less pronounced, may receive greater support and political will, and thus - perhaps paradoxically - may best help to achieve the reforms required. To guard against abuse and to limit the occasions of intervention, many scholars assert that unauthorised intervention is impermissible. Likewise, China and Russia insist that there must be a Security Council approval for any intervention measures.[62]

State practice shows that the R2P principle has failed to protect civilians from atrocity crimes in many crises around the world, and the most recent significant failure is in Syria. However, the R2P principle affiliates to an internationally recognised concept, human security. The lack of an effective response to serious humanitarian crises is said to constitute a 'failure' in the implementation of the R2P principle. Even the successful example of implementing the

[57] Ibid; Axworthy (n 6)
[58] Andrew Cottey, 'Beyond humanitarian intervention: the new politics of peacekeeping and intervention' (2008) 14:4 Contemporary Politics 429, 436
[59] Bajpay (n 35) 201-204
[60] Susan C. Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (1st, Routledge, New York 2016) 28-29
[61] Hehir (n 8) 678-684
[62] Bellamy (n 19) 143, 151; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 79-86

R2P principle in Libya in 2011 was criticised as it may have taken place due to political wills and national interests.[63] As state practice shows, the repeated failure of implementation of the R2P principle through different periods of time and in different geographical locations could assert that the death of the R2P principle has taken place, a principle which was born with a great degree of hope and ambition to protect civilians from atrocity crimes.[64]

1.5 Overview of the Syrian Crisis

The situation in Syria cannot be separated from the Arab Spring. The Arab Spring appears to have played a key role in encouraging the Syrians to begin a revolution against the al-Assad regime which had seized power since March 1971, following a coup d'état by Hafiz al-Assad.[65] In the first six months, the revolution took the form of peaceful protests and demonstrations against the Syrian regime, demanding for fundamental freedom of expression and the freeing of several political prisoners - some of whom had been behind bars as early as, or prior to 1982.[66]

During the initial six months, the Syrian regime gradually resorted to violence to suppress and silence protesters. However, at the end of the initial six months, protesters responded in a similar manner, eventually yet hastily, leading to one of the worst modern armed conflicts. Consequently, some soldiers from the governmental army dissented to form the Free Syrian Army (FSA).[67] The humanitarian situation in the country has worsened significantly.[68] The Security Council has continuously sought to protect civilians under Chapter VII of the UN Charter, but since March 2011 to April 2018 the use of the double veto twelve times by Russia and China has blocked those draft resolutions that aimed at ending Syria's massive human rights violations.

[63] Aidan Hehir, 'From Human Security to the Responsibility to Protect: The Co-Option of Dissent' (2014) 23 Michigan State International Law Review 675, 685-686
[64] Aidan Hehir, 'The responsibility to protect in international political discourse: encouraging statement of intent or illusory platitudes?.' (2011) 15:8 The International Journal of Human Rights 1337-1339
[65] Jess Gifkins, 'The UN Security Council Divided: Syria in Crisis' (2012) 4:3 Global Responsibility to Protect 377, 378
[66] Gifkins (n 64); Joseph Holliday, 'The Assad Regime' (MIDDLE EAST SECURITY REPORT 8, Institute for the Study of War, Washington 2013) 11; Reva Bhalla, 'Making sense of the Syrian crisis' (Geopolitical Weekly, 2011) 4; see generally, Leila Nadya Sadat, 'Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will' (2015) 5 Impunity Watch Law Journal 1
[67] Breau (n 60) 258-259
[68] Ibid, 29

1.6 Scope and Aims of the Research

1.6.1 Scope

The dissertation undertakes a close examination of state practice which occurred prior to and following the articulation of the R2P principle in 2005. The analysis includes the examination of detailed incidents relevant to the R2P principle such as Darfur, Libya, *Côte d'Ivoire* and Syria. The aforementioned incidents have been selected following an assessment of whether the acts that have taken place constituted atrocity crimes.

Through the analysis of state practice, the dissertation identifies the discrepancies that exist among UN Member States on the application of the R2P principle in humanitarian crises. These discrepancies are more evident in the context of the authorization of military intervention to protect civilians from atrocity crimes. Furthermore, the controversies surrounding the R2P principle seem to mirror the same discrepancies, which previously surrounded humanitarian intervention. These discrepancies on the content and application of the R2P principle in state practice illustrate the international community's failure to resolve fundamental controversies in international law in relation to the handling of humanitarian crises.[69]

The dissertation suggests that the general, unassigned duty to protect civilians largely stems from the more fundamental duty of human security to prevent human suffering. Additionally, it asserts that there is a duty to do what is possible to prevent, halt and decrease substantial human suffering. If this duty is taken seriously, it paves the way for most regional and international actors to work towards improving the capacity to undertake legitimate protecting approach. As Tan argues, "all members are obliged to do what is necessary to establish and support the cooperative arrangement required to carry out the duty to protect."[70]

1.6.2 Aims

The aims of this dissertation are to characterise the R2P principle as a concept, which promotes human security. Moreover, it aims to demonstrate that state sovereignty is not only merely a state's ability to make authoritative decisions concerning the populations and resources within

[69] UNSC RES. 2042 (14 April 2012) U.N. Doc. S/RES/2042; UNSC RES. 2043 (21 April 2012) U.N. Doc. S/RES/2043; John MacMillan, 'After Interventionism: A Typology of United States Strategies' (2019) 30:3 Diplomacy & Statecraft 576 Evans G, *The responsibility to protect: ending mass atrocity crimes once and for all* (1st, Brookings Institution Press, Washington D.C. 2009); Hehir A, *Hollow Norms and the Responsibility to Protect* (1st, Palgrave Macmillan, Cham 2019)
[70] Kok-Chor Tan, 'The duty to protect' (2006) 47 Nomos 84,104

its territory.[71] As the responsibility to protect individuals is the primary responsibility of the state, this naturally extends to cover protecting them from atrocity crimes.[72] Only when the state fails to meet this crucial and valuable responsibility where individuals are suffering grievous harm, the principles of non-intervention and state sovereignty are restricted to allow the international community to take the suitable measure by applying the R2P principle.[73]

Despite the large volume of literature on the different aspects of the R2P principle since its introduction in 2001, the issues of the implementation of the R2P principle have mainly been studied from the paradigm of international relations and/or politics. Additionally, the R2P principle has been studied in literature as development of humanitarian intervention; however, this dissertation finds it as a mechanism to ensure Human Security. Therefore, this dissertation specifically aims at making contribution to contemporary literature with particular emphasis on the development of the R2P principle within the international framework concerning the protection of civilians.

1.7 Methodology

The main sources of international law are examined in this dissertation to give a clear understanding of the R2P principle, to reach to evidence-based outcomes and to answer the research question: whether the R2P principle is applicable to be implemented to the Syrian civilians from atrocity crimes during the Syrian crisis. The dissertation applies the doctrinal analysis methodology where textual, comparative and critical analysis methods are implemented to study the R2P principle. Additionally, it examines the cases where the R2P principle was applied such as the Libyan case in 2011 or when it failed to be applied such as in Darfur, Somalia and recently in Syria. This dissertation is multi-faceted, whilst it is mainly a legal argument; it also includes political and economic empowerment and aspects of socio-political science, with genuine analyses conducted and conclusions reached.[74]

[71] W. Michael Reisman, 'Sovereignty and human rights in contemporary international law' (1990) 84:4 American Journal of International Law 866, 867-868
[72] Ibid
[73] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras 138-139; ICISS Report 2001 at para. 4.22; Ottawa Roundtable Report 2001 at pages 9-10; Weiss (n 17) 147-150; see also John MacMillan, 'After Interventionism: A Typology of United States Strategies' (2019) 30:3 Diplomacy & Statecraft 576
[74] See generally, Reza Banakar and Max Travers (ed.), *Theory and method in socio-legal research* (1st, Bloomsbury Publishing, London 2005); Christopher McCrudden, 'Legal research and the social sciences' (2006) 122 Law Quarterly Review 632, 632-650; Maksymilian Del Mar and Michael Giudice (ed.), *Legal Theory and the Social Sciences Volume II* (1st, Routledge, London 2010) 147-165

The dissertation relies on both primary and secondary sources. The primary sources include treaty legislation, Security Council Resolutions, General Assembly Resolutions, Secretary-General of the UN Reports, decisions of international courts and tribunals. The secondary sources include reports of non-governmental organisations, books, journal articles, newspapers, websites, television reports, and general expert academic commentary in the field.

1.8 Limitations and Challenges of the Research

Studying a recent and ongoing crisis with many serious humanitarian violations poses a serious challenge for a dissertation which seeks to critically examine it. Moreover, conducting research on primary sources with a deficit of secondary sources is far from an easy task. Furthermore, the limited volume of secondary sources on the topic seems to have focused on the topic from an international relations perspective rather than international law, thus examining the topic from the latter perspective spontaneously becomes a more difficult task.

The candidate is more familiar with the Syrian crisis as he is Syrian and has first-hand accounts of some of the problems which have occurred during the conflict. The candidate seeks to use this to his advantage along with his knowledge of the Arabic language as it shall assist him in overcoming some of the above-mentioned limitations. Moreover, the candidate is better equipped to offer more up-to-date and detailed findings about the ongoing Syrian crisis.

1.9 Contribution to Knowledge

The dissertation provides a defence of the R2P principle and calls for renewed focus on its content and applicability in light of the Syrian conflict. R2P mainly emerged in the ICISS Report (2001) and in the World Summit 2005, and it was circulated in several cases prior to the Syrian conflict. The most clear-cut example of implementing the principle is in Libya in 2011. Yet the UN failed to exert any practical preventive or responsive position in the Syrian crisis.

This dissertation contributes to the discourse and applicability of the R2P principle by exploring and examining its effectiveness and efficiency as an international norm to address mass atrocities during armed conflicts times. In order to understand the efficacy and workability of the R2P principle and its added value to the current and normative framework in relation to the protection of civilians, the dissertation investigates whether this principle

should be applied to the Syrian crisis. By analysing the Syrian conflict, the dissertation assesses whether the UN's strategies to address conflicts characterised as mass atrocities have changed since the adoption of the R2P principle in the World Summit 2005.

'International law is made by the powerful few to support their particular interests.'[75] Previous studies, for instance Susan Breau and Andrew Garwood-Gowers, link the R2P principle to humanitarian intervention where practice frequently shows that national interests occupied high priority over individuals themselves.[76] This dissertation, however, examines that the R2P principle puts individuals and not states' interests at the centre. In line with Bellamy, this dissertation supports implementing the R2P principle when triggers are met.[77] Outstandingly, this dissertation contributes to knowledge by linking the R2P principle to human security under international law where individuals themselves and, not states, are the core theme.

Additionally, scholars such as Andrew Garwood-Gowers argues that the R2P principle died and it could not be implemented in cases where atrocity crimes are committed against civilians.[78] He claims that his revelation about the death of the R2P principle stems from the fact that implementing the R2P principle is against state sovereignty and non-intervention principles.[79] However, state sovereignty should be considered as responsibility, including protecting civilians from atrocity crimes.

This dissertation shows that R2P is not moribund but it is at the heart of the enquiry. The R2P principle has emerged in the World Summit 2005 and it is still in a developing stage. There is a limited number of cases in state practice; therefore, it is early to judge at this stage and rather encouraging more scholars and lawyers to research about the principle. Thus, a re-evaluation of the principle should be achieved. After examining the R2P principle, this

[75] Louis Henkin, *How Nations Behave* (2nd, Columbia University Press, New York 1979) 10

[76] Breau (n 60); Andrew Garwood-Gowers, 'China and the 'Responsibility to Protect': the implications of the Libyan intervention' (2012) 2:2 Asian Journal of International Law 375, 380-391; John MacMillan, 'After Interventionism: A Typology of United States Strategies' (2019) 30:3 Diplomacy & Statecraft 576; Alex Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (1st ed., Oxford University Press, New York 2016) 402; Max Mathews, 'Tracking The Emergence of New International Norm: The Responsibility to Protect and the Crises in Darfur' (2008) 31 Boston College International and Comparative Law Review 137; Brian Babour and Brian Gorlick, 'Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum from Potential Victims' (2008) 20 International Journal of Refugee Law 533; Jutta Brunnee and Stephen Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2:3 Global Responsibility to Protect; see also Aidan Hehir, 'The responsibility to protect in international political discourse: encouraging statement of intent or illusory platitudes?' (2011) 15:8 The International Journal of Human Rights 1331

[77] Bellamy (n 76) 402

[78] Mehrdad Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 Journal of International law 470; Garwood-Gowers (n 76) 380-391; Susan C. Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (1st, Routledge, New York 2016)

[79] Aidan Hehir and Robert Murray, (eds.) *Libya, the responsibility to protect and the future of humanitarian intervention* (Springer, Cham 2013); Alex J. Bellamy, 'Responsibility to protect or Trojan horse? The crisis in Darfur and humanitarian intervention after Iraq' (2005) 19:2 Ethics & International Affairs 31; Garwood-Gowers (n 76)

dissertation concludes that claiming the death of the principle is an early outcome; rather a re-evaluation of the principle can help to implement the principle whenever its triggers are met.

The dissertation draws upon overlapping mechanisms of international humanitarian law, customary international law and international human rights law. It attempts to bridge continual barriers between state sovereignty and non-intervention on one the hand and protecting civilians from genocide, war crimes, ethnic cleansing and crimes against humanity on the other. The dissertation presents a specific role for R2P by realising its three pillars of preventing, reacting and rebuilding and highlighting the significant importance of the first pillar - the responsibility to prevent - to be implemented to prevent atrocity crimes before conflicts breaking out. At the responsibility to prevent stage, the state, regional organisation and the UN should work together at an early stage of a crisis to prevent atrocity crimes. This strategy has successfully been implemented in the Gambia in 2017.

Finally, the dissertation finds that the UN follows a selective approach in implementing the R2P principle and this is no more apparent than in the Syrian and the Libyan cases. Atrocity crimes have been committed for so long with such impunity in Syria and the use of veto power was used by the two permanent members of the UN Security Council, Russia and China to block any attempt to stop atrocity crimes all over Syria.[80] Therefore, the dissertation builds towards recommendations in chapter six. It significantly highlights the role of UN and regional body partnerships which could be played in implementing R2P at an early stage. Implementing the R2P principle at an early stage of a crisis could offer more opportunities to pass resolutions inside the UN Security Council. The dissertation refers to the Gambian crisis 2017 where the regional organisation - ECWAS- with the support of the UN succeeded in preventing atrocity crimes at an early stage of a conflict.

Practice shows that there is no consistency in implementing the R2P principle wherever atrocity crimes are committed. Hence, it seems that the problem of not implementing R2P is not related to the principle itself and its value - protecting civilians from atrocity crimes, but it is related to the way of taking decisions inside the UN Security Council. Taking decisions by the UN Security Council is coded in Article 27 of the UN Charter and a permanent member of the UN Security Council – such as Russia – which is 'a party to a dispute shall abstain from voting'.[81] The guidance to resort to using veto power is recommended in Chapter six.

[80] *Ibid*; UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; Madeleine O. Hosli and Others 'Squaring the Circle? Collective and Distributive Effects of United Nations Security Council Reform' (2011) 6:2 The Review of International Organizations 163, 164-169; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 79-86

[81] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 27

Accordingly, the UN Security Council permanent members should not resort to using veto in situations where genocide, war crime, ethnic cleansing and/or crimes against humanity are committed.

1.10 Structure of the Research

This dissertation comprises of an introductory Chapter, five main Chapters, and a concluding Chapter. Chapter two examines the development of protection of civilians. It examines the development and evolution of protecting civilians at the earliest instances. The Chapter then charts the emergence of states' responsibility, and the UN, to intervene to end inhuman practices and demonstrates that the principle of non-combatant immunity has both religious and secular roots. The Chapter concludes with an analysis that the R2P principle theoretically fills the *lacunae* between state sovereignty and human rights violations.

Chapter three of the dissertation analyses four types of atrocity crimes which constitute the limited triggers to implement the R2P principle. The Chapter focuses on the obligation to protect civilians from mass atrocities as enshrined in international law. It emphasizes that states have both an individual and collective responsibility to prevent and to protect their populations from human rights abuses. After a brief introductory examination at how atrocity crimes were recognised as international crimes under international law, the Chapter centres on states' obligations concerning protecting civilians against atrocity crimes.

Chapter four examines the Darfur, Srebrenica, Somalia, Myanmar, Cambodia, East Timor, Kenya, *Côte d'Ivoire*, Libya and Gambia case studies, all of which involved arguments relating to the R2P principle. These case studies have significantly, yet differently, contributed to the debate about the meaning and impact of the R2P principle in international law. Additionally, the case studies include variations on key aspects of the R2P debate, with, for example, involving Security Council authorization of military force to act and other situations marked by the Security Council's failure to act. The most clear-cut example of implementing the R2P principle is the Libyan case where the Security Council authorised to intervene in Libya under R2P to protect the civilians in Benghazi city.[82] Furthermore, the Chapter examines other crises where the UN failed to implement R2P; however, the crimes committed are considered as triggers to intervene to protect civilians. For instance, during the last two decades, the UN failed to protect civilians in Darfur and Somalia from atrocity crimes.

[82] UNSC RES. 1973 (17 March 2011) U.N. Doc. S/RES/1973

Chapter five of the dissertation studies the Syrian crisis and illustrates the crimes committed on the ground. In order to fully appreciate whether the Syrian conflict is a situation which calls for R2P principle's implementation. The history of the conflict is examined in this Chapter, together with the serious effects of the conflict on the civilian populations. Several Reports and Resolutions about Syria and the huge committed crimes prove that the Syrian authority is not only unable or unwilling to discharge its responsibility but the authority itself is often the perpetrator and the UN has failed to protect the populations. The continuance of the crisis in Syria shows that there is a collective responsibility to support states to meet their obligations. The UN should be prepared to respond to crises in a timely and decisive manner when states clearly fail to protect their populations.[83]

Chapter six examines the arguments surrounding the 'death' of the R2P principle and recommends five approaches to make implementing the R2P principle more applicable. Resolving sources of tension at the earliest stage of crisis; activating the role of regional organisations in implementing the R2P principle; implementing the responsibility not to veto (RN2V); depending on a resolution passed by two-thirds of the general assembly and implementing limited intervention are studied to support implementing the R2P principle whenever the triggers to implement the R2P principle are met.[84]

Chapter seven synthesizes the analysis of the R2P principle in international law. The Chapter highlights findings and conclusions from previous Chapters and integrates them to show if the R2P principle could be reliable in practice as at present the Security Council follows discontinuity in implementing the principle. The dissertation concludes with an analysis of the legal scope and international normative about the protection of civilians from atrocity crimes and an analysis of how this framework has failed to protect civilians in Syria.

Most of the reforms examined in Chapter Seven, if put in place, would to some extent, help in overcoming the reluctance to undertake the responsibility. In particular, one of the benefits of increasing the ability of regional organisations to undertake to implement the R2P principle is that this would take advantage of their greater willingness to intervene, which is currently limited by their lack of capacity. Finally, it also proposes several areas for future research.

[83] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; Sadat (n 65) 3-5

[84] Michael Hirsh, 'Calling all Regio-Cops: Peacekeeping's Hybrid Future' (2000) 79:6 Foreign Affairs 1, 6

Chapter Two: Emergence of the R2P principle

2.1 Introduction

Since 1945, the UN has constantly witnessed many incidents of genocide, war crimes, ethnic cleansing and crimes against humanity. The systematic and common killing of civilians in Rwanda, Palestine, Bosnia, Darfur, Sierra Leone, Somalia, Libya and Syria continues the long history of conflicts characterised by the commission of mass atrocities against the civilian population. The UN failed to respond effectively to the atrocity crimes perpetrated in Kosovo and Rwanda in 1992 and 1994 respectively. These incidents and several similar crises posed serious questions on how to protect civilians more effectively from mass atrocities such as genocide, war crimes, ethnic cleansing and crimes against humanity in times of armed conflicts in the future.[1] states and the UN's failure to protect civilians in many cases led the UN to seek consensus on the legality of an action, including the use of force, to protect civilians from mass atrocities. In 1999, the UN Secretary-General Kofi Annan urged the UN to develop a way forward on reconciling the principles of maintaining state sovereignty and protecting fundamental human rights when faced with humanitarian crises.[2]

This Chapter examines the emergence of the R2P as a principle to fill the *lacunae* between state sovereignty and non-intervention and human rights violations against civilians during armed conflicts. The Chapter examines the ICISS Report as a preliminary document to the World Summit 2005. The R2P documents outline the role of the principle in shaping subsequent discourse on protecting civilians during armed conflicts.[3]

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[1] Jennifer Welsh, 'Implementing the 'Responsibility to Protect'' (Policy Brief Number 1/2009, Oxford Institute for Ethics, Law, and Armed Conflict 2009) 1, 3; UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; Jennifer Welsh and Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2:3 Global Responsibility to Protect 213, 213-217; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (1st, Brookings Institution Press, Washington D.C. 2009) 11-15

[2] UN Secretary-General, Statement: Secretary-General Presents his Annual Report to General Assembly (20 September 1999) U.N. Doc. SG/SM/713; Jennifer Welsh, 'Implementing the 'Responsibility to Protect'' (Policy Brief Number 1/2009, Oxford Institute for Ethics, Law, and Armed Conflict 2009) 1, 3; Christian Henderson, *The use of force and international law* (1st Cambridge University Press, New York 2018) 155; Philip Cunliffe, 'Dangerous duties: power, paternalism and the 'responsibility to protect' 36 Review of International Studies 79, 93-96; Welsh (n 1) 2015-220; Auriane Botte, 'Redefining the responsibility to protect concept as a response to international crimes' (2015) 19:8 The International Journal of Human Rights 1029, 1035-1036; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 84-89; see generally, H.L.A. Hart, with a Postscript edited by Penelope a. Bulloch and Joseph Raz and with an Introduction and Notes by Lesile Green, The concept of law (3ed, Oxford University Press, Oxford 2012)

[3] ICISS Report 2001 at pages 11-15; Ottawa Roundtable Report 2001 at para. XIII; Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (1st, International Development and Research Centre, Ottawa 2001) 16-19; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 138-139; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 47-49; Malcolm D. Evans (ed.), *International Law* (4th, Oxford University Press, New York 2014) 517-521; Welsh (n 1) 215-220; Rebecca J. Hamilton, 'The Responsibility to Protect: From Document to Doctrine - But What of Implementation?' (2006) 19 Harvard Human Rights Journal 289, 290-294; Botte (n 2) 1032-1034

The Chapter critically examines the narrative surrounding the R2P principle. R2P came into existence following international collaboration amongst sovereigns who found that it was their responsibility to stop and prevent atrocity crimes during armed conflicts. Moreover, it examines the meaning of state sovereignty as responsibility and UN General Assembly Members' consensus on protecting civilians from atrocity crimes during armed conflicts.[4] Thus, this dissertation examines the R2P principle as an outcome of human security where the protection of civilians, rather than a state's benefits, is the utmost paramount.

There are several reasons for attempting to maintain support for the R2P principle. Firstly, it could become a clear and established norm that reinforces the conditionality of state sovereignty on the protection of human rights. Secondly, it could motivate states to improve their human rights records. Finally, it could lead to the development of early warning and other preventative capacities. A central aim, therefore, of the R2P principle is to avoid the need for military intervention, by acting on the responsibility to prevent by, for instance, developing early-warning capacity in which violent disturbances may be suppressed before they become serious humanitarian crises that require military intervention.

2.2 The Emergence of the R2P Principle as a Universal Norm

At the UN General Assembly meetings in 1999, the former UN Secretary-General Kofi Annan made a convincing argument to the UN to try to develop a novel consensus on how to find 'forge unity' about the main questions of the principle and process of protecting populations around the world. Moreover, the following question was raised:

> "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that affect every precept of our common humanity?"[5]

[4] Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 American Journal of International Law 99, 113; Jonah Eaton, 'Norm, Determining the Meaning and Legal Status of the Responsibility to Protect' (2011) 32 Michigan Journal of International Law 765, 799; Henderson (n 2); Lassa Oppenheim, *International Law: A Treatise Volume 2: Disputes, War and Neutrality* (6th, Longmans, Green and Co, London 1944); Cunliffe (n 2) 94-96; Terry Nardin and Melissa S. Williams, *Humanitarian Intervention* (1st, New York University Press, New York 2006) 89-92; Francis M. Deng and Others., *Sovereignty as Responsibility: Conflict Management in Africa* (1st, Washington DC: The Brookings Institute, 1996) 211-215; Welsh (n 1) 215-217

[5] Kofi Annan, *'We The Peoples' The Role Of The United Nations in The 21st Century'* (1st, United Nations Department of Public Information, New York 2000) 48; Nardin (n 4) 89-92; Botte (n 2)1029-1034

In the 2000 Millennium Summit Report, Annan followed up this challenge by again asking the UN Members to look at the apparent tension between state sovereignty and human rights violations during humanitarian crises to reach a consensus on the issue of protecting civilians from atrocity crimes.[6] This urgent desire to find a workable way to lawfully protect populations from atrocity crimes under international law has led to the discussion of the R2P principle in the ICISS Report 2001.

At the UN General Assembly in September 2000, in response to Annan's concerns, the establishment of the ICISS Report was announced by the Government of Canada. The duty of the ICISS was to tackle all the legal, operational, moral and political questions the debate involved and familiarise itself with all possible views around the world followed by handing in a report that would assist the UN Secretary-General and everyone to reach a new common opinion.[7] Thus, the R2P principle mainly implies setting a dialogue process between realists who defend the non-intervention principle and liberalists who emphasis on individuals and essential human rights.[8]

In his report to the Member states of the UN, the UN Secretary-General, Ban Ki-Moon described the R2P principle as an idea whose time had come. Similarly, Annan also presented an inclusive plan for activating the R2P principle in the UN system.[9] The R2P principle primarily seeks to guarantee that the UN never again fails to act against gross forms of human rights abuses and atrocity crimes during the times of armed conflicts.[10]

For his part, Ramesh Thakur, an ICISS Report commissioner, stresses that the R2P principle is not a charter to intervene in a foreign state's internal affairs and that the concept does not offer a checklist against which decisions can be made with accuracy. He suggests that the ICISS Report provides transparency about the circumstances in which the R2P principle should be applied to protect civilians. He justifies this attitude by highlighting that the probability of international unanimity is higher under terms of due authority, due process and due diligence.[11]

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[6] Annan (n 5) 47-48; Henderson (n 2); Nardin (n 4) 89-92; Welsh (n 1) 216;
Brian Barbour and Brian Gorlick, 'Embracing The Responsibility to Protect: A Repertoire of Measures Including Asylum for Potential Victims' (2008) 20:4 International Journal of Refugee Law 533, 555-556

[7] Welsh (n 1) 215-217; Stahn (n 4) 101-106; Botte (n 2) 1035-1036; see generally, International Commission on Intervention and State Responsibility, *The Responsibility To Protect Report of the International Commission on Intervention and State Responsibility* (1st, International Development Research Centre, Ottawa 2001) [Hereinafter: ICISS Report 2001]

[8] Jonathan Moore, *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (1st, Rowan and Littlefield Publishers Inc., Maryland 1998) 29, 41-42; Welsh (n 1) 215-221

[9] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; Alex Bellamy and Paul D. Williams 'On the Limits of Moral Hazard: The 'Responsibility to Protect,' Armed Conflict and Mass Atrocities' (2012) 18:3 European Journal of International Relations 539, 539-544

[10] Botte (n 2) 1032-1034

[11] Thakur (9) 247-249; Welsh (n 1) 215-221

The ICISS Report's co-chairs sought to follow the Brundtland example which aimed to overcome the divide between economic growths and environmental protection and resulted in the idea of 'sustainable development'.[12] By analogy, the aim of the ICISS Report was to find a model in order to reach a consensus on a key divisive issue, protecting civilians in times of armed conflicts.[13]

The fundamental elements of the R2P principle – the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity (atrocity crimes) – are widely known within the UN.[14] It is problematic to define norms because they are both fixed and changeable.[15] They are fixed as norms must serve the function of providing stable standards of conduct to guide the choices of those subject to them. Nonetheless, norms are also changeable since, over time, different norms come into practice within the international system.[16] This dissertation illustrates that the R2P principle has reached the level of an international norm since it was unanimously considered so by world leaders in the World Summit 2005.

According to the ICISS Report, the R2P principle is not broad like humanitarian intervention as previously debated in international law and hence, R2P is different and novel. Intrinsically, the ICISS appears to have distinguished the R2P concept from previous international law opinions which accepted humanitarian intervention.[17] Based on this report, the R2P principle can be distinguished from humanitarian intervention in that, in the former, intervention is approached from a unique perspective. That is, the R2P principle considers the viewpoint of those who need protection and support rather than concentrate on the benefits and perspectives of those who act through humanitarian intervention.[18]

Since its emergence, considerable attention has been paid to the R2P principle. Yet, the position of the R2P principle in international law remains to be debatable and often fenced by disagreements. There are divergent viewpoints on whether the R2P principle has changed or affected contemporary international law. Thus far, there is consensus on several features of the

[12] World Commission on Environment and Development, Our Common Future (1st, Oxford University Press, New York 1987) 3; Bellamy (n 9) 541-544; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras. 97-105; Welsh (n 1) 215-221

[13] ICISS Report 2001 11-15; Weiss (n 3) 16-19; see generally, Ottawa Roundtable Report 2001

[14] ICISS Report 2001 19-23; Ottawa Roundtable Report 2001 at para2.20; Weiss (n 3) 29-30; see generally, Gareth Evans, 'R2P down but not out after Libya and Syria' 9 Open Democracy 2013

[15] Jennifer M. Welsh, 'Norm contestation and the responsibility to protect' (2013) 5:4 Global Responsibility to Protect 365, 369-370; Wayne Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder' (2008) 14/1 European Journal of International Relations: 101, 103-105

[16] Ottawa Roundtable Report 2001 para. 1-6; Weiss (n 3) 119-131; Gareth J. Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?' (2008) 22 International Relations 283, 286; Welsh (n 1) 213-217

[17] Thomas G. Weiss, Humanitarian Intervention (3rd, Polity Press, Cambridge 2016) 108; Welsh (n 1) 215-221; Ottawa Roundtable Report 2001 viii; see also David Chandler, 'Review Essay: Human Security: The Dog That Didn't Bark' (2008) 39 Security Dialogue 427, 429-437

[18] Weiss (n 3) 227-234; Moore (n 8); see generally, Ottawa Roundtable Report 2001; see generally, Louis Henkin, *How Nations Behave* (2nd, Columbia University Press, New York 1979)

R2P principle among states as well as lawyers.[19]

The R2P principle is a complex and multi-faceted concept with some of its features reaching the level of internationality and some others not widely recognised yet. Gareth Evans, an Australian international policymaker and pioneer architect of the R2P principle, contends that the principle has changed from being a merely debated and unspecified concept rarely utilised by the UN to a norm utilised almost habitually and possibly near becoming a novel rule of customary international law.[20]

The R2P "based on the principle of the sovereign equality of all its Members"[21] has been seen a principle of international law that should be applied *pari passu* – as it was declared in Article 2(1) of the UN Charter - to rich and poor states, to powerful states and to fragile ones, to the smallest state in the UN General Assembly and to the permanent Members of the UN Security Council.[22] The R2P principle was adopted by the World Summit 2005 when the world leaders and Members of the UN General Assembly, reached a consensus on shifting the R2P principle to the UN when a state would prove unable or unwilling to protect its own civilians.[23]

As mentioned above, Evans argues that the R2P principle has reached the status of an international norm. He mentions several constituencies and events that contribute to turn the R2P principle to be an international norm.[24] Evans points out to the UN Security Council meeting in April 2006 on the Protection of Civilians in Armed Conflict where the Resolution cited paragraphs 138 and 139 of the World Summit 2005. He further believes that the April 2006 UN Security Council's adoption of the Resolution on the protection of civilians in armed conflicts contains a direct reaffirmation of the conclusions of the World Summit 2005 pertinent to the R2P principle. The fact that most Members of the UN General Assembly approving these documents shows that R2P was accepted as part of international law by a significant number of states.[25]

As was recognised in the World Summit 2005 by the UN General Assembly Members, the R2P principle has attained universal recognition level and became an international norm. The consequence of this might be the ability to implement the R2P principle whenever atrocity

[19] Hamilton (n 3) 215-220
[20] Evans (n 16) 286; Louise Arbour, 'the Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34:3 Review of International Studies 445, 447-449; Welsh (n 1) 213-217; Max Mathews, 'Tracking The Emergence of New International Norm: The Responsibility to Protect and the Crises in Darfur' (2008) 31 Boston College International and Comparative Law Review 137, 148-151
[21] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(1)
[22] Ibid
[23] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 138; Evans (n 1) 43-49; Botte (n 2)1032-1034
[24] Evans (n 16) 286; Welsh (n 1) 213-217
[25] UNSC 'Importance of Preventing Conflict Through Development, Democracy Stressed, As Security Council Unanimously Adopts Resolution 1674 (2006)' (28 April 2006) Press Release SC/8710, at para. 4; Evans (n 16)

crimes occur. Additionally, it can be argued that having become an international norm, the R2P principle entails positive changes to the way the UN responds to atrocity crimes. The previous practice reflects that the principle has been discussed and adopted by the UN Security Council in numerous crises around the world; for instance, in the crisis of Darfur, Somalia, Myanmar, Libya, the Gambia and Syria.[26] There is often much debate over how to apply the responsibility to protect in some complex situations. Besides, deep sensitivities remain about resorting to coercive measures without state permission.

Defenders of the R2P principle assert that one of its key draws is that it offers a wide variety of different responses to serious humanitarian crises, rather than military intervention exclusively. If the concern lies with a broad array of measures, then humanitarian intervention which is outside the remit of the R2P principle should also be considered as part of the potential responses to serious humanitarian crises.

By framing a concept to protect people from atrocity crimes, the ICISS Report has added significant international attention and made R2P part of international political and legal rhetoric.[27] As will be discussed in the following section, the ICISS attempts to find a legal consensus on the international norm of customary international law on the essential demands of protecting individuals.

2.3 The International Commission on Intervention and State Sovereignty Report (ICISS)

In 2001, the core principles of R2P were developed by the ICISS Report, a group of famous academics and policymakers chaired by Sahnoun and Evans and funded by the Canadian government. The ICISS Report was initially presented by the International Commission on Intervention and State Sovereignty (ICISS) in 2001 as a response to arguments relating to intervention for humanitarian reasons.[28] Later in 2005, the R2P principle was approved by governments and heads of states at the World Summit 2005.[29]

The previous UN Secretary-General Kofi Annan indicated that by reconciling the principle of state sovereignty with human rights and the R2P principle institutes the most carefully-considered and comprehensive response to the dilemma of humanitarian

[26] UNGA Res. 63/308 (7 October 2009) U.N. DOC. A/RES/63/308; Philip Cunliffe (ed.), *Critical Perspectives on The Responsibility To Protect* (1st, Routledge, New York 2011) 85-91; Weiss (n 3) 117-120
[27] Ottawa Roundtable Report 2001 341; Weiss (n 3) 170-172; Welsh (n 1) 215-220; Botte (n 2)1029-1034
[28] Weiss (n 3) 127-138; Nardin (n 4) 83-92; Barbour (n 6) 539-540; Ottawa Roundtable Report 2001
[29] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; UNSC 'Importance of Preventing Conflict Through Development, Democracy Stressed, As Security Council Unanimously Adopts Resolution 1674 (2006)' (28 April 2006) Press Release SC/8710, at para. 4

intervention.[30] Likewise, the Commissioners of the ICISS Report chiefly focus on state sovereignty as a responsibility to protect civilians from atrocity crimes.[31] The ICISS was unanimously approved by the twelve Commissioners. The title of the report, "The Responsibility to Protect", reflects the report's core theme which is as follows:

> "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states."[32]

First, the ICISS Report stipulates that states have a responsibility to protect their people from atrocity crimes. Second, the UN should support states to protect their civilians. However, if a state is unable or unwilling to act appropriately, the responsibility of protecting civilians falls on the UN as it is the larger community of states.[33] The language of the report emphasises the state's key responsibility as being to protect its own people from mass atrocity crimes. Therefore, the report essentially focuses on state sovereignty as responsibility, not as an unlimited authority to kill.[34] Significantly, the ICISS Report mainly emphasises state sovereignty by ascribing the duty of protecting civilians to the state itself before taking any coercive measures by the UN. The prevention efforts involve numerous forms of supporting any state struggling during a crisis.

As the R2P report endeavours to differentiate the R2P principle from prior humanitarian intervention in several ways. Many researchers view the R2P principle as the most inclusive basis for approaching humanitarian intervention.[35] Whereas, other researchers claim that it simply legitimises the *status quo* by depending on the UN Security Council as the major authorising body.[36] Some others insist that the R2P principle only departs from the concept of humanitarian intervention in terms of language and terminology. Therefore, this does not

[30] Henderson (n 2); Nardin (n 4) 89-92; Cunliffe (n 4); Welsh (n 1) 217-221
[31] Annan (n 5); Cunliffe 82-93; Nardin (n 4); Welsh (n 1) 217-221
[32] Ottawa Roundtable Report 2001 Viii; Weiss (n 3) 129-137; Evans (n 1) 43-49
[33] ICISS Report 2001 11-14; Weiss (n 3) 129-137; Alex J. Bellamy, 'Ending Atrocity Crimes: The False Promise of Fatalism' (2018) 32:3 Ethics & International Affairs 329, 330-332; Botte (n 2)1029-1034
[34] Simon Chesterman, '"Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya' (2011) 25:3 Ethics and International Affairs 279, 283-284; Cunliffe (n 2) 82-93; Nardin (n 4) 83-92; Welsh (n 1) 215-220; Evans (n 1)
[35] Hamilton (n 3) 289, 293; Sakiko Fukuda-Parr and Carol Messineo, 'Human Security: A critical review of the literature' (Working Paper 11, Centre for Research on Peace and Development, 2012), 8; Jennifer Welsh and Others 'The Responsibility to Protect Assessing the Report of the International Commission on Intervention and State sovereignty' (2002) 57 International Journal 489, 504-505
[36] Jeremy I. Levitt, 'The Responsibility to Protect: A Beaver Without a Dam?' (2003) 25 Michigan Journal of International Law 153, 176

eliminate the need for resolving the debates that have always existed concerning intervention to protect civilians.[37] Furthermore, there are fears that the R2P principle is basically a pretext for legitimating the neo-colonialist strains of major powers.[38]

The ICISS Report 2001 also presents a novel notion of responsibility with a view to resolve clashes between protecting state sovereignty and protecting civilians from atrocity crimes during armed conflicts. In this respect, David Chandler states that the responsibility to protect "is more of a linking concept that bridges the divide between intervention and sovereignty; the language of the "right or duty to intervene" is intrinsically more confrontational."[39]

Under the R2P principle, the concept of protecting civilians is expanded as the principle affirms that an operative response to atrocity crimes involves not only reaction but also engagement to prevent conflict and rebuild after the event.[40] The report coined the idea of 'responsibility to protect' and it spelt out what the commissioners believed this responsibility involved in an endeavour to develop a global consensus on how to move the R2P principle from the stage of theoretical debate to that of within the UN.[41]

2.3.1 Genesis of the R2P Principle

The R2P principle is grounded on the concept of human security and is innovative in several ways.[42] The R2P principle exerts efforts to weld two requirements: a broader security perspective and the UN's resort, under specific situations, to an intervention undertaking measures to protect both human life and security.

As introduced by the ICISS Report, the R2P principle depends on the concept of human security and concentrates on the human needs of requiring protection. The ICISS shows that this approach is different from previously disputed issues in international law about the legitimacy of intervention for humanitarian reasons.[43] Significantly, the R2P principle focuses on privileging the urgent needs of the insiders suffering from harm; rather than, the rights of

[37] Welsh (n 35) 489-90
[38] Alex J. BELLAMY and Ruben REIKE, 'The Responsibility to Protect and International Law' (2010) 2 Global Responsibility to Protect 267, 271; see generally, Mlada Bukavansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (1st, Princeton, NJ: Princeton University Press, 2002)
[39] Chandler (n 17) 65; Cunliffe (n 2) 82-93; see also, Nardin (n 14) 89-92; Welsh (n 1) 215-220
[40] ICISS Report 2001 at pages 39-44; Weiss (n 3) 352; Evans (n 1) 139-145; see generally, Ottawa Roundtable Report 2001
[41] ICISS Report 2001 at pages 69-75; Weiss (n 3) 137-138; Hamilton (n 3) 294-297; see generally, Ottawa Roundtable Report 2001
[42] ICISS Report 2001, at paras 1.25-1.29; Weiss (n 3) 11-12; Hehir (n 61) 679-680; Botte (n 7) 1032-1035; see generally, Ottawa Roundtable Report 2001
[43] Ottawa Roundtable Report 2001; Weiss (n 3) 227-234; Botte (n 7)1029-1034

outsiders to intervene in the internal affairs of a foreign state.[44]

Along with the introduction of the R2P principle came the change in terminology. The traditional term humanitarian had now been somewhat discarded following the ICISS Report as it had coined the term R2P.[45] This unanimous terminological agreement on the R2P principle denotes a growing recognition of the principle of giving priority to protecting each state, rather than intervening in any state's internal affairs.[46] Meaningfully, the ICISS Report also confirms the significant of the terminological variation away from what had been used as the deeply divisive about humanitarian intervention to the unanimous concept about the R2P principle. This unanimous terminological agreement on the R2P principle denotes a growing recognition of the principle of giving priority to protecting each state, rather than, intervening in any state's internal affairs.[47] Besides, the ICISS Report proposes six criteria for legitimate intervention: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.[48]

For this part, Stedman argues that the R2P principle is a different concept since it has succeeded in finding a new lawful duty for the UN to protect civilians by providing an origin "for legitimising coercive interference in the domestic affairs" of foreign states that are unable to protect their own people.[49] In a similar vein, Evans supports the argument that the R2P principle has helped international law to go past all previous disagreements about intervention for humanitarian reasons. Stedman further contends that the traditional humanitarian intervention concentrates on outsiders instead of the urgent needs of those experiencing human rights violations.[50] Hence, the R2P principle concentrates on the civilians themselves, focusing on protecting them from human rights violations and atrocity crimes in conflict areas where their governments are unable or unwilling to do so.

Evans expressly rejects the claim that the R2P principle is merely another name for humanitarian intervention and insists that it is a new and different concept.[51] According to Evans, every principle of the traditional significance of humanitarian intervention is nothing more than a coercive military intervention for humanitarian purposes while the R2P principle is about much more than that.[52] Evans believes that both the ICISS Report and the World

[44] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 138; Ademola Abass (ed.), *Protecting human security in Africa* (Oxford University Press, New York 2010) 2-9
[45] Bellamy (n 19) 143, 146-149
[46] UNGA, 'Note by the Secretary-General' (2 December 2004) 59th Session (2004) U.N. DOC. A/59/565 at paras 65, 201
[47] Ibid, at para. 207; Botte (n 7)1029-1034
[48] ICISS Report 2001 at para. 4.16; Ottawa Roundtable Report 2001, at para. 6.17; Weiss (n 3) 139-140; Botte (n 7)1029-1034
[49] Stephen John Stedman, 'UN transformation in an era of soft balancing' (2007) 83:5 International Affairs 933, 938
[50] Evans (n 16) 290-291
[51] Ibid
[52] Ibid

Summit 2005 reflect that the R2P principle is about taking operative preventive action before a conflict breaks out.[53] Hence, the R2P principle is viewed as a concept that replaces humanitarian intervention. However, the R2P principle departs from humanitarian intervention in its stress on the illegality of any military action for human protection purposes without the authorisation of the UN Security Council.[54]

From another perspective, some critics do not think that the R2P principle is a new principle under contemporary international law. For example, Bellamy and Reike stress that the R2P principle has offered a solution to the dilemmas pertinent to humanitarian intervention.[55] According to Bellamy and Reike, even paragraphs 138-140 of the World Summit 2005 uncover that the R2P principle does not alter the international legal framework. The R2P principle is an emergent concept that depends upon a very advanced reading of international law.[56]

These views accentuate the necessity of finding responsibilities of states operating within the existing framework of international law. Similarly, Contarino, Lucent and Rosenberg note that several components of international law refer to the responsibilities to protect foreigners and that the R2P principle is not anything new.[57]

At the time the introduction of the ICISS Report, specialists clarified that the international obligations of R2P principle were not a part of international law. Rather, the R2P is precisely defined by the ICISS Report as an emerging principle grounded in a miscellany of legal fundamentals depending on previous state practices and the UN Security Council.[58] However, the ICISS Report points out that if the UN Security Council approves of the R2P principle and its doctrinal root, a novel law of customary international law may ultimately be recognised.[59]

Welsh and Banda argue that although the R2P principle does not find formal legal responsibilities, it can influence the way in which states understand and apply their duties as

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[53] Ibid

[54] Gelijn Molier, 'Humanitarian Intervention and the Responsibility to Protect After 9/11' (2006) 53 NETH. INT'L L. REV. 37, 52; Stahn (n 4) 103-104; Antonio Cassese, 'Ex Iniuria lus Oritur Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 European Journal of International Law 23, 26-27; see generally, H.L.A. Hart, with a Postscript edited by Penelope a. Bulloch and Joseph Raz and with an Introduction and Notes by Lesile Green, The concept of law (3ed, Oxford University Press, Oxford 2012)

[55] Alex J. Bellamy and Ruben Reike, 'The Responsibility to Protect and International Law' (2010) 2 Global Responsibility to Protect267, 287-289; Alicia L. Bannon, 'The Responsibility to Protect: The UN World Summit and the Question of Unilateralism' (2006) 115 The Yale Law Journal 1157, 1158

[56] Bellamy (n 55) 275-276; Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (1st, Routledge, New York 2007) 99; Wouters (n 4); Botte (n 7)1032-1038

[57] Alex J. Bellamy and Others, *The Responsibility To Protect And International Law* (1st, Martinus Nijhoff Publishers, Boston 2011) 157, 193

[58] ICISS Report 2001 at para. 5.23; Weiss (n 3) 9-12; Botte (n 7)1029-1034; see generally, Ottawa Roundtable Report 2001

[59] ICISS Report 2001 at para. 6.17; Weiss (n 3) 128; Breau (n 60) 61-64; Ottawa Roundtable Report 2001

Members of the UN.[60] However, Strauss maintains that the R2P principle has not yet reached the international legal standard. He further argues that even the UN General Assembly Resolution which supports the global consensus on the R2P principle in 2005 is a non-binding recommendation for member states or soft law. As such, similar Resolutions, alone, will not lead to the creation of a new law.[61] Likewise, conceiving the R2P principle in terms of a legal norm is risky since that could enable self-interested coercive intervention, involve re-limiting state sovereignty and expand the scope of potential interference in the domestic affairs of foreign states.[62]

Opinions vary about the functional content of the R2P principle. The ICISS Report points out that the UN Security Council is the responsible body, the international actor responsible to implement the R2P principle in the ultimate examination remains undefined. It is still not clear to which body (UN, the North Atlantic Treaty Organisation (NATO), etc.) the international responsibility to protect civilians in times of armed conflicts should be ascribed.[63] For a political theorist like Pattison, this uncertainty in the ICISS Report is vastly unacceptable. According to Pattison, whether the UN Security Council or any other actor instead should approve military intervention is unclear.[64] As maintained by Pattison, though the ICISS Report mainly succeeded in altering the main idea in the debate about humanitarian intervention, for the UN, it remained a very broad-spectrum one.[65]

In its mandate, the R2P principle is an individual-centric principle that has blurred the lines between domestic and international matters. The R2P principle as a spirit of the human security discourse is also able to test the previously unquestioned nature of the norm of non-intervention and state sovereignty that has dominated.[66] Thus, the factual significance of the R2P principle is similar to that of Article 99 of the UN Charter. That is, its significance does not lurk in finding new obligations to do the correct thing but in making it difficult to do the wrong thing or nothing.

2.3.2 The Right Authority to Implement the R2P Principle

[60] Bellamy (n 57) 119
[61] Ibid
[62] Sheri P. Rosenberg, 'Responsibility to protect: A framework for prevention' (2009) 1:4 Global Responsibility to Protect 442, 446; Nardin (n 4) 83-92; Welsh (n 1) 215-220
[63] James Pattison, *Humanitarian Intervention And The Responsibility To Protect: Who Should Intervene?* (1st, Oxford University Press, New York 2010) 284
[64] Ibid; Botte (n 7)1029-1034
[65] Pattison (n 63); Welsh (n 1) 213-220
[66] Pattison (63) 284; Nardin (n 4) 83-92; Botte (n 7)1032-1035; Welsh (n 1) 215-220

The sixth Chapter of the ICISS Report is utterly dedicated to the question of the right authority that can authorise intervention under the UN Charter, the role of the Security Council. Besides, the ICISS Report introduces substitute routes for permitting military intervention through the UN General Assembly and through regional organisations when the UN Security Council fails to take action against atrocity crimes. Regarding the right authority as an essential criterion for making the decision of intervention, the report states the following:

> "Security Council authorisation must in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention must formally request such authorisation, or have the Council raise the matter on its own initiative, or the Secretary-General raise it under Article 99 of the UN Charter; and [… t]he Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing; it should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention."[67]

The report claims that the UN Security Council should initially approve any forceful action to halt mass humanitarian suffering, but it does not name a specific agent that is assigned the duties pertinent to R2P.[68] Similarly, this lack of identification of the agent that should perform the duty of protecting human rights is the *lacunae* that led Tan to describe the R2P as an 'imperfect duty'.[69] Notably, Tan declares that the ambiguity concerning the authority agent, even if in an informal way, such as the commonly recognised norm of the most legitimate intervener to act, grants other actors the chance to participate when necessary.[70]

Tan declares the actuality of positive state responsibilities to protect civilians from mass atrocities within another foreign state's jurisdiction. However, the law remains undecided as to which states have that commitment to act in specific situations.[71] Paragraph 139 of the World Summit 2005 illustrates that authorising the use of force is determinedly within the UN and, more precisely, within the Security Council. Still, by allocating the R2P principle clearly to the Security Council, the World Summit 2005 does not recognise any new legal duties on the part

[67] ICISS Report 2001 at para. 6.15; Ottawa Roundtable Report 2001, at para. 6.15; Weiss (n 3) 139-140
[68] Pattison (63) 249-250; Evans (n 1)
[69] Nardin (n 4) 117-123
[70] Ibid, 94-101; Welsh (n 1) 215-221
[71] Arbour (n 20) 449; Nardin (n 4) 261-267

of states to avert or react to mass atrocities:

> "There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has."[72]

The ICISS Report stressed that any military action should be authorised by the UN Security Council being the source of authority.[73] However, the R2P principle did not identify an alternative authority to the UN Security Council when the latter fails to pass a Resolution to protect civilians.

Assessing the criteria of the use of force by the R2P commissions are continuously differences of largely similar themes based on the theories of 'Just War'.[74] The ICISS Report studies the concept of just cause in more detail than the other standards did. For example, the report underscores that any military intervention is justified when its aim is averting large-scale atrocity crimes and loss of life:

> "large-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large-scale 'ethnic cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape."[75]

The unique point raised in 2004 by the report of the UN Secretary-General's High-level Panel on Threats, Challenges and Change was the suggestion that the UN Security Council has the duty of resorting to the use of force beforehand to avert atrocity crimes.[76] This was a new change since the UN Security Council was adopted to pass Resolutions which would authorise coercive action. Coercive actions involve peaceful measures, diplomatic sanctions and as a final option, resorting to the use of force to stop humanitarian crises from getting worse.[77] The

[72] ICISS Report 2001 at para. 6.14; Ottawa Roundtable Report 2001, at para. 2.14; Weiss (n 3) 139
[73] Ibid; Botte (n 7)1029-1034
[74] Gareth Evans, 'From Humanitarian Intervention to the Responsibility To Protect' (2006) 24:3 Wisconsin International Law Journal 703, 710; Weiss (n 3) 139-140
[75] Gareth J. Evans, 'The responsibility to protect' (*NATO Review*, 10 April 2013) <https://www.nato.int/docu/review/2002/Managing-Crisis/Responsibility-protect/EN/index.htm> accessed 11 March 2018
[76] Nicholas J. Wheeler, 'A victory for common humanity? The responsibility to protect after the 2005 World Summit' (2005/6) 2:1 Journal of International Law and International Relations 95, 98-99
[77] Ibid

UN Secretary-General, Kofi Annan, warmly not only welcomed the report of the High-Level Panel, but also included all its schemes linked to the responsibility to protect into the 'In Larger Freedom' report. Moreover, the report of the High-Level Panel was discussed in March 2005 and it was re-discussed in the UN General Assembly in the run-up of the World Summit 2005.[78]

The R2P commissioners' willingness to find different means of authorisation through either the UN General Assembly or regional organisations was discussed by Wheeler as 'imaginative'.[79] It seems that some governments considered the authorisation of the UN General Assembly as a noteworthy means for limiting the use of force.[80] The UN Secretary-General pointed out in 'In Larger Freedom' that if the UN Security Council does not reach a covenant depending on the concepts included in the report of the High-Level Panel, this may enhance transparency of discussions to make the judgments of UN Security Council more likely to be valued by both world public opinion and governments.[81] Hence, the initial authority of applying the R2P principle is the state that is the first responsible party for preventing mass atrocity. The ICISS Report and the High-Level Panel report of the R2P principle discuss the most controversial matter in international law, state sovereignty, which is recognised by the UN General Assembly as a responsibility.

2.3.3 State Sovereignty and State Responsibility

The publication of the ICISS Report is regarded as a significant event despite most studies recognising it as merely a set of recommendations of an independent commission and as having a restricted impact. Burke-White highlights that the ICISS Report is a "significant normative statement about both the transformation of sovereignty and the legal obligations of the territorial state and international community."[82] The lawmakers of the ICISS Report made much effort to meet the concerns related to the raised issue – specifically as they supported the core idea of the state's responsibility to protect.

In the Westphalian concept, state sovereignty indicates the legal character of a state in

[78] UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) 59th Session (2005) U.N. DOC. A/59/2005, at para. 33; Wheeler (n 76) 96; Henderson (n 2)
[79] Wheeler (n 76) 96-98; Kofi Annan, 'A Glass At Least Half Full' (*United Nations*, 19 September 2005) <https://www.un.org/sg/en/content/sg/articles/2005-09-19/glass-least-half-full> accessed 25 April 2018
[80] Wheeler (n 76) 96
[81] Ibid; Henderson (n 2)
[82] Jared Genser and Irwin Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (1st, Oxford University Press, New York 2012), 21; Nardin (n 4) 93-96; see also, Deng (n 4)

international law. Moreover, it is a notion that provides order, predictability and stability in international law as sovereign states are considered equal, irrespective of the comparative size or wealth of each state.[83] Domestically, state sovereignty implies the ability to make authoritative decisions regarding the resources and people within the territory of the state. Nonetheless, the authority of the state is typically not observed as absolute but regulated and constrained internally by constitutional power-sharing arrangements.[84]

Broadly, membership to the UN seemed to be the ultimate signal of the independent sovereignty of a state and thus the point of acceptance into the international community.[85] The UN also became the primary international forum for collaborative action in the shared pursuit of the three goals: state building, nation building and economic development.[86] Therefore, the UN was the primary ground for protection, not the casual abrogation, of state sovereignty.[87]

The UN Secretary-General, Kofi Annan, discussed the dilemma in the theoretical language of two main concepts of sovereignty; the first one is vested in the state while the second is vested in the civilians. Annan's approach illustrates the ever-collective commitment over the world to independent governments and better popular freedoms.[88] The second idea of state sovereignty that the UN Secretary-General refers to should not be recognised as any kind of challenge to the old meaning of state sovereignty. Rather, it emphasises the traditional view of state sovereignty by requiring the state to be contentedly able to embrace the goal of preventing atrocity crimes to protect people's lives.[89]

The ICISS Report endeavours to bridge the *lacunae* between protecting civilians during armed conflicts and state sovereignty by introducing the complementary concept of the R2P principle to protect civilians. The report offers state sovereignty as a shared responsibility between both the national state and the UN. The ICISS Report acknowledges that the central responsibility to protect civilians from massive human rights violations directly resides with

[83] Roderic Pitty and Shannara Smith, 'The indigenous challenge to Westphalian sovereignty' (2011) 46:1 Australian Journal of Political Science 121, 123-127; Stephen D. Krasner, *Sovereignty: organized hypocrisy* (1st, Princeton University Press, Princeton 1999) 74-76; Treaty of Westphalia (singed 30 January 1648, ratified 15 May and 24 October 1648); Welsh (n 1) 215-220; Evans (n 1) 15-18; Deng (n 4)

[84] ICISS Report 2001 at paras 2.14-2.15; Ottawa Roundtable Report 2001 at para2.7; Weiss (n 3) 8-12; Nardin (n 4) 83-92; Welsh (n 1) 215-220; Deng (n 4)

[85] Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 164 LNTS 19, Art. 1 (a-d)

[86] Deng (n 4); ICISS Report 2001 at para. 2.11; Ottawa Roundtable Report 2001 at para2.11; Weiss (n 3) 8-12

[87] *Island of Palmas case (Netherlands, USA) Judgment of 4 April 1928, RIAA Reports 1928 Volume II 829-871*, at page 838; Welsh (n 1) 215-220

[88] UN Secretary-General, Annual Report (20 September 2017) U.N. DOC. SG/SM/7136; Jennifer Welsh and others, 'The responsibility to protect: assessing the report of the International Commission on Intervention and State Sovereignty' (2002) 57:4 International Journal 489, 492-496; ICISS Report 2001 at paras 2.14-2.15; Ottawa Roundtable Report 2001 at para2.13; Weiss (n 3) 7-8

[89] UN Press Release SG/SM/7136 (20 September 1999) U.N. Doc. SG/SM/713; Jennifer Welsh, 'Implementing the 'Responsibility to Protect'' (Policy Brief Number 1/2009, Oxford Institute for Ethics, Law, and Armed Conflict 2009) 1, 3; Henderson (n 2) 153-156; Stahn (n 4) 102-107; Eaton (n 4) 799; Nardin (n 4) 83-92; Welsh (n 1) 215-220

the state. In situations where the state is unable or unwilling to achieve this responsibility, the responsibility of protecting civilians should be shifted to the UN.[90]

The central responsibility to protect civilians during armed conflicts is also applied in cases where the state itself is the perpetrator as in examples of Myanmar, Darfur, Libya and Syria. Hence, the responsibility to protect civilians should not only be laid on the state; rather, it becomes the tripartite-shared responsibility of the state, regional organisations and the UN.[91] As mentioned before, the R2P report expanded the concept of protecting civilians, affirming that an operative response to atrocity crimes involves not only reaction but also engagement to prevent conflict and rebuild after the event as well.[92]

Much of the developing countries' concerns stem from the belief that monitoring some crimes may place the states under enduring observation, which violates their sovereignties. Effective precautionary measures may seem a highly intrusive action and the UN should not ignore the problematic matter of states' thoughts about sovereignty. However, the R2P documents have proved that the first thing that consolidates state sovereignty is the state's responsibility to protect its civilians from mass atrocity.[93] Besides, the 2001 report of the R2P and the World Summit 2005 highlight that sovereignty should not be considered if atrocity crimes are committed and civilians are the aim of those crimes.[94]

The ICISS Report does not transfer or weaken the eminence of state sovereignty but it emerges as an essential need for a change in the exercise of sovereignty stressing that sovereignty is the state's responsibility both in internal functions and external duties. In this context, the report examines the three pillars of the R2P: the responsibility to prevent, the responsibility to react and the responsibility to rebuild.

2.4 The Pillars of the Responsibility to Protect

There are many questions regarding the essential content of the R2P principle. One of these questions is about what actions should be taken for the R2P to be implemented. The principle is discussed by the UN General Assembly in three pillars of responsibilities. In the following

[90] ICISS Report 2001 at paras 2.14-215; Weiss (n 3) 184-186; Welsh (n 1) 215-220; Evans (n 1); see generally, Ottawa Roundtable Report 2001
[91] ICISS Report 2001 at para. 2.25; Ottawa Roundtable Report 2001 at para. 2.30; Weiss (n 3) 136-137
[92] ICISS Report 2001 at paras 3.1-3.9; Ottawa Roundtable Report 2001 at para. 2.29; Weiss (n 3) 195-196
[93] Cunliffe (n 2) 82-93; Welsh (n 1) 216-220; Evans (n 1) 11-15
[94] ICISS Report 2001 at paras 2.14-2.15; Ottawa Roundtable Report 2001 at para. 4.23, 4.32; Weiss (n 3) 147-150; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 138; Alex J. Bellamy, 'The Responsibility to Protect turns ten' (2015) 29:2 Ethics & International Affairs 161, 175-178; Nardin (n 4) 83-92

paragraphs, the three pillars of the R2P – the responsibility to prevent, the responsibility to react and the responsibility to rebuild – are examined.[95]

2.4.1 The Responsibility to Prevent

This pillar of the R2P principle is defined by the ICISS Report as the most important aspect of the R2P and it is ideally the best option at an early stage of a conflict.[96] This pillar was also discussed in the UN Secretary-General report in 2010, in which Annan confirmed that the R2P principle should be applied at an early stage of a crisis.[97]

Bellamy stresses that the R2P principle highly focuses on the crucial importance of conflict prevention. He adds that the ICISS Report makes concrete proposals when it calls to centralise the world's conflict prevention efforts and to find capacity on the subject of early warning.[98] Similarly, Weiss and Hubert stated that it is disgraceful to set prevention as a most significant priority.[99] Weiss and Hubert point out that, "most of the stammering about prevention and rebuilding is a superficially attractive but highly unrealistic way to try and pretend that we can finesse the hard issue of what essentially amounts to humanitarian intervention."[100] For Weiss and Hubert, the prevention and rebuilding responsibilities are the most crucial pillars of the R2P principle.

The ICISS Report includes a discussion of the single most pressing dilemma, namely, the responsibility to prevent. However, it does not present how to decode early warning signs into a commitment to apply the first pillar of the R2P principle and reach a consensus on how to act. The previous practices of the UN proved that the ICISS Report did not address the issue of what practical mechanisms can be used to implement the R2P principle. Thus, the question of how to implement preventive measures or how to monitor any implementation mechanisms remains unanswered.[101]

Similarly, the guidelines on how to provide international assistance in support of preventive measures in a host state are ambiguous. The ICISS Report clarifies that the responsibility to prevent is the most central feature of the R2P principle directed at addressing

[95] ICISS Report 2001 at page 19-43; Weiss (n 3); see generally, Ottawa Roundtable Report 2001
[96] ICISS Report 2001 at para. 4.1-4.2; Weiss (n 3) 27-31; see generally, Ottawa Roundtable Report 2001
[97] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864
[98] Bellamy (n 94) 177; Evans (n 1) 79-88
[99] Weiss (n 17) 27-29
[100] Aidan Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (1st, Macmillan International Higher Education, 2012) 115; see generally, ICISS Report 2001; Weiss (n 3) 27-29; see generally, Ottawa Roundtable Report 2001
[101] ICISS Report 2001 at paras 3.1-3.9; Weiss (n 3) 35-37; see generally, Ottawa Roundtable Report 2001

the direct roots of conflict that put human security at hazard. However, the absence of mechanisms to implement the R2P principle has led to the unsuccessful application of the responsibility to prevent in many crises like Darfur, Myanmar and Syria.[102]

Moreover, there is vagueness surrounding the questions of what states are supposed to do to avert mass atrocities and whether there are restrictions on taking precautionary measures. Besides, under the R2P principle, it is an essential matter that the UN should assist states in exercising their responsibility towards their civilians. The scope of any support given to a state remains a loose end under the R2P principle.[103]

2.4.2 The Responsibility to React

The second pillar, the responsibility to react, seems to be the most problematic feature of the R2P principle. This pillar is applied when a state fails to apply the first pillar of the R2P principle, the responsibility to protect, to protect its civilians from atrocity crimes. As stated in the ICISS Report, when a state is unable or unwilling to prevent atrocity crimes, then it is the responsibility of the UN to take all measures, including military action, to stop mass atrocities.[104]

Responsibility to react poses the question of what military measures should be applied in any intervention in situations where there are mass atrocities. The ICISS Report adds that wherever possible, coercive measures for short of military intervention should be examined initially.[105] The responsibility to react consists of an extensive range of measures, involving diplomatic, economic and political tools. Military intervention is discussed in the report under the reaction pillar as a last resort to stop mass atrocities.[106] Additionally, military intervention should be limited to extreme cases where mass atrocities threaten the lives of huge numbers of civilians or for crises that constituted a noticeable and imminent danger to international security. The R2P report stresses any coercive measures should be applied only after all the other preventative measures have been exhausted. Moreover, any intervention should be

[102] W. Andy Knight and Frazer Egerton (ed.) *The Routledge Hound Book of the Responsibility to Protect* (1st, Routledge, New York) 117-121
Botte (n 7)1032-1035
[103] ICISS Report 2001 at paras 3.25-3.43; Weiss (n 3) 27-29; Anthony Lewis, 'The Challenge of Global Justice Now,' (2003) 132:1 Daedalus 5, 8-10; see generally, Ottawa Roundtable Report 2001
[104] Bellamy (n 19) 143, 165-166; Botte (n 7)1029-1034
[105] ICISS Report 2001 at paras 4.3-4.9; Ottawa Roundtable Report 2001 at para29; Weiss (n 3) 140-143; Evans (n 1) 105-118
[106] ICISS Report 2001 at paras 4.37-4.40; Ottawa Roundtable Report 2001 at para3.25, 4.3; Weiss (n 17) 140-143; Evans (n 1) 43-49

limited to a level to stop the committed atrocity crimes.[107]

In order to categorise situations requesting coercive measures, the ICISS Report suggests the following set of criteria: "right authority, just cause, right intention, last resort, proportional means and reasonable prospects."[108] These criteria should be met before taking a decision of intervention. The main threshold for taking a coercive action is a 'just cause' such as eliminating the danger of a large-scale ethnic cleansing or loss of life.[109] The six criteria that should be considered before applying the responsibility to react have a key heritage in customary international law, Just War, and international legal concepts of *jus ad bellum* and *jus in bello*.[110] This point is discussed in further detail in the next Chapter.

To resort to military intervention, the report lists four criteria for authorising the resort to military action. The four criteria are: (a) right intention, (b) last resort, (c) proportional means and (d) reasonable prospects of achieving the intended results.[111] To authorise preventive measures under the R2P, such measures should be a response to convincing evidence of credible large-scale killing, which is required for sidestepping the morally unsustainable position of having to wait for the breakout of genocide before being able to stop it.

When a state fails to protect its civilians, and the responsibility is laid on the UN, the latter will have the essential duty of resorting to coercive measures.[112] The UN's response should start with using peaceful means first. However, under the R2P principle, it is not clear what kind of peaceful measures should be applied and to what extent those measures should be applied.[113]

The previous pillar, the responsibility to prevent, refers to the body that should take the decision on how to help and support states in applying precautionary measures. Yet, there is no specification in terms of how the peaceful means should be used in supporting the host state. The ICISS Report recognises the UN Security Council as the right body to authorise military interventions.[114] However, the ICISS Report recommends alternatives if the UN Security Council fails or refuses to deal with a proposal within a reasonable time.[115] In such situations, the issue could be assessed in the UN General Assembly under the 'Uniting for Peace' formula

[107] ICISS Report 2001 at paras 4.39-4.40; Ottawa Roundtable Report 2001 at para. 4.13; Weiss (n 3) 140-143
[108] ICISS Report 2001 at para. 4.16; Ottawa Roundtable Report 2001 at para. 4.16; Weiss (n 3) 139-140; Evans (n 1) 7-12
[109] Ibid; Wheeler (n 76) 98-99
[110] Pattison (63) 99-107
[111] ICISS Report 2001 at para. 6.1; Ottawa Roundtable Report 2001 at para. 4.23, 4.32; Weiss (n 3)
[112] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139; ICISS Report 2001 at para. 4.1; Ottawa Roundtable Report 2001 at para. 4.23, 4.32; Weiss (n 17) 11-12; Evans (n 1) 7-12
[113] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139
[114] ICISS Report 2001 at para. 3(E)(I-II); Ottawa Roundtable Report 2001 at para. 6.28; Weiss (n 3) 278-283; Evans (n 1) 105-119; Botte (n 7)1029-1034
[115] ICISS Report 2001 at para. 3(E)(I); Ottawa Roundtable Report 2001 at paras 6.29, 6.31; Weiss (n 3)

of the matter.[116] Thus, the task of the R2P principle is not crucially to find an alternative to the UN Security Council as a basis of authority but to make the Council works better than it has. According to the R2P principle, if the Security Council fails to apply the R2P principle to protect civilians, the issue can be discussed by a regional organisation. However, any action by regional organisations should be authorised by the UN Security Council under Chapter VIII of the UN Charter.

A reply to another concern posted by research is that regional organisations and individual states also have the authority after getting permission from the UN Security Council to resort to the use of force to protect foreign individuals. The response to their concern can be found in the ICISS Report as follows:

> "action within area of jurisdiction by regional or sub-regional organisations under Chapter VIII of the Charter, subject to their seeking subsequent authorisation from the Security Council."[117]

Standards for resorting to the military option under the R2P principle to protect civilians are a more divisive matter. There is a broad agreement concerning the authorisation of intervention to prevent atrocity crimes, namely, that the UN Security Council should be the sole source of authority. Besides, participants regard the UN General Assembly a viable alternative.

In contrast to UN Security Council Resolutions, it is evident that even if the UN General Assembly successfully passes a Resolution, it shall only be recommendatory rather than binding. The R2P report stated that an intervention which resort to with the backing of a two-thirds vote in the UN General Assembly should clearly have political and moral support and high degree of legitimacy.[118] The threshold criteria for intervention as well as non-military forms of intervention become the crucial components of applying the R2P principle. Therefore, the ICISS Report and the World Summit 2005 also underline the first pillar of the R2P - responsibility to prevent - as an important element to enable implementation of the R2P principle.

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[116] Nardin (n 4) 93-95

[117] ICISS Report 2001 at para. E(II); Ottawa Roundtable Report 2001 at para. XIII; Weiss (n 3) 156-158

[118] ICISS Report 2001 at paras 6.7, 6.30; Ottawa Roundtable Report 2001 at para. 6.7; Weiss (n 3) 159-162; Bellamy (n 19) 143, 157-159; see generally, H.L.A. Hart, with a Postscript edited by Penelope a. Bulloch and Joseph Raz and with an Introduction and Notes by Lesile Green, The concept of law (3ed, Oxford University Press, Oxford 2012)

2.5.3 The Responsibility to Rebuild

The third pillar of the R2P principle is the responsibility to rebuild which stresses the post-conflict recovery, reconstruction and reconciliation of a state. The aim of the rebuilding pillar is the prevention of potential recurrences and continuation of humanitarian crises. The ICISS Report shows that the R2P principle has created an integrated approach which incorporates the prevention pillar and rebuilding pillar. Although the ICISS Report studies the R2P principle and strongly emphasises the three responsibilities to protect people from mass atrocities, it does not focus on taking coercive action and military aspects as humanitarian intervention did.[119]

Bellamy holds the view that states coming out of conflicts and extreme violations of human rights need international support for rebuilding collapsed infrastructure and recreating destroyed institutions of governance as well as for economic resilience.[120] However, other scholars find that these require a long-term commitment from the international community, which is not always the case.[121] Researchers demonstrate that in the best scenario where R2P was applied, Libya, under the UN Security Council Resolutions 1972 and 1973 in 2011, the international community failed to apply the responsibility to rebuild.[122] This failure may be attributed to the intervening countries giving priority to their interests rather than the Libyan individuals.[123]

The dissertation has tracked the international community's action to find where the R2P principle was successfully applied to save lives and put an end to violations and abuses. Previous UN Security Council practice in Libya, Sudan and recently Syria has shown the responsibility to react and responsibility to rebuild as far from easy to be applied to stop violations of human rights.[124] For that reason, this study recommends that the international community should focus on the first pillar of the R2P principle, the responsibility to prevent. Failing of the regional and international organisations to implement the third pillar - the responsibility to rebuild – of the R2P principle could lead to a real recondite problem. It seems that this problem results from facing the question of who should be responsible in rebuilding post-conflict settings and how rebuilding stage should be applied.[125]

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[119] Weiss (n 3) 195-196; Lewis (n 103) 8-10; Alex J. Bellamy, 'The Responsibility to Protect and the problem of military intervention' (2008) 84:4 International Affairs 615, 620-623; see generally, Ottawa Roundtable Report 2001
[120] Bellamy (n 119) 630-631
[121] Ibid,622-623; see also, Nardin (n 4) 161-170
[122] Mohammed Nuruzzaman, 'The 'Responsibility to Protect' Doctrine: Revived in Libya, Buried in Syria' (2013) 15:2 *Insight Turkey* 57, 64; see also, Nardin (n 4) 161-170
[123] UNSC Res. 1973 (17 March 2011) U.N. DOC. S/RES/1973, paras 3, 5, 7; Nardin (n 14) 93-96
[124] Alex J. Bellamy, 'The Responsibility To Protect: Added Value Or Hot Air?' (2013) 48 Cooperation and Conflict 333, 345-346; Nardin (n 14) 161-170
[125] Weiss (n 3) 28-31; Bellamy (n 124) 345; Nardin (n 4) 161-170; see generally, Ottawa Roundtable Report 2001

The study focuses on the outcome of the ICISS Report where it rightly illustrates that state sovereignty not only entails rights but also responsibilities, especially a state's responsibility to protect its people from violations of human rights.[126] The study focuses on the core spirit of the ICISS Report, i.e. the government's responsibility to protect its own people from atrocity crimes. In this context, it is the responsibility of the Syrian state to protect the Syrian people and when the state is unable or unwilling to do so, the responsibility should be shifted to the international community. Accordingly, in a case like this, the principle of non-intervention leads to the international responsibility to protect the Syrian people from atrocity crimes.[127]

2.5 Evaluation of the International Commission on Intervention and State Sovereignty Report (ICISS)

The conceptual approach of the R2P principle is surrounded with several disagreements and the literature does not reflect an apparent consensus on whether the R2P principle has changed international law. These disagreements do not only involve the conceptual features of the R2P principle but its implementation to crises including mass human rights violations. Given the confusion and debates in the existing literature, the question of whether R2P principle has changed international law regarding states and the international community's responses to mass atrocities is justifiable and significant.

Another serious matter with implementing the R2P principle is the ability of the five permanent Members of the UN Security Council to use their veto power to block a Resolution even when atrocity crimes are committed.[128] They can use their veto power against applying the R2P principle, even in cases containing atrocity crimes and gross human rights abuses. Although the ICISS Report refers to the responsibility not to vote (RN2V),[129] the language of the report does not solve the problem of using the veto power for national interests and political wills.

Moreover, the report does not point to Article 18 of the UN Charter which clarifies the role of the UN General Assembly in addressing specific problems where the UN Security

[126] Ottawa Roundtable Report 2001 at para. 12, 24; Weiss (n 3) 5-12; Cunliffe (n 2) 82-93; Nardin (n 4) 83-92; Welsh (n 1) 215-220
[127] Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12:1 Human Rights Law Review 1, 10; Nardin (n 4) 93-96, 161-170
[128] Weiss (n 3) 18-19; Stedman (n 49) 938; Hosli (n 73)
[129] Stedman (n 49) 936-938; Hosli (n 73)

Council failed to play its role, in this context putting an end to atrocity crimes.[130] Participants of the ICISS Report also decided that intervention should not be launched to replace democratically elected governments and aims of the intervention should focus narrowly on humanitarian concerns and stop human rights violations. Yet, some studies discuss that replacing an elected government may sometimes be a normal outcome of a conflict such as in the Libyan case.[131]

The ICISS Report warns that, if the UN Security Council fails to discharge its obligation to protect people in mass atrocity crimes, the Council should take into consideration that it is unlikely to assume concerned states to rule out other forms or means of action to meet a humanitarian emergency.[132] The ICISS Report suggests that the UN General Assembly can play a significant role in applying the responsibility to react pillar; however, it did not offer the responsibility of military intervention to other bodies outside the UN Security Council. The possibility of coalitions of regional states willing to take actions under the R2P principle is not accurately recommended; however, the ICISS Report does not clearly rule out such a coalition in states where all other reasonable actors have failed to act.[133]

Another serious aspect is that the five permanent Members of the UN Security Council have different ideologies and geopolitical interests. Therefore, in some cases, we find that some permanent Members see a need for intervention while others may use their veto due to having different interests in danger, disagree about the need for military intervention, or worry about military intervention leading to regime change.[134]

A period such as this could have some similarity with the Cold War period in which the coalition of the US, the UK and France stuck to one opinion while Russia and China stuck to the opposite opinion. Practice often reflects that if one group presented a draft to the UN Security Council, the other group blocks it via using the veto power.[135] This disagreement between primary members of the UN Security Council backs to our minds the period of the cold war. However, this matter can be sorted out via the proposed model by the French Minister of Foreign Affairs, Hubert Védrine. However, Védrine's approach does not give a full solution

[130] Weiss (n 3) 159-160; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 18
[131] Weiss (n 3) 79; Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2011) 52:2 Virginia Journal of International Law 357, 373-376; Botte (n 7)1029-1034; see generally, Ottawa Roundtable Report 2001
[132] ICISS Report 2001 at para. 6.39; Ottawa Roundtable Report 2001 at para. 12, 24; Evans (n 1) 43-49
[133] Glanville (n 127)
[134] Stedman (n 49) 938; Andrew Garwood-Gowers, 'China and the 'Responsibility to Protect': the implications of the Libyan intervention' (2012) 2:2 Asian Journal of International Law 375, 376-7
[135] Weiss (n 3) 79-123; Chandler (n 17) 60-62; Hosli (n 73); Alex Bellamy and Paul D. Williams 'On the Limits of Moral Hazard: The 'Responsibility to Protect,' Armed Conflict and Mass Atrocities' (2012) 18:3 European Journal of International Relations 539, 545-552

to using the veto power as he believes that the veto power can be used to block implementing the R2P principle when a permanent Member of the UN Security Council's interests and political wills are under threaten.[136]

The ICISS Report stipulates that permanent Members of the UN Security Council should not use their veto if the majority supports the Security Council's intervention to apply R2P and protect people. Moreover, the permanent Members of the UN Security Council should also not block any Resolution by using veto if genocide or mass atrocities have been committed. Besides, the ICISS Report adds that the permanent Members should not use their veto if their vital national interests are not at stake.[137]

In general, the language of the ICISS Report illustrates that RN2V should not be approved as a formal procedural rule but as an informal rule which would avert interventions from being unreasonably blocked. The responsibility component of the R2P principle implies that when mass human rights violations and mass atrocities occur, the five permanent Members of the UN Security Council should not apply the veto to reach political aims.

The R2P principle seems to be an optimistic development, primarily since it is realised as more positive when separating itself from the principle of humanitarian intervention, and is much broader in scope regarding the prevention and rebuilding pillars.[138] Prevention is a legitimate undisputed aspect of the argument and contestants at all the roundtables approve that the prevention concept is essential.[139] Although abstractly the ICISS Report is still focused on resorting to military intervention as a central aspect of the R2P principle, it insists on giving attention to the threshold standards of such an intervention. Similarly, the Chapter charting measures under the second pillar, the responsibility to react, largely focuses on military intervention. The subsection on 'measures short of military action' works as a simple prelude to a much longer debate on measures for the legitimate use of force as well as its approval.

2.6 The 2005 World Summit Outcome

[136] Richard Barnes and Vassilis P. Tzevelekos, *Beyond Responsibility to Protect: Generating Change in International Law* (1st, Intersentia, Cambridge 2016) 103-122; UNGA 'the Responsibility to protect: timely and decisive response' (5 July 2012) 66th Session (2012) U.N. DOC. A/66/874-S/2012/578

[137] ICISS Report 2001 51-52; Weiss (n 3); Stedman (n 49) 938; Evans (n 1) 43-49; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83; see generally, Louis Henkin, *How Nations Behave* (2nd, Columbia University Press, New York 1979)

[138] ICISS Report 2001 9; Ramesh Thakur (ed.), *Reviewing the Responsibility to Protect: Origins, Implementation and Controversies* (Routledge, New York 2018) 38-58; see generally, Ottawa Roundtable Report 2001; Weiss (n 3) 17-20

[139] ICISS Report 2001 19-23; Ottawa Roundtable Report 2001 at para. 6.39-6.40; Weiss (n 3) 27-29; Evans (n 1) 139-145

2.6.1 Overview

After the release of the ICISS Report in 2001, interest in the R2P principle increased among the regional as well as sub-regional organisations, the UN, non-government actors and academics. The UN has attempted to address and apply the R2P principle on several occasions. In May 2002, at the annual retreat of the ICISS Report, the UN Security Council discussed the ICISS Report and established the first post-ICISS argument and first responses to the R2P principle.[140]

Later, two further reports contributed to making the R2P principle more popular on the international platforms.[141] The first report is "A More Secure World: Our Shared Responsibility" (November 2004).[142] As for the second, it is "In larger Freedom: towards Development, Security and Human Rights for All" (21 March 2005).[143] The former report was the outcome of the 2004 High-Level Panel on Threats, Challenges and Change (HLP). The HLP, which was chaired by the former prime minister of Thailand, Anand Panyarachun, paved the way for the World Summit 2005. The report of the HLP was published in 2004, one year before the World Summit 2005, and the last draft of the report was under the title "A More Secure World: Our Shared Responsibility". This report illustrates that the world is changing dramatically; therefore, human security is increasingly becoming more imperative.[144] In addition, this report recognises the concept of the R2P principle and underscores the need for collective action aiming to protect civilians during armed conflicts where atrocity crimes are committed.

As for the second report, "In Larger Freedom: towards Development, Security and Human Rights for All", which was presented by the previous UN Secretary-General, Kofi Annan, it adopts a human security perspective and it dedicates two sections to the 'freedom from fear' and 'freedom from want'. Additionally, it encourages states to "move towards embracing and acting on the responsibility to protect actual or potential victims of atrocity crimes."[145]

In addition, the report clarifies that the UN Security Council approved a Resolution

[140] Bellamy (n 19) 151-152
[141] Christine Gray, *International Law and the Use of Force* (4th, Oxford University Press, New York 2018) 57-62
[142] UNGA, 'Note by the Secretary-General' (2 December 2004) 59th Session (2004) U.N. DOC. A/59/565
[143] Ibid; UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) 59th Session (2005) U.N. DOC. A/59/2005
[144] UNGA, 'Note by the Secretary-General' (2 December 2004) 59th Session (2004) U.N. DOC. A/59/565; Botte (n 7)1032-1034
[145] UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) 59th Session (2005) U.N. DOC. A/59/2005, at para. 132; Henderson (n 2)

setting out these principles and reaffirming their binding nature.[146] Annan argued that criteria would make UN Security Council decisions more valued by both world public opinion and governments by making their deliberations more transparent.[147] The report recognises the legitimacy measures for resorting to intervene involved in the ICISS Report. However, it does not explicitly refer to the "seriousness of threat; proper purpose; last resort; proportional means; and reasonable prospects of success."[148]

The ICISS Report, the High-Level Panel Report, and the Report of 'In Larger Freedom' resulted in the passing and adoption of the World Summit 2005 by the world leaders in a Resolution adopted by the UN General Assembly in September 2005. The UN General Assembly Members took one of the most important and bravest steps when they adopted the World Summit 2005 which was unanimously recognised by the UN General Assembly Members on 24 October 2005.

2.6.2 Paragraphs 138 and 139

The World Summit 2005 endeavoured to form a legal consensus on the R2P principle concentrating on protecting civilians through the times of armed conflicts. On 24 October 2005, the Members of the UN General Assembly unanimously adopted the World Summit 2005 in which the R2P principle was embedded in paragraphs 138-139. Eventually, an international consensus on R2P principle was reached when the Members of the UN General Assembly supported the Summit Resolution.[149]

Like the ICISS Report, paragraph 138 of the World Summit 2005 primarily asserts each state's responsibility to protect their populations from atrocity crimes. Paragraph 138 emphasises that:

> "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes,

[146] UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) 59th Session (2005) U.N. DOC. A/59/2005, at para. 126
[147] UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) 59th Session (2005) U.N. DOC. A/59/2005, at para. 122, 135
[148] Bardo Fassbender (ed.), *Securing human rights? Achievements and challenges of the UN Security* (1ed, Oxford University Press, New York, 2011) 24
[149] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras. 138-139; Stahn (n 4) 108-109; Botte (n 7)1029-1034

> including their incitement, through appropriate and necessary means."[150]

Significantly, paragraph 138 of the World Summit 2005 focuses on the prevention aspect of the R2P principle as an *ab initio* responsibility of the state itself.[151] The paragraph does not only include protecting population from genocide, war crimes, ethnic cleansing and crimes against humanity, but it also reflects the responsibility of the UN to support its Members to prevent such crimes or incite them through appropriate and necessary means.[152]

Additionally, this paragraph stresses that the Members of the UN General Assembly and the Secretary-General consider the R2P principle as responsibility and that the UN will act in accordance with it.[153] The leaders of the world seem to recognise the R2P principle as a responsibility of each state, in the first place, to prevent atrocity crimes in armed conflicts. Again, paragraph 138 stresses that if a state shows unwillingness or inability to protect its civilians from atrocity crimes, then this responsibility should be shifted to the UN to take the necessary measures to prevent mass crimes.[154]

Compared to the ICISS Report and to the other previous Resolutions, the World Summit 2005 even takes a further step when it emphasises that it is the UN Members' responsibility to help states in advance to implement the R2P principle to protect civilians from atrocity crimes in times of armed conflicts.[155] Paragraph 138 of the World Summit 2005 highlights that the R2P principle is a responsibility of the state to prevent atrocity crimes and protect its populations; therefore, it is clear that the R2P principle is not an excuse to intervene in the internal affairs of foreign states.[156]

The early warning prevention systems recited in the World Summit 2005 are far more advanced than the steps discussed in Chapter VI of the UN Charter. The World Summit 2005 contemplates short and basic measures of intervention at a much earlier stage than where human rights are violated, and atrocity crimes are committed. Ignoring a crisis will make the situation extremely complicated and impact the neighbouring states.

Moreover, in paragraph 139, the Members of the UN General Assembly confirmed they would help and support states to build capacity to protect their populations. The UN General

[150] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 138; Botte (n 7)1032-1034
[151] UNSC 'Report of the Secretary-General' (2001) U.N. DOC. S/2001/394; Stahn (n 4) 114
[152] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 138
[153] Ibid
[154] Global Centre for the Responsibility to Protect 'Unwilling and Unable: The Failed Response to the Atrocities in Darfur' (Occasional Paper Series, Global Centre for the Responsibility to Protect 2010) 24
[155] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 138; Botte (n 7) 1029-1034
[156] Botte (n 17) 1032-1034

Assembly confirmed that the UN should assist the states under pressure before the breakout of any conflicts and crises. In this paragraph, the UN Secretary-General confirmed the following:

> "We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[157]

The threshold of intervention in the internal affairs of a foreign state appears to be much lower and contains every aspect of society; human rights, economic development and political stability.[158] Since this might be an essential reframing of the aspect of state sovereignty, it is understandable why the sovereign states hesitated in backing these recommendations overtly.

Regarding the two advisors on Genocide and the Responsibility to Protect, Bellamy emphasises that their key role is the building of real capacity for preventing mass atrocities.[159] However, the roles appear to be limited to the preparation of statements and reports of warning. Despite the existence of several Resolutions, there seems to be no actual breakthrough regarding the complicated issue of state sovereignty and the perceived need for consent.

The UN practice contradicts the verbiage of Resolution 2171.[160] In Resolution 2171, the UN Security Council declares devotion to "consider and use the tools of the UN system to ensure that warning signals about potential conflicts trigger early concrete prevention action."[161] Resolution 2171 refers to the R2P principle when it confirms the primary responsibility of each individual state to protect its people from atrocity crimes. Furthermore, this Resolution highlights the R2P principle when it importantly recalled the significant role of the UN Special Advisers on the Prevention of Genocide and the R2P and their responsibilities to act as early warning tools to avert situations that may lead to mass atrocities.[162] Significantly, this Resolution stresses the crucial importance of the UN Secretary-General's efforts in enriching his role in preventing armed conflicts, specifically via early warning consisting with Article 99 of the UN Charter 1945.

Similar to the ICISS Report, the World Summit 2005 not only highlights supporting

[157] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139
[158] Breau (n 60) 196; Cunliffe (n 2) 93-95
[159] Alex Bellamy, *Responsibility to Protect* (1st, Polity Press, Cambridge 2009), 131; Evans (n 1) 79-88; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83
[160] Breau (n 60) 79
[161] UNSC Res. 2171 (21 August 2014) U.N. DOC. S/RES/2171 at para. 20
[162] Ibid, at para. 16

states to protect their people, but it also calls UN Members to support the UN to find an 'early warning capability' before a crisis breaks out.[163] The UN Secretary-General Ban Ki-moon also refers to the key component in the R2P principle, the responsibility to prevent. His first report in 2010, released following his implementation plan, was entitled Early Warning, Assessment and the Responsibility to Protect (EWAR2P)[164] which echoes the World Summit's emphasis on the importance of preventing atrocity crimes.

This report shows that the World Summit 2005 also recommends mechanisms to expand the UN's ability to use better early warning information effectively.[165] The R2P "holds that all states have a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[166] Hence, the World Summit 2005 illustrates that the aim of the R2P principle focuses on the people. In other words, it finds the suitable legal, moral and political environment to protect them from atrocity crimes. Establishing an early warning capability before the stage of conflict is discussed further in the Gambian case in Chapters five and six.

The World Summit 2005 discussed military intervention as just one part of a much wider range of response options, accentuating that military action can only be taken after failing to apply the responsibility to prevent. Additionally, it confirmed that after taking actions, the responsibility to rebuild should be applied. The World Summit 2005 suggested a variety of measures to be taken to responsible governments to prevent atrocity crimes in times of armed conflicts.[167]

Additionally, according to the World Summit 2005, applying the R2P principle should be implemented in a timely and decisive manner through a collective action by the UN Security Council. Among the points stressed in the World Summit 2005 was the capability of regional organisations to play a more active role in preventing atrocity crimes.[168] Therefore, the World Summit 2005 advocated taking

> "[c]ollective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as

[163] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 138; Botte (n 7)1032-1034
[164] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864
[165] Ibid
[166] Bellamy (n 47) 539-540
[167] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139; Botte (n 7)1032-1034
[168] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; Bellamy (n 33) 330-337

appropriate."[169]

If dealing with a crisis via using 'appropriate diplomatic, humanitarian and other peaceful means' does not avert atrocity crimes, the World Summit 2005 advises to resort to a collective action consistent with the UN Charter, including Chapter VII. Moreover, it focuses that any action should be through the Security Council.[170] State practice reflects that both international and regional organisations should work to apply the R2P principle under the UN's supervision.

Significantly, paragraph 139 of the World Summit 2005 set the implementation of the R2P principle under the discretion of the UN Security Council.[171] "[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII."[172] Yet, no compulsory obligation is imposed on the UN to resort to collective action. Although paragraph 139 calls for action through the UN Security Council, it does not overtly exclude unilateral intervention in situations where the UN Security Council fails to act and protect civilians. Thus, in the absence of the UN Security Council's authorisation, the paragraph does not authorise any novel right to intervene to protect civilians.

Furthermore, the World Summit 2005 evoked Chapters VI and VIII of the UN Charter that present "a wide range of tools that could be employed to protect populations by peaceful means."[173] In the EWAR2P of 2010, Ban Ki-moon declared that these measures would be effective if they were taken at an early stage, and this would require activating an early warning system.[174]

The Report of the Panel on UN Peace Operations in August 2000 criticises the shortage of coordination of information within the UN system and the early warning mechanism does not consider the report's contents through the R2P principle.[175] Additionally, it significantly underlines the key roles of the Special Advisors on Genocide and the R2P. The Report assesses the information received in order that there is an early and flexible response suitable to the situation of each case.[176] Concerning the question of on what basis crises should be dealt with,

[169] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139; see also, Susan C. Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (1st, Routledge, New York 2016) 204-206
[170] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139
[171] Ibid
[172] Ibid
[173] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864, at para. 3
[174] Ibid
[175] UNGA 'Identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council' (21 August 2000) 56th Session (2000) U.N. DOC. A/55/305–S/2000/809, at paras 24, 26
[176] Breau (n 60) 195-198

the World Summit 2005 provides that a case-by-case approach should be employed although it does not promise the continuity of dealing with mass atrocities.[177]

The principle of continuity is explained by Franck as follows:

> "if I act in accordance with a rule you will do so, too, will only pull me toward compliance if our interactions have achieved the level of continuity of an ongoing game, or system, and we share an understanding of what the rule covers."[178]

One can note that the most significant stumble about the previous practice of applying the R2P principle by the UN Security Council is that the Council does not permanently apply the R2P principle whenever mass atrocities are committed. Furthermore, the UN Security Council sometimes applies the R2P principle in situations where the thresholds of the atrocity crimes are less dangerous than others as in the examples of the Libyan and Syrian cases.[179]

Recently, there has been a noteworthy breakthrough in conflict prevention. For instance, on 21 August 2014, the UN Security Council approved another Resolution relating to conflict prevention.[180] On this occasion, there was an acknowledgment in the argument that even though the UN Security Council had discussed the question in several meetings, it had failed to avert the escalation or onset of conflicts.[181] Cases such as the Central African Republic, Somalia, Darfur and Mali are perhaps the best examples to demonstrate this.[182] The UN Secretary-General offered five crucial actions as well as the Rights Up Front Initiative to prevent atrocity crimes prior to crises. Precisely, the Rights Up Front Initiative "seeks to ensure that we avoid the systematic failures of the past and recognize that human rights violations are early warning signals of mass atrocities."[183]

During the argument, Navi Pillay, the High Commissioner for Human Rights, directed the discussion about the R2P language. Pillay points out that "when governments are unwilling or unable to protect their people, it is the responsibility of the international community, and

[177] Thomas M. Franck, *The Power of Legitimacy Among Nations* (1st, Oxford University Press, New York 1990) 61-62; Robert Zuber and Ana Carolina Barry Laso 'Trust but Verify: Building Cultures of Support for the Responsibility to Protect Norm' (2011) 3:3 Global Responsibility to Protect 286, 287-292; Evans (n 1) 43-49; Mehrdad Payandeh, 'The concept of international law in the jurisprudence of HLA Hart' (2010) 21:4 European Journal of International Law 967, 968; Ibid, 204-208
[178] Franck (n 177) 61
[179] Bellamy (n 33) 330-333
[180] UNSC Res. 2171 (21 August 2014) U.N. Doc. S/RES/2171
[181] UNGA Res. 60/1 (16 September 2005) U.N. Doc. A/RES/60/1
[182] Breau (n 60) 197
[183] UNSC Verbatim Record (21 August 2014) U.N. Doc. S/PV/7247

singularly [the UN Security Council] to intervene."[184] In Resolution 2171, the UN Security Council concentrates on the R2P principle significance when it considers and uses the tools of the UN system to confirm that warning hints about possible conflicts initiate an early real prevention action.[185] Resolution 2171 refers to the R2P principle twice. Firstly, it reaffirms the crucial responsibility of each individual state to protect its people from atrocity crimes. Secondly, it recalls the significant function of the UN Special Advisers on the Prevention of Genocide and the Responsibility to Protect, as well as their roles to act as an early warning mechanism to prevent states from committing such crimes.[186]

The World Summit 2005 has been criticised for merely mentioning the prevention and the reaction aspects of the R2P principle. Another criticism of the World Summit 2005 has been of its inability to add any more value than the previous ICISS Report 2001. It addresses the post-conflict stage in the peacebuilding section and it highlights the necessity of a coherent, coordinated and integrated approach to post-conflict peacebuilding and settlement with the purpose of reaching sustainable peace.[187] Therefore, the World Summit 2005 identifies the requirement for a consecrated institutional mechanism to meet the different essentials of situations arising from conflict towards revival, reconstruction and reintegration.[188]

Outstandingly, the World Summit 2005 discussed the issue of agreeing on an alternative body to authorise the R2P principle in case the UN Security Council was inactive or deadlocked. The UN Secretary-General suggested that the UN General Assembly may be employed as an alternative international body to protect civilians from mass atrocities. To this regard, the UN General Assembly's role should be in line with the Charter of the UN. The General Assembly is required

> "to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law."[189]

As did the ICISS Report, the World Summit 2005 acknowledged the responsibility of each

[184] Ibid; Nardin (n 4) 161-170
[185] UNSC Res. 2171 (21 August 2014) U.N. Doc. S/RES/2171 at paras 6, 20, 25
[186] Ibid; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83
[187] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 97
[188] Ibid
[189] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139; Stahn (n 4) 119-111

individual state to protect its population from mass atrocities during times of armed conflicts. Moreover, both the World Summit 2005 and the ICISS Report emphasised the UN's dual obligation to resort to the use of force in case a state failed to protect its civilians from atrocity crimes.[190] The UN General Assembly Members' approval of the World Summit 2005 means that they lawfully elevated the R2P principle. The R2P principle, as declared in paragraphs 138 and 139 of the World Summit 2005, can overwhelm the pre-R2P collateral problems linked to humanitarian intervention.

Under the R2P principle, the threshold for implementing R2P and taking actions to protect civilians is the large-scale loss of life or ethnic cleansing.[191] Despite underlining the responsibilities of states and those of the UN, neither paragraph 138 nor paragraph 139 imposes any legal penalties on the UN primary Members, if one or more Members fail to implement the responsibility to prevent.[192] Therefore, one can argue that the World Summit 2005 failed in resolving an old debatable matter; that is, the required response to the states which might refuse to intervene for preventing atrocity crimes until an armed conflict breaks out.

Paragraphs 138 and 139 of the World Summit 2005 limit the scope of the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.[193] Paragraph 138 of the World Summit 2005 states that atrocity crimes are triggers to implement the R2P principle to protect civilians; however, it does not identify the severity of atrocities that can trigger the R2P implementation.[194] Moreover, both paragraphs 138 and 139 do not illustrate how R2P would work in procedural terms through the responsibilities to prevent, react and rebuild. Similarly, the pre-R2P humanitarian intervention debates have also suffered from uncertainties. Thus, the World Summit 2005 failed in finding a conclusive and final solution to these issues.

2.6.3 Evaluation of the 2005 World Summit Outcome

The World Summit 2005 endorses the necessity for the UN General Assembly to engage in the high concern level with regard to the R2P principle, in light of the principles of the UN Charter and of international law.[195] The World Summit 2005 also suggests that the R2P principle has to be applied under Chapters VI and VIII of the UN Charter – and, if necessary, a collective

[190] Evans (n 1) 43-49
[191] Ottawa Roundtable Report 2001, at para. 6.17
[192] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras. 138-139; Chandler (n 17) 75-76
[193] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras 138-139
[194] Ibid, at para. 138
[195] Ibid, at paras 138-139

action should be taken under Chapter VII of the UN Charter.[196] However, the World Summit 2005 highlights that a collective responsibility is related only to peaceful means, for instance, diplomatic and humanitarian measures.[197]

Concerning enforcement action under Chapter VII of the UN Charter, the governments' leaders more vaguely state that they are willing to act in a timely manner, in accordance with a case-by-case valuation.[198] The World Summit 2005 presents an answer to the demanding inquiry of who can consent to intervene in the domestic affairs of a state by highlighting the essential role of the UN Security Council under the UN Charter.[199] If the Security Council fails to stop violations of human rights, the World Summit 2005 endorses that action should be taken by the UN General Assembly as a potential remedy which can afford a trusted legitimacy concerning action.[200]

Above all, there was a substantial argument about the international organisation meant by the international community in the World Summit 2005. An examination of the World Summit 2005 would lead to the interpretation of the R2P principle as comprising the international community as merely extending to the UN Member States. This conservative view will only allow the UN to be a duty-bound actor through states and subject to their decisions. This would assign the UN as well as its agencies only a supportive role without any distinct and separate responsibility.[201]

A different opinion would consider that the World Summit 2005 imposes direct responsibility on the UN and its Members as main players of the international community. Under this explanation, the UN Secretary-General, the UN secretariat and the numerous UN programmes, agencies and funds have a substantive, concurrent and direct responsibility to protect civilians from atrocity crimes.[202] The latter view seems wider in scope than the first one since it could offer more solutions to prevent atrocity crimes. Therefore, it appears that the World Summit 2005 stresses that the UN with a regional organisation's support has the collective responsibility to protect populations from atrocity crimes in times of armed conflicts. However, such action without UN Security Council Resolution can in specific situations be considered legitimate but may be illegal under international law.

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[196] Ibid
[197] Ibid, at para. 139
[198] Ibid; Payandeh (n 177); Franck (n 177); Breau (n 60) 204-206
[199] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139; Hamilton (n 3) 290-292
[200] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139; UNGA Res. 337 (V) (3 November 1950) U.N. DOC. A/RES/377(V) A; UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118
[201] Barbour (n 29) 556-568; Nardin (n 4) 161-170
[202] Barbour (n 29) 534-536; Nardin (n 4) 93-96

Similarly, to the ICISS Report, the World Summit 2005 highlights that the main concern of the R2P principle is the protection of individuals and that state sovereignty is recognised as the responsibility to protect civilians. A state should be willing and able to protect its own people and if it cannot meet this responsibility, the responsibility should be shifted to the UN. Only then may the body be able to take a proper action to protect civilians from atrocity crimes.[203]

This study highlights that R2P is a legal norm that can remove the tension between state sovereignty and non-intervention, on the one hand, and responsibility, on the other hand.[204] Hence, neither state sovereignty nor the concept of non-intervention is considered as restrictions to implement the R2P principle. Rather, they are inherent essentials of states' responsibility to protect their civilians from mass atrocities.[205] State sovereignty should be considered as a realisation of a responsibility that is shared between the state and the UN.[206]

The key challenge of prevention is involved in the World Summit 2005 in which states pledged themselves to back up any states when subject to serious situations before the breakout of any crises and conflicts.[207] The implementation of the R2P principle should place emphasis on giving superior meaning and in particular, to this commitment. Preventive efforts would be enriched by investing in methodologies to examine mechanisms, which are notably difficult to verify, and by finding covenants amongst states on what establishes a state under stress.[208]

2.7 Concluding Remarks

This Chapter studied the emergence of the R2P principle to examine whether it led to any substantive doctrinal changes in international law. The R2P principle represents a remarkable step forward for the UN under international law since it articulates a united approach to protecting populations from atrocity crimes in times of armed conflicts. More precisely, the R2P principle is strictly applied in situations where a state is unable or unwilling to protect its people from atrocity crimes – genocide, ethnic cleansing, crimes against humanity and war crimes – in times of armed conflicts.

The R2P principle provides basic guidance on who takes the decisions to avert atrocity

[203] Evans (n 1) 90-95; Cunliffe (n 2) 93-96; Nardin (n 4) 83-92; Welsh (n 1) 215-219
[204] Nardin (n 4) 83-92; Welsh (n 1) 215-219
[205] Nardin (n 204) 83-92; Welsh (n 1) 215-220
[206] Cunliffe (n 2) 93-96; Nardin (n 4) 83-92; Welsh (n 1) 215-220
[207] ICISS Report 2001; Ottawa Roundtable Report 2001 at para. XIII; Weiss (n 3) 6-12; Barbour (n 29) 550
[208] UNGA 'Fulfilling our collective responsibility: international assistance and the responsibility to protect' (11 July 2014) 68th Session (2014) U.N. DOC. A/68/947–S/2014/449

crimes, where decisions happen and how decisions are to be made in times of armed conflicts. Moreover, it allocates the primary responsibility to protect the civilians of a given state and defines the UN's duty of supporting individual states to use their respective responsibility to prevent atrocity crimes. Thus, the World Summit 2005 has overcome uncertainties in the scope of each of the three responsibilities; the responsibility to prevent, the responsibility to react and the responsibility to rebuild to apply the R2P in times of mass atrocities. The R2P principle specifies what actions states must take in exercising its three pillars but it is ambiguous in terms of how the principle works procedurally across the three pillars.

In terms of the responsibility to react, R2P does not support the idea that military intervention without UN Security Council approval is legal. Thus, the R2P principle did not resolve this controversial issue. However, the World Summit 2005 states that if the Security Council fails to take a decision about a crisis, the issue can be discussed by the UN General Assembly. The World Summit 2005 obtained support from over 150 States; yet, the practice since 2005 indicated real disagreements among the Member States on implementing the principle. These disagreements are more obvious among the five permanent Members of the Security Council, the UK, the USA, France, China and Russia. For instance, China and Russia often seem concerned of the R2P principle and do not accept any kind of intervention by foreign states as they claim that any coercive action violates state sovereignty and non-intervention, and therefore, the territorial integrity and political independence of a state have higher priority.[209]

The R2P principle is a tool to bridge the *lacunae* between state sovereignty and the main responsibility of each state to protect civilians in times of armed conflicts. This, in turn, adds more value to the R2P as a new tool solving a long-history dilemma in international law. It should be noted that the UN Secretary-General also recognised paragraphs 138 and 139 of the World Summit 2005 to be firmly anchored in the well-established principles of international law.[210]

Although the commitment undertaken by the UN General Assembly Members when they passed the World Summit 2005 may not form new human rights, it absolutely added further responsibilities on states behaviour to prevent atrocity crimes. Moreover, these obligations provided a framework to support the UN to respond to situations when the state was unable or unwilling to protect its people. Hence, the R2P principle did not alter the legal obligations of Member states, but it reinforced that states should refrain from intervening in

[209] Welsh (n 1) 215-220
[210] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; Welsh (n 1) 215-220

the internal efforts of a foreign state except in conformity with the UN Charter.[211]

The World Summit 2005 posed an early warning system that is illustrated in this dissertation to be a mechanism to be applied by the UN and regional organisations when a state fails to protect its civilians from atrocity crimes. However, the R2P principle did not impose any serious legal restrictions against using veto by a permanent Member of the UN. However, a legal consensus was reached on questions regarding protecting civilians in times of armed conflicts.

After analysing the R2P principle's key documents, it may be concluded that R2P has not completely changed international law. Yet, theoretically, it filled the *lacunae* between state sovereignty and human rights violations and showed a satisfactory basis to claim the emergence of a key principle of human security. Therefore, in Chapters four and five, it is essential to impartially assess state practice and UN reactions in order to explore what such practices and actions tell us about the R2P principle in contemporary international law. However, before such an assessment, it is important also to explore the four triggers of implementing the R2P principle which the World Summit 2005 stated: genocide, war crimes, ethnic cleansing and crimes against humanity.

[211] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677

Chapter Three: The Legal Triggers in International Law to Implement the R2P Principle

3.1 Introduction

This Chapter examines the legal triggers for implementing the R2P principle as described in the ICISS Report 2001 and the World Summit 2005. The documents which relate to the R2P principle have limited the incentives for implementing the R2P principle to any of these four atrocity crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.

The World Summit 2005 added that the incidence of crimes should be combined with the fact that the state is unable or unwilling to protect its civilians. This chapter examines these four atrocity crimes to determine whether the crimes committed during the Syrian crisis should be considered as having satisfied the triggers required to apply the R2P principle.

After the Nuremberg Charter was issued by the European Advisory Commission in August 1945, there was no international court with jurisdiction over crimes such as crimes against humanity, for almost five decades. However, efforts continued developing the definition of crimes against humanity at the UN. In 1947, the International Law Commission (ILC) was tasked by the UN General Assembly with drafting and strengthening the principles of international law recognized in the Nuremberg Charter in 1945 and to the drafting of a "code of offenses against the peace and security of mankind."[1]

About fifty years later, in 1998, the Rome Statute of the International Criminal Court (ICC) defined several kinds of crimes committed in various situations as inhuman acts. Examples of these crimes are murder, torture, arbitrary deportation or forcible transfer of population committed on a large scale or a systematic manner and directed or instigated by governments or by non-state actors.[2]

The definition of crimes under the Rome Statute (1998) slightly differs from that used in the Nuremberg Charter. The Rome Statute illustrates that criminal acts are required to have

[1] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement)*, signed in London 8 August 1945; Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need To Establish a Permanent International Criminal Court' (1997) 10 Harvard Human Rights Journal 11, 21-26; Brian Barbour and Brian Gorlick, 'Embracing The Responsibility to Protect: A Repertoire of Measures Including Asylum for Potential Victims' (2008) 20:4 International Journal of Refugee Law 533, 543-545; see generally, Attorney General, *The Trial of German Major War Criminals before the International Military Tribunal Sitting at Nuremberg, Germany* (1st, His Majesty's Stationery Office, London 1946); David Hirsh, *Law Against Genocide: Cosmopolitan Trials* (1st, Routledge-Cavendish, 2012)

[2] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; Bassiouni (n 1) 49-53; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727

been committed before or during the war.[3] States agreed on whether atrocity crimes should be limited to acts occurring during armed conflicts and on the threshold of seriousness of the offenses in question. In the Rome Statute, it was confirmed that crimes against civilians should not be limited to times of armed conflicts and that these crimes should be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[4]

As for the 2001 ICISS Report and the World Summit 2005, they defined the legal threshold for applying the R2P principle as the stage when civilians suffer from atrocity crimes in times of armed conflicts and their government is unable or unwilling to protect them. This means that applying the R2P principle is dependent on the occurrence of one or more of these four crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. The other requirement that should be met is the state's inability or unwillingness to protect its people. To define each of the atrocity crimes, an analytical examination may be applied to the ICC.[5]

3.2 Atrocity Crimes under International Law

The R2P principle should be accepted as applying only to a strict set of atrocity crimes in times of armed conflicts. Otherwise, the principle will become excessively broad and weak, and the extensive variety of activities would be inaccurately considered as R2P activities.[6] When the R2P principle was in its early phases, the incumbent UN Secretary-General Ban Ki-moon pointed out that the concept is not distorted or misapplied after its clarification during the World Summit 2005. Precisely, the World Summit 2005 highlights that the scope of the R2P principle is narrow and it focuses only on the violations and crimes that the Members of the General Assembly views as serious enough to be stopped.[7]

The R2P principle does not cover suggestions to include natural disasters, such as response(s) to natural disasters or climate change, as they would undermine the World Summit 2005 and widen the principle further than its operational utility.[8] The UN and regional

[3] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; Barbour (n 1) 543-545; Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280

[4] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

[5] ICISS Report 2001 at para. 8.1; Ottawa Roundtable Report 2001 at para6.17; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at paras 93, 139; See Also, International Criminal Court Act 2001, Chapter 17

[6] Susan C. Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (1st, Routledge, New York 2016) 27-31

[7] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 138

[8] ICISS Report 2001 at para. 4.26; Ottawa Roundtable Report 2001 at para6.17; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; Barbour (n 1) 541-548

organisations should not wait until atrocity crimes are committed since stopping crimes at that stage will be a serious challenge, if not impossible. Waiting for a crisis to break out could be the main reason for failing to implement the R2P principle as previous cases have demonstrated.[9]

Rehabilitative and preventive actions would not prove to be useful if the UN and the regional organisations have no commitment to carry out matched effective responses early enough to successfully protect civilians from atrocity crimes. Limiting the cases where the R2P can be applied in that manner might lead to the ineffectiveness of the R2P principle. Additionally, it will not deliver operative support to the Member States of the UN and would not assess any accountability for failure to protect civilians.[10] Therefore, the R2P principle "represents progress towards the replacement of sovereign impunity with a culture of national and international responsibility and accountability."[11]

The R2P principle is conditional to the four egregious atrocity crimes as there are universal agreement and recognition of the need for preventing and addressing them.[12] The R2P principle of non-intervention is thereby limited to the range that there is no threat to or breach of peace. More parasitical actions are limited to situations where the sovereign state has evidently failed, for years, to take serious measures that would take part to avert such crimes. The aforementioned crimes are well-established and recognised internationally as peremptory norms of international law - *jus cogens* - from which no deprecation can be allowed.[13]

Preventing these atrocity crimes is an obligation in international law and is binding on all states regardless of whether or not they have signed or ratified a specific treaty which mentions them. Apart from ethnic cleansing, which remains undefined under international law, all atrocity crimes mentioned in the instruments of the R2P principle are codified in various conventions and statutes.[14] The development of a legal framework for such crimes can be

[9] Alex J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25:3 Ethics & International Affairs 263, 264-268

[10] ICISS Report 2001 at paras 3.9-3.14; Ottawa Roundtable Report 2001 at para. 2.18; Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (1st, International Development and Research Centre, Ottawa 2001) 27-29; Barbour (n 1) 541

[11] Barbour (n 1) 541

[12] Breau (n 6) 183-199; Barbour (n 1) 541-548

[13] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 336, Art. 53; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727; Jan Wouters and Sten Verhoeven, 'The Prohibition of Genocide as a Norm of [J]us Cogens and its Implications for the Enforcement of the Law of Genocide' (2005) 5:3 International Criminal Law 401, 401-406

[14] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; Geneva Convention relative to the protection of civilian persons in time of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

achieved by ratifying and applying international instruments like the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) 1948[15] and the Rome Statute of the ICC, which are important stages towards applying the R2P principle.[16] For example, Article 5 of the Rome Statute (1998) sets out the types of crimes under the jurisdiction of the ICC, in which the Court's jurisdiction is restricted to the most dangerous crimes of concern to the international community. The jurisdiction of the ICC covers the following crimes: aggression, genocide, war crimes and crimes against humanity.[17]

3.3 Rome Statute of the International Criminal Court

The Rome Statute of the ICC is the treaty that established the ICC and was adopted at a Diplomatic Conference held in Rome on 17 July 1998 and came into force after four years, July 2002 and set out the functions, structure and jurisdiction of the ICC. The Preparatory Committee presented to the Rome Conference a draft list that included "(a) the crime of genocide; (b) the crime of aggression; (c) war crimes; (d) crimes against humanity."[18] However, some states such as Syria and Sudan signed the Rome Statute in 2000 without actually ratifying it.[19] This may mean that some states still believe that the Court has not observed the optional protocols of human rights monitoring mechanisms.[20]

Another point stressed by the Rome Statute (1998) is that crimes shall "not be subject to any statute of limitations."[21] The Court shall have jurisdiction over offenses only if they are committed in the territory of a state Party or by a national of a state Party. Immunity to this is where the UN Security Council has passed a Resolution which confers jurisdiction to the ICC in relation to a case.[22] Hence, the ICC jurisdiction may be said to be complementary to the jurisdiction of domestic courts.

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[15] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277
[16] Barbour (n 1) 558-560
[17] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 5
[18] Ibid; See Also, *Case concerning Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Judgment of 27 June 1986, ICJ Reports 1986*, at para. 9; Barbour (n 1) 541-548
[19] Leila Nadya Sadat, 'Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will' (2015) 5 Impunity Watch Law Journal 1, 13-16
[20] Ibid; Breau (n 6) 92-107;
[21] Mahnoush H. Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 American Journal of International Law 22, 36
[22] Alex J. Bellamy, 'The Responsibility To Protect: Added Value Or Hot Air?' (2013) 48 Cooperation and Conflict 333, 350

3.3.1 The Trigger of Genocide

Linguistically, the term is a combination of the Greek word *génos*, which means race and the Latin suffix, *cide*, which means act of killing.[23] On 11 December 1946, the UN General Assembly consensually passed resolution 96(1) which considered the crime of genocide as the rejection of the right to exist for human groups, and authorized a UN committee to draft a treaty to ban the crime.[24]

Two years later, on 9 December 1948, the CPPCG was unanimously adopted by the UN General Assembly in which states accepted that genocide, whether occurring during peace or war, is an atrocity crime under international law.[25] Genocide under the Rome Statute (1998) appears to be:

> "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[26]

The Article of the Rome Statute (1998), however, fails to identify a specific doer of the crime in question; whether it is a group, external power, or the state itself.[27] In an advisory opinion

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[23] Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (1st, Routledge, New York 2007) 19-23

[24] *ÉDOUARD KAREMERA MATTHIEU NGIRUMPATSE v. THE PROSECUTOR,* Case No. ICTR-98-44-A, APPEALS CHAMBER (29 September 2014) 206-210; *THE PROSECUTOR v. VIDOJE BLAGOJEVI AND DRAGAN JOKI,* Case No. IT-02-60-A, International Tribunal for the Prosecution of Persons, (9 May 2007); *THE PROSECUTOR v. BLAGOJE SIMI,* Case No. IT-95-9-A, APPEALS CHAMBER (28 November 2006); UNGA Res. 260 (III) A (9 December 1948) U.N. DOC. 260 (III) A; William A. Schabas, 'Genocide, Crimes against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide' (2006) 27 *Cardozo L. Rev.* 1703, 1716-1722; *Théoneste BAGOSORA Anatole NSENGIYUMVA v. THE PROSECUTOR,* Case No. ICTR-98-41-A, APPEALS CHAMBER (14 December 2011) at para. 132; *THE PROSECUTOR v. MILOMIR STAKI,* Case No. IT-97-24-A, Trial CHAMBER (22 March 2006); *THE PROSECUTOR v. DU[KO TADI],* Case No. IT-94-1-A and IT-94-1-Abis, THE APPEALS CHAMBER (26 January 2000)

[25] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727, at page 35-38; Barbour (n 1) 541-543; Convention on the Prevention and Punishment of the Crime of Genocide (singed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later' (1994) 8 TEMP. INT'L & COMP. L.J. 1, 11-13

[26] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 6; Barbour (n 1) 540-548; see also, Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993, by Security Council Resolution 827) Art. 4;

[27] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 6

on the Genocide Convention in 1948, the ICJ held that the Convention should be interpreted in accordance with its origins and purpose.[28] The ICJ considered that the fundamental principles of the Convention are principles considered by states as binding, even with the absence of the traditional obligation. Moreover, the ICJ recognizes the universal acceptance of both, the condemnation of genocide and the assistance essential to free humanity from the abhorrent scourge. Therefore, pre-existing legal obligations are emphasized by the Genocide Convention and these obligations seem to have rendered the prohibition of genocide as a norm having attained the status of *jus cogens*.[29] Thus, it seems that states are committed to take all measures under their authority to restrain and avert the crime of genocide.

The ICJ has decided that each state holds responsibility as it clearly fails to consider all measures within its jurisdiction that may avert the crime of genocide.[30] The Convention's enforcement mechanisms are more ambiguous in regard to penalising and punishing perpetrators rather than focusing on specific preventive methods. Yet, as the title of the Convention suggests, its purpose is prevention. In this respect, Chapter VIII of the UN Charter states that any state Party of the Convention should call upon the UN competent bodies to adopt such action in line with the UN Charter. This is because Chapter VIII seems proper for suppressing and preventing acts of genocide including; incitement, plotting, involvement, and attempts to commit genocide.[31]

Similarly, the World Summit 2005 underscored each state's responsibility for protecting its civilians from genocide. This responsibility entails the prevention of committing or inciting this crime through necessary and appropriate means.[32] The World Summit 2005 also

[28] Thomas Weiss, 'Military humanitarianism: Syria hasn't killed it' (2014) 37:1 The Washington Quarterly 7, 16-18

[29] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727; Daniel Moeckli and Others, *International Human Rights Law* (2nd, Oxford University Press, New York 2014) 84; Barbour (n 1) 541-543; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83

[30] Marko Milanović, 'State responsibility for genocide' (2006) 17:3 European Journal of International Law 553, 554-559

[31] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at paras 93, 139
ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83; Jan Wouters and Sten Verhoeven, 'The Prohibition of Genocide as a Norm of [J]us Cogens and its Implications for the Enforcement of the Law of Genocide' (2005) 5:3 International Criminal Law 401, 401-406; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Chamber I, (2 September 1998); *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, (3 July 2002); *The Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T, Trial Chamber II, (20 April 2006); *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, (7 July 2006); *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-2005-85-I, Trial Chamber, (20 November 2007); *The Prosecutor v. Michel Bagagaza*, Case No. ICTR-05-86-S, Trial Chamber III, (17 November 2009); *The Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-A, The Appeals Chamber, (18 March 2010); *The Prosecutor v. Théoneste Bagosora Anatole Nsengiyumva, Case* No. ICTR-98-41-A, Appeals Chamber (14 December 2011); *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-558-A, The Appeals Chamber, (8 May 2012); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-A, Appeals Chamber, (9 October 2012); *The Prosecutor v. Justin Mugenzi and Prosper Mugiraneza*, Case No. ICTR-99-50-A, The Appeals Chamber, (4 February 2013)

[32] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras 138-139; Auriane Botte, 'Redefining the responsibility to protect concept as a response to international crimes' (2015) 19:8 The International Journal of Human Rights 1029,1029-1032

confirmed that - as appropriate - the international community should assist and encourage states to exercise this responsibility and back the UN to establish an early warning capacity. In paragraph 140 of the World Summit 2005, the world leaders confirmed their full support for the mission of the Special Adviser of the UN Secretary-General on the Prevention of Genocide.[33]

3.3.2 The Trigger of War Crimes

History shows that laws relating to war crimes existed a long time ago, even before the emergence of the Geneva Conventions 1949, in the Hague Conventions 1907 which codified existing customs of war. Similarly, the Nuremberg Tribunal in 1939 pointed out that the rules laid down in the Hague Convention were accepted by nations and considered as customs of war and declaratory of the laws.[34] War crimes are defined as acts that are carried out in the course of war and that breach the international rules of war.[35] Any violations of the law of war can be a war crime.[36] According to the Nuremberg Charter, war crimes are defined as

> "namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."[37]

Protecting civilians from war crimes during the time of armed conflicts is highlighted in the four Geneva Conventions 1949 that codified International Humanitarian Law. Protecting civilians during armed conflicts and the treatment of prisoners of war are the two main ideas

[33] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras 138, 140
[34] Barbour (n 1) 543-545; General (n 1) 248-249; Hirsh (n 1)
[35] Barbour (n 1) 543-545; Botte (n 32)1029-1032
[36] *THE PROSECUTOR v. LJUBE BOSKOSKI JORAN TARCULOVSKI*, Case No. IT-04-82-A, THE APPEALS CHAMBER (19 May 2010) p 20; *THE PROSECUTOR v. MIĆO STANIŠIĆ STOJAN ŽUPLJANIN,* Case No. IT-08-91-A, APPEALS CHAMBER (30 June 2016); *THE PROSECUTOR v. MITAR VASILJEVI*, Case No. IT-98-32-A, THE APPEALS CHAMBER (25 February 2004); The PROSECUTOR v. LJUBE BOSKOSKI JORAN TARCULOVSKI, Case No. IT-04-82-A, THE APPEALS CHAMBER, 19 May 2010; Jordan J. Paust, 'The Preparatory Committee's "Definition Of Crimes"—War Crimes' (1997) 8 Criminal Law Forum 431, 431-444; Barbour (n 1) 543-545
[37] Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280, Art. 6(b)

reflected in the Geneva Conventions 1949.[38] Similarly, in 1977, the Additional Protocols II of the Geneva Conventions focused on the protection of victims of both international and non-international armed conflicts.[39] These instruments recommended by the Additional Protocols of the Geneva Conventions cover a list of serious breaches that are usually committed in both international and domestic armed conflicts. War crimes are also thoroughly defined under Article 8 of the Rome Statute (1998), specifically when this kind of crime is committed as part of a policy or plan or as part of a large-scale commission.[40]

3.3.2.1 The Scope of War Crimes in the Rome Statute

Article 8 of the Rome Statute (1998) provides the most up to date definition of war crimes as crimes involving "[g]rave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Convention; wilful killing; torture or inhuman treatment."[41] Under the ICC's jurisdiction, war crimes are limited to those committed as part of a large-scale commission or as part of a systematic policy or plan.[42] The Report of the 5th Preparatory Committee in December 1997 shows that war crimes can be part of a policy or a plan or part of a large-scale commission of such crimes.[43] However, these categories did not involve all treaty-based and customary violations of the law of war.[44] War crimes are defined in Article 8(b) of the Rome Statute (1998) as "acts against persons or property protected under the provisions."[45]

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[38] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention relative to the protection of civilian persons in time of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

[39] Protocol Additional (No. II) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609; Barbour (n 1) 543; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

[40] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8; Barbour (n 1) 543-545; *THE PROSECUTOR v Radislav KRSTIC*, Case No IT-98-33-A, THE APPEALS CHAMBER (1 July 2003) at para. 45; Examples The Prosecutor v Germain Katanga, Case No. ICC-01/04-01/07, Trial Chamber II (7 March 2014) at para. 710

[41] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Arts 8(2)(a); Barbour (n 1) 543-544; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 69-71

[42] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Arts 7, 8(1); Sadat (n 20) 3-5; Botte (n 32)1029-1032

[43] Paust (n 36) 436-438; Preparatory Committee on the Establishment of an International Criminal Court, 'Working Group On Definitions And Elements Of Crimes - War Crimes -Art. 20 C' (Report of the 5th Preparatory Committee, 1-12 December 1997) A/AC.249/1997/WG.1/CRP.9, 1, 11

[44] Paust (n 36) 432

[45] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Arts 8(b)

During the time of war, violations by anyone whether military or civilian against protected individuals, whether they are civilians or prisoners of war, are considered as war crimes.[46] While the war crimes tribunals continue, it is common for states to find slight administrative punishment that *de facto* and *de jure* allow perpetrators to act with immunity.[47] In some incidents, states may even wink or encourage violations covertly, if not overtly.[48]

3.3.2.2 International Tribunals of War Crimes

During the last two decades, numerous regions around the world went through armed conflicts and civilians suffered from war crimes, so several international criminal tribunals were established with jurisdiction over serious breaches of the Geneva Conventions. The tribunals included limited time tribunals instituted by resolutions of the Security Council. Examples of such tribunals include the International Criminal Tribunal for the former Yugoslavia (ICTY) 1993 and the International Criminal Tribunal for Rwanda (ICTR) 1994.[49]

Hybrid tribunals were also established by bilateral treaties between host states and the UN such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 1997 for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, the Special Court of Sierra Leone in 2002 and the Special Tribunal for Lebanon in 2009.[50] Similarly, there were special panels set-up by interim UN peacekeeping missions and civil administrations; for instance, those established as part of the UN Transitional Administration in East Timor (UNTAET) and, the UN Interim Administration Mission in Kosovo (UNMIK). All these led to the eventual foundation of a permanent court, the ICC, which was established by the treaty the Rome Statute of the International Criminal Court in 1998.[51]

The inclusive role and significant precedent founding of these international criminal tribunals and courts are an overt point of growth in the development of international law. Like national criminal courts and tribunals, the value of deterrence or prevention achievable by such international criminal institutions is questionable. Nevertheless, it is plain that the international tribunals present a significant and essential function. Despite some accusations of

[46] Convention on the Prevention and Punishment of the Crime of Genocide (singed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277
[47] Barbour (n 1) 544
[48] Human Rights Watch, 'Entrenching Impunity: Government Responsibility for International Crimes in Darfur' (Report Vol. 17 No. 17(a), November 2005) at pages 6-10
[49] Barbour (n 1) 546-548
[50] Ibid, 544-545
[51] Ibid

incompetence and criticism of the limited number of convictions so far, the international courts will continue to play an essential role in strengthening international criminal law, international humanitarian law and human rights law which may practically limit war crimes in the future.[52]

Some states declared that only those war crimes which are accepted as such by customary international law should be considered.[53] Such crimes are the ones listed in the 1907 Hague Convention and the 1949 Geneva Conventions.[54] Despite the original intent of including only war crimes in customary international law, some of the crimes mentioned in Article 8 of the Rome Statute (1998) are related to war crimes but not considered as crimes under customary international law.[55] To this regard, lawyers encourage expanding the range of the Rome Statute to encompass the crimes mentioned in the Protocols Additional to the Geneva Conventions. It can be more advantageous to include all grave breaches that are related to customary international law and verified in any international legal agreement.[56]

The customary standard of Article 4(1) of Protocol II Additional to the Geneva Conventions does not cover every person in a society, but it protects only individuals who do not involve directly in a conflict. It also involves persons who have ceased to take part in hostilities.[57] Article 4 (1) states that all those "who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices."[58] According to the same Article, not only during armed conflicts but also in all circumstances people should be protected and "treated humanely, without any adverse distinction" and "it is prohibited to order that there shall be no survivors."[59]

Likewise, Article 13 of Protocol II Additional to the Geneva Conventions states that "[t]he civilian population as such, as well as individual civilians, shall not be the object of

[52] Sadat (n 20) 2-5; Breau (n 6) 95-109
[53] Bassiouni (n 1) 25-26
[54] Barbour (n 1) 543
[55] Paust (n 36) 436-438; Preparatory Committee on the Establishment of an International Criminal Court, 'Working Group On Definitions And Elements Of Crimes - War Crimes - Article 20 C' (Report of the 5th Preparatory Committee, 1-12 December 1997) A/AC.249/1997/WG.1/CRP.9
[56] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3
[57] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 4(1); Breau (n 6) 136-138
[58] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 4(1)
[59] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 4(1); Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(2)(b)(xii)

attack."[60] Articles 4 and 13 of Protocol II should be considered steadily so that the expression 'individual civilians' is not interpreted very widely to cover individuals not included under Article 4 to be protected. As for Article 51 of Protocol I Additional to the Geneva Conventions, with specific reference to paragraph 3, it entails that civilians will no longer be entitled to being protected if they are involved in perpetrating hostilities.[61] However, according to Article 50 of Protocol I, in cases of uncertainty whether a person is a civilian or not, they shall be considered as civilians.[62]

The issue of non-intervention in the internal affairs of foreign states is codified in paragraph 3 of Article 8 of the Rome Statute (1998) based on Article 3 of Protocol II Additional to the Geneva Conventions. The paragraph was introduced to lessen the concerns of some Member States. It confirms that the way the subparagraphs dealt with internal armed conflicts has nothing that "shall affect the responsibility of a Government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means."[63]

Crimes meeting the criteria listed in the Rome Statute (1998) and occurring in an internal armed conflict should be covered although this is a subject of debate.[64] Due to these dissenting positions, Article 8 of the Rome Statute was drafted in four sections. The first section focuses on grave breaches under the 1949 Geneva Conventions and the second focuses on war crimes under Protocol I Additional to the Geneva Conventions.[65] While the third section focuses on violations listed in Common Article 3 to the four Geneva Conventions and the last section focuses on breaches under Protocol I.[66] Categorising crimes might facilitate and simplify defining war crimes after the Rome Statute (1998) has come into force.

The final draft of the Rome Statute was drawn from other treaties and did not continuously maintain the four different types of crimes. Indeed, several provisions in the last

[60] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 13

[61] Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment' (2002) 43 Harvard International Law Journal 1, 6-9; *The Prosecutor v. Kupreskic*, Case No. IT-95-16, 522 (Jan. 14, 2000); *The Prosecutor v. Martic*, Case No. IT-95-11, Initial Indictment (July 25, 1995); *The Prosecutor v. Tadic*, Case No. IT-94-1, Opinion and Judgment, 71-85 (May 7, 1997)

[62] Mahnoush H. Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 American Journal of International Law 22, 28-32

[63] Ibib 35-36

[64] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; Barbour (n 1) 541-548

[65] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Art. 8; see also,'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) U.N. DOC. A/CONF.183/10, at page 7

[66] Arsanjani (n 62) 32-34

category of war crimes were drawn from the Hague Convention 1907, the Geneva Conventions 1949 and Protocol I of the Geneva Conventions 1949.[67] Although some of these norms were initially planned to be applied during international armed conflicts, the drafters of the Rome Statute (1998) believed they should be also applied during internal armed conflicts.[68]

3.3.3 The Trigger of Ethnic Cleansing

'Ethnic cleansing' as a term was widely used during the 1990s and it refers to the treatment suffered by ethnic groups during armed conflicts. The term is defined as mass killing or expulsion of members of one religious or ethnic group in a territory by another group.[69] Similarly, Ethnic cleansing is defined as "the forcible removal of an ethnically defined population from a given territory" and as "occupying the central part of a continuum between genocide on one end and nonviolent pressured ethnic emigration on the other end."[70]

Ethnic cleansing is usually a systematic force used to remove a religious ethnic group from a given territory by a more powerful ethnic group. The aim of committing these kinds of crimes can be to make that territory ethnically homogeneous.[71] During the last three decades, ethnic cleansing is committed several times and the most brutal crimes could be those erupted in the former Yugoslavia, Rwanda, Sudan and Palestinian.

3.3.4.1 The Atrocity Crime of Ethnic Cleansing

The phrase 'ethnic cleansing' is not clearly defined in international law.[72] However, the term is debatably covered under the definition of crimes against humanity in Article 7 of the Rome Statute (1998).[73] There is always an overlap between the crimes of ethnic cleansing and each of the other three other R2P crimes - genocide, war crimes and crimes against humanity.[74] The types of grave human rights abuses and mass atrocities that result from actual incidents of

[67] Ibid
[68] Ibid,34-35
[69] Barbour (n 1) 545-546; UNCS Res 780 (6 October 1992) U.N. DOC. S/RES/780; Botte (n 32)1029-1032
[70] Timothy Snyder, 'The causes of Ukrainian-Polish ethnic cleansing 1943' (2003) 179 Past & Present 197, 198
[71] Ibid, 200
[72] UNGA 'A vital and enduring commitment: implementing the responsibility to protect' (13 July 2015) 69th Session (2015) A/69/981–S/2015/500, at para. 3
[73] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7; Barbour (n 1) 545-549
[74] *The Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Trial Judgement, at para84 (2 August 2001); *The Prosecutor v. Kupreskic and Others*, IT-95-16-T, the Trial Chamber, (14 January 2000)

ethnic cleansing are crimes that frequently fit into the classifications of genocide and crimes against humanity. These violations and mass atrocities sometimes also fall under particular war crimes as they are defined in Article 8 of the Rome Statute (1998).[75] However, the massive human-rights violations fundamental to strict classifications of ethnic cleansing are treated as separate crimes falling under crimes against humanity and in some situations under genocide.[76]

Additionally, the term 'ethnic cleansing' appeared within the terms of international humanitarian law during the conflict in the former Yugoslavia between 1990 and 1995. On 25 August 1992, a Resolution of the UN General Assembly condemned the practice of ethnic cleansing. It confirmed that the crime also constituted grave and serious violations of international humanitarian law. The UN General Assembly Resolution also mentioned that what was happening in the former Yugoslavia was an intensive effort by the Serbs of Bosnia and Herzegovina, with the support from the Yugoslav People's Army, to find 'ethnically pure regions.'[77] Likewise, on 16 December 1992, the UN General Assembly confirmed again that those who ordered or committed the acts of ethnic cleansing were exclusively responsible and should be judged for their actions.[78]

The crime of ethnic cleansing was also examined in the documents of the R2P principle, the ICISS Report in 2001 and World Summit 2005. These documents are firmly based on well-sold principles of international law. Under conventional and customary international law, each state has obligations to avert and punish crimes of ethnic cleansing. Similarly, in his 2009 Report, the UN Secretary-General Ban Ki-Moon confirmed that acts of ethnic cleansing may constitute genocide, war crimes or crimes against humanity.[79] "Ethnic cleansing is the removal by members of a self-identifying ethnic group of those they consider an ethnic out-group from a community they define as their own."[80]

[75] Sadat (n 20) 14-16; Breau (n 6) 92-107; Botte (n 32)1029-1032; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 84-89
[76] Barbour (n 1) 541-543
[77] UN General Assembly, The situation in Bosnia and Herzegovina (25 August 1992) U.N. DOC. A/RES/46/242
[78] UNGA Res. 47/80 (16 December 1992) U.N. DOC. A/RES/47/80; Barbour (n 1) 544-546; Sadat (n 20) 2-5; Examples *The Prosecutor v Germain Katanga*, Case No. ICC-01/04-01/07, Trial Chamber II (7 March 2014) at para. 710; *THE PROSECUTOR v. MILAN BABIĆ*, Case No. IT-03-72-A, THE APPEALS CHAMBER, (18 July 2005); *THE PROSECUTOR v. BLAGOJE SIMI*, APPEALS CHAMBER, Case No. IT-95-9-A (28 November 2006); *THE PROSECUTOR v. MILOMIR STAKI*, Case No. IT-97-24-A, Trial CHAMBER (22 March 2006); *THE PROSECUTOR v. DU[KO TADI]*, Case No. IT-94-1-A and IT-94-1-Abis, THE APPEALS CHAMBER (26 January 2000); *THE PROSECUTOR v. MITAR VASILJEVI*, Case No. IT-98-32-A, THE APPEALS CHAMBER (25 February 2004); The PROSECUTOR v. LJUBE BOSKOSKI JORAN TARCULOVSKI, Case No. IT-04-82-A, THE APPEALS CHAMBER, (19 May 2010)
[79] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677
[80] Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (1st, Cambridge University Press, New York 2005) 15

3.3.4.2 The Atrocity Crime of Ethnic Cleansing and the R2P Principle

The protection responsibility of every state is not only a responsibility to protect its population from ethnic cleansing but also to prevent instigating against this type of crimes.[81] The protection and promotion of the rights of civilians belonging to ethnic, national and religious minorities aim at a social and political stability, peace and the enrichment of the cultural diversity and heritage of society.[82] During the World Summit 2005, the Members of the UN General Assembly affirmed their commitment, as necessary and appropriate, to help states to find the capacity to protect their civilians from ethnic cleansing and to assist those states under stress before conflicts break out.[83]

In 1992, as violence started in the Balkans, the Organisation for Security and Cooperation in Europe established the post of High Commissioner on National Minorities (HCNM) to seek and identify an early resolution to prevent ethnic stresses before they became worse. The HCNM acted impartially, independently and confidentially to find "an instrument of conflict prevention at the earliest possible stage."[84] The ongoing call of states for the High Commissioner's services in the most turbulent parts of the region indicated the usefulness of methodology and the value that regional and sub-regional bodies may consider in other regions of the world.

In West Africa, the Economic Community of West African States (ECOWAS) at an early warning and response system reflected a partnership between the intergovernmental authority and a network of civil society organisations with a focus on human security.[85] These factors showed both the possible value of learning from one region to another, which could be facilitated by the UN or outdoor supporters and the significance of adapting to local cultures and circumstances.

So far, the world has witnessed several ethnic cleansing crimes (e.g., in Myanmar, Sudan and Palestine) and, sadly, the massive number of the victims of these crimes have been civilians. In the context of this dissertation, the Syrian case, it seems that the ethnic cleansing crime was committed by Daesh against some Kurdish civilians. Similarly, the Kurdish People's Protection Units (YPG) and Kurdish Workers' Party (PKK) could commit ethnic cleansing

[81] Ibid,452-459; Breau (n 6) 183-196
[82] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 130
[83] Ibid,139
[84] Jane Wright, 'The OSCE and the Protection of Minority Rights' (1996) 18 Human Rights Quarterly 190, 200-202; Breau (n 6) 185-198
[85] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677, at para. 36

crimes against some Arab minority groups in some villages in the northern and north-eastern parts of Syria.[86]

Other crimes committed by Alawites in Homs, West of Hama in the central part of Syria, could meet the criteria of ethnic cleansing crimes; however, the UN did not refer to them in its reports.[87] Several of these crimes have lasted for years and the UN and its bodies have often failed to stop them and find an adequate standard to protect the Syrian civilians from this type of crimes. Moreover, failing to stop the conflict that exhausted Syria during the past years affected the security situation in Syria's neighbouring countries.

The crimes committed during the Syrian conflict have rarely been considered as ethnic cleansing crimes. Yet, several of these crimes have the characteristics that make them meet the criteria of ethnic cleansing as they are widespread and systematically perpetrated.

3.3.4 The Trigger of Crimes against Humanity

Crimes against humanity is a trigger for implementing the R2P principle and is defined in several primary sources of international law as a premeditated act, typically, it is part of a systematic campaign causing widespread human suffering or death.[88] Crimes against humanity acts are committed at different times and not only through armed conflicts and as part of a systematic and widespread attack directed against any civilian populations with awareness of the attack.[89]

Such crimes can be an individual attack directed against any civilian or an identifiable part of a civilian population and may include offenses; for instance, murder, torture, rape and enforced disappearance of persons.[90] Before considering the provisions of crimes as crimes

[86] Vittoria Federici, 'The Rise of Rojava: Kurdish Autonomy in the Syrian Conflict' (2015) 35:2, SAIS Review of International Affairs 81, 87-90; Ozden Zeynep Oktav and Others, *Violent Non-state Actors and the Syrian Civil War*, (1st, Springer, Cham, 2018) 154-164; Ross Dayton, 'Identity and Conflict: PKK vs. Turkey (1984-Present)' (2013) Jack D. Gordon Institute for Public Policy, 1, 1-6; Pinar Ipek, 'Oil and intra-state conflict in Iraq and Syria: sub-state actors and challenges for Turkey's energy security' (2017) 53:3, Middle Eastern Studies, 406, 410-414; Patrick Martin and Christopher Kozak 'The pitfalls of relying on Kurdish forces to counter ISIS' (2016) 3 Institute for the Study of War 1-5; Botte (n 32)1029-1035

[87] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043

[88] Christopher Roberts, 'On the Definition of Crimes Against Humanity and Other Widespread or Systematic Human Rights Violations' (2017) 20:1 Univ. of Pennsylvania Journal of Law and Social Change 1, 9-11; Sharon Sliwinski, 'The childhood of human rights: The Kodak on the Congo' (2006) 5:3 Journal of Visual Culture, 333, 333-335

[89] *Théoneste BAGOSORA Anatole NSENGIYUMVA v. THE PROSECUTOR*, Case No. ICTR-98-41-A, APPEALS CHAMBER (14 December 2011) 133; *The Prosecutor v Germain Katanga*, Case No. ICC-01/04-01/07, Trial Chamber II (7 March 2014) at para. 710; Botte (n 32)1029-1032

[90] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 4 February 1985, entered into force 26 June 1987) 1465 UNTS 85; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727, 31

against humanity, an overview of the historical development of the trigger of crimes against humanity would be beneficial.

3.3.4.1 The Historical Development of the Crimes against Humanity

The term 'crimes against humanity' was used by George Washington Williams in 1890 to describe the practices of Leopold II of Belgium's administration of the Congo Free State.[91] It is questionably the first-born view supported by the general principles of law considered by a community of nations, as verified, for instance, by the Martens Clause of 1899, the Hague Convention in 1899 and the Hague Conventions II in 1907 that were involved in the codification of novel rules of international humanitarian law. The preamble to the Conventions pointed to the laws of humanity as terms of inherent human values.[92]

Similarly, the Joint Declaration of 28 May 1915 condemned crimes against humanity and the report of the Commission on the Responsibility of the Authors of War in 1919 called for the responsibility of individuals for violations of the humanitarian law.[93] The first prosecution of crimes against humanity appeared in the Nuremberg trials from 20 November 1945 to 1 October 1946. Since then, crimes against humanity have been prosecuted by international courts; for instance, the ICC, ICTR and the ICTY.[94]

3.3.4.2 The Nuremberg Charter

Crimes against humanity were addressed by the Nuremberg Charter in 1945. Yet, it remains debatable whether this was a legislative act introducing a new crime category or whether it merely emphasised a crime previously involved in customary international law.[95] The drafters of the Nuremberg Charter in 1945 framed a definition of crimes against humanity. In this respect, Article 6(c) of the Charter of the Nuremberg Tribunal classifies crimes against

[91] Sliwinski (n 88)
[92] Barbour (n 1) 543; Arsanjani (n 62) 32-34
[93] James W. Garner, 'Punishment of Offenders against the Laws and Customs of War' (1920) 14:1-2 American Journal of International Law 70, 72; Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1942) 31 Calif. L. Rev. 530, 544-547; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 84-89
[94] Arsanjani (n 62) 43-45
[95] Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280; James Crawford, *State Responsibility The General Part* (1st, Cambridge University Press, New York 2013) 81-84; Hirsh (n 1)

humanity as inhuman acts committed against any civilian during peace or war.[96] The offense of crimes against humanity is usually committed during the time of war and in relation to another crime involved in the case law of the Court.[97]

Article 6(c) of the Nuremberg Charter describes crimes against humanity as "murder, extermination, enslavement, deportation, and other inhuman acts" directed against any civilian.[98] Other actions are also defined as crimes against humanity such as the persecution of civilians on racial, religious or political grounds with regards to any crime within the jurisdiction of the tribunal, regardless of whether the crimes are part of the domestic law of the state in which the crimes have been committed.[99] These actions are considered by Article 6(c) of the Nuremberg Charter crimes against humanity whether they are committed during a war or other times.[100]

Against this backdrop, the authors of the Nuremberg Charter faced an awful policy of persecution and atrocities against civilians, where several cases were not appropriate for the technical definition of war crimes. Examples of such cases are any brutal acts against civilians who are not nationals of the enemy. However, the drafters undoubtedly contradict the general principles and public conscience of law accepted by the community of nations.[101]

The next key development regarding crimes against humanity was the adoption of the ICTY 1993 and ICTR in 1994.[102] The both tribunals define crimes against humanity listing inhuman acts and specifying the conditions in which committing such acts establishes a crime against humanity. There are differences between the two definitions. Whereas the Statute of the ICTY refers to the need for a link to an armed conflict, the Statute of ICTR stresses the need for a discriminatory motive. Additionally, the establishment of the Tribunals facilitated the establishment of a body of international jurisprudence on crimes against humanity that helped to guide delegations that met in 1998 at the Rome Conference.[103]

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[96] Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280, Art. 6(c)

[97] Sadat (n 20) 4-6

[98] Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280, Article 6(c)

[99] Global Centre for the Responsibility to Protect, 'Cameroon' (*Global R2P*, 15 March 2019) <http://www.globalr2p.org/regions/cameroon> accessed 5 February 2018

[100] Arsanjani (n 62) 28-29

[101] *The Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 97 (Appeals Chamber decision, 2 Oct. 1995)

[102] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(4)

[103] Barbour (n 1) 546-548; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191, 202-204

3.3.4.3 The Rome Statute

The definition of the Rome Statute (1998) seeks to involve a varied range of likely mass crimes and does not require a nexus to armed conflict. This definition provided a more clarity as to what constitutes a specific crime, encompassing the various types of mass atrocities committed in the past. Significantly, crimes against humanity are considered as peremptory norms of international law – *jus cogens* - and all states have a responsibility to prosecute perpetrators and contribute to safeguarding people from such crimes.[104]

Article 7(1) of the Rome Statute (1998) of the ICC states that crimes against humanity may be considered as such when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. According to the Article, the *mens rea* of crimes against humanity includes the presence of discriminatory motivation, the connection to an armed conflict and a widespread or systematic violence.[105]

The Rome Statute (1998) endorses that the accused, while not essentially responsible for the whole attack against civilian population, should be aware of the attack.[106] Moreover, the Statute observers recommended that such awareness should not be essential. From this point of view, any attack against the civilian population would simply be a judicial obstacle. Once this obstacle is sorted out, a person accused of a crime against humanity could be convicted despite their being unaware of the general attack. However, it seems that the approach adopted at the Rome Conference is steadier with the essential principles of criminal law. The obligation of the prosecution to verify all elements of crimes, including mental elements, was defined as the most common feature of criminal law.[107]

The link to a widespread or systematic attack is the fundamental and significant element that elevates an ordinary crime to one of the gravest crimes ever known by humanity. Convicting a person of this gravest international crime would breach the principle *actus non facit reum nisi mens sit rea* if the convicted person was truly unaware of this central and fundamental element.[108] Moreover, the obligation to prove all mental elements does not impose an inappropriate burden on the prosecution. Given the certain notoriety of widespread or

[104] ; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 21-44; Human Rights Watch, 'Entrenching Impunity: Government Responsibility for International Crimes in Darfur' (Report Vol. 17 No. 17(a), November 2005) at pages 76-79; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 336, Art. 53; Moeckli (n 29); Jan Wouters and Sten Verhoeven, 'The Prohibition of Genocide as a Norm of [J]us Cogens and its Implications for the Enforcement of the Law of Genocide' (2005) 5:3 International Criminal Law 401, 401-406

[105] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(1)

[106] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Arts 5 and 7

[107] *Woolmington v DPP* [1935] UKHL 1

[108] Barbour (n 1) 541-548; Breau (n 6) 261-264

systematic attack against civilian areas, it is complex to imagine a state where a person could commit a murder; for instance, as part of such an attack while unconvincingly claiming to have been just unaware of that attack.[109] If such a case were to occur, however, the accused would have the *mens rea* for murder, but not for the far more serious charge of crime against humanity.

Article 7 of the Rome Statute (1998) covers a much wider characterisation of crimes against humanity than the one contained in the statute of the *ad hoc* ICTY and the *ad hoc* ICTR. However, the two *ad hoc* tribunals precisely include, *inter alia*, rape, sexual slavery and forced pregnancy.[110] This can be a normal outcome as the Rome Statute (1998) is directed to address crimes against humanity in general while the *ad hoc* international criminal tribunal is directed to address a specific case. Therefore, it is normal for the Rome Statute to include more examples of crimes against humanity. Another reason why the Rome Statute is more popular than the ICTR is that the latter focuses on the most serious crimes and does not always cover the crimes that are less serious committed during a given crisis.

In the case of the Rome Statute (1998), delegations readily approved that crimes against humanity gave rise to individual criminal responsibility in customary international law. They found that there was no single authoritative definition of the crime and that there were inconsistencies among the major precedents on the definition. Delegations supported the fact that crimes against humanity raised individual criminal responsibility in customary international law. Yet, they found no sole agreed upon definition for the crime and no consistency among the chief precedents of the crime classification.[111] Given the number of states participating in the negotiations and the negotiations being based on national situations as to the content of the existing customary international law, it can be argued that the definition the Rome Statute (1998) provided would be more reliable than the previous ones.[112]

A minority of the delegations participating in the Rome Conference highlighted that any crime against humanity might simply be committed merely during an armed conflict. Nevertheless, numerous delegations supposed that such a restriction would have led to more

[109] Darryl Robinson, 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 American Journal of International Law 43, 45-46, 54-55; *Regina v. Finta*, [1994] 1 S.C.R. 701, 819; see also, *The Prosecutor v. Tadic*, Case No. IT-94-1, Trial Chamber (7 May 1997) at page 946

[110] Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993, by Security Council Resolution 827) Art. 5; Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, by Security Council Resolution 955) Art. 3; UNSC Res. 827 (25 May 1993) U.N. DOC. S/RES/827; UNSC Res. 955 (8 November 1994) U.N. DOC. S/RES/955

[111] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7; Barbour (n 1) 541-548; Sliwinski (n 88); ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 84-89

[112] Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (14 April 1998) U.N. DOC. A/CONF.183/2/Add.1; Arsanjani (n 62) 33-36

crimes against humanity since in most cases they would have been included in the definition of war crimes. In the opinion of the majority, such a limitation would be contrary to post-Nuremberg developments, as noted in the statements of the ILC of the UN General Assembly in 1947 and the ICTY, and as contained in instruments dealing with specific crimes against humanity (the Genocide Convention and the Convention on Apartheid).[113]

One of the most significant aspects of the Rome Statute (1998) is that it does not refer to armed conflicts, emphasising that crimes against humanity can arise not only through armed conflicts but in times of peace or civil war as well.[114] Different from war crimes, crimes against humanity can be committed during peace or war.[115] Hence, this finding was necessary for the effectiveness of the ICC in dealing with widespread atrocities committed by governments against their populations.

3.3.4.4 The Scope of Crimes against Humanity

The Rome Statute (1998) was drafted in the widest expressions. Article 7(1) included the following acts when committed as part of a widespread or systematic attack directed against civilian populations and with awareness of the attacker during war and peace times:

> (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery; (h) persecutions against any identifiable group or collectively on political, national ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[116]

[113] Barbour (n 1) 546-548
[114] ILC, 'Report of the International Law Commission on the Work of its 2nd Session' (5 June–29 July 1950) U.N. DOC. A/CN.4/34
[115] Roberts (n 88) 7-10
[116] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(1); Barbour (n 1) 545-546; Sadat (n 20) 2-5;

Article 7 focuses on the widespread or systematic threshold test along with the concept of an attack against any civilian population resulting from related precedents. Some observers expressed their explicit recognition of the policy component as it had not been explicitly defined in previous instruments but had been supported by the jurisprudence of national and international tribunals and relevant comments.[117]

Enforced disappearance and the crime of apartheid were also included and overtly recognised as two forms of inhuman acts of actual fear to the international community. Relatively ambiguous terms such as persecution and other inhuman acts are maintained by illustrating and restricting their scope. Although the process of joint negotiations requires a more structured and precise approach than the preceding instruments required, these controls aid to support the definition. Thus, Article 7 of the Rome Statute (1998) provides an efficient definition of crimes against humanity which should run a comprehensive foundation for international criminal prosecution in the forthcoming time.[118]

All participants at the Rome Conference accepted that not every inhuman act can be considered a crime against humanity and that a strict threshold test is essential. Delegations effortlessly adopted two familiar stages of jurisprudence of the tribunal and other foundations, namely, the qualifications on a wide and systematic basis. The term 'widespread' needs extensive action concerning a large number of victims, while the term 'systematic' involves an advanced knowledge of organisation and systematic planning.[119] War crimes, genocide, ethnic cleansing, murder, massacres, dehumanisation, deportations, unethical human experimentation, sponsoring of terrorism, torture, rape and many other human rights abuses also amount to the threshold of crimes against humanity when they are committed as part of a widespread or systematic practice.

The most debated and complicated issue in the negotiation of the classification of crimes against humanity is whether this definition should be disjunctive, meaning widespread

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THE PROSECUTOR v. VIDOJE BLAGOJEVI AND DRAGAN JOKI, Case No. IT-02-60-A, The Appeals Chamber, (9 May 2007); *THE PROSECUTOR v. MILAN BABIĆ,* Case No. IT-03-72-A, THE APPEALS CHAMBER, (18 July 2005); *THE PROSECUTOR v. BLAGOJE SIMI,* APPEALS CHAMBER, Case No. IT-95-9-A (28 November 2006); *THE PROSECUTOR v. MILOMIR STAKI,* Case No. IT-97-24-A, Trial CHAMBER (22 March 2006); *THE PROSECUTOR v. MIĆO STANIŠIĆ STOJAN ŽUPLJANIN,* Case No. IT-08-91-A, APPEALS CHAMBER (30 June 2016); *THE PROSECUTOR v. DU[KO TADI],* Case No. IT-94-1-A and IT-94-1-Abis, THE APPEALS CHAMBER (26 January 2000); *THE PROSECUTOR v. MITAR VASILJEVI,* Case No. IT-98-32-A, THE APPEALS CHAMBER (25 February 2004); THE PROSECUTOR v. DRAGAN ZELENOVIĆ PUBLIC, Case No. IT-96-23/2-A, THE APPEALS CHAMBER or International Tribunal for the Prosecution of Persons (31 October 2007)

[117] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7; Barbour (n 1) 546-548

[118] Ibid

[119] *The Prosecutor v. Akayesu*, Judgement, No. ICTR-96- 4-T (Sept. 2, 1998); Beth Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence' (1999) 37 Columbia Journal of Transnational Law 787, 828, 832-840

or systematic, or conjunctive, meaning systematic and widespread. Throughout the negotiations, a unit comprised mostly of Members of the 'like-minded group' confirmed that a disjunctive test had already been carried out in the current authorities.[120] For instance, the Statute of ICTR entailed the commission of brutal acts as part of a widespread or systematic attack against any civilian population.[121]

The belief that a disjunctive test would be over-comprehensive was another point raised during the negotiations by the Security Council's permanent Members and various Asian and Arab delegations.[122] For instance, a legitimate question was raised about whether the widespread crimes commission would be adequate because an impulsive wave of widespread but totally not linked crimes does not found a crime against humanity within existing authorities.

Fortunately, an answer has been found to overcome this apparently undefeatable separation, as it has been effectively claimed that legitimacy concerns itself with unilateral testing.[123] The unexpected favouring the conjunctive test was prepared to acknowledge this disagreement; however, it required a coherent understanding of the Rome Statute (1998). Hence, Article 7(2)(a) of the Rome Statute (1998) defines the attack against any civilian population as a conduct of multiple acts, in furtherance or pursuant to the policy of an organisation or a State to commit this attack. Article 7(2)(a) of the Rome Statute required several authorities to meet the legitimate concerns discussed by confirming that an "attack directed against any civilian population" needs to be widespread to some extent to be considered a crime against humanity.[124]

It may be inferred that the language of Article 7(1) and 7(2)(a) echoed a central ground between the terms widespread and systematic. The text of the Article implements the previously recognised threshold test for a widespread or systematic attack; however, it limits an attack action to the authorities concerned to ease concerns about an absolute contrapuntal test.[125]

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[120] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7; Barbour (n 1) 546-548

[121] Mahmoud Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd, Kluwer Law International, The Hague 1999) 25; Nadia Bernaz and William Schabas, *Routledge Handbook of International Criminal Law* (1st, Routledge, New York 2011) 121-122; Schaack (n 119) 791-792; Roberts (n 88) 19

[122] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(2)(a); Barbour (n 1) 546-548

[123] Louis Henkin, *How Nations Behave* (2nd, Columbia University Press, New York 1979)

[124] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(2)(a); Barbour (n 1) 546-548

[125] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(1) and Art. 7(2)(a)

The perpetrators of crimes against humanity may not only be under the direction of state officials but under the direction of organisations or groups like terrorist groups and separatist or insurrectional movements.[126] Thus, the initial clause of Article 7 of the Rome Statute (1998) limits the overall threshold of crimes against humanity and it should not be read separately from its subparagraph 7(2)(a). This approach offers a source for a real compromise on numerous other acts identified under Article 7 as crimes against humanity.

The basic meaning of the phrase 'attack directed against any civilian population' involves a component of planning or direction policy. Several observers would have preferred not to identify the policy element overtly lest this should pose more difficulties to the prosecution. However, applying the policy element has been strengthened by most authorities since the Nuremberg Charter in 1945. The drafting period of the Nuremberg Charter and the statements of the Nuremberg Tribunal emphasise the policy of atrocities as well as persecutions against civilian populations. These two kinds of policies are also defined respectively as a policy of terror and a policy of persecution, repression and murder of civilians. Furthermore, the jurisprudence of subsequent military tribunals shows that a policy element was an essential requirement to establish the occurrence of crimes against humanity.[127]

3.3.4.5 Current Legal Position

In international law, there are several texts which define crimes against humanity, but there are slight differences among these definitions of this kind of crimes and their legal elements. In 2008, the crimes against humanity initiative was the first endeavour to address the *lacunae* in international criminal law through an enumeration of a comprehensive international convention on crimes against humanity.[128]

In July 2013, a long-term program was adopted to include the topic of crimes against humanity in the UN International Law Commission.[129] Moving crimes against humanity as a topic to an active programme of work was achieved by the Commission based on a report submitted by Sean Murphy. Murphy is a Member of the UN International Law Commission and named as the Special Rapporteur for Crimes against Humanity. There is some intense

[126] Arsanjani (n 62) 31-32
[127] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(2)(a); Barbour (n 1) 546-548; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 84-89
[128] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(2)(a); Barbour (n 1) 546-548; Sliwinski (n 88)
[129] Bassiouni (n 121) 24-28

debate surrounding the state of crimes against humanity in customary international law.[130] However, they are further considered to be a norm which has attained *jus cogens* status making them non-derogable rules of international law.[131] The topic of crimes against humanity often developed through the development of customary international law although this evolution was not organised.

3.4 The R2P Principle in Practice

Over the past decades, the Member States of the UN resorted to several non-military measures to prevent or respond to the increasing amount of atrocity crimes. These measures included mediation, fact-finding missions and commissions of inquiry, monitoring and observing missions as well as public advocacy by international officials. In paragraph 139 of the World Summit 2005, the Members of the UN General Assembly underlined a full range of instruments, non-military and military, available to the international community to respond to imminent threats or to perpetrate crimes against humanity.[132] Likewise, acting under Chapter VII of the UN Charter, the international community has employed additional strong measures including sanctions intended to limit committing crimes against civilians, founding peacekeeping missions and authorising military action with the direct aim of protecting civilians.[133]

The world leaders at the World Summit 2005 recognised their responsibility to protect their people from atrocity crimes. The R2P principle seems to be accepted unanimously by the UN General Assembly in 2005 and the body decided to last concern about the issue. Through several interactive dialogues, Member States of the UN General Assembly frequently affirmed their chief responsibility to protect their populations from atrocity crimes.

The world leaders similarly showed their support for the three-pillar implementation approaches, which were considered in the 2009 Report of the UN Secretary-General, implementing the R2P principle.[134] The views of the Member States converge on many important elements, including that of prevention which is at the core of the R2P principle. This

[130] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 336, Art. 53; Moeckli (n 29)
[131] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727; Bassiouni (n 121) 24-27
[132] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; Breau (n 6) 186-201
[133] UNGA 'A vital and enduring commitment: implementing the responsibility to protect' (13 July 2015) 69th Session (2015) A/69/981–S/2015/500
[134] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677

element also focused on the UN's efforts to help states fulfil their protection responsibilities to respect the principle of national ownership. In addition, the report of the UN Secretary-General in 2009 highlighted that any international action should employ the full range of diplomatic, political and humanitarian measures and that the resort to military force should be a last measure.[135]

The Members of the UN General Assembly did not deny their primary responsibility to protect their civilians from atrocity crimes. They also confirmed the need for international support for states facing such challenges.[136] Significantly, the Member States have continuously confirmed the need to build on the noteworthy consensus that has been achieved and to see the R2P principle having an effect whenever lives of civilians are in danger.

The state of enhanced implementation of the R2P principle cannot be sturdier as genocide, war crimes, ethnic cleansing and crimes against humanity are profound offenses to all of mankind. Atrocity crimes thus exacerbated broader protection needs, transformed current crises into more severe humanitarian emergencies, and led to situations which were particularly detrimental to vulnerable populations.[137] Sadly, such acts pose a serious threat to international peace and security since situations including atrocity crimes could lead to lasting instability not only within borders but also across them. Such crimes frequently inflated the foundations of conflict, edged the possibility of peaceful resolution of crises and resulted in internal displacement and enormous flows of refugees which destabilised neighbouring countries.

On 11 July 2014, the UN General Assembly Members met to fulfil their collective responsibility and stressed that implementing the R2P principle can be achieved by international assistance. In their session, the UN General Assembly Members highlighted that:

> "The World Summit 2005, paragraphs 138 and 139, set 'a collective responsibility' for helping to protect civilian populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The main conceptual thing taken by the vital conceptual step made by the R2P principle was to divert the debate from 'the discretion or right of third parties to intervene to the responsibility that a variety of actors have, at various levels, to assist in protecting potential victims of atrocity crimes. Collective responsibility is a

[135] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999–S/2016/620, at para. 18
[136] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999–S/2016/620, at para. 24
[137] UNGA 'A vital and enduring commitment: implementing the responsibility to protect' (13 July 2015) 69th Session (2015) A/69/981–S/2015/500, at para. 15

> demanding but more inclusive idea. Rather than simply providing support to states when they are in need, international assistance under pillar II contributes to fulfilling a collective responsibility."[138]

The observations of Member States agree upon several significant elements as well as prevention which is central to the R2P principle. Furthermore, the Member States' exertions to help any state in the fulfilment of their responsibility to protect should be established on respect for national ownership.[139]

3.4.1 The R2P Principle and Classifying the Implementing Triggers

The R2P principle entails that each state has a responsibility to protect its own people from atrocity crimes and that if the state fails to do so, this responsibility is shifted from that state to the UN.[140] The R2P principle limited three responsibilities comprised by the R2P principle and these three responsibilities are the responsibility to prevent, the responsibility to react and the responsibility to rebuild.[141] However, the R2P principle added more emphasis on the first pillar, the responsibility to prevent.[142]

The R2P principle stresses the clear consequences of an action against inaction and it considers the doubtless connection between assistance, intervention and rehabilitation.[143] The ICISS Report also draws attention to the costs and consequences of the indubitable relation between assistance and support on the one hand and intervention and rehabilitation on the other hand.

3.4.2 Implementing the Triggers of R2P under the International Commission on Intervention and State Sovereignty Report

In 2000, Canada held an independent International Commission on Intervention and State Sovereignty (ICISS). The ICISS Report addressed the right authorities to resort to the use of

[138] UNGA 'Fulfilling our collective responsibility: international assistance and the responsibility to protect' (11 July 2014) 68th Session (2014) U.N. DOC. A/68/947–S/2014/449, at para. 13
[139] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677
[140] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras 138-139
[141] ICISS Report 2001 at pages 19-44; Breau (n 6) 233-241; see generally, Ottawa Roundtable Report 2001; Weiss (n 10)
[142] ICISS Report 2001 at paras 3.1-3.2; Ottawa Roundtable Report 2001 at para. 4.23, 4.32; Weiss (n 10) 27-29; Breau (n 6) 20-26
[143] Sadat (n 20) 3-5

force and it confirmed the benefits of prevention by encouraging states to fulfil their fundamental protection responsibilities.[144] Similar to what is included in the Geneva Conventions and their Additional Protocols, crimes against humanity and violations of the laws of war should result in large scale killing to be considered as triggers for applying the R2P principle.[145]

The R2P principle confirms that crimes which are in breach of the Geneva Conventions and their Additional Protocols and the Convention against Torture attract universal jurisdiction.[146] Significantly, the R2P principle also considers the universal jurisdiction under customary international law and relates state legislation for crimes against humanity and genocide.[147] Thus, the state has the right to bring perpetrators to trial.

Furthermore, it has become apparent in recent times that universal jurisdiction is a developing principle of international law and is increasingly being employed to punish perpetrators of *jus cogens* crimes.[148] Significantly, the states' obligations on which the first pillar was based, namely, the responsibility to prevent, were firmly anchored in international treaty-based law and customary international law. It should be noticed that these established international crimes and the obligation to punish their perpetrators are included under the Rome Statute (1998). The Rome Statute focuses on individuals who committed or incited such atrocities, including armed groups or leaders of states as well. It also highlights developing processes and mechanisms to identify and prosecute those responsible for violations and crimes relating to the R2P principle.[149]

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[144] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; see generally, Louis Henkin, *How Nations Behave* (2nd, Columbia University Press, New York 1979)

[145] ICISS Report 2001 at paras 4.20-4.21; Ottawa Roundtable Report 2001 at para. 4.20; Weiss (n 10) 22-23; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol Additional (No. II) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609

[146] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 69-71; ICISS Report 2001 at para. 1.6; Weiss (n 10) 9-10; see generally, Ottawa Roundtable Report 2001; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol Additional (No. II) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609

[147] ICISS Report 2001 at para. 3.31; Weiss (n 10) 167-168; see generally, Ottawa Roundtable Report 2001; see generally, Kenneth C. Randall, 'Reviewed Work: Universal Jurisdiction: International and Municipal Legal Perspectives by Luc Reydams' (2004) 98:3 The American Journal of International Law 98, 627-631

[148] *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* [1999] 2 WLR 827, at para. 843; *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Judgment of 14 February 2002, ICJ Reports 2002,* (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal), at para. 20-24, 45; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 4 February 1985, entered into force 26 June 1987) 1465 UNTS 85, Art. 5(1), 5(2), 7(1); ICISS Report 2001 at paras 2.19-2.20; Ottawa Roundtable Report 2001 at para. 1.26; Randall (n 147) 627-631; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 21-44

[149] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677, at para. 18

The core of human rights law growly approaches the realisation of the notion of universal justice. Therefore, new international criminal tribunals were specifically formed to handle crimes against humanity committed during armed conflicts in the Balkans, Rwanda and Sierra Leone. International criminal tribunal should be founded to try such crimes when they occur in the future.

The current universal jurisdiction under several treaties, like the Geneva Conventions 1949, is now being applied.[150] This point is further studied in chapter six as a mechanism to deter criminals and subject them to ICC. This can deter leaders from committing atrocity crimes knowing that they will be prosecuted for such crimes. This mechanism along with the supreme position of *jus cogens* in the hierarchy of the sources of international law object to decrease or even remove the immunity of criminals that could in turn either wrongly support and strengthen state sovereignty or *vice versa*.[151]

The ICISS Report illustrates direct prevention endeavours such as the effort of 'root causes prevent'. In this paragraph, the Report shows that the threat of pursuing criminals or applying international legal sanctions has recently become a chief novel mechanism in the international preventive weapons arsenal. In the first instance, the founding of specific tribunals to deal with atrocity crimes committed during conflicts - for the former Yugoslavia, Rwanda, Sierra Leone, Libya and expected for Syria – drew the attention of potential perpetrators of crimes against humanity to the risk of being exposed to international retribution.[152]

The ICISS Report focuses on resolving conflicts while they are in their initial stages and this phase is considered to prevent root causes. Hence, one can recognise that the tool of root causes to prevent atrocity crimes can be applied through the establishment of specialised tribunals to deal with atrocity crimes committed during certain conflicts.[153]

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[150] ICISS Report 2001 at paras 2.19-2.20; Ottawa Roundtable Report 2001 at para. 2.19; Weiss (n 10) 21-23; Randall (n 147) 627-631

[151] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (13 December 2011); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber II (9 March 2015); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber II (11 July 2016) (Republic of Djibouti); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber II (11 July 2016) (Republic of Uganda); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber II (6 July 2017); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber II (11 December 2017); ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727; See also, Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc Assembly/AU/13(XIII), Thirteenth Ordinary Session, Sirte, 1-3 July 2009; See also, Assembly of the African Union, Decision on the Progress of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Doc EX.CL/710(XX), Eighteenth Ordinary Session, Addis Ababa, 29-30 January 2012; See, UNSC Res. 1593 (31 March 2005) U.N. DOC. S/RES/1593; African Union Peace and Security Council, Communiqué PSC/PR/Comm. (CLXXV), 175th Meeting - Addis Ababa, 5 March 2009

[152] ICISS Report 2001 at para. 3.29; Ottawa Roundtable Report 2001 at para. 3.29; Weiss (n 10) 27-29; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 84-89

[153] ICISS Report 2001 at para. 3(A); Ottawa Roundtable Report 2001 at para6.7; Weiss (n 10) 27-29; Breau (n 6) 189-208

3.4.3 Implementing the Triggers of R2P under the 2005 World Summit Outcome

States and governments' leaders unanimously declared at the World Summit 2005 that each state has "the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity."[154] Besides, the leaders decided that the international community should support and assist UN Members in undertaking this responsibility. When a state has clearly failed to protect its population from atrocity crimes, the international community should decide and take collective action in a 'timely and decisive manner' under the Security Council approval and in line with the UN Charter.[155]

The UN Secretary-General similarly stressed the responsibility of state to protect its civilians from atrocity crimes and the need to act in line with this responsibility.[156] In this regard, it should be emphasised that the provisions of paragraphs 138 and 139 in the World Summit 2005 strongly leans towards the deep-rooted principles of international law. Each Member State of the UN has obligations under customary international law to prevent atrocity crimes and to punish perpetrators.[157] Ethnic cleansing is not considered an atrocity crime under international law; however, acts of ethnic cleansing may constitute one of the other three crimes.[158]

The UN and states bear responsibility for the use of appropriate diplomatic, humanitarian and other peaceful means, in consistence with chapters VI and VIII of the Charter, to protect people from atrocity crimes.[159] The approach of the R2P principle should be narrow and profound since paragraph 139 of the World Summit 2005 refers to 'appropriate diplomatic, humanitarian and peaceful means' under Chapters VI and VIII as well as 'collective action' according to Chapter VII of the UN Charter.[160] A narrow and profound approach to implement the R2P principle can be achieved, as stressed by the World Summit

[154] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 138; Stahn (n 25) 108-109; Botte (n 32)1029-1033; Alex Bellamy and Paul D. Williams 'On the Limits of Moral Hazard: The 'Responsibility to Protect,' Armed Conflict and Mass Atrocities' (2012) 18:3 European Journal of International Relations 539, 541-544
[155] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677
[156] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 138
[157] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677: Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need To Establish a Permanent International Criminal Court' (1997) 10 Harvard Human Rights Journal 11, 21-26
[158] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; Breau (n 6) 186-205
[159] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139
[160] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677

2005, through early warning and assessment which are essential for effective protective and preventive action by the Member States of the UN.[161]

Paragraph 139 of the World Summit 2005 highlights "should peaceful means be inadequate," that means "national authorities clearly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[162] It is necessary that the UN General Assembly would bear the responsibility to protect civilians from atrocity crimes and their implications. Paragraph 139 also confirms that the UN action should be in consistent with the principles of the UN Charter and international law.[163]

The first pillar is clearly and unequivocally illustrated in paragraph 139 as an essential part of the strategy of fulfilling the responsibility of protection decided by the World Summit 2005 of world leaders.[164] In addition, paragraph 139 stresses that the purpose is to have this responsibility under way and to continue to use this peaceful way and the peaceful measure defined in Chapter VI, Chapter VII and Chapter VIII of the UN Charter.[165]

3.5 The Development of International Criminal Courts and Tribunals

After the trials of Nuremberg in 1945 and International Military Tribunal for the Far East in 1946 respectively, the next international tribunal with jurisdiction over crimes against humanity was not recognised for about another five decades, till 1990s. In response to atrocity crimes committed during the 1990s, various *ad hoc* tribunals were founded with jurisdiction over atrocity crimes.

There was never a particular international treaty on the trigger of crimes against humanity, but this kind of crimes has been covered in the Charter of the International Military Tribunal of Nuremberg 1945, the Statute of the ICTY 1991, the Statute of the ICTR and recently in 1998 in the Rome Statute.[166] The definition was improved faintly over time. Hence, a crime to be considered a crime against humanity, an action had no longer to be committed

[161] Ibid
[162] Ibid, at para. 139
[163] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1
[164] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677
[165] Ibid, at para. 49
[166] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7; Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280, 88; see also, Human Rights Watch, 'Entrenching Impunity: Government Responsibility for International Crimes in Darfur' (Report Vol. 17 No. 17(a), November 2005) at pages 76-79; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 84-89

during times of armed conflicts; that is, the definition has become wider than that encompassing an extensive range of potential mass atrocities.[167]

The ICISS Report in 2001 acknowledged the establishment of the ICC – when 60 states ratified the Rome Statute (1998). Thereupon, a new jurisdiction over a wide range of genocides, war crimes, ethnic cleansing and crimes against humanity was established. Noticeably, some of the atrocity crimes were defined in more detail in the Rome Statute (1998) than in standing instruments. Moreover, other crimes were mentioned for the first time like the prohibition of the enrolment of children for military actions. The founding of the ICC should be received as a measure to escape dual standards or 'victor's justice'.[168]

Practice showed that the ICC and tribunals assisted by the UN supplied a necessary tool for implementing the R2P principle, which has already been strengthening efforts at deterrence and dissuasion.[169] This policy element was later reproduced in the effort of the ILC, the writings of jurists and the decisions of the ICTY. The Draft Code of Crimes established by the ILC aimed at preventing a government or any organisation or group to commit or direct all crimes against humanity.[170]

The ILC noted that this trend or incitement led to the classification of several acts as crimes against humanity.[171] The ICTY, in its interpretation of the term 'against any civilian population', has stressed that there must be some form of governmental, organisational or collective policy to commit such acts.[172] It reflected that the phrase 'against any civilian population' called for a systematic strategy to be implemented.[173]

In regards to crimes against humanity, Bassiouni confirmed that the policy element was the basic feature of crimes against humanity.[174] At the first stage of negotiations in the Preparatory Commission, it became clear that an article on crimes against humanity similar to Article 5 of the Statute of the ICTY would not be satisfactory to the majority of states.[175]

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[167] Barbour (n 1) 546-568; Sadat (n 20) 2-5

[168] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Arts.6, 7 and 8; ICISS Report 2001 at para. 3.30; Ottawa Roundtable Report 2001 at para. 3.30; Weiss (n 10)

[169] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677, at para. 18

[170] ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) U.N. DOC. A/51/10, at pages 93, 95-96.

[171] ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) U.N. DOC. A/51/10, 96; Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7

[172] *The Prosecutor v. Tadic*, Opinion and Judgment, No. IT-94-1-T (May 7, 1997) at para. 652

[173] Virginia Morris and Michael P. Scharf, *An Insider's Guide To The International Criminal Tribunal For The Former Yugoslavia* (1st, Transnational Publishers, New Jersey 1995) 79-80

[174] Bassiouni (n 121) 244, 247

[175] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention relative to the treatment of prisoners of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135

The prosecutor should establish an 'attack directed against any civilian population' involving numerous acts and a policy component, namely the equal nevertheless low threshold test, which was found to be either 'widespread or systematic.' It should include a higher threshold and disjunctive alternatives.[176] Likewise, if the prosecutor decides to find the 'methodological' basis, some basics of the scale must be established before the jurisdiction of the ICC is passed, since a course of conduct including various crimes.

3.6 Other Essential UN Efforts after the 2005 World Summit Outcome

After the adoption of the World Summit 2005 by the UN General Assembly, the UN members showed their concerns about moving the R2P principle from words to deeds. The 2009 UN Secretary-General's report stressed that the R2P should call upon every Member of the UN to speak out wherever and whenever atrocity crimes were imminent or committed. As a manifestation of commitment, the UN Secretary-General aimed at stimulating collective action to prevent and react to atrocity crimes at the national, regional and international levels as well as to raise the costs of failing to act against these atrocity crimes. In order to achieve this commitment, the UN Secretary-General called on the Member States to prioritise the protection of vulnerable civilians over narrow national interests and to work indefatigably to overcome political views in prevention and response capacities.[177] In short, the R2P principle essentially demands sustained political leadership.

The R2P principle deals with mass collective atrocities from the viewpoint of those needing and seeking support instead of other views considering the R2P principle as a tool to intervene in the internal affairs of a foreign state. State sovereignty is a defence and "[cannot] include any claim of the unlimited power of a state to do what it wants to its own people."[178] The R2P principle highlights the efforts where the principle should be implemented to prevent or stop atrocity crimes. Categorizing a specific set of measures will require political consensus and it should build on the strengths and capacities of the UN system as well as its partners. This

[176] Roberts (n 88) 19

[177] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677, at para. 63; Breau (n 6) 190-208

[178] Gareth J. Evans, 'The responsibility to protect' (*NATO Review*, 10 April 2013) <https://www.nato.int/docu/review/2002/Managing-Crisis/Responsibility-protect/EN/index.htm> Accessed 11 March 2018; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 138; ICISS Report 2001 at paras 2.7-2.8, 2.14-2.15; Jennifer Welsh and Others 'The Responsibility to Protect Assessing the Report of the International Commission on Intervention and State Sovereignty' (2002) 57 International Journal 489, 497; Rebecca J. Hamilton, 'The Responsibility to Protect: From Document to Doctrine-But What of Implementation?' (2006) 19 Harvard Human Rights Journal 289, 294-296

is the existing challenge facing UN entities and states which are ultimately responsible for the exercise of the R2P principle.[179]

There is a developing recognition that the question is not the right of interference in the internal efforts of any state, but the responsibility of the UN to protect civilians of each state suffering from an avoidable disaster such as torture, ethnic cleansing, and crimes against humanity. Besides, the principle of non-intervention in the internal affairs of a foreign state should not be resorted to when atrocity crimes are committed.[180]

Before atrocity crimes spread out to become an ongoing threat or terrorism to a region, the UN with the help and support of regional organisations should take part in preventing atrocity crimes. In addition, the UN should, if necessary, address violence as well as rebuilding shattered societies.[181] Hence, the core aim should be to contribute to end violence and protecting civilians through several instruments such as mediation and UN missions. However, resorting to use of force should remain available only when it is vitally needed.

The inhuman legacy of the twentieth century shows the deep failure of individual states in committing to their core compelling and key responsibilities in protecting their civilians, in addition to the collective shortages of international institutions.[182] For the time being, atrocity crimes can be significantly reduced by the effective application of the R2P principle through not only international but also domestic humanitarian actors. They can deliver an early warning, technical assistance, risk analysis, capacity building and international protection through enabling measures intended to avert victimisation.[183] It seems that there is no easier way for the UN to meet its essential obligation to protect civilians than by offering protection for civilians on appropriate terms when their state is unable or unwilling to do so.

[179] Sadat (n 20) 2-5; Breau (n 6) 188-208

[180] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras 130; ICISS Report 2001 at para. 1.37; Ottawa Roundtable Report 2001 at para4.23, 4.32; Weiss (n 10) 15-17; see generally, Mann (n 80); Breau (n 6) 185-204

[181] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999–S/2016/620; see also, UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677, at para. 5

[182] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999–S/2016/620; see also, Alex J. Bellamy, 'The Responsibility to Protect: Added Value Or Hot Air? (2013) 48 Cooperation and Conflict

[183] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999–S/2016/620; H.L.A. Hart, with a Postscript edited by Penelope a. Bulloch and Joseph Raz and with an Introduction and Notes by Lesile Green, *The concept of law* (3ed, Oxford University Press, Oxford 2012) 248-252

3.7 Concluding Remarks

The importance of these developments in establishing novel standards and means to protect civilians during armed conflicts is paramount. However, both state practice and their domestic laws remain problematic for states, regional organisations and the UN to effectively prevent atrocity crimes. The defence of the rule of law on the frontline is the best practice of the judicial systems of sovereign states that should be professional, independent and properly resourced. When national justice systems are either unwilling or unable to judge atrocity crimes, universal jurisdiction as well as other international routes should be put into effect.

It is underlined that collective actions under paragraphs 138 and 139 of the World Summit 2005 should be undertaken only when atrocity crimes are committed, and the state is unable or unwilling to protect its civilians. Such collective actions should be in conformity with the purposes, provisions and principles of the UN Charter and should be supported by regional organisations. Hence, it seems that the R2P principle does not change the legal obligations of UN Members, but it indeed strengthens the states' role to refrain from resorting to the use of force except in limited situations and in a manner consisting with the UN Charter.[184] In the next chapters, the dissertation examines several cases where one or more trigger(s) for implementing the R2P principle was/were met and the UN succeeded or failed to implement the R2P principle.

[184] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; Sadat (n 20) 17-19

Chapter Four: Previous Lessons

4.1 Introduction

This chapter examines previous cases where the R2P principle was or was not implemented to prevent atrocity crimes in the light of one or more trigger(s) being met. The overview of the implementation of the R2P principle in this dissertation analyses a range of R2P-related cases and serious humanitarian crises. For instance, it examines the crises in Cambodia (1975-1979), Srebrenica (1995), Palestine (developing case), East Timor (1999), Darfur (2004), Kenya (2007), Myanmar (2008), Somalia (2008), *Côte d'Ivoire* (2011), Libya (2011) and The Gambia (2017). The cases were chosen as one trigger or more of the R2P principle had been met. The analysis of these cases will concentrate on state practice within the UN, and will also include, where relevant, state practice outside the UN, namely, that of regional organisations. These cases span the first decade of the existence of the R2P principle and cases are catechised under two groups. The first group includes the cases where the R2P principle is failed to be implemented and the second group includes the cases where the R2P principle is partially or fully implemented. Where relevant, other cases that preceded the R2P principle will also be examined.

4.2 Moving of the R2P Principle from Words to Deeds

The UN Secretary-General António Guterres followed a similar approach to his predecessors, Kofi Annan and Ban Ki-moon, and concerned himself with the R2P principle.[1] The previous UN Secretary-General Kofi Annan appointed a special adviser to develop and refine the R2P principle and set an agenda for transforming the principle from a theoretical idea into a practical mechanism.[2] Guterres also evaluated several reports that helped promote the implementation of the R2P principle. Likewise, on 20 December 2018, the UN Secretary-General announced the appointment of Karen Smith as his Special Adviser on the Responsibility to Protect.[3]

[1] UNGA 'Responsibility To Protect: From Early Warning To Early Action' (1 June 2018) 72nd Session (2018) U.N. DOC. A/72/884–S/2018/525

[2] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; UNGA 'the Responsibility to protect: timely and decisive response' (5 July 2012) 66th Session (2012) U.N. DOC. A/66/874-S/2012/578

[3] UNSG 'Secretary-General Appoints Karen Smith of South Africa Special Adviser on Responsibility to Protect' (20 December 2018) Biographical Note SG/A/1845-BIO/5165-HR/5423

The R2P principle promised to process UN actions to protect civilians from human rights violations.[4] The 2005 World Summit Outcome grounded R2P in state practice and the UN Security Council.[5] After 2005, the prospect of the world in which the R2P principle put an end to atrocity crimes was strengthened by a set of documents – the UN Secretary-General reports.[6] However, the practice in this context reflects an increase in the number of atrocity crimes committed around the world, especially following the Arab Spring in 2011.[7]

Failing to deal with current crises reflects that after the adoption of the World Summit 2005 several of the UN Member States showed no significant interest in dealing with cases of atrocity crimes. Moreover, some of these states often tried to evade their commitments to support further operational efforts.[8] For instance, in the Syrian case, the R2P principle has not been implemented; however, according to the UN Security Council, the crimes committed during the Syrian crisis amount to war crimes and crimes against humanity.[9] Failing to implement the R2P principle in Syria was caused by a division of opinion inside the UN Security Council concerning the R2P principle's effect on state sovereignty. Notwithstanding, the R2P principle offered a novel interpretation of sovereignty as a concession which carries with it a responsibility.[10]

The practice of the UN shows that it was during the Libyan crisis (2011) where the R2P principle was clear-cut implemented for the first time.[11] The R2P principle was implemented in Libya to prevent an expected massacre if Gaddafi's troops recaptured the city of Benghazi as the UN predicted that half a million civilians would be killed.[12] However, the

[4] Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 American Journal of International Law 99, 102-104; Jonah Eaton, 'Norm, Determining the Meaning and Legal Status of the Responsibility to Protect' (2011) 32 Michigan Journal of International Law 765, 799; Robert Zuber and Ana Carolina Barry Laso 'Trust but Verify: Building Cultures of Support for the Responsibility to Protect Norm' (2011) 3:3 Global Responsibility to Protect 286, 287-292

[5] Anne Orford, *International Authority and the Responsibility to Protect* (1st, Cambridge University Press, New York 2011) 180-184; UNGA 'Report of the Secretary-General 63/677' (2009) U.N. Doc. A/63/677

[6] UNGA 'the Responsibility to protect: timely and decisive response' (5 July 2012) 66th Session (2012) U.N. Doc. A/66/874-S/2012/578; UNGA 'Implementing the Responsibility to Protect: Accountability for Prevention' (10 August 2017) 71st Session (2017) U.N. DOC. A/71/1016 –S/2017/556

[7] Charles T. Hunt and Alex J. Bellamy, 'Mainstreaming the responsibility to protect in peace operations' (2011) 13:1 Civil Wars 1, 7-8; Kate Cronin-Furman, 'Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity' (2013) 7:3 International Journal of Transitional Justice 434, 439-442

[8] Kanti Bajpay, 'The Idea of Human Security' (2003) 40:3 International Studies 195, 201-204

[9] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 84-89; Mary Kaldor, *Human Security* (1st, Polity Press, Cambridge 2007) 10; Lloyd Axworthy, 'Human security and global governance: Putting people first' (2001) 7:1 Global governance 19, 22-23

[10] Graham Cronogue, 'Responsibility to Protect: Syria the Law, Politics, and Future of Humanitarian Intervention Post-Libya' (2012) 3:1 International Humanitarian Legal Studies 124, 128; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; William A. Schabas, 'Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide' (2006) 27 Cardozo Law Review 1703, 1704-1709

[11] Aidan Hehir, *Hollow Norms and the Responsibility to Protect* (1st, Palgrave Macmillan, Cham 2019) 70-75

[12] Bellamy (n 9) 265-268

UN failed to apply the R2P principle in numerous crises even where crimes constituting triggers for implementing the R2P principle were met.[13]

4.3 Previous Lessons

When the World Summit 2005 was adopted by the UN General Assembly, the world leaders promised to protect civilians from genocide, war crimes, ethnic cleansing and crimes against humanity. As the previous Chapter –Chapter three- has examined, these atrocity crimes were examined in the World Summit 2005 as triggers to implement the R2P principle. Ever since, the R2P has been referred to by the UN Security Council, the UN General Assembly and the UN Secretary-General several times.[14]

Previous practice shows that applying the R2P principle is not always possible whenever the triggers are met. It demonstrates that the principle has repeatedly been blocked via the use of the veto power by one or more permanent Members of the UN Security Council.[15] Examining the previous practice reflects that even in the best scenario, Libya, where the R2P principle is used and 'all necessary measures' were considered, the action of NATO had exceeded the UN Security Council Resolution 1973. Also, it appears that NATO exceeded the limitations of the UN Security Council in terms of duration and the overthrowing of Gaddafi's regime.[16]

Since the adoption of the World Summit 2005, practice has shown that the UN has failed to protect civilians from atrocity crimes in numerous incidents around the world such as Darfur, *Côte d'Ivoire*, the Central African Republic, Somalia, Gaza, Myanmar, Zimbabwe and more recently in Syria. Hitherto, it may be inferred that the only clear-cut case of implementing the R2P principle was the Libyan crisis (2011).[17]

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[13] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 1556 (30 July 2004) U.N. DOC. S/RES/1556; UNSC Res. 1706 (31 August 2006) U.N. DOC. S/RES/1706; UNHRC 'Report of the independent international fact-finding mission on Myanmar' (2018) U.N. DOC. A/HRC/39/64

[14] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 138; United Nations, 'Background Information on the Responsibility to Protect' (*United Nations*, 1 January 2013) <https://www.un.org/en/preventgenocide/rwanda/backgrounders.shtml> Accessed 4 March 2018); Schabas (n 10) 1716-1722

[15] Madeleine O. Hosli and Others 'Squaring the Circle? Collective and Distributive Effects of United Nations Security Council Reform' (2011) 6:2 The Review of International Organizations 163, 164-169

[16] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 139; Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (1st, Routledge, New York 2016) 231-232

[17] Christopher C. Taylor, 'A gendered genocide: Tutsi women and Hutu extremists in the 1994 Rwanda genocide' (1999) 22:1 PoLAR: Political and Legal Anthropology Review 42, 51; Eki Yemis Omorogbe, 'The African Union, responsibility to protect and the Libyan crisis' (2012) 59:2 Netherlands International Law Review 141, 149; United Nations, 'Background Information on the Responsibility to Protect' (*United Nations*, 1 January 2013) <https://www.un.org/en/preventgenocide/rwanda/backgrounders.shtml> accessed 4 March 2018)

4.3.1 Cases Where the R2P Principle was Failed to be Implemented

4.3.1.1 Cambodia 1975

From 1975 to 1979, under the Khmer Rouge regime, it was estimated that about a million civilians died from torture, execution and genocide in Cambodia. In 1997, the UN endeavoured to establish a tribunal for the crimes committed by the Khmer Rouge regime. The crimes committed amounted to war crimes, crimes against humanity, genocide and other violations of the 1948 UN Genocide Conventions.

It remains unclear why a tribunal of war crimes was not founded earlier in the wake of such a crucial human tragedy.[18] However, it has been suggested that this failure was a direct result of the political wills of some UN Security Council Members and the government of Cambodia's resistance.[19] Founding a tribunal for the Cambodian crimes was met with some support from the Cambodian government, mainly, Prime Minister Hun Sen. The UN suggested some potential configurations of the tribunal, all of which displayed institutional adjustments stemming from the previous lessons learned from critical cases such as those of the former Yugoslavia and Rwanda.[20]

Cambodia, which held an abysmal human rights record strictly adhered to non-intervention and did not criticise members of its regional bloc for their human rights abuses.[21] Human rights scholars further argue that taking action to establish a court in such situations are essential due to the poor health of numerous suspects, this is in spite of the fact that no statute of restrictions on tribunal indictments exists. Nevertheless, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was eventually established which to date has convicted three persons from the Khmer Rouge period. Speculatively, it seems likely that perpetrators of atrocity crimes from both sides of the Syrian conflict may also be eventually brought before an international or hybrid criminal court or tribunal.[22]

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[18] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (1st, Brookings Institution Press, Washington D.C. 2009) 24, 134-136
[19] Ibid,137-139
[20] Ben Kiernan, 'Introduction: conflict in Cambodia, 1945-2002.' (2002) 34:4 *Critical Asian Studies* 483, 490-494
[21] Alex J. Bellamy and Catherine Drummond, 'The responsibility to protect in Southeast Asia: Between non-interference and sovereignty as responsibility' (2011) 24:2 The Pacific Review 179, 186; Hiro Katsumata, 'Why Is Asean Diplomacy Changing? From 'Non-Interference' to 'Open and Frank Discussions'' (2004) 44:2 Asian Survey 237, 242
[22] ECCC, 'ECCC At a Glance' (Factsheet, January 2018) 2

4.3.1.2 Rwanda 1994

The genocide in Rwanda was sparked when the plane of the Rwandan President Juvenal Habyarimana, a Hutu, was shot down above Kigali airport on 6 April 1994 resulting in the death of the President. A French judge blamed Paul Kagame – the current Rwandan President – who was the leader of a Tutsi rebel group at that time and his close associates for the rocket attack. Kagame vehemently denied and stated that the attack was carried out by the Hutu extremists and it was an excuse to achieve their plans of exterminating the Tutsi community. Immediately, on the same day a campaign of violence outspread from Kigali throughout the country and continued for over three months.[23]

The Rwandan conflict in 1994 was considered by the UN Security Council a humanitarian tragedy caused by mass murder and violations of human rights which led to a massive loss of civilians' lives.[24] In May 1994, the Security Council authorised Resolution 918 in which it revealed that widespread and severe violations of human rights and international humanitarian law in population areas had taken place. Accordingly, under Chapter VII of the UN Charter 1945, the UN Security Council passed an arms embargo against Rwanda.[25]

In the same year, as the situation in Rwanda got worse, the Security Council passed Resolution 929 authorising military operations led by France.[26] In this resolution, the Council stated that systematic violations of human rights by Rwanda had taken place. Under Chapter VII of the UN Charter 1945, the UN Security Council authorised the temporary establishment of a multinational operation in Rwanda to protect civilians and assist displaced people. Later, the expanded United Nations Assistance Mission for Rwanda (UNAMIR) was fully deployed.[27]

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[23] Orford (n 5) 99-103; Fred Grünfeld and Wessel Vermeulen 'Failures to prevent genocide in Rwanda (1994), Srebrenica (1995), and Darfur (since 2003)' (2009) 4:2 Genocide Studies and Prevention 221, 223-225
BBC, 'Rwanda: How the genocide happened' (*BBC News*, 17 May 2011) <https://www.bbc.co.uk/news/world-africa-13431486> accessed 7 April 2018

[24] UNSC Res. 918 (17 May 1994) U.N. DOC. S/RES/918; David Hirsh, *Law Against Genocide: Cosmopolitan Trials* (Routledge-Cavendish, 2012) 62-69; UNSC Res. 929, (22 June 1994) U.N. DOC. S/RES/929; UNSC Res. 955 (8 November 1994) U.N. DOC. S/RES/955; Kofi Annan, *'WE the PEOPLES' THE ROLE OF THE UNITED NATIONS IN THE 21ST Century'* (1st, United Nations Department of Public Information, New York 2000) 48

[25] Alex J. Bellamy, and Paul D. Williams 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect' (2011) 87:4 International Affairs 825, 839-841; see generally, Danish Institute of International Affairs, 'Humanitarian Intervention: Legal and Political Aspects' (Report Commissioned by the Government and Submitted to the Minister for Foreign Affairs, 25 January 1999)

[26] Jaana Karhilo, 'The Establishment of the international Tribunal for Rwanda' (1995) 64:4 Nordic Journal of International Law 683, 702-704

[27] Ibid; Bellamy (n 25) 839-841

The Hutu militia massacred hundreds of civilians in the areas under their control and only after genocide crimes were committed, the UN finally recognised the flaws in dealing with the Rwandan conflict.[28] The UN Secretary-General's statements, press release and his annual report to the UN General Assembly show that the UN Security Council was reluctant to seriously deal with the Rwandan case and avert the abuse of human rights. This hesitation resulted in the loss of more civilians' lives.[29] The delay or failure to protect Rwandan civilians from genocide led to the necessity of finding an early warning system in the UN. Thus, the UN General Assembly later introduced novel ideas relating to the early warning assessment procedures to help states to protect their civilians from atrocity crimes. This kind of system may lead to improvements in the UN's capacity to analyse the shared information from states.[30]

The International Criminal Tribunal for Rwanda

Mass massacres of the Tutsis were committed by members of the central Hutu political elite, many of whom occupied positions at the highest levels of the national government in 1990 during the civil war in the country. Sadly, the civil war led to genocide crimes where over one million Rwandans – an estimated seventy percent of the Tutsi population in Rwanda – were killed. Additionally, millions of civilians in the country, mostly Hutus, were displaced and became refugees internally and externally. After the Tutsi-backed Rwandan Patriotic Front (RPF), led by Paul Kagame, controlled the capital and the country, the large-scale massacres and genocide of Rwandans were stopped.[31]

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[28] Mark A. Drumbl, 'Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials' (1998) 29 Columbia Human Rights Law Review 545, 547-549

[29] UN Secretary-General, Statement: Secretary-General Presents his Annual Report to General Assembly (20 September 1999) U.N. Doc. SG/SM/713; Fred Grünfeld and Wessel Vermeulen 'Failures to prevent genocide in Rwanda (1994), Srebrenica (1995), and Darfur (since 2003)' (2009) 4:2 Genocide Studies and Prevention 221, 223-225

[30] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864 at para. 13; UNSC 'Letter Dated 15 December 1999 From the Secretary-General Addressed to the President of the Security Council' (16 December 1999) U.N. DOC. S/1999/1257; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83

[31] Allan Thompson, *The Media and the Rwanda genocide* (1st, Pluto Press, London 2007) 90-98; William A. Schabas, 'Genocide, Crimes against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide' (2006) 27 Cardozo Law Review 1703, 1716-1722; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Chamber I , (2 September 1998); *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, (3 July 2002); *The Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T, Trial Chamber II, (20 April 2006); *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, (7 July 2006); *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-2005-85-I, Trial Chamber, (20 November 2007); *The Prosecutor v. Michel Bagagaza*, Case No. ICTR-05-86-S, Trial Chamber III, (17 November 2009); *The Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-A, The Appeals Chamber, (18 March 2010); *The Prosecutor v. Théoneste Bagosora Anatole Nsengiyumva, Case* No. ICTR-98-41-A, Appeals Chamber (14 December 2011); *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-558-A, The Appeals Chamber, (8 May 2012); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-A, Appeals Chamber, (9 October 2012); *The Prosecutor v. Justin Mugenzi and Prosper Mugiraneza*, Case No. ICTR-99-50-A, The Appeals Chamber, (4 February 2013)

The Rwandan case showed how the interests of the superpowers impact the process of formulating the regime. Besides, it significantly revealed the negotiation between hard and soft law as an effective process, including the degree of institutional learning. The magnitude and scope of the atrocity crimes in the Rwandan conflict and the bureaucratic, procedural and financial obstacles to halt them contributed to the development of an *ad hoc* court. This case showed the need for institutional elasticity.

The ICTR followed the precedent set by the ICTY; in this case, an evaluation of comprehensive goals of national reconciliation and deterrence can be made. Although the military intervention was not planned after the incident in April and May 1994, the UN Security Council on 8 November 1994 announced the establishment of the ICTR.[32] The ICTR jurisdiction was time specific as it only covered the period between 1 January 1994 and 31 December 1994. Also, the scope of the court was limited to the assassination of President Habyarimana.

To promote consistency between the two *ad hoc* courts – ICTY and ICTR, which are significant for founding clear precedents and steady legal norms, Article 12 of the Statute of the ICTR identified that the appeals chamber of the ICTR would work in a similar manner to the appeals chamber of the ICTY.[33] Furthermore, to promote the consistency of the investigation and prosecution strategy, Article 15 of the ICTR stipulated that the chief prosecutor of the ICTY would serve as the chief prosecutor of the ICTR. Consistency demands that 'likes be treated alike.'[34] However, consistency in a rule text does not guarantee its coherence and a rule that is consistently applied may be incoherent. Coherence requires a level of connectedness, other than consistency, between crises covered by a given rule.[35]

It may be noted that the conflict in Rwanda was an internal one and, from an international perspective, it was not similar to the conflict between Bosnia and Croatia which had been a case of breakaway republics. However, due to the fact that Article 3 of the Geneva Convention applies not only to inter-state conflicts but also to state conflicts as well, the ICTY supported the international decision concerning the internal conflict in Rwanda.[36]

The normative significance of this practice cannot be overstated because it expanded the jurisdiction of the court and applied international law to the problem traditionally inherited

[32] Orford (n 5) 99-103
[33] Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, by Security Council Resolution 955), Art. 12
[34] Thomas M. Franck, *The Power of Legitimacy Among Nations* (1st, Oxford University Press, New York 1990) 150-153
[35] Ibid
[36] Breau (n 16) 136-138; Catherine Powell, 'Libya: A Multilateral Constitutional Moment?' (2012) 106:2 American Journal of International Law 298, 309-311

to state sovereignty. Expanding this kind of jurisdiction could be a major obstacle to ICC activities as strong nations expressed concern about international tribunals seeking to expand authority.

The limited temporal jurisdiction applied to the ICTR was an additional degree of competition which led to an initially 'vulnerable' cooperation between the Court and the Rwandan government. Undoubtedly, the Rwandan government opposed the institution of the Court as articulated in the Resolution of the UN Security Council; although, it primarily prompted the action of the Security Council.[37] The Rwandan ambassador to the United States clarified that the government of Rwanda considered the dates set for the *ratione temporis* competence of the international tribunal for Rwanda inappropriate.[38]

Another issue associated with jurisdiction was the interaction between the ICTR and the Rwandan national courts. The purpose of the ICTR Statute was to unite international law with national courts to cope with such widespread and systematic human rights violations. Additionally, it assumed the ICTR requires many active roles once either the national system was insufficient or unjust rulings were doubtless.[39] However, the ICTR Statute indicated that the ICTR's jurisdiction had primacy over national courts and it could request national courts to defer it at any step of ongoing proceedings.[40] For such transfers to happen, it is urgent for the country's authorities to cooperate.

These ideas are sincerely at odds when national court proceedings are concluded. In cases where an ongoing national trial is partial or dependent, jurisdiction is to be shifted to the ICTR. Nevertheless, the ICTR rules of procedure and evidence offered no clear recommendations for doing this, nor did they identify who was to make such decisions.[41] Besides, the ICTR jurisdiction seems significant as the national courts pay very little heed to the cultural components of native legal norms. This component will be essential to the ICTR's goal of achieving national reconciliation and assuaging ethnic tensions. The ICTR allowed imposing a long sentence of captivity, while the Rwandan national courts might execute corporal punishment for those found guilty of capital crimes.[42] Rwandans before the ICTR would get off more lightly than those who received capital punishment by national courts.

[37] Breau (n 16) 136-138
[38] Ibid,198-200
[39] James Crawford, *State Responsibility The General Part* (1st, Cambridge University Press, New York 2013) 81-84
[40] Ibid, 33
[41] Breau (n 16) 37-38
[42] Luc Reydams, 'Universal Jurisdiction: International and Municipal Legal Perspectives' (2003) 98 American Journal of International Law 627, 628-629; Kenneth C. Randall, 'Reviewed Work: Universal Jurisdiction: International and Municipal Legal Perspectives by Luc Reydams' (2004) 98:3 The American Journal of International Law 98, 627-631

The arrangements denying the twofold risk leave the national courts no plan of action once the decisions of the tribunal are viewed as out of line. As indicated by Rwandan lawful sensibilities, the ICTR did not offer a sufficient scope of condemning choices to differentiate high-level planners from the individuals who executed the plans. Since it was conceivable that the individuals who formulated and composed the genocide might escape the death penalty - if endeavoured by the ICTR. Such incongruity was not been helpful for a national compromise in Rwanda and was cited by the Rwandan government as a reason for their refusal to back the tribunal.[43]

On 1 October 1990, Rwanda founded the Organic Law on the Organisation of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed.[44] These new domestic laws classified suspects into four categories according to the extent of their crimes. Leaders and organisers were to face the death penalty, but people convicted of crimes of a lower degree and who confessed, were to plead guilty and apologise to victims. Although the ICTR was founded after hundreds of thousands of Rwandan civilians lost their lives, the action of the ICTR can be considered a procedure that put an end to genocide in Rwanda.

4.3.1.3 The Sudan Case

The Darfur crisis is another example that shows the UN's failure in protecting Darfur's civilians from atrocity crimes for several years. In the 1980s, the civil war in neighbouring countries, specifically Chad, spilled over into Darfur and the government in Khartoum turned a blind eye as militias withdrew from Darfur and armed themselves with the support of the Chadians.[45] Throughout the 1990s, a civil war broke out in Darfur, consisting of multiple overlapping conflicts interspersed with a large-scale offensive by the government, its proxies and rebels.[46] Between 2001 and 2003, local conflicts were worsened due to the collapse of local governance and the desires of the provincial elite to support an insurgency that increased faster and more bloodily than either side expected.[47]

[43] Avitus Agbor Agbor, 'The Problematic Jurisprudence on Instigation under the Statute of the ICTR: The Consistencies, Inconsistencies and Misgivings of the Trial and Appeal Chambers of the ICTR' (2013) 13:2 International Criminal Law Review 429, 430-433
[44] Ibid, 465-468
[45] John Ryle, 'The Disaster in Darfur' (2004) 51:13 New York Review of Books 1, 1-12; Tim Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?' (Policy Brief Number 8, March 2013, The Institute for Justice and Reconciliation, 2013) 3
[46] Alexander De Waal, *War in Darfur and the Search for Peace* (1st, Harvard University Press, London 2007), 113–139
[47] Alex De Waal, 'Darfur and the Failure of the Responsibility to Protect' (2007) 83 International Affairs 1039, 1039-1040

The UN Security Council did not address the Darfur crisis until June 2004 when the Council passed Resolution 1547 in which it called on all parties involved in the crisis to stop the fighting immediately. Resolution 1547 also urged the Sudanese government to reach a political agreement with the Sudan People's Liberation Movement.[48] On 30 July 2004, the UN Security Council passed resolution 1556 that went further when it imposed an arms embargo on the conflict area.[49] By doing this, the council supported the deployment of an African Union Protection Force.[50]

The Resolution 1556 stressed that if the Sudanese government would not disarm the Janjaweed or other forces, it would face sanctions.[51] Significantly, the resolution highlighted the responsibility of the Sudanese government to protect civilians in Darfur. Rather than demobilising the Janjaweed, the government of Sudan incorporated the group into police forces and the official army.[52]

From 2005 onwards, the UN Security Council showed a greater will than before to put an end to the atrocity crimes in Darfur. The Security Council was motivated by the perceived insufficiency of African Union peacekeepers. During the last decade, a UN peacekeeping mission was gradually recognised; however, its composition and mandate continued to be specified.[53] Even before May 2006, to settle the crisis in Sudan, the UN Security Council started to plan to send as many as twenty-thousand peacekeepers to the conflict area. However, collecting troop commitments from member states and deploying them was expected to take up over a year.

The Sudanese government's failure to end the crisis gave legitimacy to the deployment of peacekeeping forces without the acceptance of the Khartoum government.[54] Overall, the UN Security Council did not show a real will to resort to an armed intervention to put an end to the human rights violations due to Western disinterest. Besides, China and Russia wanted to maintain their privileged access to the reserves of Sudan's oil and this made their intention to veto any proposal authorising military intervention in Sudan expected.[55]

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[48] Roberto Belloni, 'The Tragedy of Darfur and the Limits of The 'Responsibility To Protect' (2006) 5:4 Ethnopolitics 327, 337; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009); Alex Bellamy and Paul D. Williams 'On the Limits of Moral Hazard: The 'Responsibility to Protect,' Armed Conflict and Mass Atrocities' (2012) 18:3 European Journal of International Relations 539, 554-555

[49] UNSC Res. 1556 (30 July 2004) U.N. DOC. S/RES/1556

[50] Belloni (n 48) 337-339

[51] UNSC Res. 1556 (30 July 2004) U.N. DOC. S/RES/1556

[52] Belloni (n 48) 337; Ibid; Max Mathews, 'Tracking The Emergence of New International Norm: The Responsibility to Protect and the Crises in Darfur' (2008) 31 Boston College International and Comparative Law Review 137, 152

[53] Ibid, 338

[54] Ibid, 338; Bellamy (n 48) 554-556

[55] Ibid, 338

To better implement the protection of individual mandates and carry out the responsibility to protect, steady and more focused consultations on the mandating of peacekeeping missions should be activated.[56] If delegations of peacekeeping missions are under appraisal and shall be possibly changed, it should correspondingly be mandatory for the UN Security Council to consult all the troops and police of the contributing states deployed to the mission. The UN remains committed to find solutions to these consultations which may support the implementation of protecting civilians.

On 31 August 2006, the UN Security Council passed Resolution 1706 that focused on human rights violations in Darfur. In the resolution, the Council referred to paras 138 and 139 of the World Summit 2005. However, the R2P principle did not dominate the agenda of the Security Council for Darfur and it was impossible to authorise compulsory measures under Chapter VII of the UN Charter to prevent a humanitarian tragedy. The UN Security Council showed a tendency to avoid the opposition of the Sudanese government by seeking Sudan's consent to the deployment of its mission to Darfur.[57]

Numerous observers assessed such unwillingness of the Council to take operative measures as a misstep since several millions of civilians' lives were under looming threat. Also, systematic and widespread atrocity crimes were perpetrated by armed militias allied to the Sudanese government. Consecutive resolutions of the UN Security Council about the situation in Darfur failed to implement the R2P principle. The only thing the UN Security Council could do at this point was to emphasise the necessity of protecting civilians and evoking the previous resolutions of the Security Council about protecting civilians during the time of armed conflict.[58]

Al-Bashir who seized power in a military coup in 1989, faced protests in several cities and unsurprisingly the Sudanese authorities opened fire and killed dozens of protesters.[59] On 23 February 2019, al-Bashir declared a one-year state of emergency and postponed pushing for constitutional amendments which would allow him to seek a third term in office.[60] Many

[56] John R Bolton, 'United States Policy on United Nations Peacekeeping' (2001) 163:3 World Affairs 129, 133
[57] UNSC Res. 1706 (31 August 2006) U.N. DOC. S/RES/1706; William A. Schabas, 'Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide' (2006) 27 Cardozo Law Review 1703, 1716-1722
[58] Bruno Simma, *The Charter of the United Nations: A Commentary* (3rd, Oxford University Press, New York 2012) 1213-1214; Fred Grünfeld and Wessel Vermeulen 'Failures to prevent genocide in Rwanda (1994), Srebrenica (1995), and Darfur (since 2003)' (2009) 4:2 Genocide Studies and Prevention 221, 228-232
[59] Nada Altaher and Kara Fox 'Sudan Cracks Down on Growing Anti-Government Protests' (*CNN*, 25 December 2018) <https://edition.cnn.com/2018/12/25/africa/sudan-protests-violence-intl/index.html> accessed 1 January 2019
[60] Gamal Gasim, 'Reflecting on Sudan's Higher Education Revolution under Al-Bashir's Regime' (2010) 2:Fall Journal of Comparative & International Higher Education 50, 50-52; Siri Lamoureaux and Timm Sureau, 'Knowledge and legitimacy: the fragility of digital mobilisation in Sudan' (2019) 13:1 Journal of Eastern African Studies 35, 38-41; BBC, 'Sudan's Omar al-Bashir declares state of emergency' (*BBC News*, 23 February 2019) <https://www.bbc.co.uk/news/world-africa-47330423> accessed 25 February 2019

civilians accused of taking part in protests against the government got flogging sentences.[61] Doctors at hospitals, teachers and students were targeted by the Sudanese security forces. Such human rights violations could lead to a severe humanitarian crisis.[62]

The practice of the UN in Sudan showed that the UN Security Council failed to protect civilians. However, in 2006, it reaffirmed the content of the provisions of paragraphs 138 and 139 of the World Summit 2005 twice. The Security Council passed Resolution 1674 and Resolution 1706, which highlighted the protection of civilians in armed conflict.[63] This procedure resulted in integrating the issues of international humanitarian law and human rights in peacekeeping operations, thereby making the prevention of mass atrocities possible.

4.3.1.4 Srebrenica 1995

The Srebrenica genocide took place in July 1995 during the last months of the Bosnian War (1992–1995). It is estimated that between 7.000 and 8.000 Bosnian Muslim males were massacred at the hands of the Bosnian Serb Army of Republika Srpska commanded by Ratko Mladić.[64] The massacre happened as a male group, around 15,000, were fleeing through the forested hills towards territories controlled by the federal Bosnian army. Many of these men were ambushed and shelled while others were rounded up and taken away for execution.[65]

Those who remained in Srebrenica until the fall of the enclave were forced to walk to the UN compound in nearby Potocari where the men were separated from their families, taken away and executed.[66] In August 2001, a trial chamber of the ICTY handed down the tribunal's first genocide conviction. In this landmark case, the Serb army General Radislav Krstić was on trial and the chamber determined that the 1995 Srebrenica massacre constituted genocide.[67]

This took place despite the efforts of the UN Security Council that caused pass Resolution 819 on 16 April 1993 declaring Srebrenica a 'safe area', a pioneering model intended to provide protection for the town's population by the United Nations Protection Force (UNPROFOR). The Resolution stressed that "all parties and others concerned treat Srebrenica

[61] Ibid
[62] Nigel Hawkes, 'Sudanese doctors appeal for support as hospitals and staff are attacked' (2019) 364:l209 BMJ 1, 1
[63] UNGA '97th plenary meeting' (23 July 2009) 63rd Session (2009) U.N. DOC. A/63/PV.97
[64] Helge Brunborg and Others, 'Accounting for Genocide: How Many Were Killed in Srebrenica?' (2003) 19 European Journal of Population 229, 232-233
[65] Jelena Obradovic-Wochnik, 'Knowledge, acknowledgement and denial in Serbia's responses to the Srebrenica massacre' (2009) 17:1 Journal of contemporary European studies 61, 61-64
[66] Ibid
[67] *The Prosecutor v Krstić*, Judgment, Case No. IT-98-33-A, Appeals Chamber (19 April 2004); Lea David, 'Holocaust and genocide memorialisation policies in the Western Balkans and Israel/Palestine' (2017) 5:1 Peacebuilding 51, 51-66

and its surroundings as a safe area that should be free from armed attack or any other hostile act."[68] However, the hope that the "safe areas" would guarantee the protection of the civilians was short-lived. Indeed, it was impossible to provide viable protection by lightly armed, small UNPROFOR units with no mandate to enforce peace. Therefore, Srebrenica revealed the shortcomings of the policy of 'safe areas' and the deficiency of international commitment to defending them.

The European Parliament (EP) adopted three resolutions on the Srebrenica genocide.[69] On 15 January 2009, the EP stated that 11 July as the Srebrenica Genocide Commemoration Day and other parliaments in the European countries followed suit.[70] Similarly, resolutions were passed in the United States at the state and federal levels which remembered the victims of Srebrenica and condemned the massacre as a case of genocide.[71]

4.3.1.5 Somalia 2008

The concern of the protection of non-combatants in the context of the R2P principle also arose in the case of Somalia between 2008 and 2019.[72] The Special Representative of the UN Secretary-General for Somalia, Mr. Ahmedou Ould Abdallah, stressed the responsibility by insisting that the international community should be involved in a state "where there are widespread violations of human rights and humanitarian law."[73]

The Special Representative of the UN Secretary-General for Somalia emphasised the Secretary Council's responsibility for the protection of Somalians and the Somalian legitimate government and for finding ideas that would lead to solutions. As for the Secretary Council's resolutions on Somalia, they highlighted "the responsibility of all parties in Somalia to comply with their obligations to protect the civilian population from the effects of hostilities."[74]

[68] UNSC Res. 819 (16 April 1993) U.N. DOC. S/RES/819; Bellamy (n 48) 551-553
[69] Jasna Dragović-Soso, 'Apologising for Srebrenica: the declaration of the Serbian parliament, the European Union and the politics of compromise' (2012) 28:2 East European Politics 163, 169-172; Fred Grünfeld and Wessel Vermeulen 'Failures to prevent genocide in Rwanda (1994), Srebrenica (1995), and Darfur (since 2003)' (2009) 4:2 Genocide Studies and Prevention 221, 230-233
[70] Klejda Mula, 'Genocide and the ending of war: Meaning, remembrance and denial in Srebrenica, Bosnia' (2017) 68:1-2 Crime, Law and Social Change 123, 137-138; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83; see also, Hamza Karcic, 'Remembering by resolution: the case of Srebrenica' (2015) 17:2 Journal of Genocide Research 201, 202-209
[71] Mula 124-130
[72] Christian Henderson, *The use of force and international law* (1st, Cambridge University Press, New York 2018) 153-155
[73] UNSC Verbatim Record (20 March 2008) U.N. DOC. S/PV.5858; Simma (n 58) 1214-1215
[74] UNSC Res. 2010 (30 September 2011) U.N. DOC. S/RES/2010 at para22; Simma (n 58) 1214-1215; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 138

In the respective resolutions of the UN Security Council on Somalia, the R2P principle was not overtly invoked. However, the Security Council emphasised "the responsibility of all parties in Somalia to comply with their obligations to protect the civilian population from the effects of hostilities."[75]

4.3.2 Cases Where the R2P Principle was Partially or Fully Implemented

4.3.2.1 East Timor 1999

Responding to the successful referendum in September 1999, where East Timor declared its independence from Indonesia, pro-Indonesia militias launched a campaign of intimidation and violence over East Timor. The International Force to East Timor led by Australia was deployed to establish and maintain peace in the area and prevent atrocity crimes.[76]

As human rights violations became worse, the UN Human Rights Commission (UNHRC) held a special meeting resulting in a report calling for a preliminary investigation into atrocity crimes committed in the country. At that time, several lawyers considered this step as the first one towards establishing a war crimes tribunal.[77] The previous UN Secretary-General, Ban Ki-moon, precisely pointed out to the UN Security Council Resolution 1264 where the Council demanded that those responsible for war crimes should be brought to justice.'[78] The Indonesian government rejected the UNHRC resolution and this action led to the prevention of the UN investigators from examining the military file of Jakarta. As a precautionary measure to prevent any discussion about the necessity for international intervention, the Indonesian government established a fact-finding commission to compile evidence on human-rights abuses and bring the perpetrators to national justice.[79]

International criminal tribunals were established neither in Cambodia nor in Indonesia and this led to a decrease in dependence on international law to protect civilians from human rights violations and settlement of war-torn areas. The weakness was the need for cooperation

[75] UNSC Res. 2010 (30 September 2011) U.N. DOC. S/RES/2010 at para22; UNSC Res. 1814 (15 May 2008) U.N. DOC. S/RES/1814; UNSC Res. 2020 (22 November 2011) U.N. DOC. S/RES/2020; UNSC Res. 2015 (24 October 2011) U.N. DOC. S/RES/2015; UNSC Res. 612 (4 October 2011) U.N. DOC. S/RES/612; Simma (n 58) 1214-1215
[76] Ian Patrick, 'East Timor emerging from conflict: the role of local NGOs and international assistance' (2001) 25:1 Disasters 48, 48-66
[77] Simma (n 58) 1218-1219
[78] UN Press Release (6 May 2011) SG/SM/13548; Saira Mohamed, 'UN Security Council Resolution 1975 on Côte d'Ivoire' (2011) 50:4 International Legal Materials 503, 503-508
[79] Saira Mohamed, 'UN Security Council Resolution 1975 on Côte d'Ivoire' (2011) 50:4 International Legal Materials 503, 503-508

between the UN and its Member States, especially those whom had the aforementioned war-torn areas in their respective territories. Whereas *ad hoc* tribunals could be established by passing a UN Security Council resolution, the obstacles faced by the ICTY illustrated how the shortage of cooperation might curb institutional development and regime effectiveness.[80]

4.3.2.2 Kenya 2007

The Kenyan crisis could be one example where the pillar of the responsibility to prevent was explicitly utilised in December 2007.[81] Kenya was swept by an ethnic conflict triggered by the disagreement over the presidential election after Mwai Kibaki had been declared the president of Kenya.[82] The announcement of the presidential election results triggered systematic and widespread violence leading to more than a thousand deaths and the displacement of over half a million.[83] The conflict was characterised by the ethnically instigated killings of people aligned with the two major political parties, the Orange Democratic Movement (ODM) and The Party of National Unity (PNU).[84]

The international intervention was almost immediate where the French Minister of Europe and Foreign Affairs called the UN Security Council in January 2008 to react under the R2P principle to prevent Kenya from slipping into an ethnic conflict.[85] In January 2008, Kofi Annan, the former UN Secretary-General, was appointed a Chief Mediator of the African Union. The mediation efforts resulted in signing a power-sharing agreement in February 2008. The parties agreed on Mwai Kibaki as the President and Raila Odinga as the Prime Minister.[86]

This swift and arranged response by the international community was welcomed by Human Rights Watch as an ideal diplomatic reaction under the R2P principle.[87] However, this

[80] Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280; see also, Human Rights Watch, 'Entrenching Impunity: Government Responsibility for International Crimes in Darfur' (Report Vol. 17 No. 17(a), November 2005) at pages 68-75; Brian Barbour and Brian Gorlick, 'Embracing The Responsibility to Protect: A Repertoire of Measures Including Asylum for Potential Victims' (2008) 20:4 International Journal of Refugee Law 533, 546-548

[81] UNGA Verbatim Record (23 July 2009) U.N. DOC. A/63/PV.97

[82] Alex J. Bellamy, 'The Responsibility to Protect—Five Years On' (2010) 24:2 Ethics & International Affairs 143, 148-149; Abdullahi Boru Halakhe, ''R2P in Practice': Ethnic Violence, Elections and Atrocity Prevention in Kenya.' (Occasional Paper Series No.4, Global Centre for the Responsibility to Protect, 4, December 2013) 3-23

[83] Peter Kagwanja, 'Courting genocide: Populism, ethno-nationalism and the informalisation of violence in Kenya's 2008 post-election crisis' (2009) 27:3 Journal of Contemporary African Studies 365, 382-383

[84] Ibid, 365-368

[85] UNSC Res. 1189 (13 August 1998) U.N. DOC. S/RES/1189; Derek Jinks, 'State responsibility for the acts of private armed groups' (2003) 4 Chicago Journal of International Law 83, 85-87

[86] Stephen Brown, 'Donor responses to the 2008 Kenyan crisis: Finally getting it right?' (2009) 27:3 Journal of Contemporary African Studies 389, 398; Michael Chege, 'Kenya: back from the brink?' (2008) 19:4 Journal of Democracy) 125, 125-139

[87] Beth Elise Whitaker and Jason Giersch 'Voting on a constitution: Implications for democracy in Kenya' (2009) 27:1 Journal of Contemporary African Studies 1, 16

is not always the case with each crisis around the world. For instance, in Rwanda (1994), Darfur (2004) and Syria (2011), the responses of the UN were different. Significantly, the international community was either too late to act, as in the Rwandan crisis, or failed to act, as in Myanmar and Syria.

4.4.2.3 *Côte d'Ivoire 2011*

In 2011, a crisis unfolded subsequent to an election process in *Côte d'Ivoire* and led to a widespread armed confrontation between the forces of former President, Laurent Gbagbo, and the elected President, Alassane Ouattara. Gbagbo remained in power despite the UN's call for a peaceful transition of power to the elected president, Ouattara. These circumstances led to an armed conflict between the two parties.[88]

The civilians became under an imminent threat and were deeply affected by the crisis. Since the initial juncture of the crisis, the UN Secretary-General Special Advisers on the Prevention of Genocide and the Responsibility to Protect called all parties involved in the conflicts to observe their responsibility towards the population of *Côte d'Ivoire*.[89]

On 27 February 2004, the UN Security Council passed Resolution 1528 in which it called "the parties and the Government of National Reconciliation to take all necessary steps to prevent further violations of human rights and to put an end to impunity."[90] Likewise, the UN Security Council reaffirmed its real assistance to the Secretary-General's Special Representative and offered his full authority for the conduct and coordination of all the activities of the UN in the country.[91]

Resolution 1528 significantly called for finding a peacekeeping operation comprised of about 8,000 troops. The UN operation helped to establish a transitional government of national unity that led to holding presidential elections on 31 October 2010.[92] The Special Adviser to *Côte d'Ivoire* invoked the World Summit 2005 and highlighted that the responsibility of the state was not confined to preventing core crimes but also preventing their incitement.[93]

[88] Bellamy (n 25) 833-836; Lotze (n 62) 365-368
[89] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83; Bellamy (n 91) 827-30; United Nations, 'Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in *Côte d'Ivoire*' (Office of the Special Adviser of the Secretary-General on the Prevention of Genocide, New York 19 January 2011)
[90] UNSC Res. 1528 (27 February 2004) U.N. DOC. S/RES/1528; Alex J. Bellamy, and Paul D. Williams 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect' (2011) 87:4 International Affairs 825, 839-845
[91] UNSC Res. 1528 (27 February 2004) U.N. DOC. S/RES/1528
[92] Ibid; Bellamy (n 91) 829-833
[93] UNSC Res. 1967 (19 January 2011) U.N. DOC. S/RES/1967; UNSC Res. 1528 (27 February 2004) U.N. DOC. S/RES/1528

However, the peacekeeping operation was sometimes unable to protect civilians from persistent abuses and some of its crew were themselves accused of exploiting civilians and committing sexual crimes.[94]

In a further statement, the UN Special Advisers expressed their worry about the possibility of genocide, war crimes, ethnic cleansing and crimes against humanity. Later, the UN Security Council Resolution 1967 was mandated on 19 January 2011 to use 'all necessary means' to implement the mandate of the United Nations Operation in *Côte d'Ivoire* (UNOCI), aiming at the protection of civilians.[95] On 30 March 2011, the UN Security Council authorised a Report 1975 which confirmed the chief responsibility of each UN Member to protect civilians.[96]

The UNOCI, supported by French forces, conducted a military operation on 4 April 2011 to avoid further use of heavy weapons against civilian areas. Some states such as China, Russia and India condemned the UN's action as a violation of the mandate given by the Special Committee under Resolution 1975.[97] This happened although, as the UN Secretary-General stressed, the UNOCI was not involved in the conflict and that "UN forces undertook a limited military operation whose sole purpose was to protect the innocent people."[98]

The *Côte d'Ivoire* crisis illustrated that the R2P principle can enhance the link between the protection of civilians and peace operations. The UN Secretary-General assessed the situation in *Côte d'Ivoire* as an R2P principle case and emphasised that the UN forces should remain impartial but not neutral when civilian lives are under imminent threat.[99] Again, this is a significant example showing the role of the UN forces as the protection of civilians not only when their state is not unable or unwilling but also when the state itself is the perpetrator.

[94] Fiifi Edu-Afful and Kwesi Aning, 'Peacekeeping Economies in a Sub-Regional Context: The Paradigmatic Cases of Liberia, Sierra Leone and Côte d'Ivoire' (2015) 9:3 Journal of Intervention and Statebuilding 391, 397-398; Mazeda Hossain and Others, 'Men's and Women's Experiences of Violence and Traumatic Events in Rural Côte d'Ivoire Before, During and After a Period of Armed Conflict' (2014) 4:2 BMJ Open 1, 2-6

[95] Simma (n 58) 1218; Bellamy (n 91) 829-830

[96] UNSC Res. 1975 (30 March 2011) U.N. DOC. S/RES/1975; see also, Joachim Alexander Koops, (ed.) *The Oxford handbook of United Nations peacekeeping operations* (1st, Oxford University Press, USA, 2015) 86-89; Simma (n 58) 1218-1219; see also, Lori-Anne Théroux-Bénoni, 'Lessons for UN Electoral Certification from the 2010 Disputed Presidential Poll in Côte d'Ivoire' (Policy Brief Number 1, June 2012, CIGI-Africa Initiative, 2012) at page 3

[97] Simma (n 58) 1218-1219

[98] UN Secretary-General, Statement, Libya, *Côte d'Ivoire* Events Mark Historic Precedent, Secretary-General Tells Sofia Platform, Citing 'Watershed' in Responsibility to Protect Doctrine, Press Release (6 May 2011) U.N. Doc. SG/SM/13548

[99] Simma (n 58) 1219

4.3.2.4 Libya 2011

4.3.2.4.1 Events Leading to Intervention under Resolution 1973 of the UN Security Council

In 2011, the Libyan government launched a violent crackdown on peaceful protesters who took to the streets against the Gaddafi regime. The violence quickly went out of control, and excessive force was used from both sides.[100] The UN Secretary-General Ban Ki-moon expressed his concern about the reactions of the Libyan authorities after using heavy weapons and tanks against the civilian population along with allegations of arbitrary arrests, indiscriminate killings and shooting of peaceful demonstrators.[101]

On 26 February 2011, the Security Council passed Resolution 1970[102] which called on the Libyan government to stop violating human rights immediately and to respect its obligations under human rights law and international humanitarian law.[103] However, the Libyan government disregarded the UN Security Council's calls. Subsequently, the UN Security Council applied various measures, excluding the use of force, to put an end to the atrocity crimes, such as the severance of diplomatic relations and the interruption of economic relations with the Libyan regime.[104]

The African Commission on Human and Peoples' Rights, which is a regional organisation, condemned the use of force and massive violence against demonstrators and called on the Libyan government to stop its violent actions and respect human rights.[105] Similarly, an emergency meeting was held by the Council of the LAS while the number of crimes in Libya was increasing massively. Therefore, Libya's membership in the League was suspended.[106] After suspending the membership of Libya, on 12th March 2011, the LAS approved Resolution 7360 which condemned using cannons and military aircraft against the

[100] Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25:3 Cambridge University Press, Ethics and International Affairs 255, 257-258; Human Rights Watch, 'Libya: Security Forces Fire on Protesters in Western City' (*Human Rights Watch*, 26 February 2011) <http://www.hrw.org/en/news/2011/02/26/libya-security-forces-fire-protesters-western-city> accessed 12 December 2018; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 246-271

[101] UNSC, UN Secretary-General Ban Ki-moon's remarks to the UN Security Council on peace and security in Africa (25 February 2011) U.N. DOC. SG/SM/13418-SC/10186-AFR/2124; Welsh (n 103) 257-259; Volkan Şeyşane and Çiğdem Çelik, 'R2P and Turkish Foreign Policy: Libya and Syria in Perspective' (2015) 7:3-4 Global Responsibility to Protect 376, 383-389

[102] UNSC Res. 1970 (26 February 2011) U.N. DOC. S/RES/1970; Nigel D. White and Christian Henderson, *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum*, (1st, Edward Elgar Publishing Ltd, Cheltenham 2013) 247-251; Hehir (n 11)

[103] White (n 105) 123-126

[104] UNSC Res. 1970 (26 February 2011) U.N. DOC. S/RES/1970

[105] Alex J. Bellamy, *Responsibility to protect: a defense* (1st, Oxford University Press, New York 2015) 79-81; Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2011) 52:2 Virginia Journal of International Law 357, 373-376

[106] Payandeh (n 108) 374-375

Libyan civilians. However, the Resolution prevented any military intervention in Libya and encouraged the UN Security Council to impose a no-fly zone to protect the population areas in the country.[107]

All efforts of UN Security Council sanctions and the threat of criminal prosecution by the ICC to stop the systematic and widespread violations of human rights in Libya went in vain. The United Kingdom, the United States and France urged the UN Security Council to establish a no-fly zone to stop the horrific abuses against the Libyan civilians.[108] Likewise, on 8 March 2011, the Organisation of the Islamic Conference called for imposing a no-fly zone over the country.[109] Two days later, the Peace and Security Council of the African Union concentrated on the validity of the struggle of the Libyan people; however, it banned any form of military intervention.[110]

These peaceful measures were ineffective in ending human rights violations in Libya as they were not enough to avert Gaddafi's troops from violating human rights.[111] Therefore, the UN Security Council resorted to using all necessary measures under the R2P principle to protect civilians in the country.[112] As the humanitarian situation was getting worse, the UN Security Council was urged to take a further step by referring the Libyan crisis to the ICC.[113]

On 17th March 2011, the UN Security Council adopted Resolution 1973 and overly pointed out that the current situation represented a threat to the lives of about half a million civilians in Benghazi.[114] Therefore, the UN Security Council's authorisation to apply the R2P principle in Libya was considered under Chapter VII of the UN Charter.[115] Resolution 1973 approved all necessary measures to enforce compliance with the no-fly zone to protect civilians. The resolution focused on the massive violations of human rights.[116] It also set an example of how all measures can be used to protect populations.[117]

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[107] UNSC 'Letter dated 14 March 2011 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council' (15 March 2011) (2011) U.N. DOC. S/2011/137; see also, Malcolm D. Evans (ed.), *International Law* (4th, Oxford University Press, New York 2014) 512-513; Hehir (n 11) 691-692

[108] White (n 105) 233-249

[109] Payandeh (n 108) 394

[110] African Union Peace and Security Council, Communiqué PSC/PR/Comm. (CCLXI), 261th Meeting - Addis Ababa, 23 February 2011

[111] UNSC Res. 1973 (17 March 2011) U.N. DOC. S/RES/1973

[112] UNSC Res. 1970 (26 February 2011) U.N. DOC. S/RES/1970; Welsh (n 103) 256-257

[113] Ibid, at paras 4-5; Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility' (2012) 10:2 Journal of International Criminal Justice 325, 326-329

[114] UNSC Res. 1970 (26 February 2011) U.N. DOC. S/RES/1970, 4-8; see also, Nigel D. White, Christian Henderson, *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum*, (1st, Edward Elgar Publishing Ltd, Cheltenham 2013) 158

[115] UNSC Res. 1970 (26 February 2011) U.N. DOC. S/RES/1970

[116] UNSC Res. 1973 (17 March 2011) U.N. DOC. S/RES/1973; White (n 105) 38-40

[117] UNSC Res. 1973 (17 March 2011) U.N. DOC. S/RES/1973

The resolution did not state the expected time by which its objective – preventing the threat of committing a massacre if the official Libyan troops captured Benghazi – was to be achieved. Additionally, Resolution 1973 might have established a surprisingly broad authorisation for intervention in Libya and it did not explicitly declare an intention to change the regime.[118] However, changing the Libyan regime was not an unexpected outcome, especially that the regime used heavy weapons against civilians.[119] This kind of use of force could be "presented as a form of coercive co-operation between intervener and target."[120]

4.3.2.4.2 The Legality of Implementing the R2P Principle in Libya

On 17 March 2011, the UN Security Council authorised international military intervention in Libya under the UN Security Council Resolution 1973. This was the first black-and-white application of the R2P principle under a UN Security Council resolution. Despite the success of the R2P implementation in Libya by resorting to a military intervention by NATO allies, it raised extensive controversy over allegations that NATO bypassed the limits on international intervention.[121]

In Resolution 1973, the UN Security Council used the legitimate purposes – the protection of civilians and enforcement of submission – as the basis for ratifying all necessary measures and resorting to the military intervention in the Libyan crisis.[122] However, Resolution 1973 did not state the exact purpose of this intervention nor the estimated time to achieve this purpose. Additionally, it was criticised for offering a surprisingly broad declaration that all necessary measures would be taken to stop violence in Libya.[123] Still, one of the predictable outcomes of passing the resolution prevention of massacres and gross violations of human rights by the Gaddafi regime.[124]

The interveners in Libya did not provide a straightforward plan for carrying out the third pillar of the R2P principle, the responsibility to rebuild. Regrettably, the intervention took place on 19 March 2011 and the conflict in the country continues for several years where many armed militias still fighting on streets. Above all, Libya currently has two governments, the

[118] Ibid; White (n 105) 38-40; John MacMillan, 'Myths and lessons of liberal intervention: The British campaign for the abolition of the Atlantic slave trade to Brazil' (2012) 4:1 Global Responsibility to Protect 98, 124
[119] White (n 105) 244-256
[120] MacMillan (n 118)122
[121] Madeleine O. Hosli and Others 'Squaring the Circle? Collective and Distributive Effects of United Nations Security Council Reform' (2011) 6:2 The Review of International Organizations 163, 164-169; Hehir (n 11) 97-102
[122] UNSC Res. 1973 (17 March 2011) U.N. DOC. S/RES/1973, at paras 3–7
[123] UNSC Res. 1973 (17 March 2011) U.N. DOC. S/RES/1973, at para4; Hehir (n 107) 691-692
[124] White (n 105) 247-251

first of which is the General National Congress in Tripoli recognised as the Libyan official authority by many UN Members after overthrowing Gaddafi's government in 2011. The second government centres in Tobruk in the east of the country.[125]

The jury is yet to say whether NATO's military action in Libya will lead to the integration or de-legitimation of the R2P principle. Resolution 1973 aimed to prevent massacres against civilians and atrocity crimes but not to intervene in internal affairs and to overthrow the government since governments have the right to exercise power to deter armed uprisings.[126] Simultaneously, given the threats of the Libyan violence to the population, the UN Security Council's authorisation of the use of military force for humanitarian purposes should be valid. The crimes committed in the Libyan case were considered to be triggers for the implementation of the R2P principle since they were seen as amounting to crimes against humanity.[127] Hence, the practice of the UN Security Council in Libya reflected an example of implementing the R2P principle to protect the population from serious violations of human rights.

In brief, after the UN Security Council referred to the R2P principle in Resolution 1973, the principle had somewhat attracted a sharp change of recognition as an accepted and effective means to avert atrocity crimes from taking place in the future. The military implementation of the no-fly zones by NATO allies was chiefly a successful application of the R2P principle; however, it also led to a controversy especially after the accusations that NATO bypassed the restrictions contained in Resolution 1973.[128]

The fact that it was NATO as a 'policeman of the UN', neither the LAS nor the African Union as regional organisations, that intervened in Libya might make the operation less successful as it did not implement the final pillar of the R2P principle, the responsibility to rebuild. During the Arab spring – which seems to be in its second term with what is looming in Mauritania, Algeria, Sudan and Egypt – the role of the League was and is still barely noticed. The absence of a fully active role of the LAS in Libya in 2011 and the 2003 unsuccessful

[125] Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29:3 Leiden Journal of International Law 743, 756-758; Ronald Bruce St John, *Libya: From colony to revolution* (2ed, Oneworld Publications, Oxford 2012) 43-52; Mikael Eriksson, 'A fratricidal Libya: Making sense of a conflict complex' (2016) 27:5 Small Wars & Insurgencies 817, 820-822

[126] Ramesh Thakur, 'R2P after Libya and Syria: Engaging emerging powers' (2013) 36:2 The Washington Quarterly 61, 71; Geir Ulfstein and Hege Føsund Christiansen, 'The legality of the NATO bombing in Libya' (2013) 62:1 International & Comparative Law Quarterly 159, 167

[127] UNSC Res. 1973 (17 March 2011) U.N. DOC. S/RES/1973; Leila Nadya Sadat, 'Crimes against humanity in the modern age' (2013) 107:2 American Journal of International Law 334, 357

[128] Breau (n 16) 229-235

initiative in Iraq and currently in Yemen seem to be inhibitors for the regional organisation to play its role as a representative of the region to implement the R2P principle in the future.[129]

4.3.2.5 The Gambia 2017

The Gambian crisis started after the presidential elections on 1 December 2016, and ended on 21 January 2017 with the outgoing president Yahya Jammeh being forced to step down in favour of his elected successor Adama Barrow.[130] The long-serving incumbent Jammeh initially accepted the victory of Barrow; however, eight days later, he refused the election results and called for annulling and appealed to the Supreme Court.[131] On 19 January 2017, a coalition of military forces from Nigeria, Senegal and Ghana intervened in the Gambia to constrain Jammeh to resign from power as delegations by ECOWAS, a regional organisation, had failed to convince him to step down. Later in the same month, Jammeh abdicated his presidential duties in favour of the elected president and left the country to exile in Equatorial Guinea.[132]

As regional organisations, the African Union and the ECOWAS worked together under Article 4(h) of the Act of African Union to prevent atrocity crimes in the Gambia. The Gambia was a country on the verge of slipping into a situation of extreme chaos that could have dangerous consequences for the country itself and the region.[133] Article 4(h) confirms "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[134]

[129] Evans (n 137) 513; Thakur (n 102) 223-231; Breau (n 16) 255-256

[130] UNSC Presidential Statement 19 (2016) U.N. DOC. S/PRST/2016/19; Christof Hartmann, 'ECOWAS and the Restoration of Democracy in The Gambia' (2017) 52:1 Africa Spectrum 85, 86-87; David Perfect, 'The Gambian 2016 Presidential Election and its Aftermath' (2017) 106:3 The Round Table 323, 326-330; Elkanah Oluwapelumi Babatunde, 'ECOWAS Intervention in Gambia: A Case Study of International Law on the Use of Force' (2017) 6:2 UCL Journal of Law and Jurisprudence 46, 46-55; Mohamed Helal, 'Crisis in The Gambia: How Africa is Rewriting Jus ad Bellum' (*OpinioJuris*, 24 January 2017) <http://opiniojuris.org/2017/01/24/crisis-in-the-gambia-how-africa-is-rewriting-jus-ad-bellum/> accessed 25 January 2019; What's in Blue?, 'Resolution on The Gambia' (*What's in Blue?*, 19 January 2017) <https://www.whatsinblue.org/2017/01/resolution-on-the-gambia.php> accessed 25 January 2019; Aidan Hehir, 'The questionable legality of military intervention in The Gambia' (*The Conversation*, 19 January 2017) <https://theconversation.com/the-questionable-legality-of-military-intervention-in-the-gambia-71595> accessed 25 January 2019

[131] Hartmann (n 133) 86-87; Perfect (n 133) 326-330

[132] Niklas Hultin and Others 'Autocracy, migration, and The Gambia's 'unprecedented' 2016 election' (2017) 116:463 African Affairs 321, 322-323

[133] United Nations Office for West Africa and the SAHEL, 'The Resolution of the Crisis in the Gambia is a Success of the Regional Preventive Diplomacy' (*UNOWAS*, 26 January 2017) <https://unowas.unmissions.org/resolution-crisis-gambia-success-regional-preventive-diplomacy> accessed 25 January 2019; Omorogbe (n 17) 149; Auriane Botte, 'Redefining the responsibility to protect concept as a response to international crimes' (2015) 19:8 The International Journal of Human Rights 1029, 1031-1033; Constitutive Act of African Union (adopted 7 November 2000, entered into force 26 May 2001)

[134] Constitutive Act of African Union (adopted 7 November 2000, entered into force 26 May 2001), Art. 4(h)

The Article limits the causes of intervention to war crimes, genocide and crimes against humanity and it is based on the recognition that these crimes are generally considered as violations of international law. Similarly, these crimes are rendered as atrocity crimes in the Rome Statute (1998) of the ICC, the Statute of ICTY and the Statute of ICTR.[135]

The regional organisations took a further step when they referred the Gambian crisis to the UN Security Council and the Council passed Resolution 2337 addressing supporting the rule of the regional organisations. Under this resolution, troops of some Members of ECOWAS – such as Nigeria and Senegal - were deployed in the capital, Banjul, as well as in Serekunda and succeeded to prevent atrocity crimes in the country.[136]

During discussions on the draft resolution, Russia and Egypt were not comfortable with the language which repeated the UN Security Council's full support for ECOWAS' commitment "to take all necessary measures"[137] to guarantee the will of the Gambians. The language of the draft based on the communique of the ECOWAS Authority on the Summit held on 17 December 2016. The Russian and Egyptian concerns stemmed from use the phrase 'all necessary measures.' Therefore, Senegal had to modify the language of the resolution to ensure that the support of power transfer in the Gambia is to be done "by political means first."[138]

The UN Security Council refer to the R2P principle in the crisis of Gambia.[139] The role played by the African Union and ECOWAS as regional organisations, along with the United Nation, prevented a looming civil war and protected the lives of hundreds of thousands, which may be considered as an achievement of the R2P principle.[140] Based on the 2012 report of the UN Secretary-General concerning timely and decisive response and the R2P implementation, preventing atrocity crimes in the Gambia could be considered a type of implementing the R2P principle.[141] There seems to be a similarity between the Gambian and the Libyan cases in which

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[135] Tiyanjana Maluwa, 'Fast-tracking African unity or making haste slowly? A note on the amendments to the constitutive act of the African Union' (2004) 51:2 Netherlands International Law Review 195, 217

[136] UNSC Res. 2337 (19 January 2017) U.N. DOC. S/RES/2337; Ben Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85:852 International Review of the Red Cross 807, 812-815; Gabriel Amvane 'Intervention pursuant to Art. 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorisation' (2015) 15 African Human Rights Law Journal 282, 282-298

[137] UNSC Res. 2337 (19 January 2017) U.N. DOC. S/RES/2337

[138] UNSC Presidential Statement 19 (2016) U.N. DOC. S/PRST/2016/19; What's in Blue?, 'Resolution on The Gambia' (*What's in Blue?*, 19 January 2017) <https://www.whatsinblue.org/2017/01/resolution-on-the-gambia.php> accessed 25 January 2019; Babatunde (n 133) 59-60

[139] UNSC Res. 2337 (19 January 2017) U.N. DOC. S/RES/2337; UNSC Presidential Statement 19 (2016) U.N. DOC. S/PRST/2016/19; UNSC Presidential Statement 2 (2017) U.N. DOC. S/PRST/2017/2

[140] UNGA 'the Responsibility to protect: timely and decisive response' (5 July 2012) 66th Session (2012) U.N. DOC. A/66/874-S/2012/578

[141] UNGA 'Implementing the Responsibility to Protect: Accountability for Prevention' (10 August 2017) 71st Session (2017) U.N. DOC. A/71/1016 –S/2017/556; United Nations Office for West Africa and the Sahel, 'The Resolution of the Crisis in the Gambia is A Success of the Regional Preventive Diplomacy' (*UNOWAS*, 26 January 2017) <https://unowas.unmissions.org/resolution-crisis-gambia-success-regional-preventive-diplomacy> accessed 25 January 2019;

the intervener used the language of preventing an expected massacre. However, the intervention in Libya was criticised by the Russian and Chinese representatives to the UN and by some scholars, whereas the intervention in Gambia has not received much criticism.

Mohamed Ibn Chambas, the Special Representative of the UN Secretary-General and Head of the UN Office for West Africa and the Sahel (UNOWAS) stated that

> "it is the success of preventive diplomacy that has been achieved through the mobilisation of regional actors in perfect coordination with the international community and in strict compliance with the Constitution, the laws of the Gambia and the principles of international law."[142]

In the Gambian scenario, resolving the crisis was a victory for the international community which demonstrated a commendable unity in the peaceful and diplomatic resolution of the crisis.[143] Resolving the Gambian crisis was also a victory for the regional preventive mediation since ECOWAS and the African Union, as regional organisations, succeeded in complying with their responsibilities to protect the Gambian population from hostilities.

The cooperation between the UN and relevant regional organisations in the Gambian case was a successful example of preventing the country from descending into a civil war in which war crimes and crimes against humanity would have been committed. What can be learnt from the Gambian example is that the cooperation between regional organisations and the UN can prevent atrocity crimes if this cooperation takes place at an early stage and in a timely and decisive manner.[144] However, practice does not show continuity regarding the cooperation between regional organisations and the UN since it is influenced by economic and political factors. For instance, what can be done in Europe by NATO, supported by the UN Security Council, cannot be done by the League of the Arab States (LAS) in the Arab countries.[145] The practice of the UN in the examined crises demonstrates that the attempt to apply the R2P

Alex J. Bellamy, 'Ending Atrocity Crimes: The False Promise of Fatalism' (2018) 32:3 Ethics & International Affairs 329, 330-337

[142] United Nations Office for West Africa and the Sahel, 'The Resolution of the Crisis in the Gambia is A Success of the Regional Preventive Diplomacy' (*UNOWAS*, 26 January 2017) <https://unowas.unmissions.org/resolution-crisis-gambia-success-regional-preventive-diplomacy> accessed 25 January 2019

[143] Ibid

[144] UNGA 'the Responsibility to protect: timely and decisive response' (5 July 2012) 66th Session (2012) U.N. DOC. A/66/874-S/2012/578; United Nations Office for West Africa and the Sahel, 'The Resolution of the Crisis in the Gambia is A Success of the Regional Preventive Diplomacy' (*UNOWAS*, 26 January 2017); UNGA 'Implementing the Responsibility to Protect: Accountability for Prevention' (10 August 2017) 71st Session (2017) U.N. DOC. A/71/1016 –S/2017/556; Babatunde (n 133) 59-60

[145] Jonathan I. Charney, 'Anticipatory humanitarian intervention in Kosovo' (1999) 93:4 American Journal of International Law 1231, 1237; Alex J. Bellamy, 'The Responsibility to Protect—Five Years On' (2010) 24:2 Ethics & International Affairs 143, 148-152; Breau (n 16) 255-267

principle has failed many times although the crises met the triggers for implementing the R2P principle confirmed in the World Summit 2005.

4.4 Authorising a Resolution after an Intervention by a Regional Organisation

Previous practice of the UN has reflected that the UN Security Council may sometimes authorise humanitarian interventions when regional organisations have already resorted to the use of force before receiving an authorisation from the UN Security Council. The best example of unilateral interventions when a regional organisation intervened and stopped atrocity crimes are the interventions in Bangladesh in 1971 and Kosovo in 1999.[146]

4.4.1 Bangladesh 1971

The Indian intervention in Bangladesh in 1971 is an example of unilateral intervention before getting authorisation from the UN Security Council. In this incident, the UN Security Council left the decision to India whether to intervene in Pakistan or not.[147] India alleged that the Pakistani conflict affected their territory and they had to protect their borders, specifically, after several hundreds of thousands of Bangladeshis crossed the Indian-Pakistani borders.[148]

The UN Security Council's decision about Bangladesh seems as the conflict in Pakistan threatened the lives of Bangladeshis in the region and affected the border area between India and Pakistan. Similarly, the International Commission of Jurists decided that the Indian intervention in Pakistan was substantiated under the doctrine of humanitarian intervention since the Indian action was limited in scope and did not lead to the occupation of the territory. It seems that the intervention was mainly motivated by humanitarian purposes.[149] Significantly, it seems that the Indian engagement was not classified by the UN Security Council to be a violation of Article 2(4) of the UN Charter 1945, as it did not affect the political independence of the territorial integrity of Bangladesh.[150]

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[146] Klinton W. Alexander, 'NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of SC Approval' (2000) 22:3 Houston Journal of International Law 403, 431-435
[147] Byron F. Burmester, 'Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights' (1994) Utah L. Rev. 269, 272; Thakur (n 9) 223-235
[148] Bumester (n 150) 288
[149] Ibid, 286-287; Idean Salehyan, 'externalities of civil strife: Refugees as a source of international conflict' (2008) 52:4 American Journal of Political Science 787, 791-792
[150] Bumester (n 150) 288-289

The UN Security Council did not consider the Indian intervention in Bangladesh in 1971 an illegal action because the Council itself had failed to halt the conflict in the region.[151] The lesson of Bangladesh can set an example for the LAS to intervene in a similar case – such as the Syrian case – as the UN Security Council fails to act. An intervention such as this will be through a broad interpretation of Article 2(4) of the UN Charter and should not affect the territorial integrity or political independence of the state under crisis.

4.4.2 Kosovo 1999

In 1999, the NATO's humanitarian intervention in Kosovo, which took place without the UN Security Council authorisation, could also inspire regional organisations to intervene in crises where using veto blocked passing a resolution.[152] The intervention preceded the authorisation since the US and its allies were confident that they would receive the authorisation.[153] By analogy, the LAS could follow NATO's intervention in Kosovo, on the assumption that the action would be authorised by the UN Security Council.[154]

Many factors can encourage the LAS to resort to further action and stop the atrocity crimes in Syria. For instance, the crimes committed during the Syrian crisis are considered by the UN Security Council war crimes and crimes against humanity.[155] Besides, Syria has faced a real humanitarian tragedy with the number of displaced people and refugees exceeding half of the Syrian population since March 2011. Just in 2013, the number of the Syrian refugees crossing the Syrian borders to the neighbouring countries was amounted to 6,000 every single day.[156]

4.5 Developing Cases

This section of the chapter examines developing and emerging cases; Venezuela, Zimbabwe Myanmar and Palestine. Firstly, a brief overview of the cases in question will be provided.

[151] Ibid, 286-287
[152] Alexander (n 149); Evans (n 127) 513-515
[153] Ibid, 445; Bellamy (n 25) 552-553
[154] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118
[155] Ibid
[156] Sidika Tekeli-Yesil, 'Determinants of Mental Disorders in Syrian Refugees in Turkey Versus Internally Displaced Persons in Syria' (2018) 108:7 American journal of public health 938, 939; Ziyad Ben Taleb and Others, 'Syria: health in a country undergoing tragic transition' (2015) 60:1 International journal of public health 63, 63-65

Secondly, the specific atrocity crimes that have or may have been committed in the respective cases will be identified. Finally, the measures that were taken in response to the specific situation in each case will be evaluated and possible solutions will be recommended.

4.5.1 Zimbabwe

The question of whether the R2P principle should be applied in Zimbabwe was previously raised for a variety of reasons.[157] For the purposes of this dissertation, the concentration will be on the situation in Zimbabwe starting from the initial protests against the former President Robert Mugabe. The protests were sparked by Mugabe's dismissal of Zimbabwe's Vice President, Emmerson Mnangagwa, to secure the position for his wife, Grace Mugabe.[158] Zimbabwe's Defence Forces swiftly responded by launching Operation Restore Legacy on 13 November 2017, only five days following the Vice President's dismissal.[159]

Operation Restore Legacy aimed to bring criminals surrounding President Mugabe to justice in order to halt social and economic suffering in Zimbabwe. In a report by Amnesty International, it was illustrated that the Zimbabwean government engaged in widespread human rights violations and abuses.[160] In particular, it was found that the freedom of association and assembly, freedom of expression, arbitrary arrests and detentions, and forced evictions had all taken place. Moreover, it is worth noting that the violations in question took place prior to and in succession to the removal of Mugabe.[161]

Fortunately, the UN Human Rights Council succeeded in securing an invitation to dispatch special rapporteurs to independently assess the human rights violations and abuses in Zimbabwe.[162] However, the rapporteurs were sent exclusively to assess breaches against the freedom of assembly rather than all violations and abuses which have taken place.[163]

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[157] Jeremy Sarkin, 'The role of the United Nations, the African Union and Africa's sub-regional organisations in dealing with Africa's human rights problems: connecting humanitarian intervention and the responsibility to protect' (2009) 53:1 Journal of African Law 1, 7-15

[158] Ben Chigara, 'Operation Restore Legacy (2017) renders Southern African Development Community (SADC) constitutionalism suspect in the coup d'état that was not a coup' (2018) 20:1 Oregon Review of International Law 1, 2-4

[159] Ibid

[160] Amnesty International, 'Amnesty International Report 2017/2018 THE STATE OF THE WORLD'S HUMAN RIGHTS' (Annual Report 2017/2018, Amnesty International Ltd 2018) 405-408

[161] Chigara (n 161) 2-7

[162] United Nations Human Rights, 'View Country visits of Special Procedures of the Human Rights Council since 1998' (*United Nations Human Rights*, 2018) <https://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewCountryVisits.aspx?Lang=en&country=ZWE> accessed 28 September 2018; Veneranda Langa, 'UN to probe Zim rights abuses' (*News Day*, 7 March 2019) <https://www.newsday.co.zw/2019/03/un-to-probe-zim-rights-abuses/> accessed 2 April 2019

[163] Ibid

Nevertheless, responses from the UN and the international community in general are limited and it remains unclear at this point whether the Zimbabwean government is able to protect its citizens. This raises the question of whether the R2P principle may be applied in light of the current situation in Zimbabwe. Thus, although a clear answer may not be provided as of the moment, it is certainly worth monitoring the situation in Zimbabwe in order to prevent potential turmoil, and the R2P principle may be the key weapon in the armoury of the international community to ensure that goal is met.

4.5.2 Myanmar

4.5.2.1 Background of the Crisis

The Rohingya are one of the many minority ethnic groups in Myanmar (formerly known as Burma). They make up most of the Muslim minority in the country and they mainly reside in the Rakhine state. The UN Secretary-General Antonio Guterres described the Rohingyas as "one of, if not the, most discriminated people in the world". The suffering of the Rohingya has been ongoing for decades in Myanmar where they were exposed to multiple forms of ethnic and religious discrimination. The civilians in the Rakhine state are not recognised by the state as citizens; rather they are seen as illegal immigrants from Bangladesh and they are not even included in the 2016 census.[164]

In 2016, the Rakhine State witnessed some acts of killing Rohingyas and burning their villages. The crisis peaked in August 2017 when 'clearance operations' by Myanmar troops began in Rakhine State and, more than four-hundred villages were burned down by the Myanmar army. During the *clearance operations*, thousands of civilians were killed and more were injured. People were killed or injured by gunshot, targeted or indiscriminate, often while fleeing the area. Women and girls were raped and killed and houses were set on fire.[165]

Additionally, according to the UN Refugee Agency over 725,000 people fled the violence, leading to the increase in the number of Rohingya refugees in the neighbouring country of Bangladesh to approximately reach one million.[166] Similarly, the UN High

[164] *The Prosecutor v. Situation In the People's Republic Of Bangladesh/Republic of The Union Of Myanmar*, Case No. ICC-01/19, Pre-Trial Chamber III (20 January 2020)

[165] United Nations Human Rights Council, 'Report of the independent international fact-finding mission on Myanmar' (*United Nations Human Rights Council*, 12 September 2018) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf> accessed 10 December 2019

[166] Morten B. Pedersen, 'The Roots of the Rohingya Refugee Crisis' (2018) 27 Human Rights. Defender 16, 16-17; Rebecca Barber, 'The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study' (2009) 14:1 Journal of Conflict and Security Law 3, 2-5; Gareth Evans, 'The Responsibility to Protect in Environmental Emergencies' (2009) 103

Commissioner for Refugees (UNHCR) stated that there are about one million refugees in the largest refugee settlement in the world, Kutupalong camp, and in Nayapara camp alone.[167]

There is a serious threat of genocidal actions taking place against Rohingyas in the Rakhine province as it is believed that there is still more than half a million Rohingyas living in the province. In September 2017, the UNHCR investigators blamed the government of Myanmar for their lack of responsibility and accountability as Myanmar failed to investigate and criminalise genocides. Myanmar has long denied genocide and asserts that it is conducting its own investigations into the events of 2017. The Independent Commission of Enquiry established on 30 July 2018 by Myanmar government stated that members of the security forces may have committed war crimes and violations of domestic law. The Independent Commission still claims that there is no evidence of genocides.

4.5.2.2 International Respond

On 22 July 2016, the UN Secretary-General highlighted in his report, "Mobilising collective action: the next decade of the responsibility to protect" the role of the R2P to protect the civilians in Rakhine State. In the report, the Secretary-General points out to the profound divisions and disunity in the UN Security Council. The Secretary-General stressed that one significant step to implement the R2P principle when atrocity crimes are committed can be to agree to restrain from using the veto by the permanent members of the UN Security Council.[168] Overall, the Secretary-General pledged that "the United Nations must redouble its own efforts to mainstream the responsibility to protect". He stressed that if the UN Member States do not uphold and defend this principle, then the achievements realised since 2005 of the R2P will be seriously affected.[169] However, the report does not offer a practical solution for preventing conflicts at an early stage.

Proceedings of American Society of International Law Annual Meeting of the American Society of International Law 27, 28-33; John Langmore and Ashley McLachlan-Bent, 'A Crime against Humanity? Implications and Prospects of the Responsibility to Protect in the Wake of Cyclone Nargis' (2011) 3 Global Responsibility to Protect 37, 38-41; see generally, Damian Kingsbury, 'Political Transition in Myanmar: Prospects and Problems' (2014) 6:3 Asian Politics & Policy 351

[167] Alvin K. Tay *at el,* UNHCR, the UN Refugee Agency, *Culture, context and mental health of Rohingya refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees*. Geneva, Switzerland. Retrieved from https://www.unhcr.org/5bbc6f014.pdf

[168] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999–S/2016/620, at para. 14

[169] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999–S/2016/620, at para. 18

On 10th August of 2017, another UN report entitled "implementing the responsibility to protect: accountability for prevention"[170] on the topic of R2P was published. The report identifies the gap between stated commitment to the R2P principle and the daily reality faced by populations exposed to the risk of atrocity crimes.[171] It discusses that the UN has confirmed that prevention of atrocity crimes at an early stage of a conflict is the core idea of implementing the R2P principle. However, the UN continues to fail to prevent atrocities in many armed conflicts.

The report stated that if peaceful means are "inadequate and national authorities manifestly fail to protect their populations," the UN member States have confirmed that they are ready and prepared to take collective action, in a timely and decisive manner.[172] Similarly, the World Summit 2005 clearly states that R2P "entails the prevention of such crimes, including their incitement, through appropriate and necessary means".[173] Due to this failure, it seems that the statement in the Secretary-General Report (2017) points out that at this sensitive period, the UN Security Council should take more deliberate steps to implement R2P.

In March 2017, the UN Human Rights Council established the Independent International Fact-Finding Mission (IIFFM) for Myanmar. On 27th August 2018, the IIFFM released its final report. The IIFFM report revealed that the crimes committed by Myanmar's security forces against the Rohingya amounted to the level of prohibited acts by the Genocide Convention.[174] Additionally, the report pointed out to evidence of genocidal intent, considering government policies as discriminatory policies intended to change the demographic composition of the country. The report also considers the government policies as an intentional plan to demolish the Rohingya communities. Moreover, the report described the authorities' action as not only unable to meet its main "responsibility to protect the civilian population" but also involves in committing atrocity crimes against the civilians in Rakhine state.[175]

On 14 November 2019, the Pre-Trial Chamber III of the ICC authorised the Chief Prosecutor to investigate into crimes against humanity which could be committed against the Rohingya people. The Prosecutor stated that "persecution on grounds of ethnicity and/or religion" resulted in forced deportation across the Myanmar-Bangladesh border. An outcome

[170] UNGA 'Implementing the Responsibility to Protect: Accountability for Prevention' (10 August 2017) 71st Session (2017) U.N. DOC. A/71/1016 –S/2017/556
[171] UNGA 'Implementing the Responsibility to Protect: Accountability for Prevention' (10 August 2017) 71st Session (2017) U.N. DOC. A/71/1016 –S/2017/556, at para. 1
[172] UNGA RES. 60/1 (16 September 2005) UN Doc A/RES/60/1
[173] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 30
[174] Pedersen (n 172) 2-8; Global Centre for the Responsibility to Protect, 'R2P Monitor applies the Responsibility to Protect lens to the following situations of concern:' (*Global R2P*, 15 May 2019) 45, 3-5
[175] Bellamy (186) 190; Hannah Duffus and Others, 'R2P Monitor' (Issue 41, Bimonthly Bulletin, 15 September 2018) 3

to the Pre-Trial Chamber III of the ICC, the UN General Assembly adopted Resolution 246 on 27 December 2019 which criticises the "Situation of human rights of Rohingya Muslims and other minorities in Myanmar." The resolution also called the continued attention of the Security Council to the serious situation in Myanmar.[176]

The failure of UN to hold those responsible for the atrocity crimes committed against the civilians to account encouraged the Myanmar army to increase its campaign against the vulnerable civilians in the Shan and Kachin states.[177] From the UN reports and resolutions, it seems that the Myanmar's government failed to uphold its main obligations to protect its civilians, the Rohingya, and it has also committed atrocity crimes against them. Establishing an international tribunal can limit committing atrocity crimes against the civilians in the Rakhine State and may also contribute to returning the refugees from Bangladesh.

4.5.2.3 Necessary Action

The UN should adopt the FFM's recommendations and guarantee that people responsible for atrocity crimes do not run away from justice. States that are parties to the Genocide Convention should deeply support the case brought by the Gambia against Myanmar through legal interventions and public statements at the ICJ.

Another procedure that could be followed is that the UN Security Council should immediately refer the situation in Myanmar to the ICC. Additionally, access for humanitarian organisations and UN agencies should be granted to all conflict areas inside Rakhine state and other territories in the country. Myanmar's government must repeal or amend all laws that systematically discriminate against the Rohingya people and other minorities in the country. It should find conditions for the voluntary, dignified and safe repatriation of the Rohingya refugees from Bangladesh.

4.5.3 The Occupied Palestine

4.5.3.1 Background of Seventy-Year Conflict

[176] United Nations Human Rights Council, 'Situation of human rights of Rohingya Muslim minority and other minorities in Myanmar' (*Report of the United Nations High Commissioner for Human Rights*, 27 January 2020)
[177] Donald Steinberg, 'Responsibility to Protect: Coming of Age?' (2009) 1:4 Global Responsibility to Protect 432, 434

In 1917 during the First World War, the British government issued the Balfour Declaration which announces support for the establishment of a national home for the Jewish people on the Palestinian land. About three decades later on 14 May 1948, Israel declared its declaration of Independence and semantically terminated the British Mandate on that day. Swiftly, the USA and the previous Soviet Union (Russia) recognised that declaration.[178]

A war was launched (1947-1949 Palestine war) between Palestine and Israel and during that war, the number of Palestinians fled or expelled exceeded 700,000 and hundreds of villages and towns were depopulated and destroyed. Since that time till the present, the tensions in Palestine have been of great concern to advocates of international humanitarian law and international human rights.[179] Clearly, the Israeli troops excessively excessed the used force against civilians and it breached the freedom of association, assembly, expression and movement, arbitrary arrests and detentions, torture and other ill-treatment were committed.[180]

4.5.3.2 Developed Conflict

The current armed conflict in Palestine is between Israel, on the one hand, and Hamas and other armed groups on the other hand. One of the most dangerous wars was the one in July 2014 and it broke out after the Israeli Defense Forces (IDF) kidnapped, tortured and burned Muhammad Abu Khudair, sixteen-year old, in Jerusalem on 2 July 2008.[181] The war lasted for seven weeks and it led to the death of over 2300 Palestinians among them a hundred children and women and more than eleven thousand were injured. The war also led to displacing half a million of

[178] Walid Khalidi, 'Palestine and Palestine Studies: One Century after World War I and the Balfour Declaration (2014) 44:1 Journal of Palestine Studies 137;
Zena Tahan, 'More than 100 years since Britain's controversial pledge, here is everything you need to know about it' (2 November 2018) <https://www.aljazeera.com/indepth/features/2017/10/100-years-balfour-declaration-explained-171028055805843.html > accessed 11 January 2020

[179] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, at para. 163; Amnesty International, 'Amnesty International Report 2017/2018 THE STATE OF THE WORLD'S HUMAN RIGHTS' (Annual Report 2017/2018, Amnesty International Ltd 2018) 207-211; Christine Gray, 'The ICJ advisory opinion on legal consequences of the construction of a wall in the occupied Palestinian territory' (2004) 63:3 Cambridge Law Journal 527, 527-532; Alan Dershowitz, 'The case for Israel' (2003) 25 Dublin University Law Journal 44, 44-55; Malcolm D Evans and Susan C Breau, 'Legal consequences of the construction of a wall in the occupied Palestinian territory' (2005) 54:4 International & Comparative Law Quarterly 1003, 1003-1013; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727, at paras 69-71

[180] Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc. A/HRC/12/48; Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 425-26; Ibid Alan

[181] Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 425-26

Palestinian civilians in Gaza Strip. Israel has also announced the death of more than sixty Israeli soldiers and four Israeli civilians.[182]

Israel does not accept the 1967 borders and it continues in destroying the Palestinians' houses and simultaneously builds more settlements for the Israelis. Negotiations between the representatives of the conflict parties, Palestine and Israel, concerning a lasting peace agreement were suspended six years ago. Expansive greed of Israel led to repeated armed conflicts between Israel and Palestinian armed groups; thus, an enduring threat to the civilians in the occupied Palestinian lasts.

Article 49 of the Fourth Geneva Convention 1949 prohibits an occupying power from transferring parts of its civilian population into an occupied state or territory.

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[183]

During the seventy-year conflict, Israel has always encouraged the Jewish people to move to Palestine and, simultaneously, it forced millions of the Palestinians to leave their land. The United Nations Relief and Works Agency for Palestine Refugees (UNRWA) confirmed in its 2019 report that the number of Palestinian refugees, only in the Gaza Strip, West Bank, Jordan, Lebanon and Syria is about six million, while the number could reach thirteen million all over the world.[184]

Israeli continues expanding settlements in the East Jerusalem and West Bank. The UN Office for the Coordination of Humanitarian Affairs highlighted that several Palestinian-owned quarters and villages were seized or demolished on a daily basis by the Israeli authorities in 2018. In the same year, the Office confirmed that about five hundred structures have been demolished so far and more than half of the demolitions have occurred in East Jerusalem.

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[182] UNRWA. (2016b). Medium Term Strategy 2016-2021. Retrieved from <https://www.unrwa.org/sites/default/files/content/resources/mts_2016_2021.pdf> accessed on 6 January 2020

[183] Geneva Convention relative to the treatment of prisoners of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art 49

[184] UNRWA. (2016b). Medium Term Strategy 2016-2021. Retrieved from <https://www.unrwa.org/sites/default/files/content/resources/mts_2016_2021.pdf> accessed on 6 January 2020; Victoria Mason, 'The liminality of Palestinian refugees: betwixt and between global politics and international law' (2019) Journal of Sociology 1

Demolishing and transferring people from their land is a war crime and crime against humanity under international law.[185]

The systematic and widespread nature of human rights violations during the conflict in Palestine is the core of war crimes and crimes against humanity.[186] Article 8 of the Rome Statute (1998) stipulated that transferring population directly or indirectly "by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory," is a war crime. Similarly, many international reports confirm that Israel has committed war crimes. For instance, Amnesty International's report revealed that Israel has specifically been engaged in war crimes against the Palestinian population.[187]

Similarly, the UN confirmed that over 1.8 million people in Occupied Palestine are food insecure and among this number are thousands of families in the Gaza Strip. Since 2004, Israel has military blockaded Gaza by force and this action is considered a collective punishment to the 1.8 population of Gaza Strip. Besieging civilians violates international law and such an action is considered a crime of aggression under the Rome Statute (1998).[188]

Since May 2018, demonstrations along the border between the Gaza Strip and the west bank during a series of mass demonstrations (marches of return) were initially organised in the period leading up to the seventieth anniversary of the founding of Israel on 14 May and the Palestinian *"Nakba"* on 15 May. Hundreds of Palestinians have been killed in the marches of return – including children since March 2018. Additionally, dozens of thousand civilians have been wounded by the IDF in the Gaza Strip.[189]

On 28 February 2019, a report by the Human Rights Council-mandated Commission of Inquiry on the Gaza protests stressed that Israeli forces used excessive and disproportionate force, targeted medical personnel and journalists. It also used live ammunition against unarmed protesters. The Commission pointed out that these violations of international humanitarian law can amount to war crimes and crimes against humanity. Additionally, it called for Israel to directly investigate every casualty in the protest in line with international standards.

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[185] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; art. 7(1)(d) & Art 8(2)(b)(viii)

[186] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; art. 8(2)(b)(viii); UNGA Res. 66/290 (25 October 2012) U.N. DOC. A/RES/66/290, at para. 3

[187] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; art. 8(2)(b)(viii); Amnesty International, 'Amnesty International Report 2017/2018 THE STATE OF THE WORLD'S HUMAN RIGHTS' (Annual Report 2017/2018, Amnesty International Ltd 2018) 211; The central concern of Balfour Declarations "was to lend support to the "establishment in Palestine of a national home for the Jewish people."

[188] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; art 8(2)(c)

[189] Global Centre for the Responsibility to Protect, 'R2P Monitor applies the Responsibility to Protect lens to the following situations of concern:' (*Global R2P*, 15 May 2019) 45, 15-16

4.6 Cooperation between the International Criminal Court and The African Union

On 9th January 2012, the AU stated that it 'shall oppose any ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa'.[190] The AU statement resulted from UN Security Council referrals in Sudan and Libya as well as the Prosecutor's investigations in Kenya.

ICC includes issued warrants for arrest and surrender of the former president Omar al-Basbir for committing war crimes and crimes against humanity in Darfur in 2009[191] and genocide in Darfur in 2010.[192] The AU issued many of decisions calling on its members not to adhere to the ICC request for the arrest and surrender of Al Bashir.[193] It seems that the relationship between the AU and the ICC has been changed from cooperation to opposition. In part, this shift was motivated by the issuance of arrest warrants for President Al Bashir. This precedent revealed that other AU Heads of States, non-parties to the Rome Statute and senior serving African State officials, could be subjected to a similar decision by the ICC in the future.

The AU members argue that Article 98(1) of the Rome Statute (1998) provides protection to the immunity of the officials of States which are not members of the Rome Statute (1998).[194] Nevertheless, the ICC Pre-Trial Chamber I stated that it had the sole authority to decide if immunities are applicable in a specific case or not.[195] Therefore, the AU members are "not entitled to rely on Article 98(1) of the Statute to justify refusing to comply with the cooperation requests.'[196] The Chamber concluded that 'customary international law creates an

[190] African Union, Press Release No. 002/2012, < http://www.iccnow.org/documents/PR-_002-_ICC_English_2012.pdf> accessed 02 January 2020
[191] Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33:3 Nordic Journal of Human Rights 243, 243-45
[192] Ibid; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009)
[193] Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 386-387
[194] African Union, Press Release No. 002/2012, < http://www.iccnow.org/documents/PR-_002-_ICC_English_2012.pdf> accessed 02 January 2020
[195] Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33:3 Nordic Journal of Human Rights 243, 254-257; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009) para 41
[196] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009) para 37

exception to Head of State immunity when international courts seek a Head of State's arrest for the commission in international crimes.'[197]

In response to this decision, the AU Commission expressed its deep regret and noted that the ICC Pre-Trial Chamber I decision has the effect of calling to convert customary international law concerning immunity *ratione personae*. The AC Commission added that this decision renders Article 98 of the Rome Statute non-operational, redundant and meaningless.[198]

Since 2009, AU has made numerous decisions calling on AU Members not to cease cooperation with ICC. This has occurred in the context of cases regarding arrest warrants issued by the ICC emerging out of the UN Security Council referrals in AU States not members to the Rome Statute especially the arrest warrants for and Colonel Gaddafi, the former president of Libya and Al Bashir, the former president of Sudan.[199]

4.6.1 ICC and Surrendering Omar al-Bashir

In September 2000, Sudan signed the Rome Statute, but it did not deposit its ratification and in August 2008, the Sudanese government indicated to the UN Secretary-General that it no longer intends to become a party to the Rome Statute. Therefore, no legal obligation arises Commission of Inquiry stated that war from the Sudanese signature in September 2000.[200] In January 2005, the International Commission of Inquiry stated that war crimes and crimes against humanity had been committed in Darfur. The Commission urged the UN Security Council to immediately refer the state of Darfur to the ICC.[201] On 1 July 2002, the UN Security Council referred the situation in Darfur to the ICC and resolution 1593 was passed on 31 March 2005 under Article 13(b) of the Rome Statute.[202] One year later, the Prosecutor of the ICC opened an investigation and in 2008 issued the Sudanese President, Omar al-Bashir, with a warrant of arrest.[203]

The Sudanese regime of the former-President Omar al-Bashir was charged with war crimes, crimes against humanity and genocide by the ICC.[204] In June 2015, al-Bashir travelled

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[197] *Ibid*

[198] *Ibid;* Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33:3 Nordic Journal of Human Rights 243, 254-257

[199] Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 388-389

[200] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

[201] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, (25 January 2005), paras. 563 and 569, <https://www.files.ethz.ch/isn/10492/doc_10522_290_en.pdf>.

[202] United Nation Security Council Resolution 1593, UN Doc, S/RES1593 (2005), at para. 1

[203] Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008, No. ICC-02/05 (12 September 2008) <https://www.icc-cpi.int/CourtRecords/CR2008_04752.PDF>

[204] Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)'

to South Africa to attend the 25th African Union Summit meeting and "the Southern Africa Litigation Centre (SALC) argued *inter alia* that, because South Africa was a state party to the Rome Statute (1998) establishing the ICC, it had an obligation to assist the ICC in its effort to prosecute the alleged offenses against a fugitive."[205] However, on 15 June 2015, South Africa ignored the North Gauteng High Court Order of 14 June 2015 and facilitated al-Bashir's travel back to Sudan.[206] It became clear that the African Union had developed unequivocal regional anti-ICC standards. Hence, the South African government privileged and followed the emergent rules of a regional African customary international law, rules which were not recognised by the North Gauteng High Court.[207]

The Rome Statute clearly states that Article 98(1) is not only applied to the member States of the Rome Statute but also to the diplomatic immunity of non-member States. Additionally, Article 27(2) of the Rome Statute states that parties of the Rome Statute waive any claim they may have to state or diplomatic immunity by agreeing that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

The ICC Pre-Trial Chamber I highlighted that 'acceptance of article 27(2) of the Statute implies a waiver of immunities for the purposes of Article 98(1) of the Statute concerning proceedings conducted by the Court.'[208] Therefore, the same position should apply to the immunity of non-party State official since there is a UN Security Council referral to the ICC.[209] Hence, the impact of such a referral is that a state referred to the ICC is bound by the Rome Statute including by Article 27. The customary international law is that immunity of either

(2015) 33:3 Nordic Journal of Human Rights 243, 243-45; Sarah MH Nouwen and Wouter G. Werner, 'Doing justice to the political: The international criminal court in Uganda and Sudan' (2010) 21:4 European Journal of International Law 941, 954-958; William A. Schabas, 'Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide' (2006) 27 Cardozo Law Review 1703, 1716-1722; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83; Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 387-389

[205] Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33:3 Nordic Journal of Human Rights 243, 244

[206] *Ibid*, 244-245

[207] *Ibid*; Walter Lotze, 'A Tale of Two Councils-The African Union, the United Nations and the Protection of Civilian in Côte d'Ivoire ' (2011) 3 Global Responsibility to Protect 365, 365-368; The Economist, 'Never Again, and Again: Can the World Stop Genocide?' (*The Economist*, 10 December 2018) < https://www.economist.com/international/2018/12/08/can-the-world-stop-genocide> accessed 19 November 2019

[208] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009) at para. 18

[209] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009) at para. 45; Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33:3 Nordic Journal of Human Rights 243, 253-355

sitting or former Heads of State cannot be recalled facing a prosecution by an international court.[210] However, it seems that this scenario is not followed for all cases by the ICC.

6.4.2 Palestine and ICC

In the case of the former Sudanese president Omar al-Bashair, it has been examined that immunity of Heads of non-member states to the ICC cannot be recalled facing an ICC prosecution. However, the first Prosecutor avoided situations outside Africa and it appears that 'he would be likely to step on the toes of permanent members of the UN Security Council, from Afghanistan to Gaza [Palestine] to Iraq to Colombia.'[211] He declared that he cannot investigate the US since the US is not a Party in the Rome Statute (1998).[212] Although the US is not a member of the Rome Statute, it became *a de facto* state party of the ICC by involving in the ICC's decisions.[213] The *double-standard* policy of the ICC could stem from the prosecutor's caution about the permanent members of the UN Security Council, in this context the US, as the US could block any Security Council resolution draft calling to prevent referring its national to the ICC.

In another scenario, the ICC avoided investigating situations where the US allies were involved in. The first Prosecutor escaped continuing investigations into the Palestinian situation by refusing to continue with a Palestine statement recognizing the exercise of jurisdiction by the ICC for 'acts committed on the territory of Palestine since 1 July 2OO2'.[214] These acts of avoiding involved crimes resulted from military offensives by Israel in the Gaza

[210] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009) at para 36; Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33:3 Nordic Journal of Human Rights 243, 248-251; Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 407-409

[211] Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 424-425

[212] UN News Centre, 'Interview with Luis Moreno-Ocampo, Prosecutor for the International Criminal Court, 5 June 2009 < https://news.un.org/en/story/2009/06/302482-newsmaker-rights-abusers-must-be-stopped-starting-top-icc-prosecutor> accessed 5 December 2019

[213] Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33:3 Nordic Journal of Human Rights 243, 247-249

[214] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 12(3); Palestinian National Authority, Declaration Recognising the Jurisdiction of the International Criminal Court, 21 January 2009 <https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

Strip between 27 December 2008 and18 January 2009, during what Israel called "Operation Cast Lead".[215]

In the conflict, there were severe violations of international humanitarian law by Israel where some incidents include wilful killings, wanton destruction of civilian property, indiscriminate attacks and deliberate attacks on civilian objects have been committed. Additionally, other forms of crimes were the use of human shields and collective punishment in the form of a continuing blockade against the civilian population in Gaza.[216] Under the Rome Statute, these kinds of crimes amount to war crimes and possible crimes against humanity.[217]

A double-standard policy was clear in the first Prosecutor report where he wrote a two-page report in more than three years highlighting that he had no jurisdiction since Palestine was not a state recognised by the UN General Assembly.[218] The first Prosecutor also did not take into account the broader implications of the fact that, on 31 October 2011, Palestine was admitted to a UN specialist agency, the UN Educational, Scientific and Cultural Organisation (UNESCO); although, it was not a UN member.[219] Since UNESCO membership was 'fully representative of the international community', Palestine should be in a significantly identical situation to accede to treaties as well as the Rome Statute (1998).[220]

The first Prosecutor did not want to conduct investigations and possible prosecutions that would anger the US and some of its close allies. It would be necessary in the future for the Prosecutor to go beyond investigating cases exclusively in Africa. In this context, existing preliminary examinations in some places outside Africa including Afghanistan, Georgia, Colombia and Honduras should be taken more seriously. The ICC 'must do more to improve relations between the Court and its states Parties, especially in Africa.'[221] It can arrange various training programs in partnership with NGOs in Africa to address negative thoughts against the ICC. Additionally, a reform to the Rome Statute (1998) could be referring a case to the ICC

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[215] UNGA HUMAN RIGHTS IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES (25 September 2009) UN Doc. A/HRC/12/48 at paras. 149-283

[216] *Ibid*

[217] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7 and 8

[218] Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 422-426

[219] UN News, UNESCO votes to admit Palestine as full member (31 October 2011) < https://news.un.org/en/story/2011/10/393562-unesco-votes-admit-palestine-full-member> accessed 02 February 2020

[220] Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385

[221] Manisuli Ssenyonjo, 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13:2 International Criminal Law Review 385, 428; ICC Press Release, President of the Assembly: Statement on the Tenth Anniversary of the International Criminal Court, ICC-ASP-20120702-PR819, 2 July 2012 < https://www.icc-cpi.int/Pages/item.aspx?name=pr819> accessed 13 March 2020

can be by the UN General Assembly rather than the permanent members of the UN Security Council as they clearly involved in the decision of the ICC.

4.7 The R2P Principle and Continuity

In the recent Georgia-Russia conflict, the Russian Minister of Foreign Affairs confirmed that Russia resorted to the use of force in Georgia in 2008 under the R2P principle; however, the way Russia interpreted the principle differs from case (Georgia) to case (Libya and Syria). For instance, in the Syrian crisis, in which the Russian army has been actively involved in the conflict, Russia always criticises the implementation of the R2P principle claiming that it is merely a doctrine of military intervention by Western States.[222]

Attention has frequently focused on the security and military dimensions relating to the challenge of changeable opinions about the R2P principle. Nevertheless, it also has a legal aspect and vital normative, which is overtly reflected in the quite contested claims and narratives about the Russian actions. The legal rhetoric of Moscow's intervention and seizure of Crimea is a central issue since Russia is a permanent Member of the UN Security Council. Russia aspires to find and impose its interpretations of the R2P principle not only in its own neighbourhood, but also in the wider community around the world- for example in Syria and North America.

On different occasions, Russia referred to serious implications that could follow the R2P implementation and confirmed its commitment to respect state sovereignty. However, the Russian president, Vladimir Putin, justified the use of Russia's army against civilians inside Ukraine by claiming the desire to prevent crimes committed by the Ukrainian government describing what Ukraine had done as "a very serious crime against their own people."[223] Moscow also stressed its retainment of "the right to protect its interests and the Russian-speaking population of those areas."[224]

On 27 March 2014, the UN General Assembly passed a resolution in which Ukraine's territorial integrity was affirmed and the Russian intervention in the country was condemned.[225] The resolution also confirmed the following

[222] Barbour (n 83) 558-561; Franck (n 177) 61-62
[223] Roy Allison, 'Russian 'deniable' intervention in Ukraine: how and why Russia broke the rules' (2014) 90:6 international Affairs 1255, 1266
[224] Ibid
[225] UNSC 'Security Council fails to adopt text urging member states not to recognize planned 16 March referendum in Ukraine's Crimea region' (15 March 2014) Press Release SC/11319; UNGA Res. 68/262 (27 March 2014) U.N. DOC. A/RES/68/262; Ibid

> "the principles contained therein that the territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force, and that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter."[226]

The examples examined in this chapter so far have illustrated a discontinuity in interpreting principles of international law. For instance, in the Syrian and Libyan cases, the permanent Members of the UN Security Council interpreted the R2P principle and state sovereignty differently from how they had viewed them in light of the Ukrainian, Crimea and Venezuela crises (2014). The Russian interpretation of the R2P principle was viewed as an intervention to protect Russian nationals and as a form of self-defence. However, in the Syrian case, implementing the R2P principle was regarded by Russia as an action against Syrian sovereignty.[227]

Likewise, in several cases, the UK, the USA and France have had different interpretations for intervention.[228] Nicaragua could perhaps provide more clarity on the topic as the American intervention which took place was considered to be a human rights violation pursuant to the ICJ's rejection of the American justification(s) regarding the intervention.[229] However, consistency may potentially lead to achieving states' stability, and international organisations should seek to define by empirical tests whether a government or a state is functioning. The tests should seek to reveal the presence or absence of "an ability and willingness to behave like a state or government and to discharge the concomitant obligations of statehood and governance."[230]

The interventions in Bangladesh and Kosovo illustrated that regional systems were stronger than the international ones as there are regional courts and this type of courts can make binding international legal decisions.[231] In Europe, the old regional protection mechanisms are under the auspices of the Council of Europe. The key instrument is the European Convention

[226] UNGA Res. 68/262 (27 March 2014) U.N. DOC. A/RES/68/262
[227] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139; Franck (n 177) 61-62; Stahn (n 113)
[228] Bellamy (n 25) 545-551
[229] *Case concerning Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) Judgment of 27 June 1986, ICJ Reports 1986*, at para. 115
[230] Franck (n 177) 137
[231] Peter R. Baehr, 'Controversies in the current international human rights debate' (2000) 2:1 Human Rights Review 7, 24

on Human Rights which is complemented by the European Court of Human Rights which adjudicates on cases arising from the aforementioned instrument.[232] Whereas in the regions which are lagging in many areas of human rights are in Asia and Africa, there is no advanced human rights machinery yet.[233]

4.8 Concluding Remarks

The intervention in Libya is initially considered a victory for the R2P principle. By working through the structures and procedures of organised pluralism around the UN, regional organisations under supervision of the UN can deploy international peace-keeping forces to stalemate governments and military forces from involving in perpetrating atrocity crimes against their own civilians.[234] It seems that the Libyan precedent shifted the R2P principle from words to deeds. However, the stumble of the UN in the Syrian incident stresses that meeting the triggers of implementing the R2P principle is not enough prove to convince the permanent members of the UN Security Council for protecting civilians under the R2P principle.

Neglecting crises where the triggers for applying the R2P principle are met can weaken the principle of state sovereignty since the state fails to offer protection to its civilians due to a lack of effective control of its territorial integrity. Moreover, this could also encourage states to launch more unilateral interventions without UN Security Council authorisation. Leaving civilians suffering from atrocity crimes can also turn the R2P principle to 'hot air' principle where State is centralised rather than civilians.[235]

[232] Ibid, 9
[233] Ibid
[234] Evans (n 18)
[235] Hannah Duffus and Others, 'R2P Monitor' (Issue 41, Bimonthly Bulletin, 15 September 2018) 3

Chapter Five: The Syrian Case, a Nail in the Coffin of the R2P Principle

5.1 Introduction

The first two chapters of the dissertation examined the emergence of the R2P principle in 2005 to fill the *lacunae* between state sovereignty and human rights violations. The four atrocity crimes - genocide, war crimes, ethnic cleansing and crimes against humanity - were examined in chapter three as triggers for the implementation of the R2P principle under international law. These triggers were considered by the world leaders in the World Summit 2005 as indicators for the necessity of applying R2P to protect civilians from atrocities.

The current chapter addresses the question whether the R2P principle should be applied in the context of the crimes committed in Syria. During the Syrian conflict, the UN stated that some of the crimes committed in the Syrian crisis amounted to crimes against humanity and war crimes.[1] Thus, the question that may be put forth is; if the crimes committed during the Syrian conflict were triggers for implementing the R2P principle, is there any convincing explanation for failing to protect Syrian civilians from crimes against humanity and war crimes?

In this chapter, the dissertation demonstrates that the international community failed to respond to crimes committed during the Syrian crisis. It failed to implement the R2P principle to protect the lives of many civilians after half a million were killed in a country where chemical weapons have been used more than 336 times between March 2011 and January 2019.[2] The humanitarian situation in Syria was considered by the Secretary-General of the LAS as the worst humanitarian crisis ever after World War II. This crisis has caused more than half of the Syrian civilians to become displaced, either internally or externally.[3] This chapter concludes that the crimes committed in Syria are not only crimes against humanity and war crimes, but also in many incidents, they may meet the features of crimes of ethnic cleansing and genocide.[4]

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[1] UNHRC 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (25 February-22 March 2019) 40th Session (2019) U.N. Doc. A/HRC/40/70; Leila Nadya Sadat, 'Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will' (2015) 5 Impunity Watch Law Journal 1, 3-7

[2] Ralph Bunche Institute for International Studies, 'The 2018 UN General Assembly debate on the Responsibility to Protect and the Prevention of Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity' (Global Centre for the Responsibility to Protect, 25 June 2018); see also, Tobias Schneider and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 18 February 2019; Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (1st, Routledge, New York 2016) 255-266

[3] Breau (n 2) 255-266

[4] Ibid, 266-274

5.2 The Syrian Crisis: From Peaceful to Violent

During the first six months, protests in the country were calling for freedom of expression and the release of political prisoners - some of whom had been arrested either since or prior to 1982.[5] The protests remained peaceful; nonetheless, the Syrian authority chose to resort to the use of excessive force against civilians.[6] As a consequence, thousands of civilians were killed and many were arrested.[7] Meanwhile, some minor defections took place in the Syrian army against the actions of the Syrian authority and the defectors joined the newly-founded Free Syrian Army (FSA) later. The FSA in its early stages, exclusively consisted of Syrian people who had left the Syrian official army or civilians whose family members had been killed or arrested by the Syrian government.[8]

After thousands of civilians had been killed, the activists then changed their demands to regime change.[9] Hence, after about six months of peaceful protests, the opposition groups, in defence of themselves, started retaliating.[10] In addition, peaceful protests may have turned violent out of the belief that the international community will intervene to save civilians if the Syrian regime attempted to commit atrocity crimes against them.[11] What encouraged this thinking on the part of Syrians was the Libyan case, where NATO interfered to protect civilians in Benghazi.[12]

In the first year, the Syrian regime acknowledged the existence of peaceful protests which distinguishes it from its peer, the Gaddafi regime in Libya.[13] The response of the Syrian government to the protests appeared to be in two ways. Firstly, it admitted that there were demonstrations which were followed by promises to achieve political and other reforms.[14] Secondly, concerning its security forces, the Syrian regime refused to recognise the targeting or obstruction of peaceful protests. The Syrian government justified its acts by claiming that

[5] Raymond Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (2012) 88:1 International Affairs 95, 106-110; Breau (n 2) 258-266
[6] Breau (n 2) 253-266; Jess Gifkins, 'The UN Security Council Divided: Syria in Crisis' (2012) 4:3 Global Responsibility to Protect 377, 379-391
[7] Hinnebusch (n 5)
[8] Joseph Holliday, 'Syria's armed opposition.' (2012) Middle East Security Report 3
[9] Andrew Garwood-Gowers, 'China and the 'Responsibility to Protect': the implications of the Libyan intervention' (2012) 2:2 Asian Journal of International Law 375, 376-7; Gifkins (n 6) 381-383
[10] Marc Lynch and Others, 'Syria's Socially Mediated Civil War' (Peaceworks No. 91, Blogs and Bullets III, United States Institute of Peace 2014) 5-8
[11] Liliana Jubilut, 'Has 'the Responsibility to Protect' been a Real Change in Humanitarian Intervention? An Analysis from the crisis in Libya' (2012) 14 International Community Law Review 309, 310-314
[12] Ibid, 330-333
[13] Andrew Garwood-Gowers, 'China and Responsibility to Protect: The implication of the Libyan intervention' (2012) 2:2 Asian Journal of International Law 375, 388-393; Breau (n 2) 253-266; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 79-86
[14] Caitlin Alyce. Buckley, 'Learning from Libya, acting in Syria" (2012) 5:2 Journal of Strategic Security 81, 84, 87-89; Zuber (n 4) 287-292

its military actions were directed against terrorist groups who joined the peaceful demonstrators. The Syrian authorities claimed that these groups targeted the regime's forces. Therefore, the reaction of the Syrian army was to protect civilians from the infiltrators and vandals.[15]

Under these circumstances, the humanitarian situation in Syria significantly deteriorated to such an extent; therefore, the UN Security Council discussed seeking a solution to protect Syrian civilians and to put an end to the serious crimes. Similarly to the Libyan crisis, the UN Security Council could resort to the use of force even under Chapter VII of the UN Charter as a last resort to protect the life of the Syrian people.[16] However, the veto power by Russia and China were used, which consequently blocked the draft resolution from being passed.[17]

5.3 The Regional and International Response to the Syrian Crisis

On 14 April 2012, the UN Security Council unanimously adopted Resolution 2042 in which it authorised an advance team to monitor a ceasefire in Syria. Resolution 2042 called upon all parties involved in the conflict to secure humanitarian access. The Security Council, under the guiding principles of humanitarian assistance, called the Syrian authorities to allow direct, full and unrestricted access of humanitarian aid to all people in need inside the country.[18]

One week later, on 21 April 2012, the UN Security Council established the UN Supervision Mission in Syria (UNSMIS) under Resolution 2043. The UNSMIS placed 300 observers to monitor the cessation of violence and implement the plan of the special envoy.[19] The Resolution called upon the Syrian authorities to support and help the UN supervision

[15] As the regime called them; Breau (n 2) 253-266

[16] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118

[17] UNSC 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution' (22 May 2014) Press Release SC/11407; Yasmine Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace' (2019) 24:1 Journal of Conflict and Security Law 111, 120-125; Azuolas Bagdonas, 'Russia's Interests in the Syrian Conflict: Power, Prestige, and Profit' (2012) 5:2 European Journal of Economic and Political Studies 55, 57-59; Madeleine O. Hosli and others 'Squaring the Circle? Collective and Distributive Effects of United Nations Security Council Reform' (2011) 6:2 The Review of International Organizations 163, 164-169; Barry O'neill, 'Power and Satisfaction in the United Nations Security Council' (1996) 40:2 Journal of Conflict Resolution 219, 220-229; see also, Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 79-86

[18] UNSC 'Report of the Secretary-General on the implementation of Security Council resolution 2043 (2012)' (6 July 2012) (2012) U.N. DOC. S/2012/523

[19] UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042, at Annex

mission to be successful in their operation. Unfortunately, neither the troop movements towards population areas nor the use of heavy weapons was ceased as the UNSMIS called for.

Under these circumstances, the distribution of humanitarian aid in the area under the rebels' control was not possible as those areas were under the direct attack of the Syrian army. In December 2012, while on a round in Baba Omer, a suburb of Homs, the UNSMIS witnessed the official soldiers and tanks of the Syrian authority open fire on civilians. This happened despite the agreement between the two main involved parties in the Syrian conflict both promising to "cease troop movements towards population centres, […] cease all use of heavy weapons in such centres and begin pullback of military concentrations in […] and around population centres."[20]

A Member of the UNSMIS added that what he saw 'was a humanitarian disaster,' as it embodied systematic violations of international humanitarian law and human rights.[21] The armed violence in several quarters of the Homs city, specifically in Baba Omer showed that the Syrian soldiers violated the pledge to respect Annan's six-point plan of the Joint Special Envoy of the UN and the LAS, as they continued violating international humanitarian law and human rights.[22]

The humanitarian situation in the country became worse and the six points of the Joint Special Envoy of the UN under the Security Council Resolution would not be implemented.[23] Instead of applying the six-point plan, more violations were committed.[24] Malek, a UNSMIS member, confirmed that human rights and international humanitarian law were systematically violated in Syria.[25] He also reported that he met several Syrian women in Syria who were raped by Syrian authority soldiers and sadly many were raped in front of their children, husbands or

[20] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042 at para2

[21] Zoi Constantine, 'Arab League monitor walks out on Syria mission' (The National, 12 January 2012) <https://www.thenational.ae/world/mena/arab-league-monitor-walks-out-on-syria-mission-1.448392> accessed 28 September 2018

[22] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042, at Annex; Anouar Malek, *Revolution of Nation* (tr.), (1st, Obekan, Riyadh 2014) 98-123

[23] UNSC 'In Presidential Statement, Security Council Gives Full Support to Efforts of Joint Special Envoy of United Nations, Arab League to End Violence in Syria' (21 March 2012) Press Release SC/10583; Home Office, 'Syrian Arab Republic Country of Origin Information (COI) Report' (COI Service Report, 11 September 2013); United Nations Human Rights, 'More human rights abuses in Syria as conflict escalates - Commission of Inquiry' (*United Nations Human Rights*, 28 June 2012) <https://www.ohchr.org/EN/NewsEvents/Pages/MoreHRabusesinSyriaasconflictescalatesCoI.aspx> accessed 28 September 2018

[24] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042, 3; UNSC 'In Presidential Statement, Security Council Gives Full Support to Efforts of Joint Special Envoy of United Nations, Arab League to End Violence in Syria' (21 March 2012) Press Release SC/10583; Home Office, 'Syrian Arab Republic Country of Origin Information (COI) Report' (COI Service Report, 11 September 2013); United Nations Human Rights, 'More human rights abuses in Syria as conflict escalates - Commission of Inquiry' (*United Nations Human Rights*, 28 June 2012) <https://www.ohchr.org/EN/NewsEvents/Pages/MoreHRabusesinSyriaasconflictescalatesCoI.aspx> accessed 23 September 2018

[25] Malek (n 22) 103-107

parents.[26] The observer also added that he met prisoners who bore witness to numerous prisoners being tortured to death.[27]

5.4 Chemical Weapons and the UN Obligation

Using chemical weapons has been reported 336 times during the Syrian conflict. The areas where these weapons were repeatedly used against civilians were: Homs, Idlib, Aleppo and Eastern Ghouta, which is only a few kilometres from the centre of the Syrian capital city.[28] The use of chemical weapons against civilians, which is undeniably a heinous crime, was also witnessed in Khan Al Asal in the suburbs of Aleppo in March 2013, Saraqib (29 April 2013), the Eastern Ghouta (21 August 2013), Jobar (24 August 2013) and Ashrafiah Sahnaya (25 August 2013). Moreover, using the chemical weapons by the Syrian regime in Khan Sheikhoun on 4 April 2017 drew international condemnation and led to a unilateral military intervention by the US against the air base at Shayrat under the control of the Syrian government.[29]

On 7 April 2018, a chemical attack was launched in Douma, Eastern Ghouta, where more than one thousand five hundred civilians were killed in less than sixty minutes in the first episode.[30] The attack drew a unilateral military response from the UK, the US and France. Besides, in June 2018, the Organisation for the Prohibition of Chemical Weapons (OPCW) confirmed that it was the Syrian government that used the sarin and chlorine in Ltamenah and the sarin in Khan Sheikhoun.[31] The limited unilateral action by the US was independent of the UN Security Council and failed to prevent using chemical weapons against civilians later.

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[26] Malek (n 22) 303-304; *ÉDOUARD KAREMERA MATTHIEU NGIRUMPATSE v. THE PROSECUTOR*, Case No. ICTR-98-44-A, APPEALS CHAMBER, (29 September 2014), at pages 202-217

[27] Malek (n 22) 384-392

[28] Bethan McKernan, 'Collapsed Eastern Ghouta ceasefires must not become a copycat of Aleppo, UN says' (*The Independent*, 1 March 2018) <https://www.independent.co.uk/news/world/middle-east/eastern-ghouta-ceasefire-syria-aleppo-un-united-nations-assad-regime-civilian-deaths-a8235156.html> accessed 28 September 2018; Tobias Schneider and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 28 September 2018

[29] Yasmine Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace' (2019) 24:1 Journal of Conflict and Security Law 111, 138-142; Alan Bloomfield, 'What does New Delhi's engagement with the war in Syria (and Iraq) reveal about India as an International Actor?' (2018) 17:2 India Review 209, 226-228; Michael N. Schmitt and Christopher M. Ford 'Assessing US Justifications for Using Force in Response to Syria's Chemical Attacks: An International Law Perspective' (2017) 9 Journal of National Security Law and Policy 283, 284-287

[30] Tobias Schneider and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 28 March 2019

[31] Human Rights Watch, 'Safeguard Chemical Weapons Treaty, Countries Should Set Way to Identify Users of Banned Weapon' (*Human Rights Watch, 19 June 2018*) <https://www.hrw.org/news/2018/06/19/safeguard-chemical-weapons-treaty> accessed 11 December 2018; Brett Edwards and Mattia Cacciatori, 'The politics of international chemical weapon justice: The case of Syria, 2011–2017' (2018) 39:2 Contemporary Security Policy 280, 282-285; Tobias Schneider and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 28 September 2018

In response to the chemical attack, on 27 September 2013, the UN Security Council passed Resolution 2118 in which the Council confirmed that chemical weapons were used in an attack that took place on 21 August 2013. The Resolution of the UN Security Council stressed that the attack was a 'violation of international law'.[32] Similarly, the UN Secretary-General Ban Ki-moon described the chemical attack as

> "a war crime and grave violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and other relevant rules of customary international law."[33]

The UN Security Council Resolution 2118 also welcomed the framework for elimination of Syrian Chemical Weapons between the USA and Russia dated14 September 2013 in Geneva.[34] They ensured to destroy Syria's chemical weapons and pledged direct international control over chemical weapons in the Syrian territory.[35] However, this Resolution did not limit using chemical weapons as several similar incidents were subsequently reported.

Using chemical weapons against non-state actors made the humanitarian situation tremendously problematic. Therefore, millions of Syrians left the areas of the incidents[36] mostly to Turkey, Jordan, Lebanon and Iraq.[37] More than three and a half million of the Syrian refugees were received by Turkey alone after the humanitarian situation became worse, especially in Aleppo, a home for more than seven million people in the north of Syria.[38]

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[32] UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118; Tobias Schneider and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 28 May 2019

[33] United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, 'Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013' (United Nations Mission Report, 21 August 2013) at page 1; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118; Malcolm D. Evans (ed.), *International Law* (4th, Oxford University Press, New York 2014) 510-512

[34] UNSC Res. 2254 (18 December 2015) U.N. DOC. S/RES/2254; UNGA 'Letter dated 19 September 2013 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General' (24 September 2013) 68th Session (2013) U.N. DOC. A/68/398-S/2013/565; UN News, 'Geneva conference on Syria set for January, UN chief announces' (*UN News*, 25 November 2013) <https://news.un.org/en/story/2013/11/456202-geneva-conference-syria-set-january-un-chief-announces#.VUQqbeOaWjI> accessed 29 December 2016

[35] UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118

[36] Josie Ensor, 'Syria conflict anniversary: the worst refugee crisis in recent history' (*The Telegraph*, 12 March 2014) <https://www.telegraph.co.uk/news/worldnews/middleeast/syria/10692931/Syria-conflict-anniversary-the-worst-refugee-crisis-in-recent-history.html> accessed 4 May 2016; Katarina Montgomery, 'UNICEF: Nearly Half of Syria's Refugees Are Children' (*News Deeply*, 12 March 2014) <https://www.newsdeeply.com/syria/articles/2014/03/12/unicef-nearly-half-of-syrias-refugees-are-children> accessed 4 May 2016

[37] Alan J. Kuperman, 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign' (2013) 38:1 International Security 105, 105-136

[38] Volkan Şeyşane and Çiğdem Çelik, 'R2P and Turkish Foreign Policy: Libya and Syria in Perspective' (2015) 7:3-4 Global Responsibility to Protect 376, 393-395; Regional Refugees and Resilience Plan, Trend of Registered Syrian Refugees,

In February 2014, about nine million Syrian civilians had been displaced either internally or externally since the outbreak of the revolution in March 2011.[39] About one million and three hundred thousand Syrian refugees settled in Jordan, about a quarter of the completely Jordanian population. In February 2014, after breaking the siege of Homs, civilians stated to the BBC that they "lived on grass boiled with water [and] lived with gunfire and bombardment."[40] Sieging areas of civilian populations overtly represents acts of collective punishment which violates international humanitarian law and human rights law.[41]

In March 2014, the UN International Children's Emergency Fund pointed out that over one million and two hundred thousand refugees in the neighbouring countries were children, and almost half of them were under the age of five years.[42] Similarly, in May 2014, the Ministers and the High Commissioner for Refugees pointed out that the massive flow of Syrian refugees to the neighbouring countries illustrated the mass atrocity crimes committed in the country.[43] The massive number of Syrian refugees in the neighbouring countries and over the world appears as the direct consequence of severe violations of human rights and international humanitarian law in Syria.

On 22 February 2014, the UN Security Council unanimously adopted Resolution 2139 to ease aid delivery to Syrians, and provide relief from 'Chilling Darkness' in which it was stressed that some of these violations may amount to crimes against humanity and war crimes.[44] The Permanent Representative of Chile to the UN, Octavio Errazuriz, confirmed that those who had committed serious crimes, such as genocide, war crimes and crimes against humanity

(Regional Refugees and Resilience Plan, last updated 15 August 2019) <https://data2.unhcr.org/en/situations/syria> accessed 21 August 2019

[39] Josie Ensor, 'Syria conflict anniversary: the worst refugee crisis in recent history' (*The Telegraph*, 12 March 2014) <https://www.telegraph.co.uk/news/worldnews/middleeast/syria/10692931/Syria-conflict-anniversary-the-worst-refugee-crisis-in-recent-history.html> accessed 4 May 2016; Katarina Montgomery, 'UNICEF: Nearly Half of Syria's Refugees Are Children' (*News Deeply*, 12 March 2014) <https://www.newsdeeply.com/syria/articles/2014/03/12/unicef-nearly-half-of-syrias-refugees-are-children> accessed 4 May 2016

[40] Lyse Doucet, 'Syria conflict: Emerging from the siege of Homs' (*BBC News*,13 February 2014) <https://www.bbc.co.uk/news/world-middle-east-26171674> accessed 4 May 2016

[41] Ibid

[42] Josie Ensor, 'Syria conflict anniversary: the worst refugee crisis in recent history' (*The Telegraph*, 12 March 2014) <https://www.telegraph.co.uk/news/worldnews/middleeast/syria/10692931/Syria-conflict-anniversary-the-worst-refugee-crisis-in-recent-history.html> accessed 4 May 2016; Katarina Montgomery, 'UNICEF: Nearly Half of Syria's Refugees Are Children' (*News Deeply*, 12 March 2014) <https://www.newsdeeply.com/syria/articles/2014/03/12/unicef-nearly-half-of-syrias-refugees-are-children> accessed 4 May 2016

[43] United Nations High Commissioner for Refugees, 'Ministerial coordination meeting of major host countries for Syrian refugees in Jordan' (*UNHRC*, 4 May 2014) <https://www.unhcr.org/536652a39.html> accessed 4 May 2016; Regional Refugees and Resilience Plan, Trend of Registered Syrian Refugees, (Regional Refugees and Resilience Plan, last updated 15 August 2019) <https://data2.unhcr.org/en/situations/syria> accessed 21 August 2019; Higher Commission for Refugees, 'UNHCR - Syria Factsheet (January 2019)' (Report, 31 Jan 2019) <https://reliefweb.int/report/syrian-arab-republic/unhcr-syria-factsheet-january-2019> accessed 12 August 2019

[44] UNSC Res. 2139 (22 February 2014) U.N. DOC. S/RES/2139

should be referred to the ICC. He confirmed that only through a peaceful solution could an end to the humanitarian crisis be found.[45]

5.5 Atrocity Crimes in Syria

The triggers for implementing the R2P principle confirmed by the world leaders in the World Summit 2005 outcome are genocide, war crimes, ethnic cleansing or crimes against humanity.[46] This kind of crimes is considered by the Secretary-General of the LAS as a crime against humanity.[47] Likewise, in December 2012, the Secretary-General's Special Adviser on the Prevention of Genocide stated that

> "[t]he Government of Syria is manifestly failing to protect its populations. The international community must act on the commitment made by all heads of state and government at the World Summit 2005 to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, including their incitement."[48]

Assessing the gravity of the situation in Syria requires examining *jus cogens* and its characters under international law. Chinkin argues that *jus cogens* constitute the pinnacle of the hierarchy of the sources of international law.[49] To further understand the implications of *jus cogens*, Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT) 1969 must be examined. Article 53 provides the following

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention,

[45] UNSC 'Security Council Unanimously Adopts Resolution 2139 (2014) to Ease Aid Delivery to Syrians, Provide Relief from 'Chilling Darkness' (22 May 2014) Press Release SC/11292
[46] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at paras. 138-139; Volkan Şeyşane and Çiğdem Çelik 'R2P and Turkish Foreign Policy: Libya and Syria in Perspective' (2015) 7:3-4 Global Responsibility to Protect 376, 379-381
[47] Malek (n 22) 93-103, 434-453
[48] UN News, 'Statement by the Special Adviser of the Secretary-General on the Prevention of Genocide, Adama Dieng, on the situation in Syria' (*UN News*, 20 December 2012) <https://www.un.org/en/genocideprevention/documents/media/statements/2012/English/2012-12-20-OGPRtoP%2020%20December%20Statement%20on%20Syria%20-%20ENGLISH.pdf> accessed 4 May 2016; ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 78-83
[49] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727; Daniel Moeckli and Others, *International Human Rights Law* (2nd, Oxford University Press, New York 2014) 84-85

> a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[50]

It is also worth noting that the ICJ has reached a similar conclusion and reaffirmed the contents of Article 53 in the Nicaragua case.[51] As for Article 64, it provides that "if a new peremptory norm of general international law emerges, any existing treaty which conflicts with that norm becomes void and terminates."[52]

Moreover, Chinkin argues that the traditional norms of *jus cogens* were almost exclusively determined. Several norms which have been generally accepted as having attained the status of *jus cogens* include, but are not limited to: the prohibition of genocide, the prohibition of prolonged arbitrary detention, the prohibition of murder and torture and the fundamental rules of international humanitarian law.[53] It is worth noting that *jus cogens* seem to limit the ability of states from engaging in specific acts. Unlike most rules of international law, *jus cogens* require no consent in order for any state in the international community to be bound by their provisions.[54]

5.5.1 Genocide

The crime of genocide is defined under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (1949) and Article 6 of the Rome Statute (1998) as:

> "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about

[50] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 21-44; Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under the UN Charter' (2005) 3:1 Santa Clara Journal of International Law 73, 75-76; Moeckli (n 49) 83-85
[51] *Case concerning Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Judgment of 27 June 1986, ICJ Reports 1986*; Moeckli (n 49) 83-85
[52] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 336
[53] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727, at paras 69-71; Moeckli (n 49) 83-85
[54] Ibid

its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[55]

During the Syrian conflict, the Syrian regime was on the path to failure and the ongoing sectarian violence caused mass atrocities and cleansing that could meet the criteria of genocide in some areas. It has massacred, terrorised, imprisoned and tortured thousands of thousands of people - mainly non-combatants and mostly Sunnis. The Syrian army also sieged Eastern Aleppo, the Eastern Ghouta and Homs for years and, apparently.[56]

Besides, the crimes committed by Daesh and by the YPG and the PKK against Arabs could amount to the crime of genocide and this illustrates that the Syrian authority failed to protect the Syrian civilians in several areas over the Syrian territory.[57] This failure on the part of the Syrian government to achieve its primary responsibility - protecting civilians from human rights violation and genocide – would have been enough to shift R2P to the UN to protect Syrian civilians.[58] However, these crimes could not be confirmed by the UN Security Council or the UN General Assembly as genocide. Nevertheless, the sieging of cities, transferring of populations, and the use of heavy and chemical weapons against civilians arguably may also meet the atrocity of genocide.[59]

5.5.2 War Crimes

Article 27 of the Hague Convention No. IV of 1907 and its two protocols (1954) and (1999) highlighted the issue of protecting civilians and cultural properties during times of war.

[55] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, Art. II; Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 6; UNGA Res. 260 (III) A (9 December 1948) U.N. DOC. 260 (III) A; Fredric C. Hoff and Alex Simon, 'Sectarian Violence in Syria's Civil War: Causes, Consequences, and Recommendations for Mitigation' (A Paper Commissioned by The Centre for the Prevention of Genocide, United States Holocaust Memorial Museum, 25 March 2013) 35-38

[56] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 p 31; Breau (n 2) 256-266; Emma Graham-Harrison, 'UN security council to meet on Syria as Assad's troops tighten grip on Aleppo' (*The Guardian*, 25 September 2016) <https://www.theguardian.com/world/2016/sep/24/aleppo-siege-tighten-bashar-al-assad-water-two-million> 28 September 2017; Michelle Nichols and Ellen Francis, 'U.N. Security Council delays vote on Syria ceasefire resolution' (*Reuters*, 23 February 2018) <https://uk.reuters.com/article/uk-mideast-crisis-syria-ghouta/u-n-security-council-delays-vote-on-syria-ceasefire-Resolution-idUKKCN1G70Y8> accessed 5 May 2018

[57] Natalie Nougayrède, 'Assad can still be brought to justice – and Europe's role is crucial' (*The Guardian*, 1 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/01/assad-europe-lawyers-syrian-war-criminals?fbclid=IwAR0PQQHu4bB4rn95SJf5h_Wu_T48bfw28Ztdxl5e7BgMlB01rGhYVxNBJS8> accessed 10 April 2019

[58] Breau (n 2) 267-270

[59] De Zayas ALFRED M., 'International Law and Mass Population Transfers' (1975) 16 Harvard International Law Journal 207, 233-235

Likewise, Article 8(2)(b)(ix) of the Rome Statute (1998) stresses that "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" is a serious violation of international law. [60]

Article 8(1) of the Rome Statute (1998) states that "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[61] During the Syrian conflict, crimes were directed against buildings devoted to education, religion, history and hospitals. Mostly, the targeted people in these buildings were not military objectives. Furthermore, the aforementioned buildings functioned to care for the sick and wounded or for civilians.[62]

The Syrian crisis showed that many towns and cities – such as Daraya, Douma, Homs and Aleppo - were sieged and almost completely destroyed. Destroying and seizing wide population areas in Syria showed that these actions were not "imperatively demanded by the necessities of war [and] the extensive destruction of property not justified by military necessity."[63] Civilians in the besieged areas suffered from a serious shortage of food and medical services as the Syrian army sieged many cities – such as Aleppo, Madaya, Homs, Darya and the Eastern Ghouta - for long months or years.[64]

War crimes as highlighted in Article 8(2)(b)(xxv) of the Rome Statute (1998) include "[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided

[60] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(2)(b)(ix)
[61] Ibid, Art. 8(1)
[62] Ibid, Art. 8(b); Fouad M. Fouad, 'Health Workers and the Weaponisation of Health Care in Syria: a Preliminary Inquiry for the Lancet–American University of Beirut Commission on Syria' (2017) 390 The Lancet 1011, 2518-2520
[63] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(b)(xiii); Fouad (n 62); United Nations Human Rights Council, 'UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity' (*United Nations Human Rights Council*, 20 June 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23226&LangID=E> accessed 10 September 2018
[64] United Nations Human Rights Council, 'UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity' (*United Nations Human Rights Council*, 20 June 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23226&LangID=E> accessed 10 April 2019; Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(b)(xii); UNSC 'Decrying Carnage in Aleppo, Speakers Urge Security Council to End Violence, Open Humanitarian Corridors, Engage in Genuine Dialogue' (13 December 2016) Press Release SC/12624; Breau (n 6) 256-266; Emma Graham-Harrison, 'UN security council to meet on Syria as Assad's troops tighten grip on Aleppo' (*The Guardian*, 25 September 2016) <https://www.theguardian.com/world/2016/sep/24/aleppo-siege-tighten-bashar-al-assad-water-two-million> 28 September 2017; Michelle Nichols and Ellen Francis, 'U.N. Security Council delays vote on Syria ceasefire resolution' (*Reuters*, 23 February 2018) <https://uk.reuters.com/article/uk-mideast-crisis-syria-ghouta/u-n-security-council-delays-vote-on-syria-ceasefire-Resolution-idUKKCN1G70Y8> accessed 5 May 2018; Fouad (n 62); Lyse Doucet, 'Syria conflict: Emerging from the siege of Homs' (*BBC News*,13 February 2014) <https://www.bbc.co.uk/news/world-middle-east-26171674> accessed 4 May 2016

for under the Geneva Conventions."[65] Humanitarian aid by the UN failed to be delivered to civilians in several cities under the rebels' control. Reports showed that delivering relief supplies as provided in the Geneva Conventions was obstructed and this caused severe suffering to civilians in the areas under the rebels' control.[66]

The savagery of crimes during the Syrian crisis was represented by torturing, "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) [i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives."[67] One of the UNSMIS missions also confirmed that they were attacked by the forces of the Syrian regime.[68]

Article 8(b)(xvii) and (b)(xviii) of the Rome Statute (1998) also prohibits "[e]mploying poison or poisoned weapons and employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices."[69] During the Syrian conflict, Chemical weapons were used 336 times, and the UN Security Council Resolution 2118 stated that using chemical weapons is a war crime. The Resolution referred to the incident of the Eastern Ghouta on 21 August 2013.[70]

The UN Commission of Inquiry on Syria confirmed in its meeting in Geneva on 20 June 2018 that the siege and recapture of the Eastern Ghouta was marked by war crimes and crimes against humanity.[71] The use of poisons during conflicts is considered a war crime and

[65] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(b)(xxv)

[66] Malek (n 22) 98-123; Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(b)(xii); UNSC 'Decrying Carnage in Aleppo, Speakers Urge Security Council to End Violence, Open Humanitarian Corridors, Engage in Genuine Dialogue' (13 December 2016) Press Release SC/12624; Breau (n 6) 256-266; United Nations Human Rights Council, 'UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity' (*United Nations Human Rights Council*, 20 June 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23226&LangID=E> accessed 10 April 2019 Emma Graham-Harrison, 'UN security council to meet on Syria as Assad's troops tighten grip on Aleppo' (*The Guardian*, 25 September 2016) <https://www.theguardian.com/world/2016/sep/24/aleppo-siege-tighten-bashar-al-assad-water-two-million> 28 September 2017; Michelle Nichols and Ellen Francis, 'U.N. Security Council delays vote on Syria ceasefire resolution' (*Reuters*, 23 February 2018) <https://uk.reuters.com/article/uk-mideast-crisis-syria-ghouta/u-n-security-council-delays-vote-on-syria-ceasefire-Resolution-idUKKCN1G70Y8> accessed 5 May 2018; Fouad (n 62); Lyse Doucet, 'Syria conflict: Emerging from the siege of Homs' (*BBC News*,13 February 2014) <https://www.bbc.co.uk/news/world-middle-east-26171674> accessed 4 May 2016

[67] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(b)(ii); Amnesty International, 'Amnesty International Report 2017/2018 the State Of The World's Human Rights' (Annual Report 2017/2018, Amnesty International Ltd 2018) 349-353; Stephen J. Rapp, 'Overcoming the Challenges to Achieving Justice for Syria' (2015) 30 Emory Int'l L. Rev. 155, 164-165

[68] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(e)(iii); Malek (n 22) 303-305; BBC News, 'UN envoy Kofi Annan meets Syria's Bashar al-Assad' (*BBC News*, 29 May 2012) <https://www.bbc.co.uk/news/world-middle-east-18245458> accessed 5 March 2016

[69] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8 (xvii) and (xviii)

[70] Tobias Schneider and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 22 February 2019

[71] United Nations Human Rights Council, 'UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity' (*United Nations Human Rights Council*, 20 June 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23226&LangID=E> accessed 10 April 2019

a grave violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare. Arguably, the Syrian regime breached these provisions by using chemical weapons against the civilian population.[72]

The crimes committed in Syria meet the criteria of war crimes - a trigger for R2P implementation; however, the UN failed to stop these kinds of crimes and protecting Syrian people. It is evident that the action of the UN in dealing with war crimes during the long years of the conflict in Syria has not fulfilled its responsibility of protecting the Syrian people from atrocity crimes.[73] It did not also meet the responsibility of the Members of the UN General Assembly. The promise of the five permanent Members of the UN Security Council to refrain from using the veto power was not delivered in Syria as they had consistently been employed to block draft resolutions.[74]

5.5.3 Ethnic Cleansing

The Syrian nation incorporated a variety of religions, sects, and tribes. The majority of Syrians are adherents of the Sunni sect of Islam (more than 70%). The Assad family that has been in power since the military coup of 13 November 1970 belongs to the Alawite sect, a division of the Shia sect of Islam. Throughout the decades of the Assad family's rule, the regime gave Alawite people very high positions in the Syrian army which made it completely controlled by them. Before the Syrian Revolution started the percentage of Alawites was about four percent of the Syrian population, this figure has now risen as the majority of those who fled or those who were killed were Sunni.[75]

[72] UNSC Res. 2139 (22 February 2014) U.N. DOC. S/RES/2139; UNSC 'Security Council Unanimously Adopts Resolution 2139 (2014) to Ease Aid Delivery to Syrians, Provide Relief from 'Chilling Darkness' (22 May 2014) Press Release SC/11292; Tobias Schneider and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 25 February 2019

[73] Leila Nadya Sadat, 'Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will' (2015) 5 Impunity Watch Law Journal 1, 9-14; Natalie Nougayrède, 'Assad can still be brought to justice – and Europe's role is crucial' (*The Guardian*, 1 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/01/assad-europe-lawyers-syrian-war-criminals?fbclid=IwAR0PQQHu4bB4rn95SJf5h_Wu_T48bfw28Ztdxl5e7BgMlB01rGhYVxNBJS8> accessed 10 April 2019

[74] Yasmine Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace' (2019) 24:1 Journal of Conflict and Security Law 111, 120-125; Auriane Botte, 'Redefining the responsibility to protect concept as a response to international crimes' (2015) 19:8 The International Journal of Human Rights 1029, 1029-1030; Robert Zuber and Ana Carolina Barry Laso 'Trust but Verify: Building Cultures of Support for the Responsibility to Protect Norm' (2011) 3:3 Global Responsibility to Protect 286, 287-292; Hosli (n 17); Barry O'neill, 'Power and satisfaction in the United Nations security council' 40:2 Journal of Conflict Resolution (1996): 219, 220-229; see generally, Louis Henkin, *How Nations Behave* (2nd, Columbia University Press, New York 1979)

[75] Breau (n 60) 258

Along with the official army, the Assad regime was also involved in the Syrian conflict, namely, through their affiliation with the Shabiha militia and other Shia militia groups such as Hezbollah from Lebanon and Liwa Abu al-Fadhal al-Abbas from Iraq.[76] The Syrian regime's strategy was to deliberately turn the conflict into a sectarian conflict. Nevertheless, this strategy was refused by the people from all sects as all Syrian cities joined the Revolution and participated in protests against the regime. An exception to the previous statement is that participating in protests against the Syrian regime was impossible in several small towns in the coast region as the populations there are fully comprised of Alawites.[77]

According to Article 7(d) of the Rome Statute (1998), deportation or forcible transfer of population was considered by Article 7(d)(2) of the Rome Statute (1998) an ethnic cleansing crime.

> "Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."[78]

The Article labels deportation as an ethnic cleansing crime. In the Syrian case, this crime was recurrently committed by the Syrian regime after a long-time of bombing several civilian areas and recapturing them from the rebels. As in the Bosnian conflict, the Syrian regime forced those who still lived in the recaptured areas to leave their homes and this happened under international observation.[79] Million civilians were usually deported to Idlib, a city in the northern part of Syria. This happened again in Homs where thousands of Sunni families were extradited from fourteen districts in Homs after a siege was imposed on them for more than 700 days. Similar practices took place in Madaya, Zabadani, the Eastern Ghouta and East Aleppo.[80]

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[76] Ibid

[77] Shiar Youssef, 'Iran in Syria: From an Ally of the Regime to an Occupying Force' (Report, 2nd Edition, Naame Shaam, April 2016) < http://www.naameshaam.org/wp-content/uploads/2016/04/Iran_in_Syria_2edition_2016.pdf > accessed 18 March 2019 at pages 111-128

[78] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(2)(d); UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118

[79] UNSC Res. 780 (6 October 1992) U.N. DOC. S/RES/780

[80] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7; UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118; UNSC Res. 780 (6 October 1992) U.N. DOC. S/RES/780; Malek (n 22) 98-123; Jelena Obradovic-Wochnik, 'Knowledge, acknowledgement and denial in Serbia's responses to the Srebrenica massacre' (2009) 17:1 Journal of contemporary European studies 61, 61-64; Bethan McKernan, 'Collapsed Eastern Ghouta ceasefires must not become a copycat of Aleppo, UN says' (*The Independent*, 1 March 2018) <https://www.independent.co.uk/news/world/middle-east/eastern-ghouta-ceasefire-syria-aleppo-un-united-nations-assad-regime-civilian-deaths-a8235156.html> Accessed 28 September 2018; Tobias Schneider and Theresa Lütkefend, 'Nowhere to

The loss of control of more than 80% of the Syrian territory over several years led to various consequences. One of the effects is that the military Kurdish groups, PKK and YPG, have attained the control of large areas in the north east of the country, where they constitute the majority. Additionally, the PKK and YPG engaged in transferring thousands of Arabs and Turkmens form their area – crimes that match ethnic cleansing crimes. Similarly, Daesh as well secured the control of a considerable amount of land in Syria and Iraq. It also committed ethnic cleansing against Yazidis in Iraq and against other military fighters in Syria and Iraq who refused to join them.[81]

PKK, YPG and Daesh's crimes were committed during a time when the Syrian authority failed to protect its own population in the areas it had lost control over. Yet, the crimes committed by the Syrian authorities themselves were not recognised at all by the UN Security Council or the UN General Assembly as ethnic cleansing crimes. Numerous violations appear to have met the standard threshold for establishing the Syrian regime as having explicitly engaged in ethnic transferring crimes. It seems violations were committed under the Syrian regime's watch or by the regime. Therefore, it is unclear why the relevant fora have not imposed responsibility on Syria, for failing in its obligation to protect its civilians from such atrocities.[82]

5.5.4 Crimes against Humanity

The four Geneva Conventions of 1949 are concerned with the protection of civilians during armed conflicts.[83] Similarly, the Additional Protocols of the Geneva Conventions of 1977 focus on the protection of victims during armed conflicts.[84] In addition, Article 7(1) of the Rome

Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 28 September 2018; see generally, Jan Willem Honig and Norbert Both, *Srebrenica: Record of a war crime* (1st, Penguin Books, London 1996)

[81] Natalie Nougayrède, 'Assad can still be brought to justice – and Europe's role is crucial' (*The Guardian*, 1 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/01/assad-europe-lawyers-syrian-war-criminals?fbclid=IwAR0PQQHu4bB4rn95SJf5h_Wu_T48bfw28Ztdxl5e7BgMlB01rGhYVxNBJS8> accessed 10 April 2019

[82] UNSC Res. 1160 (31 March 1998) U.N. DOC. S/RES/1160; Evans (n 33) 513-515; Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(b)(xii)

[83] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention relative to the protection of civilian persons in time of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Geneva Convention relative to the treatment of prisoners of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135

[84] Geneva Convention relative to the protection of civilian persons in time of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978)

Statute (1998) provides that several acts committed as part of a systematic or widespread attack and directed against non-combatant people may be considered as crimes against humanity. Some of these acts include:

> "(a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture."[85]

Since March 2011, several cities and towns over the Syrian territory were sieged for many months or years. The Syrian regime sieged East Ghouta, Daria, Madaya, Zabadani and Aleppo where million civilians were living under sieges and two small towns - al-Fu'ah and Kafriya – in the countryside of Idlib were sieged by the rebels.[86] With the support of Russia and Iran, the Syrian regime proceeded in bombing the besieged areas and all other areas under the rebels' control. Daesh, and in some incidents, the rebels had taken advantage of the presence of civilians to protect themselves from potential military attacks and advances of the regime forces.[87] Examining the conflict closely reveals that crimes against humanity are committed by all the conflict parties and mostly by the Syrian authorities.

During the 8188th meeting of the UN Security Council, it was demonstrated that the Syrian authorities had sieged civilians and used explosive barrels to bomb civilian areas.[88] In

1125 UNTS 3; Protocol Additional (No. II) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609

[85] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 7(1)

[86] Ibid, Art. 8(b)(xii); UNSC 'Security Council Unanimously Adopts Resolution 2139 (2014) to Ease Aid Delivery to Syrians, Provide Relief from 'Chilling Darkness' (22 May 2014) Press Release SC/11292; UNSC 'Decrying Carnage in Aleppo, Speakers Urge Security Council to End Violence, Open Humanitarian Corridors, Engage in Genuine Dialogue' (13 December 2016) Press Release SC/12624; United Nations Human Rights Council, 'UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity' (*United Nations Human Rights Council*, 20 June 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23226&LangID=E> accessed 10 April 2019; Breau (n 60) 256-266; Fouad (n 62); Emma Graham-Harrison, 'UN security council to meet on Syria as Assad's troops tighten grip on Aleppo' (*The Guardian*, 25 September 2016) <https://www.theguardian.com/world/2016/sep/24/aleppo-siege-tighten-bashar-al-assad-water-two-million> 28 September 2017; Michelle Nichols and Ellen Francis, 'U.N. Security Council delays vote on Syria ceasefire resolution' (*Reuters*, 23 February 2018) <https://uk.reuters.com/article/uk-mideast-crisis-syria-ghouta/u-n-security-council-delays-vote-on-syria-ceasefire-Resolution-idUKKCN1G70Y8> accessed 5 May 2018; Lyse Doucet, 'Syria conflict: Emerging from the siege of Homs' (*BBC News*,13 February 2014) https://www.bbc.co.uk/news/world-middle-east-26171674> accessed 4 May 2016; United Nations Human Rights Council, 'UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity' (*United Nations Human Rights Council*, 20 June 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23226&LangID=E> accessed 10 April 2019; Amnesty International, 'Crackdown In Syria: Terror in Tell Kalakh' (Report, Amnesty International Publications, 2011) 5-7

[87] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; Amnesty International, 'Amnesty International Report 2017/2018 the State of the World's Human Rights' (Annual Report 2017/2018, Amnesty International Ltd 2018) 351

[88] UNSC Meeting 8188th (24 February 2018) U.N. DOC. S/PV.8188; Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(b)(xii); UNSC 'Security Council Unanimously Adopts Resolution 2139 (2014) to Ease Aid Delivery to Syrians, Provide Relief from 'Chilling Darkness' (22 May 2014) Press Release

a similar manner, Daesh had also used civilians to progress and control territory, this is best evidenced by when they prevented Deir-ez-Zor's people from leaving the city.[89] This kind of crimes is highlighted by Article 8 of the Rome Statute (1998) as "[u]tilizing the presence of a civilian or another protected person to render certain points, areas or military forces immune from military operations."[90]

The UN Security Council Resolution 2139 and the UN General Assembly persistently stressed that the crimes committed in Syria may amount to crimes against humanity.[91] This was also the view of many UN Commissions and Organisations.[92] As sieging civilian populations over extended periods of time is a grave and heinous crime committed as part of a policy, plan or as large-scale perpetration, under the ICC, it should be considered a crime against humanity and a jurisdiction related to this is essential.

5.6 Is the International Community's Inaction in the Face of the Syrian Crisis Justifiable?

Traditional international law is based on a set of rules which respect state sovereignty and the principle of non-intervention in states' internal affairs. The same rules paved their way into contemporary international law and became directly linked with the question of the use of force. Article 2(4) of the UN Charter (1945) provides that

> "all members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN."[93]

SC/11292; UNSC 'Decrying Carnage in Aleppo, Speakers Urge Security Council to End Violence, Open Humanitarian Corridors, Engage in Genuine Dialogue' (13 December 2016) Press Release SC/12624; United Nations Human Rights Council, 'UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity' (*United Nations Human Rights Council*, 20 June 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23226&LangID=E> accessed 10 July 2019; Breau (n 60) 256-266; Fouad (n 62) 2518-2520; Emma Graham-Harrison, 'UN security council to meet on Syria as Assad's troops tighten grip on Aleppo' (*The Guardian*, 25 September 2016) <https://www.theguardian.com/world/2016/sep/24/aleppo-siege-tighten-bashar-al-assad-water-two-million> 28 September 2017; Michelle Nichols and Ellen Francis, 'U.N. Security Council delays vote on Syria ceasefire resolution' (*Reuters*, 23 February 2018) <https://uk.reuters.com/article/uk-mideast-crisis-syria-ghouta/u-n-security-council-delays-vote-on-syria-ceasefire-Resolution-idUKKCN1G70Y8> accessed 5 May 2018; Lyse Doucet, 'Syria conflict: Emerging from the siege of Homs' (*BBC News*,13 February 2014) https://www.bbc.co.uk/news/world-middle-east-26171674> accessed 4 May 2016

[89] UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118

[90] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 8(2)(b)(xxiii)

[91] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999–S/2016/620

[92] Alex J. Bellamy, *Responsibility to protect: a defense* (1st, Oxford University Press, New York 2015) 69-71

[93] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(4)

The practice of the UN in the Syrian crisis and other conflicts demonstrates that the UN Security Council is usually prevented from passing a resolution due to the principle of state sovereignty entailing non-intervention in internal affairs. Moreover, the way the Syrian case was addressed by the international community is an example of how national interests and political wills also play a significant role in implementing the R2P. The lack of agreement amongst the permanent Members of the UN Security Council concerning Syria was illustrated when the veto power was used by Russia and China.[94]

5.6.1 State Sovereignty as a Barrier

Article 2(4) of the UN Charter (1945) requires states to refrain from threatening or using force against the territorial integrity or political independence of any state.[95] Similarly, this view is reflected in the Resolutions of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of states and the Protection of their Independence and Sovereignty, adopted by the UN General Assembly in 1965.[96]

The Declaration stresses that no state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any state.[97] Therefore, intervention in the domestic affairs of a foreign state under the R2P principle is prohibited. However, the World Summit 2005 highlights that sovereignty cannot be accepted as an excuse for states which fail to deliver their responsibility in protecting their civilians from atrocity crimes which are considered *jus cogens* under international law. Precisely, the main idea of the R2P principle is to protect civilians when their respective state is unable or unwilling to protect its people.[98] However, implementing R2P should be limited to the atrocity crimes mentioned in the World Summit 2005.[99]

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[94] Amnesty International, 'Amnesty International Report 2017/2018 THE STATE OF THE WORLD'S HUMAN RIGHTS' (Annual Report 2017/2018, Amnesty International Ltd 2018) 46-47; Paul Collier, 'Laws and Codes for the Resource Curse' (2008) 11:9 Yale Human Rights & Development Law Journal 9, 14; Bagdonas (n 17) 57-71; Hehir (n 107) 686-688; Hosli (n 17); Angus McDowall and Others, 'Syria's Assad Discusses Tartus Port With Russians' (*Reuters*, 20 April 2019) <https://www.reuters.com/article/us-syria-russia/syrias-assad-discusses-peace-talks-tartus-port-with-russians-idUSKCN1RW07P> accessed 20 May 2019

[95] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(4)

[96] James Uriah Blacksher and Lani Guinier, 'Free At Last: Rejecting Equal Sovereignty And Restoring The Constitutional Right To Vote: Shelby County V. Holder' (2014) 8 Harvard Law & Policy Review 39, 39-52

[97] UNGA Res. 2131 (21 December 1965) U.N. Doc. A/RES/20/2131

[98] UNGA Res. 60/1 (16 September 2005) U.N. Doc. A/RES/60/1; Evans (n 198)

[99] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; Evans (n 198)

According to the World Summit 2005, the prohibition of the use of force in the Charter of the UN does not mean that the sovereignty of the target state is ranked higher than human rights in the rule of values of modern international society. The World Summit 2005 illustrates that state sovereignty means the responsibility of states to protect their peoples and if a state is unable or unwilling to protect its civilians, then the responsibility to protect is shifted to be applied by the UN.[100]

The term 'sovereignty' has gained a new meaning after being coined with responsibility. During the World Summit 2005, the UN Secretary-General confirmed that every individual state has the responsibility of protecting its own people from atrocity crimes.[101] Thus, state sovereignty should be considered as the recognition of a responsibility shared between the state, in this context, Syria, regional organisations and the UN.[102] Hence, since the Syrian authority failed in fulfilling its responsibility of protecting the Syrian people from atrocity crimes during the Syrian conflict, the intervention by regional organisations under the UN in Syria's internal affairs is not an action against the sovereignty of Syria.[103]

When examining how Syrian authorities acted during the conflict, one finds that they failed in protecting Syrian people from atrocity crimes and, above all, Syrian authorities themselves were actively engaged in committing war crimes and crimes against humanity.[104] Based on the UN Charter and the Charter of the LAS, as a regional organisation, they should both share the responsibility of protecting the Syrian population as the Syrian government is no longer willing to take responsibility and protect its people.[105]

5.6.2 Adherence to Non-Intervention in Internal Affairs of Foreign State

The impasse in the decision making can also be attributed to the principle of non-intervention. Non-Western countries such as Russia and China are reluctant to accept the issue of

[100] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; John Forrer and Conor Seyle (ed.), *The role of business in the responsibility to protect* (1st, Cambridge University Press, New York 2016) 206-229; UNSC Res. 1160 (31 March 1998) U.N. Doc. S/RES/1160; International Commission on Intervention and State Responsibility, *The Responsibility To Protect Report of the International Commission on Intervention and State Responsibility* (1st, International Development Research Centre, Ottawa 2001) [Hereinafter: ICISS Report 2001]

[101] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 5; Breau (n 60) 19-21

[102] Breau (n 60) 25-26

[103] UNSC Res. 1160 (31 March 1998) U.N. DOC. S/RES/1160

[104] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1

[105] League of Arab States, Charter of Arab League, 22 March 1945; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI and VIII; Ottawa Roundtable Report 2001 at para. XIII; Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (1st, International Development and Research Centre, Ottawa 2001) 33-34

legitimising the R2P principle under the name of humanitarianism.[106] This attitude often means that such countries tend to stick to non-coercive measures such as diplomatic and political ones though these measures are not necessarily effective in ending a conflict. They believe that the most adequate method of ending any given conflict is offering a peaceful resolution rather than coercive measures.[107] This may be specifically inferred from the comments of Russia and China on the Resolutions of the UN Security Council.[108]

The ICJ's landmark decision in the Case Concerning Military and Paramilitary Activities Against and in Nicaragua demonstrates the illegality of intervention in the internal affairs of another state.[109] The Chinese and Russian permanent representatives to the UN argued that remaining on the peaceful avenue to sort the Syrian problem is the most ideal and optimal option. However, the continuing massacre of civilians arguably proves that the adoption of peaceful measures in Syria had ultimately failed. Furthermore, the imposition of economic sanctions had little to no effect on the Syrian conflict.[110]

The principle of non-intervention should therefore be preserved to the extent that no atrocity crimes are committed against civilians. More intrusive actions however should not be dismissed; instead, they should be used as a mechanism where a sovereign has failed to take measures which would prevent such crimes.[111]

5.6.3 The Repercussion of the Libyan Test in 2011

On 17 March 2011, the UN Security Council passed Resolution 1973 which enabled the UN members to take all necessary measures to prevent an expected massacre if troops loyal to

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[106] Chelsea O'Donnell, 'The Development of The Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' (2014) 24 Duke Journal of Comparative International Law 557, 569-571; Jason Ralph and Adrian Gallagher 'Legitimacy faultlines in international society: The responsibility to protect and prosecute after Libya' (2015) 41:3 Review of international studies 553, 554-559

[107] *Case concerning Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Judgment of 27 June 1986, ICJ Reports 1986* at para. 115; O'Donnell (n 106) 563-566; Marcos Tourinho and others' "Responsibility while protecting": Reforming R2P implementation' (2016) 30:1 Global Society 134, 144-145

[108] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043

[109] Stahn (n 109); *Case concerning Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Judgment of 27 June 1986, ICJ Reports 1986* at para. 239; see generally, H.L.A. Hart, with a Postscript edited by Penelope a. Bulloch and Joseph Raz and with an Introduction and Notes by Lesile Green, The concept of law (3ed, Oxford University Press, Oxford 2012)

[110] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; O'Donnell (n 106) 569-571; Garwood-Gowers (n 13); Michael Small 'An Analysis of The Responsibility to Protect Program In light of the Conflict in Syria' (2014) 13 Washington University Global Studies Law Review 179, 192-193; Caesten Stahn, 'Between law breaking and Law-making: Syria, Humanitarian Intervention and 'What the Law Ought to Be'' (2014) 19 Journal of Conflict and Security Law 25, 36-37

[111] Jonathan Moore, *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (1st, Rowan and Littlefield Publishers Inc., Maryland 1998) 29, 41-42; Alex J. Bellamy and Catherine Drummond, 'The responsibility to protect in Southeast Asia: Between non-interference and sovereignty as responsibility' (2011) 24:2 The Pacific Review 179, 186

Gaddafi recaptured Benghazi.[112] On 19 May 2011, NATO acted under UN Security Council Resolution 1973 and launched a military attack to prevent atrocity crimes against the civilians of Benghazi. Since February 2011, the Libyan crisis has remained unsolved. In various scholars' opinions, NATO's action tickled a nest of wasps when the UN left the country in a dangerous situation without implementing the third pillar of the R2P principle, namely, the responsibility to rebuild.[113]

In an attempt to decipher the clues and puzzles which underlie the inaction of the UN Security Council in Syria, the fallout of the Libyan episode was one of the main reasons which discouraged the UN Security Council to act.[114] However, Bellamy and the Global Centre for the Responsibility to Protect, have hailed the Libyan scenario as it has functioned to avert mass atrocities in Benghazi. They regarded it as a practical success which was applied decisively in line with the spirit of the R2P principle, namely, protecting civilians in Benghazi from their own government.[115]

The practice of the UN Security Council demonstrates the various challenges encountered when attempting to implement the R2P principle, which was discussed in each session of the UN Security Council by the Russian and Chinese delegators whilst actively vetoing every draft resolution related to Syria.[116] Russia and China showed that they learned a lesson from the Libyan case which they would not easily forget.[117]

The two permanent Members further expressed that the intervention which took place in Libya had undoubtedly exceeded the prescribed limitations of the UN Security Council Resolution 1973 when it led to replacing the governing regime of Gaddafi.[118] Therefore, the Russian delegator had confirmed that "these types of models should be excluded from global practice once and for all."[119] It is also worth noting that Russia has actively participated in the Syrian conflict militarily. The Russian aircrafts bomb and shell the Syrian cities and population

[112] UNSC Res. 1973 (17 March 2011) U.N. DOC. S/RES/1973
[113] Anthony Lewis, 'The Challenge of Global Justice Now,' (2003) 132:1 Daedalus 5, 8-10; Alex J. Bellamy, 'The Responsibility to Protect and the problem of military intervention' (2008) 84:4 International Affairs 615, 620-623
[114] Spencer Zifcak, 'The Responsibility to Protect After Libya and Syria' (2012) 13 Melbourne Journal of International Law 59, 87; Hehir (n 107) 692-695
[115] Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 223-23; Alex J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25:3 Ethics & International Affairs 263, 265-266
[116] Garwood-Gowers (n 13)
[117] Garwood-Gowers (n 13); Bagdonas (n 17) 57-58
[118] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 139; Breau (n 60) 274-275; Azuolas Bagdonas, 'Russia's Interests in the Syrian Conflict: Power, Prestige, and Profit' (2012) 5:2 European Journal of Economic and Political Studies 55, 57-58
[119] Garwood-Gowers (n 13); see generally, Aidan Hehir, *Hollow Norms and the Responsibility to Protect* (1st, Palgrave Macmillan, Cham 2019)

areas while it uses its veto power inside the UN Security Council to mask its war crimes and crimes against humanity.[120]

5.6.4 The Fear of an Emerging Rule of Customary International Law and the Ineffectiveness of the Traditional Approach

Current literature suggests that an intense argument exists relating to the status of atrocity crimes under customary international law as some of the crimes in question are considered as norms having attained the status of *jus cogens*. It is also arguable that the development of atrocity crimes was the direct result of customary international law.[121]

From examining contemporary international human rights law, it appears that many courts and tribunals exist at the regional level to deal with human rights violations.[122] Some of these courts and tribunals were established according to several treaties such as the African Charter on Human and Peoples Rights (1986), European Convention on Human Rights (1950), and the American Convention on Human Rights (1969).[123] More importantly, several rights have been considered as having gained the status of customary international law.[124]

The World Summit 2005 involved detailed discussion of atrocity crimes against civilians and violations of international humanitarian law and whether they should be considered as potential triggers for the implementation of the R2P principle. Furthermore, conditions to discuss the aforementioned points as triggers were put forth. For instance, the R2P principle would be applied if massive scale killing was a result of the aforementioned acts.[125] As pointed out earlier the UN should be in a position to protect the Syrian civilians due to the Syrian authority's failure in protecting civilians and ending human rights abuses against its population.[126]

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[120] Gareth Evans and Others, 'Humanitarian Intervention and Responsibility to Protect' (2013) 37 International Security 205, 207; Hosli (n 17) 166-171; O'neill (n 17) 220-229

[121] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 21-44; Mahmoud Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 Virginia Journal of International Law 81, 108

[122] Ibid

[123] European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights "Pact of San José, Costa Rica" (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; African Charter on Human and Peoples' Rights Organization of Africa Unity, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

[124] Antonio Cassese, *International Law in a Divided World* (1st, Clarendon Press, Oxford 1989) 19-21

[125] Ottawa Roundtable Report 2001 at para. 4.20

[126] Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2006) 44-47; Richard B. Lillich, 'Forcible Self-Help by States to Protect Human Rights' (1967) 53 IOWA L. REV. 325,327

This begs the question of why the international community avoided applying the R2P principle in the Syria Case as it had under similar circumstances in Libya 2011. The UN and the international community have always concerned themselves with ending atrocity crimes in several cases. For example, Kouchner, the French Foreign and European Affairs Minister in 2008 appealed to the UN Security Council to react to the Kenyan Crisis "in the name of the responsibility to protect" before a deadly ethnic conflict arises. Similarly, in the Gambia in January 2017 the UN backed the African Union and ECOWAS through UN Security Council Resolution 2337 to protect the Gambian population from atrocity crimes.[127]

The weight of research by leading experts in the field, like the UN Secretary-General Kofi Annan, seem to point towards the Libyan crisis as the first real test of implementing the R2P principle through military means. Although the R2P principle appears to function as a useful mechanism in ensuring the end and prevention of atrocity crimes, it has been met with opposition.[128] Those who oppose the implementation of the R2P principle, such as China and Russia, justify their position on the argument that the continued application of the R2P principle will eventually render it as a rule of customary international law.[129]

Firstly, China and Russia compared the Syrian crisis to the Libyan scenario as the latter highlighted the emergence of a new rule of customary international law. Secondly, they stressed that resorting to the use of force should be excluded from practice. Evidently, this is based on the notion that the R2P principle was met with universal support during the World Summit 2005. This consensus satisfies the first element for the establishment of a new rule of custom, *opinio juris*, and the only remaining element is state practice.[130] Therefore, the Syrian crisis may mark the ending-point of the R2P principle in the short term.

Under customary international law, the deployment of peacekeepers is a well-established rule.[131] However, the reason why this was not applied in Syria rests on the difficulty faced by the international community whilst attempting to arrange such measures with the Syrian regime.[132] Thus, along with other complications, this resulted in an overall failure of

[127] UNSC Res. 2337 (19 January 2017) U.N. DOC. S/RES/2337; Elkanah Oluwapelumi Babatunde, 'ECOWAS Intervention in Gambia: A Case Study of International Law on the Use of Force' (2017) 6:2 UCL Journal of Law and Jurisprudence 46, 59-60

[128] Zachary DA. Hingst, 'Libya and the Responsibility to Protect: Building Block or Roadblock' 22 (2013) 22 Transnat'l L. & Contemp. Probs. 227, 263-264

[129] Bagdonas (n 17) 68-69

[130] Cronogue (n 10) 151-152; Bagdonas (n 17) 68-69

[131] Ray Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply To Peacekeepers?' (2003) 14:2 Criminal Law Forum 153, 156-158

[132] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC 'Decrying Carnage in Aleppo, Speakers Urge Security Council to End Violence, Open Humanitarian Corridors, Engage in Genuine Dialogue' (13 December 2016) Press Release SC/12624; John R Bolton, 'United States Policy on United Nations Peacekeeping' (2001) 163:3 World Affairs 129, 132; Gifkins (n 6) 388-391; Small (n 109) 183-187

the international community in finding successful methods to deploy peacekeeping troops on the Syrian territory. However, the Syrian government invited foreign forces from Russia, Iran, and loyal militias to intervene. Others intervened without authorisation from the Syrian authority such as the International Coalition against Daesh and Turkey.[133]

The international community failed in creating a humanitarian corridor to protect civilians – in Homs, Daraya, the Eastern Ghouta, Madaya, Zabadani, East Aleppo and Idlib - who were under the siege of the Syrian troops.[134] This resulted in the inability to distribute humanitarian aid which led to the death of thousands of civilians due to the shortage of food and cold weather during winter.[135] Certainly, the Syrian crisis demonstrates that, without an effective host government, it would be difficult for customary international law to function to meet humanitarian demands. Nevertheless, the international community has exhibited its willingness, consistent with the rules of engagement, to carry out its responsibilities to protect civilians.[136]

5.6.5 National Interests and Political Wills

In the Syrian case, the UN Security Council's dilemma stemmed from the concerns of non-Western nations about the emergence of a novel rule of customary international law. China and Russia, along with their allies, are known for blind complying with the non-intervention principle, regardless of which crimes have been committed.[137] The reasons for this attitude can also base on the national interests and political wills specific to these states.[138]

Concerning Russia, its approach to the Syrian crisis can be understood by dissecting the Russian-Syrian relationship. Since the beginning of the Syrian crisis, the Russian president

[133] UNSC 'Security Council Unanimously Adopts Resolution 2042 (2012), Authorizing Advance Team to Monitor Ceasefire in Syria' (14 April 2012) Press Release SC/10609

[134] UNSC 'Decrying Carnage in Aleppo, Speakers Urge Security Council to End Violence, Open Humanitarian Corridors, Engage in Genuine Dialogue' (13 December 2016) Press Release SC/12624

[135] E. Tendayi Achiume, 'Syria, Cost-sharing, and the Responsibility to Protect Refugees' (2015) 100 Minnesota Law Review 687, 696-698; BBC, 'Battle for Aleppo: Photo of Shocked and Bloodied Syrian Five-Year-Old Sparks Outrage' (*BBC News,*18 August 2016) < https://www.bbc.co.uk/news/world-middle-east-37116349> accessed 26 November 2016

[136] Gifkins (n 6) 391; Small (n 109) 192-198

[137] Cronogue (n 130) 149-152; Garwood-Gowers (n 13); Collier (n 94) 14; Hehir (n 8) 686-688; Derek Averre and Lance Davies 'Russia, Humanitarian Intervention and The Responsibility to Protect: The case of Syria'. (2015) 91:4. International Affairs 813, 826-829; Angus McDowall and Others, 'Syria's Assad discusses peace talks, Tartus port with Russians' (*Reuters*, 20 April 2019) <https://www.reuters.com/article/us-syria-russia/syrias-assad-discusses-peace-talks-tartus-port-with-russians-idUSKCN1RW07P> accessed 20 May 2019; Leila Nadya Sadat, 'Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will' (2015) 5:1 Impunity Watch Law Journal 1, 10-12; John MacMillan, 'After Interventionism: A Typology of United States Strategies' (2019) 30:3 Diplomacy & Statecraft 576

[138] Bagdonas (n 17) 57-71; Hehir (n 137) 286; Jens Petersson, 'Making Europe's Responsibility to Protect More Credible' (2011) 3 Global Responsibility to Protect 353, 354-359; Aidan Hehir, 'The responsibility to protect in international political discourse: encouraging statement of intent or illusory platitudes?' (2011) 15:8 The International Journal of Human Rights 1331, 1338

visited Syria and illustrated his support to the Syrian government, one of Russia's oldest allies in the Middle East. From an economic perspective, Damascus and Moscow's military deals reach an estimate of tens of billions of US Dollars.[139]

Since the beginning of the Syrian crisis, the Russian president had visited Syria several times and illustrated his support to the Syrian regime, one of Russia's oldest allies in the Middle East. Furthermore, Moscow insists on keeping its last running military base in the Mediterranean Sea in Tartus port for another forty-nine years.[140] Therefore, the core difficulty is that "no matter what criteria are recognised for a justified intervention, the decisive reasons will continuously be authority and political will."[141]

Likewise, China as a superpower also has its own geopolitical and economic interests in Syria; therefore, China always dismisses and vetoes any draft Resolution related to the Syrian crisis.[142] The American delegator in the UN Security Council, Rice, clarified and commented on the employment of the veto power by China and Russia and stated that "it is the military and oil deals not the Libyan calculations."[143]

Traditional practice demonstrates and continues to demonstrate that presently, humanitarian considerations are indeed less important for primary members of the UN Security Council when geopolitical and economic factors are involved in conflicts.[144] Examples of this were the cases of Bosnia and Kosovo where Russia used its veto power to block draft resolutions of the UN Security Council despite the clear evidence that atrocities had taken place.[145] Eventually, however, NATO intervened unilaterally in Kosovo in the absence of a UN Security Council resolution and averted atrocity crimes. Although its legality has been questioned, its legitimacy is clear.[146]

According to the World Summit 2005, implementing the R2P principle would be considered on a 'case-by-case approach. The terms used suggest that even in the presence of one or more of the four triggers (genocide, crimes against humanity, war crimes, ethnic cleansing), the R2P principle is not necessarily applied.[147] However, this still does not provide

[139] Caitlin Alyce. Buckley, 'Learning from Libya, acting in Syria" (2012) 5:2 Journal of Strategic Security 81, 84,91-93
[140] Cronogue (n 130) 149-152; Bagdonas (n 17) 61; Rod Thornton 'Countering Prompt Global Strike: The Russian Military Presence in Syria and the Eastern Mediterranean and Its Strategic Deterrence Role' (2019) 32:1 the Journal of Slavic Military Studies 1, 10
[141] See generally, Stephen John Stedman, 'UN Transformation in an Era of Soft Balancing' (2007) 5 International Affairs 933
[142] Garwood-Gowers (n 13); Collier (n 94) 14; Bagdonas (n 17) 57-71
[143] Zifcak (n 114) 91
[144] Averre (n 137)
[145] O'Donnell (n 106) 563-566; O'neill (n 17) 220-229
[146] UNSC Res. 688 (5 April 1991) U.N. DOC. S/RES/688
[147] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 139; Christof Royer, 'Fig Leaves, Paradoxes and Hollow Hopes–The Politics (and Antipolitics) of Protecting Human Rights' (2019) Journal of Intervention and Statebuilding 1, 1-3; Mehrdad Payandeh, 'The concept of international law in the jurisprudence of HLA Hart' (2010) 21:4 European Journal of International Law 967, 968

a clear and adequate answer as to why the R2P principle has not been implemented in Syria. What remains as the most convincing explanation in this regard is related to the national interests and political wills of Russia and China.[148]

On 22 January 2019, the American House of Representatives unanimously passed legislation to impose further sanctions on the Syrian government and its allies.[149] The bill imposed sanctions on anyone engaged in "substantial financial, material or technological support, or engaged in an important deal with the Syrian government or the governments of Russia and Iran in Syria."[150] An exception was made however for non-governmental organisations operating in Syria.[151]

To improve the will to reform, the current mechanisms and agents of human security and undertake protecting civilians is to promote an accurate adjustment in states' concepts of their national interest. In this context, the UN Secretary-General Kofi Annan called for a novel, broader definition to the national interest in which states understand that the collective interest is a mirror and in line with their national interest.[152] In this respect, intervention is implemented dynamically by states or agents can have great potential benefits for the intervener, such as greater standing in regional organisations, increased international status and opening up of new foreign markets.

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[148] Collier (n 94) 14; Bagdonas (n 17) 57-69; Hehir (n 137) 686; Breau (n 60) 204-206

[149] Congress of the United States of America 'H.R.31 - Caesar Syria Civilian Protection Act of 2019' (*Congress*, 21 January 2019) <https://www.congress.gov/bill/116th-congress/house-bill/31/text?q=%7B%22search%22%3A%5B%22Syria%22%5D%7D&r=1&s=3> accessed 1 April 2019; Aída Chávez, 'CONGRESS IS PUSHING SANCTIONS AGAINST SUPPORTERS OF SYRIA'S BASHAR AL-ASSAD' (*The Intercept*, 25 January 2019) <https://theintercept.com/2019/01/25/syria-sanctions-bill-assad/> accessed 26 February 2019; Carla E. Humud and Others, 'Armed Conflict in Syria: Overview and U.S. Response' (CRS Report, Congressional Research Service, 28 September 2016) 7-8

[150] Aída Chávez, 'CONGRESS IS PUSHING SANCTIONS AGAINST SUPPORTERS OF SYRIA'S BASHAR AL-ASSAD' (*The Intercept*, 25 January 2019) <https://theintercept.com/2019/01/25/syria-sanctions-bill-assad/> accessed 26 February 2019; see generally, Carla E. Humud and Others, 'Armed Conflict in Syria: Overview and U.S. Response' (CRS Report, Congressional Research Service, 28 September 2016); Congress of the United States of America 'H.R.31 - Caesar Syria Civilian Protection Act of 2019' (*Congress*, 21 January 2019) <https://www.congress.gov/bill/116th-congress/house-bill/31/text?q=%7B%22search%22%3A%5B%22Syria%22%5D%7D&r=1&s=3> accessed 1 April 2019

[151] Congress of the United States of America 'H.R.31 - Caesar Syria Civilian Protection Act of 2019' (*Congress*, 21 January 2019) <https://www.congress.gov/bill/116th-congress/house-bill/31/text?q=%7B%22search%22%3A%5B%22Syria%22%5D%7D&r=1&s=3> accessed 1 April 2019; Aída Chávez, 'CONGRESS IS PUSHING SANCTIONS AGAINST SUPPORTERS OF SYRIA'S BASHAR AL-ASSAD' (*The Intercept*, 25 January 2019) <https://theintercept.com/2019/01/25/syria-sanctions-bill-assad/> accessed 26 February 2019; see generally, Carla E. Humud and Others, 'Armed Conflict in Syria: Overview and U.S. Response' (CRS Report, Congressional Research Service, 28 September 2016)

[152] Hehir (n 137) 679-280; Angus McDowall and Others, 'Syria's Assad discusses peace talks, Tartus port with Russians' (*Reuters*, 20 April 2019) (*Reuters*, 20 April 2019) <https://www.reuters.com/article/us-syria-russia/syrias-assad-discusses-peace-talks-tartus-port-with-russians-idUSKCN1RW07P> accessed 20 April 2019

5.7 Unoffered Rescue

The inability of applying the R2P principle remains problematic; this is evidenced by the death toll which has continued to rise to the date of this dissertation. The shortage of food and medical care due to the suffocating blockade on the rebel-controlled areas has made the situation more catastrophic and devastating. In light of the absence of an effective response on the part of the Syrian government and the UN's reluctance in acting to protect the Syrian civilians, the atrocity crimes thus far examined are ongoing.[153]

It was obvious that there was a failure to carry out a suggested solution because the Syrian regime disregarded Annan's plan. Also, the economic sanctions proved to be an inadequate measure for putting an end to the civilians' suffering.[154] The failure of stopping atrocity crimes through peaceful means called for further action to put an end to the atrocity crimes taking place against the Syrian civilians since 2011.[155] This failure of adopting a certain plan to end the widespread bloodshed in Syria raised a significant concern as to why the R2P principle was applied in Libya but not in Syria. Although the Libyan conflict was generally less atrocious and, arguably, was on such a smaller scale compared with the Syrian conflict, there was an intervention to protect Libyans.[156]

The failure of finding an adequate solution under the UN led Russia and Iran to act as interlocutors to resolve the Syrian conflict. They tried to impose a solution which *de facto* leans towards the Syrian regime's favour. The offered answer by Moscow and Tehran functioned as the Syrian regime's lifeline.[157] Eccentrically, the two states, which blindly supported the Syrian government and fought alongside its troops, simultaneously acted as peacemakers by guaranteeing talks.

Turkey participated in the talks as a guarantor for the rebels as several of the opposition and rebel groups are based in Turkey. Furthermore, Turkey shares a long land border with the Syria, and this border area has been affected by Kurdish militant groups during the crisis.

[153] Ramesh Thakur, 'R2P after Libya and Syria: Engaging emerging powers' (2013) 36:2 The Washington Quarterly 61, 61-65; see generally, Bolton (132)
[154] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042, at Annex; Breau (n 60) 257-260
[155] Breau (n 60) 256-256
[156] Breau (n 60) 255-257
[157] AlJazeera, 'Syrian war: All you need to know about the Astana talks' (*AlJazeera*, 30 October 2017) <https://www.aljazeera.com/news/2017/10/syrian-war-astana-talks-171029160554816.html> accessed 2 April 2019; AlJazeera, 'Syria talks led by Russia, Iran and Turkey revived in Sochi' (*AlJazeera*, 30 July 2018) <https://www.aljazeera.com/news/2018/07/syria-talks-led-russia-iran-turkey-revived-sochi-180730152251886.html> accessed 2 April 2019

Moreover, Turkey has hosted more than three and a half million Syrian refugees on its soil.[158] Therefore, Turkey called the NATO members for a meeting under Article 4 of NATO Treaty as the Turkish territory was under threat by the Syrian crisis. That threat has motivated Turkey to involve more in the Syrian crisis to protect its own national security.[159]

The key players in the Syrian conflict met in Astana and Sochi to establish 'de-escalation zones' and agree on a solution to the violence. Armed opposition groups and representatives of the Syrian regime held talks which aimed to implement a ceasefire agreement. The UN Special Envoy for Syria, de Mistura, also participated in the talks which sought to end the war.[160] In May 2017, talks took place in Astana which specifically aimed to establish four 'de-escalation zones' in mainly opposition-held areas of the country, with Russia, Turkey and Iran acting as guarantors. The four proposed zones were the Eastern Ghouta, Rastan, parts of Idlib as well as parts of Daraa and Quneitra.[161]

Implementing the R2P principle is not always an affordable solution even where the triggers of implementing the principle are met. Syria, the LAS and the UN have failed to protect the Syrian population from atrocity crimes.[162] Iran and Russia participated directly in the Syrian crisis and tried to impose a solution in favour of the Syrian regime. Similarly, Russia used its veto power and loomed to use this power again and again against any suggested draft resolution inside the UN Security Council.[163] This dissertation suggests that in order to limit the commission of atrocity crimes in the future, the R2P principle should be re-evaluated with particular emphasis being placed on limiting the veto power of the permanent members of the UN Security Council.

5.8 Is the R2P Principle Still Alive?

Proponents of the view that confirms the death of the R2P principle argue that implementing the principle is a violation to state sovereignty and non-intervention principles.[164] They went

[158] Sidika Tekeli-Yesil, 'Determinants of Mental Disorders in Syrian Refugees in Turkey Versus Internally Displaced Persons in Syria' (2018) 108:7 American journal of public health 938, 939; Mohammed Nuruzzaman, 'The 'Responsibility to Protect' Doctrine: Revived in Libya, Buried in Syria' (2013) 15:2 *Insight Turkey* 57, 65-65

[159] North Atlantic Treaty (signed 4 April 1949, entered into force 24 August 1949) 34 UNTS 243

[160] Hinnebusch (n 5) 103-109; Colin H. Kahl and Others, *A strategy for Ending the Syrian Civil War* (Washington, DC: Centre for a New American Security, 2017) 6-9

[161] Maxwell B. Markusen, 'Idlib Province and the Future of Instability in Syria' (2018) CSIS Briefs 1, 2-6; DPA and AFP 'UN Syria Envoy Calls Astana Talks On Syria 'Missed Opportunity''(29 November 2018) <https://www.rferl.org/a/un-syria-envoy-calls-astana-talks-on-syria-missed-opportunity-/29628886.html> accessed 12 December 2018

[162] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI

[163] Angela Stent, 'Putin's Power Play in Syria: How to Respond to Russia's Intervention' (2016) 95 Foreign Affairs 106, 107-110

[164] Antonio Cassese, *International Law in a Divided World* (2nd, Clarendon Press, Oxford 2005) 47-49; Mehrdad Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 Journal of International law 470, 492

further when they added that the R2P principle was born dead and any kind of intervention under the excuse of R2P is illegal. Additionally, they stress that any kind of use of force is illegal without an authorisation from the UN Security Council and consent from the host state.[165] Kosovo 1992, Iraq 2003, Mali 2013, Somalia 1993 and recently Libya 2011 are cited as illegal military interventions which increased humanitarian suffering.[166] This group argue that the R2P principle cannot make any legal commitment under international law and it is merely a norm in the domain of international relations.[167] It seems that this group considers R2P as a political tool which is not enforceable under international law.

In responding to a non-interventionist theory about Syria's human rights catastrophe this dissertation examines that state sovereignty is considered by the UN General Assembly members as a responsibility under the World Summit 2005.[168] State sovereignty is viewed 'not as an absolute term of authority but as a kind of responsibility'.[169] Intervention within a state that fails to protect its criticism from atrocity crimes should not constitute a violation to that state's sovereignty, but it appears as a realisation of a responsibility which is shared by initially the state, regional organisations and UN.[170] Thus, protecting civilians under R2P seems a three-dimension responsibility where the state, regional organisations and UN should share the responsibility of protecting civilians from atrocity crimes. The responsibility of regional organisation and UN come when the state fails to deliver its responsibility in protecting its own people from atrocity crimes.

Before resorting to military intervention, the ICISS Report 2001 presents a detailed criteria: 'just cause, right intention, proportional means right authority, reasonable prospects and last resort.'[171] The report examines that R2P is not a pretext to intervene in the internal affairs of states but it is a limited tool to protect civilians from atrocity.[172] This study stresses

[165] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(4); Andrew Garwood-Gowers, 'China and the 'Responsibility to Protect': the implications of the Libyan intervention' (2012) 2:2 Asian Journal of International Law 375, 380-391; *Ibid* Antonio; Thomas M. Franck, 'Who killed Article 2 (4)? or: changing norms governing the use of force by states' (1970) 64:5 American Journal of International Law 809

[166] Mehrdad Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 Journal of International law 470, 506

[167] Gareth J. Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?' (2008) 22 International Relations 283, 283-385; Jutta Brunnee and Stephen Toope, 'Norms Institutions and UN Reform: The Responsibility to Protect' (2006) 2 Journal of International Law & International Relations 121, 133

[168] UNGA RES 60/1 (16 September 2005) UN Doc A/RES/60/1 at para. 138; Mehrdad Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 Journal of International law 470, 485; Kees Homan, 'CEBRI-Clingendael Conference in Brasilia on 29 May 2012, challenges in implementing the Responsibility to Protect: Undertaking coercive and non-coercive action' (2012) 23 Security and Human Rights 105, 113; Thomas Weiss at el 'The responsibility to protect' (2011) E-International Relations

[169] Andrew Garwood-Gowers, 'China and the 'Responsibility to Protect': the implications of the Libyan intervention' (2012) 2:2 Asian Journal of International Law 375, 377; ICISS Report 2001 at para 1.35

[170] Mehrdad Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 Journal of International law 470, 485

[171] ICISS Report 2001 at paras 4.16-4.43

[172] *Ibid* 3.1-3.9

that R2P is limited and implemented just when atrocity crimes are committed and the state is unable or unwilling to protect its civilians. To respond to the failure of implementing the R2P principle in the key case of the dissertation, the Syrian crisis, and other cases, recommendations to implement the principle at an early stage of a crisis are recommended in chapter six.

Another reason for confirming the death of R2P in literature is that the permanent Member States of the UN Security Council have different opinions and understandings of the R2P principle. Diversity among the Members shows that reaching international consensus on measures of protecting civilians is hardly straightforward.[173] The lack of clear standards governing how and when the UN should act to stop atrocity crimes means and protect civilians depends on the will of the Security Council members and this will be closely dependent on political exigencies.[174] Similarly, diversity could appear from 'diverging strategic cultures based on different historical lessons on the use of force'.[175]

Supporters of implementing the R2P principle in Libya, namely, the UK, France and the USA, immediately greeted resolution 1973 as a significant step towards the consolidation of R2P's status as a new international norm.[176] They referred to the Libyan case 2011 as a clear-cut example of implementing R2P which shifted the emphasis from intervention to prevention. Political consensus on civilian protection in Libya quickly dissolved as disagreements emerged within the Security Council over the scope of military action permitted by the resolution.[177]

Practice shows that Russia, China and other non-Western states have criticised the R2P principle for long time. They highlight that the principle might be used as a pretext for regime change and a unilateral intervention.[178] This reaction effect is evident in the UN's inability to reach a consensus to protect the civilians in Syria.[179] Similarly, resorting to using veto by Russia and/or China over the Syria crisis is a clear example of this deficiency.[180] Later,

[173] UNGA RES 60/1 (16 September 2005) UN Doc A/RES/60/1
[174] Aidan Hehir, 'The responsibility to protect in international political discourse: encouraging statement of intent or illusory platitudes?' (2011) 15:8 The International Journal of Human Rights 1331, 1342-45
[175] Alex Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (1st ed., Oxford University Press, New York 2016) 402
[176] Max Mathews, 'Tracking The Emergence of New International Norm: The Responsibility to Protect and the Crises in Darfur' (2008) 31 Boston College International and Comparative Law Review 137, 152; Brian Babour and Brian Gorlick, 'Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum from Potential Victims' (2008) 20 International Journal of Refugee Law 533, 535; Jutta Brunnee and Stephen Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2:3 Global Responsibility to Protect p16-18
[177] UNGA RES. 60/1 (16 September 2005) UN Doc A/RES/60/1 at para. 138
[178] Andrew Garwood-Gowers, 'China and the 'Responsibility to Protect': the implications of the Libyan intervention' (2012) 2:2 Asian Journal of International Law 375, 376-7; Mehrdad Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 Journal of International law 470, 492
[179] UNGA RES. 60/1 (16 September 2005) UN Doc A/RES/60/1 at para 139
[180] UNSC RES. 2042 (14 April 2012) U.N. Doc. S/RES/2042; UNSC RES. 2043 (21 April 2012) U.N. Doc. S/RES/2043

diversity about implementing the R2P principle led Brazil to propose responsibility while protecting (RWP) in the Clingendal conference in Brasilia 29 May 2012.[181]

Reaching an agreement between the permanent members of the Security Council on a set of standards is by no means an outright task and it will be the core step towards improving the Security Council's ability to respond to R2P situations in a timely and consistent manner.[182] The critical question about the future of R2P principle is whether the conceptual, political and operational challenges that have occurred after the Libyan intervention can be resolved. In chapter six of this dissertation, recommendations from the Syrian case and other cases, on how to respond regarding the failure of implementing the R2P principle and implementing the R2P at an early stage, are presented.

5.9 Concluding Remarks

Despite the fact that the situation in Syria met the criteria needed for R2P implementation through the presence of at least two triggers for this implementation, the Syrian crisis was not satisfactorily addressed by the UN. This means that the UN did fail to deliver on the promise of the World Summit 2005, namely, the protection of civilians.[183] The UN Security Council's traditional practice reflects that it follows a selective approach in implementing the R2P principle. The UN Security Council should meet its responsibility whenever the triggers for implementing R2P are met.

The absence of an adequate response and indifference from the host government, in this context the Syrian government, and the reluctance of the UN in acting to protect the Syrian civilians has resulted in the continuation of atrocity crimes. The indifference and reluctance about the Syrian case shed light on the need for developing novel mechanisms to prevent atrocity crimes, the achieving of which should be a regional and international obligation.[184]

The failure of the UN Security Council over protecting the Syrian civilians could not be considered as a sign of the death of the R2P principle. Undoubtedly, such a standpoint cannot be easily established, at least not in legal terms. The R2P principle has both, national and international dimensions; the national aspect is exercised mainly by the concerned state while the international dimension is contingent upon the failure of the first dimension. However, this

[181] Kees Homan, 'CEBRI-Clingendael Conference in Brasilia on 29 May 2012, challenges in implementing the Responsibility to Protect: Undertaking coercive and non-coercive action' (2012) 23 Security and Human Rights 105, 110-111
[182] Ariela Blatter and Paul D. Williams, 'The Responsibility Not to Veto' (2011) 3 Global Responsibility to Protect 301
[183] Zuber (n 47) 287-292; see generally, Bolton (n 132)
[184] Thakur (n 153) 62-64; see generally, Bolton (n 132)

chapter and the previous one endeavoured to show that applying the R2P principle is not related to the *bona fide* of the R2P aims. Instead, the concept of R2P is constrained by narrow interpretations of state sovereignty, non-intervention, past experience, domestic politics and foreign policy aspirations.

In order to offer mechanisms which may apply the R2P principle and prevent atrocity crimes in the future, academics and scholars should re-evaluate the principle. The re-evaluated approach may potentially help apply the first pillar of the R2P principle – the responsibility to prevent – by preventing atrocity crimes at an early stage of any given crisis through the state itself, and if needed, regional organisations and the UN.[185] This may prove to be a more effective approach than the current legal position.

[185] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI

Chapter Six: Re-Evaluation of the R2P Principle

6.1 Introduction

Quoting the words of Julius Malema, a distinguished South African politician; "If things are going the way they are, there will be a revolution [t]here will be an unled revolution, and an unled revolution is the highest form of anarchy."[1] This is perhaps one of the few imminent risks which may cause inevitable havoc if the R2P principle does not function to prevent or stop atrocity crimes.

The R2P principle emerged to bridge the *lacunae* between state sovereignty and human violence which causes suffering for millions of crimes around the world. The UN has repeatedly failed to protect civilians as decisions have usually been blocked due to the UN Security Council's selective approach in the R2P implementation. This turned the principle into a chameleon that changes its colour in each situation.

Noticeably, practice shows that the UN failed to implement the R2P principle in several cases where the triggers for implementing the principle were met, especially in the Syrian crisis where chemical weapons were used against civilians more than 336 times.[2] When chemical weapons were used against children and women and the UN confined its role to condemning the perpetrator without taking any action to stop these crimes.[3] Russia, one of the permanent members of the UN Security Council, has been participating in committing atrocity crimes in Syria and used its veto power to obstruct resolutions for protecting Syrian civilians.[4] The fact that at such critical times when there are triggers for the R2P implementation but any draft resolutions are blocked highlights the necessity of re-evaluating the principle to make it more reliable in resolving crises.

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[1] Daniel Friedman, 'Malema warns ANC of 'unled revolution' if land isn't expropriated' (*The Citizen*, 25 June 2019) <https://citizen.co.za/news/south-africa/politics/2146936/malema-warns-anc-of-unled-revolution-if-land-isnt-expropriated/> accessed 17 July 2019

[2] Tobias Schneider and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 27 February 2019

[3] Natalie Nougayrède, 'Assad can still be brought to justice – and Europe's role is crucial' (*The Guardian*, 1 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/01/assad-europe-lawyers-syrian-war-criminals?fbclid=IwAR0PQQHu4bB4rn95SJf5h_Wu_T48bfw28Ztdxl5e7BgMlB01rGhYVxNBJS8> accessed 10 April 2019

[4] Amnesty International, 'Amnesty International Report 2017/2018 THE STATE OF THE WORLD'S HUMAN RIGHTS' (Annual Report 2017/2018, Amnesty International Ltd 2018) 351; Jan Wouters and Tom Ruys 'Security Council reform: A new veto for a new century' (2005) 44 Military Law and Law of War Review 139, 150-152; Madeleine O. Hosli and others 'Squaring the Circle? Collective and Distributive Effects of United Nations Security Council Reform' (2011) 6:2 The Review of International Organizations 163, 164-169; Barry O'neill, 'Power and Satisfaction in the United Nations Security Council' (1996) 40:2 Journal of Conflict Resolution 219, 220-229; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 79-86

The five permanent members of the UN Security Council have always expressed doubts about the notion of the intervention principle. Similarly, it is emphasised in the World Summit 2005 that the UN cannot pledge to intervene in each crisis.[5] As for previous practice, it significantly demonstrates that consensus on the R2P principle is not essential since the World Summit 2005 did not provide mechanisms which adequately remove fear to states concerning state sovereignty.[6]

In the case of Syria, the UN has failed on a large scale in protecting civilians during a crisis which has turned more than half of the Syrian people into refugees, either internally or externally.[7] Literature and previous practice show that state sovereignty is one of the main matters which prevents the permanent members of the UN Security Council from preventing atrocity crimes along with the conflict of interests and political wills among the five permanent members.[8]

The R2P principle was accepted in the World Summit 2005 by all world leaders. However, practice shows that even where one or more triggers for implementing the R2P principle are met, the UN fails to apply the principle as evidenced by several crises around the world such as in Palestine, Darfur, Myanmar and Syria. This dissertation concludes with five-recommended approaches to revive the R2P principle to prevent atrocity crimes from taking place in the future. Adopting the five suggested approaches in this dissertation can potentially assist in preventing the death of the R2P principle. These five approaches reflect that the R2P principle should be deconstructed since state sovereignty carries with it a large degree of responsibility.[9]

The first approach is resolving the sources of tension at the early stages of a crisis. The second approach is based on the regional and sub-regional organisations' role in implementing the R2P principle with the UN's support and supervision.[10] The third approach is related to the RN2V. The fourth approach suggests that the UN General Assembly should play a role when atrocity crimes are committed and passing a resolution via the UN Security Council is blocked. The fifth and final approach is applying non-military intervention through deploying

[5] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1
[6] Jennifer Welsh and Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2:3 Global Responsibility to Protect 213, 227-228
[7] Alex J. Bellamy, 'Ending Atrocity Crimes: The False Promise of Fatalism' (2018) 32:3 Ethics & International Affairs 329, 331-334
[8] Welsh (n 6) 217-226; Aidan Hehir, 'From Human Security to the Responsibility to Protect: The Co-Option of Dissent' (2014) 23 Michigan State International Law Review 675, 679-280; Auriane Botte, 'Redefining the responsibility to protect concept as a response to international crimes' (2015) 19:8 The International Journal of Human Rights 1029, 1034-1038
[9] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at paras 138-139; see generally, David Cornell and Others, *Deconstruction and the Possibility of Justice* (1st, Routledge, Oxon 1992)
[10] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI

peacekeeping missions, implementing no-fly zones to prevent the bombing of population areas and distributing humanitarian aid and finally breaking sieges against civilians whenever they appear.

6.2 Resolving the Sources of Tension at the Early Stages of a Crisis

The World Summit 2005 introduces immediate responsibilities on the UN and its entities as Members of the international community to implement the R2P principle at an early stage of a conflict. Under this interpretation, the UN Secretary-General and the different UN agencies have a direct concurrent and substantive responsibility to protect civilians from atrocity crimes.[11] Yet, the UN is only an actor charged with a duty through its Members and submit to their decisions. Hence, it appears that the UN and its agencies only have a backing role without any distinct and separate responsibility.

Hitherto, this dissertation has presented a trajectory of the international community action to find where the R2P principle has been successfully applied to save lives and end mass abuses and violations of human rights. From the previous practice of the UN Security Council in Libya in 2011, Sudan and recently Syria, it seems that the second pillar and the third pillar of the R2P principle, the responsibility to react and the responsibility to rebuild respectively, are far from easy to be applied to stop violations.[12] Therefore, this study recommends that the international community should focus on the first pillar of the R2P principle, the responsibility to prevent.

On 14 July 2010, the UN Secretary-General, Ban Ki-moon released a Report about preventing civilians from atrocity crimes at an early stage of a conflict.[13] He highlighted the lessons learned in the 1990s and referred to the UN Independent Inquiry's findings on Rwanda.[14] In the Report, the UN Secretary-General stressed that "there was not sufficient focus or institutional resources for an early warning and risk analysis."[15] The Report emphasised the "institutional weakness in the analytical capacity of the United Nations."[16] To build up the UN's early warning capacity, Ban Ki-moon called for enhancing the UN's "capacity to analyse

[11] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; Ramesh Thakur, 'The Responsibility to Protect' (2011) Norms, Laws and the Use of Force 289, 291
[12] Alex J. Bellamy, 'The Responsibility To Protect: Added Value Or Hot Air?' (2013) 48 Cooperation and Conflict 333, 338-340
[13] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864
[14] Ibid, at para. 7
[15] Ibid
[16] Ibid, at para. 7

and react to information"[17] and for sharing information within the UN system and to the UN Security Council specifically on human rights matters.[18]

The EWAR2P Report of the UN Secretary-General stresses the first pillar of the R2P principle, the responsibility to prevent, during the times of armed conflicts at an early stage of any crisis. The first entity responsible for implementing this pillar is the state itself based on the concept of state responsibility for protecting civilians from mass atrocities and human rights violations. To move the principle from words to deeds this dissertation followed the Report stressing on the significance of establishing early warning and root-cause conflict prevention mechanisms, in addition to economic, diplomatic and military instruments to limit conflicts before they break out.[19]

The UN Secretary-General concluded his EWAR2P Report by stating that, while an "early warning does not automatically result in early or effective action, but that with fuller and more timely reporting "the international community might have been compelled to respond more robustly and more quickly, and that some lives might have been saved."[20] Early action must be recognised, that focuses on the necessity for advanced an early warning and assessment capabilities.[21]

Implementing the R2P principle at an early stage of a crisis was also discussed in the UN Secretary-General's report – Responsibility to Protect: from Early Warning to Early Action.[22] The UN Secretary-General's report shows how early warning and assessment can be further outlined and improved. A three-fold strategy for strengthening early action is recommended to support preventing atrocity crimes: reviewing and strengthening present precautionary capacities, promoting accountability for preventing atrocity and innovating. The third strategy, innovating, can be achieved by increasing civilian action to prevent atrocity crimes and by making use of all existing resources to meet this challenge – the most pressing of all.

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[17] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864, at para. 7

[18] Ibid, at para. 7

[19] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (1st, International Development and Research Centre, Ottawa 2001) 27-29; Rebecca J. Hamilton, 'The Responsibility to Protect: From Document to Doctrine-But What of Implementation?' (2006) 19 Harvard Human Rights Journal 289, 294-296; see generally, Ottawa Roundtable Report 2001

[20] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864, at para. 7; Bellamy (n 7) 330-337

[21] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864, at para. 19; Bellamy (n 7) 330-337

[22] UNGA 'Responsibility to protect: from early warning to early action' (1 June 2018) 72nd Session (2018) U.N. DOC. A/72/884–S/2018/525

6.2.1 The Responsibility to Prevent

Resolving the sources of a crisis at an early stage demonstrates that preventive efforts may be enriched by investing in methodologies to examine prevention conclusions, which are notoriously difficult to verify, and by states agreeing on what establishes a state under crises.[23] In an attempt to pursue a legal approach in this regard, the drafting of a binding treaty for the R2P principle can be a viable option.[24] However, it is highly unlikely for the major powers to accept any limitation or condition controlling their use of force apart from the UN Charter.[25] Although some may argue that such an agreement would permit regional organisations to work in such circumstances, it remains unlikely for such a treaty to be productive as most oppressive regimes would choose not to ratify it.[26] Also, it legitimises leaving UN Charter provisions on the use of force, and thus it is highly likely to be counted in contradiction with Article 103, which provides that where a conflict between a UN Member States' obligations under any international agreement and their obligations under the UN Charter, the latter shall prevail, and thus, not function as intended.[27]

The responsibility to prevent has been implemented in some crises and succeeded in preventing atrocity crimes; for example, implementing the R2P principle at an early stage in Kenya in 2007 and the Gambia in 2017. The UN's coordinated and rapid reaction was praised by Human Rights Watch as an ideal of diplomatic reaction under the R2P principle.[28]

In his report concerning an early warning system, the UN Secretary-General stated that before crises break out, we would need assessment tools and enlarged capacity to confirm an extensive system and efficiency unity in developing reactions to R2P situations under Chapter VI, VII, and VIII of the UN Charter.[29] Furthermore, the 2009 Report referred to the significance

[23] UNGA 'Fulfilling our Collective Responsibility: International Assistance and The Responsibility to Protect' (11 July 2014) 68th Session (2014) U.N. DOC. A/68/947–S/2014/449

[24] Steven J. Rose, 'Moving forward with the responsibility to protect: Using political inertia to protect civilians' (2014) 37 Boston College International and Comparative Law Review 209, 222-224

[25] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(4)

[26] Ibid, Chapter VI

[27] Ibid, Art. 103

[28] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864, at para. 10(c); Alex J. Bellamy, 'The Responsibility to Protect—Five Years On' (2010) 24:2 Ethics & International Affairs 143, 148-151; UNSC Res. 1189 (13 August 1998) U.N. DOC. S/RES/1189; Beth Elise Whitaker and Jason Giersch 'Voting on a constitution: Implications for democracy in Kenya' (2009) 27:1 Journal of Contemporary African Studies 1, 16; UNSC Res. 955 (8 November 1994) U.N. DOC. S/RES/955; UNSC Res. 918 (17 May 1994) U.N. DOC. S/RES/918; UNSC Res. 1556 (30 July 2004) U.N. DOC. S/RES/1556; UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118

[29] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864, at para. 10(c); Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapters VI, VII, and VIII

of the 'two-way flow of information' between the UN and regional and sub-regional organisations that should help close the limited *lacunae*.[30]

The Human Rights Council's Universal Periodic Review (UPR) process could be utilised to support the R2P goals, preventing violations of human rights. Additionally, in December 2013, the UN Secretary-General discussed a new "Human Rights Up Front" action plan, which called on UN missions and country teams to highlight human rights protection.[31] Similarly, the Indian representative in the UN argued said: "we need to activate an advance warning system of potential dangers to the civilian population by the UN Human Rights Council when the country concerned is being reviewed in the UPR system."[32]

This approach shows that applying the UPR and the Human Rights Up Front action plan can help to reduce atrocity crimes. Successfully applying the responsibility to prevent means there will be fewer human rights violations around the world. If the international community takes its role to help states and governments prevent violations of human rights at an early stage of any conflict, then there will be no need for any response to crimes that will not be committed in the first place.[33]

It seems that several ways to fill the *lacunae* in sharing information between regional organisations and the UN were mentioned; however, no tools were suggested to be used in filling this *lacunae*. The lack of sharing information can cause a lack in information analysis and in sharing accurate information among the UN branches and member States. Unquestionably, this recommended approach, implementing the R2P principle at an early stage of a conflict, cannot be applied without regional and sub-regional organisations' help to protect civilians from atrocity crimes.[34]

Under the World Summit 2005, states pledged themselves to support a state subject to serious situations before such situations break out into conflicts. Previous practice shows that regional organisations have succeeded in preventing atrocity crimes in many crises.[35] In 2008,

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[30] UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864, at para. 11; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI

[31] Alex J. Bellamy and Catherine Drummond, 'The responsibility to protect in Southeast Asia: Between non-interference and sovereignty as responsibility' (2011) 24:2 The Pacific Review 179, 168-169; see generally, Whitaker (n 28)

[32] Permanent Mission of India to the UN, General Assembly (Year Wise 2000 to 2017), Statement by Mr. Abhishek Singh, First Secretary, Permanent Mission of India to the United Nations, at the Informal Interactive Dialogue of the General Assembly on the Responsibility of States to protect their populations by preventing genocide, war crimes, ethnic cleansing and crimes against humanity through appropriate and necessary means. September 8, 2014

[33] Alex J. Bellamy, 'The Responsibility to Protect—Five Years On' (2010) 24:2 Ethics & International Affairs 143, 143, 158

[34] Natalie Nougayrède, 'Assad can still be brought to justice – and Europe's role is crucial' (*The Guardian*, 1 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/01/assad-europe-lawyers-syrian-war-criminals?fbclid=IwAR0PQQHu4bB4rn95SJf5h_Wu_T48bfw28Ztdxl5e7BgMlB01rGhYVxNBJS8> accessed 10 April 2019

[35] UNGA 'No Justification for Atrocity Crimes, Prevention Less Costly than Crisis Response, Speakers Tell General Assembly at Opening of Debate on Responsibility to Protect' (25 June 2018) Press Release GA/12031; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI

the UN Security Council, with the support of the African Union, depended on the R2P principle and prevented Kenya from slipping in an ethnic conflict. Similarly, the ECOWAS and the African Union protected the Gambia from slipping into a civil war in 2016-2017. Hence, it seems that finding a warning system is the key challenge to prevent atrocity crimes at an early stage of the conflict. The application of the responsibility to prevent should emphasise giving superior meaning to the R2P principle to be successfully implemented.

6.3 The Role of Regional Organisations in Implementing the R2P Principle

To implement the R2P principle at an early stage and before a crisis breaks out the state, regional organisations, sub-regional organisations and the UN should work together to prevent atrocity crimes. Previous cases where the UN was successful in preventing atrocity crimes, the UN did not work alone but in cooperation with the concerned regional organisations and sometimes with the state under crisis itself.[36] This second approach illustrates that regional and sub-regional organisations always play a crucial role in putting an untimely end to atrocity crimes at an early stage of a crisis. The Members of the UN General Assembly highlighted that fostering more effective global-regional collaboration is a key strategy for realising the promise underlying the R2P principle.[37]

Over more than a decade after holding the World Summit 2005, the elements of the R2P principle have been applied through addressing threats to populations in several crises. In many cases, regional and sub-regional engagements have made significant contributions, frequently as side-by-side partners with the UN.[38] The previous practice related to the support of regional organisations shows how much effort is needed to completely achieve the potential cooperation between global-regional and sub-regional to effectively prevent atrocity crimes.[39]

Beyond these normative, instrumental and historical linkages between global and regional organisations, there are also serious legal and political connections. Chapter VIII of

[36] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI; Jens Petersson, 'Making Europe's Responsibility to Protect More Credible' (2011) 3 Global Responsibility to Protect 353, 354-359; Anne-Marie Slaughter, 'Global-Government Networks, Global Information Agencies and Disaggregated Democracy' (2002–2003) 24 Michigan Journal of International Law 1041, 1044-1050

[37] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para 170; Jeremy Sarkin, 'The role of the United Nations, the African Union and Africa's sub-regional organisations in dealing with Africa's human rights problems: connecting humanitarian intervention and the responsibility to protect' (2009) 53:1 Journal of African Law 1, 5-14; Robert Zuber and Ana Carolina Barry Laso 'Trust but Verify: Building Cultures of Support for the Responsibility to Protect Norm' (2011) 3:3 Global Responsibility to Protect 286, 287-292; see generally, Bellamy (n 7)

[38] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393 at para. 4

[39] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393

the UN Charter illustrates a "dual bottom-up, top-down relationship" and, as stated by Article 52(2), the member states "shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council."[40]

It seems that regional and sub-regional organisations, such as the African Union, the Economic Community of West African States (ECOWAS)[41] and the Organisation for Security and Cooperation in Europe (OSCE),[42] seriously attempted to push international efforts to develop principles of protection and active tools to achieve them.[43] It seems that their involvement reveals that preventing atrocity crimes is a common concern for several regional and sub-regional organisations. Dynamic implementation efforts by regional and sub-regional organisations can also bring supplementary implication to the three pillars of the UN Secretary-General's strategy for recognising the commitment of the responsibility to protect.[44]

The intervention in Bangladesh 1971 by India was not considered by the UN Security Council a violation of the UN Charter 1945, nor a violation of Article 2(4) of the UN Charter since the intervention did not affect the territorial integrity of Bangladesh.[45] Still, several scholars consider it a violation of Article 2(4) of the UN Charter as India resorted to the use of force without getting an authorisation from the UN Security Council.[46]

The intervention was considered by the International Commission of Jurists to have been under the doctrine of humanitarian intervention because it did not lead to the occupation of the Bangladeshi territory.[47] India claimed that it had to intervene to end the Pakistani conflict as this conflict had been affecting its borders and the UN Security Council had failed to stop it.[48] Thus, the UN practices concerning the Indian invasion in 1971 could indicate that this kind

[40] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 52(2)
[41] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393
[42] Constitutive Act of the African Union, (signed 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 Art. 4 (h); Dan Kuwali and Frans Viljoen (ed.), *Africa and the Responsibility to Protect: Article 4 (H) of the African Union Constitutive Act* (1st, Routledge, New York, 2013) 25-37
[43] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393, at para. 9
[44] Ibid
[45] Byron F. Burmester, 'Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights' (1994) Utah L. Rev. 269, 286-287
[46] Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67:2 American Journal of International Law 275, 277-285; Gary J. Bass, 'The Indian Way of Humanitarian Intervention' (2015) 40 Yale Journal of International Law 227, 229-230
[47] Niall MacDermot, 'Crimes against humanity in Bangladesh' (1973) 7:2 International Lawyers 476, 480-484; see generally, Ved P. Nanda, 'Self–Determination in International Law: The Tragic Tale of Two Cities–Islamabad (West Pakistan) and Dacca (East Pakistan)' (1972) 60:2 American Journal of International Law 321; see generally, Richard B. Lillich and Frank C. Newman, 'International human rights: problems of law and policy' (1981) 15:1 VRÜ Verfassung und Recht in Übersee 87
[48] Ved P. Nanda, 'A critique of the United Nations inaction in the Bangladesh crisis' (1972) 49:53 Denver Law Journal 53, 57-62; Lillich (n 45)

of intervention was possibly not an illegal action since the UN Security Council had failed to end the conflict in the region.[49]

The case of Bangladesh shows that the LAS's intervention in Syria would have been possible through a broad interpretation of Article 2(4) of the UN Charter. This action could have obtained high legitimacy as the UN Security Council failed to put an end to atrocity crimes in the country. The action by the LAS could also have depended on the support of UN General Assembly resolution backed by two-thirds of the Members. However, had this solution been resorted to, it would have been expected not to affect Syria's territorial integrity or political independence as it was confirmed in Annan's plan.[50]

Similarly, NATO's humanitarian intervention in Kosovo in 1999 was carried out without a UN Security Council authorisation.[51] So, this example also could have inspired the LAS as a regional organisation to intervene in Syria as resorting to veto power has prevented the UN Security Council from passing a resolution to put an end to the committed atrocity crimes.[52] The LAS could have morally copied the intervention in Kosovo by NATO.[53] Such an intervention on the part of the LAS would have been legal if it were authorised by the UN Security Council. Moreover, the fact that Syria has been under a humanitarian tragedy for the eight years so far, implementing the R2P principle to protect the Syrian people from atrocity crimes would be considered legitimate.

The Arab League could have argued that the Syrian conflicting parties did not stick to the UN-Arab League peace envoy, Annan's plan, in March 2012, since heavy weapons and other forms of armed violence were not ceased.[54] The aim of the UN Security Council resolution regarding the UN-Arab League Envoy in March 2012 was not to affect Syria's territorial integrity or its political independence. Instead, the fundamental aim was to protect the Syrian people through stopping all aspects of the systematic and widespread violations of

[49] Bumester (n 45 286-87; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 1; ICISS Report 2001, at para. 4.21

[50] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042, at Annex; UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393

[51] Klinton W. Alexander, 'NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of SC Approval' (2000) 22:3 Houston Journal of International Law 403, 431-435; ICISS Report 2001 at para. 4.21

[52] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI; BBC News, 'UN says Syria refugee crisis worst since Rwanda' (*BBC News*, 16 July 2013) <https://www.bbc.co.uk/news/world-middle-east-23332527> accessed 1 January 2019; Botte (n 8)1034-1035

[53] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118; see generally, H.L.A. Hart, with a Postscript edited by Penelope a. Bulloch and Joseph Raz and with an Introduction and Notes by Lesile Green, The concept of law (3ed,Oxford University Press, Oxford 2012)

[54] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; Home Office, 'Syrian Arab Republic Country of Origin Information (COI) Report' (COI Service Report, 11 September 2013)

human rights and returning peace to the region.[55] Hence, the Arab League's supposed intervention could be legitimate even if carried out without the UN Security Council's full authorisation. The aim of the intervention was stated as returning peace to the region.[56] Ultimately, the LAS's aim would have encouraged the UN Security Council to approve their intervention, after legitimately intervening without a UN Security Council authorisation.

A reckless experience and regretful lesson for the LAS as a regional organisation was the international intervention in Iraq in August 1990 to January 1991 after the Iraqi troops invaded Kuwait.[57] Similarly, in 2003, the American coalition invaded Iraq claiming that the Iraqi regime had weapons of mass destruction (WMD) and Iraq could use them against countries in the region. The Arab League could not play its part as a regional organisation and did nothing but condemn the American intervention.[58] The coalition claim faded and no WMD were destroyed as the Iraqi regime had none. The intervention led to regime change and left Iraq suffering from instability, which could be one of the reasons for the emergence of Daesh (early 2014) the perpetrator of many atrocity crimes and severe human rights violations.[59]

Another negative experience was the intervention in Yemen on 26 March 2015, the Operation 'Decisive Storm', conducted initially under the host government's invitation with the support of the Gulf Cooperation Council (GCC) led by Saudi Arabia.[60] This kind of intervention is not considered illegal action under the UN Charter since it was implemented under the invitation by the Yemeni government.[61] However, the intervention in Yemen was another failure for the Arab League as a regional organisation in dealing with atrocities in the region.

It appears that interventions that took place in the region of the Arab League were not dealt with successfully. The incompetence of the Arab League as a regional organisation could be attributed to the shortage of support provided by the UN.[62] This has been illustrated through

[55] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043

[56] Theodore Karasik, 'How strong is Arab League support for striking Syria?' (*AlArabiya*, 11 September 2013) <http://english.alarabiya.net/en/views/news/world/2013/09/11/How-strong-is-Arab-League-support-for-striking-Syria-.html> accessed 20 December 2018

[57] Marco Pinfari, 'Nothing But Failure?: The Arab League And The Gulf Cooperation Council As Mediators In Middle Eastern Conflicts' (Working Paper no. 45, Regional and Global Axes of Conflict, Crisis States Research Centre, March 2009)

[58] *Ibid*, 11-12

[59] Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29:3 Leiden Journal of International Law 743, 744-745; Andrew Garwood-Gowers, 'China and the 'Responsibility to Protect': the implications of the Libyan intervention' (2012) 2:2 Asian Journal of International Law 375, 376-7

[60] Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65:1 International & Comparative Law 61, 62-69; Benjamin Nußberger, 'Military strikes in Yemen in 2015: intervention by invitation and self-defence in the course of Yemen's 'model transitional process'' (2017) 4:1 Journal on the use of force and international law 110, 112-118

[61] Ruys (n 61); Max Byrne, 'Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen' (2016) 3:1 Journal on the Use of Force and International Law 97, 112-115

[62] Marco Pinfari, 'Nothing But Failure?: The Arab League And The Gulf Cooperation Council As Mediators In Middle Eastern Conflicts' (Working Paper no. 45, Regional and Global Axes of Conflict, Crisis States Research Centre, March 2009) 11-12

the Arab League's inability to help any of its member states whom are/were facing a crisis. In many states, disputes broke into armed conflicts and the state involved became either unable or unwilling to protect its civilians.[63] Thus, the UN is required to have a more developed role in guiding regional organisations and helping them deal with crises at their early stages.[64]

6.3.1 Implementing R2P by Regional Organisations

Article 53(1) of the UN Charter stipulates that "no enforcement action shall be taken without the authorisation of the UN Security Council."[65] Likewise, Article 54 of the UN Charter continues to state that the UN Security Council "shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security."[66] Still not continuously strictly noticed in practice, the provisions of Chapter VIII emphasise the significance of ongoing working relationships among sub-regional, regional and global organisations for prevention and protection purposes.[67]

The Report of the UN General Assembly on the role of regional and sub-regional arrangements in implementing the responsibility to protect (2011) highlights that the R2P principle is a universal one. However, in order to successfully implement it, the model of cultural relativism which respects cultural and institutional differences among regions should be followed.[68] Thus, each region will operationalise the principle using its own approach. The UN Secretary-General encouraged intra-regional dialogue among government officials, independent experts and civil society representatives how to progress supporting states in times of armed conflicts, such as the Study Group on the Responsibility to Protect of the Council for Security Cooperation in the Asia Pacific (CSCAP) of the ASEAN Regional Forum (ARF).[69]

The 2011 Report stresses the role of regional and sub-regional organisations in motivating states to recognise their responsibilities under related international conventions and

[63] NUGA Res 60/1 (16 September 2005) U.N. DOC. A/RES/60/1; Marco Pinfari, 'Nothing But Failure?: The Arab League And The Gulf Cooperation Council As Mediators In Middle Eastern Conflicts' (Working Paper no. 45, Regional and Global Axes of Conflict, Crisis States Research Centre, March 2009) 11-12
[64] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; UNGA 'Early warning, assessment and the responsibility to protect' (14 July 2010) 64th Session (2010) U.N. DOC. A/64/864
[65] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393, at para. 5
[66] Ibid
[67] Ibid; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VIII
[68] Mashood A. Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (1st, Routledge, New York 2016) 43-45
[69] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393

resolve causes of friction disputes within their societies before they result in atrocity crimes.[70] There are many such examples of states helping their neighbouring states.[71] In 2009, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was launched as part of a constant attempt to improve a more people-oriented ASEAN, complementing longer-standing regional human rights frames in Latin America, Europe and Africa.[72] Among the ASEAN functions are the promotion of human rights and protection values within the region as well as the development of operative and self-regulating national commissions on human rights.[73]

6.3.2 The Role of ASEAN as a Regional Organisation

The Association of Southeast Asian Nations (ASEAN) as a regional intergovernmental organisation was established based on Southeast Asia in 1967. The principal aim of ASEAN is to develop intergovernmental cooperation and to promote political, security, economic, military and sociocultural integration among its members and other countries in Asia. In December 2008, ASEAN member states gathered in Jakarta to launch the Charter that was signed in 2007. Article 2(b) of the charter highlights that the member states of ASEAN share 'commitment and collective responsibility in enhancing regional peace, security and prosperity.'[74] Similarly, paragraph (C) of Article 2 stresses 'renunciation of aggression and […] the threat or use of force or other actions in any manner inconsistent with international law.'[75]

In October 2009, ASEAN member States established the ASEAN Intergovernmental Commission on Human rights (AICHR) and in 'respect for the independence, sovereignty,

[70] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393
[71] Ibid
[72] Hsien-Li Tan, *The ASEAN Intergovernmental Commission on Human Rights* (1st, Cambridge University Press, New York 2011) 24-27; Michelle Staggs Kelsall, 'The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?' (Analysis no. 90, East-West Centre, September 2009) 2-4; see generally, Catherine Drummond, 'The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect: Development and Potential' (Working Paper on ASEAN and R2P No. 1, Asia-Pacific Centre for the Responsibility to Protect, 30 November 2010)
[73] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393; see generally, Jr. Henry Louis Gates and Kwame Anthony Appiah (ed.), *Berlin Conference of 1884–1885* (1ed, Oxford University Press, New York 2010)
[74] Association of Southeast Asian Nations (ASEAN), *Charter of the Association of Southeast Asian Nations*, 20 November 2007, Art. 2(b); Lee Leviter, 'The ASEAN Charter: ASEAN failure or member failure' (2010) 43 NYUJ Int'l L. & Pol. 159; André Asplund, 'ASEAN Intergovernmental Commission on Human Rights: civil society organizations' limited influence on ASEAN' (2014) 7:2 Journal of Asian Public Policy 190, 194-195
[75] Association of Southeast Asian Nations (ASEAN), *Charter of the Association of Southeast Asian Nations*, 20 November 2007, Art. 2(c); André Asplund, 'ASEAN Intergovernmental Commission on Human Rights: civil society organizations' limited influence on ASEAN' (2014) 7:2 Journal of Asian Public Policy 190, 194-195

equality, territorial integrity and national identity of all ASEAN Member States'.[76] Additionally, AICHR calls it member States to recognize 'the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State'.[77] Similarly, in November 2012, the ASEAN Commission adopted the ASEAN Human Rights Declaration which urges all ASEAN Member States to promote and protect all human rights and fundamental freedoms.[78]

Comparing the role of ASEAN with the AU's role shows that ASEAN has played a limited role during armed conflicts in the region. This limited role for ASEAN could be justified due to the limited number of the ASEAN member States since it includes just ten member States in the region. Additionally, many big Asian countries – such as Pakistan, India and Saudi Arabia – are still out of this body.

ASEAN has established a charter and declaration, but it still barely plays a role in protecting civilians in Asia when compared to the significant role of the NATO's. ASEAN failed to play its role as a regional organisation and protect the Rohingya civilians from atrocity crimes committed by the Myanmar Government. The Myanmar Government committed genocide and crimes against humanity; however, neither ASEAN nor any other organisation managed to put an end to the atrocity crimes and deliver protection to the Muslim Rohingya in Rakhine State.[79] The regional organisations in Asia – such as the Arab League, ASEAN and many other bodies, should follow a more active role – similar to the EU and the AU's one - to protect the population in Asia from atrocity crimes during armed conflicts.

A strong emphasis on non-interference in other countries' domestic affairs and state sovereignty constitutes collective action principles in East Asia. Collaborating 'the ASEAN way' outlines a less intrusive and less interventionist approach.[80] However, this does not mean that the ASEAN countries do not respond to humanitarian emergencies. There has been increased support for peace operations in the region. For example, ASEAN contributed to the UN missions in East Timor (UN Transitional Authority in East Timor, 1999–2002 and United

[76] Association of Southeast Asian Nations (ASEAN), *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*, July 2009, principles 2.1(a); André Asplund, 'ASEAN Intergovernmental Commission on Human Rights: civil society organizations' limited influence on ASEAN' (2014) 7:2 Journal of Asian Public Policy 199
[77] Association of Southeast Asian Nations (ASEAN), *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*, July 2009, principles 2.3
[78] Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012, Art. 19
[79] Donald Steinberg, 'Responsibility to Protect: Coming of Age?' (2009) 1:4 Global Responsibility to Protect 432, 434
[80] Association of Southeast Asian Nations (ASEAN), *Charter of the Association of Southeast Asian Nations*, 20 November 2007; Mathew Davies, 'The ASEAN synthesis: human rights, non-intervention, and the ASEAN human rights declaration' (2013) 14:2 Georgetown Journal of International Affairs 51, 52-53; John MacMillan, 'After Interventionism: A Typology of United States Strategies' (2019) 30:3 Diplomacy & Statecraft 576

Nations Mission of Support in East Timor, 2002–2005), and provided military and civilian police personnel for security control and nation-building. [81]

The tension between the solidaristic pressure that highlights the increasing prominence of the individual or citizens, as outlined in the concept of human security, and the pluralist pull that highlights the role of the sovereign state, is a primary element of international relations in the ASEAN region which must be adjusted. In July 2009, UN General Assembly Informal Debate, including the subsequent September 2009 consensus resolution, demonstrated that ASEAN has seen a considerable change in favour of R2P since 2005.

In summary, the adoption of R2P in 2005 triggered a feedback loop at the ASEAN local level leading to efforts to strengthen rather than adjust the pre-existing local normative framework. Although ASEAN member States have officially approved R2P, they effectively resisted localising the norm by participating in a strategy of norm competition in their operational policies. By doing so, they pushed the human security envelope, while attempting to limit the scope of the second pillar – the responsibility to react – of the R2P principle.

6.3.3 The Role of African Union and the Significant Lesson of the Gambia

Under the patronage of the New Partnership for Africa's Development in 2003, The African Peer Review Mechanism (APRM) has offered recommendations for explicit reform and assessments of African countries on difficulties pertinent to the R2P principle.[82] Attention of UN Members may be given to the introduction of standards associated with regional peer review mechanisms and the responsibility of protecting the Universal Periodic Review of the Human Rights Council.[83] The 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa was in the vanguard of international legal implementation on an issue quite linked to the R2P principle.[84]

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[81] UN Security Council, Report of the Secretary-General on the United Nations Transitional Administration in East Timor (17 April 2002) S/2002/432; Human Rights Watch, Human Rights Watch World Report 2005 - East Timor (1 January 2005)

[82] Chidi Anselm Odinkalu, 'From Architecture to Geometry: The Relationship Between the African Commission on Human and Peoples' Rights and Organs of the African Union' (2013) 35:4 Human Rights Quarterly 850, 850-869; Dimitris Bourantonis, *The history and politics of UN Security Council reform* (1st Routledge, New York 2004) 39-54; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 79-86

[83] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393

[84] African Union Convention for the protection and assistance of internally displaced persons in Africa (Kampala Convention) (signed 23 October 2009, entered into force 6 December 2012) 3013 UNTS 1; Andrew Solomon, 'African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa' (2010) 49:1 International Legal Materials 83, 92-100

Regional and sub-regional arrangements can assist in ensuring the timely and accurate flow of information and analysis from both national and international levels to universal decision-makers whilst minimising the risk of misinformation, misinterpretation and deliberate misrepresentations.[85] For instance, the European Union, the African Union and the organisation for Security and Cooperation in Europe OSCE have founded dedicated situation rooms.

Regional bodies, such as the African Union Panel of the Wise, can strengthen global messages about human rights norms and the R2P principle as well as about accountability. In this regard, both the African regional economic communities and the African Union have established early warning systems which can be quite advantageous in recognising such serious signs with the aim of delivering timely and effective preventive action.[86]

Significantly, the African Union Panel of the Wise has been adopted to utilise the framework of analysis advanced by the joint office of the two Special Advisers of the UN Secretary-General, the thing which other regional and sub-regional arrangements can consider.[87] The established early warning system of the African Union was applied in several crises such as the Gambian crisis in January 2017 and protected civilians from expected massacres.[88] However, this system cannot be applied in other regions under crises around the world.

The details of the R2P principle are included in the 2001 ICISS Report, in the 2004 High-Level Panel Report and in the World Summit 2005. They illustrate that any action by regional organisations prior to the UN Security Council's authorisation is illegal.[89] Previous practice showed that sub-regional and regional organisations occasionally resort to use of force to stop human rights violation with or without the UN Security Council's resolution. This kind of intervention in internal affairs of a foreign state seems based on the R2P principle when human rights had been violated systematically on a large scale. For example, in 1999, NATO intervened in Kosovo without the UN Security Council resolution. NATO Members declared they sought to stop the violence and return peace to the region; however, the intervention could

[85] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393

[86] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393; Elkanah Oluwapelumi Babatunde, 'ECOWAS Intervention in Gambia: A Case Study of International Law on the Use of Force' (2017) 6:2 UCL Journal of Law and Jurisprudence 46, 46-70; Bellamy (n 7) 330-337

[87] High Level Retreat of the African Union Panel of the Wise on Strengthening Relations with Similar Regional Mechanisms, 'The African Union Panel of the Wise: Strengthening relations with similar regional mechanisms' (4-5 June 2012 , organised by the African Union Peace and Security Department in partnership with the African Centre for the Constructive Resolution of Disputes, Ouagadougou, Burkina Faso) at paras 9-13

[88] Ibid, at paras 17-18

[89] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(1); UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1, at para. 79

not be considered a legal action.[90] Another example was the success of ECOWAS and the African Union in preventing a civil war in the Gambia in 2017.

Regional and international ownership is required to implement R2P principle. However, each region must move forward to confirm that people are more protected and that the danger of mass atrocity crimes decreases with each passing year. Protecting civilians from atrocity crimes must not be weakened or reduced through reinterpretation at the national, sub-regional and regional levels.[91] The R2P principle tackled the issue without presenting an appropriate solution to it.

The Lesson from the Gambia 2017

The crisis began in the Gambia when the Gambian President Yahya Jammeh refused to step down after losing the election on 01 December 2016.[92] As a civil war was looming, the Peace and Security Council of the African Union (AU) at its 647th meeting held on 13 January 2017 confirmed that Jammeh was no longer recognised by the African Union as a legitimate President of the Republic of the Gambia. Additionally, the military forces of the Economic Community of West African States (ECOWAS) were ready to intervene to carry out a transfer of power and to prevent expected atrocity crimes.[93]

The UN Security Council unanimously passed Resolution 2337 on 19 January 2017 in which the elected president, Adama Barrow, was recognised as the president of the Gambia. The resolution also requested "[the] former President Jammeh to carry out a peaceful and orderly transition process, and to transfer power to President Adama Barrow by 19 January 2017 in accordance with the Gambian constitution."[94]

Furthermore, the mediation role played by the regional leaders in the region is also noticed; for instance, the Mauritanian President, Mohamed Ould Abdel Aziz convinced President Yahya Jammeh to sort the problem out by a peaceful measure and to accept to leave

[90] Ruth Wedgwood, 'NATO's Kosovo Intervention: NATO's Campaign In Yugoslavia' (1999) 93 A.J.I.L. 828, 830-833
[91] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393
[92] BBC News, 'Gambia Leader Yahya Jammeh Rejects Election Result' (*BBC News*, 10 December 2016) <https://www.bbc.co.uk/news/world-africa-38271480> accessed 15 December 2016
[93] Ibid
[94] UNSC Res. 2337 (19 January 2017) U.N. DOC. S/RES/2337 at para. 7; UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393

the power.[95] It appears that the Resolution 2337 encouraged the African Union and ECOWAS to promote peace, stability and good governance in the region.

The action of the ECOWAS forced the Gambian government to bear its responsibility of protecting human rights.[96] Hence, the regional organisations, ECOWAS and the AU, with the support of the UN Security Council, successfully prevented atrocity crimes in the Gambia as they dealt with the crisis at an early stage.

6.4 The Responsibility Not to Veto (RN2V)

The RN2V perception is plainly embedded in the ICISS Report and there were two core doubts concerning the RN2V's aim of expanding the protection of people.[97] Similarly, in May 2012, the UN General Assembly examined the reasons why the five permanent members engage or refrain "from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity."[98] In the preliminary discussions of the R2P principle, the French Minister of Foreign Affairs, Hubert Védrine, proposed a model of the RN2V.[99] Firstly, Védrine discussed the novel "code of conduct" for the five permanent members in the context of the R2P principle. The concept of RN2V suggests that the five permanent members of the UN Security Council should agree not to use their veto power against any action in response to atrocity crimes that would otherwise be authorised by a majority.[100]

In an attempt to bridge this *lacunae* and avoid a stalemate at the UN Security Council, the RN2V stresses that the five permanent Members should not resort to the veto power when an action is urgently required to halt or avert a serious humanitarian crisis.[101] Védrine added that "[i]f the UN Security Council were required to make a decision regarding a mass crime,

[95] UNSC Res. 2337 (19 January 2017) U.N. DOC. S/RES/2337 at para. 3; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI

[96] UNGA 'the Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) 66th Session (2011) U.N. DOC. A/65/877–S/2011/393,

[97] Gareth Evans, 'The French Veto Restraint Proposal: Making It Work' (International Conference on Limiting the Use of Veto at the UN Security Council in the Case of Mass Atrocities, Sciences Pro, Paris, January 21, 2015) at paras 1-2; Botte (n 8)1029-1036

[98] UNGA, 'Enhancing the accountability, transparency and effectiveness of the Security Council' (15 May 2012) 66th Session (2012) U.N. Doc. A/66/L.42/Rev.2; Gareth Evans, 'The French Veto Restraint Proposal: Making It Work' (International Conference on Limiting the Use of Veto at the UN Security Council in the Case of Mass Atrocities, Sciences Pro, Paris, January 21, 2015) at paras 1-2

[99] UNGA Res. 4/290 (1 December 1949) U.N. DOC. A/RES/4/290; Daniel H. Levine, 'Some Concerns About' The Responsibility Not to Veto' (2011) 3:3 Global Responsibility to Protect 323, 324-326

[100] ICISS Report 2001 at paras 6.21, 6.30

[101] Gareth Evans, 'The French Veto Restraint Proposal: Making It Work' (International Conference on Limiting the Use of Veto at the UN Security Council in the Case of Mass Atrocities, Sciences Pro, Paris, January 21, 2015) at para. 1-2; Hosli (n 4) 164-169; Wouters (n 4) 150-152; Botte (n 8)1034-1035

the permanent members would agree to suspend their right to veto."[102] It appears that RN2V controls the veto based on the seriousness of violations instead of any feature of the proposed intervention. Additionally, it seems that RN2V indirectly favours resorting to military action over non-military responses to human rights violations.

Likewise, the High-Level Panel in 2004 called the permanent members of the UN Security Council, "in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses."[103] Refraining from using the veto against atrocity crimes also allows quicker reaction by the UN that, in turn, would lead to more reliability, predictability and credibility for the UN Security Council.

A major drawback of this approach, as suggested by Védrine, is that in crises where the five permanent members' dynamic national interests are not engaged, the Members can use their veto to obstruct passing draft resolutions which favour the prevention or stopping of atrocity crimes.[104] France submitted a proposal to the General Assembly trying to introduce a code of voluntary restraint when Laurent Fabius, the Minister for Foreign Affairs, clarified "if the Security Council were required to make a decision regarding a mass crime, the permanent members would agree to suspend their right to veto."[105]

The UN Security Council's practice often reflected the inability of the UN to protect civilians even when triggers for implementing the R2P principle were met. During the Syrian crisis, war crimes and crimes against humanity have been committed. Moreover, as the Syrian authority has lost control over a considerable part of the Syrian territory for years, genocide and ethnic cleansing were also committed by Daesh against the Yazidi ethnic group and sometimes by Kurdish military groups, PKK and YPG, against Arabs.[106] Other crimes committed by the Syrian regime included forcing the Sunni population to leave many cities and areas to the North of Syria. If this action does not amount to ethnic cleansing, it amounts to changing the demographics of the Syrian population.[107]

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[102] Thomas G. Weiss and Sam Daws (ed.), *The Oxford Handbook on the United Nations* (2ed, Oxford University Press, New York, 2018) 140-158; Laurent Fabius, 'Suspending the right to veto in the event of mass crimes' (6 May 2019) <https://et.ambafrance.org/Suspending-the-right-to-veto-in> accessed 19 June 2019

[103] UNSC 'Security Council Report, In Hindsight: The Veto' (31 November 2013) Monthly Forecast; Jared Genser and Bruno Stagno Ugarte (ed.) *The United Nations Security Council in the age of human rights* (Cambridge University Press, Cambridge 2014) 24-28

[104] Weiss (n 19) 211-212; see generally, Ottawa Roundtable Report 2001

[105] Philippa Webb 'Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria' (2014) 19:3 Journal of Conflict and Security Law 471, 483; Laurent Fabius, 'A Call for Self-Restraint at the U.N.' (*The New York Times*, 4 October 2013) <http://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html> accessed 19 January 2018

[106] Leila Nadya Sadat, 'Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will' (2015) 5:1 Impunity Watch Law Journal 1, 3-6

[107] Malek (n 22) 98-123; Bethan McKernan, 'Collapsed Eastern Ghouta ceasefires must not become a copycat of Aleppo, UN says' (*The Independent*, 1 March 2018) <https://www.independent.co.uk/news/world/middle-east/eastern-ghouta-ceasefire-syria-aleppo-un-united-nations-assad-regime-civilian-deaths-a8235156.html> accessed 28 September 2018; Tobias Schneider

The problem regarding the Syrian crisis does not seem to relate to the characterisation of the committed crimes since they are considered by the UN Security Council war crimes and crimes against humanity. Instead, the real issue appears to be the disagreement among the five permanent members of the UN Security Council. Practice reflects that using their veto power when atrocity crimes are committed may lead to unilateral intervention.[108]

During the Syrian crisis, although the crimes committed met the triggers for implementing the R2P principle, Russia and China used their veto power several times to block draft resolutions related to Syria.[109] This shows the importance of Védrine's recommended agreement that should be made concerning using the veto when it is urgent to halt or avert a serious humanitarian crisis.[110] Védrine's 'code of conduct' was a more reachable alternative than formally changing the UN Charter to reproduce a change in the veto authority.[111] Therefore, finding an agreement among the five permanent members to refrain from using the veto would support the UN Security Council to be a more effective international institution. Refraining from using the veto against atrocity crimes also allows quicker reaction that, in turn, would lead to more reliability, predictability and credibility for the UN Security Council.[112]

Any final code must include a definition of what can be considered as mass atrocities that could trigger the RN2V code of conduct. In this case, the five permanent members of the UN Security Council may feel the necessity to protect their use of the veto for non-RN2V purposes. The definitions of crimes involved in the Rome Statute (1998) of the ICC can be the main-stone corner to clarify the process.[113] The idea of an RN2V has done the diplomatic

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and Theresa Lütkefend, 'Nowhere to Hide: The Logic of Chemical Weapons Use in Syria' (*Global Public Policy Institute*, 17 February 2019) <https://www.gppi.net/2019/02/17/the-logic-of-chemical-weapons-use-in-syria> accessed 28 May 2019; United Nations Human Rights Council, 'UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity' (*United Nations Human Rights Council*, 20 June 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23226&LangID=E> accessed 10 April 2019; see generally, Amnesty International, 'Crackdown In Syria: Terror in Tell Kalakh' (Report, Amnesty International Publications, 2011); Carla E. Humud and Others, 'Armed Conflict in Syria: Overview and U.S. Response' (CRS Report, Congressional Research Service, 28 September 2016); Congress of the United States of America 'H.R.31 - Caesar Syria Civilian Protection Act of 2019' (*Congress*, 21 January 2019) <https://www.congress.gov/bill/116th-congress/house-bill/31/text?q=%7B%22search%22%3A%5B%22Syria%22%5D%7D&r=1&s=3> accessed 1 April 2019, 2-4, 14-16; Zoi Constantine, 'Arab League monitor walks out on Syria mission' (The National, 12 January 2012) <https://www.thenational.ae/world/mena/arab-league-monitor-walks-out-on-syria-mission-1.448392> accessed 28 September 2018

[108] UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118; Malcolm D. Evans (ed.), *International Law* (4th, Oxford University Press, New York 2014) 510-512; UNSC 'Security Council Adopts Resolution 2286 (2016), Strongly Condemning Attacks against Medical Facilities, Personnel in Conflict Situations' (3 May 2016) UN Press Release SC/12347; Yasmine Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace' (2019) 24:1 Journal of Conflict and Security Law 111, 138-142; Qu. Xing, 'The UN Charter, the Responsibility to Protect, and the Syria Issue' (2012) 33 China Int'l Stud. 14, 24-32; Hosli (n 4); Wouters (n 4) 150-152; Botte (n 8)1034-1035

[109] UNSC 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution' (22 May 2014) Press Release SC/11407; Wouters (n 4) 150-152; Bagdonas (n 17) 57-59; Hosli (n 4); Botte (n 8)1034-1035

[110] Weiss (n 19) 379

[111] Ibid; Ottawa Roundtable Report 2001 at pages 7-8

[112] Ibid 23

[113] Wouters (n 4) 154-156

rounds and now it needs improvement in the arena that really counts, the practical field of the UN Security Council, to be applied. In this context, a significant focus on defining the acts and the trigger process should be utilised to assuage the concerns of the five permanent members of the UN Security Council.

6.4.1 The Applicability of the RN2V

The RN2V concept was one of the main topics of many debates which arguably led to the World Summit 2005. There was support to openly discuss self-imposed limits on the veto authorities of the five permanent members of the UN Security Council beyond what is prescribed by the UN Charter. However, what is possibly more telling is that all orientations to the RN2V were absent from the final text of the World Summit 2005.[114]

The Task Force and the French, Global Solutions Organisation highlights that any code of conduct presented should limits what are mass atrocities and trigger mechanisms to halt those crimes.[115] Additionally, it occasionally refers to where one of the five UN Security Council's permanent members made effective collective action in practice unattainable by explicitly or implicitly threatening veto.[116]

The code would "exclude cases where vital national interests of a permanent Member of the Council were at stake."[117] The national interests should not limit the criterion of a code of conduct. The French proposal is to exclude cases where the vital national interest of any of the five permanent members of the UN Security Council is at stake. This exclusion is too broad and a repeated resort to it for political purposes would weaken any code's integrity.

The R2P principle focuses on the UN Security Council's role as a key player under the UN Charter.[118] The principle seems to recommend that action should be taken by the UN General Assembly in case the UN Security Council fails to address ending violations. Furthermore, this seems to be a reasonable remedy which affords legitimacy in relation to

[114] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 139
[115] Ibid; Weiss (n 19) 379; see generally, Ottawa Roundtable Report 2001
[116] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Arts 5-9
[117] United Nations Association – UK, 'UN Security Council and the responsibility to protect: Voluntary restraint of the veto in situations of mass atrocity' (Briefing for Parliamentarians, October 2013); Beth VanSchaack, 'The Building Blocks of Hybrid Justice' (2015) 44 Denver Journal of International Law and Policy 169, 173; Botte (n 8)1034-1038
[118] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at para. 152-154

action.[119] In addition, previous practice illustrates that using the veto against draft resolutions is perhaps the greatest barrier to the principle in question.[120]

Hence, it is clear that forbidding the permanent members of the UN Security Council involved in the Syrian crisis, such as Russia, from voting on such decisions irrespective of their status in the UN system may potentially resolve many of the issues presented thus far.[121] It is highly unlikely for the UN Security Council not to pass a resolution that goes against the interests of the suffering people who are being safeguarded. In contrast, it is highly likely for the Security Council to act in case of any abuse in this regard. However, eventually the above solutions are only proposals the adoption of which in the future remains uncertain.

6.5 Resolution Passed by Two-Thirds of the UN General Assembly

The fourth approach that could prevent blocking the R2P implementation is adopting a reform of the traditional way of passing a resolution under the UN Security Council. The five permanent members of the UN Security Council should agree a Resolution passed by two-thirds of the UN General Assembly should add further impetus to an expeditious UN Security Council response without the threat of a veto. An agreement along these lines would make the UN Security Council a more operative and effective body in cases when a permanent Member may otherwise prefer to block action.[122]

In 1966, a reform to the UN Security Council was made through increasing the number of temporary Members of the UN Security Council. The number of the temporary Members of the UN Security Council was increased from six to ten elected Members. Increasing the number of the elected Members in Article 23 of the UN Charter can pave the way to changing the traditional way of depending on a resolution when atrocity crimes are committed. The

[119] Uniting for Peace, G.A. Res. 377 (V), U.N. Doc A/1775 (3 November 1950)

[120] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042; UNSC Res. 2043 (21 April 2012) U.N. DOC. S/RES/2043; UNSC Res. 2118 (27 September 2013) U.N. DOC. S/RES/2118; SC Res 2165 (14 July 2014) U.N. DOC. S/RES/2165; SC Res (17 December 2014) U.N. DOC. S/RES/2191; UNSC Report of the Secretary-General about Implementation of Security Council resolutions 2139 (2014), 2165 (2014), 2191 (2014) and 2258 (2015) (18 OCTOBER 2016) U.N. DOC. S/2016/873; UNSC Letter dated 21 October 2016 from the Secretary-General addressed to the President of the Security Council (21 October 2016) U.N. Doc. S/2016/888; UNSC Statement by the President of the Security Council (8 January 2015) U.N. DOC. S/PRST/2015/10

[121] Steven J. Rose, 'Moving forward with the responsibility to protect: Using political inertia to protect civilians' (2014) 37 Boston College International and Comparative Law Review 209, 234-238; Wouters (n 4) 150-152

[122] UNGA Res. 60/1 (16 September 2005) U.N. DOC. A/RES/60/1 at paras 98, 154; Gareth Evans, 'The French Veto Restraint Proposal: Making It Work' (International Conference on Limiting the Use of Veto at the UN Security Council in the Case of Mass Atrocities, Sciences Pro, Paris, January 21, 2015) at para. 7; Bourantonis (n 75) 39-51; Wouters (n 4) 154-156

suggested approach to resort to the UN General Assembly is recommended in this dissertation when the state is unable or unwilling to protect its own civilians from atrocity crimes.[123]

As Franck previously argued, the veto power appears to undermine the coherence of the sovereign equality of states enshrined in Article 2(1) of the UN Charter.[124] This is mainly due to inability of non-permanent Security Council Members to exercise such a power, and thus, it appears to render them not equal.[125] Franck further argues that this may have the effect of undermining Members' "sense of obligation to the system as a whole and its many rules" although the precise extent remains difficult to measure.[126]

Chapter IV of the UN Charter highlights that the UN General Assembly depends on a majority voting policy. Article 18 of the Charter states that "[d]ecisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting."[127] However, Article 12(1) of the UN Charter states that "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."[128]

The humanitarian situation in Syria became complicated when hundreds of thousands of civilians were killed and millions of Syrians became refugees, especially in Turkey, Jordan and Lebanon. The UN Security Council failed to pass a resolution to prevent massacres in the country. Therefore, the UN General Assembly passed a resolution by a recorded vote of 133 in favour to 12 against, with 31 abstentions. It was declared in the UN General Assembly that

> "the Assembly overwhelmingly adopted a resolution expressing its concern about a raft of gross human rights violations being carried out by Syrian Government forces, systematic attacks against civilians, and the increasing use of "heavy weapons, armour and the air force against populated areas."[129]

[123] UNGA 'Member States Call for Removing Veto Power, Expanding Security Council to Include New Permanent Seats, as General Assembly Debates Reform Plans for 15-Member Organ' (20 November 2018) U.N. DOC. GA/12091; Bourantonis (n 75) 39-51; Wouters (n 4) 154-156; Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (1st, Cambridge University Press, Cambridge 2017) 79-86
[124] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 2(1); Franck (n 46) 277-285; O'neill (n 4) 220-229
[125] Ibid
[126] Franck (n 46), 277-285
[127] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 18
[128] Ibid, Art. 12(1-2)
[129] UNGA Res. 66/253 (3 August 2012) U.N. DOC. A/RES/66/253 B

The UN General Assembly strongly condemned Syria's indiscriminate use of heavy weapons against civilians and its widespread abuses of human rights, demanding that all parties 'immediately and visibly' commit to end a conflict that Ban Ki-moon described as "a test of everything this organisation stands for."[130] Although, the resolution was adopted by more than two-thirds of the Members of the UN General Assembly, it failed to protect civilians in Syria. The reason for this failure is that the resolutions passed by the UN General Assembly are only recommendatory and need authorisation from the UN Security Council.

Defining the Syrian crimes by two-thirds of the Assembly's Members as atrocity crimes highlights that failing to pass a resolution is not linked to the essence of the R2P principle nor to state sovereignty. This failure is rather caused by the permanent members' national interests and political wills. The overuse of the veto power by the UN Security Council in times of humanitarian catastrophes where civilians require urgent protection could lead to the emergence of more crises around the world.[131] Thus, there is an urgent need for a reform of the UN Security Council to limit using the veto power, so that the recurrence of a situation similar to the Cold War is avoided.[132]

6.6 Non-military Interventions as Measures

"[O]nly when political will and military capacity come together will humanitarian space open and war victims be assisted and protected."[133] The Report of the Secretary-General: Implementing the Responsibility to Protect in 2009 stated that the preventive deployment of peacekeepers under Chapter VI of the UN Charter 1945 or of combat forces under Chapter VII should be under the agreement of the host state to confront armed groups committing atrocity crimes.[134]

[130] Ibid
[131] Hosli (n 4); Wouters (n 4) 150-152; Angus McDowall and Others, 'Syria's Assad discusses peace talks, Tartus port with Russians' (*Reuters*, 20 April 2019) <https://www.reuters.com/article/us-syria-russia/syrias-assad-discusses-peace-talks-tartus-port-with-russians-idUSKCN1RW07P> accessed 3 May 2019
[132] Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67:2 American Journal of International Law 275, 175-182; Hehir (n 8); O'neill (n 4) 220-229; Wouters (n 4) 150-152
[133] Thomas G. Weiss and Martin Welz, 'The UN and the African Union in Mali and beyond: a shotgun wedding?' (2014) 90:4 International Affairs 889, 889-905
[134] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. Doc. A/63/677

6.6.1 Imposing a No-Fly Zone in the North of Syria

In the Syrian case, in March 2012, the UN and the LAS sent an Observer Mission under the UN Security Council Resolution 2059 to examine the humanitarian situation in several areas in Syria.[135] The main task of the mission was to observe the Syrian authority remove its troops from the streets and fulfil the other five points of Annan's plan.[136] However, the mission failed and could not achieve Annan's six-point plan as the Syrian regime was not helpful and did not achieve its promises about moving troops from streets and freeing the political prisoners. The UN Security Council Renews Mandate of Syria Observer Mission for 30 Days and other similar missions – the Revolutionary United Front in Sierra Leone[137] – can be considered as acts of backing the state under the R2P principle to achieve its responsibility of protecting civilians from atrocity crimes.

The UN Secretary-General Kofi Annan stated that "[t]he Member States of the United Nations should have been able to find common ground in upholding the principles of the Charter, and acting in defence of our common humanity."[138] The LAS, as a regional organisation, could have imposed a no-fly zone in the North of Syria in cooperation with the Friends of Democratic Syria and under the UN's supervision.[139] The main aim of this remedy measure would have been the protection of Syrian civilians from atrocity crimes. This remedy is a rescuing measure as the Syrian government has shown unwillingness to protect the Syrian people for years.[140] This way of non-military intervention by the regional organisation can enrich legitimate intervention as China and Russia have violated the World Summit 2005 by using their veto power to block draft resolutions of the UN Security Council.

Similarly, to the new look about agreement to the principle of *jus cogens*, using the veto power when atrocity crime - such as genocide which is considered a *jus cogens* - is committed should be legitimacy enough to block a decision to protect civilians.[141] This type of resorting to veto can be a violation of *jus cogens*. Under the R2P principle, using veto power to block

[135] UNSC Res. 2059 (20 July 2012) U.N. DOC. A/RES/2059
[136] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042, at Annex
[137] Ibrahim Abdullah, 'Bush path to destruction: the origin and character of the Revolutionary United Front/Sierra Leone' (1998) 36:2 The Journal of Modern African Studies 203, 222-226
[138] UN Secretary-General, Statement: Secretary-General Presents his Annual Report to General Assembly (20 September 1999) U.N. Doc. SG/SM/713
[139] Foreign & Commonwealth Office, 'Chairman's Conclusions of Friends of Syria meeting' (*GOV.UK*, 1 April 2012) <https://www.gov.uk/government/news/chairmans-conclusions-of-friends-of-syria-meeting--2> accessed 19 January 2016
[140] Global Centre For The Responsibility To Protect, '2015-2016 UN Security Council Elections and the Responsibility to Protect' (Statements, Global Centre For The Responsibility To Protect, 16 October 2014) 1-6
[141] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 69-71; ILC, 'Report of the International Law Commission on the Work of its 71th Session' (29 April–7 June and 8 July–9 August 2019) U.N. DOC. A/CN.4/L.936, draft conclusion 7, at para2; Hosli (n 4); O'neill (n 4) 220-229; Botte (n 8)1034-1035

implementing R2P seems to be a key reason for failing to protect civilians from serious human rights violations.[142] Imposing a no-fly zone in the North of Syria could have stopped stop bombing population areas under the no-fly zone where millions of civilians were forced to move. Moreover, a no-fly zone would have put an end to the military actions of non-military groups - such as Al-Nusra Front, later Jabhat Fatah al-Sham, PKK and PYD - in that area. Imposing a no-fly zone would have ended the Syrian conflict quicker, protected civilians and distributed humanitarian aids to them.

6.6.2 The Deployment of Peacekeeping Forces

During the last two decades, UN peacekeepers played a dynamic role in helping conflicting parties end hostilities. The UN peace operations are frequently a front-line supply supporting states under stress to uphold their responsibilities towards their people. At present, UN peacekeeping missions are often deployed by the UN Security Council to back host states in protecting their civilians.[143] Due to their important role, this dissertation suggests that, in the future, the LAS should deploy peacekeeping forces under the UN's supervision in cases similar to the Syrian crisis.

Considering the demands for UN peacekeepers in many regions over the world, the development of regional military capabilities; for instance, the African Stand-by Force, should be supported as a legitimate alternative, even if they will sometimes not be fully successful. Civilian capacities that help to inform regional and sub-regional policies of emerging crises – such as through the Central American Integration System, the European External Action Service and the African Union's Peace and Security Architecture – could make a more substantial contribution to preventing atrocity crimes in the short term.

The recommended peacekeeping missions can resort to a limited use of force as a last option in circumstances where civilians are under imminent threat of physical harm since protecting civilians is mandated under Chapter VII of the UN Charter.[144] The peacekeeping

[142] ILC, 'Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (31 January 2019) U.N. DOC. A/CN.4/727 at paras 69-71; Weiss (n 19) 3-12; UNGA Res. 743 (21 February 1992) U.N. DOC. A/RES/743; O'neill (n 4) 220-229

[143] UNGA 'A vital and enduring commitment: implementing the responsibility to protect' (13 July 2015) 69th Session (2015) A/69/981–S/2015/500

[144] UNGA 'the Responsibility to protect: timely and decisive response' (5 July 2012) 66th Session (2012) U.N. DOC. A/66/874-S/2012/578; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VII

missions may be called upon to respond wherever civilians are threatened; hence, peacekeepers' work can contribute to achieving the R2P principle purpose, protecting civilians.

In 2015 a Report by the UN Secretary-General called on peacekeeping missions to be directed by more forward-looking and strategic valuations of threats to populations which integrate with the perception and the protection strategies of populations.[145] This, in turn, will involve enhancing the intelligence capabilities of missions and providing fast-deployable resources to both military personnel and civilians. Furthermore, this seems to be essential to respond to the ever-changing nature and scale of the threats they would meet.[146]

The international and regional organisations have significantly participated in decreasing the international adversity of atrocity crimes. The development of a new peacekeeping doctrine and the strengthening of civilian capacities in host states involves preventive diplomacy and mediation, human rights protection, and the rule of law.[147] For example, the interference by the UN may take place too late to resolve a crisis and end atrocity crimes. This is similar to the Rwandan case (1994) where a large number of civilians lost their lives due to the Security Council's delay in passing a resolution.[148]

The Department of Peacekeeping Operations is sometimes employed for preventing, protecting, peacekeeping and disarming. They can also be employed to counter armed groups which seek to threaten the civilian population by casual and unlimited violence with the aim of overthrowing a government. States may in some crises request assistance from regional or international military forces to protect individuals in danger of atrocity crimes or subject to these kinds of crimes. For instance, in 2003, the Regional Assistance Mission to the Solomon Islands was founded at the call of the Government of the Solomon Islands as well as with the full contribution of the Pacific Islands Forum. The mission handed over wide-ranging civilian, police and military support to national authorities to protect the civilians on the island.[149]

Presently, the protection of civilians is a main topic in UN Security Council debates for peacekeeping missions, namely it was discussed in the meetings concerning *Côte d'Ivoire*, South Sudan, Libya, and Syria amongst others.[150] To stop atrocity crimes in Sudan, the UN Security Council passed Resolution 1996 (2011) to establish the UN Mission in South Sudan

[145] UNGA 'A vital and enduring commitment: implementing the responsibility to protect' (13 July 2015) 69th Session (2015) A/69/981–S/2015/500
[146] Ibid
[147] UNGA 'Mobilizing collective action: the next decade of the responsibility to protect' (22 July 2016) 70th Session (2016) U.N. DOC. A/70/999-S/2016/20; UNGA 'A vital and enduring commitment: implementing the responsibility to protect' (13 July 2015) 69th Session (2015) A/69/981–S/2015/500
[148] UNSC Res. 918 (17 May 1994) U.N. DOC. S/RES/918
[149] UNGA 'Fulfilling our collective responsibility: international assistance and the responsibility to protect' (11 July 2014) 68th Session (2014) U.N. DOC. A/68/947–S/2014/449
[150] *Ibid*

(UNMISS) and peacekeepers were deployed to assist the national authority to implement their responsibility to protect civilians.[151] Similarly, in MONUSCO, the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo, peacekeeping missions created flexible and innovative measures to afford security in areas where non-combatants were subject to imminent threat(s). Some of these measures were successful, especially when they involved temporary deployments of mobile patrols and military contingents.[152]

In the Syrian case, the LAS could have depended on this proposal for action through implementing a broad role for the UN Security Council Resolution drafted in April 2012.[153] The Resolution approves "an initial deployment of up to 300 unarmed military observers to Syria for three months to monitor a fragile one week-long ceasefire."[154] Extending the authorisation and the period of the UN Security Council's drafted resolution should have aimed at ending human rights abuses. In the future, the role of the LAS peacekeeping forces which is recommended in this dissertation should solely be the protection of civilians.

Critically, deploying peace enforcement and peacekeeping forces may not be the solution to terminate conflicts as they are not effective for a long-term recovery. Hence, thoughtful consideration of the continuous process of security and peacebuilding in all its dimensions are serious. Previous practice shows that failing to build peace in a sufficient manner can result in a conflict zone slipping into more serious kinds of conflict.[155] For example, the peacekeeping force in Darfur failed as human rights violations had just decreased while the peacekeeping missions were present; however, the situation became worse when the forces left Sudan.[156] Similarly, the continuous crisis in Somalia proves that the Australian contribution to the Unified Task Force (UNITAF) of peacekeeping was only useful as a temporary solution. However, the peacekeeping force disarmed the conflicting parties during the period of its deployment.[157]

These peacekeeping missions' failure could be attributed to their being launched by international colonial powers. However, the missions launched by regional organisations under the UN's supervision have usually been more successful. An international and regional

[151] *Ibid*
[152] *Ibid*
[153] UNSC Res. 2042 (14 April 2012) U.N. DOC. S/RES/2042
[154] *Ibid*; UNGA Res. 743 (21 February 1992) U.N. DOC. A/RES/743
[155] United Nations, 'One Year On: An open letter from former members of the UN Secretary-General's High-Level Panel of Eminent Persons on the Post-2015 Agenda.' (Open Letter, United Nations Secretary-General, 22 September 2014) 1-3
[156] Paul D. Williams and Alex J. Bellamy 'The responsibility to protect and the crisis in Darfur' (2005) 36:1 Security Dialogue 27, 27-47
[157] Robert G. Patman, 'Beyond 'the Mogadishu Line': Some Australian Lessons for Managing Intra-State Conflicts' (2001) 12:1 Small Wars and Insurgencies 59, 65

example of success is the peacekeeping forces of the ECOWAS and African Union in the Gambia in January 2017. However, the African Union failed to put an end to atrocity crimes in several parts of Africa, for instance in Darfur and Central African Republic.[158]

During the last few decades, different elements of the UN system and the international community organisations were involved in some kind of peacebuilding. However, their progress showed that not only did they lack sufficient coordination but also they were too slow.[159] One solution to activate the role of the UN and international community organisations can be to trigger the individual representatives. This should be achieved via the guidance and authority to work with the appropriate parties to create such mechanisms and to find the means to achieve coordination functions effectively. Additionally, it is important to ensure that the sequencing of UN valuations and activities are in line with government priorities.[160] A preliminary operating capability for a permanent police capacity can afford coherent, responsive and effective start-up ability for the peacekeeping missions' policing element and can assist existing missions through providing advice and capability.

The deployment of peacekeeping forces and the imposition of a no-fly zone may assist in the effective distribution of humanitarian aid to civilians. However, peaceful measures to distribute humanitarian aid to those in need in Syria did not achieve this as evidenced by the international community's failure to do so in Homs, Daraya, the Yarmok Camp and Douma.[161] The regional organisations could depend on the previous practice in Resolution 770 passed by the UN Security Council in 1992 concerning human rights violations in Sarajevo, Bosnia and Herzegovina.[162]

Unfortunately, despite the knowledge (of the UN Security Council and other regional and international organisations, including the LAS and the EU) that Syrian authorities were the perpetrators of crimes against humanity and of human rights violations, most humanitarian aids were given to them.[163] Syrian authorities abstain from distributing any aids to the areas

[158] Babatunde (n 79) 57-60
[159] United Nations, 'One Year On: An open letter from former members of the UN Secretary-General's High-Level Panel of Eminent Persons on the Post-2015 Agenda.' (Open Letter, United Nations Secretary-General, 22 September 2014) 1-3
[160] United Nations, 'One Year On: An open letter from former members of the UN Secretary-General's High-Level Panel of Eminent Persons on the Post-2015 Agenda.' (Open Letter, United Nations Secretary-General, 22 September 2014) 1-3
[161]Lyse Doucet, 'Syria conflict: Emerging from the siege of Homs' (*BBC News*,13 February 2014) <https://www.bbc.co.uk/news/world-middle-east-26171674> accessed 4 May 2016; BBC News, 'Homs: Syria rebels 'die trying to break siege'' (*BBC News*, 10 January 2014) <https://www.bbc.co.uk/news/world-middle-east-25678312> accessed 22 July 2014
[162] UNSC Res. 770 (13 August 1992) U.N. DOC. S/RES/770
[163] BBC 'Arab League agrees to create joint military force' (BBC, 29 March 2015) <https://www.bbc.co.uk/news/world-middle-east-32106939> accessed 2 March 2018

under the siege of the official army or under the rebel control. Instead, the aids are only distributed to the areas under the Syrian regime control.[164]

Through this approach, the LAS could have called upon its Members to take all necessary measures through national and regional organisations and UN agencies to provide humanitarian aids to the Syrian civilians – especially those under siege. This would have been a particularly useful approach because many organisations of the UN failed to distribute aids to many cities, including Homs, Daraya, the Eastern Ghouta and Yarmouk Camp, besieged by the Syrian army for a long time.[165]

The outcome of resorting to a non-military intervention by a regional organisation in cases like the Syrian crisis can help to stop atrocity crimes. A non-military intervention could have been achieved by imposing a no-fly zone in the North of Syria and deploying a peacekeeping mission. As a result, this would have protected civilians from bombing while the peacekeeping mission would have guaranteed delivering humanitarian aid to several millions who were forced by the Syrian authorities to leave their areas and move to the north of Syria. Such a step might have helped both parties of the conflict to reach an agreement and end the crisis.[166]

6.7 Concluding Remarks

This chapter has examined five approaches that could help to implement the R2P principle and prove that the principle is still dynamic to prevent committing atrocity crimes. The five approaches highlight the role of regional organisations in implementing the R2P principle when a draft resolution of the UN Security Council is blocked by using the veto power. They also recommend that when a draft resolution is supported by two-thirds of the UN General Assembly, then a resolution can be passed by the UN General Assembly rather than the UN Security Council.

To make the R2P principle a more reliable tool through sorting conflicts in their initial stages, it is best to devise efficient mechanisms to prevent root causes. Hence, one can

[164] Ibid

[165] UNSC Res. 770 (13 August 1992) U.N. DOC. S/RES/770; also see AlJazeera, 'Aid enters besieged Palestinian camp in Syria' (*AlJazeera*, 18 January 2018) <https://www.aljazeera.com/news/middleeast/2014/01/aid-enters-besieged-palestinian-camp-syria-201411815539107398.html> accessed 2 April 2019; BBC News, ''Aid enters' besieged Damascus camp of Yarmouk' (*BBC News*, 18 January 2018) <https://www.bbc.co.uk/news/world-middle-east-25793480> accessed 2 April 2019

[166] Anne-Marie Slaughter, 'How to Halt the Butchery in Syria' (*New York Times*, 23 February 2012) <http://www.nytimes.com/2012/02/24/opinion/how-to-halt-the-butchery-in-syria.html?_r=2&> accessed 27 March 2016

recognise that addressing root causes can be applied through establishing specialised *ad hoc* tribunals to deal with the atrocity crimes committed during the Syrian crisis.

In contrast to what the French Minister of Foreign Affairs, Hubert Védrine argued, this chapter stresses that a reform to the use of veto power should be carried out. A permanent Member of the UN Security Council should not be allowed to be a peacemaker and a belligerent simultaneously. For instance, Russia blocks several draft resolutions through using its veto power whilst simultaneously being a third party fighting side-by-side with the Syrian regime'forces.[167] Therefore, the R2P principle should be evaluated as an action-oriented normative project that seeks to codify and shape international precepts and world order to realise the core UN values of a better and safer life for all peoples. It should be implemented as an analytical concept and concerning its philosophical antecedents, theoretical coherence, tensions and inconsistencies.

[167] UNGA 'Report of the Secretary-General 63/677' (2009) U.N. DOC. A/63/677; Hosli (n 4); O'neill (n 4) 220-229; Bourantonis (n 75) 39-74; Botte (n 8) 1033-1036

Chapter Seven: Conclusion and Recommendations

7.1 Summary

This dissertation has critically examined the R2P principle and demonstrated that it is the primary responsibility of states, followed by the secondary responsibility of regional organisations and the UN to protect civilians from atrocity crimes during times of armed conflict. Furthermore, it situated the debates surrounding the R2P principle into an analytical framework. The dissertation did this through the examination of state practice during major humanitarian crises prior to and throughout the fourteen years following the inception of the R2P principle in 2005. The analysis included the examination of detailed cases where the R2P principle was of relevance such as Darfur, Libya and Syria.

In analysing the R2P principle and its international legal impact, the dissertation examined state practice as states have not, to date, codified the R2P principle in any treaty legislation. Ultimately, this chapter aims to recite the key findings of the dissertation. Furthermore, it shall recommend points of view which may improve upon the current legal position. Finally, it puts forth several key areas where further research may be carried out in order to build upon the findings of this dissertation.

7.2 Key Findings

The World Summit 2005, *prima facie*, appears to function as a bridge to fill the *lacunae* between human rights violations and state sovereignty by introducing the R2P as a complementary principle of international law to protect civilians. The World Summit 2005 regarded sovereignty as a shared responsibility between both, the sovereign state and the UN. It is accepted that the central responsibility to protect resides with the state(s) whose civilians are directly affected by massive human rights violations and that in situations where a state is unable or unwilling to fulfil this responsibility.

The dissertation illustrates that the R2P principle is not only found to be the responsibility of the state, but it is also a tripartite-shared responsibility, it is shared between the state, regional organisations and the UN. The central responsibility is also applied in incidents where the state itself is the perpetrator of numerous crises such as in Darfur, Myanmar, Libya and Syria. Moreover, the UN Secretary-General also recognized paragraphs

138 and 139 of the World Summit 2005 to be firmly anchored in well-established principles of international law.

The principle of state sovereignty was considered by the World Summit 2005 to include the responsibility of the state of both, internal obligations and external duties and thus, sovereignty is not merely the state's 'control' over its respective territory. Under the World Summit 2005, it is the responsibility of states to protect their peoples from atrocity crimes - considered *jus cogens* in international law. The non-implementation of the R2P may lead to, in due course, weaken the entrenched principles of state sovereignty and non-intervention.

Based on the World Summit 2005, the R2P principle should be implemented where atrocity crimes have been committed and the state is unable or unwilling to protect them. Additionally, the aforementioned crimes should be committed in a wide and systematic manner in order to qualify as triggers to implement the R2P principle. Yet, following a selectivity approach to implement the R2P principle is one major setback to the principle. Moreover, practice demonstrates that some incidents where the triggers to implement the R2P principle are met with neglect due to the case-by-case approach employed to authorise implementation.

The key challenge of the prevention of atrocity crimes seems to stem from the World Summit 2005 itself, where states pledged to ensure that serious breakouts of crises and conflicts are prevented. In particular, the implementation of the R2P principle was found to lack emphasis on this commitment due to political wills and national interests of Members of the UN Security Council. One can confirm that the action of the UN reflects that implementing the R2P principle to protect civilians is a responsibility to the UN but not an obligation.

This dissertation has demonstrated that previous practice pointed to discrepancies which existed among the UN Member States regarding the implementation of the R2P principle, especially among the five permanent members of the UN Security Council. For instance, in the Syrian context, China and Russia often seem bitter towards the R2P principle, reciting this disapproval of any kind of intervention due to the notion that coercive action violates a state's sovereignty and territorial integrity. However, Russia describes its intervention in Georgia under the banner of the R2P principle; therefore, the discrepancies among the five permanent members in relation to the use of the veto power could be due to national interests and political wills.

From the perspective of the international dimension of the R2P principle, there seems to be a sound justification for instituting the R2P principle. The Libyan scenario was the first genuine test of the military aspect of the R2P principle; however, it was also where non-Western States argued that the doctrine was being utilised for political gains. This was arguably

later evidenced by the use of the veto power during the Syrian crisis to block UN Security Council Resolutions. Hence, it may be inferred that it is highly unlikely for the R2P principle to be resorted to in the short term.

Despite the World Summit 2005 having attained the support of over 150 States, the R2P principle does not support the idea that military intervention without Security Council authorisation is legally permitted. Moreover, many crises have taken place following the adoption of the World Summit 2005, however, this has not always resulted in remedial action by the international community. The promise that the Permanent Members of the Security Council will not employ their veto power due to the aims of the R2P principle fails in practice. Furthermore, this was perhaps best illustrated in the Syrian case. Hence, it may be said that no real disincentives exist which would push the Permanent Members of the Security Council away from using their veto power to block resolutions which concern the implementation of the R2P principle. Thus, the R2P principle did not prove to be an all-encompassing solution to address this controversial issue. However, the World Summit 2005 intended that where the Security Council fails to take a decision in relation to a crisis, a decision may be passed by the General Assembly.

Despite the issue of the Syrian crisis being brought before the UN General Assembly and having also attained more than two-thirds of the Member States' support, no further action relating to the implementation of the R2P principle in Syria was taken. Additionally, the R2P principle was found to extend beyond the conceptual limitations of the notion of intervention, asserting that an operative response to mass atrocities involves not only reaction, but continuing engagement during the conflict and rebuilding after taking actions.

The implementation of the R2P principle in the Libyan crisis to change the regime had negative effects on its future implementation in the Syrian crises and other cases in the future. As the mandate of Security Council Resolution 1973 was exceeded, it ultimately led to reluctance on the part of the Chinese and Russians to countenance the current Syrian regime. Now it is the time for the UN Security Council and the Member States to embrace their responsibility to protect in Syria and Iraq. However, in doing so, they must develop long-term coherent plans for reconstruction, recovery, and rebuilding.

The setbacks of previous practice urged this study to highlight that when *jus cogens* has been violated, regional and sub-regional organisations should take their role under the observation of the UN to prevent atrocity crimes. Moreover, in all crises, both the concerned regional organisation(s) and the UN should work as one body to protect civilians from atrocity crimes. However, even when the triggers of the R2P principle are met, their role no longer

serves a practical purpose when any permanent Members of the UN uses veto power to block a resolution. In order to address this issue, it seems that allocating the initial responsibility to prevent atrocity crimes to the most relevant regional organisation could be an adequate alternative.

Previous practice demonstrates that the R2P principle failed to be implemented *pari passu* and civilians have been left without protection. Failing to implement the R2P principle whenever atrocity crimes committed widely and systematically shows that reforms to the implementing the veto power should be carried out and the R2P principle should also be re-evaluated.

7.3 Recommendations

Since the approval of the World Summit 2005, the practice of the UN has shown that implementing the R2P principle in crises where atrocity crimes have been committed is not always possible for various reasons and is thus problematic.

This dissertation, therefore, recommends the following:

Firstly, the R2P principle should be implemented in an effective, sustainable and balanced approach and with the full cooperation of regional and sub-regional organisations. Nevertheless, the implementation of the principle should be in line with the provisions of the UN Charter. At this stage, practice on the ground shows that the R2P principle barely moves from words to deeds on both the global and regional levels. What is undeniably needed is an early and flexible response suitable to the surroundings of each case rather than any widespread or prescriptive group of policy alternatives that care first and foremost about national interests.

Secondly, the use of the veto power in matters relating to the implementation of the R2P principle should be restricted. The power was demonstrated to be used for political wills and national interests and acted as a bar to the prevention and halting of atrocity crimes. More specifically, the implementation of the R2P principle should take place following voting in the Security Council without the ability of using a veto, and the General Assembly. Additionally, in the Security Council a minimum of more than half should vote in favour of implementation. Finally, in the General Assembly a minimum of two thirds should vote in favour of implementation.

Thirdly, reforms should be made which reaffirm the status and legal position of R2P under international law. This may be achieved through novel treaties which limit the principle

of sovereignty when atrocity crimes are committed and clarify when the R2P principle may be implemented. Additionally, the limits on sovereignty should allow for the deployment of peacekeeping forces. Moreover, this recommendation may potentially address most of the issues which have been presented in this dissertation.

Fourthly, novel mechanisms should be put in place which relate to the establishment of *ad hoc* tribunals during and after atrocity crimes. Furthermore, this may help in limiting atrocity crimes from taking place as they will aim to punish perpetrators and bring them to justice.

Taking these recommendations into account may assist in the realisation of the consistency approach in implementing the R2P principle rather than the current selectivity approach. The necessity of the former approach lies in the failure of the latter, where it is clear that the policy of the five permanent members of the Security Council to protect civilians from atrocity crimes is just like a chameleon that changes its colour in every single case.

Despite the recommendations put forth, it is worth also clarifying that the R2P principle should be exclusively implemented when atrocity crimes are committed. This will help ensure that the principle is not abused and applied out of context for non-humanitarian purposes.

7.4 Final Remarks

Over the last eight years of the Syrian crisis, applying the R2P principle has failed to fulfil its purpose, and this failure does not seem to be related to the legal status of the R2P principle itself, but rather, it seems to relate to the complicated political wills and national interests of super-power States. At this stage, practice shows that the R2P principle hardly moves from words to deeds at both the global and regional levels. Therefore, it is clear thus far that reforms must be made to improve the current legal position of the R2P principle.

The previous practice of implementing the R2P principle in several crises reflects that no real changes have been achieved to the international system as the legal process governing responding to crises shows inconsistency. For instance, the second pillar and the third pillar of R2P, the responsibility to react and the responsibility to rebuild respectively, are far from easy in being implemented to stop atrocity crimes. The dissertation focused on sorting conflicts while they are in their *ab initio* stages as they are the least problematic to resolve. Preventive efforts would be enriched by investing in methodologies to examine prevention conclusions, which are notoriously difficult to verify, and by finding covenants among states on what places a state under stress.

State sovereignty as highlighted in this dissertation carries with it the state's responsibility to protect its civilians from atrocity crimes; therefore, the authority of state should not be observed as absolute but regulated and constrained internally by constitutional power and sharing arrangements. The R2P principle highlights that it is the civilians who are the referent and states are the guarantors where their sovereignties are seen responsibilities, subject to the ability of a state to protect their civilians against an ever-growing list of increasingly noticeable atrocity crimes. The mass atrocity crimes during the armed conflict in Syria show that the Syrian government is not only unwilling to protect its own civilians but also, it is the perpetrator of most of the crimes committed since February 2011. In addition, the Syrian authority failed to deliver its key responsibilities and duty to protect the Syrians from the other crimes committed by Daesh and other military groups.

The international aspect of the R2P principle would more likely persist whenever geo-political circumstances permit along with the international community's support. However, such a finding gives hope for those who call on the international community to realise their responsibility to protect civilians during armed conflicts and atrocity crimes occur. Nevertheless, it does not help in averting the problem of selectivity whilst responding to humanitarian crises. Thus, the tensions between *jus cogens* and state sovereignty would remain unresolved.

Furthermore, the dissertation stressed that authorised interventions when atrocity crimes are committed should be limited; for instance, finding a no-fly zone to protect civilians and distributing food and aid to civilians under sieges. However, in the Syrian case the UN failed to find humanitarian corridors for several millions that struggled from sieges in many cities during the conflicts. The R2P principle may be implemented more effectively with the support of a regional organisation, in this context, the Arab League.

The dissertation confirmed that the implementation of the R2P principle should be in line with the measures and procedures specified in the UN Charter. However, practice shows that there is a lack of transparency, predictability or continuity in implementing the R2P principle since its triggers have been, and continue to be met in Syria with no adequate action by the UN to prevent or stop the atrocious crimes. It found that intervention under R2P is not applied legally and normatively, but selectively.

7.5 Future Research Areas

As this dissertation comes towards its end, it becomes apparent that it was not able to address several research areas for a wide array of reasons. Thus, this section shall recommend future research areas which may be examined in order to build upon the findings of this dissertation, as well as assist in clarifying some of the points which this dissertation was unable to directly address.

Firstly, it would prove to be worthwhile to examine the role of regional organisations, in particular the LAS, in implementing the R2P principle to protect civilians from atrocity crimes when their state is unable or unwilling to do so.

Secondly, it may be worth analysing the pattern of the use of the veto power to block Security Council resolutions, especially when atrocity crimes have been committed, to determine its root causes which will assist in recommending changes to the regulation of the veto power to the benefit of the R2P principle amongst others.

Finally, it is worth examining the effectiveness of non-military interventions such as no-fly zones, humanitarian corridors, and breaking of sieges as additional measures which may be imposed alongside the R2P principle. Research in this area may clarify whether such measures may ultimately be useful in ensuring that the number of victims of atrocity crimes is kept to a minimum.

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