RESPONSIBILITY TO PROTECT AND RESPONSIBILITY TO REACT

From Doctrine to Practice: the Military Intervention in Libya

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<tr>
<td>AU</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>EU</td>
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<td>Internally Displaced People</td>
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<td>ICISS</td>
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“It has been said that the United Nations was not created in order to bring us to heaven, but in order to save us from hell.’

Dag Hammarskjöld1

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1 Address at the University of California’s Convocation, 13 May 1954.
Introduction

One of the most controversial issues dividing theorists and practitioners of international law during the 1990s was the question of legality of humanitarian intervention which can be defined as a ‘coercive interference in the internal affairs of a state, involving the use of armed force, with the purposes of addressing massive human rights violations or preventing widespread human suffering.’ Beyond the unwillingness of the international community to intervene in some crises such as the Rwandan genocide in 1994, the violation of state sovereignty and the non intervention norm enshrined in the Charter of the United Nations (UN Charter) was the core argument of the opponents of humanitarian intervention. Kofi Annan, the then UN Secretary-General responded to this argument by asking the UN General Assembly (UNGA) to consider the possibility that intervention may sometimes be necessary to respond to urgent humanitarian crises.

To answer the challenge issued by the UN Secretary-General, the Canadian government established a Commission of experts to work on the question. The answer was to be found in the Independent Commission on Intervention and State Sovereign (ICISS) report delivered in 2001. The Commission proposed to re-conceptualise the concept of state sovereignty by including the notion of ‘responsibility to protect’ (RtoP) in the concept of sovereignty. In the views of the ICISS the RtoP is threefold: each state and the international community as a whole shared the Responsibility to Prevent, the Responsibility to React (RtoP) and Responsibility to Rebuild.

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2 Welsh J M (ed.) Humanitarian Intervention and International Relations (OUP 2004)
3 There is no clear definition of what the ‘international community’ is; it could refer to a broad community including governments, the international civil society (composed of NGOs and other civil societies organisations CSOs), here and after I use the term of international community in a narrower sense to refer to the community of Member States of the UN. The international community can express itself and act through the UN itself but also through regional and sub regional organisations to which UN member states belong.
4 Art 2 (4) “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…” Art 2(7) “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ” Charter of the United Nations (adopted on 26 June 1945 entered into force 24 October 1945) 1 UNTS XVI (UN Charter)
In 2005 the concept was endorsed by the UN General Assembly (UNGA), which unanimously adopted the ‘World Summit Outcome Document’7 and its two paragraphs, 138 and 139 setting out the principle of RtoP (albeit with a different understanding of what it entails compared to the ICISS report; see the discussion in Chapter 1 for details).

Agreeing upon the principle of RtoP was one step but the debate on military intervention to protect a population, the last resort measure in the RtoP framework is still going on. Critics are pointing out the gaps in the principle adopted by the UN and are very doubtful about a possible implementation of the RtoP and especially of the RtoR. 8

The ICISS, former UN Secretary-General Kofi Annan and UN current Secretary-General Ban Ki-moon invited Member States to ‘consider the principles, rules and doctrine that should guide [The Security Council in] the application of coercive force (...)’.9 Despite those many invitations, the UN Security Council (UNSC) refused to codify criteria for the use of military force.

Not codifying criteria did not prevent the UNSC to answer in a surprisingly swift way to the Libyan crisis. On 26 February 2011, twelve days after the beginning of the pacific protests in the Libyan Arab Jamahiriya (Libya), the crackdown was considered as a ‘widespread and systematic attacks (...) against the civilian population [which] may amount to crimes against humanity’10 and the UNSC adopted resolution 1970 to implement the third pillar of the RtoP. After recalling ‘the Libyan authorities’ responsibility to protect its population’ the UNSC urged them to stop the violence and called for steps to fulfil the legitimate demands of the population.11 The UNSC also adopted a series of coercive measures including an arms embargo to protect the Libyan population and put pressure on the Libyan regime to stop the crackdown.

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7 UNGA ‘2005 World Summit Outcome Document’ (2005) UN Doc A/RES/60/1
11 ibid
This exhortation was not acted upon by Colonel Muammar al-Qadhafi’s regime and the UNSC Council on 17 March 2011 adopted a follow up resolution against Libya in which it established a no fly-zone in Libya airspace and authorized third Member States to intervene and ‘to take all necessary measures (...) to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya’. This was the first time since the adoption of the RtoP principle in 2005 that a military intervention non-consented by the targeted country was authorized by the UNSC. According to Gareth Evans, advocate of RtoP, former Australian Foreign Minister and member of the ICISS, ‘the Libyan case has been, at least until now, a textbook case of the RtoP norm working exactly as it was supposed to, with nothing else in issue but stopping continuing and imminent mass atrocity crimes’. If Evans is right, then studying the Libyan crisis could provide us answers regarding the grey area concerning the implementation of the third pillar of the RtoP, especially on how to identify a RtoP situation and how to determinate when military intervention is the appropriate means to protect a population against one of the crimes listed in the World Summit Outcome document.

Having a good understanding of what the RtoP principle means, when the RtoR is triggered and when military intervention may take place is essential if we do not want to undermine the achievement made in the last decade to create a framework for the protection of civilians against gross human rights violations. The fear of or reluctance to launch a military intervention should not impair the international community’s responsibility to react by all appropriate means to a humanitarian crisis falling into the scope of RtoP. Indeed many countries in the region have been hit by the shock wave caused by the Arab Spring, one of which is Syria. Pacific protestors in the country are also subjected to a bloody crackdown. Voices have spoken to qualify the ongoing...
repression in Syria as an alleged case of crime against humanity. The international community and the UN particularly have been so far unable to give a coherent answer to the Syrian crisis. On 27 April 2011, a draft resolution proposing the adoption of a press release calling on the Syrian government to stop the violence against its own people was put to a vote at the Security Council. Russia and China put in their veto against the measure. ‘The current situation in Syria, despite the increase in tension, does not represent a threat to international peace and security,’ said Alexander Pankin, Russian deputy permanent representative to the United Nations.

The goal of my thesis is to analyze how the requirements of the responsibility to react have been fulfilled in the case of Libya and in a second step to identify the criteria on which the UNSC based its decision to resort to coercive measures and ultimately to military force in Libya to protect civilian populations. From this it may be possible to have a better understanding of how and when the responsibility to protect triggers the responsibility to react and to identify a framework, under the RtoP principle, in which coercive measures, and especially in last resort military force, can be used to protect civil populations.

Before looking at how the international community implemented RtoR in the Libyan crisis, we first need to understand what does RtoP means in current international law (chapter 1). With a comprehensive understanding of the notion I will then focus on the Libyan crisis and the measures adopted by the international community and specially the UNSC (chapter 2). Thereby I will try to identify implicit criteria that have been guided the UNSC decision to intervene (chapter 3). From this analysis I will then draw conclusions on how the international community has implemented its RtoR and what could be the impact of the Libyan crisis and international intervention on the future of the RtoP (chapter 4).

15 ‘July 21 – In a press release, Special Advisers Francis Deng and Edward Luck express their alarm at the growing reports of human rights violations by Syrian security forces, the scale and gravity of which may amount to “crimes against humanity,” calling on the Government to refrain from the use of force and allow humanitarian access and the HRC-mandated Fact Finding Mission to complete their work.’ From ‘Timeline of Response to Situation in Syria’ (Global Centre for the Responsibility to Protect) <http://globalr2p.org/media/pdf/Timeline_of_International_Response_in_Syria.pdf> accessed 14 November 2011

1. The Responsibility to Protect

1.1 From Humanitarian Intervention to the RtoP doctrine …

1.1.1 Evolution of the UNSC practice for civilian protection

Why did the world need the concept of RtoP? After the Second World War the concert of Nations said ‘never again’ to mass atrocities such as genocide. While the UN system has been designed to protect international peace and security that could be threaten by interstate conflicts, it will later appeared to conflict with the development of an international framework to protect citizens against the power of State. The tension between article 2 (7) of the UN Charter prohibiting interference in domestic affairs and the weak enforcement mechanisms attached to human rights was growing. Moreover the concept of international peace and security that the UNSC has primary responsibility to maintain on behalf of the UN Member States (Article 24 of the UN Charter), had to evolve to take into account the evolution of modern conflicts. Most of the conflicts since the end of Second World War are internal conflicts with ‘mass causalities among populations’.

Another obstacle to military intervention for ‘humanitarian’ purposes within the border of one State was the principle of non-interference in the domestic affairs of a State enshrined in Article 2(7) of the UN Charter. Article 41 and 42 of the UN Charter provides that the UNSC may use non-coercive and coercive measures including military force only to restore or maintain international peace or security in situation where it has identify threat or breach of international peace or security. For a long time the position of states and of the UN was not to acknowledge that the situation ongoing within the boarder of one country could have an international impact threatening international

17Nicholas J Wheeler, Saving Strangers-Humanitarian Intervention in International Society (OUP 2000) 4
18 UN Charter (n 4) arts. 24 (1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf and 24 (2). In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
19 Ramesh Thakur and Thomas G. Weiss, ‘R2P: From Idea to Norm—and Action?’(2009)1 Global Responsibility to Protect 22
peace and security. In 1971 India argued that the situation in Pakistan, where 10 million refugees fled across the border after the slaughter of tens of thousands of Bengali civilians, was a threat to regional security. The argument was unanimously rejected by the UNSC, which considered that the situation fell within the scope of Article 2(7) of the UN Charter.  

Wheeler identifies the first normative shift regarding armed intervention to protect civilians in the 1990s with the end of the cold war and the willingness of the UNSC to define humanitarian crisis occurring within the border of a State ‘as threat to international peace and security’. To answer to the situation of Kurds and Shiites civilians oppressed by the Iraqi government the UNSC adopted resolution 688 in which it identified consequences of the repression as a threat to the peace and security in the region. But Wheeler also attributes this development to the fact that the resolution condemning the Iraqi repression did not adopt measures under Chapter VII of the UN Charter. It was nevertheless the first time (since the case of South Africa) ‘that the Security Council collectively demanded an improvement in the human rights situation of a member state as a contribution to the promotion of international security’. By doing so the UNSC limited the scope of the non-interference principle and opened the door to the possibility for the international community to have a say in the domestic affairs of a member state and more importantly to adopt coercive measures to respond to an internal crisis.

The second landmark case presented by Wheeler is the case of Somalia. The UNSC anonymously adopted resolution 794 under Chapter VII, authorizing the use of military force in Somalia considering that ‘the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the humanitarian assistance, constitutes a threat to international peace and security’ But as

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20 Wheeler ‘The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society’ in Welsh (n 2) 29,33
21 ibid
22 UNSC Res. 688 (5 April 1991) UN Doc S/RES/688
23 Wheeler ‘The Humanitarian Responsibilities of Sovereignty’ (n 20) 79 also mentioned two cases of internal situation qualified as being threats to international peace and security by the UNSC during the cold war, Rhodesia in 1966 and South Africa in 1977 against which sanctions short to the use of military force under Chap VII of the UN Charter were adopted.
24 Wheeler, Saving Strangers (n 17) 146
25 UNSC Res. 794 (3 December 1992) UN Doc S/RES/794
stressed by Wheeler in Somalia the situation was exceptional because it was not an intervention against the will of the State but an intervention ‘when there [was] a lack of government.’

1.1.2 Sovereignty-as-responsibility

In the normative evolution of authorized intervention by the UNSC, Wheeler also underlined that beside the first step of reframing of the notion of ‘the threat to international peace and security’ a second important outcome is the reframing of the notion of state sovereignty itself. From the 1990s Francis Deng, who was the Special Representative of the UN Secretary-General for Internally Displaced Persons (IDPs), worked on a new approach of state sovereignty to thwart the use of sovereignty by state to deny international assistance for IDPs whose situation was often caused by the state authorities who were supposed to take care of them. Deng and his colleague Roberta Cohen introduced the notion of ‘sovereignty as responsibility’ in which the host state bears the primary responsibility for protecting and assisting IDPs. According to Deng and Cohen no legitimate State could question the claim that ‘it was responsible for the well-being of its citizens’. When a state fails to discharge its responsibility towards its citizens, it should call upon the international society’s assistance to help it. By doing so, the state is enabling ‘to discharge its sovereign responsibilities’ and can still be considered a legitimate member of the international society.

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26 It is also in the context of a collapsing state that the UNSC authorize the intervention in Bosnia in 1992 and in Haiti in 1994 Wheeler ‘The Humanitarian Responsibilities of Sovereignty (n 20) 35 citing Adam Roberts ‘Humanitarian War: Military Intervention and Human Rights’ (1993) 69 International Affairs 429,440
27 ibid, Wheeler, (n 20) 37. For an overview of Francis Deng, currently Special Adviser of the UN Secretary General for the Prevention of Genocide and Roberta Cohen contributions to the RtoP doctrine see Thomas G Weiss and David A Korn Internal Displacement: Conceptualization and Its Consequences (London, Routledge 2006) ; Alex J. Bellamy ‘The Responsibility to Protect and the problem of military intervention’(2008) 4 International Affairs 615
29 ibid Bellamy refers to Cohen and Deng Masses in flight: the global crisis of internal displacement (Washington DC, Brookings Institution 1998)
30 ibid Bellamy refers here to Deng, ‘The impact of state failure on migration’(2004) 15 Mediterranean Quarterly 18
worked on ‘guiding principles’ to implement the sovereignty as responsibility, thereby offering protection to IDPs.

But Bellamy considered that something was still missing from Deng and Cohen’s outcomes, especially regarding the question when and by whom a state will be considered to have forfeited its sovereignty. According to Bellamy when they suggest a ‘higher authority capable of holding supposed sovereigns accountable’ which should uphold the common good over its members’ interests\(^{32}\) to evaluate the behaviour of a State regarding the implementation of its responsibility, the UNSC is the authority which best fits this description. Moreover, Deng and Cohen’s framework is relevant only when the host state invites the international community to help it fulfilling its responsibilities and offers only the use of diplomacy as persuasive means for reluctant states. Once again when contemplating who could decide on what would be appropriate when the host state does not request the assistance of the international community, Bellamy stresses that the UNSC is the best option.\(^{33}\)

Beside the evolution of the UNSC’s practice of humanitarian intervention and the reframing of the notion of State sovereignty as responsibility, there are other roots of the RtoP principle which have contributed to the elaboration of the ICISS report. Several important milestones preceding the adoption of the RtoP principle by the UN members have been identified by two advocates of RtoP, Evans and Bellamy.\(^{34}\)

### 1.1.3 The right to intervene

When looking at the roots of RtoP and the attempts to build consensus on intervention for humanitarian protection, Evans identified a few precursors\(^{35}\). One of them is the ‘right to intervene’ formulated in the late 1980s by Bernard Kouchner, co-founder of Médecins sans Frontières and former minister of humanitarian affairs under Mitterand

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\(^{32}\) ibid Bellamy 620  
\(^{33}\) ibid Bellamy 620  
as ‘the international community’s right to intervene in a member state’s affairs in order to respond to a humanitarian crisis.’

1.1.4 The genocide in Rwanda and the NATO’s intervention in Kosovo

Two major events were crucial factors in the debate related to humanitarian intervention and the emergence of the doctrine of RtoP, creating a controversy over the inaction of the UNSC in the face of massacres and encouraging new doctrinal developments.

Two years after Somalia, in 1994 the international community failed to prevent or stop the genocide in Rwanda that claimed the lives of more than 800,000 individuals. According to Wheeler, while the principle of non intervention was raised by the UNSC in 1967 during the humanitarian crisis in Pakistan or by countries disapproving Resolution 688 (1991) on Iraq, no state invoked the argument that the ongoing genocide fell within the Rwandan’s domestic affairs. This time it was not the concerns about state sovereignty that prevented the international community from intervening but its unwillingness to do so, leading the UNSC to ‘become a bystander to genocide.’ Wheeler refers here to Annan’s 1999 report, in which the former UN Secretary-General explains that the non-intervention was justified by the reluctance of UN Member States ‘to pay the human and others costs of intervention, and by doubts that the use of force would be successful [rather] than by concerns about sovereignty’. Indeed the Rwandan genocide took place less than a year after the considerable losses of American troops in the battle of Mogadishu and was mentioned during an informal meeting of the UNSC on 20 April 1994 on the reinforcement of the UNAMIR troops already present in the country. The British representatives reminded members ‘to think back to Somalia and think about what you would ask these troops to do’.

In March 1999, the NATO’s operation launched in Kosovo without the approval of the UNSC was highly controversial. France, UK and USA failed to secure a resolution Russia and China using the threat of their veto power. Explicitly justified by the coalition on humanitarian grounds, the operation was regarded by some as ‘legitimate

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37 Wheeler, ‘The Humanitarian Responsibilities of Sovereignty’ (n 20) 33, 36
38 Wheeler, *Saving Strangers* (n 17) 208
39 Wheeler, ‘The Humanitarian Responsibilities of Sovereignty’ (n 20) 36
40 Wheeler, *Saving Strangers* (n 17) 221
but illegal’. The intervention divided the permanent members of the UNSC. The debate was on how to interpret the UN Charter, on how to conciliate the human rights principles enshrined in the Charter on the one hand and the principle of non-intervention in the domestic affairs of sovereign states and the ban on the use of force without prior UNSC authorisation on the other hand. On 26 March 1999, Russia put a draft resolution on vote demanding the halt to the bombing which was defeated by twelve votes to three. During the debate the Slovenian representatives argued that it was China and Russia who by using the threat of their veto and refusing to authorize military enforcement action, were in breach of Article 24 for prevention the UNSC to exercise ‘its primary responsibility for the maintenance of international peace and security.’

It is in this context that two more roots of RtoP acknowledged by Evans are grounded. In 1999 the former Britain’s Prime Minister, Tony Blair, delivered a speech in which he introduced what Evans calls the ‘Blair doctrine’ elaborated in order to justify the NATO intervention in Kosovo and to build consensus on the potential of humanitarian intervention without UNSC authorisation. He offered ‘the international community a set of criteria for deciding when and how to intervene militarily in the affairs of another country where the immediate threat was not to the outside world, but to a domestic population.’

Another important source of RtoP is, according to Evans the ‘two Sovereignties’ notion developed by Kofi Annan who distinguished between the State sovereignty and the individual sovereignty the ‘fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties’ and underlines the necessity to make both sovereignties cohabited.

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41 The Independent International Commission on Kosovo, The Kosovo Report-Conflict, International Response, Lessons Learned (OUP 2000) 4
42 Wheeler, ‘The Humanitarian Responsibilities of Sovereignty’ (n 20) 43
43 Wheeler, Saving Strangers (n 17) 279
44 Evans The Responsibility to Protect (n 35) 33
46Kofi Annan, ‘Two concepts of sovereignty’ The Economist (New York, 16 September 1999); For more example of Annan’s speeches and interventions in his campaign for RtoP see Adam Robert ‘ The United Nations and Humanitarian Intervention in Welsh (n 2) 86-7
It is in that context that Kofi Annan addressed the UNGA Members in 1999 asking them ‘if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?’

Canada supported Annan’s plea which launched the ICISS commission which delivered in late 2001 its report on ‘the Responsibility to Protect’.

1.2 …and from Doctrine to emerging norm

1.2.1 The ICISS report

Delivered in late 2001 the ICISS report renews Deng’s ‘sovereignty as responsibility’. In the very first lines of the report the Commission exposes what it considers the core principle of RtoP:

State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

Where the ICISS goes beyond what Deng and Cohen, is where it offers to introduce for the international community the responsibility not only, to assist the host state in fulfilling its primary responsibility, but also the responsibility to replace the host state even without its consent, when it is unwilling or unable to protect its population from or when it is itself the perpetrator of mass atrocities.

According to the ICISS, the foundations of the RtoP, as a guiding principle for the international community, are the following: the inherent obligations that lie in the concept of sovereignty exposed above, the primary responsibility of the UNSC for the maintenance of international peace and security (Art. 2(4) UN Charter), States’ legal obligations under human rights and human protection declarations, covenants and

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48 ICISS, The Responsibility to Protect (n 6)
49 ibid xi, where the ICISS gives the Synopsis of the RtoP
50 ibid para 2.31
treaties, international humanitarian law and national law and the developing practice of states, regional organizations and the Security Council itself. The ICISS refers here to cases where the interveners acted for human protection purposes in intrastate crises for instance the UNSC in Somalia in 1994 or the Economic Community of West African States (ECOWAS) in Liberia in 1992 and Sierra Leone in 1997.

What does the RtoP principles implies for the each state and for the international community? The RtoP shaped by the ICISS entails three specifics responsibilities. Firstly, the ICISS focused on the ‘Responsibility to Prevent’ which means ‘to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk’. Secondly conscious that prevention may fails or not be possible the RtoP entails the ‘Responsibility to React’ (RtoR) in other words ‘to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention’. Thirdly the RtoP includes the ‘Responsibility to Rebuild’ which implies ‘to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.’ By doing so the ICISS places the controversial humanitarian intervention in the much broader pattern of RtoP. The focus is oriented on protection rather than intervention. Military intervention is the last resort measure that could potentially be activated while fulfilling the RtoR. It is delicate to evaluate when the last resort condition is fulfilled there is no predefined answered; the response should be tailored to the circumstances of the crisis. But RtoR it is not the first responsibility triggered in the RtoP pattern.

While the ICISS claims that prevention is better than cure and that in implementing their Rto Prevent and RtoR states should always privilege and have first recourse to the less intrusive measures, most part of the report is dedicated to the RtoR and particularly

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51 ibid XI
52 ibid para 2.25
53 ibid XI
54 ibid XI
55 ibid XI
to the guiding principles of military intervention. Fulfilling RtoP will imply intervening in the State affairs. After acknowledging that the definition of ‘intervention’ may vary from one state to another the ICISS indicates that in its report to intervene means to take action ‘against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective.’ Aware of the controversial character of military intervention the ICISS insists on the use that can be made of ‘alternatives to military action, including all forms of preventive measures, and coercive intervention measures – sanctions and criminal prosecutions – falling short of military intervention. Moreover coercive measures short of military action have a deterrent effect, and the simple threat to adopt such measures could be used as a preventive tool as well as a reactive tool.

In the section entitled ‘Responsibility to React’ The ICISS gives the list of measures short of military action that states may use when prevention of a humanitarian crisis has failed, the so called ‘targeted sanctions’, designed to have a minimal impact on civilians while increasing pressure on the decision makers. This list includes measures that could be taken in the military area (arms embargoes, ending of military cooperation and trainings), in the economic area (freezing foreign assets of a country or of entities involved or of individuals; restrictions on income generating by specifics activities; restrictions on access to petroleum products, aviations ban) and in the political and diplomatic area (restrictions on diplomatic representation, restrictions on travel, suspension of membership or expulsion from international or regional bodies; refusal to admit a country to a membership of a body) judicial measures as international prosecution may also be used.

The report then considers the military intervention option. Using deadly force is a very serious decision to take and with grave consequences. The report focused on two questions. Firstly ‘In what circumstances is intervention legitimate?’ To answer that question the ICISS recommends to the UNGA and to the Security Council to adopt and

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57 See Bellamy’s critics of the focus made on intervention and on the necessity to have criteria for military intervention Bellamy ‘The Responsibility to Protect and the problem of military intervention’ (n 27)
58 ICISS, *The Responsibility to Protect* (n 6) paras 1.37-1.38
59 ibid paras 4.3-4.9
60 Bellamy ‘ The Responsibility to Protect and the problem of military intervention’(n 27) 621
follow the ‘just war’ principles that the ICISS has summarised in its ‘principles for military action. These principles embrace the just cause threshold (what kind of harm can justify a military intervention?), the precautionary principles (right intention, last resort, proportional means and reasonable prospect) and the right authority. They will be discussed in more detail in chapter 3. Regarding the just cause threshold the ICISS details what can be a ‘conscience shocking situation’ justifying an intervention from the international community. The list includes: large scale loss of life, genocide, ethnic cleansing, crimes against humanity, war crimes, situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war and overwhelming natural or environmental catastrophes.61

Second point of attention was ‘what institutions are entitled to authorize intervention?’62 After reviewing the provisions of the Charter on the use of force the report concludes that the UNSC is the primary authority vested with the responsibility to react. To avoid situation of blockage of the UNSC by a ‘capricious’ use of veto or threat of us of veto or its use for unrelated concerns,63 the ICISS advises the UNSC’s permanent members to adopt a ‘code of conduct’ for the use of their veto power and that ‘in matters where their vital state interests are not involved, [a permanent member] would not use its veto to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support’.64

But what if the UNSC fails to act? The report examines the fallback responsibilities of the UNGA to endorse an intervention and then of relevant regional organisations. Indeed, as stressed by the ICISS the UNSC is vested with the ‘primary’ responsibility for issues related to international peace and security, but is not the only one to bear such a responsibility. According to article 10 of the UN Charter the UNGA has a general responsibility for any topic within the scope of the UN authority and also a secondary responsibility for the maintenance of international peace and security. Unlike the UNSC, the UNGA can only make non binding recommendations. But the like of binding effect of these recommendations did not prevent the UNGA to introduced the

61 ICISS (n 6) para 4.20
62 Bellamy ‘The Responsibility to Protect and the problem of military intervention’(27) 621
63 ICISS,(n 6) para 6.20-6.21
64 ibid para 6.21
procedure of ‘Uniting for Peace’, which served as basis for several intervention in the past.\textsuperscript{65} Moreover the ICISS contemplate the possibility for collective intervention that would be launched by regional or sub-regional against one of its member. Neighbouring states to the one where a humanitarian catastrophe occurs are the one that could be the most affected by the crisis. Therefore they would have strong incentives to promptly find a solution and this would respect the spirit of article 52 of the UN Charter.\textsuperscript{66} It would be more controversial if the intervention would be lead by an organisation acting outside its boundaries (such as NATO in Kosovo) but it can still argue that the crisis might have effects that could reach its geographical boundaries. Finally the ICISS envisaged interventions by ad-hoc coalitions and even individual states. Such interventions without UNSC’s authorisation or UNGA’s endorsement find little favour.\textsuperscript{67}

Should those actions fulfil all the criteria established in the report it would be much preferable to receive the support of the UNSC or the UNGA. For the ICISS if cases such as Rwanda or Kosovo are answered in the future by unauthorised interventions, the UNSC might contemplate an ‘\textit{ex post facto authorisation}’ like the one given to ECOWAS after its intervention in Liberia and Sierra Leone.\textsuperscript{68} The ICISS insists on what could be the consequences that the UNSC would have to face if failing to implement its responsibility to protect in ‘\textit{a conscience shocking situation crying out for action}’.\textsuperscript{69} The UNSC should also think of the fact that an ad hoc intervention to circumvent the UN failure to react may be conduct by interveners which would no be motivated by the right reasons. Finally if a non-authorised intervention is led in respect of all the principles set up in the report and is successful in reaching the goal of protection of civilians and is perceived as a successful intervention by the world public opinion as well, this would have a This would have disastrous consequences on the credibility and the stature of the UNSC.\textsuperscript{70}

\textsuperscript{65} ibid para 6.7  
\textsuperscript{66} ibid para 6.31  
\textsuperscript{67} ibid para 6.36  
\textsuperscript{68} The ECOWAS’s interventions were backed up by the UNSC with Res. 788 (19 November 1992) UN Doc S/RES/788 (1992) for the intervention in Liberia and Res 1132 (8 October 1997) UN Doc S/RES/1132 (1997) in the case of Sierra Leone.  
\textsuperscript{69} ICISS (n 6) para 6.39  
\textsuperscript{70} ibid para 6.40
1.2.2 The High-Level Panel on Threats, Challenges and Change report

In March 2005, a few months before the UNGA adopted the ‘World Summit Outcome Document’, the Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change (High-Level Panel) ‘A more secure world: Our shared responsibility’ was presented to the UNGA. This report is interesting because it shows how in a few years, the RtoP has become part of the working language and a focus for UN experts working on the use of force. The High-Level Panel had for mission to identify the existing and potential threats to international security and offered solutions to address and tackle those threats and also to examine the current functioning of the UN system and to formulate recommendations on changes that could improve its functioning and efficiency. The principle of RtoP endorsed by the High-Level Panel is narrower than the one depicted in the ICISS report in different ways. Firstly it takes into account only the military dimension that the RtoP may entail, secondly it acknowledge only one authority, the UNSC and does not mention the UNGA or regional arrangements; finally it narrows the scope of RtoP to by listing the situation covered as the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

1.2.3 The World Summit Outcome Document

In September 2005 the 192 UN Member States met in a World Summit and unanimously endorsed the RtoP as set up in the World Summit Outcome Document:

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international

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72 ibid para 203
73 For a definition of those crimes see the Rome Statute of the International Criminal Court (ICC Statute), genocide art. 6; crimes against humanity art.7; war crimes art 8; regarding ethnic cleansing ‘that is to say ‘forced displacement of persons by expulsion or other coercive acts from the area’ the ICJ ruled in 2007 in the Bosnian Genocide case that the notion ‘has no legal significance of its own’. Act of ‘Ethnic cleansing’ may fall under the crime of genocide or crime against humanity see Robert Cryer, Håkan Friman, Darryl Robinson and Elisabeth Wilmshurst, An introduction to International Criminal Law and Procedure (2nd edn, Cambridge University Press 2010) 215-16,249
community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means in accordance to Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.74

In this document, all heads of States acknowledge their primary responsibility to protect their population against genocide, war crimes; ethnic cleansing and crimes against humanity, the scope of RtoP as been narrowed compared to what the ICISS offered. The international community has the duty to help the state fulfilling its responsibility by using all non-coercive means available. Regarding the RtoR, it belongs to the UNSC and to the UNSC only, in ‘cooperation with regional organizations’ to decide ‘on a case by case basis’ which coercive means it could adopt when the state is ‘manifestly failing’ to protect its population from genocide war crimes, ethnic cleansing and crimes against humanity. The criteria for military intervention, as indicated in the introduction, were not adopted by the UNGA. According to Weiss when endorsing the RtoP principle without adopting criteria for the use of force and insisting upon the UNSC authorisation, the UNGA has adopted ‘R2P-lite’.75 The UNSC remains free to decide whether or not to launch a military intervention.

After its adoption by the UNGA, the principle of RtoP was unanimously endorsed by the UN Security Council (UNSC) in two resolutions in 2006 and 2009.76 Once the principle of RtoP adopted it was important for the UN to start thinking on the implementation of the RtoP principle.

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74 UNGA (n 7) paras 138-139 (emphasis added)
The ICISS report was the foundation for discussions among the international community leading to the adoption of the principle of RtoP a few years later at the World Summit. But as pointed out by Bellamy in Responsibility to Protect: The Global effort to End Mass Atrocities, what the world leaders agreed upon in 2005 is different from what the different precursors of RtoP have so far offered.

On the identification of roots of RtoP there is a major difference between Evans and Bellamy approach that needs to be underline because it has created two streams in the RtoP advocates. There is a distinction between ‘those who think that [RtoP’s] focus ought to be on questions concerning military intervention.’ like Evans and who acknowledge four roots of RtoP (the right to intervene, the sovereignty-as-responsibility, the Blair Doctrine and the ‘two sovereignties’. This stream still apprehends the RtoP principles ‘as originally conceived’ in the ICISS report. The other stream, whom Bellamy belongs to, of those who considered Deng’s ‘sovereignty as responsibility’ concept and the Kosovo debate resulting in the ICISS reports as the two roots of RtoP and ‘who believe that [RtoP] is primarily about prevention and protection’ and are following the international consensus on what RtoP ‘actually entails’.

Those two streams are important in the debate that preceded and followed the adoption of the RtoP principle by the UN Member States. They also reflect the fears and reluctances that some States have expressed towards the principles when negotiating the World Summit Outcome, when examining what needed to be done and what is still to be done to implement or when a humanitarian crisis has to be handled.

1.2.4 Implementation of RtoP principle

The Secretary-General Ban Ki Moon contributes intensively to the debate on the implementation of RtoP. In 2009, he presented a report to the UNGA on the implementation of the principle. He started by reminding to the UN Members that the

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77 See Sharma, (n 34) 125, citing Bellamy, Responsibility to Protect: The Global effort to End Mass Atrocities (Cambridge, UK: Polity Press, 2009) 4
78 ibid
79 UNGA ‘Report of the Secretary-General -Implementing the responsibility to protect ’(12 January 2009) UN Doc A/63/677
goal is not to continue the debate on the notion of RtoP but to ‘develop fully the United Nations strategy, standards, processes, tools and practices for the responsibility to protect’80 as adopted by the World Summit outcome. Indeed as underlined by Thakur and Weiss ‘the first danger [for RtoP] is that of a rollback.’ RtoP is sometimes perceives as a new way for the powerful nations to intervene in the domestic affairs of smaller one.81 Moreover this defiance towards RtoP can also be explained by the misuse of the language of RtoP which has been overstretched to justify interventions outside the scope of what has been endorsed in 2005. This was the case when RtoP was used to try to justify the war in Iraq,82 the intervention of Russia against Georgian in august 200883 or in May 2008 when Kouchner wanted to apply RtoP to the humanitarian crisis in Burma devastated by Cyclone Nargis to circumvent the refusal of the government for international humanitarian assistance.84 This attempt from France to justify the use of force in Burma for the delivery of humanitarian aid illustrated what Bellamy has identified as two different visions of the RtoP Indeed the ICISS contemplated the possibility to intervene in the face of overwhelming natural or environmental catastrophes but those hypotheses have been excluded from the World Outcome Summit Documents.

Ban Ki-moon offered a three pillars implementation scheme for the UN to turn words into deeds and make RtoP a norm that will offer effective protection to civilians. The first pillar is ‘The protection responsibilities of the State’, second pillar ‘International assistance and capacity-building’ and third pillar ‘Timely and decisive response’ which correspond to the implementation of the RtoR.

In the section ‘the timely and decisive response’ the line of thought is that when a state is defying the international community by refusing assistance in preventing and protecting its population, by committing the crime listed in paragraphs 139 of the World Summit Outcome Document and is not reacting to peaceful means then the international community will have to think to of collective measures. The collective reaction may

80 UNGA ‘Implementing the Responsibility to Protect’(n79) 1
81 Thakur and Weiss (n 19) 45
83 Sharma (n 34) 127
84 ibid 128
consist of a large scale of non coercive as well as coercive measures short to military force and in last resort in a military intervention. Those measures can be taken by the UNSC under Chap VII of the UN Charter but also by the UNGA under the ‘Peace and Uniting’ procedure or by relevant regional arrangements with the UNSC authorisation. The major gap, according to Ban Ki-moon, in the implementation of RtoP, especially regarding military intervention, is the ‘weaknesses of capacity and the paucity of will’. The future of RtoP also depends according to Ban Ki-moon on the consistency of the UN in applying the principle and for him the Member States have ‘to consider the principles, rules and doctrine that should guide the application of coercive force in extreme situations relating to the responsibility to protect’. Furthermore; as the ICISS did in its report Ban Ki-Moon also called upon the UNSC members not to use their veto when faced with a RtoP situation.

Having now a better idea of what RtoP entails for UN Members I am going to examine the first case in which a military intervention has been authorised by the UNSC on behalf of the international community to implement its responsibility to react.

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85 UNGA -Implementing the responsibility to protect ’(n 79)
86 ibid para 58
87 ibid para 60
88 ibid para 62
2. The Libyan Crisis and the activation of the International Community’s Responsibility to React

2.1 The situation in Libya

Since 1969, Libya was ruled by Colonel Muammar al-Qadhafi who came to power by leading a coup against King Idriss. In 1977 Qadhafi declared a ‘people’s revolution’ in the ‘Great Socialist People's Libyan Arab Jamahiriyah’. This was the starting point for ‘institutionalised chaos, economic decline and general arbitrariness’.89

The Qadhafi regime had an infamous record regarding human rights abuses. In the long list of human rights violations documented for instance by Human Rights Watch (HRW) and Amnesty International we can note the systematic repression of those criticizing the regime. Freedom of expression, association and assembly were tightly restricted, independent political activity banned, political activists were detained, despite their acquittal by courts, or forcibly ‘disappeared’. According to HRW,

Law 71 bans any group activity based on a political ideology opposed to the principles of the al-Fateh Revolution, which brought Mu’ammad al-Qadhafi to power in 1969. Article 3 of the law imposes the death penalty on those who form, join or support such groups. Over the years, Libyan authorities have imprisoned hundreds of people for violating this law, and sentenced some to death.90

Impunity was also a sensitive issue in Libya. In June 1996, a revolt started in Abu Salim Prison and security forces allegedly killed 1200 prisoners to regain control in circumstances that remained unclear. Despite the formation of an official committee in 2005 to investigate the killings, no information on the findings of the committee was provided and the exact number and identities of all the prisoners killed remain unknown and no proceedings ever started. 91

On 15 and 16 February 2011, peaceful protests against the regime started in Benghazi, Libya’s second largest city (670.000 inhabitants), after two human rights campaigners,

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members of ‘Abu Salim families’ organising committee’ called for a demonstration for “accountability over the deaths of more than 1,000 inmates at Abu Salim prison in 1996 and for greater political and human rights freedoms in Libya”

On 17 February 2011, protesters organised a ‘Day of Rage’. This also marked the beginning of the dramatic escalation of the violence used to suppress the anti-governmental movement. The death toll dramatically increased with the protest movement spreading to neighbouring cities, the crackdown hardening and the security and police forces opening fire on protesters with live ammunition. On 18 February 2011 information coming from Libya on the battle raging between protesters and pro-Qadhafi forces, relayed by the Associated Press, were almost impossible to verify due to the media blackout and internet outage imposed by the regime. Rumours that mercenaries were helping the security forces and that heavy weapons were used against protesters were spreading.

On Monday, 21 February 2011, 1 a.m, Qadhafi’s son, Saif al Islam, warned the population in a television speech ‘of a civil war’ and that ‘rivers of blood’ would flow over Libya if the violence would not be stopped immediately. Assuring viewers of his father’s determination to remain in power and of his supporters to fight at his side he also declared that ‘[w]e will fight until the last man, the last woman, the last bullet.’ At this time the death toll was estimated between 233 and 550. While rebel forces that

92 Remarks by Fahti Terbil, Lybian lawyer, representing the Youth in the Lybian National Transitional Council (NTC), is one of the two members of Abu Salim families’ organising committee arrested on 15 February 2011, Amnesty International ‘Libya must end protest crackdown’ (Amnesty International 16 February 2011) <http://www.amnesty.org/en/news-and-updates/libya-urged-end-protest-crackdown-2011-02-16> accessed on 26 October 2011


94 ‘Violence in Bahrain and Libya - Friday 18 February’ (Guardian.co.uk ,18 February 2011 last modified 19 February 2011) <http://www.guardian.co.uk/world/blog/2011/feb/18/middle-east-protests-live-updates> accessed 26 October 2011

According to the first elements of the investigation led by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court (ICC), the Libyan regime taking into account the uprising in Tunisia and Egypt and anticipating demonstrations in the country started to hire mercenaries and to brought them into Libya in January. UNSC Verbatim Record (4 May 2011) UN Doc S/PV.6528

took control of Benghazi were celebrating ‘the fall of the regime in their city’, in the
evening police and security forces in Tripoli were backed up by helicopters firing at
protesters and by warplanes dropping small bombs in their attempt to crush the protest
in the capital. The same day several members of the Libyan government, among them
Justice Minister Mustafa Abdul Jalil, Libyan ambassadors in several countries and
international organisations (the League of Arab States (LAS) and UN) resigned in sign
of protest. The Libyan delegation at the UN called upon Qadhafi to stop the violence
against its people and to step aside.96

On Tuesday February 22, 2011 Qadhafi in a vehement televised speech ‘vowed to fight
on and die a “martyr” ’ and invited its supporters to take the streets, get rid of the
protesters whom he called ‘cockroaches’ and ‘rats’, and to ‘clean […] Libya house by
house.’ Qadhafi also claimed ‘I have not yet ordered the use of force, not yet ordered
one bullet to be fired ... when I do, everything will burn.’97 In reaction to Qadhafi’s
speech, the Interior minister resigned.

By or around the 24 February 2011, the rebellion against Qadhafi turned into a non-
international armed conflict.98

On February 25, Qadhafi delivered a new violent speech, calling on his supporters to
keep on fighting against the dissidents. He also indicated that ‘At the suitable time we
will open the arms depot so all Libyans and tribes become armed, so that Libya
becomes red with fire.’99

On February 26 an interim opposition government was created (renamed National
Transitional Council on 27 February) led by the former Minister of Justice, Mustafa

96 David D. Kirkpatrick and Mona el-Naggar ‘Qadhafi’s Grip Falters as His Forces Take On Protesters’
New York Time (New York, 22 February 2011)1
John Hooper and Ian Black, ‘Libya defectors: Pilots told to bomb protesters flee to Malta’ The Guardian
(London, 22 February 2011)2
97 ——‘Defiant Gaddafi vows to fight’(Al Jazeera 23 February 2011)
98 This shift was determined by the International Commission on Inquiry in Libya, established by the
Human Rights Council (HRC) Resolution S-15/1 (25 February 2011) UN Doc A/HRC/S-15/1, as
‘bringing into play both international humanitarian law alongside international human rights law.’
investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya’(1 June
2011) UN Doc A/HRC/17/44 4
99 Neil MacFarquhar ‘The Vacuum After Qaddafi’ New York Time (New York, 27 February 2011) 1
accessed 26 July 2011
Abdul Jalil. Looking at the humanitarian crisis at this time of the conflict, the number of civilian who died was estimated between 500 and 700. On top of the dead and injured victims in the country, the UNHCR reported that around 100,000 people fled from Libya to the neighbouring Egypt and Tunisia.

2.2 The reaction of the international community

The international community reacted to the Libyan crisis at different institutional levels and with a great variety of measures. In the first part of the implementation of its RtoR the international community used diplomatic means and then adopted coercive measures short of military action in the military, economic as well as in the political and diplomatic area that are briefly present below. As indicated in the introduction (n 2) the working definition of the international community, is a narrow one, it refers to the community o the UN Members, which can express themselves and act through the UN itself but also through regional and sub-regional organisations.

2.2.1 The regional and sub regional organisations response

The European Union (EU) through the voice of Catherine Ashton, Vice-president of the European Commission and High Representative of the Union for Foreign Affairs and Security Policy, condemned the violence on 20 February 2011 and on 22 February the European Union decided to suspend the negotiation on an EU-Libya framework agreement and of ongoing cooperation contracts.

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100 UNSC (n 94). As mentioned by Moreno it is very difficult to estimate the number of victims because Qadhafi’s forces covered up the crimes, “[d]octors were not allowed to document the number of dead and injured admitted to hospitals and people by fear of retaliation demonstrators neither sought medical attention in nor brought their dead to hospital.

101 ‘UNHCR emergency teams supporting Tunisians and Egyptians to respond to tens of thousands fleeing violence in Libya’ Press release (UNHCR, 27 February 2011) <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4d6a2a4d9&query=Libya> accessed 5 November 2011

The number of people who fled the country dramatically increased in the following month, a UN report indicated that ‘[a]s of 20 May, some 814,022 persons were reported to have left Libya’ UN HRC(n 98) 25

On 22 February The **League of Arab States** (LAS) condemned the crackdown considering that the ‘use of live rounds, heavy weapons and foreign mercenaries is a ‘grave breach of human rights’.’ and decided to suspend the participation of the Libyan delegation in Arab League session meetings.103

The same day the **Organisation of Islamic Countries** (OIC) ‘called on Libyan authorities to stop immediately violence against innocent Libyans and emphasizes the need to address their claims peacefully and through serious dialogue instead of assassination and blood shedding.’104

On 23 February the Peace and Security Council of the **African Union** (AU) condemned ‘the indiscriminate and excessive use of force and lethal weapons against peaceful protestors, in violation of human rights and International Humanitarian Law’ and called on Libyan authorities ‘to ensure the protection and security of the citizens…’ and on all the parties to stop all acts of violence. The AU also announced its intention to ‘urgently dispatch a mission of Council to Libya to assess the situation in the ground’. But the fact-finding mission announced in the Communiqué was never dispatched.105

**2.2.2 The UN response**

Within the UN system, the first reactions to condemn the crackdown and the excessive use of force against peaceful protesters came from the Office of the High Commissioner for Human Rights (OHCHR) 106 and from UN experts on Human Rights. On, 18 February Navy Pillay, UN High Commissioner for Human Rights, in a press release

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expressed her concerns regarding the situation in many countries including Libya, she ‘condemned the use of live ammunition […] against peaceful protestors.’ The same day a group of UN experts on Human Rights ‘urged the Governments of […] Libya to guarantee the right to peaceful protest and immediately cease the use of excessive and lethal force.’  

On 22 February 2011, UN officials declared that RtoP applies to the situation in Libya. The UN Secretary-General Special Advisers on the Prevention of Genocide and Special Adviser on the Responsibility to Protect indicated that the first reports on the attacks against the civilian populations indicated that they might amount to crime against humanity. They reminded the Libyan authorities ‘that the Heads of State and Government at the 2005 World Summit pledged to protect populations by preventing genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as their incitement.’ The same day, the UNSC called on the Libyan government to carry out its responsibility to protect its population.

On 25 February the Human Rights Council opened a Special Session on ‘the situation of human rights in the Libyan Arab Jamahiriya’ and adopted a resolution that called on the Libyan authorities to stop the bloodshed, the UNGA to suspend Libya from the Human Rights Council and further pleading for establishment of an international commission of inquiry.

On 26 February, the UNSC adopted unanimously resolution 1970 against Libya. Deploring ‘the gross and systematic violation of human rights’ and considering that ‘the widespread and systematic attacks (…) against civilian population may amount to crimes against humanity’ the UNSC demanded an end to the violence and a safe
passage for humanitarian and medical supplies as well as humanitarian personnel. The UNSC also decided to refer the situation to the Prosecutor of the ICC and to impose an arms embargo on Libya, travel ban and asset freeze on Qadhafi’s family and officials of the regime.

The decision to refer the situation in Libya to the ICC sent a strong message to Qadhafi and the international community. Indeed this power was use only once by the UNSC for the situation in Darfur.\(^\text{111}\) The sanctions short of military force adopted in resolution 1970 are intended to increase the pressure on the regime and induce it to change its behaviour. The arm embargo was aimed at cutting off the access to military material creating a shortage for the security forces. The international community hoped that those sanctions combined with diplomatic efforts would force Qadhafi to halt the violence against its population and to try to reach a political agreement with the opposition. In the weeks following the adoption of Res. 1970 Qadhafi remained adamant. The multilateral sanctions adopted and the diplomatic efforts have not achieved the desired result. In the meantime, the humanitarian crisis was worsening. Qadhafi’s forces were continued bombing rebel-controlled on the cities.

While the UN Secretary-General and the AU were working on trying to find a political solution to the crisis\(^\text{112}\), others were already calling on the UN for more coercive measures to stop the crackdown. On 7 March 2011, the Gulf Cooperation Council called on the UNSC to ‘take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya’.\(^\text{113}\) Although the LAS already invoked the idea of establishing

\(^\text{111}\) In the case of Darfur the resolution was adopted by 11 votes in favour and 4 states abstaining see UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593

\(^\text{112}\) On 10 March 2011, UN Secretary –General Ban Ki-moon appointed his Special Envoy to Libya. The same day the AU Peace and Security Council established an AU ad-hoc High level Committee on Libya which mission is to: engage with all parties in Libya and continuously assess the evolution of the situation on the ground; facilitate an inclusive dialogue among the Libyan parties on the appropriate reforms; engage AU’s partners, in particular the League of Arab States, the Organization of the Islamic Conference, the European Union and the United Nations, to facilitate coordination of efforts and seek their support for the early resolution of the crisis ; see Alisha Kugel (ed) Review of Political Missions 2011 (Centre on International Cooperation – New York University 2011) 137-141 available at <http://www.cic.nyu.edu/politicalmissions/spm2011.pdf>; African Union (Peace and Security Council) ‘Communiqué of the 265th Meeting of the Peace and Security Council’(10March 2001) PSC/PR/COMM.2 (CCLXI)

and enforcing a ‘no fly’ zone together with the AU,\textsuperscript{114} its only on 12 March 2011 that the ALS officially ‘called on the Security Council to bear its responsibilities(...)and to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighbouring States’\textsuperscript{115}

\textsuperscript{114} ‘Arab League says could impose Libya ”no fly” zone’ (Reuters Africa, 2 March 2011) \linebreak \url{http://af.reuters.com/article/libyaNews/idAFLDE7212AI20110302} accessed 19 October 2011

\textsuperscript{115} Resolution 7360 of the Council of the Arab League meeting at the Ministerial level, (12 March 2011) available at \linebreak \url{http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20March%202011%20-%20en.pdf}
3. The Military Intervention in Libya: Criteria guiding the UN Security Council in implementing its RtoR?

3.1 Adoption of Resolution 1973 (2011)

In the three weeks following the adoption of resolution 1970, the efforts of the international community to put an end to the Libyan crisis were far from paying off. Qadhafi did not react to the multilateral sanctions adopted and the diplomatic efforts. The Libyan authorities were not complying with resolution 1970 and failing to uphold their responsibility to protect the population. Civilians were still victims of widespread and systematic attacks and humanitarian aid could not reach them. On 17 March Qadhafi announced on the radio his intention to launch an attack on Benghazi. He warned the rebels that his troops were ‘coming tonight’, that they would show ‘no mercy and no pity’ and that they would hunt them ‘house by house, room by room’.  

Qadhafi’s speech was a determining factor in the decision of France, Lebanon, the United Kingdom (UK) and the United States of America (USA) to put the draft resolution they had prepared to a vote in the UNSC. The draft was adopted on 17 March 2011 as Resolution 1793. The vote on Resolution 1973 passed with 10 votes in favour (France, the UK, the USA, Bosnia and Herzegovina, Colombia, Gabon, Lebanon, Nigeria, Portugal, and South Africa) and 5 UNSC members abstaining (China, Russia, Brazil, Germany and India).

The UNSC considered that the situation in Libya ‘continues to constitute a threat to international peace and security’. Therefore pursuant to Article 24 of the UN Charter it could act under Chapter VII of the UN Charter and decided the adoption of a series of measures including the use of military force. There are three components of the military intervention. First, military force can be used ‘to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi’. Second, a ban on all flights in the airspace of Libya is established and the use of

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117 UNSC Res.1973 preamble (n 12)

118 ibid para 4
military force to ‘enforce compliance with the ban on flights’\(^\text{119}\) is authorised. Thirdly, the arms embargo is strengthened and Member States are authorised ‘to use all measures commensurate to the specific circumstances’\(^\text{120}\) when inspecting the cargo of vessels and aircrafts in order to ensure strict implementation of the arms embargo.

The UNSC decided that the ‘timely and decisive response’ it had to adopt was a military one. But how did the UNSC reach this conclusion? As mentioned in Chapter 1, the UNGA and the UNSC did not adopt ‘guiding principles’ for military intervention proposed by the ICISS. Now it will examined now examine in more detail what those principles entail. Then, by studying the verbatim of the meeting of the UNSC when adopting Resolution 1973, it will identify on which criteria UNSC members based their decision to resort to military force in Libya and whether these are in line with the ICISS’ guiding principles.

3.2 ICISS’s ‘guiding principles’ for military interventions

In 2001, the ICISS offered a set of criteria to guide and help the UNSC to determine whether a military intervention is the appropriate means to stop or halt ‘RtoP crimes’. According to Evans those principles would improve the nature of UNSC decision making, by enabling the Council to easily reach a consensus on when it is appropriate or not to resort to military force, by legitimising its decision and gaining the support of the international community as a whole, whatever it decides; and by avoiding the possibility for individual member states to bypass or ignore its decision.\(^\text{121}\) The ICISS identified six principles: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.

As explained in Chapter 2, the questions of right authority and just cause have been solved by the UNGA when adopting the World Summit Outcome. Paragraph 139 provides that the right authority to decide on military intervention is the UNSC. The same paragraph establishes the threshold criterion, referred to as the just cause criterion, when ‘peaceful means [are] inadequate and national authorities are manifestly failing

\(^\text{119}\) ibid para 8  
\(^\text{120}\) ibid para 13  
\(^\text{121}\) Sharma (n 34) 123-124
to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.122

The four remaining principles, not adopted by UN members, were called precautionary principles by the ICISS. The first precautionary principle is ‘right intention’. It means that ‘[t]he primary purpose of the intervention must be to halt or avert human suffering’.123 ‘Primary’ does not mean ‘only’: the ICISS acknowledged that interveners may not have only humanitarian motives and that they can have a certain degree of self-interest. They may have national economic or political interests at stake which prompt them to act not only on an altruistic basis.124 The report excluded interventions whose goals would be to alter the borders of the country or to support a combatant group claiming to exercise the right to self-determination. The ICISS also contemplated the issue of regime change. It cannot be the primary goal of the military intervention but it is not excluded when neutralising the ‘regime’s capacity to harm its own people may be essential to discharging the mandate of protection’.125 Not accepting that interveners may have mixed motives to intervene would jeopardise the participation of states with the necessary military capacities. Furthermore the ICISS recommends, in order to enhance the legitimacy of the decision to intervene, taking a collective action, seeking the support of the population for which the intervention is envisaged, taking into account the opinion of regional countries and seeking their support. The ‘right intention’ criterion is a key element to evaluate the legitimacy and the ‘sincerity’ of the interveners.

The second precautionary principle is ‘last resort’. For the ICISS every pacific means (diplomatic and non-military) to prevent or resolve a conflict must have been explored before considering military means. This criterion was actually included in the World Summit Outcome for military intervention when indicating ‘should peaceful means be inadequate.’ But this must not be taken literally. As explained by the ICISS and also as underlined by Ban Ki-moon, the international community should take a ‘timely and decisive action not (…)following arbitrary, sequential or graduated policy ladders that

122 UNGA, ‘World Summit Outcome Document’ para 139 (n 7)
123 ICISS (n 6) para 4.33
124 ibid paras 4.33-4.35
125 ibid
When the situation in the country consists of a conflict opposing a state party to insurgent minority, they should be encouraged to negotiate. The ICISS insists that a ceasefire secured if necessary by international peacekeepers and observers should be preferred if possible to a military action. It is only when the intransigence of one or both parties jeopardises all good faith attempts to reach such a compromise and when full-scale violence is occurring or is likely to occur that the international community may consider the military option.

The third precautionary principle proposed by the ICISS to guide the decision on using military force is *proportional means*. According to the report *the scale, duration and intensity of a planned military intervention should be the minimum necessary to secure the humanitarian objective in question.* The idea is that the principles of necessity and proportionality have to be respected when determining what should be done. The action also has to be designed so that it has a limited impact on the political system of the targeted country, limited to what is necessary to fulfil the goal of the intervention. Interveners should strictly respect all the rules of humanitarian law.

Finally the ICISS recommended following the *reasonable prospects* criterion. According to this principle, military action is justified only if there is a reasonable chance of success to stop or halt the crimes that triggered the intervention in the first place. If military protection cannot offer actual protection to populations or if the situation is likely to be worsened by a military intervention, especially when there is a risk to create a larger conflict, then the international community should refrain from resorting to it and accept the idea that sometimes the price to pay to rescue some human beings is too high. The ICISS acknowledged that the consequence of obeying to the *reasonable prospects* criterion means also creating *double standards*. A military intervention would never be contemplated against one of the five permanent members of the UNSC or other major powers, because the likelihood for the intervention to degenerate into a major conflict is too high. But for the ICISS *the reality that*

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126 UNGA, Implementing the responsibility to protect (n 9) para 50
127 ICISS, (n 6) paras 4.37-4.38
128 ibid para 4.39
interventions may not be able to be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in any case.'\textsuperscript{129}

Why did the UNGA and the UNSC refuse to endorse the full set of principles for military intervention? First, Bellamy stresses that it was impossible to reach a political agreement on the adoption of a set of principles by the UN. Since 2002 many UN Member States have expressed their scepticism, refusing to restrain their right to use their veto power or to resort to force, concerned that the criteria could be used to circumvent the UNSC authority or to justify abusive intervention or doubting their ability to create a consensus or political will necessary to adopt an effective response to humanitarian crises. The same rejection of criteria was observed during the negotiations preceding the World Summit Outcome Document. It was impossible to reach a political agreement on the adoption of criteria during the negotiations of the World Summit. In support of the criteria African states argued that they would make the UNSC’s decisions more ‘transparent, accountable (...) and hence legitimate’.\textsuperscript{130}

Second, commentators also expressed their doubts regarding the necessity of such criteria. Bellamy questions the ability of the criteria to fulfil the goals assigned by the ICISS or by other proponents. According to him adopting criteria in order to create an expectation that UNSC members will evaluate with transparency the opportunity to resort to armed force or not, or to dissuade one of the permanent members from using its veto, has been partly fulfilled by the establishment of a threshold for intervention in the World Summit Outcome document.\textsuperscript{131} Third, to answer Thakur, who argued that criteria would prevent governments from abusing RtoP and limit the scope of potential UNSC interventionism, Bellamy underlines that this function is already fulfilled by the UNSC safeguard mechanisms, namely, the majority vote and the veto. In Bellamy’s view, setting criteria would create a pathway to legitimise intervention without the UNSC authorisation, far from preventing the abuse of RtoP.\textsuperscript{132} Finally, Bellamy as well as Welsh stress the waste of time and energy to try to reach an agreement on criteria

\textsuperscript{129} ibid para 4.42
\textsuperscript{130} For an overview of arguments given by states in favour or against the criteria see Bellamy, ‘The Responsibility to Protect and the problem of military intervention’ (n 27) 625-626
\textsuperscript{131} ibid 627
\textsuperscript{132} ibid 628-629
which have created such a controversy among governments when the bigger need is to focus on how to operationalise RtoP.133

For the above reasons, UN members did not adopt the guiding principles offered by the ICISS. In the next section, however, I will examine arguments used by the UNSC members when Resolution 1973 was adopted and see to which degree they can be linked to the guiding principles offered by the ICISS or whether the UNSC has developed its own guiding criteria. Indeed if the UN Members and the UNSC acting on behalf of the international community wants to give full effect to what has been accomplished so far to obtain a commitment on the RtoP and implement their RtoP in a constant, impartial and effective way, their decision-making should offers clarity.

3.3 Criteria guiding the UN Security Council for military intervention in Libya

The verbatim record of the meeting of the Security Council when adopting Resolution 1973 gives us clues on the elements on which countries have based their decision to support or not to support the intervention in Libya. Five UNSC members abstained from voting. Among them were China and Russia, two permanent members, who could have cast their veto to prevent the intervention and decided not to use this power. Their decision can be viewed as an acknowledgment of the call of the ICISS and the Secretary-General Ban Ki-moon not to use the veto power when no vital national interest at stake. It could also reflect that in their view, the LAS which called on the UNSC to respond to the crisis in Libya by creating a non-fly zone, is in a better position to assess what is appropriate to do to respond to the situation.

The unanimously adoption of Resolution 1970 suggests that there were no difficulties for SC members to agree on the allegation of crimes against humanity (‘just cause’ criterion). Neither were there difficulties to take the first step by adopting non coercive and coercive measures short of military force (While for instance in the crisis in Darfur, thirteen UNSC Members voted in favour of resolution 1556 (2004) 134 demanding the disarmament of the Janjaweed militias when China and Pakistan decided to abstain from voting). But when some States felt the need to go a step further to halt the ongoing

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133 ibid 630 ; Welsh, ‘Conclusion’ (n 2) 185
bloodshed and to prevent an attack on Benghazi’s population, States disagreed on whether the recourse to military force was the best way to protect civilians.

The 17 March meeting of the UNSC started with a statement by the French Minister for Foreign affairs, followed by the vote on the resolution; finally all other members (except Gabon) took the floor to expose their views and positions on the resolution adopted. By examining the different arguments in the next paragraphs, we see that most of them are related to the just war criteria adopted by the ICISS report. Even if the UNSC has refused to codify them, they remain the official grounds on which their reasoning was based. Of course the views expressed during the meeting give us only a partial representation of what states have discussed behind closed doors when drafting the resolution.

According to UNSC members, was the ‘right intention’ principle respected? That is to say, was the primary purpose of the intervention in Libya to halt or avert crimes against humanity? Did the Libyan people support the idea of an intervention in their favour? What did regional organisations think about an intervention in Libya, did they support the intervention? Identifying clearly that the right intention criterion was respected was crucial for the decision of the UNSC to be considered as legitimate. None of the States questioned the fact that the primary motive for the intervention in Libya was to protect the ‘civilians under threat of attack and the provision of humanitarian assistance’.

The UK representative added one element, indicating that ‘the central purpose of the resolution is clear: to end the violence, to protect civilians and to allow the people of Libya to determine their own future, free from the tyranny of the Al-Qadhafi regime’.

In the light of what happened during the NATO intervention it is difficult not to interpret the statement from the UK representative as foreshadowing that the intervention would entail the overthrow of Qadhafi. Of course it could also be interpreted in the way Germany did. The German representative made it clear that it was imperative for the future of Libya that Qadhafi renounced power and that this goal would be achieved through economic and financial sanctions:

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135 Statement from Nigeria. The same idea was underlined by France, Lebanon, the UK, the USA, Bosnia and Herzegovina, Colombia, Portugal and South Africa in the verbatim of the UNSC meeting of 17 March 2011, UN Doc S/PV.6498

136 Ibid statement from the UK
It is therefore crucial that we tighten the sanctions against the Al-Qadhafi regime even more. We need to cut it off from the financial means that have helped it to remain in power. In our view, strong sanctions, backed by the whole international community, will be an effective way to end the rule of Muammar Al-Qadhafi and thereby to initiate the necessary political transition.\textsuperscript{137}

The regime change issue became the most controversial one after the NATO intervention in Libya and is directly linked to the right intention principle. As mentioned above, the ICISS considered the option of regime in case it is necessary to protect the population. Given the context in Libya and the intransigence of Qadhafi, who asserted several times that he would not give up power; it is unlikely that during the drafting of the resolution members of the UNSC did not discuss the topic.

Regarding the right intention criteria, what speakers particularly emphasised was that they were answering to the call for action from the Libyan population and from regional organisations. The resolution of the LAS calling upon the UNSC to act in the Libyan crisis and to adopt a no-fly zone was acknowledged both by those who voted in favour of the intervention and those who decided to abstain from voting. It swung the balance in favour of the adoption of the resolution. In particular, statements by Russia and China show that it was crucial in their decision not to use their veto power to block the resolution. It is more than mere support that the LAS brought to the UNSC decision; the LAS was the main instigator of the intervention. As indicated by the representatives of the UNSC members, the position of the LAS, and to a lesser extent the views of the AU, were crucial in the UNSC’s choice.

China reaffirmed its traditional opposition to the use of force in international relations but added that ‘(…) China attaches great importance to the relevant position by the 22-member Arab League on the establishment of a no-fly zone over Libya’.\textsuperscript{138} In the same vein, Russia indicated that it gave the LAS’s request its full attention, and Brazil pointed out that it also ‘took into account the call of the League of Arab States for strong measures to stop the violence through a no-fly zone\textsuperscript{139}’ and that it was sharing the LAS’s concerns. Indeed it would not have been possible to contemplate an

\textsuperscript{137} ibid statement from Germany
\textsuperscript{138} ibid statement from China
\textsuperscript{139} ibid statement from Brazil
intervention in the area without its support. Moreover, Western countries and NATO had previously indicated ‘that they would not move forward with coercive options without approval from regional organizations.’\textsuperscript{140} It seems like the UNSC members considered that the intervention in Libya met the first criterion.

If the UNSC decides to integrate the ‘right intention’ criteria and to seek the support of regional or sub-regional organisations to reinforce the legitimacy of its decision to resort to military force, in order it is important to avoid cherry-picking by listening only to some regional actors and ignoring others’ point of view. This could create a sense of unease among those who are the most impacted by the destabilization of the area.\textsuperscript{141} But as we have witnessed in the case of Libya there could be dissonances between the different regional actors. The views of the AU were not taken into account by the UN council, which decided to follow the LAS and the Gulf Cooperation Council. The AU was the first intergovernmental organisation to enshrine in its Constitutive Act a right for the organisation to intervene in the domestic affairs of one of its members in case of war crimes, genocide and crimes against humanity.\textsuperscript{142} Despite the efforts put in finding a political solution to the crisis, the fact the AU announced that it will ‘urgently’ dispatch a fact-finding mission, which it never did, or the division among the AU members on Libya discredited the capacity of the AU to handle the crisis.\textsuperscript{143} The closer to the epicentre the decision to intervene in order to prevent or halt mass atrocities will be taken the more legitimate this action will be considered. Even if the resort to force will have to be authorized by the UNSC, the likelihood that the Council vetoes the decision will be decreased. On the other hand the UNSC should not rely exclusively on the approval of regional and sub-regional organisations to delay the activation of its RtoR; the response of the international community should remain a ‘timely and decisive’ one.

\textsuperscript{140} ICRtoP ‘The Crisis in Libya’ (n 110)
\textsuperscript{141} ‘For the African Union – and South Africa in particular – there was the embarrassment of seeing peace efforts (no matter how well intended) dismissed internationally while the rebels fought towards Tripoli under the NATO air cover which made their war possible.’ in ‘Has the African Union got Libya wrong’ (Reuters US edition, 31 August 2011) <http://blogs.reuters.com/africanews/2011/08/31/has-the-african-union-got-libya-wrong/> accessed 20 November 2011
\textsuperscript{142} Art 4(h) of the Constitutive Act of the AU (adopted on 11 July 2000, entered into force 26 May 2001)
\textsuperscript{143} See Apuuli (n 105)
Disagreements between the two sides are visible when examining the three remaining criteria. The questions on which States did not reach an agreement were whether or not other means had been explored and seriously given a chance to succeed (‘last resort’) and whether or not the use of force as contemplated in Resolution 1973 would be the best way to achieve the protection of civilians in the Libyan context (‘proportional means’ and ‘reasonable prospects’).

Regarding the ‘last resort’ criterion, it is not on this subject that the divisions were the most pronounced. Only India argued that the time for using military force had not come yet and that the diplomatic and political efforts to solve the situation should be given more time. India stressed the fact that the UN Secretary-General had sent a Special Envoy and the AU a high-level panel, and that none of them had reported yet. Indeed it is clearly difficult to evaluate whether means short of military force had lost any chance to produce an effect. But as argued by Ban Ki-moon when presenting his implementation pattern, quiet diplomacy should not be used ‘as a delaying tactic’. For the countries which voted in favour of the resolution, Qadhafi had been given a chance to avoid the use of force with resolution 1970. For France, ‘measures [adopted in resolution 1970] have not been sufficient. Throughout the country, violence against the civilian population has only increased.’ According to South Africa ‘[t]he authorities have defied that resolution and have continued to kill and displace numerous civilians while continuing to violate their human rights.’ Colombia considered that Qadhafi had been given ‘sufficient time to comply with resolution 1970’ and that in the ‘face of non-compliance, the Council has a pressing need to act’.

The biggest stumbling-block to the vote in favour of the resolution were the last two criteria. Was the use of military force in Libya as envisaged consistent with the ‘proportional means’ principle? For several members of the UNSC the answer was definitely no. According to them during the negotiation of the draft resolution, proponents failed to make specific what exactly the military intervention would entail. Russia expressed concerns about unanswered questions which ‘touched on how the no-

144 S/PV6498 (n )
145 UNGA, ‘Report of the Secretary General Implementing the Responsibility to Protect’ (n 9) para 66
146 S/PV.6498 (n 135)
147 ibid
fly zone would be enforced, what the rules of engagement would be and what limits on the use of force there would be. Similar concerns were also expressed by India and China. Moreover India also challenged the choice of the financial measures considering the impact that they could have on the economic situation of the Libyan population and of Libyan partners. For Brazil the measures adopted were going a step too far compared to what the LAS was expecting from the UNSC.

Finally, concerning the ‘reasonable prospect’ for a military intervention to achieve an effective protection for civilians and not generating a bigger harm, several doubts were also expressed. Brazil, India, Germany and Russia indicated that the resort to military force entailed too much risk. They warned that a military intervention could cause ‘more harm than good’ to the Libyan people and that there also existed a risk of destabilisation for the whole region. Russia proved the most vehement opponent to the intervention, stressing that ‘the passion of some Council members for methods involving force prevailed.’ It disclaimed any responsibility for ‘the inevitable humanitarian consequences of the excessive use of outside force in Libya’.

Many States emphasized that the solution to the Libyan conflict should be an effective protection of civilians and that a sustainable political future could be reached only by diplomatic and political means and after establishing a ceasefire. It is interesting to note that Lebanon considered that the deterrent effect of the resolution might convince Qadhafi to end the violence and that the recourse to force will actually not be necessary. Despite all those arguments against the use of military intervention in Libya, the opponents of military force decided to abstain and not to vote against the resolution. It is somewhat of a paradox that China and Russia, who would have been able to prevent the launch of an operation, decided not to use their veto power. Despite all the relevant arguments given against the use of force, Russia declared that it decided not to prevent the adoption of the resolution ‘[g]uided by [the] basic principle [of the protection of the civilian population.] as well as by the common humanitarian values that we share with both the sponsors and other Council members’. China’s decision not to veto the resolution was motivated by the call of the LAS.

148 ibid statement from Brazil
149 ibid statement from Russia
150 ibid statement from Russia
The remarkable thing about the verbatim of the 17 March meeting is that the entire nine pages of States taking the floor contain only arguments as to whether the ‘guiding principles’ were met or not. These are the same principles that the UN member states repeatedly refused to officially endorse. Yet their arguments are based exclusively on the principles. While States that voted in favour of the intervention were particularly attached to demonstrate that the ‘right intention’ and the ‘last resort’ were fulfilled, those opposed to the use of force carefully exposed how the ‘proportional means’ and ‘reasonable prospect’ conditions were not satisfied.

Although the verbatim provides us useful information especially on the reason why the military intervention contemplated goes to far from what would be necessary for the protection of civilians, it is not possible just from it of to deduce all the reasons that led the UNSC Members which decided to abstain to voting not to vote against the resolution. Two reasons may justify this choice. First and foremost, the will to respect the decision of LAS who called on the UNSC to fulfil its responsibility towards the Libyan people, seems to be the most plausible reason. The strong emphasis on the LAS resolution seems to make of legitimacy the primary criteria to decide to resort to military force.

3.3.4 Conclusion

Why make use of criteria one has previously refused to endorse when discussing the intervention in Libya? To conclude this chapter, I provide some tentative explanations. The merit of the guiding principles is that they enable States to articulate clearly what are the important points to be considered when thinking of military intervention. The arguments given by the UNSC members also show that, although the guiding principles give a coherent structure to the debate, this is not enough to create a consensus among the UNSC Members. The guiding principles are flexible enough for both sides pro and contra to formulate arguments to justify their position. I conjecture that one reason for this difficulty to reach an agreement on what to do in Libya is that the UNSC members might have two different visions of what a military intervention for human protection purposes means. Chapter 7 of the ICISS’ report is dedicated to ‘the operational
dimension’ of intervention for human protection. The ICISS underlined the two existing contexts that justify the use of force:

Because the objective of military intervention is to protect populations and not to defeat or destroy an enemy militarily, it differs from traditional war fighting. While military intervention operations require the use of as much force as is necessary, which may on occasion be a great deal, to protect the population at risk, their basic objective is always to achieve quick success with as little cost as possible in civilian lives and inflicting as little damage as possible so as to enhance recovery prospects in the post-conflict phase. In war fighting, by contrast, the neutralization of an opponent’s military or industrial capabilities is often the instrument to force surrender.151

What some States have identified as a lack of information on what the operation in Libya would entail may reflect the fear that the operation will turn into a ‘large-scale military intervention’152 closer to the traditional war fighting with the use of armed force to defeat Qadhafi instead of a limited use of armed force strictly necessary to the protection of civilians.

Moreover the criticism concerning the ‘reasonable prospects’ of the Libyan intervention can be explained by this recommendation of the ICISS when envisaging a military intervention in order to protect populations. There could be no successful operation without a ‘careful advance planning’. This means, that the future interveners have to ‘to build an effective political coalition, work out agreed objectives, provide a clear mandate, devise a common plan of operations, and marshal the necessary resources.’153

The apparent failure to establish this ‘careful advance planning’ may have created serious doubt on the future of the operation.

At the same time, one of the interesting features in the Libyan case is that the principles were able to give legitimacy to the arguments of the UNSC members who decided not to vote in favour and yet allow them not to use their veto. We should bear in mind that UNSC members have to justify their decision not only vis-à-vis the international community on behalf of which they are acting but also vis-à-vis their own citizens. In this balancing act between satisfying national interest and fulfilling international duty the language of the criteria may be helpful to legitimize a decision.

151 ICISS (n 6) para 7.1
152 Russia’s statement Doc S/PV.6498
153 ICISS (n 6) para 7.9
Would the adoption of criteria help to solve the debate on the use of military force? We have seen that that States have used the rhetoric of the principles offered by the ICISS and the High Panel on Threat to justify their positions towards Resolution 1793. As expressed by Mr Dreiss, President of the 65th General Assembly session, on July 2011, during the ‘Interactive dialogue of the General Assembly on the role of regional and sub-regional arrangements in implementing the Responsibility to protect’ (Interactive dialogue) there are still challenges for RtoP to face, notably ‘the issue of implementing the norm in a consistent and impartial manner.’ Indeed during the dialogue although most of the States renewed their commitment to the RtoP principles they had endorsed in 2005, they also expressed their concerns about ‘the lack of consistency in the international response to RtoP crises’ expressing the need for ‘consistency in protecting populations from mass atrocities whatever the political contexts or interests at play’. States also have concerns about ‘the use of force and potential abuse of RtoP’. Regarding that issue some States stressed ‘the need to discuss criteria to determine when peaceful means have failed’. This is where guiding principles might answer those concerns. Some States and the EU supported the proposition of the Secretary General to adopt the third pillar of RtoP as the topic of the ‘2012 Dialogue on RtoP’. Another argument in favour of the adoption of criteria, highlighted by Evans, is that the situation in Syria shows that there is an ‘unfinished business with respect to RtoP: (…) the need to get started the really serious debate we haven’t yet had on the criteria for coercive military intervention.’ If States managed to reach an agreement on the conditions to use military force and if the UNSC adopts guidelines, according to Evans ‘it will be a lot easier to avoid the kind of “inevitable escalator” (or, to vary the metaphor, “slippery slide”) argument which has

154 Representatives of 43 countries, the EU and AU, UN officials and civil society met during an informal Dialogue on RtoP in New York on 12 July 2011 see ICRtoP, ‘Report on the Interactive dialogue’ (n 168) 2
155 ibid, 3
156 ibid, 7
158 ibid, 7
159 The question was raised by the Netherlands, New Zealand, Cuba and Lebanon, ibid, 7
160 ibid, 5
paralysed the Security Council response on Syria, making some countries unwilling to
even foreshadow non-military measures like targeted sanctions or ICC investigation
because of their concern that any inch conceded will indeed be driven a mile.\textsuperscript{161}

The intervention in Libya restarts the debate on criteria among States; it may help to
dispel the confusion which still exists around the RtoP and more specifically the RtoR
concept. We have seen how UN Members States for various reasons are opposed to the
adoption of such principles. Yet, these principles might be a way to tackle the criticism
of RtoP as a ‘Trojan horse’ to justify abusive intervention. They might also lead to more
consistency in the decision-making process. The use of the ‘guiding principles’ rhetoric
by the UNSC Members when commenting on Resolution 1973 may be seen as a first
step showing that criteria matter also for the UNSC when deciding on the use of force.
Even if the guiding principles are not codified, an informal adoption is already a
positive step.

During the Interactive Dialogue as well as during the general debate of the 66\textsuperscript{th}
session of the UNGA in September 2011, criticisms on the NATO ‘Operation Unified
Protector’ in Libya arose. In the view of some States the operation was a misapplication
of Resolutions 1970 and 1973. Moreover, there was too much divergence in the
interpretation of the Resolutions mandate. What was primarily an operation to protect
civilians turned into a mission to overthrow Qadhafi’s regime.\textsuperscript{162} They also pointed out
the need to put in place an effective framework to protect populations during armed
conflict.\textsuperscript{163} Regarding the ‘effectiveness’ of the NATO operation in protecting the

\textsuperscript{161} Evans, ‘Responding to Mass Atrocity Crimes: The Responsibility to Protect after Libya’(El Hassan bin
accessed 25 November 2011

\textsuperscript{162} ICRtoP, Report on the ‘Interactive dialogue of the General Assembly on the role of regional and sub-
regional arrangements in implementing the Responsibility to protect’ (ICRtoP August 2011) 2
<http://www.responsibilitytoprotect.org/ICRtoPReport20on%20RGGA%20dialogue%20on
%20RtoP%20F1NAL%281%29.pdf> accessed 10 September 2011

\textsuperscript{163} ICRtoP ‘Report on the Interactive Dialogue’ (n 162) 6
Libyan population, observers disagree on whether it was a success or a disaster. Some accuse the UNSC of not having respected the principles of necessity existing in international law, principles encompassed in the ‘last resort’ and ‘reasonable prospect’ guiding principles. To assess the ineffectiveness of the NATO intervention, critics are pointing at the death toll (an estimated 30,000 people died during the war), without making any distinction between the number of civilians and the number of belligerents killed, to condemn the NATO operation. What is important, however, is for States to think of how to offer effective protection to civilians. Taking into account that, despite technological improvements, there is no such thing as a clean war and that collateral damage is always a factor that States have to keep in mind are aerial attacks alone an efficient way to protect civilians? LAS and AU were clear about their refusal to see foreign troops occupying the soil of Libya. But what if the intervention had been a hybrid one? One could have imagined a NATO/ or ECOWAS or NATO/AU mission. In that context the ECOWAS or AU forces could have been a ‘neutral’ intervener, not perceived as foreign invaders, in charge of ensuring protection of civilians on the ground.

Bellamy refers to Alex de Waal, who wrote about the crisis in Darfur ‘that RtoP contributed to a naïve obsession with the deployment of military forces’. On the other hand the unwillingness to have recourse to military force should not turn into an obsession that will close the door to all the other available means to try to end a crisis. States have to keep in mind that, as it was the case in Libya as well as it could be the case in the future; the question is not whether we should protect the population but how to best protect the population. The UNSC Members should know better than anyone

164 For both arguments see Seumas Milne, ‘If the war in Libya was about saving lives, it was a catastrophic failure’ The Guardian (London, 27 October 2011) Main section 33 available at <http://www.guardian.co.uk/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure>, Mary Ellen O’Connell ‘How to lose a Revolution’ in e-International Relations, The Responsibility to Protect (n) 15-16, David Clark ‘Libyan intervention was a success, despite the aftermath’s atrocities’ (Guardian.co.uk, 28 October 2011) <http://www.guardian.co.uk/commentisfree/2011/oct/28/intervention-libya-success > accessed 30 October 2011 ; Thakur, ‘R2P, Libya and International Politics as the Struggle for Competing’ in e-International Relations, The Responsibility to Protect (n 157) 12-14

Normative Architectures

165 ibid O’Connell.

166 See Pattison assessing the effectiveness of current interveners namely NATO, the UN, States and coalition of the willing, regional and sub-regional organisation, hybrid missions and Private Military Companies (n 56)181-218

167 Bellamy ‘The Responsibility to Protect and the problem of military intervention (n Error! Bookmark not defined.) 632-633
that what UN Members agreed upon in 2005 is to remain free to evaluate whether they should intervene or not and to determine what is the best option to adopt on a case-by-case basis.
4. Conclusion

The goal of my thesis was to analyze how the requirements of the responsibility to react have been fulfilled in the case of Libya and in a second step to identify the criteria on which the UNSC based its decision to resort to coercive measures and ultimately to military force in Libya to protect civilian populations. This was done in order to have a better understanding and to try to identify a RtoP framework in which coercive measures and especially the use of military could be adopted in order to protect civil populations from RtoP crimes.

In chapter 1 we had an overview of the process which started in the 1990s with the first military interventions for humanitarian purposes authorised by the UNSC, the controversy that they created because considering as violating the sacrosanct state sovereignty an the principle of non interference in domestic affairs, the necessity to fight indifference to the faith of foreigners and unwillingness, whatever the motives, to ‘save strangers’ .The achievement was the adoption of the RtoP which entails the fall back responsibility of the international community with have to react and ensure the protection of civilians when a state is unable or unwilling to live up its responsibility. However, RtoP principles were endorsed but the criteria for military intervention aimed at guiding and facilitating the UNSC’s decision-making were rejected.

In chapter 2 we have seen how the crisis in Libya led the international community to adopt a surprising swift response to try to halt the humanitarian crisis in Libya. If the first resolution and the series of coercive measures short of military force have been unanimously adopted, we have seen in chapter 3 how controversy settled in the UNSC when the need for a more coercive response appeared. The division between the UNSC Members was on whether or not the conditions to use military force were met. The whole debate has focused on the very same principles rejected a few years ago. If a consensus emerged that the criterion to evaluate the legitimacy of the intervention was met, the UNSC Members could not agree on the other core principles. However this did not prevent the adoption of Resolution 1973 which has authorised the NATO operation in Libya. But the controversy on the implementation of the mandate in Libya and the inaction of the UNSC in the ongoing crisis in Syria paralysed by the veto of China and
Syria restart the debate on the need for guiding principles. UN Members had the opportunity to express the feeling that they have on how the UNSC comply with the RtoP and more specially how it implement the RtoR and its lack of clarity, consistency and impartiality have been criticised. That is how the UNSC could use the best the criteria for military intervention. By applying predictable criteria they will improve the understanding of the decision making and avoid those criticisms. The lack on consistency in the way the UNSC responded to the crisis in Darfur, Libya and Syria raised serious doubt on the willingness of the UNSC to go beyond the logic of the controversial humanitarian intervention to the more consensual RtoR under the RtoP principle. Indeed despite the polemic we have seen that UN Members have reaffirmed their commitment to the RtoP principles. Now it is time to start a constructive dialogue on the implementation of the RtoR.

The way forward

The Syrian population should not pay the price for what happened in Libya. Reminding the Syrian President that he has the primary responsibility to protect his people, using all peaceful means available to try to stop the bloodshed and reach a political and peaceful situation in Syria does not automatically entail that in case of failure there will be a military intervention. Declining to consider that what was going on for more than eight months in Syria might amount to crimes against humanity is based on some States’ fear that Syria becomes a new Libya. Some State member feel like NATO when far beyond what was authorised and what they have agreed for.

Keeping in mind that prevention is not always possible or could fail and that a constructive dialogue how to implement RtoR should still continue, the UN Members have to focus on implementation of the first pillar because the increasing ‘collaboration in the prevention of mass atrocities will decrease the need to respond with coercive measures under the third pillar’. As Secretary-General Ban Ki-moon said in 2009 ‘if

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the international community acts early enough, the choice need not be a stark one between doing nothing or using force'. 169.

169 UNGA ‘Implementation of the Responsibility to protect’ (n 9) para 11(b)
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