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The Responsibility of the International Community to Protect Syrian Citizens

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A THESIS SUBMITTED TO
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ABSTRACT

The responsibility to protect (R2P) doctrine allows the international community to intervene for humanitarian purposes in events of massive violations of human rights. However, the legality of humanitarian intervention has received considerable critical attention because of its direct conflict with two fundamental norms in international law: the prohibition of the use of force, except under certain conditions, and the principle of state sovereignty. In Syria, mass atrocity crimes are escalating on a daily basis. Until now, international efforts have failed to find a peaceful formula to stop the crisis. International law allows the Security Council to authorize humanitarian intervention under the power of Chapter VII of the Charter of the United Nations. Politically, however, the Security Council is deadlocked. This study applied the three pillars of the R2P to the Syrian case and found that Syria is indeed an R2P case. Moreover, the research considers the legality of humanitarian intervention versus its legitimacy. It concludes that humanitarian intervention is illegal or, at best, its legality is ambiguous. The research stresses the need to re-evaluate the international legal norms to respond to overwhelming humanitarian necessity. The research then analyses different scholarly opinions to study the legitimacy of humanitarian intervention and suggests that the international community has the right to protect Syrian citizens based on their moral duty. The thesis studies the political interests of the different strategic stakeholders in the Syrian situation and concludes that due to the lack of international interest, intervention is unlikely to materialize, and Syrians must look toward conflict resolution and reconciliation between the warring parties in order to rebuild Syria.

KEY WORDS

Syrian crisis; responsibility to protect (R2P); humanitarian intervention; international law; strategic and political situation

PERSONAL ACKNOWLEDGMENTS & DEDICATION

“Gratitude makes sense of our past, brings peace for today, and creates a vision for tomorrow”

Melody Beattie

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Ghuna

For My Daughter, Mai

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LIST OF ABBREVIATIONS

AI (Amnesty International)

ECOMOG (ECOWAS Cease-fire Monitoring Group)

HRW (Human Rights Watch)

ICC (International Criminal Court)

ICISS (International Commission on Intervention and State Sovereignty)

ICJ (International Court of Justice)

IFOR (Implementation Force)

IMF (International Monetary Fund)

INTERFET (International Force in East Timor)

ISIS (Islamic State of Iraq and Syria/Al-Sham)

KFOR (Kosovo Force)

MNF (Multinational Force)

MSF (Médecins Sans Frontières)

OPCW (Organisation for the Prohibition of Chemical Weapons)

R2P (Responsibility to Protect)

SFOR (Stabilization Force)

UNAMET (UN Mission in East Timor)

UNAMIR (UN Assistance Mission in Rwanda)

UNAMSIL (UN Mission in Sierra Leone)

UNGA (United Nations General Assembly)

UNITAF (Unified Task Force)

UNMH (UN Mission in Haiti)

UNOCI (United Nations Operation in Côte d'Ivoire)

UNOSOM (UN Operation in Somalia)

UNPREDEP (UN Preventive Deployment Force)

UNPROFOR (UN Protection Force)

UNSC (United Nations Security Council)

UNSMIS (United Nations Supervision Mission in Syria)

WSOD (World Summit Outcome Document)

Chapter 1

Introduction

Summary

In March 2011, the world witnessed the outbreak of the Syrian revolution. Many Syrians protested to topple the authoritarian rule of the governing Al-Assad regime and to replace it with the rule of law and justice. Many Syrians began a peaceful revolt and demanded reforms in the country, such as the freedom of opinion and expression, but the arrogance of the ruling regime and the tyranny of power prevented any positive response to those demands. The government intensified its crackdown on protestors and denied the people's demands, and as a result, the peaceful revolution transformed into an armed rebellion. Even yet, in May 2014, Syrians have not achieved victory over the tyrannical government. In fact, the situation in the country transformed from a revolution into a battle among the different warring parties.

The current humanitarian situation is dismal, mass atrocities are being committed by the warring parties,¹ and according to figures collected by international organizations in May 2014, there have been an estimated 162,402 casualties and approximately one third of Syrians are refugees in different countries around the world. The Syrian government has failed to abide by a peace agreement brokered by the United Nations and the Arab League.² In such circumstances, one might expect an external intervention to stop the ongoing crisis and protect human rights, but for many reasons, some legal and others political, the international community has not been able

1 UNHRC, Preliminary report of the High Commissioner on the situation of human rights in the Syrian Arab Republic, 17th Sess, UN Doc A/HRC/17/CRP.1 (June 2011) para 5, online:

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.CRP.1_Englishonly.pdf> [mimeo] [UN HRC, "Rights in Syrian Arab Republic"].

2 "Syria: Army Shoots Protesters Attempting to Reach Observers", *Human Rights Watch News Centre* (12 January 2012), online:<<http://www.hrw.org/news/2012/01/11/syria-army-shoots-protesters-attempting-reach-observers>>.

to effectively intervene to assist the Syrian people. This thesis questions the responsibility of the international community to protect Syrian citizens. It examines if Syria is a responsibility to protect (R2P) case and then analyses the legality of humanitarian intervention versus its legitimacy.

The R2P doctrine is an emerging norm in international law,³ and was established in response to the grave genocides in recent history, such as in Kosovo and Rwanda.⁴ In 2000, Kofi Annan, the Secretary-General of the United Nations, challenged the international community by asking: “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?”⁵ Accordingly, the International Commission on Intervention and State Sovereignty (ICISS) was established in September 2000 and presented its report that recommends the R2P doctrine. Thomas Weiss explains that, with few exceptions, “no idea has moved faster or farther in the international normative arena than the Responsibility to Protect.”⁶ The doctrine states that: (1) “[t]he State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement,”⁷ (2) “[t]he international community has a responsibility to encourage and assist States in fulfilling this responsibility,”⁸ and (3) “if a State

3 UNGA, *Note by the Secretary-General*, 59th Sess, UN Doc A/59/565 at para 203 (December 2004), online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/602/31/PDF/N0460231.pdf?OpenElement>> [mimeo] [UNGA, “Note by the Secretary-General”].

4 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, ON: International Development Research Centre, 2001) at VII, online: <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> [ICISS].

5 UNGA, *We the peoples: the role of the United Nations in the twenty-first century: Report of the Secretary General*, 54th Sess, UN Doc A/54/2000 (March 2000), online: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/54/2000> [mimeo].

6 Thomas G Weiss, “R2P after 9/11 and the World Summit” (2006) 24 Wis Intl LJ 741 at 741 [Weiss].

7 United Nations, *The Responsibility to Protect*, online: Office of the Special Adviser on the Prevention of Genocide <<http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>> [UN “The R2P”].

8 *Ibid.*

is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.”⁹ This action may necessitate the use of force for humanitarian purposes, which is often called humanitarian intervention.¹⁰

Scholars are divided in their opinions around the doctrine of the responsibility to protect. David Chandler admits that R2P shifts toward “a pragmatic response to changes in Realpolitik as it is a response based on concern for the world’s victims.”¹¹ Alternatively, for Noam Chomsky, R2P is a justification for the West’s interests in intervention, and says: “‘new interventionism’ is replaying an old record.”¹² Gareth Evans, from another point of view, poses the question of what are the options when helpless citizens are suffering. If “prevention fails, conflict breaks out within a state, and mass atrocity crimes are occurring or imminent, it is not an option for the world to stand by and do nothing.”¹³

Moreover, humanitarian intervention is in conflict with two fundamental principles in international law: the prohibition of use of force and the principle of state sovereignty. According to Article 2(4) of the Charter of the United Nations, the use of force is prohibited:

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, or in any other manner inconsistent with the Purposes of the United Nations.¹⁴

⁹ *Ibid.*

¹⁰ J.L. Holzgrefe & Robert O. Keohane, eds, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* at 18. (Cambridge: Cambridge University Press, 2003) [Holzgrefe & Keohane].

¹¹ David Chandler, “The Responsibility to Protect? Imposing the ‘Liberal Peace’” (2004) 11:1 *Intl Peacekeeping* 59. at 72 [Chandler].

¹² Noam Chomsky, “Lessons from Kosovo”, *Chomsky.Info: The Noam Chomsky Website*, online: Books <<http://www.chomsky.info/books/humanism01.htm>>, excerpted from Noam Chomsky, *The New Military Humanism* (Monroe, ME: Common Courage Press, 1999).

¹³ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once And For All* (Washington, DC: Brookings Institution Press, 2008) at 100 [Evans, “Ending Mass Atrocity”].

¹⁴ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [UN Charter]. In the R2P context, see e.g. Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (New York: Oxford University Press, 2011) at 47 [Chesterman].

International law, however, includes two exceptions on the preceding ban. The first exception is in the case of self-defence, which falls under Article 51 of the Charter of the United Nations, and the second exception falls under the Security Council authorization defined in Chapter VII of the UN Charter. Humanitarian intervention is not one of these exceptions and for that reason scholars have argued its legality.¹⁵ Simon Chesterman explains that “[o]n reading Article 2(4), it is not immediately clear whether the phrase ‘against the territorial integrity or political independence’ is intended to qualify the words ‘threat or use of force’ ... [as] it might be argued that this is the only type of force that is to be prohibited.”¹⁶ Therefore, Chesterman argues “reference to the *travaux préparatoires*¹⁷ makes it clear, however, that there was no intention for the words to restrict the scope of the prohibition of the use of force.”¹⁸ The words were added, as per Chesterman, “in response to the desire of several smaller states to emphasize the protection of territorial integrity and political independence.”¹⁹ From the other point of view, Christopher Greenwood, a judge in the ICJ, draws our attention to the main purpose behind the establishment of the UN Charter, claiming that:

[I]nternational law is not confined to treaty texts. It includes customary international law. That law is not static but develops through a process of State practice, of actions and the reaction to those actions. Since 1945, that process has seen a growing importance attached to the preservation of human rights. Where the threat of human rights has been of extreme character, States have been prepared to assert a right of humanitarian intervention as a matter of last resort.²⁰

15 Petra Perisic, “Legal Permissibility of Unilateral Humanitarian Interventions” (2013) 9:1 Acta Universitatis Danubius. Juridica 38 at 41 [Perisic].

16 Chesterman, *supra* note 14 at 48.

17 “the initial draft of the Charter of the United Nations”, see e.g. Perisic, *supra* note 15 at 41.

18 Chesterman, *supra* note 14 at 49.

19 *Ibid.*

20 Christopher Greenwood, “Humanitarian Intervention: the Case of Kosovo” in Jarna Petman & Martti Koskeniemi, eds, *Finnish Yearbook of International Law* (The Hague, the Netherlands: Kluwer Law International, 2002) 141 at 162, online: <<http://eprints.lse.ac.uk/21492/>> [Greenwood].

Moreover, state sovereignty is protected in Article 2(7) of the Charter of the United Nations.²¹ “On the international level, sovereignty means independence, i.e., non-interference by external powers in the internal affairs of another state. International norms are based on the principle of the sovereign equality of independent states; international law excludes interference and establishes universally-accepted rules.”²² However, some scholars consider sovereignty as a defense to protect tyrannical governments. Martti Koskenniemi views sovereignty as an “organized hypocrisy,” and argues “sovereignty ought not to shield tyrannical governments. We respect it if it brings us valuable objectives—security, welfare, human rights.”²³

As an attempt to legalise humanitarian intervention, some scholars, just like Sir Greenwood, have alleged that states’ previous systematic practices in relation to humanitarian intervention could be considered as a norm in customary international law, therefore a reason to legalise it. However, A.O. Enabulele debates that the repetition of the illegal intervention cannot make it legal.²⁴ Moreover, some scholars have argued that human rights and morality have superiority over the law and, accordingly, consider that humanitarian intervention is legitimate. One such scholar is Michael Walzer, who justifies humanitarian intervention, saying that:

Humanitarian intervention is justified when it is a response (with reasonable expectations of success) to acts “that shock the moral conscience of mankind.” The old-fashioned language seems to me exactly right. It is not the conscience of political leaders that one refers to in such cases. They have other things to worry about and may well be required to repress their normal feelings of indignation and outrage. The reference is to the moral convictions of ordinary men and women, acquired in the course of everyday activities. And given that one can make a persuasive argument in terms of those convictions, I don’t think that there is any

21 UN Charter. In the R2P context, see e.g. Chesterman, *supra* note 14 at 91.

22 Alain de Benoist, “What is Sovereignty?” (1999) 1999:116 *Telos* 99 at 100, online:<<http://telospressonline.com/content/1999/116/99.short>>.

23 Martti Koskenniemi, “What Use for Sovereignty Today?” (2011) 1:1 *Asian J of Intl L* 61 at 61, 63 [Koskenniemi].

24 A.O. Enabulele, “Humanitarian intervention and territorial sovereignty: the dilemma of two strange bedfellows” (2010) 14:3 *Intl JHR* 407 at 414 [Enabulele].

moral reason to adopt that posture of passivity that might be called waiting for the UN (waiting for the universal state, waiting for the messiah).²⁵

Ultimately, politics is at the core of international interventions; hence, intervention does not materialize in Syria. This thesis analyzes the international strategic and political situation in relation to the Syrian situation. The thesis concludes by stressing on the need to replace the existing norms in international law with unified norms that do not include a pick-and-choose process, and to create a law that can respond to people's suffering and respect their humanity.

Structure of the Thesis

The overall structure takes the form of five chapters, including the introductory Chapter 1. In Chapter 2, the situation in Syria is investigated. An overview explains how the revolution started. What was the motive? How did the revolution transform into a 'civil war'? In addition, the humanitarian situation is explained using actual numbers and facts from several reports from international human rights organizations, such as Amnesty International, Human Rights Watch, and the United Nations Human Rights Office.

There are many cases in Syria that demonstrate the ongoing crimes of mass atrocities, but this research selects two of the most prominent ones that convinced the international community to report the crimes in Syria to the International Court of Justice (ICJ). These two cases are "the use of chemical weapons in Damascus"²⁶ and the "evidence of 'industrial-scale killing' by the

25 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed (New York: Basic Books, 2006) at xxiii, cited in Anne Orford, "Moral Internationalism and the Responsibility to Protect" (2013) 24:1 Eur J Intl L 83 at 97 [Walzer].

26 UNGA–UNSC, *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013*, UNGA 67th Sess, UN Doc A/67/997–S/2013/553, September 2013, online: <http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/553> [mimeo] [UNGA, "Use of Chemical Weapons"].

Syrian regime.”²⁷ These cases led me to explore the reaction of the international community to these crimes. The international community made a number of attempts to solve the Syrian crisis, for example, the four Security Council draft resolutions, the Geneva Peace Plan, as well as many other measures that have failed to resolve the Syrian crisis.

Chapter 3 introduces the R2P doctrine. I review the 2001 ICISS report, and its further amendments. The term “mass atrocity crimes” is briefly defined to facilitate understanding of the Syrian situation and my arguments. The Report of the International Commission on Intervention and State Sovereignty asserts that the responsibility to protect means not only the “responsibility to react,” but also the “responsibility to prevent” and the “responsibility to rebuild.”²⁸ I discuss both the reactive and the preventive measures, and apply them to the research case to find out what measures have been taken in Syria by the international community. The failure of the preventive measures will give way to more coercive measures, such as the use of force.²⁹ Hence, I present the criteria that were suggested by ICISS, which have to be satisfied prior to any military intervention. Finally, I investigate if Syria is an R2P situation, and I apply the three pillars suggested by Mr Ban Ki-moon, the Secretary-General of the United Nations, to do so.³⁰ The Chapter finds that R2P is applicable in the Syrian case. Accordingly, the international community have the responsibility to protect Syrian citizens, based on the R2P doctrine.

27 “A Report into the credibility of certain evidence with regard to Torture and Execution of Persons Incarcerated by the current Syrian regime”, prepared for Carter-Ruck and Co. Solicitors of London, published by *The Guardian* (20 January 2011), online: <<http://www.theguardian.com/world/interactive/2014/jan/20/torture-of-persons-under-current-syrian-regime-report>> [credibility of certain evidence].

28 ICISS, *supra* note 4 at 17.

29 *Ibid.*

30 UNGA, *Implementing the responsibility to protect: Report of the Secretary General*, UN Doc A/63/677, January 2009 at para 6, online: <http://www.un.org/ga/search/view_doc.asp?symbol=A/63/677> [mimeo] [UNGA, “Implementing R2P”].

In light of the previous conclusion, Chapter 4 argues that humanitarian intervention could break the deadlock and resolve the Syrian crisis. However, humanitarian intervention is in conflict with two well-established principles in international law. I define humanitarian intervention, to distinguish between humanitarian intervention and traditional military intervention, and then I define the components that constitute international law in order to facilitate the discussions around the subject, for example, the position of customary law in international law. Afterwards, I study the legal position of humanitarian intervention in international law. However, the chapter is designed to determine whether an intervention can be justified in Syria based on its moral duty to protect the violation of fundamental human rights; accordingly, scholars' opinions are discussed. I conclude by suggesting that the international community has the right to protect Syrian citizens.

In Chapter 5, I explore the fact that the international community is divided regarding what constitutes the best action in relation to the Syrian situation. I discuss the interests of the three main strategic actors in the Syrian case: Russia, China, and the US. The first two are discussed because they used their veto power four times to preclude the resolutions from being passed in the Security Council. The US is discussed because of its threats to operate a military intervention against the Syrian regime following the catastrophic chemical weapons incident. The Chapter explored that there was always an intervention in Syria regardless of its direct military form.³¹

Finally, I conclude with some thoughts that, in order for the Charter of the United Nations to survive, some norms have to be developed to effectively respond to new changes in the international arena, I further add a few words from my personal experience, and some

31 Michael Ignatieff, "How to Save the Syrians" (13 September 2013), *The New York Review of Books: NYR* (blog), online: <<http://www.nybooks.com/blogs/nyrblog/2013/sep/13/how-save-syrians/>> [Ignatieff].

recommendations to Syrians to rebuild their own country based upon the revolutionary principles of freedom, equality, and dignity.

Methodology

The research was conducted based on primary and secondary sources. It used international law as a primary source, as well as the Charter of the United Nations, and international conventions and agreements, to explore the position of humanitarian intervention in international law. The research also conducted an in-depth analysis of the secondary sources in a review of the relevant literature of legal and political science scholars. The research considered the ICISS reports, and the relevant instruments in international law, reports to the Secretary-General of the United Nations, and documents from Human Rights Watch, Amnesty International, and United Nations Human Rights Office.

Scope of Work

The research is categorized as public international law, which is the main jurisdiction. The research discusses the R2P doctrine, its emergence and development, but did not study the responsibility to rebuild, which usually relates to a wide range of issues, such as good governance, justice and reconciliation, economic and social science, and the role of the rebuilding commission. The research gives an overview of the humanitarian intervention after 1945, the birth of the Charter of the United Nations, but it does not discuss the roots of humanitarian intervention before that date. Moreover, the research discusses a very timely and important issue that affects international peace and security. This research covers the Syrian situation, starting from the emergence of the revolution in February 2011 until May 2014.

Personal Motivation

I have tried to be as objective as I could while writing this thesis; however, I would like to share some of my personal experiences. When the revolution started at the beginning of 2011, I was one of many Syrians who were optimistic that Al-Assad would respond to the protesters' claims and would carry out significant reforms in the country. I wanted to believe that Al-Assad would deal with the protesters with at least the minimum level of respect for human rights, and would not follow the brutal behaviour of his father. However, Al-Assad responded to the peaceful protesters by killing and torturing people who were calling for their freedom and dignity. Protesters were not conservative Islamic groups or terrorists; they were nothing more than youth calling for dignity, equality and justice. I have witnessed the repression and brutality of the Syrian regime in dealing with the peaceful protesters. As a result, some of my lawyer colleagues and I were motivated to support revolutionists and advocate for their human rights.

People were very optimistic that the international community would not allow Al-Assad to stay, and I was one of them. With the international community's hesitation to respond to the genocide, my country became the most dangerous state in the world and embraced the most dangerous terrorist groups. In my opinion, if the international community had contained the crisis from the beginning, and if international law was able to effectively respond to the suffering of the Syrian people, Syria would not be in its current state of turmoil. The hesitation of the international community to respond to the human rights violations, and its respect for the sovereignty of the tyrannical regime over human rights was a direct cause for the crisis in Syria.

Chapter 2

Overview of the Syrian Situation

For more than 40 years, the Assad family has ruled Syria. Since 1971, when Hafez Al-Assad came to power, Syrians have suffered repression, tyranny, and brutality at the hands of this family. Many people were optimistic that his son, Bashar Al-Assad, who succeeded him as president in July 2000, would improve the deteriorating human rights situation in the country, especially after Bashar Al-Assad's inaugural speech, which was described as "a space for hope following the totalitarian years of President [Hafez] Assad."³² However, the son seemed to adopt the father's behaviour. In 2010, Human Right Watch reported that "[t]en years later, these initial hopes remain unfulfilled, and Al-Assad's words have not translated into any kind of government action to promote criticism, transparency, or democracy."³³ Therefore, it was not a surprise that Syrians decided to rise up against the Al-Assad regime. The Arab Spring encouraged them to start, as did the resignation of President Zine El Abidine Ben Ali after the outbreak of the Tunisian revolution at the end of 2010, and his escape from Tunisia in January 2011. The Egyptians' success in persuading President Hosni Mubarak, who ruled Egypt for more than 30 years, to step down, and his arrest and trial for the crimes he committed against the protesters was further encouragement. Likewise, the overwhelming support the Libyan opponents of President Muammar Gaddafi received from the West bolstered the Syrians.

Today, in 2014, "Syrians are on track to becoming the largest refugee population on the planet,"³⁴ with more than 6 million displaced in the neighbouring countries as well as further

32 Human Rights Watch, *A Wasted Decade: Human Rights in Syria during Bashar al-Assad's First Ten Years in Power*, 16 July 2010 at 2, online: Human Rights Watch Publications <<http://www.hrw.org/node/91580/section/2>> [HRW, "Wasted Decade"].

33 *Ibid* at 2.

34 Marc Garneau, "Marc Garneau: Open Canada's doors to more Syrian refugees", Comment, *National Post* (18 March 2014), online: <<http://fullcomment.nationalpost.com/2014/03/18/marc-garneau-open-canadas-doors-to-more-syrian-refugees/>> [Garneau].

away. The United Nations announced its inability to count the death toll.³⁵ The Syrian situation creates instability in the Middle East and affects international peace and security.³⁶ Mr Ban Ki-moon is disturbed about the destiny of the Syrian population. The international community has no clear vision for the foreseeable future. The West is unhappy and condemns the brutal crimes in Syria, and it appears that the giant countries are remembering their old calculations from the Cold War era.

How did the Syrian revolution start? What were the motives? How was the revolution transformed into a “civil war”? What is the humanitarian situation? What was the reaction of the international community? To explore these questions, this chapter investigates the situation in Syria from the beginning of the Syrian revolution in February 2011 until May 2014. It further explores the humanitarian situation and provides actual numbers and facts based on reports from international human rights organizations, such as Amnesty International, Human Rights Watch, and the UN Office for the High Commissioner for Human Rights.

There are many incidents that demonstrate the ongoing crimes of mass atrocities, but this research looks at two of the most prominent ones that convinced the international community to report the Syrian file to the International Court of Justice (ICJ). These two incidents were the Use of Chemical Weapons in Damascus and the Evidence of Industrial-Scale Killing by the Syrian Regime. This leads to further exploration of the international community’s reaction to these crimes, including the Security Council’s resolutions for Syria, the Geneva Peace Plan, as well as many other measures that have failed to resolve the Syrian crisis.

35 John Heilprin, “UN says it can no longer keep track of Syria death toll”, *The Associated Press* (7 January 2014), online: CTV News <<http://www.ctvnews.ca/world/un-says-it-can-no-longer-keep-track-of-syria-death-toll-1.1626828>>.

36 United Nations, Press Release, SC/10752 “Security Council, Meeting on Situation in Syria, Shifts Focus to Plight of Externally, Internally Displaced Persons: Deputy Secretary-General, High Commissioner for Refugees Deliver Briefings” (30 August 2012), online: UN Meetings Coverage & Press Releases <<http://www.un.org/News/Press/docs/2012/sc10752.doc.htm>>.

This chapter has two primary aims: (1) to prove that crimes against humanity have been committed and have escalated on a daily basis to become a serious humanitarian crisis that requires external help; and (2) although the crimes were committed by both of the warring parties in the Syria battle – the Syrian regime and the rebels – the Responsibility to Protect (R2P) doctrine applies when the state authority commits crimes against its citizens or when it is not able to halt such crimes, therefore the concentration will be on the crimes committed by Al-Assad regime. The chapter will be divided into three major sections:

- The Syrian revolution: the section is divided into three phases,

Phase One: The Birth of the Syrian Revolution in March 2011.

Phase Two: From Non-Violent Uprising to an Armed Struggle (March 2011–July 2012).

Phase Three: From Armed Struggle to Military Deadlock Conflict (July 2012–to date).

- The Humanitarian Situation.
- The International Efforts.

2.1. The Syrian Revolution

The current situation in Syria has evolved from excessively violent suppression of civilians condemning the regime's oppression and corruption into an all-out civil war. Therefore, this section will be divided into three different phases. The first phase will briefly discuss the birth of the Syrian revolution, and will explain under what circumstances the revolution has started, the second phase will explore how the Syrian revolution transformed into an armed struggle conflict, and then the third phase will explain how the struggle escalated to a military deadlock conflict.

Phase One: The Birth of the Syrian Revolution – March 2011

Early in 2011 the first signs of the uprising appeared in the Old City of Damascus, the capital of Syria, with protesters chanting “the Syrian people will not be humiliated.”³⁷ Unarmed protesters raised their voices calling for reforms in the country. The uprising was in response to many factors: government corruption, inequality, injustice, as well as the Syrians’ desire for dignity, democracy, and human rights. The UN Human Rights Council, in its June 2011 Annual Report, explains “thousands of Syrians participated in public demonstrations in locations across the country. The initial grievances raised by the demonstrators centered on issues such as corruption, discrimination, freedom of expression, participation in public affairs and decision-making and the release of political prisoners.”³⁸ On March 15, 2011, large-scale but peaceful demonstrations commenced in Daraa, a city in the southern part of Syria, a group of children, inspired by the Arab Spring, were detained and tortured by government intelligence agents. Human Rights Watch said “[t]he Daraa protests, which eventually spread all over Syria, were sparked by the detention and torture of 15 young boys accused of painting graffiti slogans calling for the downfall of the regime.”³⁹

Syrians are painfully aware of their forty-year history of violence. In 2010, Human Rights Watch stated that “Bashar al-Assad inherited a country with a legacy of abusive practices, but to date he has not taken any concrete steps to acknowledge and address these abuses or shed light on the fate of thousands of people who have disappeared since the 1980s.”⁴⁰ Before the revolution, Syrians could only whisper in secret about the massacres committed by the Syrian

37 Syrian on, “Damascus Protest 17 February 2011” (2 April 2011) at 2m:15s, online: YouTube

<<https://www.youtube.com/watch?v=i41MjEGqprI>>.

38 UN HRC, “Rights in Syrian Arab Republic”, *supra* note at 1 at 3.

39 Human Rights Watch, “*We’ve Never Seen Such Horror*”: Crimes against Humanity by Syrian Security Forces, 1 June 2011 at 1, online: Human Rights Watch Publications <<http://www.hrw.org/reports/2011/06/01/we-ve-never-seen-such-horror-0>>.

40 HRW, “Wasted Decade”, *supra* note 32 at 7.

regime. The most well-known are the massacre of Hama and the Tadmor prison massacre. In February 1982, the Syrian regime shelled the city of Hama. At that time it was difficult to document the massacre; however, Robert Fisk, a UK writer and journalist, succeeded to enter the Syrian city during the 1982 military assault and was an eyewitness to the massacre:

History comes full circle in Syria. In February 1982, President Hafez al-Assad's army stormed into the ancient cities to end an Islamist uprising. They killed at least 10,000 men, women and children, possibly 20,000. Some of the men were members of the armed Muslim Brotherhood.

Almost all the dead were Sunni Muslims, although even senior members of the Baath party were executed if they had the fatal word Hamwi – a citizen from Hama – on their identity cards. “Death a thousand times to the hired Muslim Brothers, who linked themselves to the enemies of the homeland,” Assad said after the slaughter.⁴¹

The other massacre that Syrians may remember well is the Tadmor Prison massacre. Tadmor Prison was described by Human Rights Watch as “The Kingdom of Death and Madness.”⁴² It is well known in Syria “not only for its harsh conditions but also for the depredations against civilian political prisoners that have occurred within its walls since 1980, such as torture and summary executions.”⁴³ Hafez Al-Assad committed his massacre after the failed assassination attempt against him. A Human Rights Watch report in April 1996 describes the massacre:

An estimated 500 prisoners were killed in cold blood at Tadmor on June 27, 1980, the day after an assassination attempt in Damascus on the life of President Hafez al-Assad. Commando forces from the Defense Brigades and the 138th Security Brigade were helicoptered to the prison and murdered prisoners in their dormitories. It is unknown how many other civilian prisoners at Tadmor

41 Robert Fisk, “Robert Fisk: The new focus of Syria’s crackdown has seen similar bloodshed before”, Comment, *The Independent* (6 July 2011), online: <<http://www.independent.co.uk/voices/commentators/fisk/robert-fisk-the-new-focus-of-syrias-crackdown-has-seen-similar-bloodshed-before-2307427.html>> [Fisk].

42 Human Rights Watch, *Syria’s Tadmor Prison: Dissent Still Hostage to a Legacy of Terror*, 1 April 1996, Vol. 8, No. 2 (E), online: Human Rights Watch Publications <<http://www.hrw.org/reports/1996/Syria2.htm>> [HRW, “Tadmor Prison”].

43 *Ibid.*

subsequently were tried and sentenced there by an exceptional military field court, in grossly unfair proceedings, and how many of those sentenced to death by the court were executed by hanging. Nor is it known how many died from torture or medical neglect ... Since 1980, authorities incarcerated thousands of civilian detainees at Tadmor, including untold numbers detained solely on political grounds ... Severely overcrowded at times, the facility held up to 6,500 civilian prisoners.⁴⁴

As the Human Rights Watch report indicates, states from the international community attempted to halt this massacre, but faced the situation they are still facing today. The Syrian regime “considers expressions of interest by other governments in human rights cases as interference in Syria’s internal affairs.”⁴⁵ Human Rights Watch “views these actions as unconscionable and unjustifiable.”⁴⁶ Al-Assad crimes were not limited to the last two massacres, other incidents occurred in the late 1970s and 1980s as Al-Assad tried to eliminate his opponents. Human Rights Watch documented these crimes and concluded that:

The security forces detained and tortured thousands of members of the Muslim Brotherhood, communist and other leftist parties, the Iraqi Ba`ath party, Nasserite parties, and different Palestinian groups—many of whom subsequently disappeared. While no exact figures exist, various researchers estimate the number of the disappeared to be 17,000 persons. Syria’s armed forces and security services also detained and abducted Lebanese, Palestinians, and other Arab nationals during Syria’s military presence in Lebanon, hundreds of whom are still unaccounted for ... The Syrian security troops committed large scale human rights violations during the fighting, including the killing of hundreds of people in a series of mass executions near the municipal stadium and other sites.⁴⁷

Therefore, what Syrians are facing today is not new for them. They have been under the same brutal regime for a long time, even before the revolution, and the only difference is that they can no longer stay silent. Syrians, just like others, desire freedom.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ HRW, “Wasted Decade”, *supra* note 32 at 26.

Phase Two: From Non-Violent Uprising to an Armed Struggle (March 2011–July 2012)

The demonstrations of 2011, where the people were seeking reforms, spread all over the country. As the repression increased, the numbers joining the demonstrations increased – a few hundred became thousands. UN Human Rights Council noted:

Yet following the brutal reaction of the Syrian authorities to the incipient demonstrations, subsequent protests not only called for dialogue and reforms relating to these grievances, they also rejected the repressive tactics adopted by Syrian security forces, called for greater respect for fundamental human rights and freedoms generally, and demanded that far-reaching economic, legal and political reforms be undertaken on an urgent basis – in particular with respect to the 1963 State of Emergency, which allowed the suspension of fundamental rights and attributed broad and exceptional powers to the security forces.⁴⁸

Al-Assad responded by making a few reforms to grant Syrians greater freedoms.⁴⁹ One was the declaration of amnesties to free detainees from the Syrian prisons. Unfortunately, these amnesties freed drug dealers and some dangerous terrorists, not political opponents.⁵⁰ Another reform was a referendum for a new constitution. However, the new constitution gave little power to the citizens, but much power to the President.⁵¹ Al-Assad opposition commented that the constitution “gives sweeping powers to the president to decree laws, appoint the government and dissolve parliament, and seemed designed to ensure that the current system remains largely intact ... It’s incredibly weak ... It confirms our fears that there will be no true reform under Assad, only cosmetic reforms.”⁵²

48 UN HRC, “Rights in Syrian Arab Republic”, *supra* note 1 at 3.

49 Suleiman al-Khalidi, “Thousands chant ‘freedom’ despite Assad reform offer”, *Reuters* (24 March 2011), online: <<http://www.reuters.com/article/2011/03/24/us-syria-idustre72n2mc20110324>>.

50 *Al Arabiya News Agencies*, “Assad issues fresh general amnesty for crimes committed in Syria”, *Al Arabiya News- Middle East* (16 April 2013), <online:<http://english.alarabiya.net/en/News/middle-east/2013/04/16/Assad-issues-fresh-general-amnesty-for-crimes-in-Syria.html>>.

51 Liz Sly, “Syria’s President Assad announces Feb. 26 referendum on new constitution”, *The Washington Post* (15 February 2012), online: <http://www.washingtonpost.com/world/syria-announces-feb-26-for-referendum-on-new-constitution/2012/02/15/gIQAo5AbFR_story.html> [Sly].

52 *Ibid.*

Human Rights Watch criticized these reforms by saying that they continue “to be undermined by the ongoing repression and violence accompanying security operations and it do not touch on concerns regarding impunity for violations by security services.”⁵³ As a result, protesters asked “how the government intended to hold a referendum at a time when violence [was] engulfing the country.”⁵⁴ Al-Assad not only continued his violations of human rights but also intensified his attacks against civilians. The Human Rights Council commented on the situation:

At the same time [state] Syrian security forces escalated their response to the demonstrations, deploying military forces to areas where the demonstrations were the most intense. It is in this general context that allegations of widespread human rights violations have been reported. These include the excessive use of force in quelling demonstrators, arbitrary detentions, summary executions, torture and other cruel or inhuman treatment, violations of the rights to freedom of assembly, expression, and movement, and violations of the rights to food and health.⁵⁵

The demonstrations continued to spread across the country as Al-Assad’s regime pursued an aggressive approach against civilians, involving tanks, infantry carriers, artillery, and the air force.⁵⁶ “Over time, many soldiers and officers defected from the Syrian army, the number of defections increased as the level of violence used by the regime increased. As the uprising continued, opposition fighters became better equipped, and senior military officers and government officials also began to defect.”⁵⁷ On July 29, 2011, a group of officers who had

53 Human Rights Watch, “*By All Means Necessary!*”: *Individual and Command Responsibility for Crimes against Humanity in Syria*, 15 December 2011 at 77, online: RefWorld <<http://www.refworld.org/docid/4f05a2c92.html>>.

54 Sly, *supra* note 51.

55 UN HRC, “Rights in Syrian Arab Republic”, *supra* note 1 at para 5.

56 Eddie Boxx & Jeffrey White, *Responding to Assad’s Use of Airpower in Syria*, 20 November 2012, online: The Washington Institute, Policy Analysis <<http://www.washingtoninstitute.org/policy-analysis/view/responding-to-assads-use-of-airpower-in-syria>>.

57 Dawlaty and NPWJ, “Transitional Justice in Syria” (31 July 2013), online: <http://lb.boell.org/sites/default/files/thransisional_justice.pdf>.

defected from the army announced the formation of the Free Syrian Army.⁵⁸ This moved the revolution into a new phase, which soon escalated into an intensive armed struggle with an increasingly larger armed opposition.⁵⁹

Phase Three: From Armed Struggle to Military Deadlock Conflict (July 2012–to date)

The Syrians' revolution against autocracy that called for dignity, freedom, and equality turned into a deadlocked conflict. Syria now contains a number of warring parties, each with a different agenda and convinced that a military victory is possible, and resulting in a civil war in the country.. The Human Rights Council stated in the September 2013 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic that:

The Syrian Arab Republic is a battlefield. Its cities and towns suffer relentless shelling and sieges. Massacres are perpetrated with impunity. An untold number of Syrians have disappeared. ... Government and pro-government forces have continued to conduct widespread attacks on the civilian population, committing murder, torture, rape and enforced disappearance as crimes against humanity. They have laid siege to neighbourhoods and subjected them to indiscriminate shelling. Government forces have committed gross violations of human rights and the war crimes of torture, hostage-taking, murder, execution without due process, rape, attacking protected objects and pillage. Anti-government armed groups have committed war crimes, including murder, execution without due process, torture, hostage-taking and attacking protected objects. They have besieged and indiscriminately shelled civilian neighbourhoods. Anti-government and Kurdish armed groups have recruited and used child soldiers in hostilities. The perpetrators of these violations and crimes, on all sides, act in defiance of international law.⁶⁰

The country is relatively accessible to jihadists, who are radical Islamists strongly committed to global military operations, such as Al-Qaeda, Nusra Front, Islamic State of Iraq

58 Joshua Landis, "Free Syrian Army Founded by Seven Officers to Fight the Syrian Army" (29 July 2011), *Syria Comment: Syrian Politics, History, and Religion* (blog), online: <<http://www.joshualandis.com/blog/free-syrian-army-established-to-fight-the-syrian-army/>>.

⁵⁹ *Supra* note 58

60 UNHRC, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, 24th Sess, UN Doc A/HRC/24/46 (September 2013) at 1, online: <http://www.globalr2p.org/media/files/a_hrc_24_46_encoisept2013.pdf> [mimeo].

and Syria/Al-Sham (ISIS),⁶¹ and other affiliated groups and conservative parties, who have emerged from within the rebel parties. Many of these groups are composed of non-Syrian citizens coming from all around the world for jihad (martyrdom).⁶² Officials from the West believe, however, that Al-Assad used these jihadist groups to threaten the Syrian people, who, generally, are liberal, as well as to threaten the West, because it had fought anti-terrorism since the events of September 2001. Tom Whitehead per instance, writing in *The Telegraph*, argues that there is evidence suggesting that Al-Assad has forged links with terrorists:

[A British official] accused President Bashar Al-Assad's regime of deliberately helping radical groups linked to al-Qaeda to come to the forefront of Syria's civil war. Mr. Assad's history of cooperation with al-Qaeda went back to 2005 and 2006 when he allowed its fighters to enter Iraq across Syrian territory. "The regime has had a relationship with al-Qaeda since 2006," said the official. The evidence suggested that Mr Assad has forged links with the Islamic State of Iraq and Syria (ISIS) and Jabhat Al-Nusra, two al-Qaeda linked groups, he added. Mr Assad has released hundreds of radical jihadists from Syria's jails, with several of them going on to assume leading positions in both of these movements. The Syrian air force has concentrated its raids on the moderate opposition, giving al-Qaeda's allies a degree of immunity from attack. In addition, the extremists have been able to export oil from areas they control using transit routes across regime-held territory.⁶³

Unfortunately, the price for freedom is very expensive. Syrians are paying for it every day at the refugee camps, leaving their homes and missing their loved ones. The continuously deteriorating humanitarian situation requires external help and action needs to be taken to stop the bloodshed in Syria. The next section will highlight the humanitarian situation and discuss the international efforts taken by the international community in an attempt to avert the situation, but unfortunately, those efforts remain unsuccessful.

61 Ben Wedeman, "CNN Exclusive: Videos show brutality of radical group ISIS in Syria", *CNN World News*, (17 February 2014), online: <<http://www.cnn.com/2014/02/17/world/meast/syria-isis-leader-videos/index.html>>.

62 Robert Mackey, "A Dutch Jihadist in Syria Speaks, and Blogs" (29 January 2014), *The Lede: The New York Times News Blog*, online: <http://thelede.blogs.nytimes.com/2014/01/29/a-dutch-jihadist-in-syria-speaks-and-blogs/?_php=true&_type=blogs&_r=0>.

63 Whitehead, Spencer & Blair, *supra* note 50.

2.2. Humanitarian Situation

The Syria situation is considered to be “one of the worst humanitarian crises the world has seen in recent decades.”⁶⁴ Since the beginning of the revolution many humanitarian organizations have reported war crimes and crimes against humanity by the different warring parties in the Syrian battle. The United Nations Human Rights Office announced, in January 2014, that it “has stopped updating the death toll from Syria's civil war, confirming ... that it can no longer verify the sources of information.”⁶⁵ However, the Syrian Observatory for Human Rights, a UK-based organization, on May 19, 2014, documented the death toll since the beginning of the revolution as being 162,402 persons, includes 8,607 children and 5,586 women.⁶⁶

The United Nations High Commissioner for Refugees, António Guterres, announced that “Syrians are on track to become the largest refugee population on the planet. By the end of this year [2014], they are projected to number over 4-million – more than were caused by the Rwandan genocide.”⁶⁷ Moreover, the United Nations expects the number of Syrians displaced internally, as a result of the war, “to nearly double from some 3.5 million today [February 2014] to 6.5 million by the end of the year.”⁶⁸ In addition to the affected children that are in need of aid, UNICEF reported in March 2014 that:

64 “Syria: A Bearing Witness Trip”, *Confront Genocide, the Center for the Prevention of Genocide, United States Holocaust Memorial Museum* (February 2014), online: <<http://www.ushmm.org/confront-genocide/about/initiatives/bearing-witness-trips/syria-a-bearing-witness-trip>>.

65 John Heilprin, “UN says it can no longer keep track of Syria death toll”, *The Associated Press* (7 January 2014), online: CTV News <<http://www.ctvnews.ca/world/un-says-it-can-no-longer-keep-track-of-syria-death-toll-1.1626828>>.

66 “More than 162,000 dead in Syria’s since 18/03/2011”, *Syrian Observatory for Human Rights* (19 May 2014), online: <http://syriahr.com/en/index.php?option=com_news&nid=2275&Itemid=2&task=displaynews#.U6MGKLGUtyA>.

67 Garneau, *supra* note 34.

68 “Syrians internally displaced by war expected to nearly double to 6.5 million by year’s end – UN”, *UN News Centre* (5 February 2014), online: <<http://www.un.org/apps/news/story.asp?NewsID=47084&Cr#.U9GafPldXMu>>.

An accelerating crisis for children since March 2013, the number of children affected by the crisis has more than doubled from 2.3 million to more than 5.5 million. The number of children displaced inside Syria has more than tripled from 920,000 to almost 3 million. The number of child refugees has more than quadrupled from 260,000 to more than 1.2 million. Of these children, 425,000 are under the age of five.⁶⁹

While there are many cases of ongoing mass atrocities, this research focuses on two of the most prominent cases that persuaded the international community to report the Syrian file to the ICJ: the use of chemical weapons in Damascus and the evidence of ‘industrial-scale killing’ by the Syrian regime. These two cases will be discussed as an overview of the crimes against humanity that are being committed on a daily basis in Syria.

The First Case: The Use of Chemical Weapons in Damascus, Al-Ghouta

In August 2013, the international medical humanitarian organization *Médecins Sans Frontières* (MSF) reported receiving “approximately 3,600 patients displaying neurotoxic symptoms in less than three hours on the morning of Wednesday, 21 August 2013. Of those patients, 355 reportedly died.”⁷⁰ MSF could not confirm the cause, but “the reported symptoms of the patients ... strongly indicate mass exposure to a neurotoxic agent. This would constitute a violation of international humanitarian law, which absolutely prohibits the use of chemical and biological weapons.”⁷¹ In response, the Secretary-General of the United Nations established a mission to investigate the allegations of the use of chemical weapons.⁷² The mission concluded unequivocally that there was evidence that “chemical weapons have been used in the ongoing

69 UNICEF, *Under Siege: The devastating impact on children of three years of conflict in Syria*, March 2014 at 3, online: UNICEF Publications <http://www.unicef.org/publications/files/Under_Siege_March_2014.pdf>.

70 “Syria: Thousands suffering neurotoxic symptoms treated in hospitals supported by MSF”, *Médecins Sans Frontières* (24 August 2013), online: <<http://www.msf.org/article/syria-thousands-suffering-neurotoxic-symptoms-treated-hospitals-supported-msf>>.

71 *Ibid.*

72 UNGA, “Use of Chemical Weapons”, *supra* note 26 at 4.

conflict between the parties in [Syria, and also were used] against civilians, including children, on a relatively large scale.”⁷³

On September 16, 2013, the Secretary-General Ban Ki-moon remarked that the use of chemical weapons is a war crime:

This is a war crime and a grave violation of the 1925 Protocol and other rules of customary international law. It is the most significant confirmed use of chemical weapons against civilians since Saddam Hussein used them in Halabja in 1988 – and the worst use of weapons of mass destruction in the 21st century. The international community has a responsibility to ensure that chemical weapons never re-emerge as an instrument of warfare ... There must be accountability for the use of chemical weapons. Any use of chemical weapons by anyone, anywhere, is a crime.⁷⁴

Both the Syrian regime and the opposition groups, along with their allied states, started to exchange accusations. Russia accused the opponents of the Syrian regime, with President Vladimir Putin arguing that “[n]o one doubts that poison gas was used in Syria. But there is every reason to believe it was used not by the Syrian Army, but by opposition forces, to provoke intervention by their powerful foreign patrons, who would be siding with the fundamentalists.”⁷⁵ President Obama, along with US allies, accused the Syrian regime for this crime, and threatened to mobilize intervention against the Al-Assad regime.⁷⁶ Against these declarations, and in response to the United Nations Security Council Resolution 2118, dated September 27, 2013,

⁷³ *Ibid* at 8.

⁷⁴ “Secretary-General’s press encounter on the Report of the Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic: Report on the incident of 21 August 2013 in the Ghouta area of Damascus”, *United Nations Secretary-General Ban Ki-moon, Off-the-Cuff* (16 September 2013), online: <www.un.org/sg/offthecuff/index.asp?nid=2985>.

⁷⁵ Vladimir V. Putin, “A Plea for Caution From Russia: What Putin Has to Say to Americans About Syria”, Editorial, *The New York Times* (11 September 2013), online: <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?ref=opinion&_r=0>.

⁷⁶ Aaron Blake, “White House lists 10 countries supporting action on Syria”, *The Washington Post* (6 September 2013), online: <<http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/06/white-house-lists-10-allies-on-syria/>>.

which demanded the destruction or removal of chemical stockpiles by mid-2014,⁷⁷ the Al-Assad regime announced that it would become a signatory to the Convention on the Prohibition of Chemical Weapons and agreed to destroy its chemical weapons.⁷⁸

In December 2013, Ban Ki-moon called on the international community to hold accountable those responsible for the use of chemical weapons, saying that “[t]he international community has a moral and political responsibility to hold accountable those responsible, to deter future incidents and to ensure that chemical weapons can never re-emerge as an instrument of warfare.”⁷⁹ However, despite the international community’s condemnation and the US threats, the Syrian regime continues to use chemical weapons against civilians. There were strong allegations “that government forces dropped barrel bombs containing embedded chlorine gas cylinders in attacks from April 11 to 21 [2014] on three towns in northwestern Syria.”⁸⁰ Human Rights Watch conducted an investigation and announced in May 2014 that “[t]hese attacks used an industrial chemical as a weapon, an act banned by the international treaty prohibiting chemical weapons that Syria joined in October 2013. The Syrian government is the only party to the conflict with helicopters and other aircraft.”⁸¹

Nadim Houry, the Deputy Director, Middle East and North Africa Division, at Human Rights Watch, said that “Syria’s apparent use of chlorine gas as a weapon ... is a plain violation of international law ... This is one more reason for the UN Security Council to refer the situation

77 United Nations, Press Release, SC/11135 “Security Council Requires Scheduled Destruction of Syria’s Chemical Weapons, Unanimously Adopting Resolution 2118 (2013)” (27 September 2013), online: UN Meetings Coverage & Press Releases <<http://www.un.org/News/Press/docs/2013/sc11135.doc.htm>>.

78 Thomas Grove, “Syria Will Sign Chemical Weapons Convention, Declare Arsenal, Foreign Ministry Says”, *Reuters* (10 September 2013), online: The World Post <http://www.huffingtonpost.com/2013/09/10/syria-chemical-weapons-convention_n_3901417.html>.

79 “Those guilty of chemical weapons attacks in Syria must be held accountable – Ban”, *UN News Centre* (13 December 2013), online: <<http://www.un.org/apps/news/story.asp?NewsID=46739#.U3ofECiUtyA>>.

80 “Syria: Strong Evidence Government Used Chemicals as a Weapon”, *Human Rights Watch News Centre* (13 May 2014), online: <<http://www.hrw.org/news/2014/05/13/syria-strong-evidence-government-used-chemicals-weapon>>.

81 *Ibid.*

in Syria to the International Criminal Court...The international community urgently needs to take firm collective action if it is to prevent and suppress further violations.”⁸² Although, many states in the international community condemn the use of chemical weapons in Syria,⁸³ up until May 2014, the crime has not been referred to the International Criminal Court (ICC).

The Second Case: Evidence of Industrial-Scale Killing by the Syrian Regime

In April 2014, “[p]hotographs of about 11,000 Syrians said to have been tortured and killed by Bashar al-Assad's forces are to be seen ... by members of the UN security council as part of an effort to prosecute the perpetrators for war crimes.”⁸⁴ The photographs were presented by “a military policeman who worked secretly with a Syrian opposition group and later defected and fled the country.”⁸⁵ The policeman “smuggled the images out of the country on memory sticks to a contact in the Syrian National Movement.”⁸⁶ To determine the creditability of the photographs, an investigation was conducted by three “former prosecutors ... Sir Desmond de Silva QC, former chief prosecutor of the special court for Sierra Leone, Sir Geoffrey Nice QC, the former lead prosecutor of former Yugoslavian president Slobodan Milosevic, and Professor David Crane, who indicted President Charles Taylor of Liberia at the Sierra Leone court.”⁸⁷ The prosecutors prepared a report for Carter-Ruck and Co. Solicitors of London, an international law

⁸² *Ibid.*

⁸³ Jay Solomon, “France Accuses Syrian Regime of Multiple Chlorine Gas Attacks”, *The Wall Street Journal* (13 May 2014), online: <<http://online.wsj.com/news/articles/SB10001424052702303851804579560400363946762>>.

⁸⁴ Ian Black, “Syrian torture images to be examined by UN security council”, *The Guardian* (15 April 2014), online: <<http://www.theguardian.com/world/2014/apr/15/syrian-torture-images-security-council-war-crimes>>.

⁸⁵ Ian Black, “Syrian regime document trove shows evidence of 'industrial scale' killing of detainees”, *The Guardian* (21 January 2014), online: <<http://www.theguardian.com/world/2014/jan/20/evidence-industrial-scale-killing-syria-war-crimes>>.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

firm based in the UK, which was appointed by Qatar.⁸⁸ The report was published to media in January 20, 2014, and was titled: “A Report into the creditability of certain evidence with regards to Torture and Execution of Persons Incarcerated by the current Syrian regime.”⁸⁹ The report found that the policeman allegations was credible and concluded:

- The inquiry team is satisfied that upon the material it has reviewed there is clear evidence, capable of being believed by a tribunal of fact in a court of law, of systematic torture and killing of detained persons by the agents of the Syrian government.
- Such evidence would support findings of crimes against humanity against the current Syrian regime.
- Such evidence could also support findings of war crimes against the current Syrian regime.⁹⁰

The Syrian regime discharged the allegations, the Syria Ministry of Justice said that “both photos and report [are] ‘politicised and lacking objectiveness and professionalism’, a ‘gathering of images of unidentified people, some of whom have turned out to be foreigners.’”⁹¹ Amnesty International said that “[w]orld leaders must demand that the Commission of Inquiry and other human rights bodies be granted immediate access to all places of detention – formal and informal – in Syria.”⁹² It further questioned the opinion of the international community toward the crimes in Syria. Amnesty International condemned the crimes, saying “[i]t certainly raises the question once again why the Security Council has not yet referred the situation in Syria to the Prosecutor of the International Criminal Court.”⁹³ Subsequently, more than 60 countries in the international

⁸⁸ *Ibid.*

⁸⁹ Credibility of certain evidence, *supra* note 27.

⁹⁰ *Ibid.*

⁹¹ Ian Black, “Syrian torture images to be examined by UN security council”, *The Guardian* (15 April 2014), online: <<http://www.theguardian.com/world/2014/apr/15/syrian-torture-images-security-council-war-crimes>>.

⁹² “Syria peace conference must act on allegations of ‘industrial-scale’ torture and killings in custody”, *Amnesty International News* (21 January 2014), online: <<http://www.amnesty.org/en/news/syria-peace-conference-must-act-allegations-industrial-scale-torture-and-killings-custody-2014->>.

⁹³ *Ibid.*

community have suggested that the situation in Syria be referred to the ICC Prosecutor for the possible prosecution of crimes against humanity.⁹⁴ Syria is not a signatory to the Rome Statute of the International Criminal Court; hence the referral should be through the Security Council. The United Nations drafted resolution S/2014/348 dated May, 22, 2014,⁹⁵ but Russia and China used their veto power to stop the referral to the ICC, leaving the perpetrators of these crimes against humanity to go unpunished. Jan Eliasson, U.N. Deputy-Secretary-General, told the council on behalf of Secretary-General Ban Ki-moon: “If members of the council continue to be unable to agree on a measure that could provide some accountability for the ongoing crimes, the credibility of this body and of the entire organization will continue to suffer.”⁹⁶

These two examples, and many others that are not addressed herein given the length of this research, have been mentioned to show that the international community has a *prima facie* case⁹⁷ that crimes against humanity are being committed in a systematic way against Syrian citizens. In addition to the UNSC resolution mentioned above, there were many attempts by different states in the international community to find legal and peaceful solutions to the crisis in Syria, however, the next section will explain that these efforts have failed to avert the crisis.

2.3. The International Efforts

One may have expected a radical solution from the international community in response to the ongoing crisis in Syria and the deterioration in the humanitarian situation there. Following

94 Michelle Nichols & Louis Charbonneau, “Russia, China veto U.N. bid to refer Syria to international court”, *Reuters* (22 May 2014), online: <<http://www.reuters.com/article/2014/05/22/us-syria-crisis-un-icc-idUSBREA4L0V920140522>> [Nichols & Charbonneau].

95 UNSC, *Albania [et al]: draft resolution*, UN Doc S/2014/348, May 2014, online:

<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_348.pdf> [mimeo].

96 Nichols & Charbonneau, *supra* note 94.

97 A *prima facie* case is the establishment of a legally required rebuttable presumption. See “*Prima Facie*”, *Cornell University Law School Legal Information Institute*, online: <http://www.law.cornell.edu/wex/prima_facie>.

World War II, it was the international community that decided to save people from future humanitarian disasters. In the simplest terms, the United Nations, through the Security Council, could authorize humanitarian intervention under Chapter VII of the United Nations Charter. Unfortunately, the UN Security Council remains deadlocked. Its resolutions in relation to Syria were precluded by the lack of support from Russia and China, who support the Al-Assad regime because of their own strategic interests. Moreover, the international community developed an UN-Arab League Peace Plan to attempt to put an end to the continuous bloodshed in Syria. Unfortunately, in May 2014, Lakhdar Brahimi, the UN and Arab League Special Envoy to Syria, apologized to Syrians for his inability to find a peaceful solution to end the Syrian crisis after the failure of the Geneva peace talks.⁹⁸ The following section addresses the UN Security Council's draft resolutions relating to Syria, and then delves into the UN-Arab League missions in Syria.

Deadlock Resolutions

The draft resolution by the United Nations Security Council (UNSC) that was discussed above was not the first attempt by the international community to resolve the situation in Syria. Three different draft resolutions were presented to the UNSC in 2011 and 2012 that expressed serious concern about the situation in Syria and sought to force the Al-Assad regime to stop its attacks on civilians.

The first draft resolution was presented on October 4, 2011, and condemned the Syrian regime's crackdown on protesters, demanded an immediate end to all violence, and demanded that the Syrian authorities immediately:

⁹⁸ Oliver Holmes & Tom Miles, "Mediator apologizes to Syrians for lack of peace progress", *Reuters* (15 February 2014), online:<<http://www.reuters.com/article/2014/02/15/us-syria-crisis-brahimi-idUSBREA1E0G220140215>> [Holmes & Miles].

- (a) Cease violations of human rights, comply with their obligations under applicable international law, and cooperate fully with the office of the High Commissioner for Human Rights;
- (b) allow the full exercise of human rights and fundamental freedoms by its entire population, including rights of freedom of expression and peaceful assembly, release all political prisoners and detained peaceful demonstrators, and lift restrictions on all forms of media;
- (c) cease the use of force against civilians;
- (d) alleviate the humanitarian situation in crisis areas, by allowing expeditious, unhindered and sustained access for internationally recognized human rights monitors, humanitarian agencies and workers, and restoring basic services including access to hospitals;
- (e) ensure the safe and voluntary return of those who have fled the violence to their homes.⁹⁹

The draft resolution stated that it is “the Syrian government’s primary responsibility to protect its population,” and stressed that:

[T]he only solution to the current crisis in Syria is through an inclusive and Syrian-led political process with the aim of effectively addressing the legitimate aspirations and concerns of the population which will allow the full exercise of fundamental freedoms for its entire population, including of the rights of freedom of expression, assembly and peaceful protest.¹⁰⁰

The resolution “would have been the first such legally binding move adopted by the Security Council since President Bashar Assad's military began using tanks and soldiers against protesters in mid-March.”¹⁰¹ Unfortunately, the resolution was precluded by Russia’s and China’s veto.¹⁰²

The second draft resolution was presented on February 4, 2012 and demanded that:

the Syrian government immediately put an end to all human rights violations and attacks against those exercising their rights to freedom of expression, peaceful assembly and

99 UNSC, *France [et al]: draft resolution*, UN Doc S/2011/612, October 2011 para 4, online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2011%20612.pdf>> [mimeo].

100 *Ibid* at 1.

101 The Guardian, “Russia and China veto UN resolution against Syrian regime”, *The Guardian* (5 October 2011), online: <<http://www.theguardian.com/world/2011/oct/05/russia-china-veto-syria-resolution>>.

102 *Ibid*.

association, protect its population, fully comply with its obligations under applicable international law.”¹⁰³

The resolution also called “for an inclusive Syrian-led political process conducted in an environment free from violence, fear, intimidation and extremism, and aimed at effectively addressing the legitimate aspirations and concerns of Syria’s people, without prejudging the outcome.”¹⁰⁴ However, Russia and China vetoed the draft resolution again, caring for nothing but their strategic interests in the area.¹⁰⁵

The third draft resolution was vetoed on July 19, 2012; it determined “that the situation in Syria constitutes a threat to international peace and security,”¹⁰⁶ and:

[Demanded] the urgent, comprehensive, and immediate implementation of, all elements of the Envoy’s six-point proposal as annexed to resolution 2042 (2012) aimed at bringing an immediate end to all violence and human rights violations, securing humanitarian access and facilitating a Syrian-led political transition ... leading to a democratic, plural political system, in which citizens are equal regardless of their affiliations, ethnicities or beliefs, including through commencing a comprehensive political dialogue between the Syrian authorities and the whole spectrum of the Syrian opposition.¹⁰⁷

The draft resolution asserts that the Syrian authorities have to implement it within ten days,¹⁰⁸ but again the resolution was precluded by the veto power of Russia and China. Therefore, it is

103 UNSC, *Bahrain [et al]: draft resolution*, UN Doc S/2012/77, February 2012 para 2, online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2012%2077.pdf>> [mimeo].

104 *Ibid* at para 6.

105 Paul Harris, Martin Chulov, David Batty and Damien Pearse, “Syria resolution vetoed by Russia and China at United Nations”, *The Guardian* (4 February 2012), online: <<http://www.theguardian.com/world/2012/feb/04/assad-obama-resign-un-resolution>>.

106 UNSC, *France [et al]: draft resolution*, UN Doc S/2012/538, July 2012 at 2, online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2012%20538.pdf>> [mimeo].

107 *Ibid* at para 3.

108 *Ibid* at para 14.

clear that states in the international community have tried to find a legally binding resolution to the Syrian crisis through the Security Council of the United Nations, but so far, have failed.¹⁰⁹

Geneva Peace Plan

Alongside the legal efforts of the international community to find a solution to the crisis in Syria, a series of political and diplomatic measures emerged as well. In February 2012, Mr Kofi Annan, who was appointed as the first Joint Special Envoy of the United Nations and the League of Arab States, set out a six-point proposal that sought the agreement of the warring parties to:

(1) commit to work with the Envoy in an inclusive Syrian-led political process to address the legitimate aspirations and concerns of the Syrian people, and, to this end, commit to appoint an empowered interlocutor when invited to do so by the Envoy;

(2) commit to stop the fighting and achieve urgently an effective United Nations supervised cessation of armed violence in all its forms by all parties to protect civilians and stabilize the country; ...

(3) ensure timely provision of humanitarian assistance to all areas affected by the fighting, and to this end, as immediate steps, to accept and implement a daily two hour humanitarian pause and to coordinate [the] exact time and modalities of the daily pause through an efficient mechanism, including at the local level;

(4) intensify the pace and scale of release of arbitrarily detained persons, including especially vulnerable categories of persons, and persons involved in peaceful political activities, provide without delay through appropriate channels a list of all places in which such persons are being detained, immediately begin organizing access to such locations and through appropriate channels respond promptly to all written requests for information, access or release regarding such persons;

(5) ensure freedom of movement throughout the country for journalists and a non-discriminatory visa policy for them;

(6) respect freedom of association and the right to demonstrate peacefully as legally guaranteed.¹¹⁰

109 Joe Lauria, "Russia, China Veto Syria Resolution at U.N.", *The Wall Street Journal* (July 19, 2012), online:<<http://online.wsj.com/news/articles/SB10000872396390444097904577536793560681930>>.

110 United Nations, Press Release, SC/10609 "Security Council Unanimously Adopts Resolution 2042 (2012), Authorizing Advance Team to Monitor Ceasefire in Syria: Syria's Representative Pledges Support for Mission, Stresses Sovereignty" (14 April 2012), online: UN Meetings Coverage & Press Releases <<http://www.un.org/News/Press/docs/2012/sc10609.doc.htm>>.

In March 2012, the Syrian government and the opposition parties announced their commitment to implementing the six-point proposal.¹¹¹ Accordingly, the UNSC issued three different resolutions to set-up the United Nations Supervision Mission in Syria (UNSMIS): (1) Resolution 2042 (2012), that decided “to authorize an advance team of up to 30 unarmed military observers to liaise with the parties and to begin to report on the implementation of a full cessation of armed violence in all its forms by all parties.”¹¹² (2) Resolution 2043 (2012), that established “for an initial period of 90 days a United Nations Supervision Mission in Syria (UNSMIS).”¹¹³ (3) Resolution 2059 (2012), that decided “to renew the mandate of UNSMIS for a final period of 30 days.”¹¹⁴ Moreover, Mr Annan, with a group of states, such as China, France, Russia, United Kingdom, United States, Turkey, and others established the “Action Group for Syria.”¹¹⁵ The group members agreed on actions to implement the Six-Point plan, and “guidelines and principles for a political transition that meets the legitimate aspirations of the Syrian people,” in addition to “facilitate a Syrian-led political process.”¹¹⁶ However, the mission was suspended as a result of the increasingly unstable and violent situation in Syria. In addition, Mr Annan stood down from his post. He said that “the increasing militarisation of the Syrian conflict and the ‘clear lack of unity’ in the Security Council had ‘fundamentally changed the

111 *Ibid.*

112 UNSC, *Resolution 2042 (2012): Adopted by the Security Council at its 6751st meeting, on 14 April 2012*, UN Doc S/RES/2042 para 7, online: <<https://docs.google.com/file/d/0ByLPNZ-eSjJddG04b1IOU05XM1k/edit?pli=1>> [mimeo].

113 UNSC, *Resolution 2043 (2012): Adopted by the Security Council at its 6756th meeting, on 21 April 2012*, UN Doc S/RES/2043, April 2012 para 5, online: <<http://www.globalr2p.org/media/files/res2043.pdf>> [mimeo].

114 UNSC, *Resolution 2059: Adopted by the Security Council at its 6812th meeting, on 20 July 2012*, UN Doc S/RES/2059, July 2012 at para 1 online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20SRES%202059.pdf>> [mimeo].

115 *Action Group for Syria: Final Communiqué*, 30 June 2012, online: United Nations Office at Geneva, at para 4, online: <<http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf>> [Action Group for Syria].

116 *Ibid.*

circumstances for the effective exercise of my role.”¹¹⁷ He addressed the problems, which were “compounded by the disunity of the international community,”¹¹⁸ concluding that the Syrian people “desperately need action.”¹¹⁹

Following Mr Annan, Lakhdar Brahimi took over the assignment in September 2012. One of his first notable announcements was that Al-Assad would not be part of the future.¹²⁰ Brahimi made many attempts to get the warring parties in Syria to the negotiating table. The most prominent attempt was Geneva II conference on Syria, which existed as a continuation to its predecessor, the Action Group of Syria or Geneva I. Although it was supported by the efforts of foreign ministers from both US and Russia,¹²¹ Geneva II failed as all previous attempts.

In February 2014, Lakhdar Brahimi apologized to the Syrian people for the lack of progress at the Geneva peace talks. He said: “I am very, very sorry and I apologize to the Syrian people ... their hopes ... were very, very high here, that something will happen here.”¹²² Mr Brahimi resigned in May 2014, after apologizing again to Syrians for disappointing them. The UN Secretary-General Ban Ki-moon confessed that the UN Envoy had “not been able to make any progress”¹²³ in Syria. He said that Mr Brahimi had faced “almost impossible odds”¹²⁴ because of an international community that was “hopelessly divided.”¹²⁵

117 “Syria crisis: Kofi Annan quits as UN-Arab League envoy”, *BBC News* (2 August 2012), online: <<http://www.bbc.com/news/world-middle-east-19099676>>.

118 *Ibid.*

119 *Ibid.*

120 Alexander Dziadosz, “Syria denounces peace envoy who hinted Assad must go”, *Reuters* (10 January 2013), online: <<http://uk.reuters.com/article/2013/01/10/uk-syria-crisis-idUKBRE9080WX20130110>>.

121 “What is the Geneva II conference on Syria?”, *BBC News* (22 January 2014), online: <<http://www.bbc.com/news/world-middle-east-24628442>>.

122 Holmes & Miles, *Supra* note 98.

123 “Lakhdar Brahimi: UN Syria envoy stepping down”, *BBC News* (13 May 2014), online: <<http://www.bbc.com/news/world-middle-east-27399653>>.

124 *Ibid.*

125 *Ibid.*

This chapter set out to explain the serious humanitarian situation in Syria, and to explore the different attempts by the international community to find a solution to the crisis, these attempts included peaceful and legal efforts that remain unsuccessful. The Syrian situation requires additional efforts. The international community, despite their political interests, should find a solution to protect Syrian citizens from the ongoing war and the massive violation of human rights. Therefore, the next chapter will introduce the doctrine of the Responsibility to Protect (R2P), which was established in 2001 by the International Commission on Intervention and State Sovereignty (ICISS) in an attempt to find solutions to stop grave genocides that were happening around the world, as well as to prevent others in the future.

Chapter 3

Responsibility to Protect

“Doing nothing is not an option.”¹²⁶

It is hard to believe that the veto power of Russia and China in the United Nations Security Council (UNSC) has controlled the fate of the Syrian citizens, who have called for their freedom and dignity, and some of whom have died at the hands of the Syrian regime or the rebel parties, and others have been displaced all over the world. The question is: Who is responsible? Does the international community have the responsibility to protect the Syrian citizens?

It is not the first time that the international community has refrained from stemming bloodshed, arguing that international law prohibits states from intervening in each other's internal affairs. Over recent decades, history has witnessed overwhelming man-made catastrophes. The last decade of the twentieth century witnessed many examples: Northern Iraq, 1991; Somalia, 1993; Rwanda, 1994; Haiti, 1994; Bosnia, 1995; Sierra Leone, 1997; Kosovo, 1999;¹²⁷ and others. The international community began to wonder how to avoid these massacres and at the same time protect state sovereignty, and it started to question whether international law is capable, under its present provisions, of putting an end to such massacres. In a 1999 speech in front of the General Assembly of the United Nations Kofi Annan, the Secretary-General of the United Nations at the time noted that “developing international norm[s] in favour of intervention to protect civilians from wholesale slaughter will no doubt continue to pose

126 Lee H Hamilton, “Helping a Troubled Continent”, Commentary, *Woodrow Wilson International Center for Scholars* (5 July 2005), online: <<http://www.wilsoncenter.org/article/helping-troubled-continent>>. cited at Evans, “Ending Mass Atrocity”, Supra note 13 at 105.

127 Gareth Evans & Mohamed Sahnoun, “The Responsibility to Protect”, *Foreign Affairs* (1 November 2002), online: <<http://www.foreignaffairs.com/articles/58437/gareth-evans-and-mohamed-sahnoun/the-responsibility-to-protect>>.

profound challenges to the international community.”¹²⁸ Longstanding debates took place, and questions were asked in the international arena about the “right of humanitarian intervention,”¹²⁹ the question of “when, if ever, it is appropriate for states to take coercive action, in particular, coercive military action, against another state in order to protect people at risk in that other state.”¹³⁰ However, in 2000, Kofi Annan tried to challenge these debates by asking the world leaders who gathered at the Millennium General Assembly:

If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity? In essence, the problem is one of responsibility: in circumstances in which universally accepted human rights are being violated on a massive scale we have a responsibility to act.¹³¹

Accordingly, in September 2000, “the Government of Canada, together with a group of major foundations, announced at the United Nations General Assembly (UNGA) the establishment of the International Commission on Intervention and State Sovereignty (ICISS).”¹³² The ICISS announced that they were tasked to “[w]restle with the whole range of questions – legal, moral, operational and political – rolled up in this debate, to consult with the widest possible range of opinion around the world, and to bring back a report that would help the Secretary-General and everyone else find some new common ground.”¹³³ In December 2001 the

128 United Nations, Press Release, SG/SM/7136, GA/9596 “Secretary-General Presents His Annual Report to the General Assembly” (20 September 1999), online: UN Meetings Coverage & Press Releases <<http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html>>.

129 Evans, “Ending Mass Atrocity”, *supra* note 13 at 31.

130 *Ibid* at 40.

131 *Report of the Secretary-General on the work of the Organization*, UNGAOR, 55th Sess, Supp No 1, UN Doc A/55/1 (2000) at para 37, online: <<http://www.un.org/documents/sg/report00/a551e.pdf>>.

132 ICISS, *supra* note 4 at VII.

133 *Ibid*.

International Commission on Intervention and State Sovereignty presented its report titled the Responsibility to Protect (R2P).

This chapter will clarify the meaning of R2P and review the endorsements and the further developments on the responsibility to protect doctrine after 2001. It will also briefly define the term “mass atrocity crimes” because it is often used in the R2P language and defining it will make it easier to understand the different kinds of crimes against humanity. The chapter then discusses two different responsibilities of R2P – the “responsibility to prevent” and the “responsibility to react” – and tries to connect them directly to the measures that have been taken in relation to Syria by the international community. The chapter will also apply the criteria suggested by the ICISS, to justify a military intervention for humanitarian purposes.

R2P doctrine has received a lot of criticism in political and scholarly debates. These debates will be discussed, where relevant, in each section. The chapter poses the question of whether Syria is indeed a R2P situation. To answer this question, the three pillars to implement the responsibility to protect, which were suggested by the Secretary-General of the United Nations in 2009, will be applied to find out the answer to this question. Finally, the chapter will conclude by suggesting that R2P, despite the criticism of it, should apply in the Syrian case because of the political deadlock and the massive humanitarian crisis. Therefore, the chapter is divided to the following sections:

- R2P: Its Meaning and Evolution
- Operationalizing the Responsibility to Protect
- Is Syria an R2P Situation?

3.1 R2P: Its Meaning and Evolution

R2P is an emerging norm of international law, and it was endorsed by the Secretary-General of the United Nations at the United Nations General Assembly in 2004:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in 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.¹³⁴

R2P states that: (1) “[t]he State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;”¹³⁵ (2) “[t]he international community has a responsibility to encourage and assist States in fulfilling this responsibility;”¹³⁶ and (3) “if the state is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.”¹³⁷

R2P contains two major principles. First, it clearly declares that “[s]tate sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.”¹³⁸ The second principle of R2P is that “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.”¹³⁹ Therefore, R2P changes the way of understanding intervention and considers that “the debate about intervention for human protection purposes

134 UNGA, “Note by the Secretary-General”, *supra* note 3 at para 203 .

135 UN, “The R2P”, *supra* note 7.

136 *Ibid.*

137 *Ibid.*

138 ICISS, *supra* note 4 at XI.

139 *Ibid.*

should focus not on ‘the right to intervene’, but on ‘the responsibility to protect.’”¹⁴⁰ ICISS explains that “the responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention.”¹⁴¹ The framework R2P doctrine is built on the following foundation of:

- A. Obligations inherent in the concept of sovereignty;
- B. The responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
- C. Specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
- D. The developing practice of states, regional organizations and the Security Council itself.¹⁴²

Mass Atrocity Crimes

The language of R2P often uses the terminology “mass atrocity crimes.” Thus, before moving on, it is important to explain what the term means. Gareth Evans, the co-chair of ICISS, explains that “the expressions ‘mass atrocities’ or ‘mass atrocity crimes’ are used more or less interchangeably to refer to what is now embraced by the description ‘genocide, war crimes, ethnic cleansing and crimes against humanity,’ which in turn defines the ‘responsibility to protect’”¹⁴³ Evans states that “‘Mass’ is not a legal term of art, and many kinds of war crimes and crimes against humanity can, as a matter of law, be committed without large numbers of victims being involved.”¹⁴⁴ He stresses that this terminology is used to “reflect the political reality that the kind of atrocity crimes around which the responsibility to protect debate actually revolves are essentially those committed on a large scale and what, in turn counts as ‘large scale’ will always

140 ICISS, *supra* note 4 at 17.

141 *Ibid.*

142 ICISS, *supra* note 4 at XI.

143 Evans, “Ending Mass Atrocity”, *supra* note 13 at 11.

144 *Ibid* at 12.

be a matter of context.”¹⁴⁵ Furthermore, Rome Statute of the International Criminal Court (ICC) states, in Article 7, that it considers as crimes against humanity:

[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

...

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

...

(i) Enforced disappearance of persons;

...

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹⁴⁶

Article (7) of the Statute further defines these acts (only those that are used in the language of R2P are listed) as:

(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

...

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the

¹⁴⁵ *Ibid.*

¹⁴⁶ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, 37 ILM 999 (entered into force 1 July 2002), UN Doc A/CONF.183/9, online: United Nations Treaty Collection <<http://legal.un.org/icc/statute/rome.htm>> [ICC]. In the R2P context, see e.g. ICISS, *supra* note 4 at 24.

accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

...
(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.¹⁴⁷

As noted earlier in Chapter two, and this chapter will discuss it further, many of these crimes have committed in Syria by either the Syrian regime or the warring parties.

2005 World Summit

In September 2005, at the United Nations World Summit, the UNGA accepted the R2P doctrine. More than 150 heads of state and government unanimously endorsed the doctrine and committed to protect humanity from genocide, war crimes, ethnic cleansing, and crimes against humanity.¹⁴⁸ The World Summit Outcome Document (WSOD) confirmed the three following core principles:

138.

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 community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.¹⁴⁹

139.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and

¹⁴⁷ *Ibid.*

¹⁴⁸ Evans, “Ending Mass Atrocity”, *supra* note 13 at 47.

¹⁴⁹ UNGA, *Resolution adopted by the General Assembly on 16 September 2005: 60/1 2005 World Summit Outcome*, 60th Sess, UN Doc A/RES/60/1, October 2005 at para 138, online: <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf>> [mimeo] [UNGA, “Res 60/1”].

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. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.¹⁵⁰

R2P was reaffirmed later in 2006, by the UNSC resolution 1674,¹⁵¹ on the Protection of Civilians in Armed Conflict, and in 2009, when the UNSC adopted resolution 1706,¹⁵² authorizing the deployment of UN peacekeeping troops in Darfur referring to resolution 1674, and to paragraphs 138 and 139 of the 2005 WSOD.¹⁵³

United Nations Endorsement in 2009

In January 2009, Ban Ki-moon, the Secretary-General of the United Nations, issued a report that stated the R2P doctrine and the provisions of paragraphs 138 and 139 of the WSOD are “firmly anchored in well-established principles of international law. Under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes and crimes against humanity.”¹⁵⁴ The report further noted that during the 20th century three factors stood out in all of the worst human tragedies: “First, in each case there were warning

¹⁵⁰ *Ibid* at paras 138.

¹⁵¹ UNSC, *Resolution 1674 (2006): Adopted by the Security Council at its 5430th meeting, on 28 April 2006*, UN Doc S/Res/1674, April 2006 at para 4, online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Civilians%20SRES1674.pdf>> [mimeo].

¹⁵² UNSC, *Resolution 1706 (2006): Adopted by the Security Council at its 5519th meeting, on 31 August 2006*, UN Doc S/Res/1706, August 2006, online: <<http://www.un.org/News/Press/docs/2006/sc8821.doc.htm>> [mimeo].

¹⁵³ *An Introduction to the Responsibility to Protect*, online: International Coalition for the Responsibility to Protect <<http://www.responsibilitytoprotect.org/index.php/about-rtop#ICISS>>.

¹⁵⁴ UNGA, “Implementing R2P”, *supra* note 30 at para 3.

signs Second, the signals of trouble ahead were, time and again, ignored, set aside or minimized by high-level national and international decision makers with competing political agendas. Third, at times the United Nations ... failed to do its part.”¹⁵⁵ These factors led Mr Ban Ki-moon to formulate the three pillars on which R2P rests:

Pillar one: The Protection responsibilities of the state

The enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. ... The responsibility derives both from the nature of State sovereignty and from the pre-existing and continuing legal obligations of States, not just from the relatively recent enunciation and acceptance of the responsibility to protect;

Pillar two: International assistance and capacity-building

Pillar two is the commitment of the international community to assist States in meeting those obligations. It seeks to draw on the cooperation of Member States, regional and sub-regional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system. Too often ignored by pundits and policymakers alike, pillar two is critical to forging a policy, procedure and practice that can be consistently applied and widely supported. Prevention, building on pillars one and two, is a key ingredient for a successful strategy for the responsibility to protect;¹⁵⁶

Pillar three: Timely and decisive response

The responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection.¹⁵⁷

With these three pillars the Secretary-General not only shapes the strategy that is suggested by the ICISS to implement R2P but also confirms the responsibility of states of the international community to take collective action when a nation state fails to protect its citizens.

However, before delving into details, I want to highlight to the idea that the United Nations made some efforts to improve the initial report of the ICISS. In the opinion of some

¹⁵⁵ *Ibid* at para 6.

¹⁵⁶ *Ibid* at para 11.

¹⁵⁷ *Ibid*.

commenters, these efforts led “to a diluting of the commitments contained in the 2005 Outcome Document.”¹⁵⁸ Nevertheless, this thesis is concerned with the concept of the responsibility to protect as mentioned in the report of the ICISS and its implementation in the Syrian situation. This concept was an innovation in motivating the international community to fulfill its obligations to protect people who are suffering around the world, to find solutions to the ongoing genocides, and to prevent crimes from happening again in the future. In my personal opinion, the report of the ICISS is a very useful manual for the international community to consider before any intervention decision because it suggests different operational measures, which I will discuss hereafter.

3.2 How to Operate the Responsibility to Protect

According to R2P, in cases of mass atrocity crimes where the state is unable or unwilling to avert such crimes, the international community is accountable to take measures that are proportional to the scale of threat.¹⁵⁹ The responsibility to protect “directs our attention to the costs and results of action versus no action, and provides conceptual, normative and operational linkages between assistance, intervention and reconstruction.”¹⁶⁰ ICISS asserts that the responsibility to protect encompasses other duties. It explains that “the responsibility to protect means not just the ‘responsibility to react,’ but also the ‘responsibility to prevent’ and the ‘responsibility to rebuild’ as well.”¹⁶¹ The international community takes different paths to implement each of these responsibilities, and their efforts should concentrate to “address both the

158 Stephen Kirwan, “Challenge of Humanitarian Intervention: Towards a Consistent Doctrine of Responsibility to Protect in International Law” (2013) 16 Trinity CL Rev 37.

159 ICISS, *supra* note 4 at XIII.

160 ICISS, *supra* note 4 at 17.

161 *Ibid.*

root causes and direct causes of internal conflict and other man-made crises putting populations at risk.”¹⁶² R2P suggests different measures in each of the responsibilities and different instruments reflect the need of each stage. The measures essentially have the same components, which include political/diplomatic, economic, legal and military measures.¹⁶³ The measures of both the responsibility to prevent and the responsibility to react will be discussed below, and in many places the different measures that have been implemented by the international community in Syria will be explained.

3.2.1 The Responsibility to Prevent

Prior to the emergence of the R2P doctrine, those that were concerned about global security recognized the importance of prevention in order to avoid wars. In 1948, General Omar Bradley, US army field commander in North Africa and Europe during World War II and a General of the United States Army, said: “Wars can be prevented just as surely as they can be provoked, and we who fail to prevent them must share the guilt for the dead.”¹⁶⁴ R2P recognizes prevention as the “single most important dimension of the responsibility ... [that] should always be exhausted before intervention is contemplated.”¹⁶⁵

The principle of prevention is grounded in international law. A strong example of the principle is the Charter of the United Nations. The Charter tasks the UNSC to maintain international peace and security,¹⁶⁶ and Article 55 of the Charter implies that:

¹⁶² *Ibid* at XI.

¹⁶³ *Ibid* at 23.

¹⁶⁴ Omar Bradley, quoted in Evans, “Ending Mass Atrocity”, *supra* note 13 at 79.

¹⁶⁵ ICISS, *supra* note 4 at XI.

¹⁶⁶ Article 39 of the Charter of the United Nations implies that “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken.” In the R2P context, see e.g. ICISS, *supra* note 4 at 22.

[W]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations ... the United Nations shall promote:

- a- ...
- b- solutions of international economic, social, health, and related problems; and international cultural and educational cooperation;¹⁶⁷

ICISS explains that the Charter “provides the foundation for a comprehensive and long-term approach to conflict prevention based on an expanded concept of peace and security.”¹⁶⁸ Hence, the prevention measure that is suggested by the ICISS to implement R2P is primarily recognized in international law.

For effective conflict prevention efforts, R2P sets different prevention measures. These measures are political and diplomatic measures, economic measures, legal measures, and military measures. Many of these measures have been carried out in an attempt to prevent the Syrian crisis. These measures have to be accomplished with the assistance of various national and international human rights groups and the media.¹⁶⁹ In Syria, various reports, as explained earlier in Chapter two, were “complemented by the monitoring and reporting capacity of international and national human rights organizations such as Amnesty International (AI), Human Rights Watch (HRW).”¹⁷⁰ The reports of these organizations have influence on the decisions of the international community because of credibility and trustworthiness. Hereafter, I am going to explain the components of each of the four different measures of the responsibility to prevent, and explore some of the efforts undertaken by the international community in Syria.

¹⁶⁷ UN Charter, *supra* note 14. In the R2P context, see e.g ICISS, *supra* note 4 at 22.

¹⁶⁸ ICISS, *supra* note 4 at 22.

¹⁶⁹ *Ibid* at 21.

¹⁷⁰ *Ibid*

Political and Diplomatic Measures

According to ICISS report, the political and diplomatic measures “may include the direct involvement of the UN Secretary-General, as well as fact-finding missions, friends groups, eminent persons commissions, dialogue and mediation through good offices, international appeals, and non-official ‘second track’ dialogue and problem-solving workshops.”¹⁷¹ If these measures are inadequate, the international community may decide to take a different scale of preventive measures, such as “the threat or application of political sanctions, diplomatic isolation, suspension of organization membership, travel and asset restrictions on targeted persons, ‘naming and shaming,’ and other such actions.”¹⁷²

In Syria, the international community, following earlier attempts at prevention, imposed travel bans and froze assets of some of the notable Syrian regime figures.¹⁷³ It also suspended Syria as a permanent chair of the Arab League.¹⁷⁴ Furthermore, the international community established the Friends of Syria Group¹⁷⁵ and instituted the Independent International Commission of Inquiry to investigate the alleged violations of international human rights law.¹⁷⁶ It tasked the UN-Arab League joint envoy, who established the Action Group for Syria, to set up the peace plan, and the international community also appointed the United Nations Supervision Mission in Syria (UNSMIS) to observe the implementation of the peace plan.¹⁷⁷ Hence, the

171 *Ibid* at 24.

172 *Ibid*.

173 “Q&A: Syria sanctions”, *BBC News* (23 March 2012), online: <<http://www.bbc.com/news/world-middle-east-15753975>> [Q&A: Syria sanctions].

174 Neil MacFarquhar, “Arab League Votes to Suspend Syria Over Crackdown”, *The New York Times* (12 November 2011), online: <<http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html?pagewanted=all>>.

175 “‘Friends of Syria’ to call for UN to plan mission”, *The Associated Press* (23 February 2012), online: Idaho Press <http://www.idahopress.com/news/world/moscow-beijing-reject-interference-in-syria/article_10707cfc-0689-576b-b8da-55e6a4130bc9.html>.

176 UN HRC, “Rights in Syrian Arab Republic”, *supra* note 1.

177 Action Group for Syria, *supra* note 115.

international community implemented all possible political and diplomatic measures in Syria in accordance with the responsibility to prevent.

Economic Measures

R2P suggests positive and negative inducements when imposing economic measures.¹⁷⁸ The positive measures “might include promises of new funding or investment, or the promise of more favourable trade terms.”¹⁷⁹ The negative inducements usually are “of a more coercive nature, including threats of trade and financial sanctions; withdrawal of investment; threats to withdraw [International Monetary Fund (IMF)] or World Bank support; and the curtailment of aid and other assistance.”¹⁸⁰ Many of these measures have been practised in Syria. The EU banned crude oil imports from Syria, and it blocked trade in gold and precious metals and diamonds with Syrian public bodies and the Syrian Central Bank; furthermore, Arab governments halted investment in projects in Syria.¹⁸¹

Legal Measures

ICISS noted that “the threat to seek or apply international legal sanctions has in recent years, become a major new weapon in the international preventive armoury ... [It] will concentrate the minds of potential perpetrators of crimes against humanity on the risks they run of international retribution.”¹⁸² The most prominent legal measure is the referral to the ICC, which helps to end impunity for the perpetrators of the most serious crimes of concern to the international community.¹⁸³ Recently, the UNSC referred the cases for war crimes from Darfur¹⁸⁴

178 ICISS, *supra* note 4 at 24.

179 *Ibid.*

180 *Ibid.*

181 Q&A: Syria sanctions, *supra* note 173.

182 ICISS, *supra* note 4 at 24.

183 ICC, *supra* note 146. In the R2P context, see e.g. ICISS, *supra* note 4 at 24.

and Libya.¹⁸⁵ Nevertheless, it failed to refer either Al-Assad and his regime or the rebel groups, who committed crimes in Syria, to the International Criminal Court for investigation of possible breaches of human rights and for crimes against humanity. The international community “called for an ICC investigation, drawing on evidence collected by the UN Human Rights Council’s Independent International Commission of Inquiry.”¹⁸⁶ As explained earlier, the international community attempt to implement some legal measures in Syria by referring the crimes in Syria to the ICC, but it failed due Russia’s and China’s veto on the draft resolution by the UNSC.¹⁸⁷

Military Measures

Military measures are usually limited in the prevention stage, but it could include “stand-off reconnaissance, or in particular a consensual preventive deployment of which the UN Preventive Deployment Force (UNPREDEP) in Macedonia is the clearest example ... In extreme cases, direct prevention might involve the threat to use force.”¹⁸⁸ In Syria, a military preventive measure was also exercised. In May 2011, “the European Union imposed a full arms embargo on Syria in response to the violent repression by Syrian government forces on peaceful protests and the following violent conflict in the country.”¹⁸⁹ The military efforts were inadequate to halt or avert the Syrian crisis and the grave violation of human rights in the country.

Therefore, it is clear that the international community has exhausted all the prevention measure in Syria in an attempt to not lose any chance for a peaceful solution to the crisis.

184 UNSC, *Resolution 1593 (2005)*: Adopted by the Security Council at its 5158th meeting, on 31 March 2005, UN Doc S/Res/1593, March 2005, online: <<http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> [mimeo].

185 UNSC, *Resolution 1970 (2011)*: Adopted by the Security Council at its 6491th meeting, on 26 February 2011, UN Doc S/Res/1970, February 2011, online: <<http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>> [mimeo].

186 “Russia and China veto UN move to refer Syria to ICC”, *BBC News* (22 May 2014), online: <<http://www.bbc.com/news/world-middle-east-27514256>>.

187 Nichols & Charbonneau, *supra* note 94.

188 ICISS, *supra* note 4 at 25.

189 Stockholm International Peace Research Institute, *EU arms embargo on Syria*, online: SIPRI Arms Embargoes Database, online: <http://www.sipri.org/databases/embargoes/eu_arms_embargoes/syria_LAS/eu-embargo-on-Syria> [SIPRI].

Obviously, nothing worked to end the Syrian state authorities' violence on civilians. Therefore, and as per the R2P, the international community has to implement the reaction measure.

3.2.2. The Responsibility to React

When a crisis is escalating, and there is urgent need for humanitarian protection, and when the “preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required.”¹⁹⁰ R2P recognizes the responsibility to react as a response to “situations of compelling human need with appropriate measures.”¹⁹¹ However, these measures have a more coercive nature than those in the responsibility to prevent, as the measures may, if they fail, lead to the use of force in extreme cases, especially when the crisis affects international peace and security.¹⁹² Hence, the starting point should always be the non-intervention measures such as sanctions, peacekeeping to protect civilian,¹⁹³ “safe havens and no-fly zones,”¹⁹⁴ and arms embargoes.¹⁹⁵ If these measures do not succeed to halt the crisis and human rights are under question, then military intervention could be used as an exceptional measure to the non-intervention concept in international law – but only as a last resort and under certain criteria.¹⁹⁶ Therefore, if there is no other solution but to use force, R2P identifies six

190 ICISS, *supra* note 4 at 29.

191 *Ibid* at XI.

192 *Ibid*.

193 Evans, “Ending Mass Atrocity”, *supra* note 13 at 120.

194 *Ibid* at 125.

195 *Ibid* at 126.

196 ICISS, *supra* note 4 at 31.

criteria that should be fulfilled before taking any decision for military intervention. These criteria are as follows:¹⁹⁷

Criterion One: Threshold Criteria – Just Cause

R2P considers that the “exceptions to the principle of non-intervention should be limited. Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur.”¹⁹⁸ The just cause criterion will be satisfied if there is one of the following:

1. Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
2. Large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.¹⁹⁹

As discussed in Chapter two, large scale loss of life and crimes that shock the consciences of humanity were reported in Syria by human rights organizations, who accused the Al-Assad regime of attacks against civilians and of using “increasingly deadly and indiscriminate weapons, culminating in a chemical weapons attack.”²⁰⁰ In addition, the “Syrian government and pro-government forces conducted several large-scale military operations across the country during which government forces and pro-government militias carried out mass killings.”²⁰¹ At the same time, foreign fighters “carried out serious abuses including indiscriminate attacks, extrajudicial executions, kidnapping, and torture.”²⁰² The killing is escalating daily and the Syrian government not only has failed to protect Syrian

¹⁹⁷ *Ibid* at 32.

¹⁹⁸ *Ibid*.

¹⁹⁹ *Ibid*.

²⁰⁰ Human Rights Watch, *World Report 2014: Events of 2013* at 605, online: Human Rights Watch Publications <http://www.hrw.org/sites/default/files/wr2014_web_0.pdf> [*World Report* 2014].

²⁰¹ *Ibid*, at 606.

²⁰² *Ibid* at 606.

citizens, but has also involved itself in atrocity crimes. Alex Ballemby and Tim Dunne noted two features in the continuous reports on Syria. The first is “that the situation on the ground reaches ‘new levels of brutality’ ... and people are trapped in conflict-affected areas of the country.”²⁰³ The second is that “while it is acknowledged that crimes against humanity are being committed by several armed groups, the government’s willingness and capacity to use highly destructive and indiscriminate weaponry is unrivalled. And, whoever is using force, it is still the government that has the primary responsibility to ensure protection of the population.”²⁰⁴ Therefore, the just cause criterion applies to the Syria situation.

Criterion Two: Right Intention

R2P asserts that, relieving human suffering and averting the violation of human rights must be the main reasons for any intervention, “whatever other motives intervening states may have.”²⁰⁵ Therefore, R2P assumes that it is better to resume the intervention with “multilateral operations, clearly supported by regional opinion and the victims concerned.”²⁰⁶ In the words of Gareth Evans, “the motive of any such action ... [must] be civilian protection ... and have no other agenda. That means, in particular, that there must be no hint of a suggestion here that the military action is really about securing regime change.”²⁰⁷ This could be satisfied in the Syrian case if a coalition of countries existed and desired to save Syrians and did not have any other intentions. This criterion could possibly have been satisfied had the US and the UK decided to attack Al-Assad regime in August

203 Tim Dunne & Alex Bellamy, “Syria”, *Asia Pacific Centre for the Responsibility to Protect*, policy brief, 2013 at 3, online: R2P Ideas in Brief <<http://www.elac.ox.ac.uk/downloads/AP%20R2P%20Syria%20Final%20Copy%2017%20Sept%202013.pdf>>.

204 *Ibid.*

205 ICISS, *supra* note 4 at XII.

206 *Ibid.*

207 Gareth Evans, “R2P down but not out after Libya and Syria”, Editorial, *Open Democracy* (9 September 2013), online: Open Global Rights <<http://www.opendemocracy.net/openglobalrights/gareth-evans/r2p-down-but-not-out-after-libya-and-syria>> [Evans, “R2P”].

2013, without the approval of the UNSC, upon discovering the use of chemical weapons against civilians. But the issue here, I believe, is the opposite –they did not pursue the attack because there was not enough intention. This point will be discussed in Chapter 5 to argue that there is not enough interest at the international community level to avert the Syrians crisis.

Criterion Three: Proportional Means

The decision to take military action should consider “the scale, duration and intensity of the planned military intervention [which] should be the minimum necessary to secure the defined human protection objective.”²⁰⁸ In addition, the decision has to consider that “the means have to be commensurate with the ends, and in line with the magnitude of the original provocation. The effect on the political system of the country targeted should be limited, again, to what is strictly necessary to accomplish the purpose of the intervention.”²⁰⁹ Evans has applied the criterion to his consideration of the incident of the use of chemical weapons in Syria. Evans suggests “doing that which is necessary, and no more than that, to deter any future use of chemical weapons. It does not mean full-scale war designed to achieve regime change.”²¹⁰

Criterion Four: Reasonable Prospects

When military intervention is undertaken, the “action can only be justified if it stands a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place.”²¹¹ Accordingly, the intervention can’t take place “if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are

208 ICISS, *supra* note 4 at 37.

209 *Ibid.*

210 Evans, “R2P”, *supra* note 207207.

211 ICISS, *supra* note 4 at 37.

likely to be worse than if there is no action at all.”²¹² Typically, the intervention “cannot be justified if in the process it triggers a larger conflict. It will be the case that some human beings simply cannot be rescued except at unacceptable cost – perhaps of a larger regional conflagration, involving major military powers. In such cases, however painful the reality, coercive military action is no longer justified.”²¹³ This criterion cannot be applied to the Syrian case as there was no occurrence of a military intervention.

Criterion Five: Last Resort

This criterion requires that all peaceful measures must be exhausted before any decision on military decision is taken. R2P considers that “intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.”²¹⁴ In Syria, from March 2011 to date (May 2014), the international community proposed different international peaceful attempts, in addition to the diplomatic, economic, and legal measures. All of these efforts have failed to achieve any solution or to halt the crisis, and at the same time, the scale of violence in the country is constantly increasing which is causing a large loss of lives that require a radical solution. Accordingly, if the international community decided to intervene in Syria, this criterion will be satisfied.

Criterion Six: The Right Authority

The UNSC is the only party named by international law to authorize the use of military force against states in very extreme cases. The R2P affirms that the United Nations Security Council is the main legislative authority and its “authorization should in all cases be sought prior

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid* at XII.

to any military intervention being carried out. Those calling for an intervention should formally request such authorization.”²¹⁵ However, the political and strategic interests of the five permanent members at the UNSC could be an obstacle if a decision for humanitarian intervention does not comply with their own interests. In the case of Syria, all resolutions throughout the UNSC have not been possible due to the opposition of Russia and China. That is why R2P insists that the “Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.”²¹⁶ However, for the purpose of avoiding such cases where another country uses its veto power, R2P proposes that in a case where the UNSC rejects a proposal or fails to deal with it in a reasonable time, the alternative options are:

- I. Consideration of the matter by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure; and
- II. Action within the area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter,²¹⁷ subject to their seeking subsequent authorization from the Security Council.²¹⁸

R2P, then, gives alternatives to the sole authority that is granted to the UNSC by the Charter of the United Nations, in order to avert genocide when the UNSC remains deadlocked. It further warns that hesitation about taking the right action will diminish the authority of the UN, therefore, R2P suggests that “the Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations ... the

²¹⁵ *Ibid* at XII.

²¹⁶ *Ibid* at XIII.

²¹⁷ “Chapter VIII of the Charter of the United Nations provides the constitutional basis for the involvement of regional organizations in the maintenance of international peace and security for which the Security Council is primarily responsible.” See United Nations, “Regional Arrangements (Chapter VIII)”, Repertoire of the Practice of the Security Council, online: Constitutional Issues <http://www.un.org/en/sc/repertoire/regional_arrangements.shtml>.

²¹⁸ ICISS, *supra* note 4 at XIII.

stature and credibility of the United Nations may suffer thereby.”²¹⁹ In this context, David Chandler agrees with the ICISS. He admits that R2P shifts toward “a pragmatic response to changes in Realpolitik as it is a response based on concern for the world’s victims. If the UN Security Council does not reach a consensus on intervention the Secretary-General has warned that ‘there is a grave danger’ that the Security Council will be bypassed, as over Kosovo.”²²⁰ Chandler, however, viewed the argument from another prospective as well, noting that “[i]t would appear that in seeking to ensure that the UN remains central to legitimizing intervention by giving UN legitimacy to any such intervention independently of the UN’s political role in building an international consensus, the Commission’s proposals, if acted upon, may well undermine the UN, rather than ensuring that it works ‘better’.”²²¹

As a matter of fact, there has been a lot of debate by political leaders and scholars about R2P. Thomas Weiss argues that, with few exceptions, “no idea has moved faster or farther in the international normative arena than the Responsibility to Protect.”²²² Weiss explains that “ICISS contribution consists of moving away from the rights of outsiders to intervene toward a framing that spotlights those suffering from war and violence ...the new perspective thus prioritizes the rights of those suffering from starvation or systematic rape and the duty of states and international institutions to respond.”²²³ Weiss points out that “the ICISS was originally established because of the Security Council's failure to address dire humanitarian crises in Rwanda and Kosovo.”²²⁴ Consequently, Weiss explains, “the repeated failure to come to the

²¹⁹ *Ibid.*

²²⁰ Chandler, *supra* note 11 at 72.

²²¹ *Ibid* at 73.

²²² Weiss, *supra* note 6 at 741.

²²³ *Ibid* at 744.

²²⁴ *Ibid* at 756.

rescue mocks the value of the emerging R2P norm and ultimately may further erode public support for the United Nations.”²²⁵

That is why Gareth Evans, from a similar point of view, asks what are the options when helpless citizens are suffering. If “prevention fails, conflict breaks out within a state, and mass atrocity crimes are occurring or imminent, it is not an option for the world to stand by and do nothing: that way lies, yet again, the horror of Rwanda and Srebrenica.”²²⁶ Evans thinks that the ICISS report made several contributions, perhaps the most useful being political, that is, inventing a new way of talking about humanitarian interventions.²²⁷ Evans explains the debates as not being “about the ‘right’ of states to do anything but rather about their ‘responsibility’ ... to protect people at grave risk.”²²⁸

From the other point of view, some scholars are suspicious that R2P, as a legal norm, will be modified to fulfill the interests of the strong states and their desire to invade the weak ones. Noam Chomsky supports this vision by illustrating that human rights and international justice are only justifications for the West’s interests, and says that “‘new interventionism’ ... is replaying an old record.”²²⁹ Chomsky believes that:

It is an updated variant of traditional practices that were impeded in a bipolar world system that allowed some space for non-alignment – a concept that effectively vanishes when one of the two poles disappears ... the Cold War victors are more free to exercise their will under the cloak of good intentions but in pursuit of interests that have a very familiar ring outside the realm of enlightenment.²³⁰

²²⁵ *Ibid* at 759.

²²⁶ Evans, “Ending Mass Atrocity”, *supra* note 13 at 105.

²²⁷ *Ibid*

²²⁸ *Ibid* at 39.

²²⁹ Chomsky, *supra* note 12.

²³⁰ *Ibid*.

For the purpose of analysing the different points of view around R2P, S. Neil Macfarlane, Carolin J. Thielking, and Thomas G. Weiss categorize the arguments around R2P into three “distinct clusters of opinion.”²³¹ In the first cluster are the opponents to the Responsibility to Protect, which are also divided into four groups: the first group view the R2P as “potential to divide the world into ‘civilised’ and ‘uncivilised’ zones and promotes a return to semi-colonial practices in the latter. Not least, it is argued that powerful states will determine whose human rights justify departure from the principle of non-intervention.”²³² In the second group of critics are those who are “uncomfortable with instrumental decision making,” their vision that the decision for humanitarian intervention “[c]ontinu[es] on a case-by-case basis raises the matter of selectivity and arbitrary application, which affect legitimacy.”²³³ The third group are those who are labelled by Macfarlane, Thielking, and Weiss as “backed off from humanitarian intervention,” those who want to go back to the “good old days.”²³⁴ The last group are the advocacy organizations that “warn about the effects of a politically motivated interpretation of the concept of a responsibility to protect.”²³⁵ The second cluster in Macfarlane, Thielking, and Weiss’s categorization are the “agnostics and sceptics” who see the debate around the R2P as not solving the “fundamental problems of insufficient political will or provid[ing] a politically realistic blueprint for the changes in state practice that would be required to make the responsibility to protect meaningful in policy and operational terms.”²³⁶ While the third cluster

231 S Neil MacFarlane, Carolin J Thielking & Thomas G Weiss, “The Responsibility to Protect: is anyone interested in humanitarian intervention?” (2004) 25:5 Third World Q 977 at 979.

232 *Ibid.*

233 *Ibid.*

234 *Ibid.*

235 *Ibid* at 980.

236 *Ibid.*

consists of those optimists who see the ICISS report and the R2P as “guide[s] to action,”²³⁷ that is “realistic and substantial step[s]”²³⁸ on the road to the capture of “a workable consensus,” they view the R2P as an attempt at “logical extension of the ethical dimension in foreign policy.”²³⁹ They further consider the report and the R2P as “the most comprehensive attempt[s] to date to tackle sovereignty versus intervention.”²⁴⁰

It seems the case that all, the supporters and the opponents of R2P, recognize the problem that there are conscious-shocking, man-made crises behind the scenes. They also recognize that there is a need for a radical legal solution to respond to the massacres being committed on a daily basis around the world that have a negative impact on ensuring stability and peace in the world. Law, broadly speaking, should be variable over time to suit the requirements of each era because what would be appropriate at one time may not work at other times. This necessity has sparked the creation of the R2P principle as a step towards finding legal alternatives in cases where international law is unable to act. Syria is a case where international law is unable to find a legal solution to end the crisis, leaving the military solutions to prevail over the law. The next section discusses the Syrian case to decide first if Syria can be considered an R2P case, so as to allow the international community to exercise its responsibility in accordance with the doctrine.

3.3 Is Syrian an R2P Situation?

Gareth Evans asked the question, “what makes a country one of R2P concern?” Evans answers his own question by arguing that “R2P situations are those where mass atrocity crimes ... are actually occurring or imminently about to occur ... They are situations, actual or

²³⁷ *Ibid* at 981.

²³⁸ *Ibid*.

²³⁹ *Ibid*.

²⁴⁰ *Ibid*.

reasonably foreseeable, that should engage the attention of the international community simply because of the particularly conscience-shocking character of the conduct actually or potentially involved.”²⁴¹ This section tries to answer the question of whether Syria constitutes an R2P case. To answer this question, I will associate the three pillars of R2P that were suggested by the Secretary-General in 2009, to the Syrian case using the analysis conducted in the previous section. The section is not intended to repeat what already been discussed, but rather to answer this question.

Pillar One: The Protection Responsibilities of the Syrian Government:

This Pillar implies that “the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.”²⁴² In Syria, as discussed in Chapter two, the United Nations and multiple international human rights organizations concerned by the Syrian situation have continuously reported the deterioration of the humanitarian situation in Syria and the mass atrocity crimes that are escalating every day. According to the Secretary-General of the United Nations, state responsibility “derives both from the nature of State sovereignty and from the pre-existing and continuing legal obligations of States.”²⁴³ Therefore, the Syrian government, as a sovereign state, has enduring responsibility to protect its citizens from mass atrocity crimes and their incitement, but the authorities have manifestly failed to provide such protection. Conversely, the Syrian government has not only failed to protect its citizens but also was involved in crimes against humanity. The report of the Independent International Commission of Inquiry on the Syrian Arab Republic stated that “the Government has manifestly failed in its

241 Evans, “Ending Mass Atrocity”, *supra* note 13 at 72.

242 UNGA, “Implementing R2P”, *supra* note 30 at para 11.

243 *Ibid.*

responsibility to protect its people. Since November 2011, its forces have committed more widespread, systematic and gross human rights violations.”²⁴⁴ Accordingly, the first pillar of the R2P is applicable to the Syria situation.

Pillar Two: International Assistance and Capacity-Building

Pillar two implies that:

Pillar two is the commitment of the international community to assist States in meeting those obligations. It seeks to draw on the cooperation of Member States, regional and subregional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system. Too often ignored by pundits and policymakers alike, pillar two is critical to forging a policy, procedure and practice that can be consistently applied and widely supported. Prevention, building on pillars one and two, is a key ingredient for a successful strategy for the responsibility to protect.²⁴⁵

As a result of the failure of the Syrian government to protect its citizens, the international community, in accordance with the R2P doctrine, is committed to assist the Syrian government to meet its obligations in protection. As explored above, the international community has exhausted all the possible peaceful measures to prevent the crisis from escalating. Its efforts included implementing the R2P’s diplomatic and political measures, the economic measures, the legal measures and the military measures. Therefore, the international community has satisfied all possible measures to assist the Syrian government to protect its citizens and avert the crisis, but it is clear that these efforts could neither stop the crisis, nor halt the human suffering. This makes the second pillar of the R2P applicable to the Syrian situation.

Pillar Three: Timely and Decisive Response

244 UNHRC, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, 19th Sess, UN Doc A/HRC/19/69 (February 2012), online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/106/13/PDF/G1210613.pdf?OpenElement>> [mimeo].

245 UNGA, “Implementing R2P”, *supra* note 30 at para 11.

Pillar three implies “the responsibility of member States to respond collectively in a timely and decisive manner when a state is manifestly failing to provide such protection.”²⁴⁶ To implement this pillar the report of the Secretary-General on Implementing the Responsibility to Protect affirms that “the first two sentences of paragraph 139 of the Summit Outcome make unambiguously clear.”²⁴⁷

Paragraph 139 underscores that a wider range of collective actions, either peaceful or non-peaceful, could be invoked by the international community if two conditions are met:

- (a) “should peaceful means be inadequate”, and
- (b) “national authorities are manifestly failing to protect their populations” from the four specified crimes and violations.²⁴⁸

The two conditions are fulfilled in the Syria situation: (1) the peaceful measures have been inadequate and have failed to resolve the crisis; (2) the Syrian national authorities have manifestly failed to halt the crimes and contain the crisis. Hence, the third pillar is applicable to Syria. The report affirms, in paragraph 49, that the international community should respond in accordance with the second sentence of paragraph 139 that underlines “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.”²⁴⁹ The Secretary-General noted in paragraph 54 of the report of Implementing the Responsibility to Protect, that:

It is now well established in international law and practice that sovereignty does not bestow impunity on those who organize, incite or commit crimes relating to the responsibility to protect. In paragraph 138 of the Summit Outcome, States affirmed their responsibility to prevent the incitement of the four specified crimes and violations. When a State manifestly fails to prevent such incitement, the international community should remind the authorities of this obligation and that

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid* at para 49.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

such acts could be referred to the International Criminal Court, under the Rome Statute.²⁵⁰

Therefore, in answering the question of whether Syria is an R2P situation, the three pillars are used to illustrate that Syria is a R2P situation, which means that it is the responsibility of the international community to respond to the Syrian crisis in accordance with the doctrine of the responsibility to protect.

There is the will in the international community for intervention to be taken under the UNSC authorization, using the power of Chapter VII, but due to Russia's and China's repeated use of their veto power on the UNSC resolutions for Syria, it is difficult to imagine that such responsibility will be practised under the rule of Chapter VII. The Secretary-General of the United Nations, Ban Ki-moon, has urged the UNSC's five permanent members to "refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect."²⁵¹ However, in the same report, the Secretary-General insists that:

All Member States, not just the 15 members of the Security Council, should be acutely aware of both public expectations and shared responsibilities. If the General Assembly is to play a leading role in shaping a United Nations response, then all 192 Member States should share the responsibility to make it an effective instrument for advancing the principles relating to the responsibility to protect expressed so clearly in paragraphs 138 and 139 of the Summit Outcome.²⁵²

There are now continuous calls by politicians and scholars in international law to find alternatives to the authority of the UNSC, especially when it refrains from taking decisions related to international peace and security, whether the authority is the UNGA or a coalition of

²⁵⁰ *Ibid* at para 54.

²⁵¹ *Ibid* at para 61.

²⁵² *Ibid*.

willing states outside the authority of the UNSC. The international community has to take its responsibility to end the grave genocides and people's suffering, and it can't leave the decision to one authority. The R2P doctrine is a step toward achieving the goal of ending the genocides and suffering. However, it is important for any emerging norm to be consistent with the principles of international law or otherwise it is likely to be accused of illegitimacy, as is the case with the R2P, which received a lot of criticism because of its incompatibility with some well-established norms in international law, as will be discussed broadly in the next chapter.

Chapter 4

Humanitarian Intervention

“Humanitarian intervention saves lives and costs lives. It upholds international law and sometimes breaks international law. It prevents Human rights violations and it perpetrates them.”²⁵³

In light of the conclusions drawn in the previous chapter, the R2P doctrine is applicable in the case of Syria. The international community could intervene to break the deadlock and solve the humanitarian crisis using the R2P doctrine, which, as discussed above, may in extreme cases lead to the use of force in order to save lives and avoid violations of human rights guaranteed in the Charter of the United Nations.²⁵⁴ This kind of military intervention is often described as humanitarian intervention. Scholars are divided around the legality of humanitarian intervention. On the one hand, it complies with the main purposes of the Charter of the United Nations, which emerged after World War II in 1945, to protect human rights and guarantee international peace and security,²⁵⁵ a fact that motivates some scholars, just like Michael Walzer, to argue that humanitarian intervention is legitimate, given its moral duty toward humanity. On the other hand, the Charter prohibits the use of force between states, aside from where certain exceptions exist, and holds the responsibility to the United Nations Security Council (UNSC) to deal with any act of aggression and maintain international peace and security.²⁵⁶ Humanitarian intervention is occasionally operated by a state or a coalition of states across the borders of or within the territory of other state with the aim of saving the lives of the targeted state’s citizens.

253 David Vesel, “The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World” (2003) 18:1 BYUJ Pub L 1 at 1.

254 Article 1(3) of the Charter of the United Nations, states that the purpose of the United Nations is promoting and encouraging “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” UN Charter, *supra* note 14.

255 The preamble of the Charter of the United Nations states, “We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.” UN Charter, *supra* note 14.

256 UN Charter, *supra* note 14.

Moreover, humanitarian intervention raises the question of state sovereignty. The principle of state sovereignty is well established in the Charter of the United Nation, which ban states to interfere in matters that are essentially within the domestic jurisdiction of any another state in the international community.²⁵⁷ This is why scholars argue the legality of the humanitarian intervention; and call it the dilemma.²⁵⁸ Humanitarian intervention is “one of the most controversial foreign policy issues of the last decade – both when intervention has happened, as in Kosovo, and when it has failed to happen, as in Rwanda.”²⁵⁹

This chapter presents the “dilemma” around the issue of humanitarian intervention. It discusses the legal position of humanitarian intervention in international law and then argues for the legitimacy of humanitarian intervention. Finally, the thesis question – “Does the international community have a responsibility to protect Syrian citizens” – will be addressed. Therefore, the chapter explores these points in the following sections:

- What is Humanitarian Intervention?
- The Legality of Humanitarian Intervention in International Law.
- Is There a Legal Duty to Intervene?

4.1 What is Humanitarian Intervention?

Humanitarian intervention was defined by the International Commission on Intervention and State Sovereignty (ICISS) as “the non-consensual use of outside military force on humanitarian grounds.”²⁶⁰ Where the term “humanitarian” refers to “the threat or actual occurrence of large

²⁵⁷ *Ibid.*

²⁵⁸ Enabulele, *supra* note 24 at 413.

²⁵⁹ ICISS, *supra* note 4 at VII.

²⁶⁰ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa, ON: International

scale loss of life (especially genocide), massive forced migration, and widespread abuses of human rights; it does not, however, include the overthrow of a democratically elected government, unless one of the results is large scale loss of life,”²⁶¹ which is what is happening in the case of Syria, considering the huge numbers of people killed.

The term, therefore, refers to the use of force to save the lives of citizens; hence, this definition is different from the traditional understanding of military intervention because humanitarian intervention encompasses different aspects, for example, legal, political, and ethical. J. L. Holzgrefe and R. O. Keohane define humanitarian intervention as “the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the State within whose territory force is applied.”²⁶² Sean D. Murphy describes it as “the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivation of internationally organized human rights.”²⁶³ The idea of humanitarian intervention takes a prominent position in the scholarly debates. Ian Hurd reflects that the principle “evolved as a subset of the laws governing the use of force and has very quickly come to occupy an institutional position alongside self-defence and Security Council authorization as a legal and legitimate reason for war. It is both widely accepted and yet still highly

Development Research Centre, 2001) at 79, online: <<http://www.bits.de/NRANEU/docs/ICISS1201supplement.pdf>> [ICISS, “Supplementary Volume”].

²⁶¹ *Ibid* at 79

²⁶² Holzgrefe & Keohane, *supra* note 10 at 18.

²⁶³ Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996) at 11.

controversial.”²⁶⁴ Maybe that is why the United Nations General Assembly (UNGA) issued the guiding principles of humanitarian intervention that were echoed in its resolution A/RES/46/182, dated December 19, 1991,²⁶⁵ and resolution A/RES/58/114 dated February 5, 2004,²⁶⁶ which affirmed that humanitarian intervention “must be provided in accordance with the principles of humanity, neutrality, and impartiality.”²⁶⁷

4.2 The Legality of Humanitarian Intervention in International law

The legality of the humanitarian intervention is called into question because of its direct conflict with two well-established principles in international law. That is why, as in many other legal issues, there is no definite answer to the question of its legality. Scholars look at the issue from different perspectives, which will be discussed in this section, but before delving into the legality of humanitarian intervention in international law, it is important to define the components that constitute international law. This understanding will facilitate the discussion, for example, why the UN Charter is always referred to when discussing the legality of humanitarian intervention, as well as the discussion about the position of customary law in international law.

International law is a combination of many sources. The International Court of Justice (ICJ), which is acknowledged as an authoritative source of international law, has categorized these sources in Article 38, Para 1 of the Statute of the International Court of Justice as follows:

264 Ian Hurd, “Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World” (2011) 25:3 Ethics & Intl Affairs 293 at 293 [Hurd].

265 UNGA, *Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, 78th Plen Mtg, UN Doc A/RES/46/182, December 1991 para 1, online <<http://www.un.org/documents/ga/res/46/a46r182.htm>> [mimeo].

266 UNGA, *Resolution adopted by the General Assembly: Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, 58th Sess, UN Doc A/RES/58/114, (February 2004) at para 1, online: <<http://www.preventionweb.net/files/resolutions/N0350142.pdf>> [mimeo].

267 *Ibid.*

- a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognized by civilized nations;
- d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²⁶⁸

However, scholars of international law consider the “general principles of law”, the “judicial decisions”, and the “juristic writings” are third in the hierarchy of international law sources, after the first two sources of “international conventions” and “international custom.” The first two sources, however, have equal validity so “a treaty can override pre-existing custom, but subsequent custom can override a treaty.”²⁶⁹

The fundamental international convention that needs to be considered when talking about humanitarian intervention is the Charter of the United Nations. The Charter was established in 1945 with the consent of all states that agreed to make the world a better place after the atrocities of World War II. Professor Michael Mandel describes the Charter as the “World’s constitution. By the consent of all the signatories.”²⁷⁰ In this context, Mandel argues that the Charter binds the government “notwithstanding any laws or treaties they may have made to the contrary. It has a supreme legislative institution in the Security Council that is authorized by all of the states to enforce its decrees on governments and their peoples by the use of coercive measures.”²⁷¹ Therefore it is considered as the reference to any international action. Humanitarian intervention is inconsistent with two well-established principles in the Charter: the prohibition of the use of force and the principle of state sovereignty. These two principles are the main problematic issues

268 Statute of the International Court of Justice, 24 October, 1945, 832 U.S.T.D.993 [ICJ]. See e.g: Holzgrefe & Keohane, *supra* note 10 at 36.

269 Michael Akehurst, “The Hierarchy of the Sources of International Law” (1975) 47:1 Brit YB Intl L 273 at 297.

270 Michael Mandel, “R2P & ICC v. UNC: The Responsibility to Protect and the International Criminal Court versus the Charter of the United Nations” in Enrico Caterini et al, eds, *Costituzione, Economia, Globalizzazione: liber amicorum in onore di Carlo Amirante* (Napoli: Edizioni Scientifiche Italiane, 2013) at 1379.

271 *Ibid.*

in the question of the legality of humanitarian intervention, which will be discussed hereafter to find out the position of humanitarian intervention in international law.

The Prohibition of the Use of Force

The Charter of the United Nations has established a normative framework that guides the use of force in the relations between states. Article 2(4) of the Charter states the general prohibition on the use of force. It declares that:

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, or in any other manner inconsistent with the Purposes of the United Nations.²⁷²

However, the Charter includes two exceptions that may be considered in very extreme cases where the use of force is an option. The first exception is the case of self-defence that falls under Article 51 of the UN Charter, which declares that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.²⁷³

However, Article 51 also provides that the self-defending state has to use reasonable force to protect its territory and not exaggerate its position when using this right. The second exception falls under the Security Council authorization defined in Chapter VII of the Charter of the United Nations. Article 39 provides that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.²⁷⁴

²⁷² UN Charter, Article 2(4), *supra* note 14. In the R2P context, see e.g. Chesterman, *supra* note 14 at 47.

²⁷³ *Ibid*, Article 51. In the R2P context, see e.g. Chesterman, *supra* note 14 at 53

²⁷⁴ *Ibid*, Article 39. In the R2P context, see e.g. Chesterman, *supra* note 14 at 114.

Taking into consideration that the Charter requires the UNSC to take the necessary peaceful measures before any decision for use of force, any such measure could be a “complete or partial interruption of economic relations ... and the severance of diplomatic relations.”²⁷⁵ If these measures are inadequate, then coercive measures can be taken, and they include using military operations as may be necessary to maintain or restore international peace and security.²⁷⁶

These two exceptions, however, do not include or exclude humanitarian intervention. That is why the legal position of humanitarian intervention remains ambiguous and controversial among scholars. Petra Perisic argues that “although there is no explicit ban of the humanitarian intervention in the Charter, it has not been provided among the exceptions to the use of force either. That is why humanitarian interventions have mainly been considered illegal.”²⁷⁷ Perisic, explains that “there are contentions that humanitarian interventions are not necessarily contrary to the Charter...The proponents of humanitarian intervention allege that such interventions are directed neither against territorial sovereignty nor against political independence of any state. Also, they claim that humanitarian interventions are consistent with the purposes and principles of the United Nations.”²⁷⁸ Simon Chesterman suggests that “in order to establish that a right of humanitarian intervention is compatible with the terms of the Charter, it is necessary to show that it would not violate Article 2(4).”²⁷⁹ Chesterman explains that “on reading Article 2(4), it is not

275 Article 41 of the Charter of the United Nations states that “the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” UN Charter, *supra* note 14.

276 Article 42 of the Charter of the United Nations states, “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” UN Charter, *supra* note 14.

277 Perisic, *supra* note 15 at 41.

278 *Ibid.*

279 Chesterman, *supra* note 14 at 48.

immediately clear whether the phrase ‘against the territorial integrity or political independence’ is intended to qualify the words ‘treat or use of force’... it might be argued that this is the only type of force that is to be prohibited.”²⁸⁰ Therefore, Chesterman explains that “reference to the *travaux préparatoires* makes it clear, however, that there was no intention for the words to restrict the scope of the prohibition of the use of force.”²⁸¹ The words were added, as per Chesterman, “in response to the desire of several smaller states to emphasize the protection of territorial integrity and political independence. The possibility for the phrase being interpreted differently was raised...with the latter suggesting deletion of the words.”²⁸² Therefore, the words added to confirm the prohibition of use of force, but the Charter, as well, commits United Nations members to act in accordance with the purposes of the United Nations. The Charter affirms in its preamble that:

We the people of the United Nations determined to save succeeding generations from the scourge of war.²⁸³

This means that the core principle and mission of the Charter is to prevent humanitarian catastrophe and to avert abuses of human rights. Humanitarian intervention, if viewed from the humanitarian perspective, could fulfil this mission. From a different perspective, some scholars believe that the use of force is prohibition because it affects the international peace and security. Perisic argues that the phrase, “or in any other manner inconsistent with the purposes of the United Nations,” in Article 2(4) “did not seem to have been intended to limit the scope of the prohibition of the use of force, but to emphasize that any force which is directed against principles and purposes of the United Nations, among which the maintenance of peace and

²⁸⁰ *Ibid* at 48.

²⁸¹ *Ibid* at 49.

²⁸² *Ibid*.

²⁸³ UN Charter, preamble, *supra* note 14.

security is the most important one, is forbidden.”²⁸⁴ Moreover, Perisic explains that “If one should have to decide on the primacy of principles promulgated by the Charter, deciding on peace and security on one side and the protection of human rights on the other side, it seems that priority should be given to the former.”²⁸⁵ Perisic argues that “[t]he analysis of the Charter text, as well as the primary intention of its adoption, suggest that peace is the highest value promulgated by the Charter.”²⁸⁶ Anthea Roberts also believes that “the first purpose of the UN listed in Art[icle] 1 is ‘to maintain international peace and security’ and it appears doubtful that the drafters regarded human rights as equal in importance to peace. Hence, unilateral uses of force are not illegal because they breach a technical rule; they are illegal because they breach a fundamental Charter obligation.”²⁸⁷ However, the failure to guarantee human rights is, in the opinion of some scholars, a cause of threats to peace and security. Ann Orford notes in her book, *Reading Humanitarian Intervention*, that the role of international law and the UNSC after the Cold War has evolved. Orford believes that “although the jurisdiction of the Security Council ... is only triggered by the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has, since 1989, proven itself increasingly willing to interpret the phrase ‘threats to the peace’ broadly.”²⁸⁸ To prove her point of view, Orford argues that many different resolutions passed by the UNSC in relation to Yugoslavia, Somalia, Rwanda, Haiti, and many other countries, show that the UNSC is “willing to treat the failure to guarantee democracy or human rights, or to protect against humanitarian abuse, as either a symptom, or a

284 Perisic, *supra* note 15 at 42.

285 *Ibid.*

286 *Ibid.*

287 Anthea Roberts, “Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?” in Philip Alston & Euan Macdonald, eds, *Human Rights, Intervention, and the Use of Force* (New York: Oxford University Press, 2008) at 185, online:<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518290>.

288 Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (New York: Cambridge University Press, 2003) at 3.

cause of threats to peace and security.”²⁸⁹ Because of that, she explains how scholars in international law react “in favour of Security Council action based on the doctrine of ‘collective humanitarian intervention,’”²⁹⁰ which has become necessary to address many threats in the post-Cold War era. When discussing the “collective humanitarian intervention,”²⁹¹ Orford believes that “there is now a significant and influential literature arguing that ... norms governing intervention should be, or have been, altered to allow collective humanitarian intervention.”²⁹² Orford argues that such action could be through multilateral intervention or regional organizations and sometimes even without authorization by the UNSC, as happened in 1999, in the case of NATO intervention in Kosovo, which was arguably “outside the law.”²⁹³ To support her argument, Orford concludes, “there is a new trend nowadays; some scholars are arguing that commitment to justice justifies the illegality of humanitarian intervention.”²⁹⁴

There are contradictory interpretations of the Articles of the Charter of the United Nations, which are reflected by Holzgrefe and Keohane, who divide the debates around the legality of the humanitarian intervention and international law between holders of two different opinions. First are the legal positivists who argue that there is moral duty to obey the law ... for them the matters end here.²⁹⁵ The second set of opinions come from “a small group, but growing number of scholars, who advance the arguments aimed at reconciling humanitarian intervention,”²⁹⁶ and whose arguments can be divided into three different positions. Some argue that Article 2(4) of the UN Charter “does not forbid the threat or use of force ... it forbids it only

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid* at 4.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ Holzgrefe & Keohane, *supra* note 10 at 36.

²⁹⁶ *Ibid.*

when directly against the territorial integrity or political independence of any state”; they argue that “the drafters of the Charter clearly intended the phrase ‘territorial integrity or political independence of any state’ to reinforce, rather than restrict, the ban of the use of force in international relations.”²⁹⁷ Those holding second set of opinions believe that “if the Security Council fails to end massive human rights violations, states may do so without authorization.”²⁹⁸ The third group, though, debate the legality of humanitarian intervention “through an expansive interpretation”²⁹⁹ of Article 39 of the UN Charter. They argue that the Charter gives “the Security Council jurisdiction over any ‘threat to the peace’ rather than over any threat to international peace, [and] permits it to intervene to end human rights violation that lack trans-boundary effects.”³⁰⁰ There is no doubt that the need for legal standards to govern humanitarian intervention in cases of serious violation of human rights, and the absence of these standards, has made commenters provide different interpretations of international law.

The position of international law from humanitarian intervention is not really clear, and there is not enough evidence to support any of the arguments. In Chesterman’s opinion “the various attempts to justify a right of intervention considered here are, for the foreseeable future, unlikely to receive the support of more than a handful of states. As such, humanitarian intervention will remain at most in a legal penumbra—sometimes given legitimacy by the Security Council, sometimes merely tolerated by states.”³⁰¹ Therefore, there was no definite answer to the ban of use of force for humanitarian purposes, the legal situation of humanitarian

²⁹⁷ *Ibid* at 37–38.

²⁹⁸ *Ibid* at 40.

²⁹⁹ *Ibid*.

³⁰⁰ *Ibid*.

³⁰¹ Chesterman, *supra* note 14 at 87.

intervention under article 2(4) remain ambiguous. Let's next look at the second principle in international law that raises debates around the legality of humanitarian intervention.

State Sovereignty

The second principle in international law that is debatable in relation to the legality of humanitarian intervention is the principle of state sovereignty. "On the international level, sovereignty means independence, i.e., non-interference by external powers in the internal affairs of another state. International norms are based on the principle of the sovereign equality of independent states; international law excludes interference and establishes universally accepted rules."³⁰² The Charter outlaws forcible intervention and maintains equal sovereignty for all states in international community. Article 2(1) stipulates that "the organization is based on the principle of the sovereign equality of all its Members."³⁰³ In addition, Article 2(7) specifies that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.³⁰⁴

In addition, the principle of state sovereignty was echoed in the UNGA resolution 2625, dated October 24, 1970. It gives all states equal sovereignty, and declares:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

- a. States are judicially equal;
- b. Each State enjoys the rights inherent in full sovereignty;
- c. Each State has the duty to respect the personality of other States;
- d. The territorial integrity and political independence of the State are inviolable;

³⁰² Benoist, *supra* note 22 at 100.

³⁰³ Charter, *supra* note 14. See e.g. Chesterman, *supra* note 14 at 91.

³⁰⁴ *Ibid.*

- e. Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- f. Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.³⁰⁵

While it would be conceivable that the preceding Articles give a state absolute right of sovereignty within its territory, there are important limits to that right. One of these limits is international peace and security. ICISS notes “the tension between the sovereignty, independence, and equality of individual states, on the one hand, and collective international obligations for the maintenance of international peace and security, on the other.”³⁰⁶ ICISS explains that for “Chapter VII, sovereignty is not a barrier to action taken by the Security Council as part of measures in response to ‘a threat to the peace, a breach of the peace or an act of aggression.’”³⁰⁷ Therefore, the sovereignty of states, as recognized in the UN Charter, yields to the demands of international peace and security. And the status of sovereign equality only holds effectively for each state when there is stability, peace, and order among states.”³⁰⁸

The other limit to state sovereignty is that “sovereignty may be limited by customary and treaty obligations in international relations and law. States are legally responsible for the performance of their international obligations, and state sovereignty therefore cannot be an excuse for their non-performance.”³⁰⁹ Thus, ICISS explains, the expected obligations “by states by virtue of their membership in the UN and the corresponding powers of the world organization presuppose a restriction of the sovereignty of member states to the extent of their obligations

305 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UNGAOR, 25th Sess, Annex, Agenda Item 85, UN Doc A/RES/25/2625 (1970), online: <<http://www.un-documents.net/a25r2625.htm>>.

306 ICISS, “Supplementary Volume”, *supra* note 261 at 7.

307 *Ibid.*

308 *Ibid.*

309 *Ibid.*

under the Charter.”³¹⁰ Furthermore, Article 2(2) confirms that “[a]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”³¹¹ Hence, the Article commits member states “to achiev[ing] international cooperation in solving problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all.”³¹² Therefore, “the Charter elevates the solution of economic, social, cultural, and humanitarian problems, as well as human rights, to the international sphere. By definition, these matters cannot be said to be exclusively domestic, and solutions cannot be located exclusively within the sovereignty of states.”³¹³ Sovereignty, then, is a responsibility of the state. However, “[t]he quality and range of responsibilities for governance have brought about significant changes in state sovereignty since 1945. In particular, since the signing of the UN Charter, there has been an expanding network of obligations in the field of human rights.”³¹⁴ The Universal Declaration of Human Rights 1948³¹⁵ is well known. In addition to the Universal Declaration of Human Rights, the Geneva Conventions of 1949 and the two additional Protocols of 1977³¹⁶ are considered as foundations of international humanitarian law and all affirm the protection of fundamental human rights, the dignity and worth of the human person, and equal rights of men and women, prohibit torture, and prohibit

310 *Ibid.*

311 UN Charter, Article 2(2), *supra* note 14. See e.g. ICISS, “Supplementary Volume”, *supra* note 260 at 7.

312 ICISS, “Supplementary Volume”, *supra* note 261 at 7.

313 *Ibid* at 8.

314 *Ibid.*

315 *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No. 13, UN Doc A/180 (1948), online: <<http://www.un.org/en/documents/udhr/>> [Declaration of Human Rights].

316 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx>>.

discrimination.³¹⁷ Therefore, a state is committed to provide these rights to its citizens, and its sovereignty is only protected if it fulfils this target. Simon Chesterman, a staunch critic to humanitarian intervention, admits that there are limits to such a principle. “Governments are no longer completely shielded by principles of sovereignty and domestic jurisdiction when they engage in egregious violations of human rights or otherwise expose their populations to widespread or systematic abuse.”³¹⁸ Although Chesterman suggests that interveners are “also subject to constraints of a legal character...the constraints on forcible means do not demand that a concerned international community sit on its hands in the face of great human suffering, only that its response must be limited to peaceful means unless one of these institutions applies.”³¹⁹ Sovereignty is responsibility and cannot be a privilege for tyrannical states. Martti Koskenniemi, for instance, views sovereignty as an “organized hypocrisy,” and argues “sovereignty ought not to shield tyrannical governments. We respect it if it brings us valuable objectives—security, welfare, human rights.”³²⁰ Koskenniemi claims that if “sovereignty were to endanger these, ... why respect it.”³²¹ Christopher Greenwood draws our attention to the main purpose behind the establishment of the UN Charter, claiming that “[i]t is important to remember that international law in general and the United Nations Charter in particular do not rest exclusively on the principles of non-intervention and respect for the sovereignty of the State. The values on which the international legal system rests also include respect for human rights and ‘the dignity and worth of the human person.’”³²² Greenwood stresses that human rights conventions have developed continually since 1945, especially the Genocide Convention and the International

317 Declaration of Human Rights, *supra* note 315. See e.g. Greenwood, *supra* note 20 at 153.

318 Chesterman, *supra* note 14 at 110.

319 *Ibid.*

320 Koskenniemi, *supra* note 23 at 61, 63.

321 *Ibid* at 63.

322 Greenwood, *supra* note 20 at 161.

Covenant on Civil and Political Rights 1948. These developments have “reached the point where the treatment by a State of its own population can no longer be regarded as an internal matter.”³²³ The view was accepted by Holzgrefe and Keohane, who view “[t]he UN Charter’s apparent ban on unauthorised humanitarian intervention does not mean that states are free to treat their own citizens as they wish. To the contrary, most states are signatories to conventions that legally oblige them to respect the human rights of their citizens.”³²⁴

The argument of whether state sovereignty is more important than human rights was called by A. O. Enabulele “the dilemma,” and further asks if the principle of state sovereignty can exist side by side with humanitarian intervention in the same normative order. Enabulele argues that each of the two principles “carry with it some insidious evil”³²⁵ and will not work alongside “without sacrificing one for the other ... [A] State can hide under the absolute territorial sovereignty principle to unleash mayhem upon its citizens in gross violations of a treaty or customary law obligations as much as humanitarian intervention can be used by powerful States to alter the political structure and international alliances of weaker States.”³²⁶ In Enabulele’s opinion, “the choice is not one that should be made on the basis of sentiments but on the basis of law.”³²⁷ In his view, the “humanitarian intervention is more of politics and material self interest than of law and humanity.”³²⁸ I think that Simon Chesterman tries to shape the argument with his comment that “closer analysis shows that the doctrinal and historical basis for such a right is shaky indeed. None of the arguments that humanitarian intervention is compatible

323 *Ibid.* at 153.

324 Holzgrefe & Keohane, *supra* note 10 at 43.

325 Enabulele, *supra* note 24 at 413.

326 *Ibid.*

327 *Ibid.*

328 *Ibid* at 419.

with Article 2(4) is persuasive.”³²⁹ It is actually ambiguous and there is not enough evidence to support any of side of the argument. However, it seems that there is a tendency toward change in international law, or at least modifying it to cope with the variables in the international arena. It has been now 69 years since the Charter was established. Throughout these years, there have been genocides around the world, resulting in an evolution in the understanding of human rights and the importance of their superiority over the absolute power of states. I believe the time has come to consider some amendments in international law to maintain harmonization between the two rights, the sovereignty and the fundamental human rights.

Customary International Law

Customary law is the second source of international law, and is often considered as one of the debatable justifications for the legality of humanitarian intervention. Based on Article 38(1) of the International Court of Justice Statute (ICJ), which states in paragraph (b) that it shall apply “international custom, as evidence of a general practice accepted as law,”³³⁰ in order to consider a practice as rule in customary law, two components must be satisfied. Perisic explains that: “there has to be a widespread and systematic practice and there has to be *opinio juris*, that is, the belief in the legally binding nature of such practice. In determining whether a customary rule to humanitarian intervention exists, both elements have to be examined.”³³¹

States have operated many interventions in recent history. The ICISS’s supplement report provides an overview of the different interventions that have materialized from 1945 until the end of the Cold War. The report considers three prominent cases (out of ten) that are “often

329 Chesterman, *supra* note 14 at 87.

330 ICJ, *supra* note 268.

331 Perisic, *supra* note 15 at 44.

invoked as evidence of the norm of humanitarian intervention.³³² These cases are: (1) India’s intervention in East Pakistan in 1971, (2) Vietnam’s intervention in Cambodia in 1978, and (3) Tanzania’s intervention in Uganda in 1970. In the three cases, the report argues the interventions “were carried out by single states that justified them on grounds of self-defence.”³³³ Nonetheless, the report states that most of the commentators who argue that the norm of humanitarian intervention does not exist assume “that the promotion of an international regime of humanitarian intervention would give interveners a legal pretext [have ignored] one fact. Strong states which are – for reasons good or bad – determined to intervene in a weak state have no shortage of legal rationalizations for their actions.”³³⁴

After the Cold War in the 1990s, a number of interventions took place; some with the authorization of the UNSC and others without it through a state or coalition of states. The following table lists the most prominent interventions that occurred after 1990, and shows if the intervention was with or without the UNSC authorization.

Military Interventions since 1990³³⁵

Country	Chapter VII Authorization and UN Mission	Chapter VII Authorization Delegated	No Initial UNSC Authorization
Libya 2011– to date		NATO	
Côte d’Ivoire 2011 to date	UNOCI		
Liberia 1990–1997			ECOMOG
Northern Iraq 1991–to date		Coalition	Coalition
Former Yugoslavia 1992–to date	UNPROFOR	IFOR and SFOR	
Somalia 1992–1993	UNOSOM II	UNITAF	
Rwanda	UNAMIR II	Opération Turquoise	

332 ICISS, “Supplementary Volume”, *supra* note 260 at 47 (Kindly note that the first two cases of Libya and Côte d’Ivoire, was added to the original chart that was created by the ICISS at the Supplementary Volume).

333 *Ibid.*

334 *Ibid* at 67.

335 ICISS, “Supplementary Volume”, *supra* note 26160 at 80.

1994–1996			
Haiti 1994–1997	UNMH	MNF	
Sierra Leone 1997–to date	UNAMSIL		ECOMOG
Kosovo 1999–to date		KFOR	NATO
East Timor 1999–to date	UNAMET	INTERFET	

ECOMOG; IFOR: Implementation Force; INTERFET: International Force in East Timor; KFOR: Kosovo Force; MNF: Multinational Force; NATO: North Atlantic Treaty Organization; SFOR: Stabilization Force; UNAMET: UN Mission in East Timor; UNAMIR: UN Assistance Mission in Rwanda; UNAMSIL: UN Mission in Sierra Leone; UNITAF: Unified Task Force; UNMH: UN Mission in Haiti; UNOSOM: UN Operation in Somalia; UNPROFOR: UN Protection Force; UNOCI: United Nations Operation in Côte d’Ivoire

The ICISS report notes that “[d]uring this period, the balance in the UN Charter between state sovereignty and human rights has been tipped so that the latter occasionally assumes the same or more importance than the claims of states.”³³⁶ Hence, the understanding of the concept of humanitarian intervention became diffused after the 1990s and convinced some commentators that such repetitive practices could constitute an emerging norm in the customary international law. Laws develop with the times to make new rules that are commensurate with the requirements of the new era. Greenwood, argues that “international law is not confined to treaty texts. It includes customary international law. That law is not static but develops through a process of state practice, of actions and the reaction to those actions. Since 1945, that process has seen a growing importance attached to the preservation of human rights.”³³⁷ If law develops over time, why not amend it to better serve us. Lee Feinstein and Anne-Marie Slaughter advise an amendment to the existing rules and state: “We are operating under a set of rules governing the use of force that were framed for a very different world, one of sovereign states, conventional

³³⁶ *Ibid* at 48.

³³⁷ Greenwood, *supra* note 20 at 162.

armies, and noninterference in a government's treatment of its own citizens. These rules can continue to serve us well only if they are revised and updated to meet a new set of threats.”³³⁸

Ian Hurd discusses the matter from a moderate perspective. He asks an important question: “If states contradict established international law, does this change the law or is it a simple case of noncompliance (or can it be both)? Does the practice of humanitarian intervention (if it exists) sustain the legality of humanitarian intervention?”³³⁹ Hurd argues that there is “no consensus over the legality of intervention, in part because there is no consensus over the sources of international law more generally. The intervention problem is inseparable from questions that have been at the heart of international law for centuries, and that we cannot expect to be answered in order to reconcile the different views on humanitarian intervention.”³⁴⁰ Hurd gives an uncertain answer to the question of whether humanitarian intervention can be considered as a norm in customary international law: “[H]umanitarian intervention appears to contradict the United Nations Charter, but developments in state practice since 1945 might have made it legal under certain circumstances;”³⁴¹ and Hurd suggests that whether “humanitarian intervention is either legal or illegal depend[s] on one’s understanding of how international law is constructed, changed, and represented. Since these questions cannot be answered definitively, the uncertainty remains fundamental, and the legality of humanitarian intervention is essentially indeterminate.”³⁴²

Chesterman, from his perspective, does not see that humanitarian intervention can be justified based on states’ previous practices, and argues that “the scope for modification of its

338 Lee Feinstein & Anne-Marie Slaughter, “A Duty to Prevent” (2004) 83:1 Foreign Affairs 136 at 150 [Feinstein & Slaughter].

339 Hurd, *supra* note 264 at 311.

340 *Ibid.*

341 *Ibid* at 293.

342 *Ibid.*

provisions through custom is narrow.”³⁴³ Chesterman further challenges the suggestion of some scholars that previous practices of states in humanitarian interventions constitute a customary norm, by saying that it “lack[s] the necessary *opinio juris* that might transform the exception into the rule.”³⁴⁴ Chesterman considers “[t]he various attempts to justify a right of intervention considered here are, for the foreseeable future, unlikely to receive the support of more than a handful of states. As such, humanitarian intervention will remain at most in a legal penumbra—sometimes given legitimacy by the Security Council, sometimes merely tolerated by states.”³⁴⁵ A. O. Enabulele shares Chesterman’s vision, believing that the repetition of the illegal intervention can’t make it legal, and arguing that the illegality appears from the “trail of criticisms and condemnation that usually follows the invasion of the territorial sovereignty of another State and the different motives for which interventions have occurred portray the practice as very distasteful to States and international law publicists.”³⁴⁶ This is why Enabulele states that the illegal interventions can’t constitute a norm in customary law; for him “[t]he very fact of intervening in the internal affairs of the target State without its consent, makes the intervention unacceptable to, and not binding on, the target State and her sovereign sympathisers in line with the time-honoured principle that no State can be bound by a custom, the existence of which it objects.”³⁴⁷ When discussing if humanitarian intervention could be considered as an *opinio juris*, a legally obliged conduct, A. O. Enabulele makes an assumption considering the condition of repetitive state intervention practice fulfilled. He questions, “[C]an it be said that such practices were followed with *opinio juris*? ... If they do, why do States pick and choose the

343 Chesterman, *supra* note 14 at 87.

344 *Ibid.*

345 *Ibid.*

346 Enabulele, *supra* note 24 at 414.

347 *Ibid.*

humanitarian violations that they would intervene in? Why should there be intervention in Bosnia and not in Darfur or in Rwanda, where 800,000 civilians were slaughtered?”³⁴⁸ A. O.

Enabulele categorically affirms that:

[T]he decision to intervene in one country and not the other underscores the material self interest motivation for humanitarian intervention. If indeed humanitarian intervention, as claimed, is on the basis of humanity, an obligation, then humanity should be the basis of non-discriminatory intervention, except some nationals are more human than others. If it was obligatory, then non-intervention by States whenever there is gross violation of human rights will constitute a breach of a rule of customary international law. In the absence of such obligation, we cannot truly talk about the emergence of a rule.³⁴⁹

I agree with Enabulele that, from a purely legal perspective, law does not emerge based on ambiguous actions. The repetitions of illegal action will not make it legal, and we can't build a norm in customary law based on the illegal previous actions of the states even if the actions are constantly repeated in different incidents, let alone the uncertainty of the motive of intervention and pick-and-choose process that was used in many interventions. Furthermore, breaching state sovereignty is unacceptable in both international law and international relations. States have to respect each other's sovereignty. In my opinion, what is needed today is a modification in international law itself, as the current rules appear to be inadequate to fulfil the new requirements of this century. Innocent citizens cannot wait for the mercy of the UNSC. Unfortunately, the recent behaviour of the five permanent members of the UNSC in relation to the crisis in Syria shows their willingness to interpret the law to fulfil their own interests, as I will explain in Chapter 5. That behaviour does not show that they understand what they should do in their capacity as the world's leaders to avoid genocides and mass atrocity crimes. The idea of allowing

³⁴⁸ *Ibid.* at 416.

³⁴⁹ *Ibid.*

five countries to control the world seems odd in itself. Humans create the law, not the other way around, although law shapes humankind's behaviour.

Finally, I would like to refer to Enabulele's proposal for two approaches to solve the humanitarian intervention "dilemma." The proposal gives alternatives to the sole authority of the UNSC, and suggests that:

1. The power to act in the event of a breach of the peace, should be removed from the Security Council and located in the General Assembly exercisable by a two-thirds majority;
2. If the power must be retained by the Security Council, it must be exercisable by a two-thirds majority while the right of veto is removed.³⁵⁰

In cases such as Syria, when two out of five permanent members stopped a resolution to halt a humanitarian crisis, it is worth thinking of alternatives. Reconsidering the veto mechanism at the UNSC, or otherwise replacing its authority with a certain percentage of the UNGA will motivate states to let the rule of law prevail over their own interests. If a case like Syria is repeated – and just during my writing of this thesis I have witnessed Ukraine, Iraq, and recently Palestine – and if the international community remains with no solutions to such cases, the rule of international law will be endangered.

4.3 Is There a Moral Duty to Intervene?

The question that this section discusses is: If humanitarian intervention is illegal, or at the best ambiguous, and if state authorities continue to disrespect internationally accepted human rights in their relations with their own citizens, resulting crimes against the humanity within the state and instability will affect international peace and security. Does the international

³⁵⁰ *Ibid* at 420.

community have a moral duty to intervene, and can the reasons of protecting human rights and human security legitimize the intervention?

The widely accepted debate between scholars, as discussed above, is that the main purpose of creating the United Nations was to protect humanity, based on the pledge made by all state members in 1945. The international community took the initiative, in the preamble of the Charter of the United Nations,³⁵¹ to decide to save the citizens from the scourge of war, to establish justice, and to respect human rights. Therefore, they affirmed their moral duty to protect humanity. But the number of interventions that have happened since 1945 lead many to become skeptical of the notion behind interventions and question their legality, especially when the interveners execute their interventions for moral and human rights reasons while the intervention carries colonial ambitions. David Chandler and Thomas Weiss consider the moral duty as just an excuse for the West to legitimate its invasions. In Chandler's view, morality as an excuse to legitimize the intervention is another "[j]ustification for new interventionist norms as a framework for liberal peace are as dependent on the needs of Realpolitik as was the earlier doctrine of sovereign equality and non-intervention."³⁵² Chandler argues that the restriction on the use of force in international law does not depend only on "the moral legitimacy of international law but also the balance of power during the Cold War."³⁵³ Chandler believes that morality is used as an excuse to legitimize the interest of the big states in intervention, such as the US and its allies, because "while there is little barrier to the assertion of US power around the world, there is, as yet, no framework which can legitimize and give moral authority to new, more

351 UN Charter, *supra* note 14.

352 Chandler, *supra* note 11 at 59.

353 *Ibid* at 75.

direct forms of Western regulation.”³⁵⁴ This situation led Chandler to call it “the crisis of a legitimate framework,”³⁵⁵ which would “appear to be the dynamic driving the convergence of morality and Realpolitik, whether expressed in the ‘responsibility to protect’ or the ‘war against terrorism.’”³⁵⁶ Chandler fears that “[t]his crisis has provided the context in which the morally-based ideas of the ‘liberal peace’ could move from being a marginal concern into the mainstream. The less certainty there is regarding the international legal and political framework the more morality and ethics have come into play in an attempt to provide the lacking framework of legitimacy.”³⁵⁷ Chandler concludes that “the assumption that major powers, tasked with intervening as ‘good international citizens’, will act with higher moral legitimacy than powers which lack military and economic resources, relies on morality directly correlating with power.”³⁵⁸ It seems the case that many consider that intervention is not motivated by morality as much as for political interests. Thomas Weiss expresses a similar opinion and perceives that those who are “espousing the use of military force for human protection purposes are no longer on the side of the angels.”³⁵⁹ In an attempt to convince us of his opinion, Weiss emphasizes the reaction of the developing countries that interpret the Western notion of intervention in their states as “the world’s most powerful states can break the rules with impunity.”³⁶⁰

From a completely different point of view, Michael Walzer, who presents a different line of thinking about morality of international relations in his work *Just and Unjust Wars*, urges that

354 *Ibid.*

355 *Ibid.*

356 *Ibid.*

357 *Ibid.*

358 *Ibid* at 76.

359 Weiss, *supra* note 6 at 748.

360 *Ibid.*

“the commitment to state sovereignty and the prohibition on the use of force in international relations must give way in situations where those principles hamper the defence of human rights or self-determination.”³⁶¹ Anne Orford provides a critical analysis of Walzer’s work on “the emergence of moralism.”³⁶² Orford argues that Walzer’s model of thinking is relative to the doctrine of the R2P. “Walzer considers that international law in the age of the United Nations has become increasingly uninteresting ... Walzer thus rejects the legitimacy both of the UN and of the international law that has come into being in the UN era.”³⁶³ In Walzer’s view, “[t]he UN Charter was supposed to be the constitution of a new world, but, for reasons that have often been discussed, things have turned out differently. [a]nd because the UN sometimes pretends that it already is what it has barely begun to be, its decrees do not command intellectual or moral respect.”³⁶⁴ According to Walzer the “moral standing of any particular state depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile.”³⁶⁵ Therefore, “the legalist paradigm exists to protect life, liberty, and the right to self-determination. This requires judging ‘when a community is in fact self-determining, when it qualifies, so to speak, for non-intervention.’”³⁶⁶ Accordingly, if the state fails to protect its citizens, “it will no longer qualify for the principle of non-intervention – the defence of such a state will have no moral justification.”³⁶⁷ Walzer describes a case, similar to the Syrian case, arguing that “where one group within a state is fighting for secession or national liberation, in situations of civil war where one party is being

³⁶¹ Walzer, *supra* note 25 at 83.

³⁶² *Ibid.*

³⁶³ *Ibid* at 85.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid* at 90.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

supported by a foreign power, or in cases of massive human rights violations,”³⁶⁸ humanitarian intervention can be justified in certain circumstances.

Humanitarian intervention is justified when it is a response (with reasonable expectations of success) to acts “that shock the moral conscience of mankind.” The old-fashioned language seems to me exactly right. It is not the conscience of political leaders that one refers to in such cases. They have other things to worry about and may well be required to repress their normal feelings of indignation and outrage. The reference is to the moral convictions of ordinary men and women, acquired in the course of everyday activities. And given that one can make a persuasive argument in terms of those convictions, I don’t think that there is any moral reason to adopt that posture of passivity that might be called waiting for the UN (waiting for the universal state, waiting for the messiah).³⁶⁹

Another moral justification for humanitarian intervention to protect people in dire need is the paradigm of Human Security. “The term has been used by thinkers who have sought to shift the discourse on security away from its traditional state-centered orientation to the protection and advancement of individuals within societies.”³⁷⁰ The ICISS report asserts that Human Security “means the security of people - their physical safety, their economic and social well-being, respect for their dignity and worth as human being, and the protection of their human rights and fundamental freedom.”³⁷¹ The Secretary-General of the United Nations has insisted on the interrelationship between Human Security and the Responsibility to Protect. The UNSC report A/64/701 dated 8 March 2010 discloses the following:

Human security is based on a fundamental understanding that Governments retain the primary role for ensuring the survival, livelihood and dignity of their citizens. It is an invaluable tool for assisting Governments in identifying critical and pervasive threats to the welfare of their people and the stability of their sovereignty. It advances programmes and policies that counter and address emerging threats in a

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid* at 97.

³⁷⁰ S. Neil Macfarlane and Yuen Foong Khong, Reviewed by G. John Ikenberry, *Human security and the UN: A critical history*, (Indiana University Press, 2006).

³⁷¹ ICISS, *Supra* note 4 at 15.

manner that is contextually relevant and prioritized. This helps Governments and the international community to better utilize their resources and to develop strategies that strengthen the protection and empowerment framework needed for the assurance of human security and the promotion of peace and stability at every level — local, national, regional and international.³⁷²

Therefore, for those who think that humanitarian intervention is illegal in international law and stand against it, they “must explain alternatives to victims of genocide in Rwanda or ethnic cleansing in Darfur.”³⁷³

If we assume that humanitarian intervention is not applicable in Syria, then who is responsible to protect the violation of human rights? The use of force is prohibited because the norms of international law do not allow humanitarian intervention. International law protects the sovereignty of the Syrian authorities that are committing mass atrocity crimes against its civilians. The ongoing crisis is escalating every day. The Syrian crisis not only leads to instability in the Middle East, but it also affects international peace and security. Many peaceful attempts by the international community have failed. What is the alternative legal solution for Syria? Protecting human rights and maintaining human security could be legitimate reasons, I argue, to justify a humanitarian intervention to stop the crisis. Carsten Stahn was right to argue that “[t]he Syrian crisis illustrates the struggles of international law to cope with injustices and violations of legal norms.”³⁷⁴ Stahn challenges “the assumption that the Syria crisis provides a momentum to reconsider the treatment of the prohibition of the use of force or to postulate a new

372 UNSC, *Human security: Report of the Secretary-General*, March 2010, UN Doc A/64/701, online:

<<https://docs.unocha.org/sites/dms/HSU/Publications%20and%20Products/Reports%20of%20the%20Secretary%20General/A-64-701%20English.pdf>> [mimeo].

373 Arya Neil, “Is military action ever justified? A physician defends the ‘Responsibility to Protect’” (2007) 23 *Medicine, Conflict and Survival* 172–188.

374 Carsten Stahn, “Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and ‘What the Law Ought to Be’” (2013) 19:1 *J Confl & Sec L* 25 at 25.

permissive rule.”³⁷⁵ The Syrian situation provides a good example of the inability of international law to protect humanity – its rules are inadequate to halt the crisis. Lee Feinstein and Anne-Marie Slaughter portray the legal situation by stating that “[w]e live in a world with old rules and new threats ... In the name of protecting state sovereignty, international law traditionally prohibited states from intervening in one another’s affairs.”³⁷⁶ The authors debate that such hesitation cannot prevail anymore, that international law is inadequate to respond to the different threats around the world, and they demonstrate that “members of the human rights and humanitarian protection communities came to realize that, in light of the humanitarian catastrophes of the 1990s, from famine to genocide to ethnic cleansing, those principles will not do.”³⁷⁷ Arguing that “in a world in which governments can get access to the most devastating weapons and make them available to terrorists, we must take action.”³⁷⁸ They conclude if the state “is unwilling or unable to halt or avert [harm to its citizens], the principle of non-intervention yields to the international responsibility to protect.”³⁷⁹

In my opinion, the international community has a moral duty to protect Syrian citizens. It is a collective responsibility that all member states of the United Nations have to share. The norms of international law prohibit the use of force in order to secure international peace and security, not to stand disabled when human rights are violated. State sovereignty can’t be protected by the rules of law when the citizens of that state are either dead or displaced. State sovereignty is respected when the state is able to protect its citizens and respect their humanity and dignity, not when it detains and kills them. If the international community does not take the

³⁷⁵ *Ibid* at 27.

³⁷⁶ Feinstein & Slaughter, *supra* note 338 at 138.

³⁷⁷ *Ibid*.

³⁷⁸ *Ibid* at 150.

³⁷⁹ *Ibid* at 141.

appropriate actions to end the genocide in Syria, the United Nations itself will suffer the disunity of its members and its existence may be threatened.

In conclusion, I think that international law has to be amended to be able respond to crises such as the one in Syria. In this context, the responsibility to protect doctrine represents an attempt toward such amendments. The R2P doctrine still lacks the mechanism for its implementation. However, all of the debate around it means that it was successful in changing international law or at least in motivating some to think again that it needs to be amended.

Chapter 5

The Strategic and Political Situation

The lessons seem all too obvious. When states wish to intervene, they will reach for convenient humanitarian justifications that extend from genocide to electoral irregularities. When nations wish to avert their eyes, even millions dying in concentration camps or under the treads of tanks are perceived as merely local problems to be left to those in charge, often by states which have themselves pleaded the right of humanitarian intervention in other instances.³⁸⁰

It was concluded in Chapters 3 and 4 that Syria is a Responsibility to Protect (R2P) case and that the international community has a moral responsibility to stop the genocide and the grave violation of human rights. Such intervention could break the deadlock in Syria, but strategic analysis shows, and this chapter discusses, that intervention is unlikely to happen because of the international strategic situation. This chapter explores how the international community is divided on what constitutes the best action in regard to the Syrian situation. It will discuss the interests of each of the strategic actors in the Syrian situation. Finally, it will conclude by saying that there was always an intervention in Syria regardless of the intervention's direct military form.³⁸¹

The key international actors in relation to the Syrian situation are divided, in general, into two camps, with Russia, China, and Iran on one side as supporters for the Al-Assad regime, and the US, Europe, and their allies on the other side. On the actual battleground neither the Al-Assad regime nor the armed rebels are able to achieve a complete military victory. The Al-Assad regime is increasingly well positioned and the political opposition lacks political leadership.

380 Thomas M Franck & Nigel S Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (1973) 67 Am J Intl L 275 at 294.

381 Ignatieff, *supra* note 31.

There is a kind of *strategic* equilibrium so that if one side tips it will be the winner in the Syrian battle. However, because of lack of interest, neither of the two sides is willing to change this equilibrium and pursue humanitarian intervention.

While many states are involved in the Syrian situation, the following section will analyze the motive of only three key strategic actors: Russia, China, and the US. The first two were selected for discussion because they were – four times – the reason why any resolution was precluded in the United Nations Security Council (UNSC). The US was selected for discussion because it threatened the Syrian regime with a military intervention after the use of chemical weapons incident in 2013. The argument will elaborate some facts that explain the reaction of each actor and illustrate how politics is at the core of any decision of military intervention.

Russia

Russia's support for the Al-Assad regime was defined in the first days of the revolution. "[A]t the global level Russia is the power which has most prominently provided a diplomatic shield for the Syrian state and bolstered it with arms supplies, although Moscow talks about the need to 'balance' between the warring parties in Syria."³⁸² Russia's behaviour was notably different from its behaviour toward other countries of the Arab Spring. It did not, for instance, take the same position in the case of Libya and Egypt. Mark N Katz, noted that "[t]he Russian government, though, has taken a more pragmatic attitude. Although the new Egyptian government has been critical of the Assad regime, Russian Foreign Minister Lavrov expressed support for Morsi's [the Egyptian president] proposal for the creation of an Egyptian-Iranian-Saudi-Turkish quartet to

382 Roy Allison, "Russia and Syria: explaining alignment with a regime in crisis" (2013) 89:4 Intl Affairs 795 at 795. [Allison].

resolve the Syrian problem.”³⁸³ Similar behaviour was practiced by Russia in the Libyan case, Katz argues that “President Putin, Foreign Minister Lavrov, and other high-level Russian officials have often cited how UN Security Council Resolution 1973 imposing a no-fly zone over Libya was ‘overstepped’” by the West and its Arab allies to bring about the downfall of the Qadhafi regime. This is the reason Russia will not agree to even more limited Security Council sanctions against Assad.”³⁸⁴

In fact, the relationship between Syria and Russia is not new. Many elements can be listed, starting with Russia’s “de facto alignment”³⁸⁵ with the Syrian regime since 1960, maintaining the Syrian market as an arms importer,³⁸⁶ and, most importantly, “Russia[’s] ... commitment in Syria [to] construction work on the Arab Gas Pipeline linking Egypt to Turkey, and it may view Syria as strategically significant for energy transit.”³⁸⁷ Mark Katz argues that Russia holds the key to resolve the Syrian conflict as its “support for Assad has seriously damaged Moscow’s ties with the wider Middle East; and ... that after the Assad regime falls, Moscow will no longer have any influence in the Arab world.”³⁸⁸ In support of his argument, Katz cites the following reasons:

- [T]he desire to retain Russia’s naval facility in Syria (the only one Moscow has outside the former USSR);
- [T]he fear that the downfall of Assad will lead to a geopolitical gain for America and a loss for Russia;
- [T]he determination to prevent Syria from becoming “another Libya” (where, in Moscow’s view, Russia and China allowed passage of a Security Council resolution that called for the imposition of a no-fly zone that America and its allies then exceeded the terms of to bring down the [Gaddafi] regime);

383 Mark N Katz, “Russia and the Conflict in Syria: Four Myths” (2013) 20:2 Middle East Policy 38 at 42 [Katz, “Four Myths”].

384 *Ibid.*

385 Allison, *supra* note 382 at 795.

386 “No Warplanes for Syria Says Russian Arms Sales Boss”, *Ria Novosti* (13 February 2013), online:

<<http://en.ria.ru/world/20130213/179443688/No-Warplanes-for-Syria-Says-Russian-Arms-Sales-Boss.html>>.

387 Allison, *supra* note 382 at 807.

388 Katz, “Four Myths”, *supra* note 383 at 38.

- [T]he fear that the downfall of Assad will somehow result in increased Muslim opposition activity inside Russia itself.³⁸⁹

The Russian president, Vladimir V. Putin, has affirmed his country's position on the Syrian crisis on different occasions. One example is his letter to the American citizens, which reflects Russia's view of any Western intervention. He said:

No one wants the United Nations to suffer the fate of the League of Nations, which collapsed because it lacked real leverage. This is possible if influential countries bypass the United Nations and take military action without Security Council authorization.

[...]We are not protecting the Syrian government, but international law. We need to use the United Nations Security Council and believe that preserving law and order in today's complex and turbulent world is one of the few ways to keep international relations from sliding into chaos. The law is still the law, and we must follow it whether we like it or not. Under current international law, force is permitted only in self-defense or by the decision of the Security Council. Anything else is unacceptable under the United Nations Charter and would constitute an act of aggression.³⁹⁰

This makes it clear that Russia will not allow any intervention in Syria, unless anything changes in the strategic situation, even if the intervention is for humanitarian purposes.

China

Although China condemns Al-Assad's brutal actions in many incidents, the Chinese foreign minister, Wang Yi, said: "China is firmly against the use of chemical weapons and strongly backs the efforts to seek a political settlement of the Syria chemical arm[s] crisis."³⁹¹ Nevertheless, analyses suggest that China's support to Al-Assad is due to the economic and trade

³⁸⁹ *Ibid*

³⁹⁰ Vladimir V Putin, "A Plea for Caution From Russia: What Putin Has to Say to Americans About Syria", Editorial, *The New York Times* (11 September 2013), online: <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?ref=opinion&_r=0>.

³⁹¹ "China 'firmly against use of chemical weapons'", *Xinhua* (26 September 26 2013), online: China.org.cn <http://www.china.org.cn/world/2013-09/26/content_30144186.htm>.

relations between the two countries. In 2010, Syria was ranked as the third-largest importer of Chinese goods. In an analysis, CNN said that “‘Beijing’s renewed interest in Damascus – the traditional terminus node of the ancient Silk Road ... indicates that China sees Syria as an important trading hub,’ according to a 2010 report from The Jamestown Foundation, a Washington-based research and analysis institute.³⁹² However, there is another reasons for China to support the Al-Assad regime; Christina Lin, a senior fellow at the Center for Transatlantic Relations based at Johns Hopkins University in the US, argues that China has worries about the extremist parties who exist in China, such as the Uyghur. She explains that “in October 2012, [...] Chinese press reported that Uyghurs were fighting in Syria alongside Al-Qaeda and other jihadists against the Assad regime ...[and] fears that battle-hardened Chinese jihadists, after getting their jihadi tickets punched in Syria, would return home to feed local jihadist movements against the communist government.³⁹³ Many scholars debate that China’s motivation to seek to preclude UNSC resolutions was because of its hard experience in Libya. Yun Sun, a former visiting fellow with the Center for Northeast Asian Policy Studies at the Brookings Institution, suggests that “Beijing’s perception of gaining nothing while losing everything in Libya after abstaining on UNSCR 1973 significantly contributed to its decision to veto the Syria resolution. The bitter lesson from its belated and ongoing unstable relationship with the Libyan National Transitional Council has prompted Beijing to adopt a more sophisticated hedging strategy on

392 Holly Yan, “Syria allies: Why Russia, Iran and China are standing by the regime”, *CNN World News* (29 August 2013), online: <<http://www.cnn.com/2013/08/29/world/meast/syria-iran-china-russia-supporters/>>.

393 Christina Lin, “Why China supports Assad: Asian jihad hits Syria” (14 October 2013), *The Transatlantic Academy* (blog), online: <<http://www.transatlanticacademy.org/node/611>>.

Syria.”³⁹⁴ Hence, currently, China may feel that having Al-Assad is better than other ambiguous alternatives, and is less concerned with the suffering of the Syrian people.

United States

America claims that its ideology supports democracy and human rights. The US has frequently announced its support for Syrians in their revolution against the brutal regime. For instance, Hillary Clinton, the former secretary of state, commented on US foreign policy, saying: “[W]e have to stand with those who are working every day to strengthen democratic institutions, defend universal rights, and drive inclusive economic growth. That will produce more capable partners and more durable security over the long term.”³⁹⁵

However, the US has been criticized for its hesitation in finding a solution to the Syrian crisis. Mark Katz argues that the hesitation of “The Obama administration’s policy of non-intervention in Syria has been criticized... for allowing the radical jihadist opposition to grow in strength vis-à-vis the moderate opposition.”³⁹⁶ Katz explains some of the factors that impact upon the US decisions in relation to intervention in Syria. One of these factors relates to “President Obama’s own preferences”³⁹⁷ not to involve US in another war and the:

[Withdrawal of] American forces from Iraq and is in the process of withdrawing them from Afghanistan. He came to view both of these interventions—initiated by the George W. Bush administration—as quagmires whose costs far exceeded their benefits. While he did permit U.S. intervention in the Libyan conflict in 2011, Obama kept this limited.³⁹⁸

394 Yun Sun, “Syria: what China has learned from its Libya experience” (27 February 2012), *Washington, D.C. : East-West Center in Washington, Asia Pacific bulletin*; no. 152 at 152.

395 Hillary Rodham Clinton, “Remarks on the Maghreb in Transition” (Keynote Address delivered at the Center for Strategic and International Studies: The Maghreb in Transition with Secretary of State Clinton, 12 October 2012), transcript by Federal News Service, online: <http://csis.org/files/attachments/121012_csis_clinton_transcript_0.pdf>.

396 Mark N Katz, “U.S. Policy Toward Syria: Making the best of a bad Situation”, *Woodrow Wilson International Center for Scholars* (October 2013), online: Viewpoints series <http://www.wilsoncenter.org/sites/default/files/us_policy_toward_syria_making_best_of_bad_situation.pdf>.

397 *Ibid.*

398 *Ibid.*

In addition to the opposition of both US Congress and the American public to any intervention in Syria, “Washington does not want to alienate Moscow by intervening in Syria at a time when it is seeking Russian cooperation on several issues of major importance to the Obama administration, including the Iranian nuclear file.”³⁹⁹ Fear of jihadists is also a common factor that the US shares with other states. Katz explains “no government that wants to see the downfall of Assad wants his regime to be replaced by a radical Sunni jihadist one either. Indeed, this really is the basic common interest that all governments concerned – whether pro-Assad, anti-Assad, or neutral – have in Syria.”⁴⁰⁰ Therefore, as an alternative to humanitarian intervention, the US administration announced its intention to militarize the Syrian rebels.⁴⁰¹ Bernadette Meehan, of the National Security Council, comments that “the president has made the decision to authorize additional assistance, but we’re not going into specifics ... The president has been very clear that all options are on the table, with the exception of U.S. troops on the ground. That is not a possibility.”⁴⁰²

Moreover, in his May 28, 2014, speech, President Obama outlined US foreign policy, saying that human rights are related to US national security: “America’s support for democracy and human rights goes beyond idealism – it is a matter of national security.”⁴⁰³ Obama affirmed the US promotion of international law, saying “what makes us exceptional is not our ability to flout international norms and the rule of law; it is our willingness to affirm them through our

399 *Ibid.*

400 *Ibid.*

401 “White House plan to arm Syrian rebels raises fears of terrorist links”, *Fox News* (14 June 2013), online: <<http://www.foxnews.com/politics/2013/06/14/assad-use-chemical-weapons-confirmed-us-officials-say/>>.

402 *Ibid.*

403 “Remarks by the President at the United States Military Academy Commencement Ceremony”, *The White House Office of the Press Secretary* (28 May 2014), online: <<http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>>.

actions.”⁴⁰⁴ In speaking about the Syrian file, Obama said there is no easy answer regarding the Syrian conflict, and stated:

I will work with the Congress to ramp up support for those in the Syrian opposition who offer the best alternative to terrorists and brutal dictators. And we will continue to coordinate with our friends and allies in Europe and the Arab World to push for a political resolution of this crisis, and to make sure that those countries and not just the United States are contributing their fair share to support the Syrian people.⁴⁰⁵

Obama’s declarations make it obvious that the US is not interested in intervening in Syria. Thus, it seems to be the case that none of the three strategic actors, which were discussed in this chapter, are interested in operating a military intervention in Syria. The US wants the rebels to get rid of Al-Assad in an unbalanced battle; Russia wants, above all, to maintain its strategic position and the Gas Pipes, and China does not want to repeat its failures in Libya and fears the jihadists. Unless a new element arises to change the balance of the equation in the battlefield, no humanitarian intervention will happen, even though an intervention could break the deadlock after the failure of any peaceful solution.

Although, international efforts have failed to militarize a humanitarian intervention, it is “hardly a failure to intervene”⁴⁰⁶ – strategic actors intervene in indirect ways in Syria but not to protect the Syrian citizens. Professor Michael Ignatieff, criticizes the failure to mount a humanitarian intervention, saying:

[I]t is only too obvious that thus far the [international community has failed] to protect the people of Syria. This is hardly a failure to intervene: external intervention has been constant from the beginning. A ferocious, well-armed proxy war is devouring Syria, with weapons pouring in from all sides. Iran, Russia, Saudi Arabia, Turkey, the Gulf States, and Hezbollah have each tried to tip the military

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Ignatieff, *supra* note 31.

balance in favor of the regime or the rebels. Far from succeeding, they have aggravated the atrocities and exposed civilians on every side to repeated, deliberate, and murderous attack.⁴⁰⁷

Based on all of the above points, I conclude that humanitarian intervention in Syria is unlikely to happen because of the strategic and political situation. Unfortunately, Syria is one example of the weakness of international community when it comes to finding appropriate solutions to the humanitarian disasters around the world. More effort is required to modify international law, so that it meets the requirements of the times. What is required from us as lawyers and scholars in international law is to make sure that the rule of law is prevailed upon, not the political interests of the parties to any humanitarian disaster, or otherwise the world will suffer more and more.

⁴⁰⁷ *Ibid.*

Conclusion

This thesis discussed the Syrian crisis since its early days in 2011, and explained the reasons that allowed the situation in Syria to escalate and transform from a revolution into a civil war. It explored the deterioration of the humanitarian situation and further discussed the different attempts taken by the international community to avert the continuous violations of human rights. However, since no interventions were materialized, these attempts were inadequate to stop the crisis and to save Syrians from their daily suffering. Therefore, the research questioned the responsibility of the international community to protect the Syrian citizens from the ongoing genocides and war crimes. To answer the question, the research introduced the doctrine of the responsibility to protect. R2P doctrine is an emerging norm in international law and was presented in the ICISS report in 2001 in response to the grave genocides, such as in Rwanda and Kosovo. The doctrine, which was endorsed by the world's leaders at the 2005 World Summit, implies the responsibility of the state authority to protect its citizens from genocides, war crimes, crimes against humanity and ethnic cleansing. If the state authority is unable or unwilling to avert and halt the crisis, then the international community have the responsibility to respond to collectively stop such crimes.

The research applied the doctrine on the Syrian situation and discussed that the Syrian authority is not only unable to halt the crisis, but instead, is committing war crimes against its citizens. Accordingly, the international community have the responsibility to protect the Syrian citizens and to resolve the Syrian crisis. However, this responsibility may, in extreme cases, lead to military intervention in order to save lives and avoid violations of human rights. This kind of intervention was often described as a humanitarian intervention. The research analysed the legality of humanitarian interventions versus its legitimacy. Humanitarian intervention is

incompatible with international law, except in the case of two exceptions. The first exception is in the case of self-defence and the second exception is under the authorisation of the UNSC. Scholars tried to argue the legality of humanitarian intervention through different interpretations of international law but could not agree on its legality. However, the research questioned the legitimacy of humanitarian intervention, and suggested that the international community has a moral duty to protect Syrian citizens. Finally, the research explained that because politics lie at the core of any intervention, a humanitarian intervention was not materialized in Syria.

The Syrian situation is not the first crisis the World witnessed and will not be the last, and to be able to deal with future crises, there is a need to develop the norms of international law. It is doubtful that the Charter of the United Nations will be able to survive with its current rules and norms. Unless these norms are developed in a way that enables them to effectively respond to changes in the international arena, we will soon witness its end. It is obvious from state practice, in particular the more influential states, that they are willing to implement international law whenever it serves their interests and not when they should do so for moral reasons. This behaviour will diminish the respect of international law. It is also apparent that the doctrine of the responsibility to protect, although it needs improvement, is on track to replace or at least make changes to a number of fundamental principles in international law, (e.g., the use of force and the principle of state sovereignty). In my opinion, there is a need to replace the existing norms in international law with unified norms that do not include a pick-and-choose process, and to create a law that can respond to people's suffering and respect their humanity.

As for Syria, I think that the most appropriate solution for them now is to work toward conflict resolution and reconciliation between the warring parties in order to rebuild Syria. This was expressed by the Secretary-General of the United Nations, Ban Ki-moon, when he addressed

the issue of the Syrian conflict in his speech on January 22, 2014, saying: “Enough is enough. The time has come to negotiate.”⁴⁰⁸ Humanitarian intervention is unlikely to happen in the near future, unless new factors arise in the strategic political situation. “Wars eventually end. Even the longest, most brutal, and most destructive conflicts ultimately give way to peace.”⁴⁰⁹ When their conflict ends, Syrians will have to build their own pluralistic country based on the principles of freedom, equality, and dignity. They have to establish a transitional government⁴¹⁰ that represents all parties in the conflict and work together toward post-conflict life in Syria by building a sustainable peace and ensuring society is governed by the rule of law.

408 “Syria conflict: Ban Ki-moon says ‘enough is enough’”, *BBC News* (22 January 2014), online: <<http://www.bbc.com/news/world-middle-east-25851713>>.

409 Steven Heydemann, “The Big Picture - Envisioning a best-possible peace for Syria -- and what it will take to reach it”, *United States Institute of Peace* (6 December 2013), online: <<http://www.usip.org/publications/the-big-picture>>.

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