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Responsibility to Protect and the International Military Intervention in Libya in International Law: What Went Wrong and What Lessons Could Be Learnt from It?

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Abstract

The need to respond to the unfolding situation of mass atrocity crimes has become the subject of a longstanding discussion in international law, with no success in reaching an agreement on the legal status of such a right to respond. The use of coercive measures to protect endangered people remains one of the most challenging aspects of contemporary international law. Responsibility to Protect (R2P) was introduced to respond to the grave cases of massacres, but this notion has remained more in the realm of political rhetoric rather than in international law. However, the notion of R2P was invoked by the states leading international intervention in Libya. This article aims to present a critique of the application and interpretation of R2P as a normative framework, with a focus on the complementary responsibility of the international community in the face of the humanitarian crisis in Libya and the way military intervention was carried out. Drawing on the lessons learnt from the international intervention in Libya, this article provides an assessment of the UN resolutions that authorised the military intervention in Libya and the conduct of the coalition partners prior to, during and in the aftermath of the intervention and suggests the manner in which this normative framework could be developed to help the international community to shoulder its responsibility for the protection of people, without undermining the core of international legal framework in the future.

I. Introduction:

Under the evolving notion of Responsibility to Protect (R2P)[1] the international community has a duty to respond to cases of international crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity, to protect people against those cruelties that occur in the throes of war. This grounds R2P in the field of International Criminal Law (ICL).[2] The 2005 Outcome Document,

[1] For the legal status of R2P see: Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) AJIL 99-120; Jutta Brunnée and Stephen Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2(3) GR2P 191-212; Anne Orford, International Authority and Responsibility to Protect (CUP 2011); Steven Ratner, The Thin Justice Of International Law: A Moral Reckoning Of The Law Of Nations (1st edn, OUP 2015) 292-312; Alex Bellamy and Ruben Reike, 'The Responsibility to Protect and International Law' (2010) 2(3) GR2P 267-86; Volker Roeben, 'Responsibility in International Law' (2012) 16 Max Planck UNYB 99-158; Anne Peters, 'The Responsibility to Protect: Spelling Out the Hard Legal Consequences for the UN Security Council and Its Members' in Ulrich Fastenrath and others, From Bilateralism to Community Interest: Essays in Honour of Bruno Simma (OUP 2011) 297-325; Jose Alvarez, 'The Schizophrenias of R2P' in Philip Alston and Euan Macdonald (eds), Human Rights, Intervention and The Use Of Force (OUP 2008) 275-84.

[2] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/61/1 30.

wherein the concept of R2P was introduced to the realm of international law, endorses R2P's formulation as follows: (i) Responsibility to prevent – states are responsible for preventing the commission of such crimes in their societies and the international community is responsible for helping and encouraging each state to exercise its preventive responsibility; (ii) Responsibility to react by peaceful means – as the text of the Document clearly states, in cases of unfolding violence, '[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations';[3] and (iii) Preparedness to take collective action – this pillar, avoiding the term 'responsibility', acknowledges the possibility of resorting to coercive measures through the Security Council, 'in accordance with the Charter'.[4] Also, the Security Council reaffirmed R2P in its Resolution 1674 (2006).[5]

Three conceptions lie at the heart of R2P, as follows: (i) the protection of civilians is the first prioritised goal of R2P; (ii) sovereignty as responsibility, based on which, domestic jurisdiction and sovereign inviolability cannot be excused in order to violate basic human rights, such as the right to life and physical integrity; and (iii) the complementary responsibility of the international community to ensure the protection of civilians in case of any state's unwillingness to do so, or the failure of states themselves to fulfil their primary responsibility to protect. Without the grouping of these three conceptions, which are not completely new in international law, this new concept of R2P could have been of little value and no more than mere verbiage. Indeed, the innovation of this concept was to consolidate and bundle these conceptions in an appropriate way in order to respond to contemporary crises of international law, which gives R2P the status of a normative framework. Thus, it is necessary to transfer R2P, as a political catchword, from the domain of politics to the domain of law, the backdrop against which the current research is written.[6]

With this in mind, the focus of this article is on the complementary responsibility of the international community and its relationship with the primacy of the sovereignty of states, which places the concept in a legal dilemma.[7] In this regard, the case of Libya has become the epitome of interpretation and application of R2P and the moment the international community triggered this concept to protect Libyans whereas its legal status remains contested. Therefore, the present article

[3] Ibid (emphasis added).

[4] Ibid. For the origin of R2P see also: The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (International Development Research Centre 2001).

[5] UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 2

[6] Stahn (n 1) 120.

[7] See: Orford (n 1); Anne Orford, Reading Humanitarian Intervention: Human Rights, and the Use of Force in International Law (CUP 2003); Alexander Orakhelashvili, 'International Law, International Politics and Ideology' in Alexander Orakhelashvili (ed), Research Handbook on the Theory and History of International Law (Edward Elgar 2011) 368; Roeben (n 1) 106.

explores whether the manner in which the international military intervention conducted undermined or strengthened the notion of R2P in its application and interpretation. In doing so, it will examine as to what went wrong in the run up to, during and in the aftermath of the military intervention in Libya and what lessons could be drawn from this experience for the development of the notion of R2P. It will assess the international military intervention implemented in Libya and its consequent effect on the international legal system. Next, will be an examination of the legal status of the international community and its responsibility, as well as its foundations and limitations and its implications for R2P. Finally, in the concluding section, an attempt will be made to suggest the manner in which this normative framework could be developed to help the international community to shoulder its responsibility for the protection of people, without undermining the core of international legal framework in the future.

II. Libya and International Law:

i. Intervention:

The peaceful protests of the Libyans started by January 2011 quickly turned into a violent conflict due to the Libyan government's crackdown. Consequently, the situation in Libya began to receive the attention of the international community.[8] The National Transitional Council of Libya (NTC) was officially established on 2 March 2011 in Benghazi, the second largest city in Libya, consisting of several defected political elites, also prior to this, several armed opposition groups have been quickly established.[9] As a result, this violent conflict of Libyans' self-determination transformed into a non-international armed conflict (NIAC), owing to the fact that the opposition forces captured certain areas of Libyan territory and gradually began to show a certain degree of control and organisation. [10] However, very quickly, the situation augured ill for the rebels. Despite the initial success of the rebels up to mid-February, it soon became clear that, in the long term, they had little chance of success against the onslaught of the government.[11] In late February and early March, Gaddafi's forces 'tipped

[8] Secretary-General Press Release, 'Secretary-General Tells Security Council Time to Consider Concrete Action in Libya, As Loss of Time Means More Loss of Lives' (25 February 2011) Press Release SG/SM/13418, SC/10186, AFR/2124; UNSC 'Press Statement on Libya' (22 February 2011) Press Release SC/10180, AFR/2120.

[9] Paul Williams and Alex Bellamy, 'Principles, Politics, and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force' (2012) 18(3) GG 273, 275-76; Kubo Macak and Noam Zamir, 'The Applicability of International Humanitarian Law to the Conflict in Libya' (2012) 14(4) ICLR 403, 407-08.

[10] UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 1.

[11] Dirk Vandewalle, A History of Modern Libya (2nd edn, CUP 2012) 204.

the balance back in [the government's] favour', and by mid-March government was advancing to crush the epicentre of the NTC in Benghazi.[12]

The Security Council first adopted Resolution 1970 on 26 February to shoulder its complementary responsibility.[13] Then, after the unwillingness of the Libyan government to protect its people against international crimes, in response to the escalating humanitarian deterioration in Libya, Resolution 1973 was adopted on 17 March, which authorised the use of force: to implement a no-fly zone, to protect civilians and civilian populated areas short of occupation.[14] Two days after this resolution, US and European forces began air strikes against the governmental forces in Libya (Operation Odyssey Dawn), and on 23 March, NATO took over the enforcement of the no-fly zone (Operation Unified Protector).[15]

In fact, the infamous 'no mercy' speech of Gaddafi indicating that his army would commit a massacre in recaptured Benghazi – considering the fall of this city was imminent at the moment – worked as a catalyst to the mentioned authorised force,[16] as the resolution 1973 itself highlights the force majeure situation of this city.[17] Moreover, reportedly, during February 2011 alone, over 22,000 people fled the country to escape the escalating fighting; displacement is another threat to peoples' lives.[18] Although the displacement is not itself an international crime, if it is not forced, it is a symptom of the danger the people of a country face if they remain in their place of residence. Therefore, it is safe to conclude that the Libyan crisis was a grave case of R2P application.

After five months of fierce battle for all sides, the tipping point was reached on 20 August; at this time, the government's military apparatus, internal legitimacy, and repressive capabilities had been sufficiently eroded by strikes launched from the NATO-led coalition. Tripoli 'fell to a well-synchronised operation' that consisted of precision strikes by NATO, ground advances by rebel units, calls for public uprising, and disruption of Libyan broadcasting.[19] Also, the rebels received significant assistance from NATO and its allies, particularly Qatar, which sent 'hundreds of troops' to support

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[12] Williams and Bellamy (n 9) 275-76.

[13] Res 1970 (n 10).

[14] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 3.

[15] Katie Johnston, 'Transformations of Conflict Status in Libya' (2012) 17(1) JCSL 81, 95.

[16] Ishaan Tharoor, 'Gaddafi Warns Benghazi Rebels: We Are Coming, And There'll Be No Mercy' Time (New York, 17 March 2011) <http://world.time.com/2011/03/17/gaddafi-warns-benghazi-rebel-city-we-are-coming-and-therell-be-no-mercy/> accessed 8 March 2017; David Kirkpatrick and Kareem Fahim, 'Qaddafi Warns of Assault on Benghazi as U.N. Vote Nears' the New York Times (New York, 17 March 2011) <http://www.nytimes.com/2011/03/18/world/africa/18libya.html?pagewanted=all> accessed in 8 March 2017.

[17] Res 1973 (n 14) 3.

[18] Johnston (n 15) 91.

[19] Ian Black, 'Qatar Admits Sending Hundreds of Troops to Support Libya Rebels' the Guardian (London, 26 October 2011) <https://www.theguardian.com/world/2011/oct/26/qatar-troops-libya-rebels-support> accessed 9 April 2017.

the Libyan rebels in overthrowing the Gaddafi regime.[20] After the fall of Tripoli, Gaddafi and his loyalists retreated southwards and to his hometown of Sirte, where the conflict continued for a further two months. Eventually, after the summary execution of Gaddafi by the rebels and the defeat of the last remnants of the loyalist resistance, the international operation ended on 23 October,[21] and few days later, the Security Council terminated its authorisation in Resolution 2016.[22]

In reality, the interveners' desire to terminate the war as soon as possible urged them to increase their support for the rebels; as the war went on, the support of NATO for the rebels increased. Therefore, although NATO reports insisted that its entire operation was intended for the protection of civilians,[23] political statements regularly advocated the policy of regime change.[24] For example, the NATO bombing of the city of Sirte, merely because it was perceived to be loyal to Gaddafi as his hometown, and considering that, at the time, the city was not an active battleground, was not protective or necessary. At the same time, less than two weeks into the military campaign, NATO started to attack Libyan forces that were retreating and were far away from civilian populated areas, and thus were not an immediate threat to civilians.[25] Instead of weakening the enemy, these actions provoked more resistance; in fact, these actions were taken to satisfy the desire of the rebels to overthrow the Gaddafi regime rather than the protective mandate of the Resolution 1973. Such disproportional action repeatedly occurred during the military campaign by the international actors and, consequently, led to a forced regime change.[26] This strategy, in fact, protracted the conflict between the rebels and the government in favour of the rebels.[27]

ii. Post-Intervention

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[20] Ibid.

[21] Ben Barry, 'Libya's Lessons' (2011) 53(5) Survival 5, 7; Alan Kuperman, 'Nato's Intervention in Libya: A Humanitarian Success?' in Aidan Hehir and Robert Murray (eds), Libya: The Responsibility to Protect and the Future of Humanitarian Intervention (Palgrave Macmillan 2013) 205.

[22] UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016 2.

[23] Operation UNIFIED PROTECTOR Protection of Civilians and Civilian-Populated Areas & Enforcement of the No-Fly Zone (October 2011) <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2011_10/20111005_111005-factsheet_protection_civilians.pdf> accessed 13 March 2017; Operation UNIFIED PROTECTOR Final Mission Stats (2 November 2011) <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2011_11/20111108_111107-factsheet_up_factsfigures_en.pdf> accessed 13 March 2017.

[24] Barack Obama, David Cameron, and Nicolas Sarkozy, 'Libya's Pathway to Peace' The New York Times (New York, 14 April 14 2011) <http://www.nytimes.com/2011/04/15/ opinion/15iht-edlibya15.html> accessed 30 January 2017.

[25] Kuperman (n 21) 197-98.

[26] Julian Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says about the Relationship between the Jus in Bello and the Jus ad Bellum' (2012) 17(1) JCSL 117, 141-44; Bruno Pommier, 'The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya and Beyond' (December 2011) 884(93) IRRC 1063, 1077-78, 1067-68.

[27] Kuperman (n 21) 207-8.

Notwithstanding the successful overthrow of the Gaddafi regime by the opposition, after an eight-month war, the aftermath augured ill. The subsequent regime change created a vacuum of power that provided fertile ground for tribal rivalries, resulting in chaos and a weak central government. Since the country is still facing an NIAC, the issue of order and security is at the heart of the problems encountered by the NTC in the post-intervention era.[28] However, in Resolution 2009 (2011), the Security Council established the United Nations Support Mission in Libya (UNSMIL), which retains more of an advisory-brokering role than shouldering the positive duty of the international community as an interventionist role likewise what happened at the beginning of the conflict.[29]

In 2016, there were three centres of power on the Libyan political scene. The first is the Presidential Council (PC), which has been located in Tripoli since 30 March 2016. This body was born out of the signing of the UN-brokered Libyan Political Agreement (LPA) on 17 December 2015. The agreement was signed in Skhirat, Morocco, by the majority of political parties and representatives of Libyan society.[30] According to this agreement, the PC will preside over the Government of National Accord (GNA). The second is the Government of National Salvation, again centred in Tripoli. This authority rests on the leadership of a rump of the General National Congress of Libya (GNC), although, in 2016, this body lacked real power to control any relevant institutions. The third is Tobruk, located in al-Bayda. This self-declared government is supposed to work under the LPA, although, so far, it has failed to be incorporated into the agreement; thus, the rivalry between them continues.[31] The UAE, Egypt and Russia support al-Bayda authority, which is under the control of the self-described anti-Islamist General Khalifa Haftar, who leads the Libyan National Army (LNA). On the other hand, Qatar, Turkey, and Sudan support the UN-backed government of Tripoli.[32]

The other dilemma that the NTC faced in the early days of the intervention's termination was the return of those loyal to Gaddafi's regime. Several reports of loyalist insurgencies demonstrate the challenge of those opposing the new regime, especially after the widespread revenge and looting committed by anti-Gaddafi forces. In fact, the unsuccessful attempt of the NTC to unify all the rebels, as they preferred to follow their tribal ambitions, made several loyalists turn against the new government and strengthened their resolve to oppose the NTC. This tide of loyalists deteriorating the

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[28] Mieczysław Boduszyński, 'The Libyan Revolution and its Aftermath / The 2011 Libyan Uprisings and the Struggle for the Post-Qadhafi Future' (2015) 20(5) JNAS 898, 899; Ben Fishman, 'Could Libya's Decline Have Been Predicted?' (2015) 57(5) Survival 199, 201-2.

[29] UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009 3.

[30] Res 2259, ibid 1.

[31] Mattia Toaldo, 'Political Actors 'in A Quick Guide To *Libya's* Main Players (European Council on Foreign Relations) <http://www.ecfr.eu/mena/mapping_libya_conflict> accessed 6 June 2017.

[32] Giorgio Cafiero and Daniel Wagner, 'How the Gulf Arab Rivalry Tore Libya Apart' the National Interest (Washington DC, 11 December 2015) <http://nationalinterest.org/feature/how-the-gulf-arab-rivalry-tore-libya-apart-14580> accessed 6 June 2017.

Libyan scene gained momentum when the de-Gaddafication of governmental administrations was enacted under pressure from some of the militias over the newly elected GNC.[33] The key armed loyalist groups, among others, are the Saif al-Islam Gaddafi clan, probably the most organised of the groups, and the Fezzan-centred group led by Ali Kana, the former head of the armed forces in the south under Gaddafi. In fact, all of the loyalist groups have one thing in common, which is the ambition to reinstate the old Jamahiriya. Even the UN, for the first time, invited Gaddafi loyalists to the Libyan political negotiations in August 2016.[34]

The refugee crisis encompassing the whole of Europe is an issue from which to explore the complicated case of Libya and R2P mandates. It is equally important to note here that the refugee problem was not exclusively limited to those caught up in the 2011 conflict, since the resulting power vacuum increased the flow of illegal immigrants from African countries,[35] a situation which had been controlled by Gaddafi based on agreements with the European states.[36] Members of the Security Council were aware of the possible humanitarian catastrophe that could occur if the Libyan conflict was not stopped and if the aftermath was not responded to effectively.[37] Therefore, it is safe to conclude that the intervention and its subsequent power vacuum exacerbated the refugee crisis. Recent reports show that illegal immigrants are sold as slaves in Libya; according to the Statute of the International Criminal Court (ICC), slavery is a crime against humanity.[38] Additionally, according to Amnesty International, in August 2016, the number of internally displaced people had risen to almost 350,000 in Libya. This includes an estimated 40,000 former residents of Tawargha, 'who had been forced from their homes five years earlier', an act which can be categorised as deportation and/or forcible transfer, both of which are crimes against

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[33] Youssef Sawania and Jason Pack, 'Libyan Constitutionality and Sovereignty Post-Qadhafi: the Islamist, Regionalist, and Amazigh Challenges' (2013) 18(4) JNAS 523, 532; Bell, Butts and Witter (n 39) 25; Colin Freeman, 'Gaddafi Loyalists Join West in Battle to Push Islamic State from Libya' The Telegraph (London, 7 May 2016) <http://www.telegraph.co.uk/news/2016/05/07/gaddafi-loyalists-join-west-in-battle-to-push-islamic-state-from/> accessed 11 April 2017.

[34] Mathieu Galtier, 'Libya: Why the Gaddafi Loyalists Are Back' Middle East Eye (the UK, 11 November 2016) <http://www.middleeasteye.net/news/libya-why-gadhafi-loyalists-are-back-2138316983> accessed 6 June 2017.

[35] Ahmed Elumami, 'Libya Mayors Say Europe's Migration Crisis Should Not Be Dumped on Them' Reuters (London, 10 February 2017) <http://www.reuters.com/article/us-europe-migrants-libya-idUSKBN15P2P7> accessed 14 March 2017.

[36] Patrick Kingsley, 'Dramatic Photos Show Refugees Fleeing Libya Being Rescued At Sea' the Guardian (London, 30 August 2016) < https://www.theguardian.com/world/2016/aug/29/dramatic-photos-show-refugees-fleeing-libya-being-rescued-at-sea> accessed 14 December 2016; UNHCR 'Libya Situation Operational Update' (1 May – 31 August 2016).

[37] UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491 6; UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498 8.

[38] BBC News, 'Libya Migrant 'Slave Market' Footage Sparks Outrage' BBC News (London, 18 November 2017) <http://www.bbc.co.uk/news/world-africa-42038451> accessed 21 November 2017; 'BBC News, 'African migrants sold in Libya 'slave markets', IOM says' BBC News (London, 11 April 2017) <http://www.bbc.co.uk/news/world-africa-39567632> accessed 1 May 2917; International Criminal Court Statute (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute) Article 7(1)(c).

humanity.[39] In October 2016, the UN Office for the Coordination of Humanitarian Affairs (OCHA) estimated that 1.3 million people across Libya were in need of humanitarian assistance,[40] and the International Organisation for Migration (IOM) estimated that the actual number of migrants and refugees in Libya was between 700,000 and 1 million.[41] Further, the UN estimated that 5,022 people had died by the end of 2016, most of whom were departing Libya and trying to cross the Mediterranean Sea.[42] This fact alone might have encouraged the members of the international community to tackle the Libyan aftermath as a case of R2P, but they preferred not to be engaged actively in the post-intervention phase.[43]

To make matters worse, international terrorists are now sheltering in Libyan territory,[44] and an international intervention seems inevitable.[45] Due to the emergence of the Islamic State (IS) in Libya, the return of international intervention in order to battle this group has become the current practice of the US.[46] To epitomise, the IS took over the city of Sirte in early 2015. After several months of fierce battle the Misrata Brigades one of the Libyan thuwars, accused of repeated violations of ICL,[47] with the support of the US airstrikes took the control of this city back in December 2016.[48] However, the interveners 'failed to identify the militant Islamist extremist element' in the beginning of the conflict,[49] as there was a link between some of the rebel groups and Al-Qaeda.[50] It has recently been identified that Gaddafi himself, in a phone call with Blair, warned the West about this possible

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[39] Amnesty International, 'LIBYA 2016/2017' <https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya/> accessed 1 May 2017; ICC Statute (n 99) Article 7(1) (d).

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] For the symbiosis between R2P and refuge protection see: William Maley, 'humanitarian law, refugee protection and the responsibility To protect' in Ramesh Thakur and William Maley (eds), Theorising the responsibility to protect (CUP 2015) 249-65.

[44] Fishman (n 28) 204.

[45] Spencer Ackerman, Chris Stephen and Ewen MacAskill, 'US Launches Airstrikes against Isis in Libya' The Guardian (London, 1 August 2016) < https://www.theguardian.com/world/2016/aug/01/us-airstrikes-against-isis-libya-pentagon> accessed 14 December 2016.

[46] BBC World Service, 'US Airstrikes Target IS 'Training-camp' in Libya' BBC World Service (London, 19 February 2016) <http://www.bbc.co.uk/programmes/p03j8wtt> accessed 22 February 2016.

[47] UNHRC, 'Report of the International Commission of Inquiry on Libya' (8 March 2012) UN Doc A/HRC/19/68 123,128,183.

[48] Patrick Wintour, 'Isis loses control of Libyan city of Sirte' the Guardian (London, 5 December 2016) <https://www.theguardian.com/world/2016/dec/05/isis-loses-control-of-libyan-city-of-sirte> accessed 21 November 2017.

[49] House of Commons Foreign Affairs Committee, Libya: Examination of Intervention and Collapse and the *UK's* Future Policy Options Third Report of Session 2016–17 (HC 119, 14 September 2016) 15.

[50] Parveen Swami, 'Libyan Rebel Commander Admits His Fighters Have al-Qaida Links' the Telegraph (London, 25 March 2011) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8407047/Libyan-rebel-commander-admits-his-fighters-have-al-Qaeda-links.html> accessed 29 September 2015.

consequence if they overthrew him.[51] Also, in 2016 a report from the House of Commons Foreign Affairs Committee about Libya (HCCL) recognised that the priority of the UK during the Libyan conflict must have remained to fight against terrorism.[52] The UN in its resolutions also recognised the IS as a threat to international peace and security, considering this group, among others, violates the ICL systematically.[53]

Additionally, the problem of abandoned ordnance arose, which caught the attention of international players only after the termination of the intervention. The origin of this problem lies in the fact that there were so many different types of weapon in Libya prior to 2011. After the fall of the Gaddafi regime, and its consequent chaos, these weapons were dispersed in the region without a central government to stockpile and maintain them.[54] This had a spillover effect in the region and also directly fuelled the Malian crisis (2012–13) which was averted only after French military intervention.[55] The Security Council in its resolutions responding to the deteriorating situation of Malian crisis stressed the primary responsibility of Malian government to protect its people and condemned strongly the abuse and violation of ICL by Malian rebels adding the implicit threat of the ICC's investigation.[56] This shows how the outcome of intervention in Libya created and brought another case of R2P-conflict before the international community. The Security Council, in its resolutions from the early days of the old regime's collapse, warned about the problem of arms smuggling and its potentially destabilising regional effect. One aim of UNSMIL was to counter the distribution of illicit arms through Libya, however the mission was not successful.[57]

The lack of any central authority to incorporate the mentioned rivalries into a national political process has undermined the new Libyan government's claim to sovereignty, with a lack of effective control, which is understood as a hallmark of Westphalian sovereignty; meanwhile, there will be more casualties and deaths.[58] As a result of this situation, the new revolutionary government is replicating

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[51] Transcripts of Two Telephone Conversations between Colonel Gaddafi and Tony Blair (took place on 25 February 2011) <http://www.parliament.uk/documents/commons-committees/foreign-affairs/10TBandGaddafi CallTranscript-1535-1600.pdf> accessed 15 March 2017.

[52] HCCL (n 49) 35.

[53] UNSC Res 2379 (21 September 2017) UN Doc S/RES/2379 1.

[54] UNSC 'Final Report of the Panel of Experts Established Pursuant To Security Council Resolution 1973 (2011) Concerning Libya' (20 March 2012) UN Doc S/2012/163 15.

[55] Adam Nossiter, 'Qaddafi's Weapons, Taken by Old Allies, Reinvigorate an Insurgent Army in Mali' New York Times (New York, 5 February 2012) <http://www.nytimes.com/2012/02/06/world/africa/tuaregs-use-qaddafis-arms-for-rebellion-in-mali.html accessed> accessed 15 March 2017; Kuperman (n 21) 210-1.

[56] UNSC Res 2071 (12 October 2012) UN Doc S/RES/2071 1-2; UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085 2.

[57] UNSC Res 2017 (31 October 2011) UN Doc S/RES/2017 1.

[58] Sawania and Pack (n 33) 540; Fishman (n 28) 199.

the old Jamahiriya of Gaddafi,[59] unable to fulfil its primary responsibility to protect Libyans; therefore, Libya remains an R2P concern. Even worse, at this stage, it is possible to conclude that Libya is on the brink of becoming a failed state; in essence, a new Somalia.[60]

iii. Libya and the Distortion in the Application of International Law:

On the basis of the facts on the ground, it appears that, without international military intervention, Gaddafi's army could have defeated the rebels and even finished the conflict with a victory.[61] However, in Libya, by the end of the campaign, on 31 October 2011, 26,000 sorties had been flown from 7,600 air-launched weapons to engage 6,000 targets, and an enormous number of weapons and support had been given to the rebels to quickly overthrow the regime.[62]

The legitimate aim of a military intervention to pursue the promise of R2P should be to neutralise the threat against people and not necessarily to defeat the enemy combatant, in the classical sense. In this regard, concentrating on weakening the government's violent power instead of destroying its armed forces is an issue that needs attention.[63] Maintaining the army infrastructure means to protect the country in the post-war period, a period that could be chaotic and even more violent than the period of intervention itself. However, targeting the government apparatus in a military operation could occur in any type of conflict. In the Libyan case, the first phase of the operation focused mainly on attacking Gaddafi's military arsenal. These attacks constituted essential and severe blows to Gaddafi's repressive apparatus and, at the same time, the Libyan army.[64] As a result, the no-fly zone was implemented aggressively as NATO destroyed the whole aerial army of the Libyan government.[65] Moreover, destroying civilian facilities such as television and radio stations is another factor that needs to be taken into account.[66] Imagine a country with a dispersed and unorganised army and no efficient communication facilities in the post-intervention period. This country must face the challenges of militias, economic dysfunction, and remedying the disruption of a sense of integration

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[59] Florence Gaub, 'A Libyan Recipe for Disaster' (2014) 56(1) Survival 101, 101-2.

[60] Giorgio Cafiero and Daniel Wagner, 'Four Years After Gaddafi, Libya Is a Failed State' Foreign Policy in Focus (Washington, 6 April 2016) <http://fpif.org/four-years-after-gaddafi-libya-is-a-failed-state/> accessed 14 March 2017.

[61] Tony Karon, 'U.N. Intervention Vote Saves Libya's Revolution from Defeat' Time (New York, 17 March 2011) <http://world.time.com/2011/03/17/u-n-intervention-vote-saves-libyas-revolution-from-defeat/> accessed 13 March 2017.

[62] Douglas Barrie, 'Libya's Lessons: The Air Campaign' (2012) 54(6) Survival 57, 58-59 58. However, there are different numbers, Paul Williams and Colleen (Betsy) Popken, 'Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity' (2011) 44(1) CWRJIL 225, 234.

[63] Adam Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (2008) 90(872) IRRC 931, 960; Nils Mezler, 'Bolstering the Protection of Civilians in Armed Conflict' in Antonio Cassese (ed), Realizing Utopia: The Future of International Law (OUP 2012) 512.

[64] Benedetta Berti, 'Forcible Intervention in Libya: Revamping the 'Politics of Human Protection'?' (2014) 26(1) GCPS 21, 34-35.

[65] Williams and Popken, (n 62) 249; Gaub (n 59)104.

[66] Lehmann (n 26) 141-2.

among its people. In a communiqué dated 26 April 2011, the Peace and Security Council (PSC) of the African Union (AU) warned of the long-standing consequences of destroying the socio-economic infrastructure in Libya.[67]

Furthermore, on the basis of facts on the ground, armed groups, including anti- and pro-government forces, commit abuses of some kind in most cases of NIAC and they remain a source of threats to civilians.[68] In the case of Libya, the violence had not been carried out only from the government side,[69] but was also systematic from the rebels' side. According to the International Commission of Inquiry on Libya, the violence carried out by different rebel militias, the so-called thuwar (revolutionaries), was widespread and grave.[70] The report explains the conduct of both the government and the rebels in graphic detail, indicating the commission of war crimes (if occurring during the armed conflict) and crimes against humanity (if occurring in a widespread and systematic manner). Hence, sending weapons to the rebels could run counter to R2P, as it can provoke additional and protracted violence. The rebels may initially use weapons defensively; however, later, the weapons could be used offensively against civilians or even aggressively against interveners.[71]

The complexity lies in the international community authorising encroachment on a state's sovereignty when the nature of the conflict remains inherently domestic: pursuit of self-determination and implementing its mandate with being biased in favour of non-state actors. Therefore, the international community might be prone to shielding armed groups from charges with respect to their behaviour in the course of armed conflict, which 'is tantamount to legalizing armed action against the state authorities and, in principle, to granting those unhappy with the state the right to take up arms'.[72] The international community needs to employ its authority by neither disrupting the protection of ICL nor disrespecting the principle of sovereignty.[73]

The significance of this becomes important as R2P recognises the primary responsibility of sovereign states to fulfil their promise; therefore, to implement this promise, governmental apparatus is necessary. Indeed, the prevention of international crimes is impossible unless the sovereign state

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[67] Organization of African Unity (Peace and Security Council) 'Communique of the 265th Meeting of the Peace and Security Council' (OAU Addis Ababa 2011) PSC/PR/COMM.2 (CCLXV).
[68] Neil Englehart, 'Non-state Armed Groups as a Threat to Global Security: What Threat, Whose Security?' 2016 1(2) JGSS 171, 175.
[69] UNHRC (n 47) 6-7.
[70] Ibid 8-9, 12-3, 15.
[71] Christian Henderson, 'International Measures for the Protection of Civilians in Libya and Côte D'ivoire' (2011) 60(3) ICLQ 767, 770-772; UK Prime Minister David Cameron Claimed that UNSCR 1973 (2011) Permitted 'Assisting the Rebels with Non-Lethal Equipment'. See BBC News, 'Cameron: Libya UN Resolution Makes Mission "Difficult"' BBC News (London, 17 April 2011) <http://www.bbc.co.uk/news/uk-politics-13107834> accessed 29 September 2015.
[72] Zakaria Daboné, 'International law: Armed Groups in a State-Centric System' (2011) 882(93) IRRC 395, 422-23.
[73] Ibid.

exists;[74] for example, in Somalia, where there was no functioning government to stop various factions, or in the case of Sierra Leone, where rebels were fighting a weak government that could not control the whole territory.[75] As the case of Libya shows, the power vacuum resulting from regime change was never filled with a strong, functioning government, and the Libyan central authority remains located between a weak and failing status.[76] Thus, it is safe to claim that the imposed regime change by NATO states and their allies played a part in the creation of failing state status of Libya, thereby endangering Libyans from the perspective of R2P.

To buttress this argument, Resolution 1973 explicitly reiterated the responsibility of the Libyan authorities to protect the Libyan population, concomitantly reaffirming its 'strong commitment to the sovereignty, independence, territorial integrity, and national unity of the Libyan Arab Jamahiriya', with reference to the initiatives of the AU as an organisation generally opposed to interfering in internal conflicts.[77] Accordingly, all these points evidently indicate that Resolution 1973 excludes regime change by force. Surprisingly, even some of the intervening actors such as the UK became sceptical of their own followed strategy.[78] The report by the HCCL clearly states that:

> … the UK's intervention in Libya was reactive and did not comprise action in pursuit of a strategic objective. This meant that a limited intervention to protect civilians drifted into a policy of regime change by military means.[79]

Further, regime change is impossible in a true sense, meaning that a government can be overthrown but the dissidence of those parts of society loyal to the targeted government and perhaps resistant to being demoted in the new political order cannot. As a result, the new government and/or the international community have to negotiate with these dissidents, who have now become the new rebels. This happened in Afghanistan when the Afghan government and the US had to negotiate with

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[74] Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (OUP 2003) 59.

[75] Robert Cryer, 'International Criminal Law vs. State Sovereignty: Another Round?' (2005) 16(5) EJIL 979, 985.

[76] For the legal analysis of failed state situation see: Daniel Thürer, 'The "Failed State" and International Law' (1999) 81(836) IRRC 731; John Yoo, 'Fixing Failed States' (2011) 99(1) CLR 95, 100; Edward Newman, 'Failed States and International Order: Constructing a Post-Westphalian World' (2009) 30(3) CSP 421; Kenneth Chan, 'State Failure and the Changing Face of the Jus ad Bellum' (2013) 18(3) JCSL 395

[77] Res 1973 (n 14) 1-2. See also Organization of African Unity (Peace and Security Council) 'Communique of the 275th Meeting of the Peace and Security Council' (OAU Addis Ababa 2011) PSC/MIN/COMM.2(CCLXXV). For the AU position in the case of Libyan operations see Christine Gray, 'The Use of Force for Humanitarian Purposes' in Nigel White and Christian Henderson (eds), Research Handbook on International Conflict and Security Law: Jus Ad Bellum, Jus in Bello and Jus Post Bellum (Cheltenham: Edward Elgar 2015) 248; Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2011-2012) 52(2) VAJIL 355, 380-81.

[78] Olivier Corten and Vaios Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of jus contra bellum and jus in bello' (2013) 18(1) JCSL 59, 75-7; Constantine Antonopoulos, '"The Legitimacy to Legitimise": The Security Council Action in Libya under Resolution 1973 (2011)' (2012) 14(4) ICLR 359, 371.

[79] HCCL (n 49) 18.

the Taliban after regime change in order to reach peace;[80] in Libya, this happened with the rising tide of loyalists to the Gaddafi regime, as mentioned previously.

In reality, the state (its governmental apparatus) has a protective role that is not easily replicable for the international community.[81] Therefore, it is safe to conclude that regime change undermines R2P and at the same time it jeopardises the international rule of law by increasing the cases of ICL violation and ending up in the failing state situation.

III. The Framework of the International Community:

The previous section portrayed the current situation in Libya and how R2P not only failed to help Libyans but also, in a way, contributed to the disintegration into the operation of international rule of law. The question is, why does an authorised intervention end up in greater violation of ICL? To answer this question, it is necessary to understand the nature of this phenomenon known as the international community and provide a jurisprudential account of R2P on the basis of the international community's true interpretation.

i. Sovereignty of States:

Sovereignty has remained the principal battlefield of R2P's legal status: how can the extraterritorial responsibility of saving people be reconciled with the domestic jurisdiction of states? Therefore, it is necessary to take a glance at the meaning of sovereignty in international law. Vattel, who heavily influenced international legal scholarship pre-World War I,[82] defined the sovereignty of states thus: sovereign states are free living persons who are 'naturally equal, and inequality of power does not affect this quality; [a] dwarf is as much a man as a giant'.[83] As a result of this assertion, states became the primary subjects of international law, and, as a consequence of this uniform legal personhood,[84] their consent provides the main basic source of international legal obligations.[85] The main qualitative features of states' sovereignty are specified as follows: (a) an exclusive jurisdiction over a territory;

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[80] Sami Yousafzai, Jon Boone and Sune Engel Rasmussen, 'Taliban and Afghanistan Restart Secret Talks in Qatar' the Guardian (London, 18 October 2016) <https://www.theguardian.com/world/2016/oct/18/taliban-afghanistan-secret-talks-qatar> accessed 10 April 2017.

[81] Cryer (n 75) 985.

[82] James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), The Cambridge Companion to International Law (CUP 2012) 117.

[83] Ibid.

[84] Ibid 118; James Crawford, Brownlie's Principles of Public International Law (OUP 2012) 447; Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law (OUP 2004) 261.

[85] James Crawford, The Creation of States in International Law (2nd edn, OUP 2006) 32-33, 40-44; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (judgment) [1986] ICJ Rep 14, 135; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment) [2005] ICJ Rep 168, 223.

(b) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (c) their obligations only arising from their consent.[86] In the light of this definition, the attributes of sovereignty, internally and externally, can be construed as the exertion of control over a territory, non-intervention, equality of states, and a consent-based relationship among states, which hereinafter will be called the 'principle of sovereignty'.

As a general rule, regarding the significance of consent, states can only be bound by their agreed international obligations; therefore, they can define, delimit, and regulate the boundaries of everything that is put before them, such as the domain of sovereignty itself. In this regard, how obligations can restrict a state's domain or freedom of action was the point in the case of S.S. Lotus before the Permanent Court of International Justice (PCIJ). The Court stated that, '[t]he rules of law binding upon States therefore emanate from their own free will'.[87] Hence, to ensure the free will of equal states, the principle of sovereignty needs to be embedded in the international rule of law. In this sense, Kelsen notes that, '[i]t is only on the basis of the primacy of the international law that the particular states appear on the same legal plane and can count legally as entities of equal rank'.[88] To bolster the common taproot of international law, sovereignty has been interpreted as, 'the status of an entity subject to international law'.[89] Judge Anzilotti, in his individual opinion in the Customs Union case, emphatically stated that, 'sovereignty … is meant that the State has over it no other authority than that of international law'.[90] As a result, the principle of sovereignty has been recognised as jus cogens of international law[91] and this principle and its conditioning to international law can provide 'a containment to unilateralism and to unlimited freedom',[92] which is the common sense of international politics.[93]

On the other hand, the principle of international peace and security is deemed to be crucial since international law fundamentally relates to the issue of collective security and is based on the balance

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[86] Ibid.

[87] Case of S.S. Lotus (France v. Turkey) (Judgment) PCIJ Rep Series A No10 18 (emphasis added).

[88] Danilo Zolo, 'Hans Kelsen: International Peace through International Law' (1998) 9(2) EJIL 306, 313 (emphasis added).

[89] Attila Tanzi, 'Remarks on Sovereignty in the Evolving Constitutional Features of the International Community' (2010) 12(2) ICLR 145, 152; Treatment of Polish Nationals in Danzig (Advisory Opinion) PCIJ Rep Series A/B No 44 24.

[90] Customs Union Case (Germany v. Austria) (Individual Opinion of Judge Anzilotti) PCIJ Rep Series A/B No 41 57.

[91] Ronald Macdonald, 'The International Community as a Legal Community' in Ronald Macdonald and Douglas Johnston (eds and comp), Towards World Constitutionalism: Issues in the Legal Ordering of the World Community (Martinus Nijhoff Publishers 2005) 869; Cherif Bassioun, 'International Crimes: Jus Cogens And Obligatio Erga Omnes' (1996) 59(4) LCP 63, 68.

[92] Tanzi (n 89) 153.

[93] Aidan Hehir, The Responsibility to Protect: Rhetoric, Reality, and the Future of Humanitarian Intervention (Palgrave Macmillan 2012) 193.

of power on the international plane to guarantee compliance with its rules;[94] it can be argued that this principle maintains the status of jus cogens.[95] In the light of this, it is fair to say that the principle of international peace and security recognised by states in their practice and the provision of the UN Charter consists of the following assumptions: generally, no state openly denies the legal equality of states; the territorial integrity and political independence of each state are inviolable, and war is inadmissible as a means to pursue each state's interests; all are derivatives of the principle of sovereignty.[96] As a result, the principle of sovereignty diverges with the international rule of law and the principle of international peace and security in tandem. This fact endorses the legal status of the states as the primary guarantors of international peace and the international rule of law.

Sovereignty deems to be the cornerstone of international law. In this regard, instead of stripping the states of their sovereignty, R2P needs to be read in a reconciliatory sense of bringing more solidarity between and within states with respect to humanitarian objectives.[97] Thus, the claim that R2P is crippling the principle of sovereignty as the pillar of stability in international law and politics is misplaced; the purpose of R2P, as states are primarily responsible to protect their people against international crimes, is to develop 'good sovereigns, a project as old as international law itself'.[98]

ii. The International Community:

a. Normative Framework:

The notion of community interests, or peremptory norms, is the cornerstone of the international community, since the violation of public interests will upset the whole family of states, not only the specific injured party or parties. It creates obligations construed as erga omnes, owing to all members

[94] Hans Kelsen, Collective Security and International Law (Naval War College 1957) 42.
[95] Orakhelashvili (n 7) 351-2.
[96] Brad Roth, Governmental Illegitimacy in International Law (OUP 1999) 6-7.
[97] Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (2005) UN Doc A/59/2005 19 (emphasis added).
[98] Frédéric Mégret, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933111> accessed 7 June 2016 1, 20 (emphasis in original).

of the international community.[99] Therefore, as higher principles, it is not allowed to derogate from[100] and states can invoke compliance with them. [101]

However, the international community contains a paradox that makes its definition and depiction problematic. Owing to the fact that naturally peremptory norms (jus cogens) are supposed to overrule the consent-based prerogative of states, the community is supposed to exist 'independently of the consent of states'. However, at the same time, it relies on the consent of its members 'as features of the ethos' to enforce its sanctions in the case of those norms violations, as discussed in the previous section.[102] International law is, to some extent, conservative with regard to its traditional institutions and shows an inclination to preserve them as they are in a statist sense, thus demonstrating resistance towards the notion of community interests.[103] In reality, the rule of law or the super-state of law, according to Lauterpacht's taxonomy, within the international community is based on states' consent.[104] Therefore, it should be noted that the above contradiction must not be interpreted in such a way as to dismiss the principle of sovereignty, but both, sovereignty and the international community, should be directed towards a 'complementary, cooperative, and coexistent' pattern. [105] Radical changes that undermine the 'integrity of states' and, subsequently, their 'legal statehood' cannot be tolerated by the international community and the states themselves, since this position would threaten 'the stability of international law as a whole'.[106]

To illustrate, the existence of peremptory norms is independent of each singular state of the international community, and yet, at the same time, exists for the benefit of the community's

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[99] Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21(2) EJIL 387, 394; Oscar Chinn (Separate Opinion of M. Schücking) PCIJ Rep Series A/B63 149-50; Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Judgment) [1970] ICJ Rep 3, 33. Vienna Convention on the Law of Treaties (adopted 23 May1969, entered into force 27 January 1980) 332 UNTS 18232 (VCLT) Article 53; Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden) (Separate Opinion of Judge Moreno Quintana) [1958] ICJ Rep 102, 106-7.

[100] Antonio Cassese, 'For an Enhanced Role of Jus Cogens' in Cassese (n 63) 164; Douglas Johnston, 'World Constitutionalism in the Theory of International Law' in Macdonald and Johnston (n 91) 5; Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (OUP 2010) 32.

[101] James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for International Wrongful Acts' in Fastenrath and others (n 1) 229. See Alexander Orakhelashvili, Peremptory norms in International Law (OUP 2006) 7-35, 47. See also Application of the Convention of 1902 (n 99) 105.

[102] William Conklin, 'The Peremptory Norms of the International Community' (2012) 23(3) EJIL 837, 856, 860; Orakhelashvili (n 5) 370-3; ILC, 'Report of the International Law Commission on the Work of its Fifty-Third session' (23 April - 1 June and 2 July - 10 August 2001) UN Doc A/56/10 112-3.

[103] Lucian Bojin, 'The Responsibility to Protect and The Kelsenian Approach to International Law' In Vasilka Sancin and Maša Kovič Dine (eds), Responsibility to Protect in Theory and Practice: Papers Presented at the Responsibility to Protect in Theory and Practice (GV Založba 2013) 74.5.; J Oloka-Onyango, 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium' (1999) 15(1) American University International Law Review 152, 195.

[104] Hersch Lauterpacht, The Function of Law in the International Community (new ed, OUP 2011) 429-30.

[105] Macdonald (n 91) 878.

[106] Chan (n 76) 408.

members.[107] Therefore, it can be argued that peremptory norms reconciled with the clash mentioned above have two main functions: (i) to protect the interests of the international community, which is superior to individual states (e.g. to respect ICL); and (ii) to protect states against their powerful partners to remedy their weaknesses and to maintain international peace (e.g. the principle of sovereignty).[108] Both have been confirmed as the peremptory norms of international law, and R2P has to straddle the legal clash between the two.[109]

(b). Complementarity

R2P lies at the heart of the clash between two peremptory norms: the principle of sovereignty and the prohibition of mass atrocity crimes. Therefore, how one supersedes the other is a question that needs to be resolved. Article 53 of the Vienna Convention on the Law of Treaties (VCLT) clearly states:

> For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized 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.[110]

As mentioned above, international law is, to some extent, conservative to the change of its institutions and states remain as the foundation of this discipline; therefore, it is implausible to expect an absolute change in the nature of international law in the foreseeable future. Following the text of the VCLT, to supersede the principle of sovereignty by the coercive application of ICL is still provisional and, from a legal perspective, difficult to define since this type of use of force is more in the form of a soft law, e.g. 'either imprecise legal obligations or non-legally binding obligations';[111] indeed, this is not lex lata yet but an evolving lex ferenda. According to Judge Alvarez, the Charter 'must be vivified so as to harmonize it with the new conditions of international life', and potential discrepancies between the text and reality are inadmissible.[112] Law cannot hang in the balance; therefore, international law needs to provide a jurisprudential account of the mentioned evolution on the basis of its principles and rules.

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[107] Conklin (n 102) 857; Orakhelashvili (n 7) 368.

[108] Maja Ménard, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Compliance with Peremptory Norms' in James Crawford, Alain Pellet and Simon Olleson (eds), The Law of International Responsibility (OUP 2010) 449.

[109] Macdonald (n 91) 869; Bassioun (n 91) 68.

[110] VCLT (n 99) Article 53 (emphasis added).

[111] Nina Zupan, 'The Responsibility to Protect: The Soft Law Riddle and the Role of the United Nations' in Sancin and Dine (n 103) 543-4, 560. See also Kenneth Abbot and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) IO 421, 435.

[112] Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion, Dissenting Opinion by M. Alvarez) [1950] ICJ Rep 12, 17.

The UN has been considered to be the embodiment of the international community[113] and the Charter has been recognised as its constitution.[114] With regard to R2P, the principle of complementarity (subsidiarity) is a 'lifeboat' to solve the aforementioned 'immanent' clash between the jurisdiction of the UN and its member states. It means neither the absolute autonomy of domestic and transnational jurisdictions, nor the absolute subordination of one to the other.[115] Although the complementarity principle supports the view that this principle should be interpreted less intrusively and not trample the principle of sovereignty, it should also 'be regarded as a device aimed at allowing the joint pursuance of universal objectives and the proper performance of obligations erga omnes'.[116]

To do so, it is prudent to mediate between different jurisdictional regimes 'in order to identify the appropriate level at which power will be exercised for attaining the common good'.[117] This principle determines which level of authority can achieve the targeted objectives more efficiently, and it justifies only action by a higher level of authority if the targeted objectives cannot be achieved equally effectively by lower levels of authority and also if that action does not interfere unnecessarily with the lower authority.[118] Hence, R2P approves the primary responsibility of states and the complementary monitoring responsibility of the international community in case of states failure or unwillingness to act. If the national authority fails to comply, and the subject is recognised as the concern of the international community as a whole, then the international community is assigned the task of countering the disobedience to the extent that the given countermeasures are taken efficiently.[119]

Accordingly, in the light of the benchmark of efficiency, in the context of the protection of the people and the principle of self-determination, the Security Council has, after extensive debates,

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[113] Pierre Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' (2002) 13(5) EJIL 1241, 1242-3, 1245-6; Pemmaraju Sreenivasa Rao, 'The Concept of 'International Community' in International Law and the Developing Countries' in Fastenrath and others (n 1) 336; ILC (n 119) 114; Third Report on Responsibility of International Organizations, A/CN.4/533, para. 10 (13 May 2005); International Criminal Court Statute (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute) Article 13(b).

[114] Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36(3) CJTL 529, 573-4.

[115] Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006)19(4) LJIL 1095, 1122; Mireille Delmas-Marty, 'The ICC and the Interaction of International and National Legal Systems' in Antonio Cassese, Paola Gaeta and John Jones (eds), The Rome Statute of the International Criminal Court: A Commentary (OUP 2002) 1927.

[116] Gioia, ibid 1115.

[117] Nicholas Tsagourias, 'Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity' (2011) 24(3) LJIL 539, 546-7.

[118] Ibid 547-8; Gareth Davies, 'Subsidiarity as a Method of Policy Centralisation' in Broude Tomer and Yuval Shany (eds), The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity; Essays in Honour of Professor Ruth Lapidoth (Hart 2008) 79.

[119] Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) EJIL 907, 921-2.

invoked Article 2(7)[120] and confirmed that 'involvement by the UN in this area must remain guided by the concern not to intervene too far in the internal affairs of states'.[121] Therefore, the primary method for the Security Council to implement its complementary responsibility of protection is to be engaged actively but not proactively. Its resolutions need to be performed restrictively without being interpreted as carte blanche.

In sum, the application of R2P by the Security Council poses a dilemma for the legality of this organ's decisions. On the one hand, this organ is obliged to protect international peace and security among states based on the principle of sovereignty expressed in the Charter. On the other hand, this organ is supposed to be under an obligation to protect the peoples of the world from international crimes. Although the recent practice of the Security Council can tip the scales in favour of ICL protection and the communitarian evolution of the UN System,[122] the legal evolution of R2P is entwined with the authority the international community can wield with the consent and cooperation of states. Therefore, the principle of complementarity restrains the international community from intervening excessively in a self-determination conflict between a government and its people.

IV. Libya and Responsibility to Protect

i. The Principle of Peaceful Settlement of Disputes

In a longstanding moral tradition, 'an act of war is held disproportionate if the damage it does is excessive to the measure of peace it can reasonably hope to achieve'.[123] This approach is the least deleterious means or least intrusive standard for assessing the proportionality of countermeasures or any resort to coercion.[124] This perspective was also confirmed by the ICJ in the Case of Namibia.[125] In this case, Judge Fitzmaurice, in his dissenting opinion, stated that

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[120] UN Charter Article 2(7).

[121] Georg Nolte, 'Article 2(7)' in Bruno Simma and others, The Charter of the United Nations: A Commentary, vol i (3rd edn, OUP 2012) 302-3. See also Crawford (n 85) 27.

[122] Tsagourias (n 117) 553; Alexander Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck UNYB 143, 148.

[123] Oliver O'Donovan, The Just War Revisited (CUP 2003) 48-49.

[124] Thomas Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102(4) AJIL 715, 727-28; ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April - 1 June and 2 July - 10 August 2001) UN Doc A/56/10 74; Oil Platforms (Iran v. U.S.) (Judgment) [2003] ICJ Rep 161; Ryan Goodman, 'Controlling the Recourse to War by Modifying Jus in Bello' (2009) 12 Ybk Intl HL 53-84/6-9; The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (International Development Research Centre 2001) 37.

[125] Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie' (1999) 10(3) EJIL 517, 527.

> even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a war-time occupation of a country or territory cannot operate to do that. It must await the peace settlement. This is a principle of international law that is as well-established as any there can be, and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are.[126]

As was shown before, the international community render coercive regime change and/or failing state situation as antagonistic to its foundation. The people and governments of a state may be allowed to have their own favouritism or any kind of political determination they want to pursue obstinately; the international community, as a superior authority, has to channel, delimit, and make those actors reasonable, of their understanding of the possibilities, through the practice of its enforced measures. The reason behind this argument is that, if the international community is not adequately competent to distinguish between what is international and domestic and the way its international authority needs to be enforced, it will be reduced to a political rhetoric or utopia rather than law in a sense of rules and institutions to sanction them. One must keep in mind that present international law cannot afford excessive internalisation, and the superior authority of the international community is, among others, its ability to distinguish and allocate each jurisdiction, to hold states to account for their actions and, at the same time, safeguarding their domestic jurisdiction, otherwise international law is doomed to be disintegrated, as the case of Libya testifies. In fact, the enforcement of R2P is a battlefield of contesting jurisdiction.[127]

This investigation pertains to the promise of R2P since regime change as a political strategy is usually justified legally by reference to the principle of self-determination which is inherently domestic, as was described in the case of Libya.[128] Thus, it is necessary to curb the unilateralism of internal actors, on the one hand, and to restrain the international community from becoming excessively internal, on the other hand.

Protecting people extraterritorially as a complementary responsibility of the international community is equated with intervention in the self-determination of other people fighting on the grounds of their history and uniqueness. This research finds that resolving self-determination conflict needs a better understanding of and new approach towards this type of conflict, moving towards more

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[126] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion, Dissenting opinion of Judge Gerald Fitzmaurice) ICJ [1971] Rep 208 282-3.

[127] Orford (n 1) 161-86

[128] Obama, Cameron and Sarkozy (n 26); S/PV.6498 5.

responsible protection of peoples with the enforcement of peace settlements to prevent future conflicts. Otherwise, the whole block of responsible protection alongside international law itself will fall apart. To do so, the international community should remain committed to humanising the use of force to respect the principles of international law and improve the rule of law.[129]

It is worth mentioning here that the principle of the pacific settlement of disputes is a fundamental pillar of international law that yearns to transform the discipline into a purely humanitarian affair; it may be relentlessly pursued, but it is yet to be achieved.[130] In addition, this has been recognised as being among the purposes and principles of the UN, as enumerated in Article 1 of the Charter, as well as being considered an obligation upon states, according to the provisions in Article 2.[131] Article 2(3) of the Charter states that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". The term 'settlement' here means 'the actual end of a dispute, either by virtue of an agreement between the parties concerned or by virtue of an authoritative decision of a third party'.[132] With regard to the concept of dispute, if a conflict situation is interpreted as being an endangerment to international peace and security, it is considered to be a clear-cut international dispute.[133] The content of this article provides that states, as members of the UN, are under an obligation to settle their disputes peacefully, so this principle seems mainly state-based;[134] however, in scholarship, as a matter of interpretation, it is increasingly perceived to be applicable to non-state actors too.[135]

Moreover, Article 33(1) of Chapter VI stipulates that:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[136]

This has been interpreted as the seeking of a peaceful solution to a dispute being a legally binding obligation upon states, which is not subsumed by the prohibition of the use of force, but 'possess[es]

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[129] Ruti Teitel, Humanity*'s* Law (Oxford University Press 2013) 206; Lorraine Elliott, 'Cosmopolitan Militaries and Cosmopolitan Force' in Hilary Charlesworth and Jean-Marc Coicaud (eds), Fault Lines of International Legitimacy (CUP 2011) 302.

[130] Alexandre Parodi, 'Peaceful Settlement of Disputes' (1948) 26 Intl Conciliation 616, 617.

[131] UN Charter Articles 1-2.

[132] Christian Tomuschat, 'Article 2(3)' in Simma and others (n 121) 198.

[133] Christian Tomuschat, 'Article 33' in Simma and others (n 121) 1073, 1073-4.

[134] Fisheries Jurisdiction (Spain v. Canada) (Judgment) [1998] ICJ Rep 432, 456; Aerial Incident of 10 August 1999 (Pakistan v. India) (Judgment) [2000] ICJ Rep 12, 33.

[135] Tomuschat (n 132)184-5.

[136] UN Charter Article 33.

a specific substance of its own'; even mere passivity to the dispute 'does not meet the requirement'.[137] Therefore, in the event of the failure of efforts by parties, or if the UN has seized the dispute, parties are under an obligation to continue their efforts to solve the given dispute.[138]

Attention needs to be paid to the terminology of Article 33, as the text says 'parties' and not necessarily members of the organisation or states exclusively. Therefore, it is possible to interpret this article as covering NIACs, which have become an international dispute and apply to all parties in an NIAC. This means that the authority of the international community can overrule not only the consent of states but also the non-state groups entailed in an international dispute.[139] The substitution of 'armed conflict' for 'war' in the provisions of the Four Geneva Conventions contributes to the discussion that the international community can trump the consent of states or even non-state actors to introduce new responsibilities that are binding to all parties in a conflict.[140] Therefore, the outbreak of an NIAC or even its internationalisation 'does not entail a suspension of the general obligation existing under the Charter', such as peaceful settlement of the dispute.[141]

To illustrate the relevance of R2P and the peaceful settlement of disputes, in self-determination conflicts, all parties 'claim victim status and mobilise supporters behind them on this basis', and, as a result of this, it becomes challenging to call upon R2P to protect the victims since parties in the dispute can be both victim and violator.[142] In this regard, as the Libyan conflict is deemed to be a domestic conflict of self-determination, after Resolutions 1970 and 1973,[143] the principles of international law, including the principle at hand, need to be applied.

ii. Resolution 1973 and its Protective Mandate:

The Security Council resolutions, with their binding characteristic on all members of the international community, are considered, 'to an important extent', to be international agreements.[144] Therefore, if the view of an individual state implementing the resolution differs from its view at the time of voting,

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[137] Tomuschat (n 133) 1074.

[138] Ibid 1075-6.

[139] Robert Kolb, An Introduction to the Law of the United Nations (Katherine Del Mar tran, Hart 2010) 100. See also Tomuschat (n 132) 193-5.

[140] Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law (CUP 2010) 21; Jean Pictet (ed), Commentary on the Geneva Conventions of August 12 1949, vol I (ICRC 1952) 32.

[141] Tomuschat (n 133) 1074.

[142] Jean-Marc Coicaud, 'International Law, The Responsibility to Protect and International Crises' in Thakur and Maley (n 43) 178.

[143] For the concept of internationalisation of an armed conflict and its definition see: Tadic Case (Judgment) ICTY-94-1-A (15 July 1999) para 84; Blaskic Case (Judgment) (3 March 2000) ICTY-95-14-T (3 March 2000) para 94; Rajic Case (Review of the Indictment Pursuant to r 61 of the Rules of Evidence and Procedure) ICTY-95-12 (13 September 1996) para 21; Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2nd edn, CUP 2010) 27; Johnston (n 20) 95, 98, 102.

[144] Orakhelashvili (n 122) 156; Fisheries Jurisdiction (n 134) 453, 457-66.

the text of the resolution prevails; hence, the auto-interpretation of the resolutions is not permitted,[145] and it produces a binding effect on the non-state actors too.[146]

The resolutions 1970 and 1973 were adopted in the context of R2P,[147] so the latter authorised the use of force to protect Libyans from the threats of international crimes. Relevant to the application of R2P, resolution 1970 'recalled the Libyan authorities' responsibility to protect its population',[148] while resolution 1973 reiterated that phrase also affirmed 'that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians'[149] which applies to extraterritorial actors and Libyan opposition. Specifically, the resolution 1973 in its operative paragraph 4:

> Authorizes Member States…, to take all necessary measures,… to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council;[150]

However, regarding the text of Resolution 1973, the promise of protection was linked to the establishment of a ceasefire and the finding of a peaceful solution to the conflict the resolutions provides, acting under Chapter VII:

> 1. Demands the immediate establishment of a cease-fire and a complete end
> to violence and all attacks against, and abuses of, civilians;
> 2. Stresses the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people …
> 3. Demands that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs.[151]

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[145] Orakhelashvili, ibid 156-7; Linos-Alexandre Siciliano, 'Countermeasures in Response to Grave Violations of Obligations Owned to the International Community' in Crawford, Pellet and Olleson (n 108) 1141.

[146] VCLT (n 99) Articles 31-2. See also Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Judgment) [1994] ICJ Rep 6, 21; LaGrand (Germany v. United States of America) (Judgment) [2001] ICJ Rep 466, 501; Kasikili/Sedudu Island (Botswana/Namibia) (Judgment) [1999] ICJ Rep 1054, 1059; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Judgment) [2002] ICJ Rep 625, 645.

[147] UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498 2-10.

[148] Res1970 (n 10) 2.

[149] Res 1973 (n 14) 1 (emphasis added).

[150] Ibid 3.

[151] Ibid 2-3.

As a result, investigation of the phrase all necessary means, as the decipher of the use of force in this organ's resolutions, seems necessary and important. In legal doctrines, terms can have different meanings, however, on the basis of natural meaning principle of VCLT,[152] authorised measures encompass only necessary ones. As the term necessary requires 'proportionality' or it provides 'least-restrictive means test'.[153] Measures may not go beyond what is strictly necessary in order to achieve a certain goal. In other words, necessary connotes 'indispensable' which prescribes measures 'absolutely necessary or requisite'.[154] Therefore, '[i]f milder means are available to pursue the objective in the same way, the authority has to resort to these milder means'.[155] In this sense, all necessary means, while seemingly broad, may have a strict meaning and in the absence of definite evidence regarding the above situations, it is true to say that the use of force remains illegal since taken measures could be inefficient.[156] Moreover, the exclusion of occupation and the request from states to inform their taken measures in the text of resolution 1973 features in the exclusion of regime change and favours the peaceful solution of the conflict.[157] Therefore, following the use of force and peaceful settlement at the same time, on account of VCLT principle of integrity,[158] a restrictive interpretation of the text of resolutions in the case of coercive authorisations is required due to its severe encroachment upon the principle of sovereignty.[159] This interpretation of law also conforms with the principles of complementarity and its benchmark of efficiency, as was explained previously.

To bolster this argument, in the course of Resolution 1973 adoption, five states abstained, namely Russia, China, Brazil, Germany, and India. They raised the concern, to explain the reason for their abstention, that the best solution to the conflict was to end it peacefully.[160] The statement by the delegation of Brazil provides an insight into the surrounding controversy and is extremely relevant to the analysis of this research:

> We are not convinced that the use of force … will lead to the realization of our common objective – the immediate end to violence and the protection of civilians. We are also concerned that such measures may have the unintended effect of exacerbating tensions on the ground and causing more harm than good to the very same civilians we are committed to protecting. Many

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[152] VCLT (n 99) Articles 31-2. See also Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 British Ybk Intl L 1, 9.
[153] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) CJTL 72-164.
[154] Lehmann (n 26)131.
[155] Payandeh (n 77) 384.
[156] Martenczuk (n 125) 525-8.
[157] Res 1973 (n 14) 3.
[158] VCLT (n 99) Articles 31-2. See also Fitzmaurice, (n 152)9.
[159] Orakhelashvili (n 122) 160.
[160] UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498 5-6, 8, 10.

> thoughtful commentators have noted that an important aspect of the popular movement in North Africa and the Middle East is their spontaneous, home-grown nature … We also welcome the inclusion in today's resolution of operative paragraphs demanding an immediate ceasefire and a complete end to violence and all attacks against civilians, and stressing the need to intensify efforts conducive to the political reforms necessary for a peaceful and sustainable solution.[161]

The ICJ, in a well-known passage from its Namibia and Kosovo advisory opinions, also held that the intent of the UN Security Council members is important in determining not only the binding effect of a resolution but also who is bound.[162]

Resolution 1970, acting under Chapter VII of the Charter and taking measures under Article 41, 'Demands an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population'.[163] This resolution using the terminology of 'demand' imposes an obligation upon primarily Libyan authorities to stop the violence based on Article 41, which authorises measures short of military intervention such as peace settlement and/or ceasefire.[164] However, Resolution 1973 demands the employment of ceasefire, without specific reference to Article 41, in tandem with its protective prerogative acting under Chapter VII of the Charter.[165] This resolution indicates that the aim of protection using the force must be followed as the aim of conflict settlement.[166]

The fact that Article 40 of the Chapter VII notes that the measures 'shall be without prejudice to the rights, claims, or position of the parties concerned' is particularly compatible with the establishment of ceasefires, which primarily aim to cease hostilities.[167] It is perhaps of significance that the Article expressly states that the Security Council will 'duly take account of failure to comply with such provisional measures'.[168] It is perceived that, in practice, the demand for peaceful settlement by the UN 'can be reinforced through the use of coercive measures'.[169] In this context, it

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[161] Ibid 6 (emphasis added).

[162] Case of Namibia (n 126) 53; Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion) (Advisory Opinion) [2010] ICJ Rep 403, 450-1.

[163] Res 1970 (n 10) 2.

[164] Christian Henderson and Noam Lubell, 'The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions' (2013) 26(2) LJIL 369, 375-6. See also UN Charter Article 41.

[165] UN Charter Article 42.

[166] Martin Wahlisch, 'Peace Settlements and the Prohibition of the Use of Force' in Marc Weller (ed), the Oxford handbook of the use of force in international law (OUP 2016) 984. See also Thomas Giegerich, 'Article 37' in Simma and other (n 121) 1160; UNSC Res 461 (1979) UN Doc S/RES/461 para 6.

[167] UN Charter Article 40.

[168] Ibid.

[169] Henderson and Lubell (n 164) 375-6.

is possible to argue that the enforced coercive measures can be directed towards the procurements of ceasefire and the consequent peaceful settlement.[170]

Indeed, the peaceful settlement of dispute 'is grounded on an idea of positive peace, meaning strategy for peace over a medium or long-term period'. Hence, Article 2(3) refers to the concept of 'justice' for the legal validity of those settlements,[171] since there will not be a perpetual or long-term peace if the settlement of a dispute is not based on justice. In contrast, short-term or emergency measures are deemed to be on the basis of 'the practical maxim, grounded on negative peace: "peace before justice"'.[172] The Declaration on Culture of Peace recognises that 'peace not only is the absence of conflict, but also requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation'.[173]

It is presupposed that the role of Chapter VII of the Charter, its Article 42, would be to authorise mandates to implement emergency measures to end the hostilities (negative peace). Since, 'once hostilities have erupted, there is no time to chart the causes of the conflict'. Subsequently, once a ceasefire has been established, following Article 41, the principle of peaceful settlement 'will feature more prominently' (positive peace).[174] This interpretation also conforms with the formulation of R2P provided in the 2005 Outcome Document, specifically the responsibility to react by peaceful means and preparedness to take collective measures.[175]

Furthermore, in the case of NIACs, it is possible that the Security Council becomes 'a quasi-arbitral tribunal' to settle a dispute peacefully between the parties; at least, there is no legal provision to debar the Security Council.[176] This purports to the argument of this article, that the application of the use of force must be directed towards the peaceful settlement, which, in accordance with the text of the Charter, can better guarantee international peace and security, as the main responsibility delegated to this organ.[177] Therefore, in self-determination conflicts, such as the case of Libya, the negotiation for peace could have been the best legal option before the international community in order to respect the principle of sovereignty and act on the basis of complementarity and its efficiency benchmark. Thus, it is possible to conclude that the aim of the resolution was to protect Libyans against the impending threat of their government in the short term, in particular, the imminent threat

[170] Ibid 378.
[171] UN Charter Article 2(3).
[172] Kolb (n 139) 45.
[173] UNGA Res 53/243 (1999) UN Doc A/RES/53/243A.
[174] Kolb (n 139) 45.
[175] Res 60/1 (n 2) 30.
[176] Thomas Giegerich, 'Article 38' in Simma and Others (n 121) 1170.
[177] UN Charter Articles 1, 24, 55.

of massacre in Benghazi, and, concomitantly, to find a peaceful solution that could provide further protection in the long term.

In this regard, three weeks after the intervention, the Libyan government accepted Venezuela's offer of mediation,[178] and, later, the AU's offer.[179] However, both were firmly rejected by rebels since they declared that they would not accept any ceasefire mediation proposals while the Libyan leader remained in power. On 26 May, the Libyan government offered its most advanced initiation of 'a ceasefire, offering to talk to anti-government rebels, move towards a constitutional government and compensate victims of the three-month conflict'.[180] Interestingly, Gaddafi's name was absent from this new offer of a ceasefire. The governmental officials were 'trying to recast the despot as a figure who will not play a prominent role in the country's affairs after the fighting stops'.[181] Also, the AU, in several different rounds, attempted to open the line of negotiation between the NTC and the Libyan government, attempts that were not taken seriously by NATO states.[182] Nonetheless, no one knows whether Gaddafi would have respected the ceasefire or not. However, to follow the text of Resolution 1973 and its R2P promise, NATO, on behalf of the international community and/or the UN itself, should have given the chance to both sides to negotiate and end the conflict.[183]

V. Conclusions

Military intervention in a conflict in which the following features exist remains an enigma of international law: (i) there is no consent by the host state to cooperate - to differentiate from peacekeeping missions; (ii) there is no occupation or trusteeship mandate; (iii) the government alongside the other non-governmental parties is one of the perpetrators of international crimes. The

[178] Milan Rai and Mark Bowery, 'Libyan Peace Deal Undermined by West' Peace News (London, May 2011) <http://peacenews.info/node/6131/libyan-peace-deal-undermined-west> accessed 13 March 2017; Statements by Alain Juppé, Ministre d'Etat, Minister of Foreign and European Affairs, at his joint press conference with William Hague, First Secretary of State, Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom of Great Britain and Northern Ireland (3 March 2011, Embassy of France in the UK) <http://www.ambafrance-uk.org/Alain-Juppe-s-statements-in-Paris> accessed 13 March 2017.

[179] BBC News, 'Libya: Gaddafi Government Accepts Truce Plan, Says Zuma' BBC (London, 11 April 2011) <http://www.bbc.co.uk/news/world-africa-13029165> accessed 13 March 2017.

[180] Martin Chulov, 'Libyan Regime Makes Peace Offer that Sidelines Gaddafi' the Guardian (London, 26 May 2011) <https://www.theguardian.com/world/2011/may/26/libyan-ceasefire-offer-sidelines-gaddafi> accessed 13 March 2017.

[181] Ibid.

[182] Ruben Reike, 'Libya and the Prevention of Mass Atrocity Crimes: A Controversial Success' in Serena Sharma and Jennifer Welsh (eds), The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention (OUP 2015) 358-60.

[183] Kuperman (n 21) 197. See also Corten and Koutroulis (n 78) 70-1.

case of Libya, although a high-profile one, is now considered to be a failed case of international law and R2P since the international community saved Benghazi but lost Libya.

What was seemingly clear at the beginning was that the coercive measures 'must be directed exclusively' towards the protection of 'civilians or civilian populated areas'.[184] As such, any objective other than this constitutes an action taken outside of the provisions of the UN resolution[185] and those actions can be considered to be the unilateral decisions taken by the intervening states and NATO. Therefore, the military intervention in Libya undermined the status of R2P and had perilous effect on its international constituency. The Security Council in its last resolution concerning the case of Libya, i.e. Resolution 2376, while determining 'the situation in Libya continues to constitute a threat to international peace and security', strongly emphasizes the role of UNSMIL as an arbitral and peace-brokering mission to facilitate the settlement of Libyan conflict.[186] This pertains to the fact that the international community must have put into effect this obligation of peaceful settlement earlier before the termination of the military intervention.

Indeed, if, in an authorised mandate, the international community has to take the side of any of the belligerents to defend humanitarian values, such an approach could encourage the supported belligerent party(ies) to continue their non-protective behaviour, as it is common in all conflicts from all sides. Therefore, to fulfil its responsibility, the international community must construe its mandate restrictively to encroach on the principle of sovereignty. This conclusion is set against the backdrop that the international community needs to be a peace-friendly arbiter among parties, to the greatest degree possible. Due to the gross nature of violations from all sides, the arbiter needs to consider their virtues and vices on equal terms, so it is necessary to assess the violations from all parties and respond to them with equity, if it helps to promote the peace and stability that can provide protection in the long term. Also, the arbiter needs to implement its protective mandate when people are endangered by either of the parties in the conflict based on its own impartial humanitarian assessment.

The Security Council, in its resolutions before and after the collapse of Gaddafi, insisted on the primary responsibility of the Libyan authorities to protect Libyans.[187] In fact, the international community is a surrogate framework to replace provisionally sovereign states and, on the basis of the principle of complementarity, to return the pursuit of R2P to responsible states as the primary duty

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[184] Res 1973 (n 14) 3.

[185] Henderson (n 71) 771. See also Jonathan Marcus, 'Libya: A New Phase in the Conflict?' BBC News (London, 18 April 2011) <http://www.bbc.co.uk/news/uk-13112559> accessed 29 September 2015.

[186] UNSC Res 2376 (14 September 2017) UN Doc S/RES/2376 3-4.

[187] UNSC Res 2095 (14 March 2013) UN Doc S/RES/2095 3; UNSC Res 2040 (12 March 2012) UN DocS/RES/2040 3.

bearers of this concept. Therefore, the facilitation of regime change and collaboration with the failing state situation are not in accord with R2P and the principles of international law.[188]

In sum, first, it is the primary responsibility of sovereign states to protect their people. Second, the coercive response of the Security Council to humanitarian conflicts needs to maintain the principle of sovereignty at the same time. Third, regime change can create a failing state situation that causes more violence and atrocity. Fourthly, the international community requests the newly established but crippling government to protect its people, which is not feasible. Finally, this could justify new ad bellum of re-intervention to save endangered people which again might facilitate the more violations of ICL as the new conflict goes on. Therefore, R2P, as a normative framework, needs to move away from the political semantics of governmental punishment[189] to a framework of peaceful settlement within the existing international legal order, since only peace can stop and prevent the violation of ICL in future.

[188] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion, Dissenting Opinion of Judge Gerald Fitzmaurice) [1971] ICJ Rep 208 282-3.

[189] Carsten Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment' (2013) 11(5) JICJ 955-77.