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Rights and Responsibilities: What are the Prospects for the Responsibility to Protect in the International/Transnational Arena?

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for the Responsibility to Protect in the
International/Transnational Arena?

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ABSTRACT

The dissertation involves a study of the emerging international norm of 'The Responsibility to Protect' which states that citizens must be protected in cases of *human atrocities, war crimes, ethnic cleansing and genocide* where states have failed or are unable to do so. According to the work of the International Commission on the Responsibility to Protect (ICISS), this response can and should span a continuum involving prevention, a response to the violence, when and if necessary, and ultimately rebuilding shattered societies. The most controversial aspect, however, is that of forceful intervention and much of the thesis focuses on this aspect.

The history and context of the Responsibility to Protect are examined as an evolving norm in international law. The study thus serves as an analysis of how a fundamental and controversial international principle has been established: its promotion, creation, formulation, acceptance, and ultimately its implementation. The dissertation identifies five critical sociopolitical issues of significance affecting the evolution of the Responsibility to Protect in international law and its implementation and considers remedies where appropriate.

Analysis of an application of the principle through force is undertaken in the context of the UN sanctioned intervention into Libya in 2011. This case study provides a clearer picture of what the Responsibility to Protect means as a legal basis for international intervention in genocidal situations. The study finds that international law is but one factor in the substantiation of the Responsibility to Protect – legitimacy counts as well as legality and for it to be implemented the self-interest of states must acknowledge 'universal' legal and ethical principles of a humanitarian nature. Also contributing to the success of a Responsibility to Protect intervention are nongovernmental actors as part of transnational governance who in a particular situation cry out for action in the face of evolving humanitarian atrocities in spite of rules of sovereignty and state hegemony. The more general significance of this research is in its understanding of existing and new forms of hard and soft governance and how they adapt in the international and transnational arena.

ACKNOWLEDGEMENTS

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Chapter One: Introduction

By withdrawing, I had undoubtedly done the wise thing. I had avoided risking the lives
of my two soldiers in what would have been a fruitless struggle over one small boy. But
in that moment, it seemed to me that I had backed away from a fight for what was right,
that this failure stood for all our failures in Rwanda.[1]

What I have come to realize as the root of it all, however, is the fundamental indifference
of the world community to the plight of seven to eight million black Africans in a tiny
country that had no strategic or resource value to any world power. An overpopulated
little country that turned in on itself and destroyed its own people as the world watched
and yet could not manage to find the political will to intervene. Engraved still in my
brain is the judgment of a small group of bureaucrats who came to assess the situation in
the first weeks of the genocide: 'We will recommend to our government not to intervene
as the risks are high and all that is here are humans.'[2]

I.   Introduction

The above quotes refer to the Rwandan genocide of 1994 when the majority Hutu tribe, through

murder, rape, and maiming, eliminated as many as one million Tutsi civilians in the culmination

of years of ethnic competition for political control. This was a bleak period in the history of the

United Nations (UN), and hence the international community in general, for though it had a

small peace-keeping force on the ground (the UN Assistance Mission for Rwanda --UNAMIR) it

was instructed not to interfere. This tragedy generated considerable discussion about whether the

international community could do more in such situations of internal national strife to stop such

intended annihilations of one segment of the population by another. Romeo Dallaire, the

Commander of the UNAMIR troops, accused the United States (US), the United Kingdom (UK)

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[1] Romeo Dallaire, with Major Brent Beardsley *Shake Hands with the Devil. The Failure of Humanity in Rwanda*
(Canada: Vintage Canada, 2003) at 4 [Dallaire, 2003].
[2] Dallaire 2003 *Ibid* at 6.

and France of 'shirking their legal and moral responsibilities' by simply allowing the combatants to fight it out regardless of the conflict's impact on the civilian population.[3]

Subsequently, the United Nations attempted to strengthen its ability to intervene to protect civilians in times of civil war through its support for the doctrine of the Responsibility to Protect.[4] This concept states that the international community may intervene in a national conflict if large numbers of its civilians are being targeted by one or more of the combatants for extermination as part of the adversarial process. This provided the basis for intervention in Libya, though it has so far not provided the basis for international action with respect to the current civil war in Syria in which it is estimated that hundreds of thousands of civilians have so far perished. There have to be compelling legal and humanitarian reasons for the international community to intervene in cases such as Rwanda, Syria, Kosovo and Libya -- and it is these rules, regulations and reasons that the thesis turns itself toward.

In the words of Ramesh Thakur, the Responsibility to Protect is a remarkable narrative of empathy, reasoning and moral sensibility that forces us to consider what we have learned from the past.   To Madeleine Albright it is the most fascinating principle in international law.[5] To me it represents hope.   So let me take you into the world of the Responsibility to Protect that I have explored, struggled with and interpreted.

This dissertation involves a study of the evolution of the international norm of 'The Responsibility to Protect' (R2P) from an idea or concept toward a legal norm. It traces its

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[3] Romeo Dallaire, Kishan Manocha, and Nishan Degnarain "The Major Powers on Trial" (2005) 3 Journal of International Criminal Justice, 877 **[Dallaire, 2005].**

[4] While it has become quite common to refer to the Responsibility to Protect principle in short form as R2P, I have refrained in the thesis from doing so. The term R2P in my view is robotic in nature and detracts from the very seriousness of its purpose.

[5] CCR2P Conference, March 29, 2014.

formative development and application in the international world and enters into the debate regarding its legal status. Such a study uncovers the controversies that surround the meaning of and implementation of this norm, particularly in terms of forceful intervention, the most contentious, and raises questions regarding the supremacy of states' rights versus 'universal' humanitarian laws.

The principle of the Responsibility to Protect came to light as a result of the work of the International Commission on Intervention and State Sovereignty (ICISS -highly influenced by Canadians) although the history of the idea goes back much further in time.[6] The ICISS developed the Responsibility to Protect as a guiding principle for the international community that rested on a wide range of legal obligations and political responsibilities already in existence. While the original ICISS report did not explicitly call for legal reform, it did lean toward the view that international morality and international law should be more closely aligned.

The World Summit Outcome Document, the formal document articulating the Responsibility to Protect adopted by resolution A/60/1 of the UN General Assembly (GA) on 24 October 2005 contains the provisions for the responsibility of states to protect population from four international crimes: war crimes, genocide, human atrocities and ethnic cleansing. It was agreed by consensus by all participating member states and the provisions were reaffirmed in UN Security Council resolutions 1674 (28 April 2006) on the protection of civilians in armed conflict

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[6] *The Responsibility to Protect* I.1.5 International Commission on Intervention and State Sovereignty (ICISS) December 2001, International Development Research Centre, Ottawa, at 11. http://www.idrc.ca The ICISS was launched at the UN Millenium Assembly in September 2001 in response to Kofi Annan's challenge to the international community to act upon future violations of human rights and humanitarian law. (Kofi Annan, Annual Report to the General Assembly, press release SG/SM 7136, 20 Sep. 1999 cited by Jennifer M.Welsh, *From Right to Responsibility: Humanitarian Intervention and International Society* (2001) 8 Global Governance, 503-521; pp 520 **[Welsh 2001].**The Responsibility to Protect: Research, Bibliography and Background, Supplementary volume to Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre for ICISS, 2001), 410 pp. United Nations, 2004, at 65, para 201; see also United Nations World Summit 2006 Resolution 1674 April 28, 2006 which reaffirmed paras. 138 and 139 of the World Summit 2005 Outcome Document.

and 1706 (31 August 2006) calling for the deployment of a UN peacekeeping force to Darfur.[7] The consequences of resolution A/60/1 are different from those of a treaty that becomes effective through a required number of ratifications which then become binding. The GA resolution is recommendatory rather than binding.[8] However, it has high political and moral significance and the obligations come from well-established rules and principles of customary and treaty international human rights law (IHRL), and international humanitarian law (IHL), which are in fact universally binding. The thesis provides a more detailed description of international law and its relevance to the Responsibility to Protect in Chapter Two. Genocide, however, is outlawed by the Genocide Convention, a treaty so widely endorsed that it is regarded as fundamental international law, binding on all."[9]

The Outcome Document, however, is most readily categorized as 'soft' law. Soft laws can signal the direction of future legal development, act as a precursor of treaties or 'harden' into custom in relation to the Responsibility to Protect and it is the evolutionary path of this norm that will be explored in subsequent chapters. Even if the Outcome Document is not legally enforceable "it does represent an important step in the evolution of international protection law"[10] and the Responsibility to Protect principle. Many states, however, refuse to accept 'soft laws' in that they may turn into enforceable rules, while other states claim these principles carry universal effect as a restatement of existing custom. The Responsibility to Protect is a powerful principle which begs the question of whether it gives rise to legal obligations. My own study of the evolution of the norm enters into a debate concerning the ambiguous nature of the

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[7] Dorota Glerycz, *The Responsibility to Protect: A legal and Rights-based Perspective* (2010) 2 Global Responsibility to Protect, 250-268 [**Glerycz, 2010**] at 250.

[8] Glerycz 2010 *ibid* at 251.

[9] Michael Doyle, *International Ethics and the Responsibility to Protect* (2011) 13 (International Studies Review, 72-84 at 73.

[10] Doyle 2011 supra note at 230.

Responsibility to Protect as a new norm of customary international law. In order to fully grasp the status of the norm I draw on international law, international humanitarian law (IHL), international human rights law (IHRL) and legal scholarship as well as apply a broadened theoretical interdisciplinary framework to explain the controversy. While one may ultimately conclude it remains an example of soft law, it nonetheless can exert significant influence on how states interpret their legal obligations towards preventing and responding to mass atrocities.[11] In addition it appears to be still evolving in ways I will demonstrate throughout the thesis. Consequently, the research considers what it would take for the Responsibility to Protect to become legally binding and what factors are holding back or promoting this development. This requires a perspective on how international law is created and maintained which will be provided in the thesis to come.

Overall, it a story of norm entrepreneurship – the norm has been conceptualized, articulated and is being progressively refined in expert and scholarly reports, in detailed responses by the Secretary General and in Security Council Resolutions. The thesis revisits the existing set of legal standards, institutional structures and the jurisprudence underpinning the principle in order to see how it can best be understood and applied – as a means of protecting the person and not only as a military doctrine aimed at justifying intervention. Human rights, for example, are not a part of the mainstream activities of the Security Council, but the Responsibility to Protect brings together international humanitarian law and international human rights law in the context of the Security Council.[12]

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[11]Jennifer M. Welsh, and Maria Banda *International Law and the Responsibility to Protect: Clarifying or Expanding States Responsibilities (2010)* 2 Global Responsibility to Protect, 213-231 [**Welsh and Banda. 2010**].
[12] Glerycz *supra* note 7 at 251.

According to my analysis, I am prepared to affirm the principle as a new international norm on its way "to becoming a rule of customary international law."[13] I also agree with Kofi Annan who tended to see it as a way to strengthen existing international humanitarian law, such as the Genocide Convention and the further implementation of existing commitments.[14]   The analysis requires an understanding of how norms become become 'soft' law (*lex ferenda*) or 'hard' law (*lex lata*) and I strive to unravel exactly how this principle has evolved and its legal status to date.[15]

The question of whether the Responsibility to Protect has transitioned into law is important for theory and practice. For one thing, states are more likely to act if it is legal. The law also emphasizes precedents and practice over national interest and preferences; as a result "legal rules may exert a greater 'compliance pull' because of the legitimacy associated with the obligations they outline."[16] In addition legal obligations as opposed to moral obligations have specific remedies if they are not fulfilled which soft law does not allow.[17]

The thesis further locates the Responsibility to Protect doctrine as an aspect of transnational law and global governance. The role of nongovernmental actors as contributing to its place in transnational law is researched and explored. The study therefore serves as a unique analysis and a case study of how a fundamental and controversial international norm can be created, promoted, and accepted at the level of transnational governance and finally implemented. In general terms, the research is of an interdisciplinary nature involving the study of transnational,

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[13] Louise Arbour as cited in Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington DC: The Brookings Institution Press, 2008) 349.
[14] Jennifer M. Welsh, and Maria Banda *International Law and the Responsibility to Protect: Clarifying or Expanding States Responsibilities (2010)* 2 Global Responsibility to Protect, 213-231 at 227 [**Welsh and Banda, 2010**].
[15] Welsh and Banda, 2010 *ibid* at 227.
[16] Welsh and Banda, 2010 *ibid* at 228.
[17] Welsh and Banda, 2010 *ibid*.

international and global forces in relation to human peace and security. The broader significance of this research is in its contribution to the understanding of existing and new forms of hard and soft law and global governance and how norms and laws can evolve and survive in the international and transnational arena.

In academic writing, governance is often associated with the state, but the paradigm change underlying the study of governance does not centre on the state, but usually more broadly includes a research question on the nature of the relationship between the state and non-state actors or citizen groups. This relationship can be expressed through a change in the authority of the state, its sovereignty, and globalization. Under these conditions, we find the distinction between national and international governance has changed. As the thesis engages in its consideration of whether the principle of the Responsibility to Protect has evolved into either international law and/or an international soft law norm, it firstly determines what the impediments and the factors that support and enhance its evolution and implementation are. Secondly, it investigates whether there are cases where it has been implemented. To consider both of these questions, the investigation has utilized an interdisciplinary approach drawn from mainly international law, international relations, anthropology, and political science.
Five sociopolitical issues of significance are identified and elaborated on that impede as well as support its acceptance in the international environment. The issues include the following: 1) the tension between the principles of state sovereignty and state responsibility to the individual; 2) the legality and legitimacy of the Responsibility to Protect; 3) the self-interest of states versus altruistic principles; 4) the inclusion of non-governmental actors as players; and, finally, 5) the UN and its limited institutional authority for resolving conflicts.

The thesis also illuminates one other major impediment that has grown and continues to exist today; i.e., that of fear and mistrust, exacerbating the tensions with regard to state sovereignty. The suspicion on the part of non-western states of the motivation of western states remains a major challenge for the implementation of the Responsibility to Protect in its soft form. Some states oppose the crystallization of the Responsibility to Protect into law for fear of excessive interventions, and reject the idea that the Responsibility to Protect has evolved into a new customary rule.

In addition, the thesis will examine the role the Responsibility to Protect has played and is playing in humanitarian crises. It will trace its history and context as both an evolving norm and as potentially customary international law. An analysis of the first true application of the principle will be carried out as a case study of the UN-sanctioned intervention into Libya in 2011. There will also be a discussion of other cases where the Responsibility to Protect has been attributed incorrectly as responsible in principle for international action -- that is Iraq (a US led action) and Kosovo (a NATO intervention) -- because they were not UN sanctioned. In this way we will gain a clearer picture of what the Responsibility to Protect means as a legal basis for international intervention in genocidal situations, and thus gain a clearer picture of its growth and prospects as well as barriers to its implementation.

In UN Secretary General Kofi Annan's report entitled *In Larger Freedom: Towards Development Security and Human Rights for All*, he states that "The protection of human rights is a collective responsibility."[18] One of the obstacles, however, is that the support of the Responsibility to protect is influenced by cultural beliefs, historical circumstances, ideological,

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[18] Kofi Annan, *In Larger Freedom: Towards Development and Human Rights for All* A/59/2005, at 37, para. 140. **[Annan, 2005].**

national and political identities in spite of any international agreements already achieved on

human rights and the acceptance of the Responsibility to Protect. The problem of

accommodating regional or cultural differences in a universal human rights framework is part of

"the disagreements between the Western developing states, on the one hand, and the Eastern

Bloc and many developing states on the other."[19]   These latter groups fear the dominance of the

post-war human rights agenda of Western liberal ideologies. Tensions remain with the Universal

Declaration and the covenants seen as largely Western constructs. Ideally, human rights

advocates would like to see human rights interpreted and applied in a consistent way which also

accommodates their own local traditions and cultural norms.[20] This renders the application of

truly universal human rights problematic. The 1993 United Nations World Conference on

Human Rights attempted to address this controversy through the adoption of a *Declaration and*

Programme of Action.

> All human rights are universal, indivisible and interdependent and interrelated. The
> international community must treat human rights globally in a fair and equal manner, on
> the same footing, and with the same emphasis. While the significance of national and
> regional particularities and various historical, cultural and religious backgrounds must be
> borne in mind, it is the duty of States, regardless of their political, economic and cultural
> systems to promote and protect all human rights and fundamental freedoms. [21]

The thesis thus moves into highly contentious territory as the Responsibility to Protect claims

that, while sovereign governments have the primary Responsibility to Protect their own citizens

from human atrocities, war crimes, ethnic cleansing and genocide, when they are unable or

unwilling to do so their responsibility should be taken up by the wider international community.

According to the work of the International Commission on the Responsibility to Protect (ICISS),

"this response can and should span a continuum involving prevention, a response to the violence,

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[19] John H. Currie, *Public International Law, second edition* (Toronto: Irwin Law Inc., 2008) at 440 [**Currie, 2008**].
[20] Currie 2008 ibid at 440.
[21] World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (1993) at para. 5.

when and if necessary, and ultimately rebuilding shattered societies."[22] The Report also sets out

three pillars (to be elaborated on in Chapter Two). The most controversial issue, however, is that

of the international reaction to forceful intervention and much of the thesis focuses on this

aspect.

To date, work in the area of the Responsibility to Protect principle has focused on the roots and

rationale for the Responsibility to Protect, but little has been done on the evolution of the norm

and its status in international law, along with the ethical principles involved in making soft law

work, as well as the role of non-state actors in its promotion and implementation. This

dissertation contributes to the literature in such a way as to fill those gaps. Due to the nature of

the Responsibility to Protect as soft law, *lex ferenda* bordering on hard law, *lex lata,* I also show

how ethics, values and principles, norms, good faith and shared expectations about appropriate

social behavior held by the community of actors must continue to be taken into consideration.

In the investigation of the principle, I am therefore not only concerned with international law as

it has existed and does exist, I am also concerned with the values that international decisions

(legal and otherwise) hold, and the ethical basis upon which decisions are made. The research

explores in more depth both the moral perspective and the perspective that it is in the interests of

the state, as well as the broader international community, to act ethically, and to account to civil

society and other states for its actions. Sovereignty, non-intervention, self-determination and

self-interest must sometimes take a back seat to crises of a humanitarian nature. Ostensibly, the

nub of the controversy is the clash between the norms regulating state sovereignty and the

question of the legitimacy of humanitarian intervention to protect human security.

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[22] ICISS *supra* note 6.

In order to understand the significance of the Responsibility to Protect as a shift in international norms, the principles of sovereignty and non-intervention are discussed in historical and legal terms. Sovereignty and non-intervention have been the basic principles around which the international environment has operated and are the cornerstones of the UN Charter and its attempts to achieve world order. While my study to date has persuaded me that there is solid justification for the objectives of the principle of the Responsibility to Protect, I have investigated arguments that do not support humanitarian intervention and/or the Responsibility to Protect in order to aid my understanding of existing impediments to its success.

Research shows that some countries continue to oppose the Responsibility to Protect principle, particularly the notion of intervention, by emphasizing non-intervention's connection with self-determination and sovereignty. By emphasizing what to some extent can be considered as both an ethical and a legal principle of self-determination, some countries attempt to protect themselves from stronger powers who they regard "at minimum as furthering their selfish interests and at maximum neo-colonialists. The Chinese, for example, in reaction to the Kosovo campaign (1996), regarded this as an attempt "to legitimate interventions designed to force countries to change their political systems."[23] (Similar objections were voiced by Russia and India in the debates leading up to the approval of the Responsibility to Protect and continue to affect more recent decisions and/or actions in support of the Responsibility to Protect). By raising these roadblocks, however, they raise questions about their own motivation. While I do not deny the history of colonialism and the current functioning of capitalism, I argue that it is

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[23] Jennifer Welsh,, *From Right to Responsibility: Humanitarian Intervention and International Society (2001) 8* Global Governance, 503-521; at 504 **[Welsh, 2001].** The debates that I will review are generally played out in discussions at the Security Council and the General Assembly of the UN, and sometimes carried over into media accounts and comments in the more public domain.

vital to recognize that the Responsibility to Protect, as a principle that must go through the UN to maintain legitimacy, is meant to provide something beyond state self-interest.

I do accept that international law can be used for imperialist purposes but I do argue the Responsibility to Protect, when interpreted and exercised properly, can be a check on imperialism and hegemony. The Responsibility to Protect as a principle, approved at the United Nations, was designed to protect the world from unilateral action from the West as well as from the North and South. The Security Council process, through the use of the veto, offers the opportunity for the Permanent Members of the United Nations Security Council (Permanent Five or P5) to have their say and functions as a corrective to imperial intervention.[24] A problem does arise, however, when one state allows its vested interests to dominate the humanitarian purpose of intervention.

While there has been a growth in the literature on the Responsibility to Protect, I have approached the literature in new and different ways. There has not been any extensive study of the evolution of the norm in international law nor of non-state actors involved in the analysis and support of the overall the Responsibility to Protect principle. I have met with and interviewed some of the more established NGOs as well as the founding authors of the Responsibility to Protect in order to understand what their contribution is and what they understand to be the problems or impediments to the development of the norm at the international level. I have also considered the role of international institutions, particularly the UN, in the development and implementation of the norm. This research has helped me to reach some conclusions regarding its ability to survive.

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[24] The P5 include China, France, Russia, the United Kingdom and the United States.

The end point for norm development is institutionalization (usually through customary law).[25]

Chapter Nine presents an analysis of a case study concerning the legitimacy of the intervention in Libya in 2011where the Responsibility to Protect was invoked in the Security Council and the international community came together sufficiently to move forward with a military intervention. Chapter Nine is original in that it presents what may be argued to be the only bona fide instance of the implementation of the Responsibility to Protect in its pillar three form. I develop a novel framework of legitimacy and test the Libyan intervention against it, and illustrate the necessity of the Responsibility to Protect operating within the context of not necessarily a legal but at minimum a legitimate authority.

The analysis also shows, however, how easily implementation can be judged by the international community in a negative light, increasing skepticism and fear of imperialism and neocolonial intentions. In this way it also illustrates that geopolitical interests remain very near the surface in international affairs and emphasizes the vulnerability of the principle. These concerns may push opportunities for implementation of the Responsibility to Protect in future situations backwards for a time, serving political interests, rather than ethical considerations. The impact of the various impediments affects the international community in its responses to other areas of great concern, particularly the three to four year old conflict in Syria. While a deeper analysis of the Syrian situation is not a goal of the thesis, I will go so far as to suggest the Syrian case demonstrates that political interests can still trump humanitarian concerns in the UN Security Council and that the quest for a disinterested regime or a neutral, principled and unbiased international organ is elusive.

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[25] Welsh and Banda *supra* note 11 at 226.

II.   Theoretical Perspectives, Concepts and Arguments

Concepts such as norms, morals, ethics, values, universal principles, intervention, humanitarian intervention, foreign policy, human rights, human security, human cultural security, international and transnational law and global governance are used and elaborated upon in the course of the discussion. To elucidate the context for the different norms, laws and principals involved at the international level in the Responsibility to Protect debate and the meaning and significance of the conceptual framework referred to above, the relevant literature and theoretical perspectives are explored and articulated.   The dissertation identifies some of the ways in which these theoretical approaches or ideologies have affected and continue to affect decisions for intervention.

The theoretical perspectives stem from international law, conflict resolution, ethics, anthropology and international relations, with support from philosophy and political science, particularly through those theories of Realism and Idealism, Constructivism, the Logic of Appropriateness and the Logic of Consequences.

Briefly: (i) Realists will consider the power and interests of states and how zero sum or distributional conflicts are resolved; (ii) Neorealists and neoliberals conceptualize states as rational, autonomous actors; and (iii) Constructivists focus on the logic of the appropriateness of a set of norms and values which constitute the order of society and which determine the authorities and the actions of actors in the system; and (iv) those propounding the logic of consequences see political action as rational, calculating behavior designed to maximize preferences.[26]

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[26] James G. March and Johan P. Olsen   *Rediscovering Institutions: The Organizational Basis of Politics*, (New York: Free Press, 1989), 24-26; **[March and Olsen 1989).** March, James .G. *A primer on Decision Making: How Decisions Happen*, (New York: Free Press, 1994), 57-58; **[March 1994].** James G. March, and Johan P. Olsen "The

In the political theory literature, the classic tripartite division separates Realists, Liberals and

Socialists. These theoreticians posit differing views on the actors in international politics. The

Realist School sees State interests as the essential determinant of public policy. State security is

inherently under threat and therefore primary. States should only intervene when it is in their

interest.[27] In theoretical terms my own view of the place of the Responsibility to Protect in

international relations is best explained by Constructivism, Idealism and the Logic of

Appropriateness - those theories that illustrate the importance of eclectic international law

located between the theory of consent and natural law rather than that of Realism or Socialism or

the Logic of Consequences.[28] The Responsibility to Protect is deeply familiar to Liberal

international ethics, but even the Realist and Marxist traditions include "commitments to human

respect that make humanitarian concerns far from foreign."[29] Constructivist notions of norm

entrepreneurship, norm socialization and related theories of social movements have found their

application across a variety of political phenomena for which the previously dominant theories of

International Relations, Realism and Neo-liberalism had no analytic models.

Institutional Dynamics of International Political Orders," *(1998)* 52 International Organization, 943-69) **[March and Olsen 1998].**
[27] Doyle 2011 *supra* note 9 at 74.
[28] Currie 2008 *supra* note 19 at 94.
[29] Doyle 2011 *supra* note 9 at 72.

III.   Methodology

The study of the Responsibility to Protect also contributes to the larger theoretical understanding of conflict resolution. The research into the doctrine of the Responsibility to Protect serves as a vehicle for the exploration of larger questions, including those concerning governance, international normative theory, norm entrepreneurship, the role of the United Nations and the role of non-state actors in international governance.

The study relies on classical research methods, e.g., *bibliographical research*, but of an intensely interdisciplinary nature, as well as the collection and review of documents, reports, resolutions, agreements, conventions, and statutes from international organizations and bodies located at regional, national and international levels. The methodology applied to the study of the Responsibility to Protect searches for motives behind the support of the principle as well as outcomes as it is considered by key players and its advocates. Interviews are carried out by means of the pursuit of a social science methodology which is designed to achieve a deeper meaning or "thick description."[30] Due to the importance of non-state actors the qualitative research was carried out in the form of *policy interviews*. The interviews involved collecting information more generally on political and advocacy groups, other members of civil society, and international organizations, particularly the UN.[31] Overall, two qualitative research methods have mainly influenced the interview questions: (1) the anthropology of policy; and (2) norm entrepreneurship. These methods incorporate ways of doing research in different fields; they

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[30] Clifford Geertz, *"Thick Description: Toward an Interpretive Theory of Culture"* in Clifford Geertz *The Interpretation of cultures: selected essays (*New York: Basic books, 1973*)* at 1 *[**Geertz 1973].**

[31] For example, Sally Engle Merry refers to "transnational consensus building" which involves "the global production of documents and resolutions that define policies such as major treaty conventions, and policy documents that come out of global conferences and resolutions and declarations of the UN General Assembly." Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice (*University of Chicago Press, 2010) [**Merry 2010].**

relate to and complement each other in fundamental ways representing the interdisciplinarity of

the theory.   The examination of norm formation and implementation requires an

interdisciplinary approach that combines the tools and techniques of the international lawyer and

political scientist with those of the sociologist and anthropologist, who offer insight into the

analysis of social movements, and social change.[32]

The qualitative research helps to expand our understanding of these factors, and aids us in

achieving a "thick description" of the meaning of the norm, while legal theory and the theory of

norm entrepreneurship provides the framework for its historical development. While on the

theoretical level the thesis considers whether intervention (and the Responsibility to Protect) is a

moral entity or a legal entity, or both, and what this means in terms of implementation, additional

research focuses the thesis on norm development. Many of the non-state actors who are

concerned with human rights and human dignity and the protection of human security[33] act as

proponents of the Responsibility to Protect. Social movement organizations are central in the

promotion of UN initiatives and to the movement of UN decisions with relation to the principles

of the Responsibility to Protect. Without these organizations, the Responsibility to Protect

would likely not have achieved the level of acceptance that it has.   Some commentators have

gone so far as to suggest that "the roots of contemporary ethical foreign policy are to be found in

the evolution of the NGO movement…" [34]

The thesis provides a description of the views, perspectives and actions of key actors with regard

to the norm in both positive and negative ways as it has emerged.   Issues of policy,

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[32] Julie Mertus, "Considering Nonstate Actors in the New Millenium: Towards Expanded Participation in Norm Generation and Norm Application" (1999-2000) 32 New York University Journal of International Law and Politics, 537 at 545 **[Mertus 1999].**
[33] Responsibility to Protect, *supra* note 6 at 6.
[34] See e.g. David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (London, 2002)] 204 **[Chandler 2002].**

communication, legitimacy, impact and effectiveness, moral issues and realpolitik are

investigated. Key areas of agreement and disagreement are also highlighted. The research also

involved collecting information more generally on leaders in the formulation of the

Responsibility to Protect, other members of civil society, and international organizations,

particularly the UN, including documents produced by the Secretary General of the UN as they

pertain to the evolution of the doctrine itself.[35]

III.1   Introduction to Norm Entrepreneurships

One important theoretical and methodological approach which helps us to understand the

development of the Responsibility to Protect as a norm is that of norm entrepreneurship. The

NGOs, their organizations and the ICISS itself can be regarded as classic examples of norm

entrepreneurs in the creation and development of the Responsibility to Protect. The significance

of the relationship of norms to social behaviour parallels in some manner the relationship of

normative action to norm entrepreneurship. Johnstone states that "...norm entrepreneurs are

actors with a cause who mobilize support for their cause and seek to have it crystallized as an

accepted standard of behaviour."[36] Finnemore and Sikkink describe norm entrepreneurship as a

process that works in three stages: In Stage 1, individuals call attention to issues and try to

persuade state leaders to become proponents. These norm entrepreneurs are usually involved

with organizations like NGOs, government or international organizations; Stage 2 comes about

when a tipping point has occurred and the norm is spreading quickly in a 'norm cascade.' This is

mostly an exercise in persuasion – not coercion, although such things as sanctions can be used to

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[35] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* University of Chicago Press, 2010 [**Merry 2010**].

[36] Ian Johnstone, "The Secretary-General as Norm Entrepreneur" in Chesterman, Simon (Ed.)
 at 126.

persuade. Finally, in Stage 3, the norm is almost automatically accepted and followed and becomes entrenched in national and international institutions.[37] "At the far end of the norm cascade; i.e. the third stage, norm institutionalization occurs; norms acquire a 'taken for granted' quality and are no longer a matter of broad public debate."[38] Not all norms reach this final stage, however, and there is some question whether the Responsibility to Protect has achieved this final status. The controversy surrounding efforts to make legal or political decisions in humanitarian crisis situations according to the Responsibility to Protect holds back its ability to harden into law.

Finnemore refers to norm entrepreneurs as "meaning managers" and introduces the term "moral proselytism" to describe the activity. The language they use to construct these, "cognitive frames," is an essential component.   New norms must challenge the current "Logic of appropriateness" and create new ones.[39] In the case of the Responsibility to Protect sovereignty is to be replaced by responsibility. Overall, however, these three phases are not necessarily sequential; it is a dynamic process that occurs through discourse and deliberation where ideas are promoted, defended, explained and justified as the thesis will demonstrate.

Platforms for the discussion of the norm often include NGOs or standing international organizations. Motivations for norm entrepreneurs are usually based on values that include empathy and an interest in the welfare of others with a shared commitment to humanity because of a "belief in the ideals and values embodied in the norms."[40] This is a very important point in terms of understanding the values and ideals that form the basis of the Responsibility to Protect

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[37] See Martha Finnemore and Kathy Sikkink, "International Norm Dynamics and Political Change" (1998) vol. 52 International Organization, p. 887 **[Finnemore and Sikkink 1998].**
[38] Finnemore and Sikkink 1998 *ibid* at 895.
[39] Finnemore and Sikkink 1998 *ibid* at 897.
[40] Finnemore and Sikkink 1998 *ibid* at 898.

principle and those entrepreneurs and entrepreneurial organizations that promote and support it as a moral and possibly legal principle rather than for any hidden purpose.

One of the central tenets of the thesis is that norm entrepreneurs do function as "moral watchdogs" and are free to advocate for moral concerns in the middle of a crisis where states are more often constrained by conflicting interests. NGOs hold some of the tools needed to promote the Responsibility to Protect. "One prominent feature of modern organizations and an important source of influence for international organizations in particular is their use of expertise and information to change the behavior of other actors."[41]   NGOs in the case of the Responsibility to Protect were critical to the development of the norm. At some point, however, norm entrepreneurs have to gain the support of state actors.

Finnemore and Sikkink suggest that norms that make universalistic claims "about what is good for all people in all places have more expansive potential than localized and particularistic normative frameworks."[42] They are more likely to gain transnational acceptance. This 'universalistic nature' is an essential part of the obligation the Responsibility to Protect and its underlying network of legal conventions and covenants imposes on nations to protect citizens (both their own and others). Three principles relevant to the norm tend to be persuasive: "universalism, individualism, and world citizenship."[43]   Universalism is necessary in that each country must buy into it. Individualism underlies the Responsibility to Protect norm as it is an extension of human rights principles. World citizenship is relevant in the sense that it applies to citizens of every country - not just our own.

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[41] Finnemore and Sikkink 1998 *ibid* at 899.
[42] Finnemore and Sikkink 1998 i*bid* at 907.
[43] Finnemore and Sikkink 1998 *ibid* at 907.

Thus, the key principle of the Responsibility to Protect is to protect innocent persons who are being subjected to serious or fatal bodily harm. Such a norm must be universal in that it needs to transcend cultural differences and must be understood and accepted across cultures. This struggle for universality is a key impediment in the achievement of any kind of intervention and will be discussed further in the thesis. A major constraint is the diversity of values and priorities awarded to civilian protection that exists. In order to reach such a universal understanding, acceptance of the new norm is related to the fit of the norm within existing normative frameworks. Activists work hard to utilize this fit between existing norms and developing ones. The Responsibility to Protect's principle represents a shift from the "rights of states" to the "responsibility of states" and the participation of activists has been significant toward the international community's ability to achieve this shift.[44]

III.2   The Anthropology of Policy

In addition to norm entrepreneurship, I also adopt an approach which applies the anthropology of policy as a qualitative research method. Proponents of the anthropology of policy look at the conceptual vocabulary of policies and what can be understood from the rejection or acceptance of ideas and map the actors who influence the policies. Policy is seen as an organizing concept in society, similar to the way family may have been seen in traditional anthropology. In the anthropology of policy "Field and site are no longer coterminous" and anthropologists follow a flow of concepts or 'policies' or 'norms' as they move across the field.[45] In this case the field pertains to a transnational network that encompasses nongovernmental civil actors at the domestic or local level, international organizations and states as the norm is created and evolved.

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[44] Finnemore and Sikkink 1998 *ibid* at 908.
[45] Susan Wright, "Anthropology of Policy," Anthropology News, Nov. 2006, 22 **[Wright 2006].**

Susan Wright calls this "studying through"[46] - events are followed through different sites to reveal the policy process and the way in which concepts, ideas, policies or norms are negotiated which in total illustrate "forms of governance and regimes of power."[47] Researchers such as Sally Engle Merry, Annelise Riles, Sally Falk Moore, Arjun Appadurai, Dorothy Smith and H. Gusterson provide methodological models for this research.[48]

Sally Engle Merry suggests "the transnational circulation of people and ideas is transforming the world we live in, but grasping its full complexity is extraordinarily difficult. To do so, it is essential to focus on specific places where transnational flows are happening."[49] By focussing on the norm I have been able to find key individuals involved with the Responsibility to Protect and either spend time with them and gain their views and insights through interviews or to hear their personal accounts of their own experience with the norm. This has presented me with a unique opportunity to gain an original perspective on the evolution of the norm and to see it through the eyes of the people who live and work with it.

The study of the Responsibility to Protect illustrates that the growth of the acceptance of the Responsibility to Protect lies not only in a traditional international legal environment with a dependence on traditional institutions such as the UN and the Security Council, but also non-state actors and individuals within a transnational legal environment. Transnational law is regarded here in effect as an institutional framework for cross-border interaction beyond the nation state.[50] Along similar lines to the methodology used by Sally Engle Merry in her study of

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[46] PhD thesis "Local Conflict an Ideological Struggle, 'Positive Images'" in Wright 2006 *ibid.*
[47] Wright 2006 *supra* note 45 at 45.
[48] Merry 2010 *supra* note 35.
[49] Merry 2010 *ibid*.
[50] Gralf Calliess, -Peter Law, Transnational Osgoode Hall Law School/Comparative Research in Law and Political Economy Research Paper No. 3/2010 **[Calliess 2010].**

human rights,[51] my own research is intended to provide a vehicle for understanding how new categories of meaning emerge and are applied to social practices (in this case at the national and the international level and within groups who advocate for the Responsibility to Protect). In order for the Responsibility to Protect principle to achieve the broad acceptance it requires to be successful, it needs to be accepted within local contexts of power and meaning as well as by state leaders and those already persuaded (i.e., the activist groups). National leaders, of course, require the support of the citizens and are sometimes influenced by these citizen groups in taking humanitarian action.

Activist groups can be regarded as intermediaries between different sets of cultural understandings of what is ethical in the behaviour of states who are making crucial decisions in the global environment; i.e. as intermediaries between the ordinary citizens and the international organizations and transnational law. Policy research was conducted through these interviews in such a way as to allow me to explore subtleties of group perspectives and collect detailed descriptions of experiences, to explore how concepts are actually understood, and how political relations are being played out.   I sought to understand what, from the perspective of those involved, have been the successes of the policy, the failures, and the impediments that might stand in the way of further success along with the ethical commonalities or conflicts that may be underlying any underlying tensions. I have been interested in gaining a "thicker" comprehension of the relationship between the political public sphere and the self-legitimating claims of organizations in support of the Responsibility to Protect. In order to accomplish this I have examined statements made at the national and international levels as well as the potentially critical or supportive views of citizen interest groups apart from the political stance of state

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[51] Merry 2010 *supra* note 35.

actors. This investigation has provided insights into the discourse that is taking place (directly or indirectly) at the international level. As expected, there are areas of agreement and areas of conflict as part of the discourse. Such findings of conflicting discourse or criticism of the political position would be expected in a democratic system.

My interest is in the professional organizations and the translocal relationship – and even further the transnational level where decisions are being made that are pre-empted or influenced by bodies such as those Nongovernmental Organizations interviewed. We will see from the interviews that many of the NGOs approached have formed coalitions or have at least cooperated with one another in order to strengthen their positions. This is the area that is covered by questions asking interviewees about their joint or collaborative efforts and if they find them worth pursuing.   My intention is to show how norms develop and grow through the influence and cooperation of norm entrepreneurs. Text-based discourses are central in this development. We will see how transnational organizations shape global governance through their advocacy strategies. The interviews with individuals constitute an investigation into their transformative potential to show how the discourse is framed, particularly in relation to the five issues identified, and becomes part of a chain of action mediated by documentary forms of knowledge to social action. Documentary data were also collected through website research or written reports or attendance at events where the Responsibility to Protect was the main topic of discussion.

The interview questions were unique in their formulation based on documentary evidence, information gathering, rules and regulations, history and current events. The interview included the intention to find a balance between directing the interview toward the researcher's goals and encouraging those being interviewed to add information or views that might not have been

included in the original set of questions. These interviews plus material evidence help to provide a 'thicker' description of the evolution of the concept as it develops toward the prospect of becoming a legal norm.

Ultimately, the thesis aims to clarify the problematic relationship between the Responsibility to Protect and international law. Overall it accepts the view that the World Summit agreement did not create new law and that the Responsibility to Protect is still best understood as a political commitment to act upon shared moral beliefs, much of which is embedded in already existing international law. That is not to say, however, that the Responsibility to Protect is devoid of legal content nor that there are not signs that it is evolving toward hard law. This growth will be evidenced throughout the thesis in documents, resolutions, reports, practice, Security Council resolution and International Court decisions. In relation to the legal responsibilities of states the Responsibility to Protect principle involves the state's responsibilities towards its own population. These responsibilities are deeply embedded in existing international law, much of which is considered *jus cogens*. As Louise Arbour, former Commissioner for Human Rights, suggests there is an emerging legal duty to prevent genocide which suggests an emerging area of legal innovation that may strengthen the application of the Responsibility to Protect over time.[52]

In the final analysis, the Responsibility to Protect requires a global order where the legal structure is based on legal rights as well as responsibilities. Its basis in international human rights law is extremely important to its evolution. In a soft legal environment, it is likely that the Responsibility to Protect will always run into obstacles in terms of implementation. Presently,

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[52] Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, (2008) 34 British International Studies Association, 445-458 [**Arbour, 2008**].

for it to succeed, the Responsibility to Protect must be treated as not only a legal and political doctrine, but as a moral one which stands to protect civilians in conflict in the case of the failure of states to protect their own population.   In my view, however, there is no need yet to despair - regardless of impediments, the Responsibility to Protect has evolved and continues to evolve and is implementable. It is not a flawed principle but an essential one in today's environment of intra state conflict. State sovereignty can and must give way to state responsibility when citizens are in extreme jeopardy.

IV.   What Follows

The following chapter, Chapter Two, provides the reader with a greater sense of the immediate history and context surrounding the formal approval of the Responsibility to Protect. The story of its approval commences within the context of the supremacy of state sovereignty and then moves toward a recognition of the concerns regarding human security and human rights in international affairs. The story proceeds with the involvement of Canada, the International Commission on Intervention and State Sovereignty (ICISS) and the acceptance of a limited form of the proposed norm in 2005 in the UN by the General Assembly.   This represents a transition of historical, legal and moral significance that has taken place since the Peace of Westphalia.

International law is introduced in this Chapter to begin to outline the framework of international humanitarian law and human rights law, along with a history of international legal scholarship and the place of the sovereignty rights of states. The legal regime of the UN Charter is also described to introduce the reader to the acceptance of its formal approval and later means of implementation. Finally, the four sources in international law are presented to illustrate the

options that exist for declaring a norm as law. To aid in the tracking of the evolution of the norm, the concept of soft law is explored, especially as it relates to the Responsibility to Protect.

Chapter Three discusses the importance of human security to the development of the Responsibility to Protect after the Cold War and the International Criminal Court (ICC). It also introduces the controversies that surround the notion of forcible intervention and the Laws of War and humanitarian intervention. On the legal side, it clarifies the legal foundation of the Responsibility to Protect in the four crimes: war crimes against humanity, genocide, and ethnic cleansing. Because of the difficulty in establishing the exact legal nature of the Responsibility to Protect, the Chapter outlines the importance of legitimacy arguments as distinct from legal determinations, as either soft law (*lex ferenda*) or hard law (*lex lata*).

Chapter Four, addresses moral behaviour and moral philosophy as underlying values and ethical principle among nations, cultures and religions. It emphasizes the necessity for common moral principles as opposed to actions in the international community taken by states in their own self-interest which emphasize their sovereignty rights as opposed to their responsibilities. It suggests that the achievement of a coherent system of conventions has in some ways already been accomplished in the human rights legal framework and provides examples of foreign policy where such ideals can be found.

Chapter Five, lays out the theoretical foundations of the Responsibility to Protect, particularly focussing on the need for morality, ethics, universal principles and idealism to take precedence over realist notions of the state acting in its own self-interest. It suggests, however, that even in an established environment of human rights, realpolitik still serves to guide state actions along with fears of neocolonialist and imperial motivations. Along with realists who see actors as only

acting in their self-interest are those who support Third World Approaches to International Law (TWAIL). Their basic mistrust of international law and its colonial underpinnings lead some to reject it altogether. Other theoretical perspectives are discussed from international relations (institutional and liberal theorists), political science, and law perspectives as they reflect on the way in which the principle is approached.

Constructivist theories, which reject rationalist explanations but stress the place of norms and shared understanding, emphasize the dominance of normative discourse in decisions being made in the development of the principle. Finally, two other forms of these two basic theories (actor oriented versus structuralist) - the logic of appropriateness (in which norms and values dominate) and the logic of consequences (actions are conducted to realize material interests) - are posed against each other to help us understand the contrast between rules and roles versus the maximization of self-interest. The thesis emphasizes the necessity of collaboration and consensus in ethical choices affecting the preservation of human rights.

Chapter Six focuses on how the responsibility to protect has evolved in the global governance context, with a particular focus on the role of Non-governmental organizations. The chapter introduces Nongovernmental Organizations that have taken hold of the Responsibility to Protect principle along with the rights of the individual and that call on governments of the world to adopt the moral choice and protect civilians in violent conflict. These organizations tend to be freer to adopt the moral high ground which has enabled them to advocate for the Responsibility to Protect with less reservation. The cooperation of NGOs and international organizations and states suggest the consideration in greater depth of transnational or supranational forms of governance and of what form of governance is best suited (either from a practical or idealist vision) to address some of these issues.

Chapter Seven discusses the theory of norm entrepreneurship as a framework for taking a deeper look at International Nongovernmental Organizations (INGO) activities and programs. It provides a description of the role of INGOs as well as early influential entrepreneurs such as Lloyd Axworthy, Bill Graham and Michael Ignatieff as a testimony to their own involvement. Questions pertaining to the sociopolitical issues of significance to the principle have been posed in the field work to those interviewed and their responses analyzed. The responses have been considered in order to gauge the significance of each issue as it influences the evolution of the norm in transnational law and any attempts to implement the principle.

Chapter Eight continues the analysis of the responses from those being interviewed with regard to whether they see the Responsibility to Protect as a moral or a legal entity, a fundamental question with regard to its status as *lex ferenda* or *lex lata* and customary international law. It is the perception of those experts working with the Responsibility to Protect that I sought to assist in the purpose of deconstructing the evolution of the principle from an idea or concept to a legal norm. It also seeks the views of those interviewed on the UN and its role as either a facilitator or an obstruction to the implantation of the Responsibility to Protect.

Chapter Nine presents a case study of the implementation of the norm in its most controversial aspect; i.e., military intervention into an internal conflict without the permission of the state. When I first began the work of tracing the development of the norm, no legitimate case of forceful implementation of the Responsibility to Protect had yet occurred. In 2011, however, the Libyan revolution began and the Responsibility to Protect was invoked at the UN Security Council. Resolutions 1970 and 1973 were passed which enabled forceful implementation of the Responsibility to Protect. Ultimately it brought down the government and brought an end to the conflict. The steps taken are described and the legitimacy of the action explored. The impact of

this action on the future of the Responsibility to Protect is also considered in terms of its success or failure.

Chapter Ten presents the conclusions of the work, and suggests whether the principle of the Responsibility to Protect is likely to thrive, adapt or wither away. It also discusses the responsibility of the international community when the conflict has been brought to an end regarding any rebuilding - perhaps even restructuring a new system of government. The concluding part of the thesis, therefore, focuses on global governance (recognized as a system of political and social authority relationships in the exercise of power and policy) at a national, international, and supranational level. In the final analysis, the place of the Responsibility to Protect in the governance of states after intervention and in peace building and the achievement of stability needs to be more rigorously addressed. In this context the full spectrum of the Responsibility to Protect principle will be reviewed in terms of not only its reaction to human atrocities but in its prevention and rebuilding efforts.

Chapter Two: History, Text and Legal Context of the Emerging Principle of the Responsibility to Protect

I.   Introduction

Before delving more deeply into the analysis of the norm of the Responsibility to Protect, its

ultimate acceptance at the UN and its subsequent evolution, it is useful for the reader to have a

greater sense of the immediate history and context surrounding its formal approval. The story of

its approval commences within the context of the supremacy of state sovereignty and then moves

toward a recognition of the concerns regarding human security and human rights in international

affairs. Human rights and human security concerns gradually began to shift the sovereignty of

states away from exclusive rights over their own domain to increased responsibility to and for

their citizens and accountability to external states and governance bodies. This represents a

transition of historical, legal and moral significance that has taken place since the Peace of

Westphalia. The story proceeds with the involvement of Canada, the International Commission

on Intervention and State Sovereignty (ICISS) and the acceptance of a limited form of the

proposed norm in 2005 in the UN by the General Assembly.

II.   Canada, the Responsibility to Protect and Human Security

In this climate of concerns regarding human security, states began to seek a legitimate way to

prevent human atrocities from occurring. Beginning in the mid-1990s, a small group of states, as

members of the Human Security Network (HSN), developed a foreign policy of human security.

An enthusiastic and outspoken champion of this policy was Canada.   The Canadian government

and its state-based human security fellows were networked, in turn, with a diverse coalition of

International and Nongovernmental Organizations in what former Foreign Minister Lloyd Axworthy characterized as the 'new diplomacy.'[53] This eventually led to the formation of the ICISS, and adoption by the UN of the principle of the Responsibility to Protect.

During Lloyd Axworthy's term (1996 -2000) as Minister of Foreign Affairs in Canada, he identified "human security as encompassing three main aspects: conflict prevention, conflict resolution and peace building."[54] These principles gained even greater substance in the Responsibility to Protect principle. Conflict prevention, for example, includes strategies such as mediation between potential combatants, preventive diplomacy and early warning systems. Conflict resolution involves intervention in ongoing conflicts including peacekeeping and other military forms of intervention. Peace building refers to what happens when the conflict comes to an end - at the conclusion of a conflict there may be nothing or there may be peace building or transitional justice. These three principles are infused in the ICISS document and illustrate how the principle can be seen through the larger lens of conflict resolution. (While military intervention is the most controversial aspect, I will in the conclusion of the thesis address the gap in the literature regarding conflict resolution as well as *jus post bellum* and peacebuilding. In Chapter Seven I also give thought to alternatives to intervention and what happens after the fighting stops).

The Canadian foreign policy at that time contained a lot about the Human Security Agenda, especially in the work done under the leadership of Axworthy from January 1996 to October 2000. Much of the inspiration of the work comes from the United Nations Development Programme (UNDP) and the 1994 World Development Report which took the position that the

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[53] In response to Kofi Annan's challenge to the international community to act upon future violations of human rights and humanitarian law.
[54] Stephen Clarkson, and Stepan Wood *A Perilous Imbalance*: *The Globalization of Canadian Law and Governance* (UBC Press, Vancouver-Toronto, 2010) at 143 **[Clarkson and Wood 2010].**

primary referent of security should be shifted from the state to the individual and that human life

and dignity should be the main concern. (It also included within human security such elements

as food, health, environmental and economic dimensions which are not covered in the qualified

approval of the principle). Security, therefore, was meant to provide a guarantee of human

rights. This human security agenda has been associated with the Landmines Convention

(another Canadian initiative), the creation of the International Criminal Court (ICC), and the

ICISS Report, as well as the Kimberley Process to control trade in blood diamonds.[55]

Axworthy prioritized peace building and the ban on anti-personnel landmines in an effort to

promote disarmament and the need for coherence in policies surrounding human security in

"freedom from fear" as well as "freedom from want."[56] Thus, by 1999, the focus had narrowed

to "freedom from fear" as Canada's particular conception of human security. Specific priorities

focused on: protecting individuals from threats (including public safety, and terrorism);

protecting civilians in war zones and areas of landmines; and, *in extremis*, military deployments

to halt atrocities and war crimes, conflict prevention and the economic destruction of civil wars.

This would involve accountability from the global level of the International Criminal Court

(ICC) to national and local levels, as well as peace operations.[57] In this context, then, the

principle of the Responsibility to Protect was conceived and brought to life.

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[55] David R. Black, Chapter 5 'Mapping the Interplay of Human Security Practice and Debates: The Canadian Experience" in *A Decade of human security: global governance and new multilateralisms*, MacLean, David R. Black, Timothy M. Shaw (Aldershot, England: Ashgate Publishing, 2005) **[Maclean, Black and Shaw 2005]** 56.
[56] Black 2005 *ibid* at 5.
[57] Black 2005 *ibid.*

III.   The Report of ICISS (2001) and the Formalization of the Responsibility to Protect

The principle of the Responsibility to Protect was formally conceptualized and advocated for in 2001 by the International Commission on Intervention and State Sovereignty (ICISS) with Canada as a major player. The Commission's goal was to deliver "practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them…".[58] The doctrine represented in the ICISS Report is not solely restricted to military intervention for protection purposes, but more broadly relates to the responsibility to prevent -- "to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk;" the responsibility to react -- "to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention;" and, the responsibility to rebuild -- "to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to a halt or avert."[59]

The Responsibility to Prevent is regarded as the single most important principle according to the Commission and envisages disparate actors working together (including States, the UN, international financial institutions, regional organizations, and NGOs among others) to achieve these objectives.[60] It also requires that prevention options be exhausted and less intrusive and coercive measures be considered in the first instance before forceful intervention options are contemplated. Discussion of peace talks and political solutions should be common at this stage.

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[58] ICISS Report *The Responsibility to Protect* (2001) *supra* note 6.
[59] ICISS Report *ibid*, p. xi.
60   ICISS Report *ibid* Para. 3.36 The Report indicates it is the most important principle; however, it is not the portion of the report that has received the most attention and has generated the most concern.

As stated earlier, the most controversial aspect, however, and the one that has drawn the most attention, and the one that this dissertation in greater part addresses, is its provision for coercive intervention when human atrocities occur and no peaceful methods seem to work. Drawing this line, however, is often contentious -- witness the political situation (September 2013) with Obama's "red line" over the use of chemical weapons in Syria[61] versus Putin's protection of Russian interests in earlier Security Council resolutions and the failure of the Security Council to act in Syria.

The Report recognizes the concept of sovereignty as "the legal identity of a state in international law" as well as the norm of non-intervention codified in the UN Charter.[62] However, the Report also suggests that the "authority of the state is not regarded as absolute."[63] There are constitutional power sharing arrangements and obligations that states share as members of the international community. These obligations raise questions about the principle of 'sovereignty as control' and arouse ethical questions about the importance of 'sovereignty as responsibility' within the state and external to the state.[64]   The basic principles of the Report are, firstly, that state sovereignty implies responsibility and the primary responsibility for the protection of its people lies with the state itself; and secondly, 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 principle of the Responsibility to Protect.[65]

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[61] News Conference at the White House August 20, 2013.
[62] ICISS Report *supra note 6*, para. 2.7 and 2.8.
[63] ICISS Report *ibid*, para. 2.14.
[64] ICISS Report *ibid*, para. 2.14.
[65] ICISS Report *ibid*, page xi.

This new concept of 'sovereignty as responsibility' requires states to accept their responsibility to protect their citizens. These principles bear some relationship to existing standards of state conduct with regard to human rights and humanitarian protection. In fact, the foundations of the Responsibility to Protect lie in established international laws and principles "(1) obligations inherent in the concept of sovereignty; (2) the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security; (3) specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law; and (4) the developing practice of states."[66] These rights and obligations will be outlined in greater detail later in the chapter.

The development of the norm is not a simple one. For example, the concept of the Responsibility to Protect is treated differently in four main texts: i.e., the ICISS report (2001), the High Level Panel report (2004),[67] the Report of the Secretary General (2005),[68] and the Outcome Document of the 2005 World Summit,[69] the most comprehensive treatment being the ICISS report. The main document is the Outcome Document but the others contribute to its interpretation. The intent of all of these was to solve the legal and policy questions of humanitarian intervention.[70]

The *UN High Level Panel Report on Threats, Challenges and Change* spoke of an "emerging norm of a collective international responsibility to protect and linked shared responsibility

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[66] ICISS Report *ibid*, page xi.
[67] *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc A/59/565 at 56-57, para. 201 (2004) available at http://www.globalpolicy.org/un-reform/un-reform-initiatives/highlevel-panels/32369.htmlj [**High-Level Panel on Threats, Challenges and Change 2004**].
[68] High-Level Panel on Threats, Challenges and Change 2004 ibid.
[69] 2005 World Summit Outcome, GA Res. 60/1, para. 138-39 (Oct. 24, 2005) [hereinafter Outcome Document]. In September 2005, the concept of the responsibility to protect was incorporated into the Outcome Document at the high –level meeting of the General Assembly.
[70] Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? (2007) 101 Am. J. Int'l. 102. [**Stahn 2007**]

directly to the UN." [71]   The report stipulated that the Security Council can authorize military

action to redress catastrophic internal wrongs if it is prepared to declare the situation as a threat

to international peace and security under Chapter VII. It also called for more responsible use of

the veto. The Report, unlike the Commission, did not allow for coalitions of the willing and I

have maintained this position with regard to the legitimate use of the norm.

In March 2005 this finding was endorsed by the Report of the UN Secretary General entitled *In

Larger Freedom: Towards Development, Security and Human Rights for All*. The Report of the

Secretary General stressed the need to use diplomatic and humanitarian methods to help protect

the human rights and well-being of civilian populations. However, the use of force was an

ultima ratio measure to be taken by the Security Council, if necessary. [72]

Overall, the Responsibility to Protect has two primary reference points: the first is the ICISS

Report (2001), and the second is the formal acceptance of the Responsibility to Protect in the UN

Summit Outcome Document in 2005 – a qualified version of the principle proposed in the

Report. The Draft Negotiated Outcome document distributed on 12 September 2005 was

approved by the UN General Assembly unanimously. The consensual text reads:

> Responsibility to protect populations from genocide, war crimes, ethnic cleansing and
> crimes against humanity
>
> 138 Each individual State has the responsibility to protect its populations from genocide,
> war crimes, 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.

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[71] High Level Panel *supra* note 67.
[72] *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary General,
UN Doc. A/59/2005.

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 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 an crimes against humanity. We stress the needs 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.

140 We fully support the mission of the Special Advisor of the Secretary-General on the prevention of Genocide.[73]

This document was subsequently adopted by the General Assembly in its Resolution 60/1, 2005 World Summit Outcome Document which incorporated the concept of the responsibility to protect. [74] Some states questioned the legal nature of the Responsibility to Protect and sought to frame it as a purely moral concept.[75] The final text is an effort to bridge the different positions and to look beyond pure morality. Paragraphs 138 and 139 of the Outcome Document represent a rather curious mixture of political and legal considerations, which reflects the continuing division and confusion about the meaning and nature of the concept.[76]

The Security Council first referred to it in Resolution 1674 on the protection of civilians in armed conflict. In April 2006, the UN SC reaffirmed the Responsibility to Protect and agreed to

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[73] UN Resolution (UN) General Assembly at the UN 2005 World Summit adopted a resolution embodying the position of forty-six heads of state. The Resolution A/Res/60/1 (October 24, 2005) was adopted by 174 states represented at the summit. Richard H Cooper, and Juliette Voinov Kohler *Responsibility to Protect The Global Moral Compact for the 21st Century* (New York : Palgrave Macmillan, 2009) at 31 **[Cooper and Kohler 2009].**
[74] 2005 World Summit Outcome, GA Res. 60/1, para. 138-39 (Oct. 24, 2005).
[75] U.S. Ambassador John Bolton wrote a letter on Aug. 30, 2005 saying the U.S would not accept that the UN or the Security Council or individual states had an obligation to intervene under international law.
[76] **Stahn 2007** *supra note* 70 at 108. UN Resolution 1674, 28 April 2006.

adopt appropriate measures where necessary.[77] On 12 January 2009, the UN Secretary General

Ban Ki-moon issued a Report entitled *Implementing the Responsibility to Protect (RtoP)* which

helped to set the tone and direction for the principle and further contributed to its evolution in

international law. His Report established a framework for the implementation of the

Responsibility to Protect which has become widely known and accepted as the "three pillar

approach."   Pillar One represents the protection responsibilities of the State to protect its

populations from genocide, war crimes, ethnic cleansing and crimes against humanity in

accordance with paragraphs 138 and 139 of the Summit Outcome 2005. Pillar Two is the

commitment of the international community to assist States in meeting those obligations.   Pillar

Three is the responsibility of Member States to respond collectively in a timely and decisive

manner when a State is manifestly failing to provide such protection (not necessarily by using

force, although it does not exclude the use of force).   All three must be ready to be utilized at

any point.[78] In terms of the status of the principle, the Secretary General's Report has

interpretive power and has been persuasive in the eventual adoption of the norm in its legal

context.

In 2009 the General Assembly subsequently adopted a unanimous resolution noting the report

and agreeing to continue consideration of the Responsibility to Protect.[79]

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[77] Alex J.Bellamy, and Ruben Reike, The Responsibility to Protect and International Law (2010) 2 Global Responsibility to Protect, 267-286 [**Bellamy and Reike 2010**]. See SC Res. 1674, para. 4 (April 28, 2006) ("reaffirm(ing) the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome, GA Res. 60/1 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war cries, ethnic cleansing and crimes against humanity."

[78] Excerpt from the Report of the Secretary General Ban Ki-Moon *Implementing the Responsibility to Protect,* 12 January 2009 (accessed at http://responsibilitytoprotect.org/SGRtoPEng%20(4).pdf 6 March 2013)

[79] UNGA Resolution A/63/L.80, 14 September 2009.

This development is part of a growing transformation of international law from a state and governing-elite based system of rules into a normative framework intended to protect certain human and community interests.[80]

These reports issued by the UN Secretary General and certain expert bodies and subsequent resolutions lend some weight to the Resolution adopted by the General Assembly in 2005 although the text of the Outcome Document is the most authoritative in terms of its legal value. Let us then consider the wider legal context for this principle.

IV. International Law

IV.I   Introduction

When considering the legal status of the Responsibility to Protect, it is important to understand and enter the debate on international hard law (*lex lata*) versus soft law (*lex ferenda*). Much of the debate regarding international law versus soft law centers on a bifurcation of the two. Most agree soft law (*lex ferenda*) is a reality and is an instrument of contemporary governance in terms of its effect on hard law.[81] It is a recurrent (legal) practice in contemporary international society. Defining soft law is a task in itself.[82] Goldman claims soft law functions as so-called hard law by operating through formalized decision-making procedures. On the other hand, it can be suggested much hard law functions like soft law. Goldman argues for an expansion of the concept of law to account for this. Given some of this ambiguity and the desire to locate the Responsibility to Protect in international law, I will start a discussion of the common understandings of the important aspects of both international law and international soft law.

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[80] Stahn 2007 *supra* note 70.

[81] See Mathias Goldmann, *We need to cut off the Head of the King: Past, Present, and Future Approaches to International Soft law* (2012) 25 Leiden Journal of International Law, 335-368 [**Goldmann 2012**].

[82] Jean D'Aspremont, and Tanja Aalberts, *Which Future for the Scholarly Concept of Soft International Law?* 25 Leiden Journal of International Law, 330-334 [**D'Aspremont and Aalberts 2012**].

The question of whether the Responsibility to Protect norm does or can be viewed as

international law is a muddy one and not one that can be answered with a definitive ease.

Clearly, the Responsibility to Protect is part of the framework of international humanitarian and

human rights law of the ICC and the Rome Statutes. There is also a tension in the literature on

the place of International law, soft law, politics and morality in decisions at the international

level. I am concerned with both as in my view any foreign policy always has a political and an

ethical component. There is no escape from the acceptance of the Responsibility to Protect as

being a moral and political choice as well as a legal one. Law, morality and legitimacy tend to

be bound together when analyzing the implementation of the norm.   It would be fair to say I take

a more eclectic approach to international law in that I borrow elements of both consensual and

natural law theories.

There is no central or constitutionally authorized legislature or law-making authority in

international law. The *United Nations Charter* is not a constitution – it is an international treaty

and has no law-making powers of its own. The International Court of Justice (ICJ), the

'principal judicial organ of the United Nations,' only has jurisdiction to give advisory opinions

and agencies and to decide cases submitted to it with the consent of the parties.   It has no power

to create binding precedent. The UN Security Council, however, is given the power to impose

binding measures in matters of international peace and security but can only bind member states

that are party to the UN Charter.

IV.2.   History of International Legal Scholarship

The main schools of thought in international legal scholarship are natural law and positivism and

there have been three main periods in the evolution of international law: the "primitive" period,

(scholarship pre-dating the Peace of Westphalia in 1648;) the "classical" or "traditional" period,

(between 1648 and the close of the First World War); and the "modern" period, beginning with

the establishment of the League of Nations in 1919.

The 'Primitives' included Vitoria, Gentili, Suarez, and Grotius who posited all law could be

deduced from some "innate, pre-existing normative order that was not dependent for its authority

on the will of its subjects."[83] Law was pre-ordained by God or "nature" and for Vitoria and

Suarez (Catholics) law was universal in scope.   Gentili and Grotius (Protestants) held a more

secular view of law whereby human reason was the source of authority. Grotius (1583-1645) a

Dutch scholar is known as the 'father' of modern international law. His major work, *De Jure*

Belli Ac Pacis is one of the earliest attempts to provide a systematic overview of the Laws of

War and Peace.[84] Grotius was preceded by Gentili (1552-1608) at Oxford University who wrote

De Jure Belli (1598) and Francisco de Vitoria (1480-1546) a Spanish theologian.[85] Samuel

Pufendorf followed (1632-1684), a German scholar, and suggests that natural law was the source

or basis of international law.[86]

The 'Classical or Traditional Period' brought a quasi-empirical approach which focused on

behaviour which was not the result of a pre-ordained or intrinsic legal or moral order. Positivism

asserted that "Law simply consisted of whatever was articulated as such or consented to by its

subjects" according to the theory of consent.[87]   The English legal scholar, Richard Zouche,

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[83] Currie 2008 *supra* note 19 at 85

[84] Thomas Buergental, and Murphy, Sean 5th Edition   *Public International Law in a Nutshell (*West Publishing Co., 2013*)*

[85] Buergental and Murphy 2013 ibid at 14-15

[86] Buergental and Murphy 2013 ibid Samuel Pufendorf *De Jure Naturna Gentium*, 1672

[87] Currie 2008 *supra* note 19 at 88

(1590-1660) was one of the early positivists who looked to state practice as the source of international law, based on the consent of states – its subjects.[88]

Modern international legal scholarship rejected the positivists and the unconditional theory of consent. States instead became lawmakers, judges and executioners.[89] In the twentieth and twenty first century legal scholars attempted to combine both schools of positivism and natural law. Positivism was used for unconventional matters while natural law was referred to in more difficult cases like states freedom to perpetuate human abuse against their own citizens. This pick and choose approach was dubbed as 'eclecticism.' "Most 21st C. international lawyers and judges are eclectics in that they borrow for various purposes and in different contexts elements of both consensual and natural law theories…"[90] This kind of approach also helps to unravel the Responsibility to Protect.

Philosophy tries to answer the question of why it is binding by proposing it is driven by the human desire for order. "The law is not externally imposed but self-imposed by humanity based on its self-perceived needs or interests."[91] Other scholars, realists or sceptics, focus on power politics which marginalize the significance of binding force.

IV.3   National Sovereignty

The concept of national sovereignty is crucial to the evolution of the Responsibility to Protect and to the complex structure that defines the relationship between actors, ideas, norms and values at the international and domestic level. The beginning of the sovereign state system has been conventionally associated with the Peace of Westphalia, concluded in 1648, which brought the

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[88] Buergental and Murphy 2013 *supra* note 84.
[89] Currie 2008 *supra* note 19 at 91.
[90] Currie 2008 ibid at 94.
[91] Currie 2008 ibid at 92.

Thirty Years War to a close. The two treaties that comprised the Peace, Osnabruck and Munster, permitted the prince to set the religion of his own territory, *cuius region eius religion*.

The most important right of states is sovereignty which means "exclusive power of jurisdiction over territory and population, fettered only by the requirements of international law."[92] Next to this is equality, enshrined in the *UN Charter*, which means that every states possesses the same basic legal rights and obligations.[93] States have a right to be free from intervention and a duty not to intervene in the domestic affairs of other states. "…aggression or the use of threat or force against the territorial integrity or political independence of another state is categorically outlawed in the *UN Charter"* and in customary international law.[94] "This prohibition is considered a 'peremptory norm' of international law.''[95]

The concept of sovereignty is not static or uniform and its meaning has changed over time. It assumes different guises in different locales. One central tenet, however, is the right to the self-determination of a government which began as the foundation of the right of a ruler to rule as he saw fit, rather than the self determination of the citizens to be ruled as they chose. Krasner, in an effort to clarify this complexity identifies three central aspects (or categories) of sovereignty which helps us to understand the significance of the shift that has occurred and the remaining tension between the two principles – sovereignty versus human rights and the Responsibility to Protect.[96]

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[92] Currie 2008 ibid at 39.
[93] See the *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA. Res. 2625 (XXV), UN GAO, 25th Seas, Supp. No. 28, UN Doc. A/9028 (1971), Principle 6 (*Friendly Relations Declaration*).
[94] UN Charter, Article 2(4).
[95] Currie 2008 *supra* note 19 at 39 a peremptory norm in international law is a rule so fundamental that it cannot be set aside even by agreement by states.
[96] Stephen D. Krasner, *Power, the State, and Sovereignty (*Routledge, New York, NY, 2009)

(i)   International legal sovereignty: States mutually recognize each other but at the same time recognize their right to voluntarily enter into international agreements or treaties. States are juridically independent territorial entities which are legally free and equal. Most international organizations limit membership to states.[97] The Responsibility to Protect accepts this concept of sovereignty, but goes beyond it to establish state responsibility for its civilians and international responsibility for the citizens of that state if the state is failing in its duties.

(ii)   Westphalian sovereignty, or Vattelian sovereignty: As states are juridically independent and autonomous, they are not subject to any external authority. A key corollary to this in international relations and law is that "one state does not have the right to intervene in the internal affairs of another state."[98] Each state has the right to independently determine its own institutions of government.[99] The Responsibility to Protect clearly challenges the right of the institutions of government to act in violation of key international regulations and rules re its citizens and establishes the right of intervention. This is a fundamental shift.

(iii)   Domestic sovereignty refers to a state's ability (and authority) to control activities both within and across its borders. It refers to the institution by which states are governed; e.g. by democratic or autocratic, federal or unitary, parliamentary or presidential systems. In addition, there must be a locus or final source of power. Failed states are those considered to be unable to govern themselves regardless of their formally legitimated authority structures. The type of government, whether democratic or autocratic or other, is not intended to enter into the decision

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[97] Krasner 2009 *ibid* at 15.
[98] Krasner, 2009 *ibid* at 15.
[99] Krasner, 2009 *ibid* at 15.

making. [100] The determination of a state as 'failed' is very important in intervention arguments

and is a cornerstone of the Responsibility to Protect.

Krasner's main interest is in sovereignty and the effect that certain situations or actions have on

sovereignty; i.e. intervention, threats from weakened states, conflict prevention, the stabilization

and management of weak post conflict states, and the increasingly interconnected international

system. These issues are also all relevant to my own work and its attempt to comprehend the

significance of the relationship between sovereignty rights of states versus obligations of the

state to override such rights in circumstances of extreme humanitarian crises. The manner in

which Krasner categorizes sovereignty emphasizes its importance to states and helps to show

why it remains critical in international relations today. It also emphasizes why a norm which

allows and even obliges states to override the rights of other states in the case of humanitarian

intervention remains so contentious and is frequently repelled.

Vattel argued in favor of the hegemony of sovereignty when he wrote that while a nation is

obliged to promote "the perfection of others," it cannot force such principles on them in violation

of their natural liberty. "Nations are absolutely free and independent."[101] Interventions did take

place nevertheless. An early instance of intervention in the domestic affairs of another state to

protect civilians came about with British Prime Minister William Gladstone in the Ottoman

Empire in 1898 (a century before the Responsibility to Protect was approved). It was considered

to be 'a duty to protect the vulnerable.' America also went to war with the Spanish Empire in

1898 claiming its abuse of its own subjects and that the behavior was 'shocking to the conscience

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[100] Krasner 2009 *ibid.*

[101] Emerich De Vattel, *Principles of the Law of Nature applied to conduct and affairs of nations and sovereigns* (Philadelphia 1852): prelim. 4. **[De Vattel 1852].**

of mankind.'[102] The Nuremberg Trials introduced a new category of crime and the concept of

'crimes against humanity.' The Charter of the UN holds 'faith in human rights' in its preamble.

Humanitarian intervention has become "perhaps the most dramatic example of the new power of

morality in international affairs."[103]

So far in the discussion of states and sovereignty we have been talking about states and their

external and internal sovereignty and their power to operate and make decisions. But quite often

it is the 'failed' state that needs to be identified for the responsibility principle to be called into

play. When states fail, they are no longer able to control their own territory or internal conflict.

Krasner points to four kinds of internal political crises that bring about state failure and

subsequent interventions. He categorizes these as 'revolutionary' wars, ethnic wars, adverse

regime change, and genocide. Sometimes the states themselves are the perpetrators.

Krasner refers to the many failed, weak, incompetent, or abusive national authority structures

that exist, which limit their citizens access to social services, including health care and education,

as well as providing for their physical security and its impact on the sovereignty of states. He

notes these instances weaken or threaten sovereignty as a universal norm.   Endemic violence

often erupts with exploitative political leaders, leading to low life expectancy, economic hardship

and even state sponsored genocide. These poorly governed states can generate conflicts that spill

across international borders, where transnational criminal and terrorist networks can flourish,

posing threats to international peace and security. [104]

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[102]   Introduction to David B.MacDonald, Robert G Patman and Betty Mason-Parker (Eds.) *The Ethics of Foreign Policy* University of Otago, New Zealand (Hampshire England: Ashgate Publishing Limited 2007) p. 4.
[103]   see Leslie H. Gelb, Justine A. Rosenthal, 'The Rise of Ethics in Foreign Policy – Reaching a Values Consensus," Foreign Affairs, 82/3 (2003): 2-7 In Chapter 12, MacDonald, Patman and Mason-Parker 2007, 205 **[Gelb and Rosenthal 2003].**
[104] Krasner 2009 *supra* note 97.

In recent years we have seen, through the Arab Spring uprisings and large revolts against oppressive leaders, efforts by citizens to gain freedom and democracy and to establish their human rights. Such efforts have frequently led to further repression and subsequent violence and questions of intervention. In fact, a clear cut case of the implementation of the doctrine of the Responsibility to Protect in Libya was prompted by such a revolt and will be presented and analyzed in Chapter Six as a case study in the Responsibility to Protect.

IV.4   International Legal Personality: The Subjects of International Law

Many international institutions have legal personality and can exercise legal powers on the international plane, including the UN and specialized agencies of the UN, as well as the International Labor Organization (ILO), the European Union (EU), and the African Union (AU). A subject or person is an entity which possesses international rights and duties and has the capacity to maintain its rights by bringing international claims.[105] States and organizations are the normal persons on the international plane. Various entities, including non-self-governing peoples and the individual, have a certain personality. States and some organizations have legal personality with respect to making claims for breaches of international law, making treaties and agreements and privileges from national jurisdictions, but the primary subjects of international law are states. The International Court of Justice (ICJ), in its landmark Advisory Opinion in the Reparations Case defined the criteria for international legal personality as a subject of international law. [106] The Court stated that a subject of international law is "capable of

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[105]Ian Brownlie, *Principles of Public International Law* Seventh Edition (Oxford: Oxford University Press 2005) at 57.
[106] *Reparation for Injuries Suffered in the Service of the United Nations*. Advisory Opinion [1949] I.C.J. Rep. 174. [*Reparations Case*].

possessing international rights and duties, and…has capacity to maintain its rights by bringing international claims."[107]

Individuals traditionally existed only "as an object, rather than a subject, of international law,"[108] with no international legal rights nor legal obligations. However, certain rules of conduct in times of armed conflict have emerged for the protection of individuals (such as civilians, combatants, prisoners of war, the sick and wounded, and so on). These codes of conduct are regarded as directly binding upon individuals and not merely the states. International criminal law is concerned not only with violations by individuals of the laws of armed conflict but also other large scale atrocities such as crimes against humanity and genocide. Thus international criminal tribunals and the International Criminal Court have been established to prosecute individuals accused of large scale atrocities. [109]

IV.5   The United Nations

The United Nations came into being with the entry into force on October 24, 1945 of the UN Charter – a multilateral treaty that serves as the UN 'constitution.' At the time of its conception, it had a membership of 51 states, although there are now many more.[110] The UN is an international organization both in terms of its membership and the purposes it is designed to advance. It is charged with peacekeeping; developing friendly relations between states; and international cooperation regarding economic, social, cultural, humanitarian and human rights concerns.[111]

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[107] Reparations Case ibid.
[108] Currie 2008 *supra* note 19 at 73.
[109] Currie 2008 ibid at 73.
[110] Buergental and Murphy 2013 2013 *supra* note 84 at 51.
[111] UN Charter Article 1.

IV.5.1   The Legal Regime of the United Nations Charter

The UN Charter and the Security Council are critical to the development and implementation of the Responsibility to Protect. The Charter has equipped the UN with organs and tasks and charged it with the maintenance of peace and security and cooperation in solving problems. It has international legal personality but it is not a State nor a super state, but rather is a "subject of international law and capable of possessing international rights and duties." [112] It has capacity to maintain its rights by bringing international claims.

> In the Advisory Opinion in the *Reparation* case…The International Court held unanimously that the UN was a legal person with capacity to bring claims against both member and non-member state for direct injuries to the Organization.[113]

Generally parties to a treaty are the only ones bound by it. However, the UN Charter provides an exception in accordance with the UN responsibility for peace and security.

> The Organization shall ensure under general international law that States which are not members of the UN act in accordance with principles so far as may be necessary for the maintenance of international peace and security.[114]

IV.5.2   The Prohibition of Force

The UN Charter's Prohibition of Force and Customary International Law

Article 2 of the UN Charter binds the members to:

a) settle their international disputes by peaceful means in such a manner the

   international peace and security and justice are not endangered;[115]

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[112] Brownlie 2005 *supra* note 105 at 677.
[113] ICJ Reports (1949), 184-5, 187.
[114] Brownlie 2005 *supra* note 105 at 689 Article 2(6) of the UN Charter.
[115] Brownlie 2005 ibid 731.

b) "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the UN."[116]

The collective right of self-defence (Article 51 of the Charter) was agreed to in general international law but it was given express recognition in Article 51 of the Charter. Article 51 of the Charter provides the right of a Member to self-defence.[117]   Article 51 reserves the right of individual or collective self-defence if an armed attack occur against a member of the UN until the Security Council has taken measures to maintain international peace and security. This is seen as an inherent right.[118]

The International Court indicated two conditions for the lawful use of self-defence: 1) the victim state must declare itself as a victim and 2) the second condition is that the wrongful act must constitute "armed attack." [119]

> …when the United States Expeditionary Force began military operations against Iraq in March 2003, the letter to the Security Council of 20 March relied upon Security Council resolutions as the putative legal basis of the action, rather than the principles of general international law.[120]

Article 2(4) of the Charter prohibits the use of force against any state, not only member states. The prohibition against the use of force also exists in customary international law in the *Friendly*

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[116] UN Charter; Brownlie 2005 ibid at 732.
[117] Brownlie 2005 ibid at 735.
[118] Brownlie 2005 ibid at 732.
[119] Brownlie 2005 ibid at 735.
[120] See U.N. Doc 3/2003/351. See further the U.K. letter of the same date, which also places reliance exclusively upon the Security Council resolutions. U.N. Doc/5/2003/350 and the similar Australian letter of the same date: UN Doc/5/2003/352.

Relations Declaration, a UN General Assembly resolution adopted in 1970[121] which repeats this prohibition). [122] According to the International Law Commission, the general prohibition on the use of force, "a universally applicable customary rule, [it] is also a rule of *jus cogens*, or a peremptory norm of international law – one from which no derogation is permitted."[123]

The Security Council and the General Assembly of the UN make recommendations and decisions relating to specific issues, which involves the application of general international law. Such practice "has considerable legal significance."[124] There is no compulsory regulation or system review required by external bodies to allocate responsibility. General international law, however, provides criteria to which an international organization may be held to be unlawful. Also, particular acts may be deemed void if they are contrary to a principle of *jus cogens (*rules so fundamental to the legal order they cannot be set aside by treaty; peremptory norms, non derogable).[125]

V.   Sources of International Law

The fact that there is no law-making authority at the international level begs the question of what the sources of international law are. In a sense, normal sources such as a constitution or legislative enactment, do not exist in international law. As a substitute, the general consent of states creates rules of general application which become custom in international law. What is necessary is evidence of the existence of consensus among states concerning particular rules or practice. This being the case, the thesis will examine certain decisions as material evidence of the attitude of states toward the Responsibility to

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[121] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV) UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1971) [*Friendly Relations Declaration*].
[122] Currie 2008 *supra* note 19 at 461.
[123] Currie 2008 ibid at 463. Note this prohibition is qualified by the Chapter VII exception.
[124] Brownlie 2005 *supra* note 105 at 692.
[125] Brownlie 2005 *ibid* at 684.

Protect, assessing how often it has been recognized and the resulting impact. An accumulation of the Resolutions (as will be discussed in Chapter Eight) invoking the Responsibility to Protect helps the norm to gain in uniformity, consistency and custom.

True sources of international law are those sources or rules to which states are willing to subject their sovereignty. The International Court of Justice (ICJ) was established in 1945 as the judicial organization of the UN: Article 38(1) of the Statute of the International Court of Justice covers the following sources or rules to which states are willing to subject their sovereignty which are considered to be the most authoritative:

A. International **'conventions or treaties,'** whether general or particular; **c**ertain types of customary rules (*jus cogens*) cannot be displaced by treaty;

B. International **custom**, as evidence of a general practice accepted as law;

C. **The general principles of law** recognized by civilized nations;

D. **Judicial decisions** and the teachings of the most highly qualified publicists of various nations (scholarly writing) are considered as law finding, but not law making. "This distinction is frequently referred to as the difference between "formal" (law-creating) sources and "material" or 'evidentiary' (law-finding) sources…"[126]

Some say Article 38.1 generally supports the positivist theory of consent. Some conclude there is a hierarchical order; others do not. Most agree, however, that the two principal sources are treaties and custom and general principles and judicial decisions play only a secondary role.

Law-making treaties, the conclusions of international conferences, resolutions of the UN General Assembly, and drafts adopted by the International Law Commission as drafts have a direct

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[126] Slomanson, William Fundamental Perspectives on International Law (Wadsworth: Boston, USA, 2011) at 26-27.

influence on the content of the law. What we do have in relation to the Responsibility to Protect is an ample amount of scholarly writing which seeks to find the law-creating aspect of the principle. It is in soft law and in these judicial decisions and the scholarly writing and material or evidentiary sources that we will find evidence of the Responsibility to Protect's legal nature along with formal sources which form the basis for international humanitarian law and human rights law. Let us examine these four sources more closely.

V.1   International Conventions and Treaties

Treaties that create general norms for the future conduct of the parties with the same requirements for all create law. The Geneva Protocol of 1925 and the Convention on the Prevention and Punishment of Genocide, December 9, 1948, 78 U.N.T.S. 277 are examples of this type of treaty. The widespread ratification of a treaty can bring into existence a rule of customary international law by which case all states, not only those party to the treaties, become bound by the rule. "Accompanied by *opinio juris* and a degree of generality, the treaty can have the effect of creating a new, corresponding customary international norm."[127] Treaties set out clear and precise obligations.

For example, Article 1 of the Genocide Convention provides that the "Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law." "Such language is evidence of what a group of states considers customary international law to be."[128] While the UN Charter is in fact a treaty, the Responsibility to Protect cannot be considered so.

V.1.1   Customary international law

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[127] Currie 2008 *supra* note 19 at 208.
[128] Buergental and Murphy 2013, *supra* note 84 at 2013.

Customary international law arises from the sustained conduct of states which they themselves believe (for whatever reason) to be legally required. "…customary international law, unlike treaties, is with very few exceptions universally binding. It is thus a common basis for international legal relations among all states."[129] Rapid change in the law does not occur in customary law and is frequently the object of profound disagreement. Customary international law involves rules and principles which bind all states whether or not they agreed to them in the first instance. International Custom may be defined as k"A general recognition among states of a certain practice as obligatory."[130]

Customary international law continues to be widely accepted along with treaties "as one of the two principal sources of international law." [131] Customary international law is universally binding on all states. No particular duration of practice is required and a long practice is not essential to establish international law. What is most important is uniformity and consistency of the practice. Complete uniformity is also not required, nor is universality.[132] There is also no threshold number of examples of state practice required to achieve this level of customary law. Each instance is evaluated independently according to the meaning attributed to it so that sufficient general practice is on a case to case basis. An issue of interest to a large number of states such as the use of force requires participation by many states.

Two actions are necessary before a rule of customary international law, however, can be said to exist: 1) state practice – the material or objective element of customary international law visible in the general and uniform behavior of states; and 2) *opinio juris sive necessitates* (or *opinio*

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[129] Currie 2008 *supra* note 19 at 100.
[130] Brownlie 2005 *supra* note 105 at 6.
[131] Currie 2008 *supra* note 19 at 187.
[132] Brownlie 2005 *supra* note 105 at 7.

juris) – the action of the state is only considered legally significant if it is accompanied by a belief on the part of the state that it is legally obligatory.[133]

(a) Opinio juris sive necessitates requires the sense of legal obligation as the basis of evidence of a general practice or consensus in the literature.as opposed to motives of "courtesy, fairness, or morality."[134] *Opinio juris sive necessitates* was coined in 1899 as the subjective element of custom.[135] In the case of Nicaragua v. United States (Merits) the Courts stated that not only must the acts concerned 'amount to a settled practice' but they must be accompanied by the *opinio juris sive necessitates* for a new customary rule to be formed.[136] The need for such a belief, i.e. the existence of a subjective element, must be implicit in the very notion of the *opinio juris sive necessitates*."[137]

Motive being difficult to establish with regard to the *opinio juris* requirement, the Courts rely on the express views of states themselves which can often be found in "government press statements, conferences, summit reports and speeches before UN bodies and government statements in national legislatures and so on."[138] Such statements and reports as they concern the Responsibility to Protect are presented in the thesis, particularly in an attempt to establish the intention behind the use of the norm.

By looking at practice and UN resolutions later in the thesis regarding the Responsibility to Protect, we will consider its place under international customary law. The Security Council of the UN was intended for implementation of the Responsibility to Protect rather than

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[133] Currie ibid at 188.
[134] Brownlie 2005 *supra* note 105 at 7.
[135] Gideon Boas, Public International Law; Contemporary Principles and Perspectives (UK: Edward Elgar Publishing Ltd., 2012 [**Boas 2012**].
[136] Brownlie *supra* note 105 at 7.
[137] I.C.J. Reports 1969, p. 44, para. 77.
[138] Currie 2008 *supra* note 19 at 197.

implementation by means of unilateral activity which would violate the fundamental principle of

the sovereign equality of states and the principle that no state can dictate the law to another.

Custom may be achieved as long as

> a sufficient number of states adhere to a given practice and *opinio juris* is present and
> states are acting from a sense of legal obligation (and the other requirements of
> customary international law are met). If that is the case, a corresponding rule of
> international law can be said to exist that binds all states, not merely those engaging in
> the practice."[139]

Further, the practice according to the Court need not be in absolute rigorous conformity with the

rule in order to establish customary law. Instances of State conduct may be inconsistent with a

given rule and are generally treated as breaches of that rule, not as a new rule.[140]

(b) Jus Cogens. Doctrinal and judicial opinion both support the notion that there are certain

overriding principles of international law, forming a body of *jus cogens (*"rules of customary law

which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent

customary rule of contrary effect.") [141] The least controversial are the prohibition against the use

of force, the law of genocide and crimes against humanity.[142] A peremptory norm of general

international law is defined as a "norm accepted and recognized by the international community

of states as a whole as a norm from which no derogation is permitted and which can be modified

only by a subsequent norm of general international law having the same character."[143]

The concept of *jus cogens* (or peremptory norms) first appeared in the Vienna Convention on the

Law of Treaties (VCLT)[144] where it as defined as a 'norm accepted' – recognized by the

international community of States as a whole as a norm from which no derogation is permitted

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[139] Currie 2008 ibid at 187.
[140] Currie 2008 ibid at 193.
[141] Brownlie 2005 *supra* note 105 at 510-511.
[142] Brownlie 2005 ibid at 510-511.
[143] Brownlie 2005 ibid at 512.
[144] Vienna Convention on the Law of Treaties (1969) United Nations Treaty Series, Vol. 1155, 331.

and which can be modified only by subsequent norm of general international law having the same character." (Art. 53 VCLT) Today *jus cogens* is regarded as a general definition in international law.[145]

For a norm to be considered *jus cogens* it must meet the following three conditions:

1. Must be a norm of general international law which makes it binding for a great majority of states;

2. Must be accepted and recognized as non derogable by the international community of states. The vast majority of states must bind a minority; and

3. No derogation is permitted from the peremptory norm. Deviation is not generally accepted.

States cannot undertake actions which go against the norm of *jus cogen*s. *Jus cogns* comes at the top of a hierarchy of norms in international law.

For example, in the ICJ Advisory opinion concerning reservations to the Genocide Convention, the Court emphasized the binding character of the prohibition of genocide, even on a state that did not subscribe to the Convention. It determined since the peremptory character of an international norm has important legal consequences, the exact content of the prohibition of genocide needs to be established. The main aspect of the peremptory prohibition of genocide is the bar on derogation from it in treaties or customary international law.[146]

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[145] Jan Wouters, and Sten Verhoeven *The Prohibition f Genocide as a Norm of Jus Cogens and Its Implications for the Enforcement of the Law of Genocide* (2005) 5 International Criminal Law Review 401-416 at 402 [**Wouters and Verhoeven 2005**].
[146] Wouters and Verhoeven, 2005 ibid at 405.

(c) An obligation *erga omnes*. The concept of obligations *erga omnes* first appeared in the

Barcelona Traction Case before the ICJ.[147] In the famous obiter dictum the Court held that

"obligations toward the international community as a whole (obligation *erga omnes*) exist, in

which all states have a legal interest in their protection in light of the importance of the rights

involved."[148]

There is some relationship between the norms of *jus cogens* and obligations *erga omnes* in the

case law. Wording used in the Barcelona Traction Case refers to Article 53 VCLT. Both refer to

the international community as a whole and in his separate opinion Judge AMMOUN mentioned

jus cogens linked to the concept of obligations *erga omnes*.[149]

Also in the Furun Zija Case, "the ICTY held that the prohibition of torture is an obligation *erga*

omnes and a peremptory norm of general international law."[150] "…while *jus cogens* deals with

the hierarchy of norms and international public order, obligation *erga omnes* refer to the

enforcement of these peremptory norms."[151] Violations of peremptory norms and obligations

erga omnes allow states not directly concerned to bring action against the offending state before

the ICJ. "…every State of the international community has an interest in the legal protection of

rights and obligations which by their content are the fundamental rules of the international

community."[152] When such a rule is violated, even if they are not directly affected it endangers

the legal interests of every member. Before countermeasures are taken every avenue provided

under international law should be taken and the measure should be legitimate and proportion to

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[147] *Case concerning the Barcelona Treaties. Light and Power Company Ltd., (Belgium v. Spain)* 5 February 1970, International Court of Justice Reports *1970, 33.*
[148] Wouters and Verhoeven, 2005 *supra* note 145 at 406.
[149] Separate Opinion Judge AMMOUN, Case concerning the Barcelona Treaties, Light and Power Co. Ltd. (Belgium v. Spain) 5 February 1970, International Court of Justice Reports 1970, 325.
[150] Prosecutor v. Anto Furudzija, Case No IT-95-17/I-T. Trial Chamber 11, 10 December 1998, 144 and 151-154.
[151] Wouters and Verhoeven, 2005 *supra* note 145 at 409.
[152] Wouters and Verhoeven, 2005 ibid at 413.

the original wrong. Also, third states should not be injured. States are usually cautious, however, not to take illegal counter measures and therefore usually only react in clear cut cases of breach such as genocide or aggression.[153]

States that are not directly affected by a breach can bring a case before the ICJ if it can establish a basis for jurisdiction or though other countermeasures. Part of the 'weakness' of soft laws is the inability to take countermeasures against states not agreeing to the invocation of the Responsibility to Protect.

A. General Principles of Law: Article 38(1)(c)

According to Brownlie, questions are often raised about whether "general principles" refers to international or domestic law. He suggests General Principles of international Law refer to "rules of customary law, to general principles of law as in Article 38(1) (c)or from judicial decisions on the basis of existing international law and municipal analogies."[154]   According to Currie, domestic systems of law are often used for inspiration in formulating international laws and 'principles of law' generally refer to general principles of domestic law rather than general principles of international law.[155]

Modern international law relies less on general principles of law as a source of law but they are still used to fill gaps, primarily for procedural matters.[156]

V.1.2   Judicial Decisions and Scholarly Writing

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[153] Wouters and Verhoeven, 2005 ibid at 415,
[154] Brownlie 2005 *supra* note 105 at 19.
[155] Currie 2008 *supra* note 19 at 101.
[156] Buergental and Murphy 2013 *supra* note 84.

The International Court of Justice or bodies such as the World Trade Organizations or the International Criminal Court or other international tribunals tend to be relied upon in determining what law is.[157] While judgments and scholarly writings on international law may be relied upon to understand or even discover the content of international law, they do not in themselves "create" the law.

The material sources of evidence include diplomatic correspondence, policy statements, press releases, opinions of office legal advisers, official manuals on legal questions, drafts produced by the International Law Commission, state legislation, judicial decisions (international and national), patterns of treaties in the same form, the practice of international organizations, and resolutions relating to legal issues in the UN General Assembly.[158] The Writing of Publicists includes the teaching of the most highly qualified publicists of the various nations or 'la doctrine.' Such a source only constitutes evidence of the law but can be influential.[159] As suggested, the review of such documents later in the thesis provides a rich source in understanding the legal status of the Responsibility to Protect.

More recently, resolutions and similar acts of international organizations have acquired "a very significant status both as sources and as evidence of international law. This is true with regard to some Security Council resolutions."[160] If a UNGA resolution is adopted unanimously or by an overwhelming majority, which includes the major powers of the world, and if it is reported in

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[157] Currie 2008 *supra* note 19 at 108.
[158] Brownlie 2005 *supra* note 105 at 6-7.
[159] Brownlie 2005 ibid at 24.
[160] Buergental and Murphy 2013 *supra* note 84 at 37.

subsequent resolutions over a period of time and relied upon by states in other contexts, it may

well have become declaratory of international law.[161]

VI.   International Human Rights Law

Some of the features of the Responsibility to Protect are imbedded in contemporary international

human rights law (IHRL).[162] Hugo Grotius maintained it would be just to resort to war to

prevent a state from maltreating its own subjects.[163] John Locke viewed the relationship between

the state and its citizens as one of "trust."[164] "The most influential modern representatives of this

tradition of 'conscience' as the enemy of sovereignty are the international human rights and

criminal law movements."[165] The claim to be representing humanity strengthens the authority of

new actors and justifies the use of force which is one of the reasons the moral or ethical element

of the Responsibility to Protect principle arises frequently in the literature.

International human rights law "is a set of rules established by convention or custom, codified in

international treaties and national bills of rights and focuses on the protection of the

individual."[166] It applies in times of war and peace.[167]

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[161] Buergental and Murphy 2013 ibid at 37.
[162] Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?* (2007) 101 Am. J. Int'l.
99 [**Stahn 2007**].
[163] Hugo Grotius, *Dejure Belli AC. Pacis*, bk. II, ch. 2 (Francis W. Kelsey trans. Clarendon Press 1925).
[164] John Locke, *The Second Treatise of Government*, ch. iii, 149 in Two Treatises of Government (Peter Laslett ed.,
Cambridge University Press 1988) [**Locke 1988**].
[165] Anne Orford, *Moral Internationalism and the Responsibility to Protect* (2013) Vol. 24 No. 1 The European
Journal of International Law At 104 [**Orford 2013**].
[166] They include the 1948 Convention on the Prevention and Punishment of Genocide, the 1951 Convention Relating
to the Status of Refugees, the 1966 Convention on the Elimination of Racial Discrimination (CERD), the 1979
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1984 Convention
against Torture (CAT), the 1989 Convention and the Rights of the Child (CRC), the 1990 International Convention
on the Protection of Rights of all Migrant Workers (CRMW) and the two conventions from 2006, Convention on the
Rights of Persons with Disabilities and International Convention on the Protection of All Persons from Enforced
Disappearance. Glerycz *supra* note 7 at 253.

The Universal Declaration of Human Rights (UDHR) spells out the right to life, liberty and security of person and bans torture, cruel, inhumane and degrading treatment and slavery. The International Covenant on Civil and Political Rights (ICCPR) obliges state parties to respect and ensure the rights to all individuals within its territory and subject to its jurisdiction.

Human rights law sits as a challenge to international laws concerned with the rights of states and sovereignty. [168]   One of the most significant developments in international law since the Peace of Westphalia has been the growth of human rights along with the prohibition of the unilateral use of force. The fundamental principles of human rights form part of customary or general international law.[169] Human rights rose mainly in the work of legal philosophers such as John Locke, Jean-Jacques Rousseau, Montesquieu and others.[170] Later on the horrors of the Second World War of what some states did to their own populations led to the placing of provisions for human rights in the UN Charter. This placed human rights at the centre of the international agenda, giving importance to the rights of individuals as well as states.[171]

1) The first stage was a draft of the *Universal Declaration of Human Rights* which was later adopted.

2) The adoption of the *Universal Declaration of Human Rights* in the form of a resolution of the General Assembly was widely regarded as a first step toward the preparation of a Covenant that would be in the form of a treaty." In 1966 the GA adopted the

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[167] Dorota Glerycz, *The Responsibility to Protect: A legal and Rights-based Perspective* (2010) 2 Global Responsibility to Protect, 250-268 [**Glerycz 2010**].

[168] Ian Brownlie, *Principles of Public International Law* Seventh Edition (Oxford: Oxford University Press 2005) [**Brownlie 2005**].

[169] Brownlie 2005 *ibid* at 562.

[170] Brownlie 2005 ibid at 414.

[171] Currie 2008 *supra* note 19 at 416.

International Covenant on Economic, Social and Cultural Rights which came into legal

force as treaties constituting a detailed codification of human rights.[172]

The premise of international human rights law is that individuals have basic rights that are

recognized. Implementation and enforcement remains underdeveloped, however, and there is a

lack of robust enforcement mechanisms. [173] In this way *lex lata* operates more like *lex ferenda*.

Human rights range from torture and fair trial to the third generation of rights (the right to

economic development and the right to health). The UN Charter provides the baseline for human

rights. Article 55 states that the UN shall promote… "universal respect for and observance of,

human rights and fundamental freedoms for all…" and Article 56 requires all members to pledge

themselves "to take joint and separate action in cooperation with the organization for the

achievement of the purpose as set forth in Article 55."[174]

The Security Council began to use its power for peacekeeping and on the basis of Chapter VII of

the Charter to provide humanitarian assistance through such mechanisms as the creation of safe

areas and forceful protection of those areas. There is a lack of enforcement mechanisms,

however, in the UN, although it can recommend sanctions. The lack of enforcement

mechanisms can lead to failure of the intention to protect.

UN efforts to codify human rights led to two International Covenants adopted by the GA on 10

December 1948. The Commission on Human Rights and the *Universal Declaration of Human

Rights* established by the UN Economic and Social Council (ECOSOC) defines the nature and

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[172] Brownlie 2005 ibid at 566.
[173] Brownlie 2005 ibid at 413.
[174] Brownlie 2005 ibid at 556.

extent of human rights. While not legally binding as such, the Declaration provides evidence of

the acceptance of certain principles as principles of customary or general international law. [175]

The main corpus of human rights standards consists of an "accumulated code" of multilateral

standard-setting conventions. One of the four general categories is the conventions dealing with

specific wrongs, such as genocide, torture or racial discrimination.[176]   The domestic legal

systems of the State Parties to the given convention are the vehicles of implementation which are

monitored in the form of reports.[177]

The International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to

the International Covenant on Civil and Political Rights (Optional Protocol)[178] allowed for

direct complaints by individuals. In response to apartheid was the *International Convention on*

the Elimination of All Forms of Racial Discrimination in 1966,[179] the Genocide Convention

(1966) and *the Elimination of all Forms of Discrimination against Women (1979)[180]*. These

were followed *by the Convention against Torture (1984)[181]* and the *Convention on the Rights of*

the Child (1989)[182] and the *Convention on the Rights of Persons with Disabilities[183]* and the

International Convention for the Protection of all Persons from Enforced Disappearance.[184]

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[175] Brownlie 2005 ibid at 560.

[176] Brownlie 2005 ibid at 562.

[177] Brownlie 2005 ibid at 562.

[178] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976; *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 1999 U.N.T.S. 171 (entered into force 23 March 1976) [Optional Protocol]

[179] *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. (entered into force 4 January 1969)

[180] *International Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981).

[181] *Covenant against Torture and other Cruel, Inhuman and or Degrading Treatment or Punishment*. 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987)

[182] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990)

A state violates human rights and international law if it practices, condones or encourages any of the following atrocities: genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhumane or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violation of the internationally recognized human rights.[185]

VII. International Humanitarian Law (Laws of War) and Humanitarian Intervention

International humanitarian law (IHL) is the branch of international law that regulates armed conflict (*jus in bello*). The objective of these laws is to limit the effects of armed conflict on and alleviate the suffering of persons who are not participating in the hostilities or are no longer involved. It does so through the use of restrictions on the means and methods of warfare. It includes the Geneva and the Hague Conventions as well as certain treaties, case law and customary international law. The Geneva Convention[186] and the Hague Conventions of 1899 and 1907 were drawn up as treaties relating to war and conflict.[187]

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[183] *Convention on the Rights of Persons with Disabilities*, 13 December 2006, U.N. UN General Assembly in U.N. Doc. A/61 (entered into force 3 May 2008)

[184] *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, U.N. Doc. A/61/488 (entered into force 23 December 2010)

[185] Brownlie 2005 *supra note* 105 at 564

[186] When one speaks of the Geneva Convention they are usually referring to the Fourth Geneva Convention of 1949 consisting of four separate international treaties whose aim is the protection of combatants and noncombatants from unnecessary suffering. The 1864 Geneva Convention was the first codified international law treaty that aimed to help the sick and wounded soldiers in the battlefield. The ten articles of the first treaty were initially adopted on August 22nd, 1864. The second treaty was first adopted in the *Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies at Sea* concluded on July 6, 1906 and specifically addressed Armed Forces a sea. It was continued in the *Geneva Convention relative to the Treatment of Prisoners of War* concluded on July 27, 1929 and entered into force on June 19, 1931. A series of conferences were held in 1949 updating and reaffirming the prior three conventions and adding a new *Geneva Convention relative to the Protection of Civilian Persons in Time of War*.

[187] The Hague Conventions of 1899 and 1907 constitute a series of international treaties and declarations declared at two international peace conferences at the Hague. The first convention was in 1899 and the second in 1907. The treaties of the 1899 conference were signed on 29 July 1899 and entered into force on 4 September 1900. The treaties, declarations, and final act of the second conference were signed on 18 October 1907 and were entered into

Both international humanitarian law and human rights law are intended to protect the life, health and dignity of human beings. Whereas international humanitarian law applies only in times of armed conflict, human rights law applies in times of both war and peace.

In the 19th C. war was often represented as a last resort; that is, as a form of dispute settlement.[188] This is the view adopted by the League of Nations Covenant drawn up in 1919. The General Treaty for the Renunciation of War was established (often referred to as the Kellogg-Briand Pact) in 1928 as a legally binding multi-lateral treaty. The Kellogg-Briand Pact comes into prominence as the foundation of the State practice and the background to the formation of customary law. International legal rules governing the use of armed force by states is a twentieth century development which is closely related to the establishment of the United Nations and the UN Security Council. Rules such as *jus ad bellum* ('right to war') and j*us in bello* ('law in war') determine the manner in which armed force may be used. These rules constitute another body of law.

St. Augustine of the early fifth century has generally been credited with injecting the Roman "just war" theory into early Christian theological doctrine. For St. Augustine, conquest can be justified under certain conditions. Saint Augustine purported that an act of war requires a just cause[189] while Thomas Hobbes saw war as a necessary evil for states to protect their citizens.[190] St. Thomas Aquinas, eight centuries later, argued that 'just war' required an (objective) just

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force on 26 January 1910. The 1907 Convention consists of thirteen treaties, twelve of which were ratified and entered into force.

[188] Ian Brownlie, , *Principles of Public International Law* Seventh Edition (Oxford: Oxford University Press 2005) at 729 [**Brownlie 2005**].

[189] See Gelb, and Rosenthal, 2003 *supra* note 103 at 3.

[190] Thomas Hobbes, Leviathan, Oxford, 1946, 82. **[Hobbes 1946].**

cause and (subjective) right intention.[191] De Vattel in the eighteenth century and other writers

placed 'just war' theories in the status of moral, rather than legal considerations.[192]

Hugo Grotius *On the Laws of War and Peace* argued war was only to be used in self-defence and

that peace is a natural state for human beings.[193] Pre-1945, Chesterman observes the origins of

humanitarian intervention can be traced to the concept of a just war put forward by the jurist

Hugo Grotius and the emerging legal restraints being placed on states 'entering into a society of

eq105uals.' These and others laid the basis for today's international morality. After the Treaty

of Versailles, sovereign states became the major players in the international arena and national

interests tended to take precedence over broader international concerns. Regulations also

developed, however, for codes of behavior decreeing war; for example the Lieber Code which

helped to found the Red Cross.[194]

This brings international law into to the realm of international morality.[195] With regard to the

writings of Emmerich de Vattel and Christian Wolff, Chesterman argues that by the early

twentieth century the Vattelians and the modern doctrine of non-intervention had won out over

the Grotians.[196] In addition peaceful means of resolving conflict were strengthened by the

League of Nations Covenant[197] and the Kellogg-Briand Pact.[198] There are prohibitions against

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[191] Brownlie 2005 *supra* note 105 at 451
[192] Brownlie 2005 *ibid* at 452
[193] Hugo Grotius, *On the Laws or War and Peace*
http://eebo.chadwyck.com.ezproxy.library.yorku.ca/search/full_rec?SOURCE=pgimages.cfg&ACTION=ByID&ID
=V169967.
[194] Introduction to MacDonald, Patman and Mason-Parker *supra* note **102** The Lieber Code April 24, 1863 dictated
how soldiers should behave in wartime. It also forbade the use of torture to gain confessions.
[195] Jennifer Welsh. "From Right to Responsibility: Humanitarian Intervention and International Society*" (2001) 8*
Global Governance, 503-521; at 510 **[Welsh 2001]** 505; Simon Chesterman, *Just War or Just Peace Humanitarian
Intervention and International Law* (Oxford: Oxford Press, 2001, 295 pp.)
[196] Chesterman 2001 ibid
[197] The Charter of the League of Nations signed 28 June 1919
[198] Welsh, 2001 *supra* note 195 at 510. The Kellogg-Briand pact was a 1928 agreement among signatories not to use
war to settle disputes.

the use of armed force in the covenant of the League of Nations, and the Kellogg-Briand Pact of 1928. Prosecutions at Nuremburg of German leaders were founded on the principles of UN Charter article 2(4) which states 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... " Article 2(3) requires that members settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.[199]

Chesterman again asserts there is essentially no coherent body of law[200] that can or does exist for the international system. [201] While he accepts that bodies of international law may develop in specific issue areas, there is no overall authority that is legitimate; i.e. accepted by the relevant parties. Not even the rule of sovereignty itself can control the behaviour of states.

Keith claims that international law determines the body of law governing the right of a state to use armed force against one another – *jus ad bellum* – and the body of law governing the manner in which states and individual may engage once armed conflict begins – *jus in bello*.   Keith also argues "the legality or illegality of the right to use force has no consequence for the application of international law." What prevails is international humanitarian law.[202] As Chesterman notes, existing treaty law on the use of force does not permit military intervention for humanitarian purposes.[203] According to Article 2 (4) of the UN Charter, the use of force is illegal.

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[199] K. J. Keith, Chapter 13 "International Security and the Law: Is International Law Still Relevant during Armed Conflict" in MacDonald, Patman and Mason-Parker 2007, *supra* note 102102 at 210 (Declaration on Principles of International Law Concerning friendly Relations and Cooperation among states in accordance with the Charter of the UN', G.A. res 2625, Annex, 25 UN GAOR, Supp. (no. 28), U.N. Doc A/5217 at 121 (1970). See UN Charter http://www.un.org/en/documents/charter/chapter1.shtmln.

[200] For a 'body of law' (presumably at any level) to exist there must be a set of coherent and consistent rules which create an environment that is predictable, efficacious and just.

[201] Stephen D Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law" (2003-2004) 25 *Mich. J. International Law* 2075 at 46 [**Krasner 2003-4].**

[202] This expression was made popular by the 1974-77 diplomatic conference which adopted the 1977 protocols.

[203] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001), 295 pp. **[Chesterman 2001]**.

Qualifications to this rule, however, are made in the name of self-defence (Article 51) or

collective security (in which case the Security Council may authorize the use of force if it does

so explicitly through a resolution adopted under Chapter VII). Nevertheless, legal analysts

themselves often disagree on the status of the law in particular actions and whether new

exceptions to the prohibition on the use of force have emerged.[204] Some legal scholars have

suggested that UN Article 2(4) of the Charter could support the use of force for humanitarian

purposes if it did 195not violate the 'territorial integrity or political independence' of the target

state (narrowly defined) or by consideration of the objectives related to human rights and

freedom listed in Article 1(3) . However, this argument does not overcome the UN Charter's

purpose: "to delegitimize individual acts of war by vesting sole authority for the nondefensive

use of force in the Security Council." [205]

> 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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported by the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[206]

These provisions are the substance of debates on the question of force for humanitarian purposes

(humanitarian intervention); e.g. Kosovo and the pre-emptive or precautionary use of force as an

act of self-defence and Bush and Iraq. The Kosovo case and other similar situations (Uganda,

Rwanda, and Somalia) led to the Canadian Government's development of the Commission on

the Responsibility to Protect and introduced the shift from right to responsibility and from

intervention to protection. Kosovo and Iraq will be presented later in this chapter as examples of

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[204] Welsh 2001 *supra* note 195 at 504.
[205] Welsh (2001) *ibid* at 506.
[206] CH. VII UN Charter: "Action with respect to threats to the peace, breaches of the peace, and acts of aggression."
http://www.un.org/about un/charter chapter 7.htm

humanitarian intervention which have been labelled wrongly as examples of the Responsibility

to Protect (being in fact neither legal nor legitimate cases of its implementation).

VIII. Soft Law

Up to this point we have been mainly talking about the sources of *lex lata* or "hard law" and I

have referenced the Responsibility to Protect as 'soft law'. This is consistent with the many

legal scholars who distinguish between *lex lata* ("hard law") and *lex ferenda* ("soft law"). *Lex

lata* refers to those laws included in the formal sources (as cited above) of binding international

law which provide

> a reservoir of evidence of state practice, *opinio juris*, or general principles, rather than a
> formal source of law in itself. This evidence can then be called upon to support an
> argument that some new norm is emerging or has emerged and should therefore be
> recognized as *lex lata* or hard law in accordance with the requirements of the formal
> sources of law reviewed above.[207]

Currie et al describe the concept of "soft law" as "principles with potentially great political,

practical, humanitarian, moral, or other persuasive authority, but which do not strictly speaking

correspond to extant legal obligations or rights."[208]

As stated earlier, draft multilateral law-making treaties are generally considered as hard law.

Most important to this discussion, however, is that UN General Assembly resolutions are

generally not seen to have binding force of their own but purport to be "declaratory" of

international law. Codes of conduct prepared by UN organs, reports, official communiqués or

declarations and statements of principles which emerge from the work of non-governmental

organizations, academic institutions, and think tanks such as those already presented in the

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[207] Currie 2008 *supra note* 19 at 118

[208] John H.Currie,, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice and Theory
(Toronto: Irwin Law Inc., 2007) at 156 [**Currie, Forcese and Oosterveld 2007**].

description of the development of the Responsibility to Protect can generally be seen as 'soft law' or *lex ferenda*. In addition, "the International Law Commission (ILC), an international commission of jurists established in 1947 by the UN General Assembly, is an important source of *lex ferenda*." [209] In many fields of international law – such as environment, human rights, trade and arms control –important principles and nonbinding norms are contained in resolutions or other decisions of states and intergovernmental organizations."[210]

Soft law remains controversial because some international practitioners do not accept its existence. However, for most international practitioners, development of soft law is necessary to the work of the international legal system. Soft law instruments also hold much potential for morphing into hard law. In this case non treaty agreements are intended to have a direct influence on the practice of states and if successful may lead to customary law. Soft law is also convenient for good faith negotiations. It is also more flexible in avoiding uncompromising commitments made under treaties. It is also faster than the slow development of customary law. In addition and of importance to the development of the Responsibility to Protect, soft laws are useful to NGOs, organizations and courts to influence governments with frequent usage till they begin to resemble legal norms.[211]

In principle a breach of a legal obligation gives rise to responsibility in international law, whether the obligation rests on treaty, custom or some other basis. The responsibility of states may be identified in the context of resolutions of the General Assembly of the UN and in a number of judicial settings. "The law may require compensation for the consequences of 'legal'

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[209] Currie 2007 ibid at 130.

[210] Edith Brown Weiss, The President's Message "American Society of International Law Newsletter (September 1995) in Currie, 2007 *supra* note 19 at 157.

[211] See C.M. Chinkin "The Challenge of Soft Law: Development and Change in International Law" 38 International and Comparative Law Quarterly 850 (1989).

or 'excusable' acts as well as illegal acts."[212] Objective tests are usually applied to the breach to determine responsibility.

In spite of well-developed rules, there are insufficient enforcement measures or institutions to implement them and controversies remain even in the case of established law, rendering recourse mostly theoretical. It is not only soft law such as is the current nature of the Responsibility to Protect that relies on the will of states. Implementing human rights remains as one of the greatest challenges to this area of international law, and thus remains at the root of difficulties in establishing the Responsibility to Protect as a legal norm.[213]

It is important nevertheless that legal obligations regarding human rights are almost universally accepted. There is widespread reliance on the Universal Declaration, the covenants and the other specialized universal human rights treaties. At the same time, serious breaches under Chapter VII of the UN Charter only are dealt with coercively by the Security Council on a very selective basis. Ad hoc geopolitics with little regard for human rights often interfere with the ability of the UN to apply human rights law.[214] These power politics can overshadow the legal standards of human rights and the matter of enforcement or the agreed-upon Responsibility to Protect principle which continues to prove critical to the protection of civilians.[215]

Soft law may evidence the formation of customary law, guide the interpretation of treaties, authorize the actions of international organizations such as the agreement in the Outcome Document re the Responsibility to Protect, and give rise to 'good faith' duties such as a duty to consider. Soft laws also have the advantage of testing some rules before concluding a treaty. As

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[212] Brownlie 2005 *supra* note 105105 at 435.
[213] Currie 2008 *supra* note 19 at 442.
[214] Brownlie 2005 *supra* note 105 at 584.
[215] Brownlie 2005 ibid at 586.

indicated, the breach of soft law, however, does not entail the same legal consequences as binding international law or *lex lata*.

Although some soft law is relegated to political or moral rules that are abstract and general, Goldmann makes the point that they often resemble much more a refined legal regime.[216] He suggests soft law can more be seen as a governance instrument which acts as a functioning equivalent to binding international law.[217] Perhaps this is an exaggeration of the force of soft law, particularly in the case of the Responsibility to Protect which is subject to the Security Council veto. The continued ambiguity of the Responsibility to Protect as soft law is part of the need for a recognition of the connection between law and legitimacy when it comes to justifying the authority of certain actions.

The next chapter discusses the importance of human security to the development of the Responsibility to Protect after the Cold War and the International Criminal Court (ICC). It also introduces the controversies that surround the notion of forcible intervention and the Laws of War and humanitarian intervention. The Chapter also clarifies the legal foundation of the Responsibility to Protect in the four crimes: war crimes against humanity, genocide, and ethnic cleansing. While I have argued the Responsibility to Protect is moving toward hard law, legitimacy arguments are often important to support its legal status (see Chapter Nine on the legitimacy of the Libyan intervention). Because of the difficulty in establishing the exact legal nature of the Responsibility to Protect, the Chapter outlines the peace of legitimacy arguments as distinct from legal determinations.

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[216] Mathias Goldmann, *We need to cut off the Head of the King: Past, Present, and Future Approaches to International Soft law* (2012) 25 Leiden Journal of International Law, 335-368 [**Goldmann 2012**].
[217] Goldman 2012 ibid.

Chapter Three: The Bedrock of the Responsibility
to Protect -- Legality and Legitimacy

I.   Human Peace and Security

In my view, one of the primary and necessary principles at the heart of the Responsibility to

Protect debate is that of 'human security' as was referred to in Chapter Two regarding the

creation of the ICISS Report. The principle of human security is not viewed by all in the

international environment in the same way, or with the same degree of importance, however.

One of the confounding issues is that international institutions tend to be intergovernmental with

states that are politically as well as culturally diverse. Nevertheless, the human security

paradigm shift requires a common principle involving cooperation, governance and diplomacy at

the transnational level. In fact, it is within this need for commonality and cooperation that many

of the impediments to the progress of the Responsibility to Protect principle lie. I am adamant,

for instance, that if the Responsibility to Protect principle is to be successfully implemented in

country specific situations, it requires not one nation, or even a group of nations, but broad and

effective global cooperation and institutional governance. Such cooperation cannot be developed

without some form of universality. If states act solely in their self-interest and/or unilaterally, the

threshold for agreement and legitimacy is diminished. Cooperation is essential to protect against

one or a few states taking action outside the confines of the UN Security Council if the action is

to be considered legitimate. The question of legitimacy will be exemplified further when we

look at some unilateral interventions which have taken place outside of the UN umbrella.

The human security discourse has provided a context for the Responsibility to Protect doctrine.

The term "human security" is not new and was used in the first instance by the United Nations

during the early 1990s. The significance of this concept is its recognition of the importance of

individual rights in addition to the rights of the sovereign state. The concept has been recognized

in the UN Charter, the Universal Declaration of Human Rights and various conventions,

including the Genocide Conventions and the Geneva Convention to name a few, and thus is well

established.[218]   Human security recognizes human beings as distinct from the 'state.' Narrower

interpretations of the concept apply to the protection of civilians in conflict zones.[219] The most

authoritative expression of the concept of human security appears in the UN Human

Development Report (UNDP, 1994) which refers to "safety from climate threats as hunger,

disease and repression, as well as protection from sudden and hurtful disruptions in the patterns

of daily life."[220] The UNDP Report acknowledges that state-centric analysis is no longer

sufficient to deal with transnational threats. "Famine, disease, pollution, drug trafficking,

terrorism, ethnic disputes, and social disintegration are no longer isolated events that are

confined within national borders. Their consequences travel the globe."[221] It is the tension

between these two concepts (responsibility and sovereignty) that frequently leads to conflicting

positions and acts as an impediment to the endorsement of the Responsibility to Protect.

 In the Commission's Report, it specifically states that human security goes beyond state security

to include individual security to civilians within the state. "Human security means the security

of the people – their physical safety, their economic and social wellbeing, respect for their

dignity and worth as human beings, and protection of their human rights and fundamental

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[218] Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, to the Woodrow Wilson International Center for Scholars online at http://www.peace.ca/axworthyaddresswoodrow.htm p. 2.
[219] Stephen Clarkson, and Stepan Wood *A Perilous Imbalance*: *The Globalization of Canadian Law and Governance* (UBC Press, Vancouver-Toronto, 2010) **[Clarkson and Wood 2010]** at 142.
[220] United Nations Development Program (UNDP) *Redefining Security: The Human Dimension,* (May 1994) 94. No. 592 Current History vol. 94, no. 592 (May 1995), 229 23.
[221] United Nations Development Program (UNDP) *ibid* (May 1995) vol. 94 no. 592 Current History, 229.

freedoms."[222] One of the issues at the centre of the human security debate and at the core of my analysis is whether states are still the key agents of response. Although sovereignty has been central to international law and international relations, new global realities have aroused concerns in the 'global community' about states' ability to govern their internal and external affairs. While sovereignty and non-intervention have been inextricably linked, human rights issues have increasingly gained prominence in decisions regarding intervention in State's affairs. The ICISS Report represents changes in international norms where a state's right to 'non-intervention' is contingent to some degree on its ability to protect its citizens from ethnic cleansing, mass killing and other human atrocities.[223]

As a result, the shift that occurred from the Cold War's protection of the territorial integrity of the state toward the individual as the basic referent of security underlies the Responsibility to Protect Commission's Report. The acceptance of the Report was qualified in that it particularly did not include such human conditions as disease but was instead narrowed to four specific areas. This acceptance represents a change in values and practice in international society.[224] People become the focus, rather than the State. The intent was to empower people. The Commission on Human Security Report, *Human Security Now*, focused on protection and empowerment.[225] The Responsibility to Protect Report suggested that inaction in conflict situations such as Srebenica and Rwanda renders the rest of the world 'complicit bystanders in massacre, ethnic cleansing, and even genocide' and refers to "gross and systemic violations of human rights that offend every precept of our common humanity."[226] This is the strength of the conviction needed for

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[222] ICISS Report *supra* note 6 Para. 2.21.
[223] ICISS Report *ibid.*
[224] Welsh 2001, *supra* note 195at 511.
[225] Commission on Human Security, *Human Security Now* (New York, 2003), available at: http://www.human security-chs.org/finalreport/index.html , 2.
[226] Responsibility to Protect, *supra* note 6 para. 1.22, 1.6.

states to take action to proceed and, while I may not agree with the United States' willingness to act alone and to take unilateral military action in the face of the Syrian government's chemical attack on its own people, I fully support and understand Obama's outrage.[227] It is just such an appalling situation that the international community committed itself to ensuring would never be permitted to happen again.

When we consider in the thesis the need for acceptance of such a principle, one question will be what motivates states or national and other participants in the international community to move from self-interest based decisions to perhaps more moral precepts concerning the 'other' in the absence of hard law? One answer may lie in the Commission's Report itself in its reference to moral outrage. And then, at what point does that outrage occur and what are the standards or guidelines that must be used to make a decision to intervene on the basis of reason? I investigate in the thesis how legitimate decisions are made in the context of the Security Council and the P5 veto.

II.   The International Criminal Court (ICC)

In human rights and humanitarian law, people become the focus, rather than the State. At a conference presented by the Responsibility to Protect Center for International Human Rights at Northwestern University School of Law in 2008, participants argued that the United States should more actively participate in the International Criminal Court and in a hybrid legal system. Whitley, rapporteur on the conference, noted:

> As a new and emerging framework in interstate relations, R2P is grounded in the rule of law that builds on the international legal and judicial systems. It is not, however, a legal

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[227]Lee Ann Goodman, "Obama Urges Americans to Support Him to Punish Syria" Canadian Press, September 10, 2013 http://globalnews.ca/news/832317/obama-assads-use-of-chemical-weapons-caused-him-to-reconsider-us-involvement-in-syria/ (accessed September 11, 2013).

construct that imposes legal responsibility on States or international organizations that fail to uphold R2P criteria. Rather, it shares with the ICC *(International Criminal Court)* a moral commitment to ending atrocity crimes (Italicised words added)[228]

The International Criminal Court was established by the Rome Statute. Article 1 of Part 1 of the

Rome Statute states:

> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.[229]

Article 5 of Part 2 of the Rome Statute details which crimes are eligible for investigation and

prosecution by the court:

> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
> (a)   The crime of genocide;
> (b)   Crimes against humanity;
> (c)   War crimes;
> (d)   The crime of aggression.[230]

The ability to link the Responsibility to Protect with strengthening the rule of law through the use

of the International Criminal Court or some sort of hybrid legal system has the potential to

greatly improve the coordination and cohesiveness of international structures. [231] The ability to

build on existing structures to permit individuals to access redress mechanisms on the

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[228] Kelly Whitley, "The Responsibility to Protect and the International Criminal Court: America's New Priorities," *Center for International Human Rights, Northwestern University School of Law* (2008), 13 <http://www.law.northwestern.edu/humanrights/R2PICC_report.pdf> (accessed November 3 2010)
[229] United Nations. "Rome Statute of the International Criminal Court," *Part 1. Article 1. "* Establishment of the Court" http://untreaty.un.org/cod/icc/statute/romefra.htm
[230] United Nations "The Rome Statute of the International Criminal Court," 1992 Article 5, Part 2 "Jurisdiction, Admissibility and Applicability" http://untreaty.un.org/cod/icc/statute/romefra.htm
[231]The rule of law requires nations to implement at home existing international laws. The state must be subject to and obey the law.

international stage through the ICC can significantly improve the international's community's

tools to effectively respond to mass human rights abuses or mass atrocities. (We will see in

Chapter Six on the Libyan 2011 intervention how the Responsibility to Protect and the ICC can

in fact be tied together by Security Council Resolutions and what the impact of such a ruling can

be.) This might be borne in mind when in conflict situations there are arguments made for the

referral of State Heads to the ICC, which may in fact inhibit political solutions. Mechanisms like

the International Criminal Court and the legal system seeking justice for crimes to humanity are

important.[232] But making the decision to refer is not yet solely based on any legal precedent,

neither through hard law nor customary law.

III.   Sources of controversy since 1945

Since the adoption of the UN Charter, forcible intervention has been particularly controversial.

Controversy surrounds:

(a) "the alleged right of forcible intervention to protect nationals;"[233]

(b) Hegemonial intervention by regions without Security Council approval;[234] and

(c) "Forcible intervention in the form of assistance to national liberation movements

conducting armed conflict to achieve independence."[235]

However, Article 39 of the UN Charter provides for a power of determination of the existence of

a threat to, or breach of the peace or act of aggression and permits the Security Council to

recommend measures to restore peace and security or to decide upon measures to be taken in

accordance with Articles 41 (non-forcible measures) or 42 (forcible measures) to maintain or

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[232] ICISS *supra* note 6 1.22, 1.6.
[233] Brownlie 2005 *supra* note 105 at 739-49.
[234] Brownlie 2005 *supra* note 105 at 739-49.
[235] Brownlie 2005 *supra* note 105 at 739-740.

restore peace and security.[236] In consequence "…the effect of a Security Council

recommendation under Article 39 is to raise a presumption of legality in respect of the actions of

states complying with that recommendation."[237]

But there is resistance to decisions in the Security Council regarding "…the ideological divide

between 'East' and 'West' each represented on the Security Council by permanent members

wielding vetoes over non procedural matters during the Cold War." [238] This resistance hampers

the Council from fulfilling its collective security responsibilities spelled out in Chapter VII of the

UN Charter. It continues to paralyze the Council's ability to act. The Security Council is made

up of only fifteen states at any one time, including five permanent members as well as ten

additional members elected on a rotational basis by the UN General Assembly for two-year

terms. Article 27 stipulates that "decisions" of the SC on non-procedural matters require the

"affirmative" vote of nine members, including the "concurring" votes of the five permanent

members. According to the "veto" power, if any one of them votes against a non-procedural

resolution, it cannot be adopted. "Each permanent member, in other words, individually wields

disproportionate power in the UN system of peace and security."[239] The veto will be discussed

further in the thesis as a continued obstacle to the Responsibility to Protect deliberations and

decisions when states act solely in their self-interest on a Responsibility to Protect resolution that

has not yet reached the status of hard law.[240]

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[236] Currie 2008 *supra* note 19 at 488.
[237] Currie 2008 ibid at 491.
[238] Currie 2008 ibid at 474.
[239] Currie 2008 ibid at 487.
[240] Currie 2008 ibid at 492 A Security Council resolution to use "all necessary means" has become synonymous with an authorization to use force in UN practice.

IV.   The Four Crimes

As has been stated the Responsibility to Protect is rooted in existing customary and Human

Rights Law (HRL) and international humanitarian law (IHL).[241] The Responsibility to Protect

currently sits at the intersection of four different legal regimes: sovereign equality, the use of

force, non-intervention and the protection of civilians. The Responsibility to Protect offers an

opportunity to improve the implementation of existing legal obligations to protect populations

from genocide, war crimes, crimes against humanity and ethnic cleansing. While the ICISS

report threshold was broader, the Outcome Document limits the application to four specific

crimes that already form part of existing international legal instruments.[242]

Since 1945 there have been a number of international treaties proscribing certain violations of

human rights such as the Convention for the Prevention and Punishment of the Crime of

Genocide (1948), the Genocide Convention, the Convention on the Elimination of All Forms of

Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966),

the Convention on the Elimination of All Forms of Discrimination against Women (1979), the

Convention against Torture (1984) and the 1993 Vienna Declaration and Programme of

Action.[243] "It is clear, therefore, that states at least since 1945 have been willing and able to agree

on certain universal human rights laws."[244] Of course, compliance has been erratic so that the

problem is putting them into practice and enforcement. The protection of civilians regime –

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[241] Glerycz 2010 *supra* note **7**.
[242] Jennifer M. Welsh, *Turning Words into Deeds? The Implementation of the 'Responsibility to Protect'* (2010) 2
Global Responsibility to Protect 149-154"Under both treaty-based and customary international law, States already
have obligations to prevent and punish genocide, war crimes and crimes against humanity. While ethnic cleansing is
not a crime identified specifically in law, acts of ethnic cleansing can be viewed as constituting one of the other
three established crimes." [Welsh 2010] at 150.
[243] Aidan Hehir, *The Responsibility to protect in International Political Discourse: Encouraging statement of intern
or illusoryw platitude?* December *20, 2011* Vol. 15 No. 8 The International Journal of Human Rights 1331-. [**Hehir
2011**].
[244] Hehir 2011 *ibid* 1338.

human rights law, humanitarian law, international criminal law and refugee law, evolved through

milestones such as the 1948 Universal Declaration of Human Rights (UDHR); four Geneva

Conventions and two Additional Protocols on international humanitarian law in armed conflict;

the two 1966 International Covenants – on Civil and Political (ICCPR) and Social, Economic

and Cultural Rights (ISECR); the 1998 Rome Statute establishing the International Criminal

Court (ICC), and the Ottawa Convention on landmines.[245]

Under article 1, paragraph 3 of the Charter of the United Nations[246] the Organization is mandated

to "achieve international cooperation in …promoting and encouraging respect for human rights

and for fundamental freedoms." However, fundamental principles of the UN Charter such as

"sovereign equality," the non-use of force and non-intervention in "domestic jurisdiction" have

been invoked to preclude any action. [247]

Most observers conclude that the Responsibility to Protect has not yet become a binding norm of

international law.[248] I suggest, however, as does Strauss, that if used for the development of a

continuum of civil and military action to prevent and halt only these exceptional crimes, the

necessary practice and *opinio juris* might be created over time sufficient to establish the

Responsibility to Protect as a norm of international customary law.[249] The universal and

unconditional nature of the legal obligation reflected in the World Summit Outcome Document

of 2005 to protect populations from genocide, war crimes, ethnic cleansing and other crimes

against humanity is clear. This obligation is primarily binding on states, but also, if these are

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[245] It also includes 'softer' laws like the UN Guidelines on Internally Displaced Persons and the Guiding Principles on Humanitarian Assistance.

[246] UN Charter 26 June 1945, Can. T.S. 1945 No. 7. [hereinafter *UN Charter*}.

[247] Ibid. art. 2(4).

[248] Jutta Brunnee, and Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?* (2010) 2 Global Responsibility to Protect, 191-212 **[Brunee and Toope 2010].**

[249] Ekkehard Strauss, *A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect* (2009) 1 Global Responsibility to Protect 291-323 at 291 [**Strauss 2009**]

unable to act, on intergovernmental organizations and other actors exercising control over a given territory.

In spite of this, as pointed out above, the Security Council cannot be relied upon to uphold these obligations with regard to the Responsibility to Protect which represents an opportunity to give force to human rights. We should not conclude, however, that the Responsibility to Protect principle that emerged from the 2005 World Summit along with subsequent writing and actions is too weak or insubstantial to be encumbered with legal responsibilities. [250] The scope of the Responsibility to Protect regarding the four crimes has fairly precise legal meaning grounded in existing international law. The principle is a product of the "largest ever gathering of heads of state and government" in the World Summit and carries immense political weight.[251]

The four crimes, genocide, war crimes, ethnic cleansing and crimes against humanity, associated with the Responsibility to Protect fall under the jurisdiction of the International Criminal Court (ICC) and evoke serious legal consequences. Protection of the individual against atrocities is a primary responsibility of states.[252] Many of today's human rights crimes violate protection against genocide, war crimes, ethnic cleansing and crimes against humanity. They are defined under Article 6 (Genocide), Article 7 (Crimes against humanity) and Article 8 (War Crimes) of the Statute.[253]

Certain types of wrongdoing are punishable as crimes before both national and international criminal courts, including:

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[250] Alex J.Bellamy, and Ruben Reike, *supra* note 77 The Responsibility to Protect and International Law (2010) 2 Global Responsibility to Protect, 267-286. [**Bellamy and Reike 2010**].

[251] Bellamy and Reike 2010 *ibid* at 273.

[252] Dorota Glerycz, *The Responsibility to Protect: A legal and Rights-based Perspective* (2010) 2 Global Responsibility to Protect, 250-268 [**Glerycz 2010**].

[253] The four Geneva Conventions of 1949 have become customary law and achieved universal ratification in 2006.

- Crimes against peace – waging a war, murder, ill treatment or deportation to slave labor, killing hostages, plunder of public or private property, and wanton destruction; and
- Crimes against humanity (Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecution on political, racial or religious grounds).[254]

The Statute of the International Criminal Court (ICC) was signed on 17 July 1998. The Court's jurisdiction (Article 5) extends to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[255] "The provisions of the Statute of the Criminal Court constitute good evidence of the offences forming part of general international law."[256]

While the extent of customary international law applicable in non-international armed conflicts is less certain, a minimum includes the provisions of Common Article 3 to the four Geneva Conventions – the obligation to treat humanely all persons taking no active part in hostilities.[257] Further provisions derive from the Additional Protocol II to the Conventions. According to the Study on Customary International Humanitarian Law by the International Committee of the Red Cross, many of the customary rules applicable in international armed conflict are also applicable in non-international armed conflict. As concerns war crimes, the 1949 Geneva Red Cross Conventions require states to pass legislation to provide penal sanctions for grave breaches of the convention and to seek out offenders and bring them to justice.[258] Individual states may be said to be burdened with a duty under customary law to enforce the obligation, just as with the Genocide Convention.[259] While the Security Council might not be able to issue binding

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[254] Brownlie 2005 *supra* note 105 at 586.
[255] Brownlie 2005 *ibid*.
[256] Brownlie 2005 *ibid* at 589.
[257] Ekkehard Strauss, *A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect* (2009) 1 Global Responsibility to Protect 291-323. [**Strauss 2009**].
[258] Stephen J.Toope, *Does International Law Impose a Duty upon the United Nations to Prevent Genocide?* (2000-2001) 46 McGill L.J. 187. [**Toope 2000**].
[259] Toope 2000 at 193.

decisions simply on the basis of its duty to implement an obligation in the area of human rights, it can adopt an active coordinating and recommendatory role that carries long legitimacy."[260]

IV.1. War Crimes (Article 8)

War crimes are enumerated in international humanitarian law. The most accepted definition of war crimes is found in Article 8(2) of the Rome Statute, which reflects customary international law. According to the Statute, a 'war crime' comprises

> grave breaches of the 1949 Geneva Conventions (and their subsequent protocols) such as willful killing, torture, causing of great suffering or extensive destruction not justified by military necessity and (b) other serious violations of the laws and customs applicable in armed conflict, such as attacks on civilians, humanitarians and peacekeepers, ethnic cleansing, the use of rape as a weapon of war, forced starvation, and the use of weapons that cause unnecessary suffering.[261]

The prohibition of 'grave breaches' of these rules is a preemptory rule with *jus cogens* status.

War crimes include serious violations of human rights and humanitarian law such as inhumane treatment, forced prostitution or forced pregnancy, subjecting detainees to mutilation, medical or scientific experiments and enlisting and using child soldiers, causing great suffering or serious injury, willfully extensive destruction and appropriation of property; compelling a prisoner of war to serve in the forces of a hostile power; depriving a prisoner of war of a fair trial; unlawful deportation; taking of hostages; and/or Intentionally attacking civilian objects.

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[260] Toope 2000 *supra* note 258 at 194.
[261] Bellamy and Reike 2010 *supra* note 77 at 277.

IV.2.   Crimes against humanity (Art. 7 of the Rome Statute)

Crimes against humanity are deemed to be part of international *jus cogens* and as a result constitute non-derogable rules of international law. This category of crimes has been included in the statutes of the ICTY, the ICTR and the Special Court of Sierra Leone.[262] States are obliged to ensure that officials do not commit crimes against humanity nor must states assist other states by supplying weapons that are used in committing such crimes.

Crimes against humanity were first mentioned in the London Charter (Article 6) establishing the International Tribunal for the prosecution of major war criminals in the aftermath of the Second World War where it defines crimes against humanity as

> [N]amely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds…whether or not in violation of the domestic law of the country where perpetrated (Article 6(c)).[263]

Any of the following acts when committed as part of a widespread or systematic attack against any civilian population constitute crimes against humanity: Murder; Extermination; Enslavement; Deportation; Imprisonment in violation of fundamental rules of international law; Torture; Sexual violence: rape, sexual slavery or enforced prostitution, forced pregnancy or sterilization; Persecution; Enforced disappearance; Apartheid; or Other inhumane acts. [264]

IV.3.   Genocide (Art. 6 of the Statute)

Provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide* oblige the United Nations to act to prevent genocide. Beyond this, there is an *erga omnes* obligation (an

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[262] See Article 2 of the Statute of the Special Court for Sierra Leone, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, Enclosure, S/2000/914, October 2000, 21 et seq.
[263] Bellamy and Reike *supra* note 77 at 278.
[264] Brownlie 2005 *supra* note 105 at 590.

obligation of such importance to the international community that all states have a care towards

its fulfillment by the United Nations to the international community to prevent gross violations

of human rights).[265] As a consequence, the United Nations is legally and morally obliged to

address genocide.

For the purpose of the Statute 'genocide' means any of the following acts committed with intent

to destroy…a national, ethnical, racial, religious group: (a) killing; (b) causing serious bodily

harm (c) inflicting conditions calculated to bring about physical destruction; (d) preventing births

within the group and (e) forcibly transferring children to another group. The legal responsibility

of states in relation to genocide is clearly codified in the 1948 Convention on the Prevention and

Punishment of the Crime of Genocide and is generally considered to be *jus cogens* and therefore

part of customary international law. Under the Genocide Convention resolution 96(1) of the

General Assembly Dec. 11th 1946 it was the intention of the UN "to punish genocide as a crime

under international law." The principles underlying the convention are binding on states.

The Convention prohibits genocide, provides a clear definition of the crime, and articulates the

duty to prevent and punish perpetrators. Article 1 of the Convention prohibits the crime of

genocide, and establishes the duty of states to actively prevent the crime and punish perpetrators.

Article 2 provides the definitive definition of genocide that has been subsequently adopted by the

International Criminal Tribunals for former Yugoslavia and Rwanda (ICTY, ICTR) and Rome

Statute of the International Criminal Court (ICC).[266]

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[265] Stephen J. Toope, *supra* note 258 *Does International Law Impose a Duty upon the United Nations to Prevent Genocide?* (2000-2001) 46 McGill L.J. 187 **[Toope 2000]**.
[266] Shirley V. Scott, *International Law in World Politics: An Introduction (Lon*don: Lynn*e Rienner Publishers) 2010*

The crime of genocide derives from the Advisory Opinion of the International Criminal Court on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide of 1951 in which the Court held that the provisions of the Convention express pre-existing customary international law and obligations *erga omnes*. "Furthermore, the Court held that the norm prohibiting genocide constitutes *jus cogens* and, thus, was binding upon all States regardless of their ratification or signature of the Convention."[267]

I argue, as Strauss has done, that paragraph 138 in the Summit Outcome Document created an additional obligation to protect civilians and in this way the Responsibility to Protect is a new international norm separate from existing legal obligations by configuring a permanent duty to protect civilians. The onus of protection falls on the international community and all states are now burdened with the responsibility to take action.[268] In the case of Bosnia and Herzegovina v. Serbia and Montenegro specific obligation of States to prevent and punish genocide were identified. If there is in fact a collective legal obligation of the international community, "failure to implement would entail some legal sanctions."[269] The obligation to prevent genocide was a duty of conduct of States involving positive obligations under international law.[270]

IV.4. Ethnic Cleansing

While ethnic cleansing has no legal significance, certain actions are understood to constitute the act of ethnic cleansing such as the "destruction of houses, crops or wells, widespread sexual

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[267] The Court confirmed its earlier statements of 1951 and 1996 in the judgement of 6 February 2006 in the case of Armed Activities on the Treaty of the Congo (New Applications, 2002) Democratic Republic of the Congo vs. Rwanda), General List No. 126, para. 64.
[268] Strauss 2009 *supra* note 249
[269] Strauss 2009 *ibid* at 318.
[270] Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Judgement of 26 February 2007, General List No. 92 Strauss 316.

violence or killings."[271] The crimes associated with ethnic cleansing (forced displacement of civilians) have been prohibited as war crimes and crimes against humanity. There are no specialised conventions that clarify their scope and established a duty to prevent them and punish the perpetrators.

V.   'Humanitarian Intervention' and the Legitimacy/Legality Debate

Law itself, however, is not always sufficient. The English School of International Theory suggests that law is not infinitely malleable and a justification must be plausible to others.[272] There are important normative restraints and states do recognize the need for legitimacy. Governments recognize the importance of accountability and do strive to give reasons for their action to be defensible within the existing rules rather than saying the rules are irrelevant.[273] As we will see, an action that is considered illegal may still be considered as legitimate by some, affording the action greater weight and authenticity in spite of its illegality. By looking at examples of interventions in Kosovo and Iraq prior to the existence of the Responsibility to Protect, we will see how this works.

As has been described, in the 20th century there was a proliferation of international institutions with power to intrude into the autonomy of states and individuals which has provided increased opportunities for the separation of the exercise of power from the will of the state. In the national context there is often demanding scrutiny given to the systems of law which provide assurance in democratic countries that the exercise of power is legitimate.[274] But at the international level this is not so much the case and much debate is carried on about what may

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[271] Strauss 2009 *ibid*.
[272] The English School was a dominant force in the teaching of international relations in the 1970's.
[273] Chapter Five Macdonald, Patman and Mason-Parker *supra* note 102.
[274] C.A.Thomas, "The Concept of Legitimacy and International Law" LSE Law, Society and Economy Working Papers 12/2013 London School of Economics and Political Science, Law Department at 2 **[Thomas 2013].**

constitute "the legitimate exercise of power beyond the nation state."[275] In addition, more

recently, unlike in the past, philosophers, lawyers and social scientists have recognized the

importance of legitimacy to justify forms of power leading to questions about why people should

comply with international law given its sketchiness, ambiguity and lack of authority.[276]

The language of legitimacy and of crisis are often linked. Sometimes the crisis can be addressed

by international law and sometimes international law constitutes the crisis.[277] As will be shown,

the NATO bombing of Kosovo raised a lot of questions about "the legitimacy of international

actors, international norms and the international legal system as a whole."[278] One of the

concerns of international law is its ability to be used subjectively which renders the application

inconsistent.[279] Something may be called legitimate or illegitimate not because they are in

concurrence with a particular normative framework but because of subjective reasons which are

being used authoritatively.[280] The concept of legitimacy appeals to international law scholarship

and lawyers to consider how the tools of their trade are being and should be used. Lawyers have

a responsibility to reflect on motivations for their action and on their role as propagators of

power and subjugation.[281]

The etymology of the term 'legitimacy' derives from the Latin *legitimus* (lawfully, as derived

from *lex* (law).[282] There are generally two main legitimacy categories: legal legitimacy and

moral legitimacy.[283] Legal legitimacy assesses actions according to particular normative

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[275] Thomas 2013 *ibid* at 2.
[276] Thomas 2013 *ibid* at 3.
[277] Thomas 2013 *ibid* at 3.
[278] Thomas 2013 *ibid* at 4.
[279] See James Crawford "The Problems of Legitimacy Speak" (2004) 98 AJIL Proceedings 271 referring to "fuzziness and determinacy" in Thomas 2013 *ibid* at 4.
[280] Thomas 2013 *supra* note 274.
[281] Thomas 2013 *ibid* at 5.
[282] Thomas 2013 *ibid* at 7.
[283] Thomas 2013 *ibid* at 6.

frameworks and provides "an exclusionary reason for compliance even in the face of opposing moral considerations."[284] Legal validity in international law is not always easy to determine, thus the focus of the thesis includes moral legitimacy as well as to strict legality. Legal validity, like positivist law, requires the law to be created in accordance with the correct legal process and is entirely separate from moral obligation; rather it is established as a perfectly formal fact.[285] The natural law tradition, on the other hand, requires law to be true to the laws of nature and justice. "Although laws that lack moral legitimacy retain their status as law, they are defective in that they fail to achieve the quality of moral obligation that should be experienced in relation to law."[286]

Moral legitimacy raises issues about who has the right to rule and how the exercise of power of one actor over another can be morally justified. Moral legitimacy is therefore central to the description and evaluation of the exercise of power through law.[287] It makes an argument about why a certain international law is worthy of compliance (although admittedly there are sometimes competing normative rules that are meant to govern action). A determination of legitimacy can give cause for a belief in an action independent from coercion or mere self-interest.[288] In the final analysis one may consider arguments for legitimacy, in enforceability and in compliance.[289]   In Harold Koh's and Abram Chayes work[290] "legitimation is the process by

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[284] Thomas 2013 *ibid* at 7.
[285] Thomas 2013 *ibid* at 9.
[286] Thomas 2013 *ibid* at 10.
[287] Thomas 2013 *ibid* at 13.
[288] Thomas 2013 *ibid* at 14.
[289] Thomas 2013 *ibid* at 15.
[290] See Harold Koh, "Why do nations obey International Law" (1997) 106 Yale Law Journal 2509 and Abram Chayes and Antonia Handler Chayes, "The New Sovereignty: Compliance with International Regulatory Agreements"(1998) in Thomas 2013 *ibid* at 16.

which actors come to believe in the normative legitimacy of an object."[291] "A legitimate order deserves recognition."[292]

Much of the literature regarding legitimacy and international law addresses the legitimacy of the use of force across state boundaries.[293] Legitimacy arguments can show why certain regimes may or may not be worthy of support and help to explain what may appear to be an inconsistency in normative decisions. The doctrine of humanitarian intervention has a tenuous basis in current international customary law, and, as will be shown, this sometimes renders Security Council action legally questionable.[294]

The issue of humanitarian intervention is very complex, not only from the ethical and political point of view but also (and possibly particularly) from the legal point of view. The issue of the legitimization of humanitarian intervention with the aim of stopping massive human rights violations are under scrutiny in the thesis.   Those who do not support humanitarian intervention tend to be cultural pluralists, while those in support of it argue for its legality and legitimization on the basis of moral universality rather than relativism.[295] The debate on the universality of human rights "... spans civilizations and scientists from the Islamic world, sub-Saharan Africa, and the Far East take part in it..." and there is no unanimity in thinking even in Western thought.[296] And I would suggest this is also true for the acceptance of the Responsibility to Protect principle. Decisions that an action in the name of the Responsibility to Protect be denounced as illegitimate will render it more difficult to be used the next time. This provides a

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[291] Thomas 2013 *ibid* at 16.
[292] Jurgen Habermas, "Cosmopolitanism and the Evolution of Society" (1979) in 2013Thomas *ibid* at 19.
[293] Thomas 2013 *ibid* at 28.
[294] Independent International Commission on Kosovo, The Kosovo Report (Oxford), 23 October 1999, at 4.
[295] Herzy Zajadlo, , "Legality and Legitimization of Humanitarian Intervention: New Challenges in the Age of the War on Terrorism" (Feb. 2005) 48, (6) The American Behavioral Scientist; ProQuest Business Collection, at 653. [Zajadio 2005].
[296] Zajadlo 2005 *ibid* at 654.

challenge for the legal argument alone, and pushes the need for arguments for legitimacy in action. In addition, the war on terrorism has increased the number of questions and skepticism about humanitarian intervention with fears that intervention is motivated by strategic national interests.[297] Realpolitik means that it is not just a cultural pluralism/universalism debate but that there are concerns over resource grabs, ongoing neo-imperialism and other such concerns.

However, while some have argued that intervention is a cover for colonial and religious motives, I would agree with Wheeler that "present day interventionism is aimed mainly at "saving strangers."[298] In the doctrine of international law, the definition of humanitarian intervention is limited to

> those actions of military and forced character determined by humanitarian motives and aims of the intervening states group of states, or international organizations without the permission of the state within whose territory intervening takes place.[299]

Interventions at the international level are sometimes interpreted as legitimate actions, but there is no legal justification given for doing so. In my own definition of legitimacy and its application in Chapter Nine, I argue that a strong definition of legitimacy for intervention should include at minimum the soft law of the Responsibility to Protect. Some cases, such as Kosovo below, have gained some legitimacy through the international community, even though they were illegal at the time. I am convinced that such decisions undermine the current standing of the Responsibility to Protect as it was intended, leaving the international community defenceless again in the face of human atrocities and genocide. Ethics, politics, and law together must be considered when analyzing humanitarian intervention. "Only a holistic approach makes it

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[297] Zajadlo 2005 *ibid* at 654.
[298] N.J.Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, U.K.: Oxford University Press, 2002) at 658 [**Wheeler 2002**].
[299] Zajadlo 2005 *supra* note 295at 658.

possible to elaborate a position free of internal considerations."[300] To demonstrate how

important interventions of the past prior to the Responsibility to Protect have been interpreted I

have elaborated on two cases below: Kosovo (1999) and Iraq (2003). There is no doubt in my

mind that these two interventions strengthened the international community's need for a norm

that articulated criteria for intervention.

V.1   Kosovo (1999)

One example of the contest between what has been regarded as legitimate and/or what has been

regarded as legal is illustrated through an analysis of the Kosovo intervention in 1999. Kosovo

was ultimately deemed to be illegal but legitimate. Britain argued it was legal. However, its

legality proved to be questionable in the absence of Security Council approval. George

Robertson, Secretary of State for Defense, (Br.) also argued NATO was acting within

international law.

> Legal justification rests upon the accepted principle that force may be used in extreme
> circumstances to avert a humanitarian catastrophe. The use of force can be justified as an
> exceptional measure in support of purposes laid down by the UN Security Council but
> without the Council's express authorization when that is the only means to avert an
> immediate and overwhelming humanitarian catastrophe.[301]

Britain tried not to make this a precedent by referring to specific Resolutions of the UN (1199

and 1203)[302] that Kosovo constituted a threat to peace and security in the region and that there

was a major humanitarian crisis. They referred to Chapter VII resolutions in cases where the use

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[300] Zajadlo 2005 *ibid* at 659.
[301] "Memo on International Legal Issues Arising in the Kosovo Crisis" submitted by Paul Vaughan Lowe to the House of Common Foreign Affairs Committee 25 March 1999] Chapter Five Macdonald, Patman and Mason-Parker *supra* note 102.
[302] S/RES/1199(1998) United Nations Resolution 1199 23 September 1998 on the situation in Kosovo, demanding that hostilities be ceased and a ceasefire be instituted. http://www.un.org/peace/kosovo/98sc1199.htm
S/RES/1203 (1998) United Nations Resolution 1203, 24 October 1998, on the agreement between The Federal Republic of Yugoslaviaj and NATO and that it comply with previous resolutions and OSCE verification missions. http://www.un.org/peace/kosovo/98sc1203.htm

of force is acceptable when it is the only means available to prevent or end a humanitarian catastrophe. NATO had in fact breached the specific UN Charter Provision in Article 2(4) and 51 and Russia, China and India opposed. Russia, China and Namibia tried to stop the bombing. Their resolution was opposed by the others on the grounds of the need to end humanitarian crises. In many ways this sets a precedent for the later establishment of the principle of the Responsibility to Protect and further attempts to clarify and legalize humanitarian intervention under specific circumstances.

NATO's intervention in 1999 into Kosovo set a precedent (prior to the Responsibility to Protect) which prompted numerous discussions regarding legality/illegality and legitimacy versus illegitimacy.[303] NATO launched an airstrike and invoked the "necessity to save the innocents and to react to atrocities in the FRY's province of Kosovo."[304]   It invoked UN Security Council Resolution 1199 in September 1998 which expressed grave concern over the fighting in Kosovo and the excessive and indiscriminate use of force by Serbian Security forces and the Yugoslav Army which was causing large numbers of civilian casualties.[305] Serbia had essentially begun an act of ethnic cleansing. The key issue in the intervention between the government of the former Republic of Yugoslavia and the Kosovar Albanian rebels (Kosvo Liberation Army or KLA) in 1998 is that NATO began military action in Kosovo without UN Security Council approval. The common question asked is whether the military intervention into Kosovo is justified according to a legal and/or a just war perspective. The legality and the morality of the decision

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[303] Lauras M Herta, "Jus in Bello and the Solidarist case for Humanitarian Intervention: From Theory to Practice" (2013) LVIII, 1, Studia Ubb, Europaea 5-48 at 21 **[Herta 2013].**
[304] Herta, 2005 *Ibid* at 34.
[305] Security Council Resolution 1199 S/RES/1199 (1998) 23 September 1998 demanding a ceasefire in Kosovo.

to wage the war (*jus ad bellum*) and the morality of the means used in the war (*jus in bello*)

needs to be considered in making such an international law determination.[306]

In legal terms, NATO's intervention without UN Security Council authorization was technically

"a breach of international law as codified by the 1945 UN Charter."[307]   Article 2(4) reads:

> 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.[308]

NATO's failure to seek Security Council authorization since agreement was unlikely to have

been obtained and the Responsibility to Protect provision did not exist has received criticism in

spite of the fact it provided three legal justifications for the use of armed force (refugee flows,

inter-ethnic violence, and human rights and minority rights violations, as referred to in the 1948

Declaration of Human Rights and the 1949 Geneva Conventions). [309] The claim of legal

legitimacy has been widely disputed.[310]

As mentioned, an aid to determining the legitimacy of an action is through just war theory. It

was clear something had to be done and proponents claim that "the humanitarian imperative did

indeed outweigh the legal constraints according to just war criteria."[311] Those in favor of

intervention argue that diplomatic efforts were exhausted and only military action was left.

There was no reasonable alternative.   Critics claim the diplomatic efforts were confusing and

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[306] Emily Schroeder, "The Kosovo Crisis: Humanitarian Imperative versus International Law" (2004) 28.1 The
Fletcher Forum of World Affairs, 179-200 On March 24, 1999 the United Nations Security Council at 179
[Schroeder 2004].
[307] Schroeder 2004 *ibid* at 180.
[308] UN Charter 1945 Article 2(4) "Coupled with Article 2(3) which imposes an obligation of UN members to settle
their international disputes by peaceful means, it is a dramatic affirmation of the sea change in international legal
thinking that had been presaged by near-universal ratification of the Kellogg-Briand Pact several years before.
(Currie 2008)
[309] Schroeder 2004 *supra* note 306 at 184.
[310] Schroeder 2004 *ibid* at 182.
[311] Schroeder 2004 *ibid* at 183.

NATO acted too rashly leading to questions about NATO's credibility. Did NATO have no alternative but to intervene?[312] Supporters of the action argue that the humanitarian imperative was more compelling than the legal constraints. Critics argue that the level of violence was not yet severe enough and intervention would set a precedent for future military intervention without Security Council approval.[313] My argument is that the Kosovo intervention mainly served to stress the need for a new international norm to help clarify the legality and legitimacy of humanitarian intervention and to help prevent atrocities in the future. In my view the action in the absence of legal authority and the new norm of the Responsibility to Protect is both illegal and illegitimate.

V.2   Iraq (2003)

Similarly, the Iraq war occurred prior to the approval in the United Nations in 2005 of the Responsibility to Protect and has been said to have been illegal but legitimate. The primary justification for the invasion of Iraq and the use of force was Iraq's development of weapons of mass destruction (wmd) in defiance of 12 years of UN resolutions demanding Iraq's disarmament. The British Prime Minister Tony Blair also supported regime change in Iraq on humanitarian grounds and wanted to rid the world of Saddam Hussein. (I will later show in Chapter Nine how the motive of regime change can also prove to be a strong impediment to building any sort of nationwide trust in the Responsibility to Protect). The British Prime Minister disagreed with President Bush who argued the UN was irrelevant.[314] In late January 2003 the UK agreed with the US that Iraq was in breach of Resolution 1441 but France, Russia

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[312] Schroeder 2004 *ibid* at 183.
[313] Schroeder 2004 *ibid* at 184.
[314] United Nations Resolution 687 S/RES/687 (1991) adopted on 3 October 1991 regarding the boundary between Iraq and Kuwait and setting out terms for Iraq to comply after losing the Gulf War.

and Germany believed inspection should be given more time.[315] It must also be recognized that the war on Iraq was prompted by the terrorist attacks of September 11, 2001 on the United States which brought about a change in US foreign policy in the form of the 'Bush doctrines.' The change, according to the US, allowed for it to take pre-emptive action in anticipatory self defense rather than simply responding, as called for in the 2005 agreement.

However, Article 51 and the right to self defense does not apply since Iraq did not attack the United States and there was no proof an attack was imminent.[316] UN Security Council Resolutions also did not provide for the use of force but simply required compliance from Iraq.[317] The US and the UK used Iraq's noncompliance as a 'quasi-legal' justification. The Security Council Resolution 1483, approved on May 22, 2003, two months after the beginning of military operations in Iraq, did not condemn the operation. Rather, it verged on providing a justification for the intervention and providing some legitimacy.[318] Security Council Resolution 1511 approved October 16, 2003 came the closest to justifying the intervention ex post facto. It authorized a "multinational force to take all necessary measures to contribute to the maintenance of security and stability in Iraq."[319] In spite of this, UN Secretary General Kofi Annan scolded the US for attacking Iraq without UN approval.[320]

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[315] Chapter Five Macdonald, Patman and Mason-Parker *supra* note 102 at 94; S/RES/1441(1992) United Nations Resolution 1441, 8 November 1992, offering Saddam Hussein an opportunity to comply with previous resolutions regarding disarmament as set out in previous resolutions. http://www.un.org/Depts/unmovic/documents/1441.pdf
[316] Schroeder 2004 *supra* note 306 at 190.
[317] Security Council Resolution 1441 S/RES/1441 (2002) 8 November 2002 offered Iraq another opportunity to comply with previous resolutions.
[318] Security Council Resolution 1483 S/RES/1483 (2003) regarding post conflict restoration.
[319] Security Council *Resolution* 1511 (2003) of October 16, 2003 calling for a multinational force.
[320] Schroeder 2004 *supra* note 306 at 192.

V.3   The Kosovo and Iraq Fall-Out

Wheeler points to the difference between illegal acts that can be legitimate and legal acts that are also illegitimate in reference to Kosovo and Iraq. While Russia and China argued intervention in Kosovo breached international law, the Security Council voted 12-3 that "an imminent threat of genocide amounted to mitigation by virtue of exceptional circumstance."[321] This provided for legitimacy but not necessarily legality. On the other hand the Security Council voted against US/British action in Iraq, making it illegal and illegitimate.[322] A substantive consideration of the meaning of legitimacy along with the determination of legitimacy appears in Chapter Nine in the analysis of the Libyan intervention.

On the one hand, Chesterman argues that the notion of humanitarian intervention which emerged in the nineteenth century was not necessarily a legal right, but was mainly a matter of politics, policy, or morality.[323] On the other hand, international lawyers such as Fernando Teson and Christopher Greenwood,[324] draw attention to the notion of an intervention which runs parallel to the Charter, citing cases from the 1990s,[325] largely carried out by Western governments as state practice supportive of a new customary rule which privileges custom over treaty – a controversial move from the perspective of the Vienna Convention.[326] However, this appears to

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[321] Macdonald and Patman 2007 *supra* note 102 at 237.

[322] Stephen Haig, David B. MacDonald and Robert G. Patman *Conclusion: Some Reflection on Ethics and Foreign Policy.*(2007) at 237.

[323] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001), 295 pp.

[324] See Fernando Teson, Humanitarian Intervention; Christopher Greenwood, "International Law and the NATO Intervention in Kosovo," (2000) 49(4) International and Comparative Law Quarter; 926-934. **[Teson 2000].**

[325] The cases that would be included are Liberia (1990-1992), northern Iraq (1991), Bosnia and Herzegovina (1992-1995), Somalia (1992-1993), Rwanda (1994), Haiti (1994), Albania (1997), Sierra Leone (1997-present), Kosovo (1998-1999), and East Timor (1999).

[326] As Chesterman has argued more recently, "Since clear treaty provisions prevail over customary international law, an ordinary customary rule allowing intervention is not sufficient to override Article 2(4). The only way intervention for purposes beyond those of self-defence of collective security could be considered legal is if such interventions had acquired the status of jus cogens." See Michael Byers and Simon Chesterman, "Changing the

favor Western states over those such as China, Russia and India. Divergent views held by China and Russia and sometimes India are, as we shall see, serious impediments to the implementation of the Responsibility to Protect. Chesterman's reading of these alleged cases of humanitarian intervention lacks "the necessary *opinio juris* that might transform the exception into the rule."[327] The main point is that the right of humanitarian intervention challenges traditional legal approaches to sovereignty in international law and brings to the fore the human rights legal regime.[328] Chesterman also raises concerns that humanitarian intervention is likely in practice to license self-interested interventionism under the guise of humanitarianism; and secondly, could jeopardize the international rule of law. In my view unilateral intervention or intervention as a 'coalition of the willing' in support of the Responsibility to Protect should not be considered as a legitimate alternative to collective action under the Charter. Some interventions in the post-Cold War period involved host-state consent and Security Council resolutions that invoked Chapter VII. This condition may support Pillar Two of the Responsibiliy to Protect but Pillar Three becomes necessary when the state itself is the perpetrator and the international community decides it must act to save civilians.

The purpose of the ICISS was to give some legitimacy to the negative views and experiences of humanitarian intervention without consent through a new principle of responsible sovereignty. Nicholas Wheeler[329] and the ICISS both argue that there is a consensus on humanitarian intervention and its development in international relations which was reached through a more

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Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law", in J.L Holzgrefe,. and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, legal and Political Dilemmas* (Cambridge: Cambridge University Press, in press) [Holzgrefe and Keohane in press].

[327] Simon Chesterman, "Just War or Just Peace? Humanitarian Interventions and International Law" (Oxford: Oxford University Press, 2011) at 87.
[328] Chesterman 2011 *ibid* at 506.
[329] Nicholas J.Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000), 336 pp **[Wheeler 2000]**.

expansive definition of what constitutes a threat to international peace and security. There is an

increasing awareness of conflict and suffering around the world due to an expansion of

communication and information technology as well as human rights norms.[330] The growth in

awareness can also be seen in the presence of non-state actors who support the principle. Welsh

suggests the ICISS has three goals: "(1) to develop the debate on humanitarian intervention; (2)

to find a global consensus on how to take action; and (3) to find new ways of reconciling the

principles of intervention and state sovereignty."[331]

In Wheeler's book, *Saving Strangers*, he makes an argument that pluralism in the international

area has been overcome through the recognition of the norm of humanitarian intervention.[332] I

would argue that humanitarian intervention can be a legitimate exception to the rules regarding

non-intervention and the prohibition against the use of force if it follows the principle of the

Responsibility to Protect as it was first created. This supports the larger constructivist claim (see

Chapter Five on theoretical perspectives for further explanation) that state actions will be

constrained if they are not legitimate but new norms, if brought into existence, can enable new

practices to develop.

Both Wheeler and the ICISS support the norm of humanitarian intervention when all other

diplomatic actions have failed. This permits states to legitimately employ military force against

another state in order to protect civilians in danger. As has been substantiated earlier, this

represents a shift in the norms of international relations from the rights of states to claim

sovereignty as authority toward a new moral stance of sovereignty as responsibility. The

problem with the earlier humanitarian interventions is that they were conducted without UN

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[330] Welsh 2001 *supra* note 195 at 510.
[331] Welsh 2001 *ibid* at 510.
[332] Wheeler 2000 *supra* note 298.

approval and no rule or norm was available to allow for a legal decision. State responsibility

obliges the state to assure a minimum standard of human rights, not only internally, but within

other states. The challenge is that both must adopt some sort of universality to be implementable.

As has been suggested, the question of 'universality' in the international milieu is disputed by

some.

According to the ICISS, sovereignty implies a dual responsibility:

> Externally – to respect the sovereignty of other states, and internally, to respect the
> dignity and basic rights of all the people within the state. In international human rights
> covenants, in UN practice, and in state practice itself, sovereignty is now understood as
> embracing this dual responsibility. Sovereignty as responsibility has become the
> minimum content of good international citizenship.[333]

For the ICISS, this moves beyond the 'right to intervene' to the 'Responsibility to Protect' and

takes into account the individual or citizens as well as the state. Neither *Saving Strangers* nor the

Report of the ICISS actually provide a legal argument that overcomes sovereignty of the state.

The ICISS and Teson admit that it is not possible to claim the emergence of a new principle of

customary international law. Rather, they lay claim to 'an emerging guiding principle.' [334]

However, as the thesis argues this emerging norm may be said to be evolving toward that legal

end.

There is also a connection between the rights of an individual and self-determination.[335] When

an individual is so threatened that he or she can no longer be truly self-actualizing, then their

rights have been infringed upon. This is an occasion for the principle of Responsibility to

Protect to be drawn upon, particularly in a case where a population is suffering serious harm as a

result of internal war, insurgency, repression or state failure, and the state involved is either

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[333] ICISS #1.35 *supra* note 6 at 8.
[334] Welsh 2001 *supra* note 195.
[335] Welsh 2001 *ibid* at 511.

unwilling or unable to stop the harm. In such a case the principle of non-intervention must yield

to the international responsibility to protect.[336] But this does not mean that the protection of

populations must involve or lead to an intention to reshape societies in a Western, liberal

democratic image, as is feared by many states. The concept of regime change, and the actions of

rebuilding and peace building along with the nature of a new government will be discussed in

greater depth in the concluding portion of the thesis.

One of the questions that must be asked in these circumstances as an aspect of the criteria for

legitimacy is whether there is 'sufficient harm' to justify action. As Wheeler argues, the

threshold of suffering needs to be high enough for other states to even consider the risk to their

own armies and the reaction of their own citizens. The ICISS Report recommends intervention

"where there is a large-scale loss of life –with or without genocidal intent – that results either

from deliberate state action or the immense failure of state capability, or where there is large-

scale 'ethnic cleansing' which takes place in the form of killing, rape, torture, or mass

expulsion."[337] In the UN Outcome Document this was further refined to the four crimes.

In the transnational nature of today's security threat and although the potential for interstate war

should be guarded against, it is arguably not the most significant threat to humanitarian values in

modern international society. The ICISS Report notes that most of the threats of war today are

not interstate but rather occur with the killing of civilians and these numbers have increased

dramatically.[338] The Report favors the United Nations as the body for managing international

peace and security and this type of contemporary conflict. Wheeler also suggests that in the 21st

century there is a greater degree of agreement on the meaning of moral principles concerning

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[336] The Responsibility to Protect: Research, Bibliography and Background, Supplementary volume to Report of the International Commission on Intervention and State Sovereignty *supra* note 6.
[337] ICISS *ibid* at 32.
[338] ICISS *ibid* at 13.

sovereignty, human rights and intervention than the pluralists would admit to.[339] As I have

suggested, however, skepticism and mistrust of the West still remains a compelling impediment

to unified action – Syria in 2012 and onward being a tragic example. Several Security Council

Resolutions to intervene in Syria have been blocked by Russia and China.

Both Wheeler and the ICISS rely on the traditional 'just war' framework for their arguments in

favor of humanitarian intervention. While Wheeler suggests adherence to universally applicable

moral rules is more acceptable than the 'particularist, case-based' reasoning that provided the

groundwork for early modern just war tradition, Welsh suggests the just war reasoning is still the

most useful approach for deciding what is the moral way to deter a war and when humanitarian

intervention is required.   As such, it remains a vital resource for those who wish to legitimate the

use of force for humanitarian purposes. [340] The manner in which Just War Theory can be applied

to an intervention is explored in Chapter Nine as a methodology for determining the legitimacy

of the Libyan intervention in 2011 with regard to the Responsibility to Protect.

The Security Council authorization of Kosovo after the fact suggests to some that ad hoc

'coalitions of the willing' acting without UN endorsement can be deemed legitimate [341] but the

ICISS, Chesterman (2001) and myself agree that developing a consensus on military

intervention involves the full collective mechanisms of the UN. While this is a very difficult

task and perhaps one of the major impediments to the implementation of the Responsibility to

Protect, I feel strongly that it is advisable. The objective becomes not to find alternatives to the

Security Council as a source of authority, but to make the Security Council work much better

than it has. The historical basis of the veto as well as some ways in which the Council could be

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[339] Wheeler 2000 *supra* note 298.
[340] Welsh 2001 *supra* note 195 at 514.
[341] Welsh 2001 *ibid* at 515.

improved is considered in the thesis along with the concern that unilateral actions can threaten the legitimacy of international law itself.

Although the veto exists for valid historical reasons, the fact that the Permanent Five have veto power and can block intervention and other UN actions for narrow political reasons is obviously a prohibiting factor in cases of possible implementation of the responsibility principle.[342] Today, of course, the Security Council is viewed by some states as unrepresentative and a poor proxy for 'international will.' [343] A 'code of conduct' for the use of the veto could possibly help to resolve the problem.

Welsh suggests one of the important alternatives would be unilateral action, based on the expectation that it can be more timely and effective, especially if undertaken by a regional power with the right mix of knowledge and capability. Interventions from the Cold War period – Tanzania in Uganda, India in East Pakistan, and Vietnam in Cambodia – would support this view. Even where UN Security Council authorization has been given, it is clear in these cases that UN action would have been unlikely without the strong nation taking the lead.[344] It is unlikely, however, in my view that unilateral action is a satisfactory solution, given the concerns of some states who are already extremely wary of the Responsibility to Protect and of imperialism and/or colonialism. Such action, without the consent of the state concerned, will only exacerbate the tensions.

The next chapter addresses moral behaviour and moral philosophy as underlying values and ethical principle among nations, cultures and religions. It emphasizes the necessity for common

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[342] See Romeo Dallaire, and the Will to Intervene http://www.usip.org/events/mobilizing-the-will-intervene
[343] For more on the contingent nature of Security Council authority, see Hurd, Ian "Legitimacy, Power, and the Symbolic Life of the UN Security Council", (2002) 8(1) *Global Governance* 35-5**[Hurd 2002].**
[344] Welsh 2001 *supra* note 195.

moral principles as opposed to actions in the international community taken by states in their own self-interest which emphasize their sovereignty rights as opposed to their responsibilities. It suggests that the achievement of a coherent system of conventions has in some ways already been accomplished in the human rights legal framework and provides examples of foreign policy where such ideals can be found.

Chapter Four: The Place of Morality

> Humanitarian intervention has become "perhaps the most dramatic
> example of the new power of morality in international affairs."[345]

This chapter focusses on what can be unpinned as universal or common principles in human rights and the Responsibility to Protect, and what lies beneath these principles in the way of moral values and ethical principles.   The thesis itself seeks to uncover shared values across the globe. Rather than pluralist arguments focussing on our differences it focuses on common moral principles and lays the groundwork for what can be shared by states. It suggests that only common expectations about appropriate behavior can bring about shared actions at the international level. It further looks at some common elements of foreign policy as an example of shared principles.   One of the roots of moral values lie in religious belief and this chapter comments on the commonalities between world religions. It also takes the opportunity to introduce NGOs as another set of players beyond the state and how they support the moral principles which engage those in favor of the Responsibility to Protect.

With the Responsibility to Protect in place, it is my intention to look more closely at how morality influences the way that actors respond to the prospect of the application of the principle to a crisis situation. In the absence of hard law, the perspectives, constructs, values and/or interest of the actors play a significant role in the decisions that are being made to protect civilians in crimes against humanity. One of the more influential legal and moral drivers are the NGOs and civil society which will be discussed in Chapter Eight with regard to the history and development of the Responsibility to Protect. Individuals and organizations are pursued in

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[345] see Leslie H,Gelb, Justine A. Rosenthal, 'The Rise of Ethics in Foreign Policy – Reaching a Values Consensus," Foreign Affairs, 82/3 (2003): 2-7 In Chapter 12, MacDonald, Patman and Mason-Parker 2007 **[Gelb and Rosenthal 2003].**

greater depth through individual interviews with major founders along with testimonies of members of Nongovernmental Organizations. The important point is that Canadian and other NGO groups have been playing an important role through soft power, moral suasion and norm entrepreneurship and constructing and popularizing the moral and legal premises of new international norms regarding human security.[346]

In terms of expanding on the norms and enhancing the dialogue around the Responsibility to Protect, Canadian Nongovernmental Organizations have promoted several initiatives, policies and strategies to incorporate the foundations of the Responsibility to Protect into their doctrines and practices. Included in their work are the numerous workshops and papers that have been done since the release of the original report. We will see more of their efforts and views in the analysis of the interviews in Chapter Eight. Before delving into these interviews, it is useful to explore further the moral system that supports the tenets of the Responsibility to Protect.

I.   Morality, values, ethics, universal principles

Moral concerns have often been referred to in this document as an 'alternative to state self-interest' and I would like at this point to expand on what is meant by 'moral concerns'. The following section addresses the dichotomy between state interest and moral principles as it is often seen in the literature and as it plays out in political action. The distinction between morality and self-interest is an important one since my argument is that for the Responsibility to Protect to be successful in intervention decisions as soft law, moral objectives must pay a greater role than the self-interest of states. While some of the literature attempts to tie the two together -

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[346] Maclean, Black, and Shaw 2005 *supra* note 55 at 60.

moral values and self-interest – from my point of view these efforts are generally weak and

unconvincing.

After WWII human rights, as well as the sovereignty of nations, became a central concern when

human beings began to be considered in their own right and not just as citizens of a state. The

Universal Declaration of Human Rights (UDHR), which was approved by the General Assembly

of the UN in 1948, was concerned with people everywhere. Article 1 of UDHR declares that:

"All human beings are born free and equal in dignity and rights." This moral position is

reflected clearly in the recent *Report of Secretary General's High Level Panel on Threat,*

Challenges and Change (2004).[347]

> The successive humanitarian disasters in Somalia, Bosnia, Herzgovina, Rwanda, Kosovo
> and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign
> governments but their responsibilities, both to their own people and the wider
> international community. [348]

There is a growing recognition that the issue is not the 'right to non-intervention' of any state,

but the moral and legal responsibility to protect in every state when it comes to people suffering

from catastrophe.

> And there is a growing acceptance that while sovereign governments have the primary
> responsibility to protect their own citizens from such catastrophes, when they are unable
> or unwilling to do so their responsibility should be taken up by the wider international
> community – with it spanning a continuum involving prevention, response to violence, if
> necessary, and rebuilding shattered societies.[349]

Possible use of collective action under Chapter VII of the UN Charter suggests it is in our

interest to act ethically, and to account to ourselves and others. Here self-interest and ethics can

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[347] "A more secure world: Our Shared Responsibility" Report of Secretary General's High Level Panel on Threat,
Challenges and Change United Nations 2004.

[348] Mark Amstutz, *International Ethics: Concepts, Theories and Cases in Global Politics* Roman & Littlefield,
(2005), at 2 in Chapter 7 "How to be Good: Morality in Japan's and Germany's Foreign Policy", Dirk Nabers in
Macdonald, Patman and Mason-Parker *supra* note 102 at 117.

[349] See UN World Summit Outcome document 2005 *supra* note 69.

be made to coincide, but where states are perceived to be acting in their self-interest only (as historically has been the priority) human rights can easily be trampled upon.

Notwithstanding the different views across countries over what constitutes ethical behavior, the question then becomes whether ethical norms can come to be shared by states. The logic of appropriateness, constructivism and structuralism, which will be explored in Chapter Five, say they can. This would represent a set of "shared expectations about appropriate social behavior that is held by some communities of actors."[350] A further question is whether ethical views can be shared at the international level and my argument is that universal norms have been established in the past by the international community and the Responsibility to Protect has been designed to further such norms in an ethical system built on individual human rights.

There needs to be a better understanding of the role ethics can and should play in deliberations about policy choices, and especially about the impact of foreign policies ultimately decided upon in the case of human crises. [351] Ethics may be defined as:

> a complete and coherent system of convictions, values and ideas that provides a grid within which certain sorts of actions can be classified as evil, and so to be avoided, while other sorts of actions can be classified as good, and so to be tolerated or even pursued.[352]

The achievement of such a coherent system of convictions at the world level is immensely challenging due to cultural differences, however, but not necessarily impossible. Even ancient laws and treaties have been designed to impede or bring aggression to an end. There are also laws that support peace, cooperation and justice between states (*jus gentium*) and laws that protect the rights of the individual.

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[350] Martha Finnemore, and Kathy Sikkink, "International Norm Dynamics and Political Change" (1998) vol. 52 International Organization, at 887 *supra* note 37.

[351] Richard V Allen in MacDonald, Patman and Mason-Parker 2007. 2007 *supra* note 102at 185.

[352] Peter J. Haas, *Morality after Auschwitz: The radical challenge of the Nazi Ethic* (Philadelphia, Pa. 1992) in Macdonald and Patman, 2007 *supra* note 102 at 3.

However, there are those who disagree with the possibility of the development of universal norms or rules in the international environment; e.g. Krasner (2009).   According to Krasner, the norms and rules of any international institutional system, including the sovereign state system, will always be subject to challenge and controversy because of certain logical contradictions; e.g. the lack of institutional authority for resolving conflicts, unequal power among principal actors, and differing incentives confronting individual actors, notably states.   He argues that in the international environment actions will not closely conform to any given set of norms.[353] In terms of theory, then, this places him very much into the realist school which suggests the improbability, if not the impossibility, of uniformity and/or universal agreements.

What does this mean for the principle of the Responsibility to Protect? Will sovereignty issues always conflict with humanitarian purpose and are there other aspects of states that also contribute to this conflict? This represents a key question of the thesis: Do we conclude, as Krasner does, that the lack of an authoritative structure, the power imbalance, and differing state incentives make it 'impossible' for the Responsibility to Protect principle to be firmly upheld? I have acknowledged there are impediments to its development as a legal norm, and indeed the objective of the thesis is to explore these impediments, but ultimately I argue that there are countervailing possibilities for cooperation and universal norms, some of which have already been established in the domain of human rights (in spite of the continuing controversy over some of them). In other words, while there are serious challenges to the Responsibility to Protect's implementation in its soft law form, these challenges are not insurmountable. The norm follows a universal theme in accordance with human rights principles which have already become law.

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[353] Krasner 2009 *supra* note 96.

Nongovernmental organizations, as referred to above, have capitalized upon this as the norm evolves.

In the introduction to their book, Macdonald, Parker and Patman define foreign policy as "the area of politics that seeks to bridge the boundary between the nation state and its international environment:" [354] It consists of independent actors (usually the state) and other actors in the international arena where they have limited control, as opposed to the domestic arena. Foreign policy also can mean 'no action,' such as in the case of Rwanda, which provided a strong incentive to develop a mechanism for states to respond to situations of human atrocity.

Phil Goff refers to moral principles as "... soft thinking which has no place in the real world."[355] Other arguments are made by realists who argue that ethics and the behaviour of nations have not much in common since the business of the nation is to defend itself and maximize its power. In addition, differences in culture, religion and other hurdles are too great to be shared in such a way that could lead to a single set of ethics strong enough to maintain or manage the world's order which is needed for the Responsibility to Protect to be enacted.[356] On the other hand, Robin Cook, British Foreign Secretary, 12 May 1997, like myself, places the ethical dimension of foreign policy in the human rights context.[357]

In the first instance, the role of the sovereign state is to provide for the wellbeing and security of its people. I believe we can all agree that genocide and human rights atrocities must not be allowed to develop. Fortunately, there have been leaders with a vision beyond their own including but not restricted to Lloyd Axworthy. For example, Roosevelt in the US Congress on

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[354] MacDonald and Patman and Betty Mason-parker, 2007 *supra* note 102 at 2.
[355] MacDonald and Patman and Betty Mason-parker Chapter 12 The Ethics of Foreign Policy in M, P, and M-P 2007 *ibid* at 197.
[356] Chapter 12 MacDonald and Patman 2007 *ibid* at 191.
[357] Robin Cook, 'British Foreign Policy,' Mission Statement, 12 May 1997.

1 March 1945 states that "The structure of World Peace cannot be the work of one man, or one party, or one nation. It must be a peace which rests on the cooperative effort of the whole world."[358] Such norms in fact lie beneath the development of the principles of human rights. Other substantive agreements include: the six core Human Rights International Treaties; the Kyoto Protocol on Climate Change; arms control treaties; the War Crimes tribunal; and, the International Criminal Court (ICC).[359] This would suggest, in favour of those who argue for a universal norm (or norms), the possibilities that may arise from strong efforts to conquer the obstacle of 'difference.' Success may include long term interest. New Zealand Foreign policy states, for example, that long term security lies in a world of ethically-based rules. A commitment to resolve conflicts can indeed be worth striving for.pr[360]

While some argue politics is morally neutral, it seems that the era of globalization is bringing ethics to the forefront of our minds and its influence in foreign policy agendas is increasingly apparent. As we are faced with disparities between worlds as well as extreme situations of human suffering at the hands of others, moral suasion becomes particularly important. We are seriously challenged by a globalized world where many still try to reach state-centric solutions to its problems. The concept of national security is still present in foreign policy, but it may be anticipated that as the world in some ways becomes smaller, the notion of national interest will have to be altered to address the moral concerns or norms of an increasingly interconnected world.[361]

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[358] Chapter 12 2007 *ibid* at 198.
[359] Chapter 12 2007 *ibid* at 199.
[360] Chapter 12 2007 *ibid* at 202.
[361] Conclusion, MacDonald and Patman and Betty Mason-parker 2007 *supra* note 102.

Lepard and Hoffman have studied the role of religion in international law and principles, and claim that the ethical framework for humanitarian intervention can be found in the world's religious traditions, and not only in those of the West.[362] Lepard categorizes the ethical principles from a number of world religions, including Christianity, Bahai faith, Islam, Judaism, Buddhism, Confucianism and Chinese 'folk' religions and illustrates how these principles and the law that exists in the UN Charter and international law have some congruence. He shows how some of the principles of human rights can be found in religious texts such as the Bhagavad Gita, Buddhist scriptures, Confucius, the Qur'an, Baha'i writing, as well as the Declaration of Human Rights and the UN Charter.[363]   This suggests that some of these texts share common principles in terms of ethics and human rights and that these worlds are not necessarily so far apart.

In Lepard's view there are signs, such as an increasing acceptance of ethics in international relations, of interdependence, of the positive role religion can play in influencing international law, and of the promotion of moral education and democratic leadership that suggests that humanitarian intervention is being rethought.[364] States do sometimes behave in ways contrary to human rights principles, commit war crimes and promulgate human atrocities and other states are often unwilling to commit resources to their responsibility to protect civilians in these circumstances. The purpose of the Responsibility to Protect is to eradicate this type of behaviour.

Lepard ultimately expresses the need for ethical principles in the policies of government leaders. The difference (according to Hoffman) in Lepard's approach from the ICISS is that Lepard looks

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[362] Document: – Brian Lepard "Rethinking Human Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions"   (2002) Ethics and International Affairs. New York: Based on Fundamental Ethical Principles in International Law and World Religions, (University Park: The Pennsylvania State University Press, 2002) 528 pp. **[Lepard 2002].**

[363] Lepard 2002 *ibid* at 167.

[364] Welsh 2001 *supra* note 195 at 504.

to ethical and religious principles for answers, whereas the ICISS looks at the possible political

compromises that may be achieved.[365] I would suggest that both as well as its political legality

must be considered in any attempt to endorse the Responsibility to Protect which in itself

involves a moral principle but also requires political cooperation. In the long run, negotiations

take place. Unfortunately, in an examination of the history of the Responsibility to Protect, one

discovers it was just as the Commission's work on the Responsibility to Protect was coming

forward that the terrorist attacks of September 11 took place and attention was drawn away from

the ICISS's efforts to develop a new consensus on humanitarian intervention. In fact, the

Commission itself tried to draw distinctions between two different kinds of military action: one

that may be regarded as an act of self-defence designed to respond to terrorist attacks in one's

own state; while the other is military action in another state for humanitarian protection

purposes.[366]

Hoffman (2006) suggests that the post 9/11 climate left little room for ethical grounding in

humanitarian intervention, and it is evident that much of the focus in contemporary security

policy is on the threat of terrorism. Nevertheless, there are situations and will continue to be

situations where mass murder and war crimes scream out for attention and a legal and moral

principle to counteract such a situation is essential.

II. States' Perspectives

States in fact do frequently include in their foreign policies some form of moral imperative - at

the minimum responsibility to their own citizens. Examples of policy are offered below of how

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[365] Lepard 2002 *supra* note 362; Hofmann, Claudia "Engaging Non-State Armed Groups in Humanitarian Action: 13(3) Sept. 2006 International Peacekeeping, 196-409.
[366] ICISS *supra* note 6 at viii-ix.

moral principles sometimes do enter into foreign policy. The examples also show, unfortunately,

how such policies are sometimes perceived by outsiders. For example, while the US purports to

be a 'good' or moral country, this by no means is accepted whole heartedly by others. David

Macdonald tells us that American policies are often based on their notion of America as a 'good

country' with good values, which leads them to the conclusion that their policies must be good.

States like the United States, however, are capable of creating a heightened positive illusion of

themselves. Joseph Nye cautions that moral values and ideas are good, but they can be used to

mislead. Recent claims of exceptionalism with respect to moral values in the West since 9/11

demonstrate for some the existence of American self-righteousness and a sense of moral

superiority.[367]

Japan provides an example of one of the Asian countries where it has been suggested their values

do not necessarily correspond with those of the West.[368] In 1993, the ASEAN Ministers met in

Singapore and discussed their approaches to human rights standards. The overall feeling was

that they differed from those of the West. According to the ASEAN Ministers, human rights,

environmental protection and humanitarian intervention were of less importance than economic

and security concerns. According to Simon Tay, "Ethical concerns regarding foreign affairs took

second place to realist and state-centred concerns." [369] This type of divergence can be an

important reason for states to be unable to come to a universal agreement in the Security Council

when a Responsibility to Protect motion is put forward for a country where extreme human

[367] David B. MacDonald, in Macdonald, Patman and Mason-Parker. P Chapter One – Exceptionalism, the Holocaust and American Foreign Policy *supra* note 102. See also President Putin's letter concerning President Obama's speech on Syria in *The New York Times*, Sept. 11, p. 1.

[368] Chapter 7, Macdonald, Patman and Mason-Parker 2007 *ibid* Yet the security policy of Japan has appeared in Article 9 of the Japanese constitution since WWII and includes a 'No War' clause which renounces the right of the Japanese people and the Nation to threaten the use of force as a means of settling international disputes.

[369] Chapter 8 "Interdependence, States and Community: Ethical Concerns and Foreign Policy in Asean" Simon S.C. Tay in Macdonald, Patman and Mason-Parker 2007 *supra* note 102 at136.

rights atrocities are taking place. In such cases, the role of the international community must be to speak forcefully in support of human protection obligations and duties already agreed to and for Security Council members to act accordingly (something that is critically needed in the Syrian conflict with close to 200,000 deaths).

On the more encouraging side, Tay tells us that members of the Asia-Pacific region are working to integrate highly diverse cultures into one coherent voice.[370] Nevertheless, both are influenced by their domestic and regional security policies and the ASEAN does have a historical tendency to perceive 'interdependence' as a euphemism for 'interference.'[371] But states are not the only players in this arena. As noted earlier there are other important players – the norm entrepreneurs and nongovernmental actors - that must be recognized and understood and who have become increasingly important in furthering ethical and legal principles such as and including the Responsibility to Protect.

III.   Making Moral Decisions

This bring us again to the question of the ability of international actors, whether they are states or non-states or a cooperative of both, to come to moral decisions at the international or transnational levels. Decisions at those levels are influenced, I would argue, by certain moral and legal issues such as trust, justice, peace, and liberty as well as sovereignty, self-determination and identity. Fear and mistrust among states with relative power and political and cultural differences interfere with attempts by the international community to come to a consensus on the humanitarian principle of protection, seen to some as 'interference.' The key to success of the Responsibility to Protect lies partly in the development of trust between the parties

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[370] Chapter 12, Macdonald, Patman and Mason-Parker 2007 *ibid* at 202.
[371] "Conclusion," Macdonald, Patman and Mason-Parker 2007 *ibid* at 239.

and with powerful states who are prepared to work at it. However, powerful states may have their own factions within that favor one side or the other, making it difficult for them to come to any agreements. Agreements must be acceptable not only to the parties involved but to the society at large.[372] This is where we will see that nongovernmental actors in the transnational environment have become an important driving force for universal principles. We shall also see the need for strengthening the Responsibility to Protect legal status.

Buchanan's work supports my own argument in that it articulates a systematic vision of an international legal system grounded in the commitment to justice for all persons.[373] My thesis asks about the desirability as well as the feasibility of such a system and whether the vision may be more of a utopian one than one of any political substance. It concludes that actors in the international milieu can make decisions on the basis of moral principles and soft law that exists and have been agreed upon rather than solely on the basis of self-interest. It provides an example in the case of Libya in Chapter Nine where in fact they have done so. Furthermore, for the Responsibility to Protect to be effective and to evolve further they must continue to do so. I come back to Buchanan who provides a probing exploration of the moral issues involved in disputes about secession, ethno-national conflict, and the right of self-determination, human rights, and the legitimacy of the international legal system itself and argues that the international legal system should make justice, not simply peace, among states a primary goal. Buchanan ultimately rejects the view that it is permissible for a state to conduct its foreign policies exclusively according to what is in the 'national interest.'

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[372] Senator George J Mitchell. *Peacemaking: The Interaction of Law, Politics and Diplomacy* American Society of International Law Proceedings Heinlein 173.

[373] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: moral foundations for International Law* (Oxford University Press: 2003) **[Buchanan 2003]**.

The next chapter, Chapter Five, offers a look at the Responsibility to Protect from a theoretical perspective, particularly focussing on the place of morality, ethics, universal principles and idealism as opposed to realist notions of the state as acting in its own self-interest. In an environment of humanitarian principles, actions of states taken in their own self-interest as well as fears of neocolonialist and imperial motivations serve to stultify international cooperation geared toward the protection of civilians and frustrate the needed cooperation between nations. Along with realists who see actors as only acting in their self-interest are those who support Third World Approaches to International Law (TWAIL). Their basic mistrust of international law and its colonial underpinnings lead some to reject the Responsibility to Protect altogether. Other theoretical perspectives are discussed from international relations (institutional and liberal theorists), political science, and law perspectives as they reflect on the way in which the principle is approached and understood and serve to either support or undermine the application of the principle.

The negative views bring us back to the global context and historical precedents and how realpolitik has served to allow millions to die in Bosnia, Rwanda and the Congo while the world sat by. This opens the door to consideration of governance and the change in relations between government networks and transnational networks as they have been evolving and the tensions arising between state sovereignty and collaborative nongovernmental systems in 'a new world order.'

Chapter Five: Discussion and Critique of Theoretical Perspectives Underlying the Implementation of the Responsibility to Protect

I.   Introduction

Given the depth of the ethical support for the Responsibility to Protect, and the range of NGOs that have gathered around its banner, what are the theoretical perspectives that influence the way in which we may analyse the Responsibility to Protect situations, and how do these perspectives stand up to critical analysis? Because international law is largely created by the actions of states and their organizations, there is inevitably a strong relationship between international relations and international law. One sees the development of theories based on social policy and international relations/politics, theories of critical legal studies as well as theories developed in response to oppressed aspects of international law. All of these theories raise important voices, while only a few will be discussed here briefly to provide an understanding of the international law landscape. What is important is the extent to which theory becomes crucial not only in dictating the direction of the law but the set of politics that is intrinsic to it. In part this is due to the fact that "the ideology adhered to by a state or group of states influence their approach to international relations in turn or 'state practice,' [and] assists in the development of custom, which itself leads to the creation of international law.'[374]

The theoretical perspectives considered here include actor-oriented approaches such as realism and the logic of consequences and structuralist or institutionalist approaches such as idealism, liberalism, the logic of appropriateness and constructivism. The differences between these

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[374] Gideon Boas, *Public International Law/Contemporary Principles and Perspectives* (Cheltenham, UK: Edward Elgam Publishing Limited, 2012) at 18.

theories are based on two fundamental approaches: an actor-oriented approach, as in the case of realism and the logic of consequences; and, institutional or structural approaches as in the case of idealism, liberalism, constructivism and the logic of appropriateness.   The critique will comment on the arguments of actor-oriented approaches which view the current international system as anarchic with individual states acting as sovereigns in their own self-interest, and structuralists who view the structure to have been built by social practice and social action. [375] Structuralist approaches are therefore not only more helpful in supporting universal principles, including the Responsibility to Protect, they are the most compelling. It is these structuralist approaches that bear the most weight in the analysis of the Responsibility to Protect and its focus on values, morality and ethics in the form of universal principles rather than power politics and the self-interest of states.

To clarify these differences, I have included a diagram in Figure 1 that distinguishes between the two basic schools of thought; i.e. individual actor oriented versus structurally or socially oriented theories. Aspects of both, however, can in fact be seen in the behaviour of those involved in the Responsibility to Protect discussions. As a result, both are described in some detail. Nevertheless, I will show how the structural approaches are more likely to support universal principles at the international level and provide better explanations for how the Responsibility to Protect has emerged and ought to be applied. I do not accept that actor-oriented approaches are the only possible explanations for action at the international level, and this will be demonstrated in Chapter Nine when we see the implementation of the Responsibility to Protect in the case of Libya.

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[375] See Thomas J. Biersteker and Cynthia Weber, eds. *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996) **[Biersteker and Weber 1996].**

Table 1: Relevant Theoretical Approaches

Actor Oriented Approaches	Institutional or Structuralist Approaches
Realism, neorealism	Constructivism, liberalism, idealism
Power politics and state self-interest	Universal principles and moral and ethical value systems
Logic of consequences	Logic of appropriateness

II. Theoretical Perspectives

II.1 Realism

Realists treat states as the principal actors in international politics. These actors interact in the absence of any central government which is expected to keep peace or enforce agreements. Power or power differences are usually identified as the main explanatory factors and realists concentrate on interactions among major powers and on matters of war and peace rather than on related, secondary issues such as human rights. [376] While they do not ignore the place of international cooperation and international law, they assume states will cooperate of their own volition solely when it is in their interest to do so. Quite frequently the interests of more powerful states dictate the way in which cooperation takes place. In fact, from their viewpoint, international rules and institutions have little effect on state behavior.[377] Realism became the dominant framework during the Cold War and realists were skeptical about any idea of world peace. The 'Will for power' dominated the 'Will for good.' The world was seen as an

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[376] Steven R. Ratner, and Anne Marie Slaughter "The Methods of International Law" (2004) Vol. 93:361 The American Journal of International Law at 364.

[377] Anne-Marie Slaughter, edited with Steven Ratner, 2004 *ibid* at 365

anarchical international system driven by self-interested nations.[378]   Realism holds that states

live in an anarchical system without a central governing authority. War, conflict and competition

are natural outcomes to this state. While cooperation is rare and likely to give way to the

exigencies of national interest, self-help and self-interest dominate and so it is necessary to

maintain a balance of power between states.[379]   If all states act according to these interests we

are left with a troubling view of international law. The likelihood of cooperation and positive-

sum actions becomes very low.[380]

Neorealism and neoliberalism deploy a logic of consequences, with states conceptualized as

rational, autonomous actors. E.H. Carr and the realists reject values, morality and ethics in favor

of facts, power and politics. (In Canada, the following politicians may be considered as realists:

Brian Mulroney, Mike Harris, Ralph Klein, Steven Harper; and in Britain, Margaret Thatcher).

According to MacDonald, Parker and Patman, "The UN at its core was based far more on great

power politics than on universal principles."[381] This position is supported by Krasner who favors

actor-oriented theories, and realism based on power and interest governing the interactions

among states as opposed to institutional, structuralist or constructivist approaches.

How far should we go with this realist perspective? There is no doubt states do act in their self-

interest – but does this dominate all actions at the international level? Realists are skeptical of

humanitarian action, seeing the self-interest and imperialism of the Western World in the

Responsibility to Protect norm. If we take this position to its logical conclusion, the international

community will never act in the face of humanitarian crises unless the action concurs strictly

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[378] Introduction to Macdonald, Patman and Mason-Parker 2007 *supra* note 102 at 6.

[379] K. Waltz, Theory of International Politics (Reading, Ma. 1979) Chapter 8, Macdonald, Patman and Mason-Parker 2007 *ibid* at 143.

[380] Anne Marie Slaughter, *International Law in a World of Liberal States* (1995) 6 European Journal of International Law, at 503.

[381] Introduction to MacDonald, Patman and Mason-Parker 2007 *supra* note 102 at 5.

with the self-interest of independent states. Krasner, unlike myself, is not persuaded by

constructivist arguments and does not agree that there is a set of norms and values that is shared

by all participants in the international sphere.[382] However, Krasner does recognize that with the

EU, for example, member states have used their international legal sovereignty, which gives

them the right to voluntarily enter into any agreement they choose, to forego their domestic

autonomy and create supranational institutions such as the European Court of Justice and the

European Central Bank. As a result, member states can be bound by a decision such as the

Responsibility to Protect with which they do not agree. In doing so, the state has permitted itself

to be subjected to an external authority where certain norms and rules, such as those of the UN,

will predominate without the power of enforcement. I suggest it is these rules - based on

altruistic principles beyond the self-interest of states - that have allowed states to develop laws in

the protection of human rights at home and abroad.

Nevertheless, in spite of the creation of these institutions, Krasner argues disagreements about

norms are determined by the power and interest of actors, rather than through discourse. In

addition, in the international system actors differ on their understanding of appropriate norms

and there is no authoritative structure to resolve these differences. This permits power and

material interests to become the most important determinants of action. Norms in the

international system are weaker than domestic ones and therefore domestic norms and interests

dominate. One exception might occur in post conflict situations where states are often highly

dependent on international assistance.[383] While the thesis shows how the self-interest of states

can act as an impediment to the implementation of the Responsibility to Protect, there is no

evidence that this must be the case in the face of atrocities. I am much more in favor of

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[382] Krasner 2009 *supra* note 96.
[383] Krasner 2009 *ibid* at 12.

arguments such as those posed by liberals and constructivists who reject realism and states as solely acting in their own self-interest with an over reliance on power dynamics.

II.2   Liberalism

Liberal theorists hope to transcend anarchy and conflict in the international arena, arguing that "human nature is manageable and that order, justice and freedom can be achieved through the creation of the right economic conditions and institutional mechanisms."[384] They hold a post-Cold War belief in the ability of democracy to prevail. Along with other interdependencies, "Liberal institutionalism" suggests institutions, regimes and norms of conduct and regulation create stability. Therefore, the liberal tradition fosters the creation of ethical norms and regulation.

"Transnational liberals" highlight the activities of private individuals and groups across national boundaries and presume interest groups independently help to develop international rules and institutions. Transnational liberals therefore disagree that law creation is limited to states.[385] Transnational liberals would therefore see the non-state actors or advocacy groups involved with the Responsibility to Protect as instrumental in developing new norms and new laws, either independently or in correspondence with states. In my view, Transnational liberalism provides a persuasive explanation of the way in which a norm such as the Responsibility to Protect is created, grows and is given recognition by social actors.

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[384] R. Latham, "The Liberal Moment; Modernity, Security and the Making of Post War International Order" (New York, 1997 p. 34]. Chapter 8, in Macdonald, Patman and Mason-Parker 2007 *supra* note 102 at 143.
[385] Ratner and Slaughter 2004 *supra* note 376 at 367.

II.3   Constructivism and International Society

Key tenets of constructivism can be found in the work of mainstream international political science theorists in the 1950s.[386] "Constructivist" theorists also reject rationalist explanations that claim that states or other actors have independent interests and use strategies to achieve their goals, but rather consider that these actors operate within a social context of shared understandings and norms. These norms become the source of their identities and roles and define appropriate forms of conduct. The meaning of actions are contingent on the context. [387] For example, Dirk Nabers takes a constructivist perspective, focusing on norms, morality and expectations of foreign policy.[388]   He considers as an example Germany and Japan who pride themselves in being moral actors, renouncing the use of force and promoting multilateralism and equality.[389]

Constructivists, such as Hedley Bull and Alexander Wendt see sovereignty as constitutive of the system as a whole. Constructivists have in fact allowed that some norms have been contested and in some case differences have been resolved through normative discourse, even without the aid of an authoritative arbiter. Actors must make choices even though it is within the boundaries of their normative viewpoints.

II.4   Idealists

Critical from my point of view to the debate and to the success of the Responsibility to Protect are the idealists. Woodrow Wilson and the idealists believed that internationalism rooted in

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[386] Jutta Brunee and Stephen J. Toope *International Law and Constructivism: Elements of International Theory of International Law* (2000-01) 19 Columbia Journal of International Law.
[387] Ratner and Slaughter 2004 *supra note* 376 at 367.
[388] Dirk Nabers, in Macdonald, Patman and Mason-Parker 2007 *supra* note 102 at 117.
[389] Dirk Nabers, "Conclusion: Some Reflection on Ethics and Foreign Policy" In Macdonald, Patman and Mason-Parker 2007 *ibid*.

moral values and legal norms "was the key to a more peaceful world order."[390] Idealist theory

supports a belief in a global community or international society. The world is not anarchical and

states are constrained by expectations of good behaviour. (Hugo Grotius, Leslie H. Gelb,

Michael Walzer).

II.5   The Logic of Appropriateness and the Logic of Consequences

These theoretical perspectives (the logic of consequences versus the logic of appropriateness)

exemplify the actor-oriented approach versus the structuralist approach. The logic of

appropriateness supports the notion that 'good' humanitarian principles can prevail and argues in

favour of morality and norm conformity and the nature of normative agreements based on moral

values.   Norms are rooted in a specific culture ("the sum of beliefs, norms, and identities of a

group of social actors in a particular place and time").[391] This is very much part of the challenge

which determines what is valued as 'good' and what is considered 'bad'. Culture serves as the

background for shared interpretations.[392]

Beliefs and attitudes about one's own nation, and about other nations, and about the relationship

between the self and other actors in the international arena "influence important decisions on the

international agenda." [393] Here we find culture, identity, norms and moral beliefs inextricably

linked to one another. Culture helps to form both the individual and collective identity that is

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[390] Introduction to MacDonald, Patman and Mason-Parker 2007 *supra* note 102 at 4.
[391] A.Wendt, "Social Theory of International Politics, op cit. 140-2 in Chapter 7, Dirk Nabers in Macdonald, Patman and Mason-Parker 2007 *ibid.*

[393] Yaakov Y.I.,Vertzberger, "The World in their Minds: Information Processing, Cognition Perception in Foreign Policy Decision Making (Stanford, 1990), p. 268] in Chapter 7 "How to be Good: Morality in Japan's and Germany's Foreign Policy, Dirk Nabers in Macdonald, Patman and Mason-Parker 2007 *ibid* at 119.

imbedded in the individual as a morally conscious human being.[394] Culture influences an individual's thoughts or behaviour as well as that of a nation.

According to Nils Brunsson (1989) and the 'logics of appropriateness,' the rules and norms associated with a specific institution may be inconsistent with the 'logics of consequences', which recognizes what actors must do to maximize what they understand to be their utility. When sovereignty rules are violated, these violations are always justified by an appeal to other principles and norms, "such as the right to protect or the need to further freedom."[395] The logics of consequences perceives political action as rational, calculating behavior designed to maximize preferences, (Classical game theory and neoclassical economies are well known examples) whereas the logic of appropriateness understands political action as a product of rules, roles and identities that stipulate appropriate behavior in a given situation, much as constructionists do.

March and Olsen claim that when there is a contradiction a logic of consequences will prevail.[396] Neorealists and neoliberalists deploy a logic of consequences, conceptualized as rational, autonomous actors. A logic of appropriateness, on the other hand, understates the importance of power and gives more emphasis to international roles and rules as opposed to domestic ones. While it is understood, in my view, that constructivism, like the logic of appropriateness, does not wholly explain how different states have responded in the international system as a whole, it goes a long way toward explaining the development of human rights norms and the influence that common norms may have on state behaviour. It also helps to explain why NGOs may be

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[394] Dirk Nabers in Macdonald, Patman and Mason-Parker 2007 *supra* note 102 at 101
[395] Stephen D.Krasner, *Power, the State, and Sovereignty* (Routledge, New York, NY, 2009) at 17.
[396] March and Olsen 1998 *supra* note 26.

freer to act according to a social conscience.[397] It discounts Krasner's view that actor-oriented arguments, realism and liberal institutionalism provide the most powerful insights.

March and Olsen describe the two logics of action: the logics of expected consequences and the logics of appropriateness.[398] According to those upholding the logics of consequences, there is no authority structure in the international system to adjudicate controversy. In most cases domestic interests will be more compelling than international ones and power asymmetries in the international system create an imbalance and raise fears for developing countries regarding imperialism or colonialism.[399] The logics of appropriateness determines action as a product of rules, roles and identities. The identity of the individual represents the state. The question is not: "How can I maximize my self-interest?" but rather, given my role, "How should I act in this particular circumstance?"[400]

According to those supporting the logic of appropriateness, on the other hand, because norms in the international system are less constraining than in the domestic setting, the need to adhere to the logics of appropriateness and competing rules becomes even stronger since rulers are easily encouraged to break the rules in their own interest. Confounding elements to the logic of appropriateness do exist, however, in the form of: 1) power imbalance 2) fear of colonialism 3) domestic interests; and 4) self-determination. Such self-interested decisions can impede moral action so that institutional norms such as the Responsibility to Protect must be developed and strengthened to overcome them.

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[397] P.J.Katzenstein, 1985 *Small States in World Markets*, Ithaca, N.Y. (Cornell University Press , 1985 2005) **[Katzenstein, P.J. 1985].**
[398] Krasner 2009 *supra* note 96.
[399] Krasner 2009 *ibid* at 181.
[400] March and Olsen 1989 *supra* note 26.

An actor-oriented approach, as in the logic of consequences, must make some assumptions about the underlying preferences of actors. "Rulers want to stay in power and, being in power, they want to promote the security, prosperity, and values of their constituents. The ways in which they accomplish these objectives will vary from one state to another."[401]

These arguments help to explain why the basic rule of international sovereignty is so important. Sovereignty can be used to support human rights arguments but it can also be used to block action in the UN and by doing so can provide a rationale which ignores human atrocities. However, we do know that agreements have been reached in the international humanitarian arena and that Westphalian sovereignty can and has been violated through both intervention and invitation. Even in the absence of international hard law, the more powerful states, or groups of states, have found it necessary or desirable to intervene, coercing weaker states to accept external authority. Sometimes it is done at their own invitation, for example, by signing human rights accords or entering into international agreements. In the case of intervention without invitation the norm of autonomy, the core of Westphalian sovereignty, has been overridden on the basis of a concern for international peace and security and the logic of appropriateness. In these cases, justifications in the form of alternative principles or rules have been offered, leading to a determination of legitimacy if not legality.

But the problem remains that in the international system the logic of consequences and the logic of appropriateness often come into conflict with each other (Krasner calls this organized hypocrisy) and there is no clear authoritative structure to resolve this or to enforce principles. It is true that the logic of appropriateness can be overpowered by rulers from different constituencies holding different values and material interests. Both international legal and

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[401] Krasner 2009 *supra* note 96 at 182.

Westphalian sovereignty are best conceptualized as examples of organized hypocrisy. According to Krasner both have clear logics of appropriateness, but these logics are sometimes inconsistent with a logic of consequences. Given the absence of authoritative institutions and power asymmetries, rulers can follow a logic of consequences and reject a logic of appropriateness. Principles, though enduring, are still violated.[402] He regards coercion and imposition as examples of violations of Westphalian sovereignty through intervention rather than invitation.

Ideally, one could have a situation where doing the 'right' or 'ethical' thing is consistent with an actor's self-interest. According to Krasner, however, this is unlikely to happen in the international system. Organized hypocrisy, when saying one thing but doing another, and while acting in ways consistent with a logic of consequences, prevails.   The lack of an authority structure to resolve the conflict among competing norms, (the admonition against intervening in the internal affairs of other states, on the one hand, and sovereign rule and the promotion of human rights, a principle endorsed in many international conventions on the other), have no authority mechanism for resolution.[403]

What we can see in relationship to the Responsibility to Protect is the need to strive for ways in which realist concepts of the national interest – power, security, independence – can be overcome by broader ideals in an extension of universal liberal norms. Here I would refer to Andrew Linklater who argues "governments should put the welfare of international society ahead of the relentless pursuit of [their] own national interests." [404]   On the other side, Barr Cooper suggests that national interest lies in state survival and security and to think otherwise is

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[402] Krasner 2009 *ibid* at 209.
[403] Krasner 2009 *ibid*.
[404] Andrew Linklater, 'What is a good international citizen' in Paul Keale (ed.) *Ethics and Foreign Policy* (Sydney, 1992; p. 28-29] Chapter Five Macdonald, Patman and Mason-Parker 2007 *supra* note 102 at 85.

utopianism. Politics are conducted in an amoral world and the state is founded in violence.[405]

For consequentialists, sovereign states are unlikely to agree on general principles and hence are unlikely to agree when interventions to change societies would be justified.[406] This bleak picture of international politics in my view discounts much of the developments toward peace and security that have become part of our international climate since the end of the Cold War and the Responsibility to Prevent provides a modern example of efforts to deal with illegal actors.

II.6   The TWAIL Critique

After the 2nd World War, human rights and later the ICC were seen to be major advances in humanitarian law. International institutions and civil society have been working together to prosecute offenders who contravene international humanitarian law.[407] These advances demonstrate the superiority of the structural arguments.   In spite of this advance, critiques emerged in the 1980s who questioned the legitimacy of international law and pointed out the need for cross-cultural dialogue as well as common principles. Such critics from the Global South frequently point out binaries such as Civilised/Barbarian, Believer/Infidel, White/Black or Advanced/Primitive that under pinned international law during and after colonisation. According to this view, these binaries are still in operation under the contemporary labels Developed/Developing, Centre/Periphery, Advanced/Emerging or Rich/Poor. These dualities were intended to reveal the larger Eurocentric ethos of international law.

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[405] Haig, MacDonald and Patman, Conclusion in Macdonald, Patman and Mason-Parker 2007 *supra note 322* at 236
[406] Bull's argument in *Intervention in World Politics*, Oxford: Clarendon Press, 1984 in Welsh 2001 *supra* note 195 at 510.
[407] Andreas L. Paulus, "International Law After Postmodernism: Towards Renewal or Decline of International Law?" (2001) 14 Leiden Journal of International Law 727-735 **[Paulus 2001].**

TWAIL scholars represent a variety of perspectives and theoretical strands. Some were more

moderate than others and did not deny the relevance of international law as it had developed.[408]

Others, like David Kennedy and Martti Koskenniemi, emphasized the internal inconsistency of

mainstream international law, and the "ideological and political bias of supposedly 'Neutral'

legal rules."[409] Feminist and international race theory also criticized the gendered and racist bias

of what is considered as the 'objective' legal categories and instead advocate for an approach

which includes social and gendered conditions.[410]

The acronym TWAIL (Third World Approaches to International Law) first came from the New

Approaches to International Law (NAIL) movement in the mid-1990s in the United States.

TWAIL was then developed by some of the NAIL scholars who wanted to support Third World

interests[411] and marginalized states or people who "lag behind in terms of economic growth and

prosperity as well as political power and influence."[412] In particular, TWAIL scholars emphasize

the Eurocentric origins of mainstream rules and institutions which they claim marginalize non-

European experiences and practice. This in some ways supports realist theory which argues that

states act only with respect to their own interests.

TWAIL, therefore, focuses on the boundaries between the colonized and colonizer countries and

between the Third World and the West and works to eliminate these boundaries. During the

initial stages, TWAIL scholars wanted to make a contribution to international law and global

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[408] Paulus 2001 *ibid* at 730.
[409] Paulus 2001 *ibid* at 731.
[410] Paulus 2001 *ibid* at 732.
[411] The Third World represents the "less-developed, developing, underdeveloped or the global south" Usha
Natarajan, "TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring"
(2012)14 Or. Rev. Int'l 177 at 179 **[Natarajan 2012]**.
[412] Natarajan 2012 *ibid* at179.

order[413] and therefore participated in the law-making process by emphasizing the state's right to self-determination, and by eliminating apartheid and racism in modern international law.[414] Efforts of the Third World states to make some changes through resolutions in the UN General Assembly to address the UN Charter, however, were not very successful[415] which led some to conclude that reform within the existing international law framework was impossible. They came to the view that the system itself "is complicit in the subjugation of formerly colonized peoples."[416] The principles of non-intervention and sovereignty were considered to bear greater prospects for empowering Third World states. Proponents believe the struggle for sovereignty over natural resources is responsible for the problems including oil which seriously affects military intervention, military and financial aid, foreign direct investment, sanctions, embargoes, and other such foreign policy issues. [417]

Thus, TWAIL represents "an attempt to understand the history, structure and process of international law from the perspective of third world states." [418] A critical third world approach goes further and "gives meaning to international law in the context of the lived experiences of the ordinary peoples of the third world in order to transform it into an international law of emancipation."[419] What brings these disparate views together is the "alienation of international law from the peoples of the third world."[420]

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[413] Usha Natarajan, 2012 *ibid* at 182.
[414] Upendra Baxi, "What May the "Third World" Expect from International Law"? (2012) 27 Third World Q. 713, 717 (2006) **[Baxi 2006].**
[415] Natarajan 2012 *supra* note 411 at 185.
[416] Natarajan 2012 *ibid* at 185.
[417] Natarajan 2012 *ibid* at 196.
[418] B.S.Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach" (2007) 8 Melbourne Journal of International Law **[Chimni 2007].**
[419] Chimni, 2007. *ibid* at 500.
[420] Chimni, 2007 *ibid* at 500.

TWAIL looks at the past to help formulate the future. The historical critique of international law and humanitarian laws, a recent instance being the criticisms of the attack on Iraq, sees the Western world as representative of a *divisive universalism*.[421] Anghie in "Sovereignty, Imperialism and the Making of International Law" considers colonialism to be at the base of international law along with the 'civilized/barbarian separation'[422] and suggests unless these constraints are understood the problem with international law cannot be fully addressed. In the TWAIL approach the colonial origins bring about the alienation of third world peoples from the present world order. Slaughter admits that even international human rights law is constrained by the global economy which may allow an imperialist global law to prevail.[423]

TWAIL advocates suggest international lawyers need to learn "the grammar of global justice."[424] It is time that the abstractions of international law are rooted in the empirical world of ordinary life and its travails.[425] The lawyers in the TWAIL stream are encouraged to take on the role of a conscious social actors and to seek acceptable solutions for third world social problems.[426] TWAIL scholars also theoreticize that the problem with contemporary international law is that it does not address the everyday divisions of wealth and poverty. In this way the lawyer would be changed from a rule maker to a policy maker to facilitate interstate/intercultural dialogue. "The role of the critical lawyer is to make the oppressive character of international law the weapon of the oppressed instead of that of the oppressor."[427] Third World Theory "is a framework within which legal scholars argue for the need for international law to reflect a consensus amongst the

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[421] Chimni, 2007 *ibid* at 502.
[422] Chimni, 2007 *ibid* at 502.
[423] Anne Marie Slaughter, and William Burke-White, "The future of international law is Domestic (or, the European Way of Law)" (2006) 47 *Harvard Journal of International Law* 327-350 **[Slaughter and Burke-White 2006].**
[424] Chimni 2007 *supra* note 418 at 512.
[425] Zygmunt Bauman, "Liquid Life" (2005) 9 in Chimni 2007 *ibid* at 515.
[426] Paulus 2001 *supra* note 407 at 735.
[427] Paulus 2001 *ibid* at 743.

international community, including newly emerged states."[428] While the Outcome Document

may not address all of the TWAIL concerns, the original ICISS report was in fact broader in its

intention to deal with such social justice issues. This view was ultimately narrowed and

deepened by the 2005 agreement.

Overall, the TWAIL historical work contributes to our understanding of the "culture" of

international law and enhances our appreciation of the relationship between law and culture, law

and history and law and society as well as drawing our attention to Third World voices.[429] I

would argue, however, that the analysis of culture and history does not necessarily provide by

itself resolutions to contemporary problems which requires not only an understanding of non-

western culture but aspirations in the third world to gain human rights and human dignity in

what is often an oppressive and murderous government.[430] I suggest international law can still

be a positive force in an international order that is attempting to deal with terrorism, religious

intolerance, social injustice, numerous violations of human rights and humanitarian law, and

poverty.[431]

The rules and principles that have been developed, if they are acted upon for the values they

were meant to exhibit makes every sovereign state subject to the same rules it consented to. The

Third World countries must demand from powerful states equal respect for their sovereignty, but

also need to continue to ensure they aspire to standards of human rights that have been accepted

and are worth being accountable to.[432] We do not necessarily need to reach a 'deep' universality

on cultural, religious or ideological factors, but we do need a political consensus on some

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[428] Boas *supra* note 135 at 26.
[429] Paulus 2001 *supra note 407* at 738.
[430] Paulus 2001 *ibid* at 739.
[431] Paulus 2001 *ibid* at 747.
[432] Paulus 2001 *ibid* at 751.

minimum substantive rules that encourage respect for the 'other,' across cultures, religions, and genders."[433] In effect, let us recognize diversity but let it not result in the end of international law. Minimum rules can be a source of inter-cultural debate. The major objective is not to 'throw out the baby with the bathwater' but to continuously strive for a cross cultural understanding of atrocity in the area of human rights.[434] Norms provide reasons for action and the norm of the Responsibility to Protect, if used as it is intended, holds the possibility of saving millions of lives and protecting the rights of oppressed and threatened members of society exposed to human atrocities.

The intention of the thesis is to give consideration to how the international structure needs to function in the future and to the kinds of governance and humanitarian values that are necessary to support the Responsibility to Protect.   One way however to achieve agreement to act is with a preponderance of states in agreement in the international community. States that agree on the violation of Article 2(4) of the UN Charter for humanitarian intervention do so when the violations of human rights are of an order that the principles of sovereignty and non intervention need be trumped. Support for interventions may include the following: (1) the anti-interventionist regime is out of sync with modern notions of justice (2) without air strikes there would have been a large refugee movement that threatened the peace and security of other regions (3) all peaceful means had been tried (4) better to uphold basic principles selectively than not at all (5) the policy was norm driven (according to international humanitarian law) rather than interest driven.[435] The decision, however, must include active consultation with key Third World States, must be transparent and the international community must be involved and

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[433] Paulus 2001 *ibid* at 753.
[434] Paulus 2001 *ibid* at 754.
[435] B.S. Chimni, "Sovereignty, Rights, and Armed Intervention: A Dialectical Perspective," Chapter 10.   In Hilary Charlesworth, and Jean-Marc Coicaud, *(Eds) Fault Lines of International legitimacy* (Cambridge University Press: New York, 2010) p. 318.

decisions must be made on a case by case basis. In Chapter 10, B.S. Chimni suggests the promotion of human right matters less in terms of a critique of the doctrine of sovereignty but on the "elimination of neo-imperial economic policies and practices."[436] He says the conflict between sovereignty and the commitment of the international community to prevent gross human rights abuses can be resolved by adhering to a legitimate non-unilateral intervention within the UN.[437]

The next chapter focuses on how the responsibility to protect has evolved in the global governance context, with a particular focus on the role of Non-governmental organizations. The chapter introduces Nongovernmental Organizations that have taken hold of the Responsibility to Protect principle along with the rights of the individual and that call on governments of the world to adopt the moral choice and protect civilians in violent conflict. These organizations tend to be freer to adopt the moral high ground which has enabled them to advocate for the Responsibility to Protect with less reservation. The cooperation of NGOs and international organizations and states suggest the consideration in greater depth of transnational or supranational forms of governance and of what form of governance is best suited (either from a practical or idealist vision) to address some of these issues.

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[436] Chimni in Charlesworth 2010 ibid at p. 11
[437] Charlesworth 2010 ibid p. 12

Chapter Six: Sovereignty, NGOs, Globalization and Governance

I.   Introduction

Up until the 1990's the possibility that any action could be taken against sovereign states through intervention in order to address massive bloodshed (call it genocide or ethnic cleansing) was nearly inconceivable.[438] When the 'Cold War' ended in 1991, military confrontations between states became less of a threat. The U.S. emerged as the main superpower and open financial transactions flowed along with worldwide communication under the umbrella of globalization. Keohane and Nye define globalization as a "state of the world involving networks of interdependence at multicultural distances."[439] Falk describes 'globalization' as transnational social forces concerned with environmental protection, human rights and peace and human security from below."[440]

One type of globalization is social/cultural and others are economic, military and environmental.[441] Increased community interdependencies, new threats and weakened states as a result of globalization prompted consideration of the need for ethical action. One of the main ways in which ethical concerns have been brought to the fore is through humanitarian intervention and human rights. The UN concern for human rights increased, and steps were taken to protect the rights of people through humanitarian intervention in Iraq, Somalia, Haiti, Bosnia and Kosovo (although not all interventions were legal). This increased attention to

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[438] Macdonald, Patman and Mason-Parker 2007 *supra* note 102.

[439] Robert Keohane, and Joseph Nye, 'Globalization: What's New? What's Not? (And so What)" (2000) Foreign Policy, 118 p. 105 –Macdonald, Patman and Mason-Parker 2007 at 9 *supra* note 102 **[Keohane and Nye 2000].**

[440] Julie Mertus, "Considering Non State Actors in the New Millenium: Towards Expanded Participation in Norms Generation and Norm Application" (New York University Journal of International Law and Politics, Vol. 32 No. 2. Winter 2000) p. 547.

[441] Robert Keohane, and Joseph Nye, (2000) *supra note 439* at 9.

human rights illustrates how the world can in fact respond to moral and ethical issues. Along with this was the promotion of democracy.

In 1994 the Clinton Administration in its Presidential Decision Directive (PDD) 25 had stated it would only participate in peacekeeping operations if they were in the national interest.[442] This adherence to realpolitik of the West permitted millions to die in Bosnia, Rwanda and the Congo while the world sat by. Later, however, Clinton realized the new wars could cause international security problems and could indeed affect their domestic interests which helped to bring idealism and realpolitik together.[443]

The approval of the Responsibility to Protect in 2005 to address human atrocities and the tensions regarding the self-interest of autonomous states was aided by changing governance structures. The current system of governance in which the Responsibility is important to its continued evolution.

II.   Governance

For such a challenge as the acceptance or implementation of the Responsibility to Protect, where there is a great deal of disagreement, there needs to be some form of governance that can ensure the fairest distribution of the burdens imposed, as well as a means for making a collective decision that all persons and states who are members will regard as binding upon them. This means that such an institution will have legitimacy – the right to rule over this issue, with morally binding force on the decision for even those who disagree and must sacrifice. And this, of course, is the crux of the problem. While we have those who facilitate achievement of this

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[442] George Ward, "Peacekeeping: An Essential tool" (1994) XIX/3 New Zealand International Review, 23-25 **[Ward 1994].**
[443] Macdonald, Patman and Mason-Parker 2007 *supra* note 102.

goal, there are those who definitely detract from and impede its success. The successful

implementation of the Responsibility to Protect norm will require the legitimacy of the UN to be

strengthened and defended against actions that lead to skepticism and mistrust.

Kahler defines governance simply as 'a set of authority relationships' but argues that the scope

of governance has expanded from being concentrated in national governments to the increasing

influence of organizations such as the International Monetary Fund (IMF), the World Bank and

GATT (General Agreement on Tariffs and Trade).[444] Rhodes suggests governance pertains to a

new process or method for governing.[445] Policy is not determined by central government and is

not imposed from above, and no one actor has all the information or the complete overview –

rather, there is an interdependency. Governance is more encompassing than government because

not only governmental organizations are involved but so are informal, Nongovernmental

Organizations.[446] According to my definition, governance is about networks which are self-

organizing, autonomous and not accountable to the state but in some ways interdependent.

Governance is ultimately a system of social and political authority relationships in the exercise of

power and policy. The new governance is presumably working to dissolve the distinction

between state and civil society and is empowering citizens.

Slaughter, for example, has a vision, in fact a grand vision, of 'a New World Order which can

provide for broader, more cohesive decision making.'[447] The building blocks for this new world

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[444] Miles Kahler, 'Global Governance Redefined' The Conference on Globalization, the State, and the Society
Washington University School of Law, St. Louis, 13-14 November 2003 (Revised October 2004) **[Kahler 2004].**
[445] R.A.W. Rhodes, *The New Governance: Governing without Government* (1996), XLIV, Political Studies 652-
667. **[Rhodes 1996].**
[446] Rhodes (1996) *ibid* at 651.
[447] Steven R. Ratner, and Anne Marie Slaughter "The Methods of International Law"(2004) Vol. 93:361 *The
American Journal of International Law.*

order would not be states but parts of states: e.g. courts, regulatory agencies, ministries, and legislatures. The new world would still include traditional international organizations such as the UN and WTO, and states would continue to interact as unitary states on important issues such as security. Slaughter then speculates, with a kind of 'governance idealism' that seems to include no enforcement mechanism, that the new world order of government networks would be more effective and more just. The primary political authority would remain with states, except where they delegate their authority to supranational institutions. National government officials would be operating at both the domestic and the international level to implement their international obligations while representing the interests of their country. They would ideally work with their foreign and supranational counterparts to disseminate and distill information, cooperate in enforcing national and international laws, harmonize national laws and regulations, and address common problems. Cooperation is obviously essential, and the mechanisms for obtaining adherence or for enforcement unclear.

Slaughter refers to the globalization paradox identified by Robert Keohane - that while international institutions are regarded as outdated and inadequate, world government is not desirable. The EU, she suggests presents an alternative 'transnational option' – rather than a 'World Government.' To many, of course, world government is a frightening concept. Global governance is championed as a much looser and less threatening conception of collective organization and regulation, without coercion. A major element of global governance, in turn, has been the rise of global policy networks.

Slaughter also introduces the concept of the 'disaggregated state' which she explains differs from the unitary state which performs unitary actions by independent nations. In an international legal system premised on unitary states, cooperation is negotiated over many years and eventually

signed and ratified through the establishment of an international secretariat. The states

participating in these negotiations are presumed to speak with one voice. Slaughter writes that

"Looking at the international system through the lens of unitary states leads us to focus on

traditional international organizations and institutions created by and composed of formal state

delegations." [448] A disaggregated world order would have numerous government networks.

They would be bilateral, plurilateral, regional or global. Taken together, they would provide the

basis for global governance. Regulation would occur by networks at the global level represented

by citizens rather than the state. And it is among these networks that NGOs gain their voice.

Those with links between counterpart national officials across borders are labeled as 'horizontal

government networks.' 'Vertical government networks' are those between national government

officials and their supranational counterparts where the rare decision has been made by states to

delegate their sovereignty to an institution above them with real power – a court or a regulatory

commission. More traditional international organizations would also exist alongside government

networks. Slaughter confines the use of the term network to government units and defines

networks as a "pattern of regular and purposive relations among like government units working

across the borders that divide countries from one another and that demarcate the 'domestic' from

the 'international' sphere."[449] She does not really take into account the wide range of NGOs,

civic and corporate entities, which to my mind, are essential to any transnational governance

arrangement and in particular instrumental in supporting the principle. As such, I would include

them in any notion of global governance.

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[448] Slaughter and Ratner 2004 *ibid* at 13.
[449] Slaughter 2004 *ibid* at 14.

Slaughter's new world order has a utopian vision – it would present "a system of global governance based on cooperation that would sufficiently contain conflict that the world might achieve greater peace and prosperity, and reach minimum standards of human dignity."[450] While the goals are laudable, the mechanisms for governance might not be sufficient. Another alternative is to give more consideration to the structure and function of the UN and international organizations which will be discussed later in the thesis. In addition, states will continue to evolve mechanisms for reaggregation and continue to act with each other as unitary actors.

But what is the power behind international networks, and what sort of enforcement mechanism might that be for their involvement in decision-making? How does Slaughter imagine these various networks can actually influence political, economic, and social outcomes to achieve substantive results? It is commonly understood that much of the work of horizontal government networks, for example, depends on soft power – the power of information, socialization, persuasion and discussion. She suggests that government networks, both as they exist now and as they could exist, nevertheless have access to traditional hard or coercive power, since the power to implement already exists at the national level. But some fear that that the informality and flexibility of networks is a way to avoid the formal constraints of representation, rules and negotiating procedures of traditional international organizations. A major question occurs about how accountability, legitimacy, and/or democracy is achieved. Who would be the watchdog? There is a perceptual concern that powerful nations may overpower weaker ones, which already happens. Slaughter proposes, particularly in response to these concerns, that government officials be held accountable for their activities, not only to specific national constitutions but to a hypothetical global polity.

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[450] Slaughter 2004 *ibid* at 15.

This brings us back to the importance of the logic of appropriateness and constructionist arguments. Five basic principles are proposed by Slaughter to ensure an inclusive, tolerant, respectful and decentralized world order. I agree that these principles are indeed important and need to be honoured in any transnational system that includes international organizations and civil society:

1) Global deliberative equality is to be achieved by the principle of inclusion and the maximization of the possibilities of participation, both by individual and groups at the level of national and transnational society and by nations of all kinds at the level of the state;

2) Ministers, heads of state, courts, legislators and bureaucrats from distinct cultural traditions, and demographic and geographic entities must recognize the validity of each other's approach - the notion of legitimate difference and the principle of pluralism;

3) Positive comity and the principle of affirmative cooperation;

4) Through the implementation of checks and balances whereby the distribution of power is always fluid on both horizontal and vertical axes; and

5) Subsidiarity and the principles of locating governance at the lowest possible level, whether local, regional national or supranational.[451]

Such values would represent a 'Just World Order.' The state is not disappearing, it is disaggregating. Regulators, judges and legislators are finding their domestic jobs have a growing international dimension where they encounter their foreign counterparts.

In summary, part of Slaughter's blueprint for the future addresses sovereignty, which she suggests could be disaggregated and attached to specific institutions such as courts, regulatory

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[451] Ratner and Slaughter 2004 *supra* note 447447 at 56.

agencies and legislators. The core characteristic of sovereignty would shift from autonomy from outside interference to the capacity to participate in transgovernmental networks of all types. This would strengthen the government institutions and in return they could help rebuild states ravaged by conflict, weakened by poverty, disease and privatization or stalled in transition from dictatorship to democracy. This theoretical position may be seen as a 'solution' or 'response' in many ways to Krasner's organized hypocrisy where agreement means that sovereign, diverse and independent entities are bound to remain beyond reach.

While the intent of my thesis is not to imagine or conceptualize a new world order, it is concerned with analyzing the current system of governance in which the Responsibility to Protect exists and is operationalized and to draw out the strengths and weaknesses of the system in relation to its evolution. Edgar Grande's and Louis W. Pauly's work entitled *Complex Sovereignty: Reconstituting Political Authority in the Twenty first Century* tackles two central issues of the thesis (those of sovereignty and international and transnational governance).[452] In Chapter I *Reconstituting Political Authority: Sovereignty, Effectiveness, and Legitimacy in a Transnational Order* three basic concepts are introduced: political authority, statehood, and sovereignty.   The main thrust of the book is directed toward the tension between the reassertion of political authority by sovereign states and the emergence of dilemmas that cannot be resolved by radically decentralized decision-making structures.

The weakness in Slaughter's model is that it involves a concept of disaggregation which in my opinion goes too far away from the central unity of the UN (at least in theory if not always in practice). What are the consequences of this type of tension for Grande and Pauly?   For Grande

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[452] Edgar Grande and Louis W. Pauly *Complex Sovereignty: Reconstituting Political Authority in the Twenty first Century* University of Toronto Press (Toronto: Buffalo, 2007) **[Grande and Pauly 2007].**

and Pauly, this tension leads to a consideration of new forms of governance, and to the key question of whether there are any new instruments for coordinating political activities that may cross traditional territories and functional borders. They emphasize, nevertheless, that states seem to be more important than ever for the production of public goods such as security and welfare and are therefore not a thing of the past. They use as an example the attack by Bin Laden on the World Trade Center and the ensuing war against the Taliban and the invasion of Iraq as evidence that the security state has re-emerged. In doing so, they conclude that sovereignty still exists as a relevant attribute of states. It certainly has raised its head in Russia and Syria's fight against any external intervention in the prolonged and unfortunate civil war and now in the battle over the Ukraine.

In spite of the continuing importance of states, they suggest the conceptualizations and practices of sovereignty are undergoing a period of transformation and the internal and external dimensions of the sovereignty of the state are emerging. This leads to a transnational polity that is based on a high degree of coordination, both internal and external. We might note, however, that they do not go so far as to call this 'a new world order,' or even a transformed world order, but they do see the change as a "significant deepening in the complexity of sovereignty."[453] They also note new modes of cooperation between public and private actors (policy networks and public private partnerships) although they do not spend a lot of time illustrating the role of private actors, which to my mind is a gap in the work.

While authority until recently tended to be centred in the state, the shift that is occurring affects the basic institutions, principles, norms and procedures of contemporary policy making, public authority and power across territorial levels. Grande and Pauly note that although there are new

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[453] Grande and Pauly, 2007 *ibid.*

types of governing arrangements evolving, the key locus of political authority remains the state.

A key feature of the modern state is its monopoly of the legitimate use of physical force which excludes individuals, groups and organizations from actively participating in legitimate means of exercising coercion. This is delineated through four principles (which in fact are essential parts of Weber's conception): the principle of **sovereignty**, implied by the 'monopoly of legitimate coercion; the principle of **territoriality,** which keeps the exercise of authority within the territorial boundaries of the state (except in self defense); the principle of **rational legitimacy,** which requires that political authority must necessarily (although not exclusively) be based on formal rules and a consistent, codified legal order, rather than on traditions of charisma; and, the principle of **bureaucratic institutionalization** that "guarantees that sovereign powers are exercised permanently, reliably and uniformly within a given territory."[454]

A key argument for them is that if a fundamental transformation of the modern state is taking place, one would expect these principles to be significantly affected. They accept that the state and sovereignty is highly contested, but their argument is that sovereignty and the state are two sides of the same coin. Sovereignty is what distinguishes the modern state from its feudal predecessor. The real change can be described in more complex terms. They criticize recent analyses of the modern state where sovereignty and governance have tended to be conceptualized in zero sum terms (i.e. as fully present or entirely absent from a given political structure). Any evidence of change must be associated with state decline. They view the practice, expression and theoretical conceptualization of sovereignty as an evolving, changing or more flexible concept which is subject to change.[455] It seems reasonable to view the state-sovereignty versus transnational polity dichotomy as a continuum with shifts in balance rather

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[454] Grande and Pauly 2007 *ibid* at 8.
[455] Grande and Pauly 2007 *ibid.*

than a complete split. Rather than tying sovereignty to the state alone, we might broaden it to include the state and other forms of governance as discussed earlier in this chapter.

It is important for the reader to keep in mind that the Responsibility to Protect only comes into relevance when the State is "unwilling or unable" to protect its own citizens. The state in that situation is failing in its sovereign duty. Of course, when a decision re the Responsibility to Protect is required in the Security Council, states may be less concerned with the case at hand than they are about future cases which might infringe on their own sovereignty. Grande and Pauly develop a more refined concept of sovereignty that is based on the following propositions:

1)   Internal and external sovereignty must be distinguished. The internal relationship lies between state and society (i.e. the state's autonomy from society) and the external dimension refers to the state's external relations in the international system (i.e. the state's independence from other states).   Internal sovereignty relies on domestic consensus, while external sovereignty is premised on recognition by other states.   In summary, sovereignty can be divided and transformed without losing its substance. (This is reminiscent of Krasner).

2)   The two dimensions of sovereignty, internal and external – can develop separately from one another, and can have separate trajectories of development. In the matter of transition of governance, we are more concerned with the external rights of the state and its internal performance of its duties.[456]

In the case of the Responsibility to Protect, external sovereignty must predominate when internal sovereignty has failed. The three essential elements of the doctrine of external sovereignty,

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[456] Grande and Pauly 2007 *ibid* at 11.

beginning in the 19th C. are as follows: states are defined as the basic units of the international system; all states are considered to be legally equal; and, state sovereignty is understood to mean freedom from external interference. The separation of state powers into external and internal sovereignty is important when we contemplate the question of intervention. States are concerned with external sovereignty when they look at situations of crisis in other states and decide the appropriate action. Grande and Pauly note there is already the emergence of a transnational human rights regime that has gradually been superseding the legitimacy of states and their insistence on non-interference. The developing paradigm of a 'Responsibility to Protect vulnerable human beings, regardless of any resistance put forward by local government authorities,' is part of what they see as a shift toward 'transnational sovereignty.' This type of sovereignty differs in at least two respects: 1) In principle it weakens the role of traditional states in international relations; and 2) It qualifies, at times even suspends, the immunity of states from external influence.

This in fact provides a good description of the transnational sovereignty as it exists, or needs to exist, for the Responsibility to Protect to be implemented. Are Grande and Pauly in fact positing a third type of 'sovereignty,' which transcends the internal and the external and moves to the transnational level and sustains a third level of hierarchical authority or power? Among scholars of international relations, the observation and analysis of such developments is central to key debates within the field and to our comprehension of the principle of the Responsibility to Protect as the fundamental principle of the thesis.

Certain dimensions of what is taking place at the international level depends on a framework that goes beyond the usual internal-external understanding of sovereignty as a multi-dimensional phenomenon that comprises territorial, functional, and political aspects of the contemporary

experience of governance. This reconstitution occurs because "The Nation state has lost its monopoly on collectively binding decision-making in the production of public goods"[457] -- that is, private actors now play a greater role in the production of public goods; there is a continuous reassessment and redefinition of public functions leading to a functional reconstruction of public authority; and, there are new and unique issues of democratic legitimacy in governance due to shortcomings in participation, representation and control.

The significance of this to my own work is in Grande and Pauly's attention to the increasing importance of regional and transnational levels of governance; the increased significance and influence of private actors along with an increasing reliance on non-hierarchical and majoritarian methods of conflict resolution at the national, regional and international levels. As a qualification, however, they do suggest that the emergence of new forms of governance does not necessarily mean that they will become the dominant or exclusive forms in the 21st C, nor does this emergence imply that they will be stable, effective and ultimately legitimate. At the moment, the state remains the key locus of authority and international law holds the authority. The persistence of the idea of sovereignty is historical and serves as a construct that permits weaker states to protect themselves from more powerful ones. But we do need to recognize the changes in and alternatives of power nodules that are taking place.

In certain situations polities are conquered and occupied and the occupying power attempts to set up a new governing structure. (Contemporary Afghanistan and Iraq are cases in point.) Transitional administration and foreign assistance to improve governance are presumably based on the principle that states will ultimately function effectively on their own, once local

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[457] Grande and Pauly 2007 *ibid* at 16.

authorities are empowered to assume the responsibility for their own sovereignty. [458]

Occasionally such interventions are touted as examples of the Responsibility to Protect at work; they are not – and I will show why they are not, particularly in Chapter Seven of the thesis which sets out the criteria for the legitimacy of the Libyan intervention. The Iraq war, for example rested on the Bush doctrine of pre-emptive self defense (PESD) and the assumption that there were weapons of mass destruction (wmd) in Iraq. Bush's doctrine was tied to democratic sovereignty and international peace and stability. Nineteenth century international law allowed for the sovereign state recourse to force and emphasized a distinction between civilized and uncivilized states. Uncivilized states were therefore not sovereign and lacked rights and thus could be legally attacked and conquered in an effort to civilize them.[459]   "Bush's PESD doctrine attempted to expand the legal use of force and is intimately connected to the concept of illegal or rogue state against which such force may be directed." [460]

As suggested, when we look more closely at processes or methods for governing the interdependent relationships between the multitude of players in the national, international and transnational level we find new forms of governance which function in self-organizing, autonomous and interdependent networks using soft principles such as negotiation, cooperation and alliance formation as opposed to coercion, command and control. What Anne-Marie Slaughter adds to this debate is the importance of not only states in the matter of international decision making regarding rules and norms, but of other key governmental players in the network and of their role in decision making. This analysis encourages us to look at how the

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[458] Chapter 10 "Sharing Sovereignty" Krasner 2009 *supra* note 395.
[459] Antony Anghie, "Rethinking Sovereignty in International Law" (2009) (5) Annual Review of Law and Social Science, 291-310 at 293 **[Anghie 2009].**
[460] Anghie 2009 *ibid* at 292.

networks of nongovernmental or non-state actors may function to make the Responsibility to Protect principle as a soft law more effective as part of a new form of governance.

In *A New World Order* (2004), while Slaughter primarily speaks of networks involving governments, officials, national regulators, judges and legislators as well as terrorists, arms and drug dealers, she points out they all operate through global networks, through the exchange of information and the coordination of activity. She adds that these government networks are underappreciated, under supported, and underused to address the central problems of global governance, as we may say are NGOs and civil society generally. This is one of the grounds for the thesis' focus on the role of NGOs and civil society as actors in governance networks; that is to show how NGOs have had a significant role in its development and any decisions toward implementation as they currently may occur. Evan if the Responsibility to Protect does evolve into common law I suggest these networks will still remain important.

While aims and subject areas may differ, Slaughter suggests there are certain functions common to them all: they expand regulatory reach; build trust, establish relationships and are motivated to establish a good reputation – the conditions necessary for long-term cooperation - and, exchange information, and build databases. The networks of nongovernmental actors are also expanding their soft power (the power of persuasion and information) –the kind of soft power that Joseph Nye has been exhorting the United States to use along with their hard power.[461]

Pauly speaks to the transnational cooperation state or the network state.[462] He, like the others, attributes part of this change to the human rights regime and the Responsibility to Protect which are superseding the legitimacy of the state, resulting in a shift toward transnational sovereignty.

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[461] Ratner and Slaughter 2004 *supra* note 376.
[462] Grande and Pauly 2007 *supra* note 452.

As a consequence, there may be a new historical cluster of power. Where the nation state has

lost its monopoly in the production of public goods, international organizations have gained

strength. If the world is to accept the responsibility to act in a cohesive manner when it comes to

international crises these networks must be instrumental at the global level.

The value of these three authors' work (Slaughter, Krasner and Pauly) to the thesis is the focus

on the tension between the political authority of the state and centralized decision making at the

transnational or international level; e.g. a form of global governance or transnational polity

based on cooperation - or is it coercion? - With questions about its authority, stability and

legitimacy. Indeed, cooperation and coordination is an essential aspect of the transition to global

governance.   According to Pauly, states are not a thing of the past, but are transforming. This

leads to a new transnational polity based on coordination representing a new model of

cooperation between public and private actors; i.e. a new form of governance. But he stresses

that the new form of governance does not replace the state. All three envisage the future of the

international regime. Pauly perceives the possibility of a transnational cooperative state with the

state remaining the locus of authority. Krasner also predicts that the state will remain the key

locus of authority. Slaughter has the grandest vision, however - A New World Order – leading

to peace and prosperity.

My own work and its prospect for the future of the Responsibility to Protect governance requires

a form of cooperation in which the Responsibility to Protect can function in all three aspects -

preventing, reacting and rebuilding - and concentrates on the tension between cooperative forms

of governance at the international or transnational level and competition or conflict between

states which still goes on. My overall concern is the need for the Responsibility to Protect to be

successful - without a high level of cooperation and/or a supranational authority structure it is

subject to failure in the current political structure. With changes in global values and global

governance away from the sovereignty of the state as a primary principle (which assures the right

of self-determination, state autonomy and protection from intervention), toward the public good

of responsibility of the global system to protect human life and the citizens of the world,

however, there exist tremendous possibilities. We need to continue to understand, however,

more fully the impediments and the drivers to the challenge of cooperation when it comes to the

acceptance of any form of "humanitarian responsibility." Ultimately we need to continue to

emphasize the critical importance of the humanitarian principles we have established.

The next portion of this Chapter takes us deeper into the changing relationship between the state,

sovereignty and global governance by exploring in greater depth the role of civil society actors

and NGOs in the development of the Responsibility to Protect. As we track the norm in more

detail, its evolution and those impediments that have stood in its way, the thesis provides a 'thick

description' from key actors and civil society organizations which facilitate better understanding

of the evolution of the norm and its complexity.

III.   International Nongovernmental Organizations (INGOs) as Nonstate Actors (NSAs)

International Nongovernmental Organizations (INGOs) as Non-States Actors includes a variety

of entities. In this thesis NGO refers to the group of private transnational actors with both

private and public purposes. The Acronym NGO is most widely used. The term actor is part of

international legal terminology. The inclusion of the state as subjects of international law did not

include the development of a legal theory pertaining to 'transnational actors.' However,

International Relations and Political Science are more generally receptive to transnational actors

and in the 1980s multi-actor models expanded the State-centric one. This led to the "policy

network approach" which operates on the assumption that policies are not formulated or

implemented or enforced by governmental actors only. Interaction occurs between state, market and civil society, although state-centric views of the relative importance of states and NSAs such as Realism and Neo-realism continue to exist.[463] The recognition of NSAs has led to an increased dialogue between NSAs, international law and international relations and any analyses of the dialogue tend to be interdisciplinary.

Distinguishing INGOs from other NSAs focuses the legal discourse on 'international legal personality'; their role in international law-making processes; and their institutional arrangements with international governmental organizations (IGOs).[464] Michael Byers focuses in the role of INGOs on the development of customary international law, especially in the field of human rights, although he refers to it as an 'indirect' or 'secondary' role.[465]

III.1   Conceptual frameworks outside personality

Some scholars, for practical and doctrinal reasons do not focus on recognized formal legal status when considering transnational actors. They deal with 'international actors' instead of 'legal persons.' Byers argues that NGOs do not have legal personality, however which enables states to consider each other as equal sovereigns. I am interested in NGOs as actors in the international and transnational legal framework. This does not wholly avoid the question of state sovereignty but the standpoint is outside the existing doctrinal law scheme of state-centered international law.[466]

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[463] Raphael Harel Ben-Ari, "The Normative Position of International Non-governmental Organizations under International Law: An Analytical Framework" (The Netherlands: Koninklijke, 2012) [**Ben-Ari 2012**].
[464] Ben-Ari 2012 ibid at 7.
[465] M. Byers, Custom, Power and Power of Rules – International Relations and Customary International Law (Cambridge, 1999), p. 86 [**Byers 1999**].
[466] Ben-Ari 2012 *supra* note 463 at 12.

Nye refers to the soft power and the political and moral influence that 'global civil society'may gain in formulating evolving norms and institutions of law.[467] Another approach examines the limits of international personality and assesses the possibilities for its expansion.[468]

Discussions of the normative position of INGOs whether *de lege lata* (regarding existing law) or *de lege ferenda* (regarding soft law) are entwined with the general debate on the scope of state sovereignty in an increasingly interdependent world. It is often legitimacy rather than legality that may be the defining factor and "the legitimacy in turn may be based on the capacity for effective [rather] than the possession of a decisive legal case."[469]

There is a range of legal capacity for subjects of international law including those recognized by international customary law and secondly those entities that are dependent on the agreement of the former. The first category includes states while the second category includes international organizations and institutions.[470]

Prior to the First World War, sovereign states were the sole members of the international legal order which was categorized as "European, Christian, mercantilist and imperialist."[471] The promotion of the right of peoples to self-determination was intended to allow for an increasingly universal regime which reinforced the relationship between the State and individual.[472] The new order included three agents: the State, the Community of Nations and transnational civil society.

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[467] J. Nyes "Soft Power – the Means to Success in World Politics (2004) New York Public Affairs, p. x-xi, 6-10. [**Nyes 2004**].
[468] Ben-Ari 2012 *supra* note 463 at 19.
[469] Ben-Ari 2012 ibid at 19.
[470] Ben-Ari 2012 ibid at 27.
[471] Ben-Ari 2012 ibid at 28.
[472] Ben-Ari 2012 ibid at 29.

International law was intended to become the law of a world community which in some ways

undermined the sovereignty of these states."[473]

> …Globalization has created new forces, new non-territorial actors whose influence
> partially deterritorializes the notion of state sovereignty. Globalization brings a concept
> no longer limited to to territorial control, but which extends to participating functions in
> an overriding, non-territory-based system." [474]

Higgins rejects the traditional concept of subjects in international law and suggests adopting the

concept of 'international legal participants' which includes individuals, corporations and

INGOs.[475] The notion of international legal personality implies that the entity has an "active

position in international relations and takes part in the law-making process." [476]

Investigation of what INGOs actually do and how they do it is indeed important in order to

properly evaluate their status of legal capacity – both *de lege lata* and *de lege ferenda*." [477]

III.2   Defining INGOs

Charnovitz defines NGOs as

> groups of individuals organized for the myriad of reasons that engage human imagination
> and aspiration, which can be set up to advocate a particular cause, such as human rights,
> or to carry out programs on the ground, such as disaster relief, and who can have
> membership ranging from local to global.[478]

The UN system describes the INGO as non-profit entities whose members are citizens or

associations of one or more countries and who activities are determined by the collective will of

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[473] Ben-Ari 2012 ibid at 31.
[474] D. Thurer," The Emergence of Non-Governmental Organizations and the Transnational Entrepreneurs in International Law and the Changing Role of the State" in *Non-State Actors as New Subjects of International Law from the Traditional State Order Toward the Law of the Global Community.* Proceedings of an International Symposium of the Kiel Walther Schucking – Institute of International Law, March 25-28, 1998 (Ed. R. Hoffman) 37, 38) 36
[475] R. Higgins, Problems and Process: International Law and how we Use it (1994), at 49-50.
[476] Higgins 1994 *ibid.*
[477] Ben-Ari 2012 *supra* note 463 at 47.
[478] Steve Charnovitz, "Nongovernmental Organizations and International Law" 100 (2006) American Journal of International Law, 348.

its members in response to the needs of the members of one or more communities with which the NGO cooperates."[479]

IV.   Role and Relevance of INGOs

It is difficult to quantify or measure the activity of INGOs. Therefore evaluations must draw on subjective assumptions. Kofi Annan suggests loose coalitions of international institutions, civil society, and private sector organizations and national governments merge together "in pursuit of common goals."[480] One way to see this movement towards 'commonality' can be seen through their efforts toward cooperation and collaboration.

Slaughter uses a paradigm of international relations to analyze the role of INGOs in international law-making. She suggests NGOs take part in "international law making by providing political, technical, and informational benefits to States."[481] INGOs constitute transnational society according to this model. Preuss argues "Mankind is evolving into a social community that provides the moral community with the means to protect its moral principles" i.e., through INGO activity. He suggests these transnational actors may play a key role in the protection of human rights."[482]

For Otto, too, INGOs "not only play a dominant constructive role, but also a moral one.[483]

Mertus acknowledges the role of non-State actors in the development of international norms and

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[479] A.M. Slaughter, International Law and International Relations' Recueil des Cours – Collected Courses of the Hague Academy of International Law, Vol. 285 (2000) at 9.
[480] R. Ann "We the Peoples: The Role of the United Nations in the 21st Century – Millenium Report of the Secretary General of the United Nations" para. 336-338.
[481] Slaughter 2000 *supra* note 479 at 33.
[482] U.K. Preuss "The Force, Frailty, and Future of Human Rights Under Globalization" in *Conference on Judgment in the Shadow of the Holocaust, Theoretical Inquiries in Law* (Vol. 1, No. 2 July 2000, Tel-Aviv University) p. 283, 301
[483] D. Otto, "Non-governmental Organizations in the United Nations System: The Emerging Role of International Civil Society, Human Rights Quarterly (Vol. 18, 1996) 107, p. 129-136.

identity formation and explains that "by using the language of international human rights treaties and other governmental documents," INGOs become 'interpretive communities' for norms that may not have gained the same level as the status of law.[484] Mertus does not claim NGOs are at the same level as States in customary law formation, but does conclude they play a significant role in how laws and norms develop.[485] "Their interpretation and behavior accord meaning to legal norms, and also contribute to the "legitimacy of the principles and rules which are adopted."[486]

Gamble and Kim recognize the role of INGOs in international law-making[487] through "judicial decisions and the teachings of the most legally qualified publicists." (e.g. scholars and experts).[488] NGOs also submit information and arguments to the Court (the ICJ) which can lead to the long-term development of international law."[489] Overall, Ben Ari concludes that INGOs have mastered so-called soft law instruments as part of contemporary international law.[490] I am interested in their participation in international law-making and proponents of emerging soft and hard law.

One of the problems of INGOs is the prospect of their remaining neutral which may be jeopardized by the receipt of government and private funds. It has also been argued that many INGOs are Western-based.[491] On the positive side INGOs may provide links between the global and local participation and provides alternate channels to the government for excluded minority

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[484] J. Mertus, Considering Nonstate Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application, New York University Journal of International Law and Politics (Vol. 32, No. 2, Winter 2000) p. 537, 50.
[485] Mertus 2000 *ibid* at 558
[486] Mertus, 2000 *ibid* at 202-3
[487] J.K. Gamble and C. Kim, "International Law – New Actors and New Technologies: Center Stage for NGOs?" Vol/ 31 (2000) Law and Policy in International Business, 237
[488] Gamble and Kim 2000 *ibid* at 245.
[489] Gamble and Kim 2000 *ibid.*
[490] Ben-Ari 2012 *supra* note 463 at 70.
[491] Ben-Ari 2012 *ibid* at 91.

groups. More transparency is recommended which would reveal and discourage the exercise of influence by national governments.

V.   The Legal Status of INGOs

A point of reference to the current legal status of INGOs under public international law appears in Article 71 of the UN Charter, regional mechanisms and Treaties.[492] The relationship between the UN and NGOs is formalized through Articles 63 and 64 of the UN Charter which specify that the Economic and Social Council (ECOSOC) "is responsible for consulting with international and, where appropriate, national organizations." The only official mention of 'NGO' comes in Article 71, where it states ECOSOC "may make suitable arrangements for consultation with Nongovernmental Organizations which are concerned with matters within its competence'."[493] NGOs have been granted 'consultative status' in the United Nations and other IGOs such as Organization for Security and Cooperation in Europe (OSCE) and the Council of Europe have incorporated NGOs into their frameworks and established guidelines for cooperation.[494]   Article 71 of the UN Charter 1945 introduced a new standardized form of cooperation between actors in an international society.[495]   In accordance with Article 71 certain resolutions define how the relationship should work. (See for example Resolution 1996/31, the Consultative relationship between the United Nations and Nongovernmental Organizations, sections 9 to 13).[496]   Martens suggests there is no codified legal status nor widely adopted international convention on the law

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[492] The European Convention on the Recognition of the Legal Personality of International INGOs, 1986.
[493] Anthony McDermott, (1998): *The UN and NGOs: Humanitarian Interventions in future conflicts, (19) 3* Contemporary Security Policy, 1-26 at 2 **[McDermott 1998].**
[494] Kerstin Martens, "Examining the (Non-) Status of NGOs" (2001) 10.t2 Indiana Journal of Global Legal Studies, 1-24 at 6 **[Martens 2001].**
[495] UN Charter art. 71 ("The Economic and Social Council may make suitable arrangements for consultation with Nongovernmental Organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned".) Martens, 2001 *ibid* at 15.
[496] Resolution 1996/31, sections 9 to 13) accessed at
http://www.un.org/esa/coordination/ngo/Resolution_1996_31/Part_1.htm

of NGOs.[497]   "As a result, NGOs are obliged to accept the national legislation of the state in which they have been established and where they are based."[498]   Since national laws differ, their status also varies from country to country. The only recognized agreement on NGOs is the European Convention on the Recognition of the Legal Personality of International Nongovernmental Organizations which provides for the general recognition of the legal personality of an NGO in any state that is party to the convention.[499]

When we consider patterns of governance in transnational NGOs their significance becomes clear as a purposive activity which I have chosen to illustrate by conducting interviews with transnational NGO individuals and coalitions. The empirically-based portion of the research shows that a number of NGOs have formed coalitions with other NGOs in order to be more influential in global politics. The amount of state cooperation with NGOs and the devolution of responsibility to NGOs is considerable and growing.[500] NGOs try to influence political actors through the way they frame and steer issues.

> A consideration of norms is particularly relevant in situations of power asymmetries, such as those between NGOs and IFIs, where framing and steering can to some degree be facilitated by normative appeals by the less powerful to influence the more powerful.[501]

Nevertheless, governance is not backed by formal authority in the manner in which governments are.[502]

Rosenau refers to governance as post internationalist, contending that governance "encompasses the activities of government, but it also includes the many other channels through which

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[497] Martens 2001 *supra* note 494 at 19.
[498] Martens 2001 *ibid* at 21.
[499] http://conventions.coe.int/Treaty/en/Treaties/Html/124.htm Martens, 2001 supra note 494
[500] Helen Yanacopulos, "Patterns of Governance: The Rise of Transnational Coalitions of NGOs" Global Society, Vol. 19, No. 3, July, 2005 **[Yanacopulos 2005].**
[501] Yanacopulo 2005 *ibid* at 250.
[502] Yanacopulos 2005 *ibid* at 251.

commands flow in the form of goals framed, directives issued and policies pursued."[503]

Governance includes the state, non-state or intergovernmental actors. The literature on

transnational relations (regular interactions across national boundaries when at least one actor is

a non-state agent or does not operate on behalf of a national government or an intergovernmental

organization)[504] has been used to explain the enhanced standing of non-state actors. Both

transnational relations literature and governance literature discuss how a principle commenced at

the transnational level can have a major impact on the global diffusion of values, norms and

ideas.

Cognitive framing is a necessary component in the political strategies of networks. The way in

which issues are framed affects governance activity.[505] NGOs tend to bring perspectives that

differ from other actors and present evidence and arguments that offer alternate perspectives

which states sometimes adopt.[506] We can see this as steering which is a fundamental aspect of

governance.[507] NGOs therefore influence through steering or persuasion and by offering added

value. Because governance is of a voluntary nature, norm structures provide legitimacy and

political support.

> Civil society is increasingly defined as a field populated by political subjects whose
> autonomy, expertise and ability to responsibly channel political will-formation has
> become crucial to the tasks of governing.[508]

Civil society is altered from a passive object of government to an entity that is both an object and

subject of government.[509] Civil society actors can in this way be seen to hold both power and

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[503] J. Rosenau "Governance in the Twenty first Century", Global Governance, Vol. 1, No. 1 (1995) 14 **[Rosenau 1995].**

[504] T. Kisse-Kappen, "Bringing Transnational Relations Back" *in Non-state actors, domestic structures and International Institutions* (Cambridge: Cambridge University Press, 1995) **[Kisse-Kappen 1995].**

[505] Yanacopulos 2005 *supra* note 500 at 260.

[506] Yanacopulos 2005 *ibid* at 260.

[507] Yanacopulos 2005 *ibid* at 262.

[508] Ole Jacob Sending, and Iver B. Neumann "Governance to Governmentality: Analyzing NGOs, States and Power," (2006) 59 International Studies Quarterly, 651-672 at 669 **[Sending and Neumann 2006].**

autonomy. The regulation of landmines is cited as an example of "how nonstate actors have

assumed a more powerful role in global governance" and civil society is seen as a key asset for

the "formulation of new policies."[510] Neumann discusses the history of the landmines

convention when certain Norwegian NGOs allied with other NGOs and over time persuaded or

'shamed' or in some other way made the Norwegian government support both politically and in

a financial way the advocacy on behalf of the landmines ban.[511]

Of course the relationship between state and civil society varies from country to country. In

some cases the state may control civil society and be unreceptive to their views. In the

landmines case, on the other hand, states and NGOs interacted as a "technology of agency" by

which "non-state actors perform[ed] governance functions by virtue of their technical expertise,

advocacy and capacity for political will-formation."[512] The Norwegian People's Aid [NPA],

and the Norwegian Afghanistan Committee (NAC) were key players in a process that resulted in

a large activism movement at the international level against antipersonnel land-mines. The NPA

acted therefore not only as an object of the state, but also as a subject and the NAC was a central

actor in shaping official Norwegian policy.[513] The Norwegian government drew on the practical

knowledge and expertise of the NGOs.   Here civil society represented a variety of actors who

bound together to advocate for a humanitarian principle as opposed to a state or a UN based

disarmament process.[514]

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[509] Sending and Neumann 2006 *ibid* at 652.
[510] Sending and Neumann 2006 *ibid* at 652.
[511] Ever B.Neumann, "Harnessing Social Power: State Diplomacy and the Land-mines Issue." In *Enhancing Global Governance: Towards a New Diplomacy*, edited by Andrew F. Cooper, John English and Ramesh Thakur, Tokyo. United Nations University Press, 2002 in Sending, O. 2006 *ibid* at 208.
[512] Sending 2006 *supra note 508* at 664.
[513] Sending 2006 *ibid* at 665.
[514] Sending 2006 *ibid* at 668.

Abeles refers to 'global politics' as a system which undermines the traditional view of government, and includes Nongovernmental Organizations which exert great influence on the power and actions of nation states, making nation states not the only actors in the system. He conducted anthropological fieldwork in transnational institutions including the NGO Oxfam. He notes transnational organizations have partly taken charge of some of the key elements of governance.[515] His main question is about the legitimacy of NGOs, particularly since they are not elected representatives. He refers to them as "self-proclaimed spokespeople of 'civil society.'"[516] NGOs, in response, defend their position by arguing that they are close to the ground and see through their own eyes humanitarian crises because of their work in the field.[517] Other arguments in support of NGOs include their lack of political motivation plus their technical expertise. [518] These characteristics can be perceived as 'virtues' of NGOs as opposed to the State. NGOs have been said to operate as 'moral watchdogs' on the activities of states."[519] This leaves the image of NGOs as charitable and altruistic organizations, although this is certainly countered by some critics.[520]

The next Chapter, Chapter seven, discusses the theory of norm entrepreneurship as a framework for taking a deeper look at International Nongovernmental Organizations (INGO) activities and programs. It provides a description of the role of INGOs as well as early influential entrepreneurs such as Lloyd Axworthy, Bill Graham and Michael Ignatieff as a testimony to

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[515] Marc Abeles, "Rethinking NGOs: The Economy of Survival and Global Governance" (Winter 2008) Issue 1, Volume 15,Indiana Journal of Global Legal Studies, 241-58. **[Abeles 2008]**

[516] Richard B. Bilder, and Dianne Otto Review: *The Conscience of the World". The Influence of Nongovernmental organizations in the UN System* Edited by Peter Willets, (Washington DC. The Brookings Institution, 1996). Xiii, 318 (Jan. 1997) Vol. 92, No. 1,The American Journal of International Law, 195-198.

[517] Abeles 2006 *supra* note 515 at 243.

[518] Abeles 2006 *ibid* at 244.

[519]*NGOs, the UN and Global Governance* Edited by Thomas G. Weiss and Leon Gordenker, Boulder CO: Lynne Rienner Publishers, 1996 243 *"The Conscience of the World". The Influence of Nongovernmental organizations in the UN System* Edited by Peter Willets, Washington DC. The Brookings Institution, 1996 Xiii, 318 Review by: Richard B. Bilder and Dianne Otto (Jan. 1997) Vol. 92, No. 1 The American Journal of International Law, 195-198.

[520] Bilder and Otto *ibid* 1997 at 124

their own involvement. Questions pertaining to the sociopolitical issues of significance to the principle have been posed in the field work to those interviewed and their responses analyzed. The responses have been considered in order to gauge the significance of each issue as it influences the evolution of the norm in transnational law and any attempts to implement the principle.

Chapter Seven: A "Thick Description" of a Principle

> On 21 April 1994 at the height of the genocide, UN force commander, General Romeo Dallaire had declared that he could bring the genocide to an end if they would give him 5000 men. The UN Security Council responded the same day by reducing his contingent from 2,548 to 270 men.[521]

In the face of such disasters and lack of response, the international community has since that time, at least in principle, accepted its responsibility to protect civilians and to even move in with force if necessary to stop massive human rights violations. A soft, and sometimes inconsistent, "consensus now exists on the need to do something more."[522] The starting point in support of the principle is that humanitarian tragedies and massive human rights violations, where the government fails or is unable to protect civilians, cannot simply be left to resolve themselves. But is it being implemented when situations call for it and, if it is, how is it being perceived?

I.   Introduction

This Chapter, through the assistance of policy interviews, critically examines impediments as well as supports for the Responsibility to Protect, with a particular emphasis on International Nongovernmental Organizations (NGOs), the role of International Governmental Organizations (IGOs) and early influential individual entrepreneurs as an aspect of global governance. The representatives of NGOs and influential individuals have been systematically sought out and their responses to questions analyzed.[523] This work advances a novel set of arguments which illustrate from a legal and moral perspective why the Responsibility to Protect is perceived as a needed principle to halt or prevent mass atrocities.

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[521] Thomas F. Keating, Andy W. Knight "Building Sustainable Peace" (The University of Alberta Press and the United Nations University Press, 2004) **[Keating and Knight 2004].**
[522] Keating and Knight 2004 *ibid.*
[523] See Appendix A for Interview Questions.

The impediments as viewed by the community confronting the implementation of this agreed-upon principle are addressed as well as the factors that work to support and enhance it. Interviews and the review of documents, reports and articles help to determine which issues are the most inhibiting or supportive and what the future likely holds for the Responsibility to Protect principle. While I am interested in a study of the principle itself, its evolution and implementation, by examining the life of the Responsibility to Protect we will also be able to understand further how international norms and laws can and do develop.

Questions pertaining to the sociopolitical issues of significance to the principle have been posed in the field work to those interviewed and their responses analyzed. The responses have been considered in order to gauge the significance of each issue as it influences the evolution of the norm in transnational law and any attempts to implement the principle. The outcome serves as an empirical illustration of how a fundamental and controversial international norm can be created, supported, accepted and ultimately implemented in a transnational environment. The responses and research findings can be grouped under a series of headings including the steps that led up to the Commission; the mandate and work of the Commission; the relevance of moral principles and moral imperatives; the legality and legitimacy of the norm; the role of NGOs; the role of the UN; and finally the interviewees' perception of the development of the principle.

Methodologically, the chapter expands on the knowledge regarding the Responsibility to Protect by posing a predetermined set of questions (while at the same time allowing for unanticipated findings) to key players who have been or are in a position to influence the evolution of the norm. The research will show that one of the most significant and influential revelations of the interviews is the role of nongovernmental actors as a positive force in norm entrepreneurship in the global governance structure. It also shows that the tension between state responsibility and

state sovereignty continues to persist in international law and impedes decisions in the Security Council. Realpolitik and state interest often impede the efforts on the part of states and non-state actors to make humanitarian decisions based on a universal principle. Prevention measures also tend to be a low priority.

Using analytic tools of inquiry, the analysis delves deeper into these factors to achieve a Geertzian 'thick description' that shows how the Responsibility to Protect norm has evolved and been nurtured from its inception to its acceptance and implementation in the transnational environment through the assistance of key norm entrepreneurs.[524] Also discussed are (1) the basic ideas and principles that are constitutive of the Responsibility to Protect; (2) the processes (legal or otherwise) that have helped to produce and develop it; (3) the relationships and agencies that have brought the Responsibility to Protect norm to institutionalization within the UN and the Security Council; and (4) the perceptions, theories and actions that constitute the most substantive impediments and enhancers.

While NGOs do not have the same authority in law formation as states, their influence is not insignificant. While they do not make customary law, they are able to give meaning to affect norms and international law.

II.   The Theory of Norm Entrepreneurship and the Evolution of the Norm

The theory of norm entrepreneurship provides a framework in which to imbed the evolution of the Responsibility to Protect norm. The analysis outlines the way in which the norm has moved from the international level to the local level and back again on the basis of historical information and personal accounts of key norm entrepreneurs who have become part of decisions being made for or against the Responsibility to Protect. It will show how norm entrepreneurs in

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[524] Geertz 1973 *supra note* **30**.

social, political and legal thought and their organizations, sometimes collectively and sometimes

independently, help to formalize the principle. The sovereign equality of states makes the

international system what it is. Mertus suggests "Those that break or seek to change the

sovereignty norms can be viewed as norm entrepreneurs or "international law breakers."[525]

Application of the three phases of the theory of norm entrepreneurship (norm creation, norm

institutionalisation and norm interpretation) [526] and its relationship to the Responsibility to

Protect is represented in the following table:

Table 2: Stages of Norm Entrepreneurship[527]

	Stage 1 Norm Emergence	Stage 2 Tipping or threshold point Norm Cascade	Stage 3 Internalization
Actors	Norm entrepreneurs With organized platforms	States, international organizations, networks	Law, professions, bureaucracy
Motives	Altruism, empathy, ideational, commitment	Legitimacy, reputation, esteem	Conformity
Dominant mechanisms	Persuasion	Socialization, institutionalization, demonstration	Habit, institutionalization
The Responsibility to Protect	ICISS and NGOs	Summit Outcome document	Cases as they arise in the Security Council

Stage 1 or norm emergence is the circumstances and activities that led up to the ICISS Report;

Stage 2 indicates the process by which the report of the Secretary General, his presentation at the

Summit Outcome, and the vote at the General Assembly led to an agreement as expressed in

Article 138 and 139 of the Summit Outcome document; and, Stage 3 or internalization is

demonstrated by the cases that are introduced in the Security Council calling upon the principle

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[525] Mertus 1999 *supra* note 32 at 566.
[526] Simon Chesterman, (Ed.) *Secretary or General: The Secretary-General in World Politics* University Press (2007) at 124 **[Chesterman 2007].**
[527] Martha Finnemore, and Kathy Sikkink, "International Norm Dynamics and Political Change" (1998) vol. 52 International Organization, 887 at 898 [**Finnemore and Sikkink 1998].**

of the Responsibility to Protect.   These instances of the institutionalization of the norm are represented later in the Chapter through an examination of the Security Council resolutions references and strengthening the Responsibility to Protect. It is through such an internalization or institutionalization process that the norm moves from the soft law area to that of *lex lata*.

In the case of the Responsibility to Protect, the first stage of norm entrepreneurship involved the development of the thinking in terms of the need for a legal mechanism to deal with humanitarian crises that was not tainted by humanitarian interventions of the past. This occurred with the creation of the International Commission on Intervention and State Sovereignty (ICISS) sponsored by the Government of Canada and its report in 2001.   Persuasion by norm entrepreneurs is characteristic of the first stage and I consider the authors of this Report as 'founding entrepreneurs.' They are introduced in this Chapter and their views and experience explored. They include well known Canadian actors such as Lloyd Axworthy, Michael Ignatieff and William Graham.

In the second phase, norms become institutionalized in organizations (domestic and international) and in new bureaucratic units whose function "is to advance the norm."[528]   The second stage of the Responsibility to Protect in practical terms occurred with the presentation of the Report to the United Nations on 14th September 2005. On that date Secretary General Kofi Annan addressed the General Assembly of the United Nations at the UN Headquarters in New York and opened the three day meeting of the 2005 World Summit, as follows:

> For the first time, you will accept, clearly and unambiguously, that you have a collective responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. You will make clear your willingness to take the timely and

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[528] Ian Johnstone, "The Secretary-General as Norm Entrepreneur" in Chesterman, Simon (Ed.) 2007 *supra* note 526 at 128.

decisive collective action through the Security Council, when peaceful means prove inadequate and national authorities are manifestly failing to protect their own populations. Excellences, you will be pledged to act if another Rwanda looms.[529]

A number of drafts had been presented prior to this date contributing to its acceptance as a soft law norm. For example, the earlier draft outcome document included the responsibility to protect in a section on human rights and the rule of law together with human security. The main concern was related to the principle of sovereignty and non-intervention as well as unilateral action. While Belarus, China, Egypt, India, Iran and Jamaica voiced their opposition, the African Union broadly supported the idea and noted similar provisions in the Charter of the African Union. (The contribution of the African Union was significant.)

It is important to note that in 2000, African nations formed the African Union (AU), and in its Constitution Act included principles later known as 'the Responsibility to Protect' transferred from the AU founding document, which recognized a significant change from 'non-interference' toward 'non-indifference'. The Constitutive Act included the following articles, while continuing to recognize the sovereignty, territorial integrity, and independence of its Member States. The Act states that

> Art. 4 (h) - the "Union has the right to intervene in a Member State (MS) pursuant a decision of the Assembly in respect of grave circumstances namely, genocide, war crimes and crimes against humanity;"
> Art. 4 (j) "a MS has the right to request intervention from the Union for the restoration of peace and security."[530]

The consent of the state is not necessary for external intervention under such circumstances. To deal with this very controversial issue the Organization of African Unity operated on consensus

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[529]UN Summit Outcome document 2005. http://www.un.org/summit
[530] The Responsibility to Protect Toolkit, ICR2P 4718-icrtop-launches-new-toolkit-on-the-responsibility-to-protect. **[R2P Toolkit].**

and stipulated that "military intervention without the consent of the state must be a last resort."[531]

These principles clearly helped to form the basis of the ICISS report. An amended document

regarding the Responsibility to Protect was produced in July, 2005.[532] After much discussion, on

5 August Jean Ping[533] presented another revised draft outcome document. After further revisions

the Draft Negotiated Outcome document distributed on 12 September 2005 was approved by the

UN General Assembly unanimously. The consensus was approved as Article 138 and 139 of the

Summit Outcome Document as outlined earlier in Chapter One.[534]

The third stage of norm entrepreneurship is that of internalization where the norm is no longer a

matter of broad public debate. In the third phase, according to the theory, 'interpretation' could

be explicit in judicial opinions by authoritative bodies or may be implicit in the form of political

and operational activities of governments or international institutions.[535] In the case of the

Responsibility to Protect, legitimate interpretation occurs in the United Nations Security Council

and General Assembly in its operations in the form of discussion and the subsequent potential for

resolutions implementing a range of the Responsibility to Protect tools. It also occurs among

INGOs and persuasive volunteers. Although the Responsibility to Protect norm has been

internalized to some extent, I would hesitate to say that it has yet achieved "a taken for granted

quality" or became customary law.[536] While the norm has been formally accepted and is

established within the United Nations, it is still subject to much debate. A great deal of

criticism, on the one hand, and persuasion on the other, still goes on. Even calls for sanctions

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[531] The Responsibility to Protect Toolkit *ibid.*
[532] Revised draft outcome document of the high level plenary meetings of the General Assembly of September 2005, submitted by the President of the General Assembly, UN-Doc A/59/HPLM/CRP.1/Rev. 1 of 22 July 2005
[533] Jean Ping is a Gabonese diplomat and politician who was the was the Foreign Minister of Gabon from 1999 to 2008 and served as President of the United Nations General Assembly from 2004 to 2005.
[534] UN Resolution (UN) General Assembly at the UN 2005 World Summit adopted a resolution embodying the position of forty-six heads of state. The Resolution A/Res/60/1 (October 24, 2005) was adopted by consensus by 174 states represented at the summit. (Cooper and Kohler 2009 *supra* note 73, p. 31).n
[535] Johnstone in Chesterman 2007 *supra* note 36 at 130.
[536] Martha Finnemore, and Kathy Sikkink, 1998 *supra* note 37 at 895.

are controversial and there is no mechanism for enforcement within the Security Council which is one of the factors to be considered as crucial to successful implementation.

The Secretary General plays an instrumental entrepreneurial role and can be effective when building on existing interpretations of international law. The United Nations is used as an institution to further those understandings of an evolving normative trend or idea and this is demonstrated by the strong and persuasive words of the Secretary General as he spoke in favor of the norm in his address to the General Assembly in 2005. While the Responsibility to Protect has followed this path successfully, problems remain. The Special Advisor to the Secretary General on the Prevention of Genocide[537] also plays an important role in the development and movement of the norm.[538] The purpose of the Special Advisor on the Prevention of Genocide is to raise awareness of the causes and dynamics of genocide, and to provide warnings and to advocate and mobilize for appropriate action when there is a risk of genocide. There is also a Special Adviser on the Responsibility to Protect. The purpose of the Special Adviser is to lead the conceptual, political, institutional and operational development of the Responsibility to Protect. The advice is required to alert the UN to the risk of genocide, war crimes, ethnic cleansing and crimes against humanity, enhancing the capacity of the organization to prevent these crimes.

United Nations Secretary-General Kofi Annan appointed Juan Méndez, an Argentinian, as Special Adviser in 2004, following the genocidal violence in Rwanda and the Balkans. (The international system had virtually allowed these tragedies to go unchecked.) In 2007, Francis M. Deng, a Sudanese Scholar, was appointed to succeed Juan Mendez with a new title of

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[537] Chayes and Chayes 1995 *supra* note 290.
[538] Johnstone in Chesterman 2007 *supra* note 36 at 125.

Undersecretary- General with 'Mass Atrocities' added to the title (the new title was eventually dropped, however).[539] Ban Ki-moon also appointed Edward Luck, an international scholar, in December 2007 as the Special Adviser on the Responsibility to Protect. Both Special Advisers Francis Deng and Edward Luck ended their assignments with the Office in July 2012 and Adama Dieng of Senegal was appointed as UN Special Adviser on the Prevention of Genocide.[540] A recent step in 2013 is the appointment of Jennifer Welsh to the position to UN Special Adviser for the Responsibility to Protect.

III.   Background to the Formation of the Commission

Throughout the 1990s, controversy raged between those who supported a right to intervene to protect populations (i.e. humanitarian intervention) and those who argued that state sovereignty, as recognized by the UN Charter, precluded any intervention in internal matters.[541] Rwanda was cited as an example of failure to address atrocity crimes while Kosovo, where the North Atlantic Treaty Organization (NATO) launched a military operation that was unauthorized by the UNSC, was regarded as an illegal intervention.[542] Clearly an international consensus on when and how to take action to prevent and end mass atrocities was needed to protect the security of the community and the individual, as well as the state.

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[539] As a counterpoint to the criticism of The Responsibility to Protect as a neo-colonial approach**,** Kyle Matthews advised that the notion of Sovereignty as a Responsibility came from Francis Deng working with the Brookings Institution. (Francis Deng is an expert on conflict management and U.S.-Africa relations, and served as Representative of the UN Secretary-General on Internally Displaced Persons. He is currently Special Adviser to the UN Secretary-General on the Prevention of Genocide.) Matthews stressed how in his view this fact counters the criticism of the Responsibility to Protect as a Western only doctrine.
[540]The Office of the Special Adviser on the Prevention of Genocide. http://www.un.org/en/preventgenocide/adviser/index.shtml
[541] The Responsibility to Protect Toolkit, ICR2P 4718-icrtop-launches-new-toolkit-on-the-responsibility-to-protect. **[R2P Toolkit].**
[542] Toolkit *ibid.*

The debate that took place during that period regarding the protection of civilians in armed

conflict began with the help of the media. The public had begun to pay more attention to

humanitarian situations than before. With the emergence of the so-called CNN effect, voters

worldwide became more rapidly aware of war and humanitarian crises, making an international

political response more urgently needed. [543] A critical moment in the debate occurred when

NATO intervened in Kosovo without authorization from the UN Security Council as a result of

Russia and China's threat to veto which prevented a UN-backed intervention. In the 1999 UN

General Assembly debate, Algerian President Abdelaziz Bouteflika expressed concerns and even

defined sovereignty as "the last defence against the rules of an unjust world."[544] The Kosovo

intervention constituted a clear violation of the basic principle of state sovereignty, and the right

to intervene represented "a neo-colonial threat to the poorest defenceless countries."[545] In spite

of the fact that the Kosovo crisis meant a significant setback with regards to public support, the

debate on humanitarian intervention, energized by the media, was adopted by NGOs and in

academic circles and was pursued sufficiently to lead to the endorsement of the Responsibility to

Protect. [546]

The Kosovo report, when produced, recommended further steps on the question of humanitarian

intervention:

> Experience from the NATO intervention in Kosovo suggests the need to close the gap
> between legality and legitimacy. The Commission believes that the time is now ripe for
> the presentation of a principled framework for humanitarian intervention which could be

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[543] Jean Garrigues, *The responsibility to protect: from an ethical principle to an effective policy*
http://responsibilitytoprotect.org/files/responsibilidad.proteger.pdf (Chapter for La realidad de la ayuda, Intermón
Oxfam)X FRIDE.
[544]UN General Assembly, 15 November 1999. http://www.un.org/peace/srebrenica.pdf
[545] UN General Assembly *ibid.*
[546]Garrigues *supra* note 543543 at 10.

used to guide future responses to imminent humanitarian catastrophes and which could be used to assess claims for humanitarian intervention.[547]

Expectations began to increase for action and new standards of conduct in national and international affairs as well as many new international institutions. There were new actors who brought their views to the table, many of whom were in the areas of human rights and human security. It is those new actors that this thesis brings to light through its "thick description" of their views, work, action and thoughts. As the International Commission on Intervention and State Sovereignty (ICISS) Report states, the presence of these new non-state actors in international affairs helped to push the debate about intervention for human protection purposes to the front of the agenda. [548] International organizations, civil society activists and NGOs began to use "the international human rights norms and instruments as the concrete point of reference against which to judge state conduct."[549]

NGOs influenced the development of a new regime of national laws and international laws using the most recent advances in the development of international humanitarian law. The agreement reached in the Ottawa Convention on Landmines provides another excellent example of their influence as NGOs brought domestic and foreign public opinion to problems of security.[550] Relief and development NGOs, national and international human rights groups, the International Committee of the Red Cross (ICRC), faith groups, academics, and the media also began to tackle early warnings of deadly conflict, aided by grass-roots organizations in different countries.

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[547] Garrigues *ibid* at 13.
[548] ICISS 2001 *supra* note 6 at 4.
[549] ICISS 2001 *ibid* at 14.
[550] ICISS 2001 *ibid* at 20.

Organizations such as the International Crisis Group (ICG) "monitored and reported on areas of the world where conflict appeared to be emerging and could result in violations of human rights or genocide." [551] The ICG during the late 1990s worked in Kosovo and brought attention to the crisis.[552]

> With the drafting of the Charter of the Nuremberg Tribunal in 1945 came the recognition in international law of the concept of "crimes against humanity" which could be committed by a government against its own people and not necessarily just during wartime. Then came the Genocide Convention of 1948, with its apparently explicit override of the non-intervention principle for the most extreme of all crimes against humanity. '[553]

It was in this context and according to the need to address this emotional, intellectual and legal tension, that the Government of Canada promoted the creation of the ICISS. While the ICISS Report recognized that political leaders are crucial in this respect, they recognized the importance of other actors as well. Political leaders are forced to be responsive to the demands and pressures placed upon them by their constituents and the media. Because of the external pressures, NGOs have become increasingly needed to contribute to the decision-making process.

IV.   Foundations and Philanthropic Organizations

If we consider foundations and philanthropic organizations as nongovernmental actors, or as supporters of NGOs, we can see how they too have been very influential at the early stages of the Responsibility to Protect movement. For example, "The Carnegie Corporation, William and Flora Hewlett Foundation, Rockefeller Foundation and Simons Foundation, all supported the

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[551] ICISS 2001 *ibid* at 71.
[552] Adele Simmons, and April Donnellan "Reaching across Borders: Philanthropy's Role in the Prevention of Atrocity Crimes" in Cooper and Kohler 2009 *supra* note 73 at 168. The ICG receives some of its funding from foundations which will be considered in affiliation with NGO funding. **[Simmons and Donnellan 2009].**
[553] Simmons and Donnellan 2009 *Ibid* at 17.

International Commission on Intervention and State Sovereignty (ICISS)."[554]   The new doctrine

shared a similar pattern to other achievements engineered by the human rights lobby. The first

achievement was the Rome Statute in 1998, which created the International Criminal Court, and

the second success, also supported by foundations and a coalition of Nongovernmental

Organizations (NGOs), was the agreement for the Mine Ban Convention as mentioned earlier.

The article by Simmons and Donnellan outlines what civil society groups and philanthropic

associations can do, especially when governments lack the political will to act.[555]   Philanthropic

associations have special tools they can employ with methods that differ from governments,

including resources and influence, the possibilities of quick action and independence.   The

Responsibility to Protect, the Mine Ban Treaty and the ICC provide important examples of the

establishment of human rights norms with the aid of civil society groups.[556]   In fact, most of the

attention to genocide since Rwanda has been brought about by NGOs funded by foundations; for

example, Human Rights Watch (HRW) and Amnesty International receive their funding from

foundations and not from government. It was in response to the challenge from Kofi Annan that

the Government of Canada, together with a group of major foundations, announced at the

General Assembly in September 2000 the establishment of the International Commission on

Intervention and State Sovereignty (ICISS).

V.   The Contribution of Founding Entrepreneurs

A number of important individuals can be attributed with a significant contribution to the

founding and articulation of the Responsibility to Protect norm. Foreign Affairs Minister Lloyd

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[554] Simmons, and Donnellan 2009 *ibid* in Cooper and Kohler 2009 at 163.
[555] Simmons, and Donnellan 2009 *ibid* in Cooper and Kohler 2009.
[556] Simmons, and Donnellan 2009 *ibid* at 164-165.

Axworthy, for example, initiated the Commission and chaired the Advisory Board, and his successor John Manley carried it through.[557] The Commission consisted of a group of international experts (not all from the West) led by two co-chairs, Gareth Evans and Mohamed Sahnoun. Other members included renowned academics and politicians: Gisèle Côté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Cyril Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein, and Ramesh Thakur.[558]

A strategy for carrying out the mandate and an agreement that the work process should be transparent, inclusive, and global was agreed to by the Government of Canada. A research directorate was established with the support of other governments and major foundations. The first meeting of the Commission took place on 5–6 November 2000, in Ottawa. A series of regional roundtables and national consultations were held in order that the Commission might hear a wide range of views. Particular emphasis was placed on the need to ensure that the views of affected populations were heard and taken into account, in addition to the views of Governments, IGOs and NGOs, and civil society representatives.[559] The Commission's plan was to consult as widely as possible and within a year they had visited around the world, including the countries of all five permanent members of the Security Council. The Commission also reached out to academics with a wide range of expertise. Individual Commissioners and members of the research team were also invited to many conferences and seminars.

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[557] ICISS *supra* note 6 p, IX.
[558] ICISS *ibid*   (Note: Gareth Evans is president and CEO of the International Crisis Group. In 2001 he was Cochair of the ICISS see other speeches and papers at http://www.crisisgroup.org, especially "From Humanitarian Intervention to the Responsibility to Protect," (2006) no. 3 Wisconsin International Law Journal 24, 101-20 and "Crimes Against Humanity: Overcoming Indifference," (September 2006) no. 3 Journal of Genocide Research 8, 325-39).
[559] ICISS *ibid* at 2.

Eleven regional roundtables and national consultations were held around the world between January and July 2001.

> In date order, they were held in Ottawa on 15 January, Geneva on 30–31 January, London on 3 February, Maputo on 10 March, Washington, DC on 2 May, Santiago on 4 May, Cairo on 21 May, Paris on 23 May, New Delhi on 10 June, Beijing on 14 June and St Petersburg on 16 July.[560]

Usually both of the Co-Chairs attended with some other Commissioners as well. In order to obtain the broadest range of views of national and regional officials, representatives of civil society, NGOs, academic institutions and think-tanks were invited to each of the meetings. Discussions took place on the basis of a paper prepared by the Commission. Certain participants were also asked to prepare papers on specific aspects of the issue. Each roundtable was selected to produce a summary report of the proceedings and outcomes of each of the discussions. The key Canadian domestic entrepreneurs in the early stages of the work of the Commission and the preparation of the ICISS Report were Bill Graham, Michael Ignatieff and Lloyd Axworthy. Efforts to gain an interview with Lloyd Axworthy have not been successful to date. I did, however, have the opportunity to hear Bill Graham and Michael Ignatieff speak in public about their role in the conception and birth of the Responsibility to Protect.

V.1   Lloyd Axworthy

During his time as Foreign Minister, Lloyd Axworthy launched the ICISS on 14 September 2000, stating that the goal was to begin a comprehensive debate on the issues, and to foster global political consensus on how to move from polemics, and often paralysis, towards action within the international system, particularly through the United Nations. He noted in an address in 2000 that during the time he had been Canada's Foreign Affairs Minister (for five years) the

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[560] ICISS 2001 *ibid* at 83.

meaning of security had changed. This also meant a shift in the international affairs language

from the discussions of states' rights and national sovereignty to the protection of civilians, war-

affected children, and language surrounding the threat of " terrorism and of drugs, open borders

and infectious diseases."[561] This made the rights of individuals the primary concern and

influenced the government's human security agenda. It was this shift in thinking that paved the

way for the Commission on the Responsibility to Protect.

As evidenced in his notes, Lloyd Axworthy was interested in the new way in which

governments, civil society and Nongovernmental Organizations worked together in making

changes in human security. He confirmed that the government of Canada actively sought a

partnership with civil society. Axworthy expressed the concern that sovereignty had protected

the perpetrators of ethnic cleansing in Bosnia, mass displacement in East Timor and Kosovo, and

genocide in Rwanda. "These crimes engage our conscience and responsibility," he wrote.[562] He

suggested civilians had become the primary target and foreign policy needed to change. This

was reflected in the UN Charter, the Genocide Convention, the Universal Declaration of Human

Rights, and the Rome Statute of the International Court. He noted that the shift to human security

did not mean the end of the state as it was the state that still held the authority over rules and

regulations.[563]

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[561]Notes for an address by the Honourable Lloyd Axworthy Minister of Foreign Affairs to the Woodrow Wilson
International Center for Scholars Washington, D.C. June 16, 2000.
[562] Axworthy 2001 notes *ibid.*
[563] Axworthy 2000 notes *ibid.*

V.2   Bill Graham

In his political career, Bill Graham served as Minister of Foreign Affairs, Minister of National

Defence, and Leader of the Opposition and Interim Leader of the Liberal Party of Canada.[564]

Bill Graham described the development of the norm in a presentation at the Munk Centre at the

University of Toronto from his own experience as a norm entrepreneur.[565] He stressed the need

to reflect and recognize that the concept is part of a larger human security agenda that emerged

after the end of the Cold War with changes in international law, diplomacy, and international

relations. He described the process whereby they had to think about how to "recast their

defence" and the concept of humanitarian intervention in that broader context.[566] He pointed out

that other changes were also taking place in security with the creation of the ICC, the Rome

Statute and the Anti-personnel Landmines Convention. He referred to these as the three pillars

in the human security agenda.[567] He further described how all moved together away from the

idea of the Westphalian notion of state towards recognizing ordinary citizens as the ones that

suffer the most in wars. While mainly soldiers in the First World War were killed, in the Second

World War it was mainly civilians and there was a recognition that the international community

must come up with legal concepts and military tools to respond.[568]

Bill Graham suggested that the Responsibility to Protect grew out of a specific conflict   – the

Kosovo conflict and the genocide by Milosevic. "We tried to intervene with UN authority but

Russia threatened to veto. NATO decided to intervene any way, even though it was understood

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[564] Bill Graham biography, http://en.wikipedia.org/wiki/Bill_Graham_(Canadian_politician).
[565] "Ten Years After the ICISS: Reflections for the Past and Future of the Responsibility to Protect" Munk Centre November 12th, 2011Keynote speech: Hon. Bill Graham.
[566] Bill Graham 2011 *ibid.*
[567] Bill Graham 2011 *ibid.*
[568] Bill Graham 2011 *ibid.*

this was illegal."[569] What developed was a notion of legitimacy instead of simple legality or illegality. There was therefore a perceived need to develop a concept that would allow intervention that was both legal and legitimate.[570]   He noted the Commission was set up with a broad representation of the international community to give it legitimacy, and when he became Foreign Minister as Lloyd Axworthy's successor he was asked by Kofi Annan "to sell it."   He recalled there was considerable resistance to the fundamental idea of intervention. He advised that at every international meeting he went to he distributed the Report. There were quite a few foreign ministers who were former professors like himself who thought this was a good principle. Over time, it evolved into a doctrine that contributed significantly to the human security agenda along with the Landmines Convention and the International Criminal Court.[571]

V.3   Michael Ignatieff

Another key leader in the second phase of the development of the norm; i.e., the creation of the ICISS report involving the shift from state sovereignty to state responsibility, was Michael Ignatieff.[572] I had the opportunity to hear him speak on the Responsibility to Protect at an event sponsored by Canadian Lawyers for International Human Rights.[573] He relayed to the audience his role in the evolution of the principle and informed the audience that in 2001 he was a member of the ICISS which released its report on the Responsibility to Protect.[574] In recalling his participation, he reminded the audience that Canada has had a strong role in international

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[569] Bill Graham 2011 *ibid.*
[570] Bill Graham 2011 *ibid.*
[571] Bill Graham 2011 *ibid.*
[572] Michael Ignatieff is best known in Canada as the former leader of the Liberal Party of Canada. He also has a distinguished academic career. He has taught at the University of British Columbia, the London School of Economics, and Harvard University. At Harvard he served as Director of the Carr Center for Human Rights Policy at the Kennedy School of Government between 2000 and 2005. He is the author of seventeen books, including "The Lesser Evil: Political Ethics in an Age of Terror" (2004) and "True Patriot Love" (2009).
[573] Canadian Lawyers for International Human Rights www.claihr.ca held on October 26, 2011 at Hart House, in the University of Toronto.
[574] In 2001 Michael Ignatieff while at Harvard was appointed to the Commission and they held a discussions in Quebec in 2001.

lawmaking and there are many distinguished Canadians in this area who have been especially influential. He referred to the Responsibility to Protect as an example of "Canadian norm entrepreneurship."[575] He explained that law often starts as a norm, moves forward to become a principle and evolves from customary international law to statutory law. There is often a gap between legality and legitimacy, however, and the Commission wrote a report that tried to put legitimacy and legality back together. He also mentioned that the Landmines Treaty was another example of imaginative leadership where efforts to prohibit the use of landmines were made by NGOs.

Michael Ignatieff indicated that Kofi Annan said he would be glad to have a report and the Secretariat side was set up in Canada. The Commission included Mohamed Sahnoun,[576] Gareth Evans,[577] Ramesh Thakur,[578] and others. They toured the world since they recognized the entrepreneurship of the norm had to not only affect the global north, but India and Rwanda and other countries in the South. They wanted a global consensus that on the one hand reinforced sovereignty as a moral value, but on the other hand enforced sovereignty as responsibility for the states' population. They also wanted to be sure not to create an "interventionist" charter.[579] He

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[575] Bill Graham Ten Years After the ICISS: Reflections for the Past and Future of the Responsibility to Protect Munk Centre, November 12th, 2011: Keynote Speech.

[576] Mohamed Sahnoun (Algeria) was Co-Chair of the Commission with Gareth Evans and Special Adviser to the Secretary General at the time. He has previously served as Special Envoy of the Secretary-General on the Ethiopian/Eritrean conflict (1999); Joint United Nations/Organization of African Unity (OAU) Special Representative for the Great Lakes of Africa (1997); and Special Representative of the Secretary-General for Somalia (March–October 1992). As a senior Algerian diplomat, he served as Ambassador to Germany, France, the United States, and Morocco. He also served as Deputy Secretary-General of both the OAU and the Arab League.

[577] Gareth Evans was foreign minister from 1988 to 1996 and is president emeritus of the International Crisis Group. He co-chaired the International Commission on Intervention and State Sovereignty, which introduced the responsibility to protect principle. He became Chancellor of the Australian National University in 2010 and was President of the Brussels-based International Crisis Group from 2000 to 2009. He was active in Australian politics and served a number of years as Cabinet Minister. He has written many books and published many articles in journals. One of his more recent books is "The Responsibility to Protect – Ending Mass Atrocity Crimes Once and for All" (Brookings Institute, Brookings Institution 2008).

[578] Ramesh Thakur is Director of the Centre for Nuclear Non-proliferation and Disarmament, and Professor of International Relations, at the Australian National University. He previously was the Senior Vice Rector of the United Nations University at the rank of Assistant Secretary-General.

[579] Michael Ignatieff, sponsored by ClAIHR, Hart House, University to Toronto, October 26, 2011.

remarked that they achieved harmony in Quebec in August 2001 when they came to agreement

on the report. For a Canadian this was an emotional moment. Ten days later the planes went

into the World Trade Center and the Responsibility to Protect disappeared off the political

agenda. Then there was Iraq and the Responsibility to Protect could not be legitimately used to

show that there were weapons of mass destruction or that there were not. There were indeed

horrible human rights issues in Iraq but this was not the primary reason for the attack on Iraq.[580]

VI.   The Participation of NGOs and Non-state Actors

The following section of this chapter is devoted to the role of NGOs and actors in the

development and implementation of the norm. In the selection of organizations and/or persons

to interview, I determined that the term NGOs or human rights advocates, while excluding

government bodies, includes a wide range of national and international organizations as well as

the media, scholars and advocates. A clear distinction between them and other entities, however,

is that the term NGO excludes government bodies. To narrow the field, I chose to focus on

NGOs that have declared some interest in the Responsibility to Protect, or more generally in

humanitarian intervention. (See Appendix B and Appendix C for sample letters to interviewees).

While these NGOs have played a role in Phases II and III of the entrepreneur framework, they

are also an important and necessary part of the current transnational governance system. NGOs

work outside of and formally within the UN constellation of relations. NGOs are represented in

large part by individuals who support and advocate for the ideal of the Responsibility to Protect

principle itself, since they generally do not represent the state but rather push or shame the state

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[580] Michael Ignatieff, *ibid.*

into action. Some of the most prominent examples of NGO involvement are found in the fields of human rights.

The data I have collected will help highlight the web of actors involved, their personal views, their written work and the institutions, where appropriate, that they are involved with. In summarizing the interview data, the findings provide insight into the following areas: evolution of the norm, its legal versus moral states motives, goals or objectives, state or government relations, and priorities and concerns. The purpose of the pursuit of these questions is to gain a sense of their understanding of and their relationship with the Responsibility to Protect norm. A table follows with a description of the organizations and individuals approached or reviewed and a categorization of institutions according to my own classification system. A number of different organizations were approached, including advocacy groups for the Responsibility to Protect, research think tanks, humanitarian organizations, human rights groups and academic institutions along with prominent individuals who have been or are involved in the Responsibility to Protect. A description of the most influential organizations (most often referred to in the literature and by other groups) which were approached and proved to be open to further inquiry follows. (See Appendix D for details with regard to non-governmental organizations).

We will see to what extent the aims of these NGOs are humanitarian in nature and gain a deeper understanding of how they perceive the norm – its purpose and intent and how it functions in a transnational environment. We will also see how they work independently from governments but at the same time work to influence governments in their decision-making. The practice of 'responsible advocacy' obliges NGOs to have the responsibility to remain independent from

governments and this gives them more freedom to express views that may differ from current government policy and renders their influence significant in its development and interpretation.

In a recent book entitled "Paved with Good Intentions" Nikolas Barry-Shaw and Dru Oja Jay criticize development NGOs for their closeness to state political positions.[581] It is inevitable that NGOs, in addition to being altruistic, will also have interests to satisfy supporters, often because of the need to generate income and raise the profile of the group and enhance staff skills. This may lead them to focus on more high profile cases or even to become closer to their respective governments. This is the reason why international NGOs should use their resources to strengthen local NGOs whenever possible in order to aid them in their efforts to maintain a distance from government. They can also assist, where appropriate, in the lobbying of the UN and other international organizations. I remain convinced, however, that overall NGOs whose mandate it is to support the Responsibility to Protect are in a stronger position to advocate for a moral value than the state which suffers from too many conflicting interests, including from its own domestic population.

We can also look to Canada where NGOs support the Responsibility to Protect in spite of the Canadian governments' negative position. I have often heard it said it is difficult to contest after reviewing the history that without NGOs or civil society the Responsibility to Protect would never have come into fruition. This being the case, I wanted to gain as much information as I could first hand of their role in its development, implementation and evolution to customary international law. Have NGOs, I asked, virtually co-opted the Responsibility to Protect? While their original influence may be debated, there is little question of their importance to its

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[581] Barry-Shaw Nikolas and Dru Oja Jay *Paved with Good Intentions* (Halifax and Winnipeg: Fernwood Publishing, 2012) **[Barry-Shaw and Jay 2012].**

continued survival today. Although some NGOs wish to remain neutral and objective regarding

military intervention and coercive measures, there are others who openly advocate on behalf of

the Responsibility to Protect. These activist groups are my main interest. Interviews that I

conducted with NGOs were illuminating in response to my request to describe their role in the

development of the Responsibility to Protect. The interviews not only show the role of

individual organizations but of numerous collaborative efforts as well.

The following table lists the Nongovernmental Organizations who participated in the study, by

name of individual, category, location and date. A brief description of these organizations and

their purpose is interwoven within the narrative stemming from the interviews, although one or

two mentioned that they spoke only for themselves and that their view did not necessarily reflect

the views of the organization with which they were affiliated.

As will be evidenced from the table below I have categorized the information according to the

organization, the interview and/or the individual within the following five categories as follows:

key persons, advocacy groups, applied conflict resolution, research thinktanks, conference

proceedings, human rights and the federal government.

Table 3: NGO Representatives and Other Key Players Interviewed

Type of Organization	Name of Organization	Persons Interviewed	Date	Interview Method	Place
Key Persons		Loyd Axworthy Bill Graham Carolyn McAskie Michael Ignatieff	12/11/2011 8/12/ 2011 26/10/2011	Conference Skype Conference	Toronto Toronto
Advocacy Group	Global Centre for the Responsibility to Protect at the City University of New York	Naomi Kikoler	9/11/2011	Face to Face (F2F)	New York, New York
	International Coalition on the Responsibility to	Marion Arnaud	5/12/ 2011	F2F	New York, New York

	Protect (ICRTOP)				
	Montreal Institute for Genocide and Human Rights Studies	Kyle Matthews	12/11/2011 and Conferences	F2F Skype	Montreal, Quebec
Applied Conflict Resolution	International Crisis Group	Heather Sonner	5/12/2011	F2F	New York, New York
	Global Action to Prevent War	Bob Zuber	4/11/ 2011	Skype	New York, New York
Research Thinktanks	Berghof Conflict Research Centre	Veronique Dudouet	31/10/2011	Email	Berlin, Germany
	Centre for International Governance and Innovation and Balsillie School of International Affairs	David Dewitt David Welch Louise Frechette Lucie Edwards Mark Sedra Andrew Thompson Evan Cinq-mars	2/11/2011 2/11/ 2011 21/6/ 2011 31/10/ 2012 2/11/ 2011 2/11/ 2011	F2F F2F Skype Skype F2F F2F	Waterloo Waterloo Quebec Ontario Waterloo Waterloo
	NATO Watch	Ian Davis	10/11/ 2011	Skype	Ross Shire, Scotland
	The Geneva Centre for Security Policy	Khalid Koser	21/2/ 2012	F2F	Geneva Switzerland
Conference Proceedings	Ten Years After – The Munk Centre	Bill Graham	12/11/2011	Speaker	Toronto, Ontario
Human Rights	Canadian Lawyers for International Human Rights (CLAIHR)	Jillian Siskind Michael Ignatieff	26/10/2011 23/11/2011 26/10/ 2011	Speaker F2F Speaker	Toronto, Ontario Toronto, Ontario
Federal Government	Canadian UN Ambassador	Elissa Goldberg	20/2/2012	F2F	Geneva, Switzerland

Certain human rights organizations approached are not included in the analysis because their interests did not coincide. Some found it to be a very worthwhile concept but explained it addresses military intervention while their work focuses more on the transformation of armed conflicts through negotiation, or nonviolent conflicts through unarmed resistance, or post-war peace building.[582]

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[582] Veronique Dudouet, interview, Berghof Conflict Research Centre, Berlin Germany, October 31, 2011.

As stated earlier, the spreading of information and knowledge is essential to the development of soft law norms. One of the primary functions of these non-governmental organization is the dissemination of information regarding the norm of the Responsibility to Protect through reports, conferences, studies, research analysis, op-eds, papers, and debates. Also, as I have stated earlier, collaboration is an important aspect of transnational governance and of the operations of INGOs. One important strategy for the promotion of the Responsibility to Protect is through collaboration efforts and cooperation with other organizations. Collaboration with other partners facilitate their objectives. One of the themes that comes through in these accounts is the importance of collaboration and of cooperation.

VI.1   Dissemination of the Norm. Cooperation and Collaboration

The first NGO I sought to approach was the International Crisis Group (ICG). While I was unable to obtain an interview with the organization, I am providing a description of the ICG New York and their operation which does have corresponding interests with the Responsibility to Protect. The ICG is an applied conflict resolution group according to my classification. They describe themselves as an independent, non-profit, Nongovernmental Organization committed to preventing and resolving deadly conflict.[583] They provide a nonpartisan source of analysis and advice to governments, and intergovernmental bodies like the United Nations, European Union and World Bank, on the prevention and resolution of deadly conflict. Its mission is to act as an indispensable source of information for governments and a wide range of institutions actively working towards peace and conflict resolution. "Crisis Group was founded in 1995 as an international Nongovernmental Organization on the initiative of a group of well-known transatlantic figures. The idea was to create a new organization that would act as the world's

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[583] International Crisis Group, NewYork, USA. http://www.crisisgroup.org/

eyes and ears for impending conflicts, and with an influential board that could mobilize effective action from the world's policymakers."[584]

The Crisis Group "currently employs worldwide some 130 permanent staff, representing between them 49 nationalities and speaking 47 different languages, plus at any given time around 20 consultants and 40 interns."[585] It publishes reports and briefing papers, as well as the *Crisis Watch* bulletin assessing every month the current state of play in some 70 countries or areas of actual or potential conflict. Publications are distributed widely by email.[586] They conduct field-based analysis, policy prescription and advocacy, with key experienced-in-government staff and an active Board of Trustees. Louise Arbour, former UN High Commissioner for Human Rights and Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda became Crisis Group's President and CEO in July 2009. She succeeded Gareth Evans, former Foreign Minister of Australia (1988-96) who served as President of the organization between January 2000 and July 2009.

Crisis Group claims to play a major role by ringing early warning bells in scores of conflicts or potential conflict situations around the world, helping policymakers in the UN Security Council, regional organizations, donor countries and others with major influence, and in the countries at risk themselves, to do better in preventing, managing and resolving conflict, and in rebuilding as well as offering new strategic thinking on some of the world's most intractable conflicts and crises.[587]

In my first interview with Kyle Matthews who works with The Montreal Institute for Genocide and Human Rights Studies (MIGS), alerted me to the existence of a strong collaborative network

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[584] *Ibid* http://www.crisisgroup.org/
[585] *Ibid* http://www.crisisgroup.org/
[586] *Ibid* http://www.crisisgroup.org/
[587] *Ibid* http://www.crisisgroup.org/ This suggests it is not totally at arm's length from government.

on the Responsibility to Protect. [588]   "We work and train with the UN Office of Genocide,

training diplomats from national governments. These are ways we share our knowledge and

authority."[589] They carry out the work through networking, high profile events, coalitions, and

civil society. He added they want to build a larger network of people working on the issue. "We

want to become a hub," he said. [590]

Mr. Matthews also advised MIGS promotes the Responsibility to Protect through education and

advocacy. The Will to Intervene Project (W2I) is a research initiative that focuses on the

prevention of genocide and other mass atrocity crimes. Mr. Matthews regards it as an advocacy

organization. Genocide experts "seek to understand how to pressure political leaders to act in a

preventive manner to halt massive human rights abuses before they escalate into genocide."[591]

Consistent with the way in which norms evolve, the W2I team disseminates its research findings

on genocide prevention amongst politicians, policy makers, global think tanks, scholars, the

media, and the wider public. It promotes research findings through presentations, municipal

outreach, policy briefings and training, new studies and conferences.

> The W2I Project seeks to understand how to operationalize the principles of the
> International Commission on Intervention and States Sovereignty on the Responsibility to
> Protect. Research focused originally on how to mobilize the will to intervene in Canada
> and the United States. Scholarly research and interviews highlight the cases of the United
> Kingdom and South Africa. The project's fundamental goal is to identify strategic and
> practical steps to raise the capacity of government officials, legislators, civil servants,
> Nongovernmental Organizations, advocacy groups, journalists, and media owners and

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[588] Kyle Matthews Interview, Montreal Institute for Genocide and Human Rights Studies, Kyle Matthews is the
Senior Deputy Director of the Will to Intervene Project at the Montreal Institute for Genocide and Human Rights
Studies, Concordia University. He joined MIGS after more than five years of diplomatic service at the United
Nations High Commissioner for Refugees. He is the President of the Canadian International Council in Montreal
and a member of the Montreal Council on Foreign Relations. In 2011 he joined the New Leaders program at the
Carnegie Council for Ethics in International Affairs and the advisory board of the Canadian Centre for the
Responsibility to Protect.[588]
[589] Kyle Matthews interview *ibid.*
[590] Kyle Matthews interview *ibid.*
[591] The Will to Intervene Project (MIGS)– The Montreal Institute for Genocide and Human Rights Studies).

managers so they can effectively pressure governments to take action to prevent future genocides."[592]

MIGS authored the report *Mobilizing the Will to Intervene: Leadership & Action to Prevent Mass Atrocities (W2I)* in 2009. The rationale of the report was to 'operationalize the Responsibility to Protect principles in Canada and the United States to parallel efforts being made in the international realm.[593] Among the suggestions listed by the W2I report was a call on the government of Canada to create an interdepartmental Coordinating Office for the Prevention of Mass Atrocities, the creation of a Canadian prevention corps, and a call on parliamentarians to exercise their initiative to bring to the public's attention specific instances in which the Responsibility to Protect could be implemented.[594] The authors of W2I argued

> The combined impact of poverty and inequality, rapid demographic growth, ethnic nationalism, and climate change on international peace and security make it strategically imperative to operationalize the principles of the *Responsibility to Protect* report. These underlying structural factors increase the risks of mass atrocities perpetrated against civilians and pose a credible danger to Canadian and American national interests, ...[595]

Canadian Senator Roméo Dallaire created the All Party Parliamentary Group for the Prevention of Genocide and Other Crimes against Humanity. Although the group provides a means by which Canadian parliamentarians can discuss matters pertaining to genocide and mass atrocities, it is not a formal, regular parliamentary committee. As a result, the authors of W2I argued that it is imperative for this informal committee to be formally recognized as a parliamentary committee, with all of the rights, privileges and resources attached to regular committees.[596]

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[592] *Ibid* http://migs.concordia.ca/W2I/W2I_Project.html
[593] Montreal Institute for Genocide and Human Rights Studies. "Mobilizing the Will to Intervene Leadership & Action to Prevent Mass Atrocities," *Montreal Institute for Genocide and Human Rights Studies* (2009), viii. <http://migs.concordia.ca/W2I/documents/ENG_MIGS_finalW2IAugust09.pdf> (accessed November 2 2010)
[594] Montreal Institute for Genocide and Human Rights Studies. *Ibid* at ix.
<http://migs.concordia.ca/W2I/documents/ENG_MIGS_finalW2IAugust09.pdf> (accessed November 2 2010).
[595] Montreal Institute for Genocide and Human Rights Studies. *Ibid* at 8.
[596] Montreal Institute for Genocide and Human Rights Studies. *Ibid* at 23.

Jillian Siskind also reported that her organization Canadian Lawyers for International Human

Rights (CLAIHR), conducts symposiums and raises awareness. They also talk to students and

lawyers, speak at conferences, publish articles as well as relying on other forms of

communication. "We get people talking about it and understanding it. We are concerned with

the protection of international human rights for people."[597]   The mandate of Canadian Lawyers

for International Human Rights (CLAIHR) is to raise awareness and promote human rights

within Canada and abroad. [598] A roundtable report called "Engaging the Responsibility to

Protect civil society" was produced in 2008. [599]

After the world summit they looked at how they could consolidate the network; moving the

loosely affiliated groups to create a stronger group of NGOs who work actively in support of the

Responsibility to Protect. CLAIHR is also working to increase its collaboration with other

advocates engaged in human rights activities. The purpose of this approach is to allow them to

have a direct impact on policy and lawmaking and to help Canada regain its position as a

forerunner in the area of human rights. In this context, "CLAIHR strongly supports and

promotes the use of the doctrine of the Responsibility to Protect." [600]

Evan Cinq-Mars, speaking at a Conference on the Responsibility to Protect, suggested his

organization (not identified) has a mandate to collaborate by bringing together NGOs from all

around the world and mobilizing them to push for action in countries like Sudan.

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[597] Jillian Siskind interview Canadian Lawyers for International Human Rights, Toronto, Ontario October 26, 2011 and November 23, 2011 Jillian Siskind is President of CLAIHR. Jillian Siskind is Prosecution Counsel for Tarion Warranty Corporation and is the former Senior Policy Advisor for Ontario's Minister of Community Safety and Correctional Services. She also worked at the International Criminal Tribunal for the former Yugoslavia where she was involved with appeals concerning both the Yugoslav conflict and Rwandan genocide and participated in the drafting of the indictment of Slobodan Milosevic.
[598] Canadian Lawyers for International Human Rights (CLAIHR)http://claihr.ca
[599] World Federalist Movement's Project on "Engaging Civil Society" 21 Feb 2008.
http://www.responsibilitytoprotect.org/files/AP%20Civil%20Society%20Consultation%20Final%20Report.pdf
[600] *Ibid* http://claihr.ca/wordpress/our-work/.

We are creating global centres for R2P and attempting to establish a coalition of NGOs. The strategy to build a coalition requires extensive work on the part of numerous players. We need to raise awareness and support and develop partners. We are fighting to make sure consensus is maintained and political will mobilized. We work at the national level and at the regional level.[601]

Lucie Edwards of the Centre of International Governance (CIGI) advised

starting in 2007 the World Federation Movement held eight round tables in key regional places and had regional discussions of the Responsibility to Protect in places like Bangladesh, taking the opportunity to tap into regional philosophy and regional organizations.[602]

NGOs also influence through publications, op-eds, social media, twitter, parliamentary groups, graduate students, TV, training for journalists on the Responsibility to Protect, and work with the UN Office. NGOs jointly strategize and co-convene events. They also pursue other avenues such as winning the support of mayors, and the Office of Genocide and influence how decisions are made.[603]

CIGI is a research centre/think tank located in Waterloo, Ontario, and is associated with the University of Waterloo. CIGI produces "Policy briefs to develop information and analysis, followed by recommendations on policy-oriented topics" for the use of "policy makers, policy specialists, the media and interested scholars."[604] CIGI commentaries are designed to advance public understanding and influence public debate through providing expert analysis of current international governance topics, written in the style of newspaper op-eds. CIGI papers present

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[601] Evan Cinq-Mars "Ten Years After the ICISS: Reflections for the Past and Future of the Responsibility to Protect" Munk Centre, November 12th, 2011.

[602] Lucie Edwards, interview Centre for International Governance and Innovation, June 21. 2011 Lucie Edwards served as Canadian High Commissioner to India (2003-06), South Africa (1999-2003) and Kenya (1993-95). She was awarded the Public Service Award of Excellence, its highest award, for her humanitarian work as Ambassador to Rwanda in 1995. She has also served at the Canadian Embassy in Tel Aviv (1977-1980) and in South Africa (1986-89).

[603] Lucie Edwards *ibid*; Centre for International Governance and Intervention, Waterloo, Ontario (CIGI). http://www.cigionline.org/

[604] Edwards 2011 *Ibid*. http://www.cigionline.org

policy positions and/or research findings, insights or data relevant to policy debates and decision making. This category includes papers in series linked to particular projects or topic areas.

The organization also holds conferences and produces reports that summarize and synthesize the main ideas, conclusions and recommendations from those conferences or meetings. It also produces Special Reports which "include multi-author studies arising from CIGI projects and research conducted in collaboration with think tank partners."[605] "Op-eds showcase the expertise of CIGI researchers on a range of relevant global governance issues and are published in newspapers and websites. Such op-eds reveal how their experts "interpret current trends in world affairs."[606] In addition, interviews with CIGI experts appear weekly on line and address time-sensitive topics and world events in international governance. CIGI also produces books which result from CIGI-sponsored projects or the work of CIGI fellows and scholars.

In an interview with Marion Arnaud from the International Coalition on the Responsibility to Protect (ICRtoP) she spoke about how civil society was instrumental in taking the Commission's work beyond the UN approval. "In 2001, when the ICISS report was put together on the Responsibility to Protect, the government of Canada was one of the ones really supportive of these initiatives. They approached World Federalist Movement (WFM) and asked if they could help them see if there was any appetite for this norm." [607] (Which it did, of course). In New York there was a group of five to six NGOs who started really pushing for its acceptance. This group included Oxfam, Human Rights Watch, Refugees International, WFM and some other groups. They started by talking about what it would take for the Responsibility to Protect to

[605] Edwards 2011 *Ibid.* http://www.cigionline.org
[606] Edwards 2011 *Ibid.* http://www.cigionline.org
[607] Marion Arnaud, International Coalition for the Responsibility to Protect, New York, Dec. 5, 2011.

become more than just an idea. They really believed that without a bottom up process, and

without strong civil society input, it would not succeed. In that way it was similar to the

Landmines Treaty, where it needed a strong network or organization and thereby acted

accordingly.[608]

The ICRtoP and the World Federalist Movement - Institute for Global Policy, New York is an

advocacy group that

> brings together NGOs from all regions of the world to strengthen normative consensus
> for the Responsibility to Protect, further the understanding of the norm, push for
> strengthened capacities to prevent and halt genocide, war crimes, ethnic cleansing and
> crimes against humanity and mobilize NGOs to push for action to save lives in the
> Responsibility to Protect country-specific situations.[609]

ICRtoP is important in its focus on the norm and the dissemination of information surrounding

the norm – its implementation and its potential use, including the three pillar approach. It has

produced multiple documents and advises on events as they occur in the United Nations, regional

groups, other NGOs as well as think tank activities concerned with the Responsibility to Protect.

Marion Arnaud (ICRtoP) suggested there was a two-pronged approach – relationship building to

create a coalition and the creation of a more research-oriented and high level advocacy center.

She explained that is why they have the global center which incorporates many more groups.

WFM encouraged groups who worked on similar missions to push the idea of the Responsibility

to Protect forward. NGO colleagues worked to be sure the Responsibility to Protect would be

supported in the outcome document.   Governments from southern countries, such as South

Africa and Mexico also influenced the General Assembly to adopt the world summit document.

This was not a small accomplishment. In fact, it was a historical achievement reached after

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[608] Marion Arnaud, interview, *ibid.*

[609] The International Coalition for the Responsibility to Protect (ICRtoP). www.responsibilitytoprotect.org

many weeks of negotiation. Unfortunately, however, now it has become a partisan issue in

Canada.[610]

Marion Arnaud talked about their project on UN reform and UN elections. She suggested it is

beneficial in terms of looking at how civil society can lobby for better accountability,

transparency and information.[611] Reinforcing the idea that the Responsibility to Protect is not

just 'a Western idea.' Ms. Arnaud also indicated that in West Africa it was very easy to

introduce the concept because they already had been considering it but just did not have the right

words to formulate it:

> The African Union had endorsed the concept of R2P.   The culture of response is
> different everywhere, however, which is a major question when it comes to the
> universality of the concept. We essentially tried to make the language part of the UN.
> We think it is crucial to engage NGOs because they are the ones talking to the region.
> We tried to have a consultative method of working with five goals for the coalition:
> increase awareness of R2P among governments, NGOs and the public; push for
> international, regional and sub-regional and national endorsements of R2P; encourage
> governments, regional and subregional organizations and the UN to build the capacity to
> prevent and halt genocide, war crimes, ethnic cleansing and crimes against humanity;
> help build and strengthen global support from governments for RtoP; and, push for action
> to save lives in RtoP country-specific situations.[612]

Now there are 40 organizations with very different mandates.   Some of ICRtoPs closest

partners from civil society include the Asia-Pacific Centre for the Responsibility to Protect,

Global Action to Prevent War, United Nations – Sweden, World Federation of United Nations

Association, and Human Rights Watch, among others. Although they have a variety of different

mandates, these groups are embracing the Responsibility to Protect as a framework and linking

their mandates to it.[613] Naomi Kikoler of the Global Centre for the Responsibility to Protect at

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[610] Marion Arnaud, interview, International Coalition for the Responsibility to Protect, New York, Dec. 5, 2011.
[611] Arnaud, Marion interview, *ibid*. Marion Arnaud is the Senior Outreach Officer at the International Coalition for the Responsibility to Protect. Her Master's thesis focused on the Responsibility to Protect in Darfur.
[612] Arnaud Marion interview *ibid* at 102.
[613] Marion Arnaud interview *ibid.*

the City University of New York spoke of the co-convening of events and the regular back and forth interaction.[614] Having shared goals helps them to maximize their impact. They also educate other NGOs on the Responsibility to Protect so they can be supportive of it.[615]

The Global Centre for the Responsibility to Protect was founded in 2008 by a number of supportive governments, as well as leaders who come from the human rights community. Some of the main organizations involved include the International Crisis Group, Human Rights Watch, Oxfam International, Refugees International, and WFM-Institute for Global Policy.[616] The mission of the Global Centre for the Responsibility to Protect is to create the principle of the Responsibility to Protect into a practical guide for action in the face of human atrocities. The Centre approaches its goal through the use of advocacy in the case of specific humanitarian crises, engages in research regarding the Responsibility to Protect, and helps states build capacity. It works closely with other NGOs, governments and regional bodies whose goals are to implement the Responsibility to Protect. The Global Centre serves as a resource and a forum for governments, international organizations and NGOs.

With regard to his organization, Ian Davis of NATO Watch referred to mechanisms such as 'shadow summits' to NATO's own summit.[617] NATO Watch Ross-shire UK is an independent, not-for-profit 'virtual' think tank which examines the role of NATO in public life and advocates for more openness, transparency and accountability within the Alliance. NATO Watch was

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[614] Naomi Kikoler, Director of Policy and Advocacy leads the Global Centre for the Responsibility to Protect's work on efforts to advance the Responsibility to Protect. She is the author of numerous publications. Prior to her association with the Centre in 2008, she worked on policy for Amnesty International Canada. She also clerked in the Office of the Prosecutor at the United Nations International Criminal Tribunal for Rwanda.

[615] Naomi Kikoler interview Global Center for the Responsibilty to Protect. http://globalr2p.org/

[616] The Global Centre for the Responsibility to Protect. http://www.globalr2p.org/

[617] Ian Davis, interview, NATO Watch, November 10, 2011 Ian Davis is the founding director of NATO Watch and is also an independent human security consultant. He has a background in government, academia and the nongovernmental sector. He received both a PhD and BA in Peace Studies from the University of Bradford in the United Kingdom. He was Executive Direction of the British American Security Council (BASIC) from 2001 to 2007.

founded by Dr. Davis in 2009 and was launched at an inaugural Shadow NATO Summit in Brussels in the spring of 2009. NATO Watch engages in research and analysis of policy questions, provides a news briefing service, distributes a monthly e-journal of media stories on NATO policy and activities, provides opinions, sponsors conferences and events, including an annual shadow NATO Summit and provides consultancy and workshops. Its mission is to increase transparency, to stimulate engagement and increase participation in NATO's policy making. By creating networks of individuals and institutions it aspires to reform NATO in ways that include shared democratic and humanitarian values, including human rights and civil liberties, the Responsibility to Protect, transparency and the promotion of peace and cooperative security approaches as well as strengthening international law.[618]

The vision for NATO Watch states that "The North Atlantic Treaty Organization (NATO) [is] at the heart of a new 'moral, muscular multilateralism,' a cooperative approach to world problems that uses international organizations and law to the fullest."[619] NATO Watch relies on voluntary associates and partners. It receives no large-scale or government funding and depends on donations. Its work includes policy input to strengthen NATO's approaches to conflict prevention, crisis management, peace building, arms control and disarmament and cooperation with non-members (particularly Russia).

Bob Zuber, Global Action to Prevent Wars, discussed how his organization interacted with every part of the UN system on a daily basis.

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[618] NATO Watch. www.natowatch.org
[619] *Ibid.* www.natowatch.org

> The interaction we have is informal. We have off-the-record briefings and so on. Clearly they do not give us credit for what we do but there are ways we can see a concrete impact from our work, whether it is in delegations or UN staffers.[620]

Global Action to Prevent War is an emerging transnational network (according to my classification, an applied conflict resolution centre) dedicated to practical measures for reducing global levels of conflict and to removing the institutional and ideological impediments to ending armed violence and severe human rights violations. A few years ago they held a four day event on the 'third pillar' of the Responsibility to Protect, in part as preparation for an upcoming General Assembly Debate on that same topic. Global Action has been working to create collaborative activities in national capitals, and also occasionally co-organizes events in New York that "help diplomats to clarify responsibilities and allow fresh voices from diverse regions to address UN officials and diplomatic missions on their security concerns and interests."[621] Their focus tends to be on both complementary (regional and secretariat) mandates for atrocity crime prevention as well as specific capacity requirements for the 'early and decisive response' to the threat of such atrocities. Two events they held focused on peace building strategies and the linkages between the gender and Responsibility to Protect communities. New York partners include the World Federation of UN Associations, the Friedrich Ebert Stiftung and the ICRtoP, the WFM as well as overseas participants from Armenia, Belgium, Brazil, Cote d'Ivoire, Nigeria, the UK and Venezuela.[622] They have also produced an 'E Book' entitled "Operationalizing the Responsibility to Protect: A Contribution to the Third Pillar Approach." The book features essays by Melina Lito and Robert Zuber with contributions from Daniel Fiott of Madariaga College of Europe Foundation and Joachim Koops of the Global Governance Institute.

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[620] Bob Zuber interview, Global Action to Prevent War, New York, November 4, 2011.
[621] Global Action to Prevent War. http://www.globalactionpw.org/
[622] *Ibid. www.globalactionpw.org*

VI.2   Difference between the Responsibility to Protect and Humanitarian Intervention

Louise Frechette, also of CIGI, suggested one of the key distinctions between the Responsibility to Protect as a formal principle and humanitarian intervention is that human intervention started long before the term was coined with early interventions after the Cold War. Somalia and Bosnia were two examples of the decision to deploy international forces - not to take control of a territory but to provide assistance to civilians in civil conflict. Somalia was threatened and Bosnia attempted to provide humanitarian relief and protect citizens. "Therefore, she notes, the notion of protection predates the concept itself."[623]

Kyle Matthews of the Montreal Institute for Genocidal Studies (MIGS) expressed some caution regarding the influence of academics regarding the Responsibility to Protect.

> We have spent time looking at the academic field of inquiry. We have found academic input to be pretty general. They are much more categorical than the situation permits. Their careers are about talking to other academics. Most academics are at arm's length while our job is to get into the nuance of things. We make that disclaimer to all the academics who call us.[624]

VI.3   NGOs and the UN

While NGOs appeal to their own governments as well as governments of different nations, a very important part of their influence is with regard to the UN as a key international organization. It is this relationship that is instrumental in furthering the doctrine and in rounding out the governance relations between civil society, state and international institutions.

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[623] Frechette, Louise Interview, Centre for International Governance and Innovation, Waterloo, Ontario, June 21, 2011 Louise Frechette, (affiliated with CIGI) was also involved with the Responsibility to Protect in its early stages. Madame Louise Fréchette is a CIGI distinguished fellow, having previously served as UN deputy secretary-general . She joined CIGI as a distinguished fellow in 2006, following a notable career. She previously served as UN deputy secretary-general. Fréchette was the Deputy Minister of National Defence of Canada from 1995 to 1998.
[624] Kyle Matthews interview, *supra* note 588.

Lucie Edwards (CIGI) spoke of a specific instance where NGOs influenced the UN.

> In Nepal during the Maoist insurgency a state of emergency was declared. Political parties were suspended. All of the NGOs systematically set up a large operation in Nepal and NGOs became their eyes and ears.[625]

VI.4   NGOs and Global Governance

What is interesting is that in the Commission Report there was some criticism of the place of NGOs in the development of the norm. The Report, in reference to NGOs, states

> ."..they are seen often as lacking in policy making experience, frequently as unhelpfully divided...and sometimes reluctant publicly (as distinct from privately) to endorse coercive measures which may be necessary."[626]

In my view the authors failed in some ways to see the increasingly important role that nongovernmental actors would play, both then and now. My own experience with the individuals I interviewed and their organizations and research on NGOs as norm entrepreneurs generally presents a different perspective of professionalism and cooperation along with an understanding of the need for coercive action under certain circumstances. They have shown their strong support for a principle of great significance in a world that has now agreed to end genocide and other human atrocities.

Because of the growth of civil society, international and global governance is no longer restricted to government or intergovernmental institutions like the UN and the EU. Many institutions function in between individual citizens and family and government.[627] The shift is from government to governance, or global governance and states. Intergovernmental organizations no

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[625] Lucie Edwards interview *supra* note 602.
[626] ICISS *supra* note 6 at 78.
[627] Logister, Louis "Global Governance and Civil Society, Some Reflections on NGO Legitimacy"(August 2007) 3(2) Journal of Global Ethics, 165-179 **[Logister 2007].**

longer hold all the political power and NGO capabilities are growing rapidly. Not only do they carry out traditional advocacy and humanitarian activities they also are involved in observing governmental institutions, lobbying, standard setting and monitoring. Over 2700 NGOs are registered with ECOSOC.[628]

Mertus explores the potential for "bottom up" democracy that means the participation of social movements in the development, articulation and application of international norms.[629] According to this view, state structures are not the only organizational form in transformative social change. Transnational and non-state entities do wield influence over the development of new legal norms and participate in their acceptance as legitimate and authoritative. These "interpretive communities create law and give law meaning through their own narratives and precepts...not only do they have access to discourse over changing norms, but also to some extent they are the discourse."[630] The transnational activities and networks they are involved in are used strategically to support their own goals.[631] Certain human rights treaties and other governmental documents form the basis of their advocacy and provide authority for international norms that may be conceived of as law.[632]

While the Responsibility to Protect focuses on the obligations of states to provide meaningful human security, much of the concept and policy development, as well as the actual application of the concepts (prevention, reacting, rebuilding) is being carried out by these Nongovernmental Organizations and their coalitions. It is becoming apparent that the provision of human security has expanded beyond the borders of the state and has contributed to the improvement of the international community's ability to prevent mass human rights abuses and genocide.

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[628] Logister 2007 *ibid* at169
[629] Mertus, 1999 *supra* note 32 at 537.
[630] Mertus 1999 *ibid* at 540.
[631] Mertus 1999 *ibid* at 542.
[632] Mertus 1999 *ibid* at 543.

Because of their participation in governance, Nongovernmental Organizations (NGOs) have the potential to create a more democratic global government. Ironically, however, states that could benefit most from the presence of NGOs are those that suppress them. The son of Omar Gaddafi, for example, wrote in his PhD thesis that authoritarian governments do not represent their people's interest because they exclude them from the decision-making process.[633] Obiora Okafor (2004) reminds us that some NGOs are struggling under repressive governments making it harder for their influence to be heard or seen. This does not mean that these governments are totally impervious to social pressure. As a result of accessibility issues, however, such organizations have not been approached, leaving a gap in the research possibly to be filled later if the government situation changes as it has in Libya, for example.

It is clear from the above that NGOs have taken their role of norm entrepreneurs in support of the Responsibility to Protect seriously and have been and continue to be critical in the understanding and evolution of the norm. Let us then take a longer look at the responses from those being interviewed with regard to whether they see the Responsibility to Protect as a moral or a legal entity, a fundamental question with regard to its status as *lex ferenda* or *lex lata* and customary international law. It is the perception of those experts working with the Responsibility to Protect that I sought to get that helps us to deconstruct the evolution of the principle from an idea or concept to a legal norm.

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[633] Saif al-Islam Gaddafi, (published under the surname Alqadhafi) *The Role of Civil Society in the Democratisation of Global Governance Institutions: From Soft Power to Collective Decision Making?* PhD Dissertation, Senate House Library, University of London, 2004).While the authenticity of the work of Gaddafi as of late has been questioned, the statements itself bears consideration. The Telegraph 27 April 2013. http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8350867/Libya-LSE-should-strip-Gaddafis-son-of-PhD.html

Chapter Eight continues the analysis of the responses from those being interviewed with regard to whether they see the Responsibility to Protect as a moral or a legal entity, a fundamental question with regard to its status as *lex ferenda* or *lex lata* and customary international law. It is the perception of those experts working with the Responsibility to Protect that I sought to assist in the purpose of deconstructing the evolution of the principle from an idea or concept to a legal norm. It also seeks the views of those interviewed on the UN and its role as either a facilitator or an obstruction to the implantation of the Responsibility to Protect.

Chapter Eight: Is the Responsibility to Protect a Legal or a Moral Entity?

I.   Addressing the Main Question

This Chapter focuses on the outcome of interviews with individuals and representatives of organizations regarding the legal status of the responsibility to protect. The principle clearly has a legal formulation as well as a social and moral one as it evolves from an 'idea or concept' to a legal norm. The objective of the thesis is to trace its evolution.. The research was designed to explore more fully the nature of the legality of the Responsibility to Protect by sounding out the interviewees on the basis of their knowledge and expertise. I was particularly interested to discover how they perceived its development. Do they see it as having achieved legal status or as a principle that relies upon moral values and 'soft law.' Also, I was interested to hear how it had evolved from their perspective. What factors drive it closer to customary law.

My question of whether the Responsibility to Protect is a moral or a legal entity solicited a number of different responses. Respondents tended to consider the question in different ways. I interpret this difference in part to the way the question was phrased. It might have been better posed as "Is it a moral or a legal entity, or both?" since to many, it was neither moral nor legal, but was a combination of aspects of both. I see this as illustrative of the ambiguity resulting from its soft law status. For some the definition of legality rests on the signing of treaties, or on customary international law. Others consider if a resolution is passed which involves the authorization of the Security Council and the UN Charter this gives it sufficient legal validation. While interviewees were certainly pragmatic when it comes to the interests of states and highly aware of realpolitik, most hesitated to suggest this was the sole driving force behind the

Responsibility to Protect which stands, they felt, ultimately upon a 'universal moral principle'. This emphasized in their mind it has not yet reached a strictly legal status.

One of the consistent responses was that while there had been interventions that infringed on the sovereign authority of the state, with the introduction of the norm of the Responsibility to Protect the principle of a universal right of a state to sovereignty was formally challenged. The problem, however, is that the Responsibility to Protect has developed baggage because of connotations associated with military and humanitarian intervention (for example Iraq in 1991; UNAMIR in Rwanda, 1994; and NATO's intervention in Kosovo in 1999). The Responsibility to Protect, in some persons' minds, legitimates the idea of the militarization of human rights. From this perspective, there is a lot of moral ambiguity, making any advance to legal status difficult. Ian Davis (NATO Watch) noted that "in the south a lot of people see the Responsibility to Protect as a Trojan Horse which gives the colonial powers the right to intervene in their sovereign affairs."[634]

Kyle Matthews responded that he sees the Responsibility to Protect as a political concept or a policy, rather than a legal doctrine, although the responsibility to prevent or react is partially imbedded in the Genocide Convention.[635] When genocide is taking place there is clearly a responsibility to act. The ICISS report in 2001 is much more of a policy dealing with sovereignty in a responsible manner. It is also tied to the ICC and the prosecution of perpetrators which places it in a legal framework.[636] Jillian Siskind (CLAIHR) maintained a similar perspective. There is law and politics, rules and realities. The Responsibility to Protect is at the very early stages of international law. "In order for anything to be recognized as international

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[634] Ian Davis interview *supra* note 617.
[635] Adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260
[636] Kyle Matthews Interview *supra* note 588.

law it has to be based in convention or custom and you have to see how widely a practice is implemented."[637]

Bill Graham, speaking at the Ten Years After Conference, referred to the legal status of the Responsibility to Protect. He suggested the question in the Kosovo conflict was how they could justify what they were doing in terms of the legal status of the intervention. It was said what they were doing was illegal. What became more important, however, was a notion of legality/illegality versus legitimacy. The illegality of a decision emphasized the necessity of Security Council approval. Some think the elasticity of the Responsibility to Protect makes it merely a principle, but one can argue it is one tool in the legal toolbox along with the ICC. On the other hand, "R2P as a moral concept includes the concept of prevention, development aid and capacity building in relation to R2P."[638]

Louise Frechette (CIGI) pointed out when the Security Council takes a decision under Chapter VII it becomes mandatory but this does not mean it is mandatory on every member state. A Chapter VII decision of the Security Council that authorizes an action taking all necessary means creates a legal directive but does not force on each member state the need to send soldiers. The decision to participate in the military action is up to each individual state.[639]

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[637] Siskind, Jillian interview, Canadian Lawyers for International Human Rights, Toronto, Ontario, October 26, 2011 and November 23, 2011.

[638] Bill Graham Ten Years After the ICISS: Reflections for the Past and Future of the Responsibility to Protect Munk Centre, November 12th, 2011: Keynote Speech.

[639] David Dewitt (CIGI) suggested that increasingly there are normative and moral judgments being made, at least among the world of the privileged few and enlightened leadership. "There is a genuine sense of belief that we should be trying to do or intend no harm." David Dewitt is vice president of programs at CIGI. Previously he was at York University as vice president of research, social sciences and humanities, and professor in the Department of Political Science. He served as director of York University's Centre for International and Security Studies from 1988 to 2006. He is author or contributing editor of numerous books, refereed articles and chapters. He has led a number of policy focused research NGOs that have dealt with security and governance issues in the Asia Pacific and the Middle East.

On the other hand, Khalid Koser, the Geneva Center for Security Policy Studies (GCSPS) commented "You cannot have purely ethical motives for intervening. There must be more. Motivations will always be mixed."[640] The GCSPS is a research think tank founded in 1995 as an international organization primarily for the purpose of promoting peace, security and stability through training, research and dialogue. The Centre trains diplomats, military officials, international civil servants and NGO staff in the fields of security and peace making. Through research. Publications, conferences and workshops, the GCSPS provides an international forum for dialogue for policy decision making.[641]

GCSPS participants come from Foundation Council members, including countries in transition, in post conflict transition or at risk. Faculty and staff are composed of both academics and practitioners who come from a wide range of countries, disciplines and interests. Their work includes a wide range of book publications, peer-reviewed journals and other specialised publications. Faculty members also act as commentators and analysts in the media.

Naomi Kikoler described the Responsibility to Protect "as a political concept that has a moral basis and in the future might have a legal status but it does not to date. There is no enforcement mechanism."[642] She considered the treaty aspect of international law and expressed doubt that the Responsibility to Protect would ever be treaty-based. She added that it would have to become customary international humanitarian law which would require a consistent invocation

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[640] Khalid Koser interview, The Geneva Centre for Security Policy, Geneva Switzerland, February 21, 2011 Dr. Khalid Koser is Deputy Director and Academic Dean at the Geneva Centre for Security Policy. He is also Non-Resident Senior Fellow in Foreign Policy Studies at the Brookings Institution, Associate Fellow at Chatham House, Research Associate at the Graduate Institute of International and Development Studies in Geneva, and Non-Resident Fellow at the Lowy Institute in Sydney.
[641] The Geneva Centre for Security Studies. http://www.gcsp.ch/About-Us/Contact
[642] Interview with Naomi Kikoler, Global Centre for the Responsibility to Protect at the City University of New York, New York, November 9, 2011.

of the language in situations where populations are at risk along with action taken to protect

civilians as opposed to one-off situations.[643]

As can be read from the responses, the legal status of the Responsibility to Protect may be said to

be 'open to interpretation.' Nevertheless, the study of the principle of the Responsibility to

Protect must consider its legal validity. As outlined earlier, according to Article 38 of the Statute

of the International Court of Justice, the sources of international law are "limited to international

treaties, custom and general principles of law. Customary international law requires a general

practice of States accompanied by *opinio juris*.[644] Resolutions of the General Assembly such as

that applying the Responsibility to Protect in Article 138 and 139 do not create new rules of

customary international law as such but rather function as a starting point, frame or concept for

the establishment or creation of international law. As I have stated, the responsibility

framework is yet to be considered as customary law but may become so if it can be said to have

been applied according to its fundamental principles of acceptance by the UN often enough. The

review of Security Council resolutions which follows and the case study of its application to be

conducted in the next chapter helps us to see more clearly how far it has come.

The legal status of the Responsibility to Protect, while not necessarily imbedded in international

public law as yet, is clearly an aspect of norm development and soft law transnationally. Over

and above international law, an example of state practice, especially as evidenced by some of the

actions taken by the UN Security Council since 2005 and the reaffirmation of the principle

illustrates the growing recognition that humanitarian crises, even if confined to one state, can be

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[643] Naomi Kikoler interview *ibid.*

[644] Strauss, E., *The Emperor's New Clothes: The UN and the Implementation of the Responsibility to Protect* (Namos 2009), 36 **[Strauss 2009].**

considered threats to international peace and security. These threats justify the involvement of

the international community and the need for legal measures.[645]

II.   Security Council Resolutions

The following resolutions since 2005 provide examples of actions taken by the international

community concerning the protection of civilians and the Responsibility to Protect, commencing

in 2006 and subsequent to its approval in the UN Outcome Document in 2005. While there is no

'threshold number' to identify when a norm becomes law, these resolutions do demonstrate that

the Responsibility to Protect is not yet an empty vessel, negated and forgotten by the

international community.

Table 4: Responsibility to Protect Security Council Resolutions

DATE	DOCUMENT #	SITUATION OR ISSUE	TEXT
27 January 2006	S/RES/1653	DRC or Burunch	"Underscores that the governments in the region have a primary responsibility to protect their populations"
28 April 2006	S/RES/1674	POC	"Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"
31 August 2006	S/RES/1706	Sudan(Darfur)	"Recalling also its previous resolutions 1325 (2000) on women, peace and security, 1502 (2003) on the protection of humanitarian and United Nations personnel, 1612 (2005) on children and armed conflict, and 1674 (2006) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the of the 2005 United Nations World Summit outcome document"
11 November 2009	S/RES/1894	POC	"Reaffirming the relevant provisions of the 2005 World Summit Outcome Document regarding the protection of civilians in armed conflict, including

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[645] Cooper and Kohler, "Introduction: The Responsibility to Protect: The Opportunity to Relegate Atrocity Crimes to the Past" in Cooper and Kohler (2009) *supra* note 73 at 3.

			paragraphs 138 and 139 thereof regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity
26 February 2011	S/RES/1970	Libya	"Recalling the Libyan authorities' responsibility to protect its population,"
17 March 2011	S/RES/1973	Libya	"Reiterating the responsibility of the Libyan authorities to protect the Libya population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians."
30 March 2011	S/RES/1975	Cote d'Ivoire	"Reaffirming the primary responsibility of each State to protect civilians and reiterating that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protecting of civilians…"
8 July 2011	S/RES/1996	South Sudan	"Advising and assisting the Government of the Republic of South Sudan, including military and police at national and local levels as appropriate, in fulfilling the responsibility to protect civilians."
21 October 2011	S/RES/2014	Yemen	"Recalling the Yemeni Government's primary responsibility to protect civilians."
27 October 2011	S/RES/2016	Libya	"…underscores the Libyan authorities' responsibility for the protection of the population including foreign nations and African migrants."
12 March 2012	S/RES/2040	Libya	"…underscores the Libyan authorities' primary responsibility for the protection of Libya's population
19 December 2012	S/RES/2085	Mali	"(d) To support the Malian authorities in their primary responsibility to protect the population;"
6 March 2013	S/RES/2093	Somalia	"Recognizing that the Federal Government of Somalis has a responsibility to protect its citizens and build its own national security forces."
12 March 2013	S/RES/2095	Libya	"…underscores the Libyan government's primary responsibility for the protection of Libya's population, as well as foreign nationals, including African migrants;
25 April 2013	S/RES/2100	Mali	"Reiterates that the transnational authorities have the primary responsibility to protect civilians in Mali."
11 July 2013	S/RES/2109	Sudan/South Sudan	"Recalling the Presidential Statement of 12 February 2013 that recognized that States bear the primary responsibility to protect civilians as well as to respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction as provided for by relevant

			international law, reaffirmed that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians

Resolutions 1970, 1973 and 2016 concerning Libya will be discussed more fully in Chapter Nine. UN Resolution 1674[646] was adopted unanimously on April 28, 2006, after reaffirming previous resolutions concerning the protection of civilians in armed conflict and calling for co-operation between the United Nations and regional organizations. The Council stressed the need for a comprehensive approach to the prevention of armed conflict and its recurrence. The Council regretted that civilians accounted for the majority of the victims during armed conflict, and was concerned about the impact of the illicit trade in weapons on the population. The resolution recognized the role of regional organizations in the protection of civilians and reaffirmed that all parties to armed conflict had an obligation to protect the civilian population. Provisions of the 2005 World Summit Outcome Document regarding the Responsibility to Protect were reaffirmed. The resolution demanded that all parties to armed conflict adhere to The Hague Conventions and the Geneva Conventions including Protocols I and II ending impunity for all states to comply with their obligations in this respect. It further stated all countries had to comply with the demands of the Security Council. The Council further required special attention be given to the protection of civilians in post-conflict situations during peace processes.

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[646] United Nations Security Council Resolution 1674 Protection of civilians during armed conflict and in peace settlements post conflicts April 2006. http://www.unhcr.org/refworld/docid/4459bed60.html; http://www.unrol.org/files/S-Res-1674%20on%20protection%20civilians%20in%20armed%20conflict%20(28Apr06).pdf

The resolution recognized the important role of regional and intergovernmental organization regarding the protection of civilians. It indicated that steps would be taken in the case of the United Nations Security Council Resolution 1674 Protection of civilians during armed conflict and in peace settlements post conflicts April 2006; deliberate targeting of civilians and protected persons. It also reaffirmed Articles 138 and 139 of the Responsibility to Protect in the Summit Outcome document 2005.   Algeria, China and Russia initially opposed the resolution but objections from China and Russia were eventually overcome.

Resolution 1706 determines "that the situation in the Sudan continues to constitute a threat to international peace and security."[647] It agrees to a peacekeeping force of more than 20,000 UN peacekeepers on the ground to protect civilians in Darfur in the Sudan (August 31, 2006). The resolution reaffirms the commitment to ensuring the security of women, humanitarian aid and UN workers, and children in Darfur and builds upon the existing UN Mission in Sudan (UNMIS) on the ground. The resolution provides for a peacekeeping force on the ground to protect civilians, humanitarian aid workers and children. Resolution 1706 also reaffirmed paragraphs 138 and 139 of the Summit Outcome document regarding the Responsibility to Protect. The resolution expressed deep concern over the recent deterioration of relations between the Sudan and Chad and called on the Governments of the two countries to abide by the agreement.

United Nations Security Council Resolution 1996 was adopted unanimously on July 8, 2011.[648] The independence of South Sudan from Sudan was recognized and the (UNMISS) established.[649] The mandate of UNMISS was to consolidate peace and security. The resolution reaffirmed its

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[647] Resolution 1706 http://archive2.globalsolutions.org/files/general/issues/pdfs/sc_res_1706.pdf Citizens for Global Solutions.
[648] United Nations Security Council Resolution 1996 post conflict peace building in Sudan.
[649] "With independence less than a day away, Security Council authorises United Nations Mission in Republic of South Sudan". United Nations. July 8, 2011.

strong commitment to the sovereignty, independence, territorial integrity, and national unity of the Republic of South Sudan and affirmed national responsibility as key to establishing sustainable peace for post-conflict peace building. The resolution presented an approach to peace consolidation which addressed the underlying causes of the conflict and the principles of security and development. It expressed its displeasure with the effect on the conflict on the civilian population, and stressed the need for peace building.

Under Chapter VII of the UN Charter UNMISS was established for an initial period of one year with possible renewals. The focus of UNMISS was to be on security and development, peace consolidation and state-building, conflict resolution, the protection of civilians, establishing the rule of law and strengthening the security and justice sector.[650] The resolution allowed for the use of "all necessary means" to enforce its mandate. It also noted "the importance of sustained cooperation and dialogue with civil society."[651] In ensuring the protection of civilians, the resolution referenced the delivery of core government functions, including settling political disputes peacefully, and the use of existing national facilities to stress national ownership of this process. The UN is intended to cooperate with national authorities to prevent a return to violence and support national peace building including human rights and the rule of law. The resolution demands that all forms of violence and human rights abuses against the civilian population in South Sudan be stopped, in particular gender-based violence, and abuses against children. It requires the renewal of the action plan signed in 2009 to end the recruitment and use of child

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[650] Varner, Bill (7 July 2011). "South Sudan to Get 7,900 UN Peacekeepers, Envoys Say". Bloomberg L.P. [Varner 2011]

[651] UNSC Resolution 1996 *supra* note 648.

soldiers. It promotes women's leadership and women's organizations and counters "negative

societal attitudes about women's capacity to participate equally." [652]

Resolution 2014 expressed serious concern over the situation in Yeman yet reaffirmed the strong

commitment to the unity, sovereignty, independence and territorial integrity of Yemen. It

encouraged all sides to reach a peaceful resolution. It expressed the need for a comprehensive,

independent impartial investigation consistent with international standards into alleged human

rights abuses and violations, with a view to avoiding impunity and ensuring full accountability.

It condemned the use of force against unarmed demonstrators, and called for an immediate

ceasefire and "the formation of a commission to investigate the events that led to the killing of

innocent Yemeni people."[653] It called for the effective participation of women at all stages of the

peace-processes and in conflict resolution. It expressed concern for the existence of Al-Queda in

the region with a determination to address this threat according to the UN Charter and

international law including applicable human rights, refugee and humanitarian law. It demands

that action be taken to end attacks against civilians and civilian targets.

These resolutions illustrate the growing recourse to the principle of the Responsibility to Protect

and strengthens the argument for consideration of the norm as customary international law. As I

have stated earlier the UN is critical to its development. According to this interpretation,

unilateral action or even collective efforts do not award the principle with the needed legitimacy

to move it from soft law to hard law. For some, this lack of a legal framework continues to serve

as an impediment. For example, Carolyn McAskie commented:

> To my mind the impediments are both legal and practical. We still do not have a formal
> legal framework that defines when and how you can intervene. I do not think we will ever

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[652] United Nations Security Council Resolution 1996 *ibid*.
[653] United Nations Security Council Resolution 2014 (2011) Adopted by the Security Council at its 6634th meeting, on 21 October 2011. http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2014(2011)

have a formal criteria. What you will have instead is a case by case argument whereby a situation will reach a point where some member states will lead a discussion and a decision will be made that enough people can live with. It is impossible to have that discussion in a formal situation of member states. Governments will not discuss conditions under which they can intervene. They are just too nervous. Having the Commission study the question and come up with the concept was the best way. Perhaps we need a second commission now. We need a mechanism outside member states to look at what implementation means.[654]

III.   The UN – A Facilitator or an Impediment?

One of the interview questions directed toward respondents was about their perception of the

UNs role in the evolution of the Responsibility to Protect. In the question of the implementation

of the Responsibility to Protect, I regard the UN as an institution that can potentially ensure the

fairest deliberations to achieve a collective decision that all member states will regard as binding

upon them. Developing a consensus on military or other forms of intervention involves the full

collective mechanisms of the UN. However, to be legitimate, the decision must include active

consultation with key Third World States, must be transparent, and must involve the

international community. Decisions are made on a case by case basis according to whether the

criteria have been met; i.e., actual or threatened large-scale loss of human life, human atrocities

or ethnic cleansing or war crimes.[655]

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[654] Carolyn McAskie interview, Dec. 8, 2011 Carolyn McAskie, OC is described on the University of Ottawa web page as an "inspiring and influential model of Canadian values in the international community", Carolyn McAskie has had an illustrious career with the United Nations, having served in various capacities including Assistant Secretary General for Peace building Support.   Prior to her appointment with the United Nations, Ms. McAskie had a distinguished career with the Federal Government of Canada as a senior executive. She has earned a reputation as an effective international diplomat and negotiator in humanitarian affairs, peacekeeping and peace building.
[655] Chimni, B.S. "Sovereignty, Rights, and Armed Intervention: A Dialectical Perspective," Chapter 10.   In Charlesworth, Hilary and Jean-Marc Coicaud, *(Eds) Fault Lines of International legitimacy* (Cambridge University Press: New York, 2010) p. 303.

At the same time it is clearly very difficult to get all states to agree.[656] Pressure is often placed on states showing hesitation to respect human rights and to make the individual its moral and political subject. However, this has not always been effective.[657] Russia and China, for example, have in the past argued in favor of diplomatic channels and mediation over peace enforcement (needless to say good principles) but as one can see in the case of the 2012 Syrian conflict thousands are dying in the interim leading to questions with regard to Russia's true motivation. Tensions have been further exacerbated by the struggle over Ukraine. The fact that the Permanent Five (P5) have veto power and can block intervention and other UN actions for narrow political reasons can be a major impediment in cases of the potential implementation of the Responsibility to Protect.[658]

A brief history of the veto will aid the reader in his or her comprehension of the significance of the veto within the Security Council. The veto dated back to 1945 from the foundation of the League of Nations in 1920 where each member of the League Council, whether permanent or non-permanent, had a veto on any non-procedural issue. By 1936 there were in effect 15 vetoes, which proved to be one of the defects of the League by making action impossible. When the UN came into being, it had already been decided at the UN's founding conference in 1944, that Britain, China, the Soviet Union and the United States, and, "in due course" France, should be the permanent members of any newly formed Council. France had been defeated and occupied by Germany (1940–44), but its role as a permanent member of the League of Nations, its status as a colonial power and its support for the allies gave it status with the other four.[659] The five

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[656] Coicaud, Jean Marc 2010 Chapter 2. "Deconstructing International Legitimacy" in *Charlesworth, 2010 ibid* p. 61.
[657] Coicaud 2010 in Charlesworth, 2010 *ibid* p. 60.
[658] See Romeo Dallaire and the Will to Intervene. 21 September 2009 http://www.usip.org/events/mobilizing-the-will-intervene.
[659] Global Policy forum.

permanent members of the Security Council enjoy the privilege of veto power. Veto power means that any permanent member can prevent the adoption, by the Council, of any draft resolutions on "substantive" matters.

Chapter 5 of the UN Charter was the official step in setting up the Security Council dominated by the five Great Powers that were the victors in World War II. The majority prefer to enlarge the Council with additional nonpermanent members in order to achieve better representation of regions, and of diverse kinds of states – poor as well as rich, small as well as large, which can then create a Council that can act credibly and legitimately.[660] Those who support the status quo often insist that the most powerful countries must be given special privileges at the UN to keep them involved in the organization. Critics argue the power balances have shifted.

Many reformers, like Colombia, New Zealand, Zimbabwe and Malaysia, would like to limit or do away with the veto and even with permanent membership itself believing "The right to veto undermines the principle of sovereign equality of states as provided in the Charter." [661] This power has been intensely controversial since the drafting of the UN Charter in 1945. However, without the veto privilege the United States and Russia would probably not have accepted the creation of the United Nations. Many years later there is still active debate regarding the role of the Security Council, its membership and its work.[662]

The Council has the authority to make decisions that authorize military action to deal with threats to the peace as well as acts of aggression:

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[660] James A. Paul, General Analysis on the Security Council Veto (Global Policy organization) February 1995 (http://www.globalpolicy.org/security-council/security-council-as-an-institution/the-power-of-the-veto-0-40/general-analysis-on-the-security-council-veto.html at 8.

[661] Hasmy Agam, Deputy Secretary General of the Malaysian Ministry of Foreign Affairs in a speech to the General Assembly.

[662]James A. Paul, "General Analysis on the Security Council Veto" (Global Policy organization) February 1995.

> ... although subsidiary responsibility arguably falls to the General Assembly, the Security Council was designed to serve as an instrument of action whenever a unanimous vote of the great powers revealed the existence of a consensus, and a forum for negotiation whenever the use of the veto revealed the absence of a consensus. In the era of the Cold War, the Council has had more frequent occasion to function in the latter capacity than in the former.[663]

The veto meant the Council was intended to have both executive and diplomatic functions. However, the veto can be abused by the permanent members in such a way when interpreting resolutions to allow them to abdicate their responsibilities for peace and security. This undermines the authority of the Council.[664]

The veto allows the five Permanent Members to block action on all substantive issues, including appointment of the Secretary General and revisions of the Charter itself.

> The Council enjoys a unique authority under international law. Its decisions stand largely unchallenged by the World Court or the General Assembly. Its resolutions (unlike those of the GA) are binding on the UN member states and though they are not always obeyed – they define what is acceptable conduct (and what is not) in the international arena.[665]

Chances of changing the veto are slim since the Permanent Members are in a position to block the necessary changes in the Charter. In the early years the Security Council mainly dealt with cases of war between states. But today, it most often takes up conflicts or crises internal to member states which sometimes lead to intervention.

When I inquired in my interviews what could be done about Russia and China's veto regarding efforts to take a stronger stance by the UN Security Council on Syria, one of the main methods described as a possible response was "shaming" them into conformity through embarrassment or guilt. Cognitive dissonance theory is often used to explain behavior of actors who experience

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[663] Claud Inis, "The Security Council" in E. Luard (ed.), *The Evolution of International Organizations* (1966), 646.
[664] White, Nigel D. "The Will and Authority of the Security Council after Iraq", 17 (2004) Leiden Journal of International Law, 645-672 at 646.
[665] James A. Paul 1995 *supra* note 660 at 2.

dissonance and thereby try to reduce it by changing their behaviour.[666] The difficulty presented by the veto, however, should not be seen as an immutable impediment to the implementation of the Responsibility to Protect – as we will see in Libya, it can work and even if nations are hesitant, they can abstain rather than vote against a resolution. One successful application is better than none.[667]

The lack of an institutional authority is an aspect of the discussions concerning global governance, international organizations and particularly the United Nations. As one of the most important international institutions, the UN is looked to for leadership. Many of the NGOs, while wary of its weaknesses, acknowledge its central role. At the same time they remain aware of its lack of authority to settle differences between states who must decide in the Security Council when an intervention must be made (and here I speak not only of military intervention but also of diplomatic endeavors and other soft methods of conflict resolution.)

Problems can also arise when negative motivations are wrongly attributed to individual states or actors, however, particularly when motivations cannot be proven by empirical means. One can listen to the arguments for intervening or can look at the outcome but it still often involves a subjective interpretation of the legitimacy of the decision or action. In order to achieve agreement at the UN in 2005 on the basis of the ICISS Report, it seems fair to say that states permitted humanitarian motives to trump the sovereignty principle. A preponderance of states reached an agreement which rendered international morality coterminous with international law.[668] The achievement of such a coherent system of convictions at the world level was

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[666] Finnemore, and Sikkink, 1998 *supra* note 37 at 904.
[667] Sanctions are also another persuasive tool. The notion of 'sources' will be considered more fully in the Chapter on Libya.
[668] Chimni, B.S. "Sovereignty, Rights, and Armed Intervention: A Dialectical Perspective," Chapter 10. In Charlesworth, and Coicaud *2010 supra* note 435 p. 303.

immensely challenging due to cultural, social and political differences and thus a momentous occasion in its occurrence.

However, when crises erupt such as that of Libya in 2011 and Syria in 2012 and when the Responsibility to Protect is invoked, the motives for action and the questions of legitimacy come under serious debate once again. With regard to the Responsibility to Protect, whether motives are perceived to be on the basis of moral, human rights and humanitarian principles or in the perceived self-interest and imperialist actions of states, the matter is debated inside and outside the Security Council by states themselves, NGOs, academics, diplomats and international scholars. These debates flood the literature surrounding the Responsibility to Protect.

In deciding whether or not to act, the Council, guided by the broader international community and transnational organizations, must consider a number of criteria including the legality, fair substantive and procedural preconditions, as well as any peaceful and democratic means of resolving the conflict.[669] In addition, however, the state is responsible to their constituents in the domestic environment. This being the case, questions of self-interest versus morality, values, ethics and universal principles must inevitably enter into the deliberation. If one argues that morality must prevail this opens the door to matters of universal morality and any statements such as neocolonialism or imperialism that oppose any such ideal.[670]

The UN is a key international organization. While it is understood that it is not perfect, it is in a strategic position to contribute to the legitimacy of any effort to implement the Responsibility to Protect. Could we bypass it? No. Can we improve it? Yes. Clearly the Security Council approval is seen by many as essential. Kyle Matthews and others interviewed addressed the

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[669] Chimni, B.S. in Charlesworth 2010 *ibid* at 306.
[670] Chimni, 2010 *ibid* at 306.

limitations, and the need for expansion of the Security Council to include countries like India,

Brazil, South Africa and India as political interests change. As the Council currently stands, it

can be very difficult to get the agreement necessary for a Responsibility to Protect resolution and

there is no overarching authority to enforce it. The veto stands to bring talks of action (even

non-military action) to an end, as has been the case, for example, with Russia and China

regarding any action in Syria. In terms of improvement, one of the proposals one hears is that

there should be some agreement that member states cannot apply their veto in cases where

genocide is taking place. Kyle Matthews admits, however, to being a realist about the likelihood

that countries won't want to let go of that power which both shields and protects them.[671]

Those interviewed spoke of some of the weaknesses of the UN, including the absence of an

enforcement capacity, a standing army, peacekeeping missions, and the equipment and resources

necessary to deal with mass atrocities. Michael Ignatieff addressed the problem of

implementation of the Responsibility to Protect and stated the UN Security Council has a terrible

track record and referred to the vetoes by China and Russia.

> In Montreal I learned when there is proof that atrocity is going on often states do not want to take the political risk. There is a lack of political will. Sovereignty was used to justify inaction in the case of Rwanda. We need to act early on so that we are not forced to use the military response. The UN does not have a strong enforcement capacity.[672]

Carolyn McAskie was pragmatic about the future of the UN, claiming

> you are not going to get any structure in the UN other than the current one. The Security Council has been built up since the Cold War in unimaginable ways. It already has evolved enormously. What you can have is new ways for the Council to work and new ways to involve other groups.[673]

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[671] Kyle Matthews, Interview, Montreal Institute for Genocide and Human Rights Studies, Montreal, Quebec, November 12th, 2012.
[672] Michael Ignatieff, *supra* note 579.
[673] Carolyn McAskie, Interview December 8, 2011 *supra* note 654.

She also sees the legitimacy of the UN and the international community as the vehicle in the

broader sense for solving crises.

> This is a legitimate role for the UN. The whole concept of the UN is to put an end to
> poverty, and create peace and security. This is also the intention of the framers of the
> Charter. If the Security Council is charged with working on behalf of the broader
> membership to intervene and decides this is the place to do something then it has to be a
> legitimate decision. (That does not prevent it from being a bad decision, of course).[674]

Marion Arnaud, in mentioning the goals of the coalition of NGOs, talked of the need to

encourage governments, regional and sub-regional organizations and the UN to build the

capacity to prevent and halt genocide, war crimes, ethnic cleansing and crimes against

humanity.[675]

IV.   Reaching Consensus

Towards the conclusion of the interviews, individuals were asked what they considered to be the

major impediments to the implementation of the Responsibility to Protect at the international

level. One individual remarked that one of the most serious impediments to its implementation

is the negative view held by some individuals and some countries of the Responsibility to Protect

as a tool to be used by Western neo-imperialists or new-colonialists.   Ian Davis commented

"R2P can be seen as Western interference."[676] Louise Frechette noted

> Some countries, although they have signed on to the 2005 Summit Declaration, have
> strong reservations regarding a law that allows other nations to meddle in their countries'
> affairs. There is a significant number of countries that are quite hesitant about the
> concept because they are developing countries.[677]

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[674] Carolyn McAskie interview *ibid.*
[675] Marion Arnaud, interview, International Coalition for the Responsibility to Protect, New York, Dec. 5, 2011.
[676] Ian Davis, *supra* note 617.
[677] Frechette, Louise Interview, Centre for International Governance and Innovation, Waterloo, Ontario, June 21, 2011.

This lack of trust can play out in a number of different ways, but often impedes crucial decisions at the international level through the Security Council veto, and engenders a lack of political will. This can be defensively framed as" the protection of state sovereignty." [678] Kyle Matthews also suggested one of the impediments to the implementation of the Responsibility to Protect is sovereignty and particularly the veto by China and Russia. He cited Rwanda as a terrible example. Even when there is proof that atrocity is going on nations often do not want to take the political risk. There is a lack of political will. Sovereignty was used to justify inaction in the case of Rwanda; the problem was the prospect of infringing on Rwanda's international sovereignty. He also stated that, even when mass atrocities are taking place, states still use their veto.[679] Lucie Edwards suggested one of the major strategies for success is for there to be one country that becomes the champion of the cause and that is willing to commit resources.[680]

The criticisms of the Responsibility to Protect are exacerbated by previous views of humanitarian intervention. As a result, one of the impediments is the difficulty of gaining consensus. "On a case by case basis getting consensus is the biggest stumbling block," commented Jillian Siskind.[681] Another impediment concerns a misunderstanding of what constitutes 'the Responsibility to Protect' where there is a belief that the Responsibility to Protect necessarily means military action. The Responsibility to Protect military action is at the far end of the spectrum in terms of the tool kit; there are sanctions, preventative deployment, and mediation, among other means that come before that. While I have not explored these tools in depth, they will be discussed in Chapter Ten, the concluding portion of the thesis, when we talk

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[678] Louise Frechette interview *ibid.*
[679] Kyle Matthews interview *supra* note 588.
[680] Lucie Edwards interview *supra* note 602.
[681] Jillian Siskind interview *supra* note 597.

about conflict resolution in general and in particular and its relation to the Responsibility to Protect.

V.   Can the Responsibility to Protect Principle be Firmly Upheld?

Do we conclude, as some have done, that the lack of an authoritative structure, the power imbalance, the existence of the veto and differing state incentives make itmpossible for the Responsibility to Protect principle to be firmly upheld?' It seems that there are indeed impediments and the objective of the thesis is to explore these impediments, as well as to illustrate the interplay between what is intended to be a universal norm or a customary law and the differing state incentives as they play out in the changing international environment. A decision to implement the Responsibility to Protect is not a simple matter of invoking a universal norm based upon an agreed upon moral value; the purpose behind the principle and the principle itself can be easily overcome by realpolitik and the self-interest of states. Instead, cooperation is essential to strengthen the universal norm but is often unattainable. In spite of its complexities and the challenges that exist, Libya shows it can be achieved and that it does and should remain a fundamentally important humanitarian world norm in the face of continued violence perpetrated against civilians today in the case of weak or even oppressive governments.

E. H. Carr argues realism ultimately fails because it excludes moral judgments and emotional appeals and the question of social purpose and legitimacy. The thesis thus addresses itself to transnational actors and ways in which they are influenced by and make an impact on norms and ideas. We can see where norms and rationality are intimately connected, particularly when we examine the action of NGOs who consciously choose to take a moral position on a principle of humanitarian intervention and then go about acting as its proponents in a strategic way.

Utilizing a broadly constructivist approach of norm entrepreneurship, this chapter shows how these NGOs have helped foster change in international law and politics. Subtle alterations – even transformations – have occurred in the nature of the 'logics of appropriateness' and sovereignty that had earlier been prevalent. [682] Understandings have been reformulated through the efforts of NGOs. As a result of the work of civil society groups, legal norms, and principles have been altered.[683] While it is difficult to measure the impact that NGOs have (norm entrepreneurship is not a science) and almost impossible to talk about causal outcomes; it is more realistic to speak of factors in the human rights reformulations.

VI. The Responsibility to Protect and *Jus Post Bellum*

Another area included in the interviews pertains to rebuilding after the fighting stops – what should be the interveners involvement in rebuilding? These responses will be presented and discussed in the last chapter as we look at what comes after the conflict ends (*ius post bellum*). An important question pertains to the long term impact of military intervention and what will happen when the military leave. The French way has been described as "Go in, do the job and get out" – but is this the best way? The Rights Crises report finds that local NGOs are likely to consult other international NGOs outside their own country if a crisis occurs. "Local NGOs and organizations, particularly those that promote tolerance and create space to mediate social tensions, need to be supported.[684] A military force may not be properly trained to take on the task of maintaining law and order in the long run and may even be reluctant to take on policing duties. Human rights abuses may also need to be brought to justice, particularly if tribunals have

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[682] Obiora Okafor "Modest Harvests: on the significant (but limited) impact of human rights NGOs on Legislative and Executive behaviour in Nigeria" (2004) Vol. 48(1) J.A.L, at 2 **[Okafor 2004].**
[683] Finnemore and Sikkink1998 *supra* note at **37**.
[684] Human International Council on Human Rights, *Human Rights Crises: NGO Responses to Military Intervention (2002)* at 36 **[Rights Crisis 2002].**

been established.[685] This can be particularly difficult if the military supporting the government are themselves responsible for war crimes.

Long term commitments - plans to avoid future conflicts - are too often neglected. More attention is given to exit strategies. State building is a costly and complex task and brings with it fears of long term commitment. Local NGOs are often pushed by international NGOs because they have more resources and more experience and often bring in their own programs. They also have access to government and sometimes hire away local agency workers which further weakens local NGOs.[686] In the long run, a major question pertains to what are the post conflict responsibilities of the interveners.

The next chapter, Chapter Nine, provides a case study of the implementation of the Responsibility to Protect in Libya in 2011 according to *bona fide* resolutions adopted by the UN Security Council. It illustrates that the Responsibility to Protect remains a live principle and <u>can</u> be agreed to in the UN (because of or in spite of) powerful states right to the use of the veto. The conditions, however, in which the 'can' may be realised are, as the Libyan case illustrates, extraordinarily complicated and raise questions about the legitimacy of an action in support of the third pillar of the Responsibility to Protect that must be addressed.

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[685] Rights Crises 2002 *ibid* at 36.
[686] Rights Crises 2002 *ibid* at 38.

Chapter Nine: On the Legitimacy of the Libyan Intervention

> Adopting Resolution 1973 (2011) by a vote of ten in favor and none against with five abstentions (Brazil, China, Germany, India, Russian Federation) the Council authorized Member states, acting nationally or through regional organizations or arrangements, to take all necessary measures to protect all civilians under threat of attack in the country, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory – requesting them to immediately inform the Secretary General of such measures.**[687]**

I.   Introduction

The purpose of this chapter is to assess whether Security Council Resolution 1973 and the

subsequent intervention into Libya in 2011 can be regarded as a 'legitimate' instance of the

forceful application of the Responsibility to Protect doctrine. The determination of its legitimacy

involves an examination of the legitimacy of the ruling as well as its implementation and

outcome. In order to systematically examine the case, a legitimacy framework will be

established and a number of fundamental matters addressed concerning the primary factors

necessary to ascribe legitimacy to a ruling or action of this nature. Following this discussion, a

subsidiary set of concerns will be examined relating to motives and/or intent, legality, process,

and humanitarian outcomes.[688]

The first part of the analysis involves establishing the criteria that can be used to qualify an

action such as a humanitarian intervention as legitimate, beginning with a description of the

meaning of legitimacy. Different theories lead to different conceptions of the legitimacy of

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[687] Security Council 10200 6498th Meeting http://www.un.org/News/Press/docs/2011/sc10200.doc.htm [687] [accessed June 8, 2011].
[688] Alex J. Bellamy, 'Motives, outcomes, intent and the legitimacy of humanitarian intervention', (2004) 3 (3), Journal of Military Ethics, 216-232 at 221 **[Bellamy 2004].**

humanitarian intervention. In particular, pluralist and solidarist theories regarding the notion of international intervention will be explored. The second question in this particular case will be whether the action was taken according to the approved principle of the Responsibility to Protect, as agreed to by the General Assembly at the 2005 UN Summit, and whether it can be regarded as successful. The third question asks whether we can classify the 2011 intervention in Libya as legitimate. Finally, why Libya and not elsewhere and does this really matter?

Other subsidiary questions arise in the process. Should military action that attempts to alleviate humanitarian suffering, but fails, be considered as legitimate?[689] Is the determination of legitimacy a purely legal determination? Does it involve a moral determination? Is it "the ostensibly humanitarian 'outcome' of the intervention or the humanitarian motivations of interveners that legitimate the act?"[690] Do motivations matter if the outcome is good? What if it is conducted with moral zeal but results in worsening the situation for those in need? The discussion will outline the debate between motives and outcomes. In regard to these, we will consider the doctrine of double effect:

> The doctrine of double effect means that any action can have two possible effects – one that is intended and one that is not. For example, in the case of self defense, an individual may be attempting to save himself and in the process kills the attacker. However, the lawful act of self defense is subject to the rules regarding proportionality; otherwise, the killing of the other may be deemed unlawful. In the case of a war, those in defense must be sure that the response is proportional to the attack. In humanitarian intervention, the intent must be to save the lives of those under threat.[691].

Are the motives totally ethical or are they in the interests of the nation? Does the action have appropriate authority? Must it be UN-sanctioned or can it be a unilateral or a coalition of the

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[689] Bellamy 2004 *ibid* at 217.
[690] Bellamy 2004 *ibid* at 217.
[691] Bellamy 2004 *ibid*, at 227. "To evaluate the legitimacy of humanitarian intervention, we also need a concept that delimits legitimate types of conduct. We can find this in the doctrine of double effect, first enunciated by Thomas Aquinas."

willing? Can it be legitimate without the authorization of the Security Council? Must the persuasive authority of the Secretary General within the UN be initiated?[692]

Overall the analysis of Resolution 1973 can be captured under three main questions: was the intervention in Libya subject to due process, was it legitimate, and was it successful? I will argue, as does Evans, that ultimately decisions in favor of the Responsibility to Protect must be made on the basis of all three and must involve a combination of ideal values (idealism) and hard-headed realism. [693] We will see that humanitarian intervention is thus caught up in the "practical application of ideal standards in a flawed world."[694] The analysis concludes that Libya represents such an instance of the practical and legitimate application of the Responsibility to Protect.

II.   The Concept of Legitimacy

Schuman (1995) defines legitimacy as:

> A generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions.[695]

It is really about who can do what and when and takes into consideration the context and moral community in which the action occurs. The main thrust of this definition is toward the institution that wields the power. My identification of legitimacy is concerned with assessing the legitimacy of a ruling or approval of a particular resolution toward Libya made within the

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[692] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington DC: The Brookings Institution Press, 2008) 349 pp. at 26 **[Gareth 2008]/**
[693] Evans 2008 *ibid* at 28.
[694] Fiona Robertson-Snape, (2000) Moral Complexity and the International Society, Global Society 14(4): 07-24, 12 in Evans 2008 *supra* note 13 at 301.
[695] Mark C. Suchman, 1995, "Managing legitimacy: strategic and institutional approaches." (1995) 20 (3) Academy of Management Review, 571-610; Jonathon Koppell, GS *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (Chicago and London: The University of Chicago Press, 2010) at 44 **[Koppell 2010.]**

context of the UN (in this case concerning Resolutions 1970 and 1973 and events surrounding them.) According to Koppell, in order for there to be normative (or moral) legitimacy "there must be a shared set of beliefs." [696] Without agreement among the players "moral legitimacy is effectively impossible." [697]   The normative argument suggests that "(1) humankind are bound together as a single moral community which transcends the sovereign state and a violation of rights in one part of the world amounts to a violation of rights everywhere and   (2) this world requires a commitment to those people outside our own national boundaries in an 'ethos of responsibility.'"[698]   To some extent the existence of such a moral community which transcends sovereignty represents the crux of the problem in the process involved.   Some may critique this as a very 'Western' and 'Northern' notion of community, but I am following the school of thought that has led to agreement in the international and transnational community on the existing principles of human rights, humanitarianism and indeed the Responsibility to Protect. While they may not be absolutely 'universal,' they form the basis of much of current international humanitarian law as described in earlier chapters.

One aspect of the determination of legitimacy is an emphasis on process. "The legitimacy of a scientist or a scientific institution, for example, depends in large measure on a demonstrable consistency with norms regarding the scientific method."[699] Legitimacy requires that the process be in accordance with legal requirements and in this context the rules and regulations of the UN.[700] Our task is to consider, therefore, the action within the current international environment. In addition to process, one can also talk about inputs versus outputs. We are concerned not only

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[696]   Koppell 2010 *ibid* at 44.
[697]   Koppell 2010 *ibid* at 47.
[698]   Richard Falk, "The Complexities of Humanitarian Intervention: A New world Order Challenge" 17(2) Michigan Journal of International Law; 491-513,499 in Chapter 9. Lorraine Elliott, "Cosmopolitan Militaries and Cosmopolitan Force" p. 279 in Charlesworth and Coicaud, 2010 *supra* note at 435.
[699] Koppell, 2010 *supra* note 695 at 46.
[700] Koppell 2010 *ibid* at 46.

with the motivation or intent of a Responsibility to Protect decision but with the outcome and the delivery of a public good 'as promised.'[701]

Application of the Responsibility to Protect principle at the Security Council permits states to legitimately employ military force against another state in order to protect civilians in danger. In principle, the contemporary international society has come to view humanitarian intervention in exceptional circumstances as a legitimate exception to the non-intervention rule through the vehicle of the Responsibility to Protect principle. While the principle has been in acceptance since 2005, its implementation remains contentious. I contend that the Libyan case is the first time, in fact, the Responsibility to Protect has been truly applied as a forceful intervention into a state's sovereignty and that the action was successful; i.e. that it accomplished its purpose of preventing genocide or further war crimes. It therefore becomes an important case study not only in itself but in terms of its historical significance and the possible development of customary law which ensues.

Due to its contentious nature, determining the legitimacy of a humanitarian intervention by the application of a fixed formula of empirical standards is difficult and reaching a conclusion without ambiguity almost impossible. Rather, it involves taking into account a broad set of values and principles that can be applied and used to interpret the legitimacy of the action. This process can be attributed to the complexity of the problem as well as the varied motives of the parties concerned. Determining whether a particular humanitarian intervention is justified

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[701] Koppell 2010 *ibid* at 47.

involves empirical analysis along with the consideration of moral, political and legal perspectives.[702]

Furthermore, the obligations of states toward humanitarian intervention are still open to dispute. As acknowledged, there is no absolute normative consensus. While the Responsibility to Protect has shifted the possibilities in favor of humanitarian intervention, it is still necessary to argue a compelling value or principle to create an exception to the rule of non-interference with state sovereignty and to the peremptory principle of the non-use of force beyond the norm of self defense articulated under Chapter VII in the Charter and in international law. And further, while the Responsibility to Protect principle exists, agreement to act still requires a preponderance of states in agreement in the international community.

 States must agree on the violation of Article 2(4) of the UN Charter for humanitarian intervention, in response to two critical questions (1) When are the violations of human rights of an order that the principles of sovereignty and non-intervention can be trumped? And (2) through what process is this determination to be arrived at?   In making these arguments, scholars must consider the practice of international relations and the question of normative legitimacy and the normative basis for the use of force rather than solely the specific content of international law.

In the framework which I will establish, legitimacy in the case of Libya will be analyzed separately from strict legality and formal agreement with international law, and as a consequence will engage an ethical vocabulary and appear in a language of justice and acceptability. This is consistent with other such analyses where legitimacy takes precedence in discussions over

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[702] Vilem Kolin *The Legitimacy of Humanitarian Intervention: A Moral Perspective*, 2007 available at strategie.eu /cs/aktualni-cislo-1-2007/clanky/ at 10 **[Kolin 2007].**

legality (e.g., as in the legitimacy, but illegality, of Kosovo).[703] Legal scholars such as Fernando

Teson adopted the position that international law is based on individual rights and popular

sovereignty.[704] Elliott notes that Kant "was opposed to intervention" and "took the view that if

states did not voluntarily recognize the principle of cosmopolitan right, there was little that other

states could do to compel them."[705] Michael Walzer argued, on the other hand, there are times

when "it is morally justified to send armed men and women across a border" for the purpose of

defending "an act of solidarity."[706] The principle of the Responsibility to Protect corresponds

more to the Walzerian School of Thought.

Historically, the principles rooted in the Westphalian model - sovereign equality of states and

non-intervention in the internal and external affairs of other states - set out the basic tenet that the

evolution of the international system cannot be separated from the state. This basic principle

applies to the rise of principles in the post-Westphalian model; e.g. the principles of self-

determination, peaceful settlement of disputes, respect for human rights, and cooperation.[707]

However, there were challenges to state supremacy, including the defense of human rights after

the Cold War. "In this regard, with the humanitarian interventions of the 1990s and the seal of

approval with the notion of the 'Responsibility to Protect' received in 2005, the state agreed to

the notion that people, not states are the ultimate beneficiary."[708] The legitimacy of the state

came to rest primarily on its being responsible and accountable to individuals.

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[703] Chapter 9. Lorraine Elliott, "Cosmopolitan Militaries and Cosmopolitan Force" p. 279 in Charlesworth,and Coicaud, 2010 *supra* note 435 at 282.

[704] Fernando R.Teson, "Collective Humanitarian Intervention" (1996) 17(2) Michigan Journal of International Law: 323-372 **[Teson 1996].**

[705] Chapter 9. Elliott in Charlesworth 2010 *supra* note 704 at 279.

[706] Michael Walzer, T*hick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994), p. x in Charlesworth 2010 *ibid* at 293 **[Walzer 1994].**

[707] Coicaud Marc Jean Chapter 2 "Deconstructing International Legitimacy" in Charlesworth 2010 *ibid* at 52.

[708] Coicaud *ibid* in Charlesworth 2010, 53-54

Pressure was placed on the state to respect human rights and to make the individual its moral and political purpose. However, this has not worked as smoothly as some would hope. Russia and China, for example, claimed to favor diplomatic channels and mediation over peace enforcement and the use of force in support of humanitarian and human rights concerns and it is very difficult still to get all states to agree. [709] While the pursuit of peace through conflict resolution techniques such as diplomacy, negotiation and mediation are highly desirable and should be the Responsibility to Protect's first strategy, it is not always sufficient to bring the killing to an end. We will discuss this further when we consider the criteria of 'last resort' in this chapter and in the final chapter. In reality, one of the major obstacles in reaching agreement among states is the self-interest of states as opposed to any moral reasoning that may be offered. Agreement is thwarted by the lack of trust among opposing states.

A key theoretical debate regarding humanitarian intervention can be found in solidarist theory versus pluralist theory. Pluralism and solidarism are competing approaches to the legitimacy of intervention. Pluralists are skeptical about the homogeneous moral values involved in humanitarian intervention.[710] Pluralist international society theory defines humanitarian intervention as a "violation of the cardinal rules of sovereignty, non-intervention and non-use of force." States and not individuals are the principle bearers of rights and duties.[711] Pluralists suggest that attempts at individual justice through unilateral humanitarian intervention jeopardizes the inter-state order. [712]

Solidarists, on the other hand, try to strengthen the legitimacy of international society by deepening its commitment to justice. Individuals have rights but they can only be enforced by

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[709] Coicaud *ibid* in Charlesworth, 2010 at 61.
[710] Nicholas J. Wheeler, *Saving Strangers*, (New York :Oxford University Press, 2000) at 12 [Wheeler 2000].
[711] Wheeler 2000 *ibid* at 11.
[712] Wheeler 2000 *ibid* at 11.

states.[713] States accept not only moral Responsibility to Protect their own citizens, but also guardianship of human rights everywhere. In order for states to accept the Responsibility to Protect principle, they must accept this moral responsibility that goes beyond their borders. Solidarism is committed to upholding certain minimum standards of human rights which places the victims of human rights abuses at the centre of the theory. This leads to a different emphasis on motivation. Teson, however, challenges the motives-first approach, but remains in the solidarist school because he believes that governments that violate human rights give up their rights to protection of their sovereignty.[714] My own argument in support of the Responsibility to Protect lies comfortably within the solidarist school.

Pluralism and solidarism are therefore competing approaches to the legitimacy of intervention. Pluralists are skeptical about moral values of humanitarian intervention.[715] In R.J. Vincent's writings in the mid-1980s he sets out to "develop a comprehensive framework for deciding what is to count as a legitimate humanitarian intervention and how pluralist and solidarist conceptions shape dialogue over humanitarian intervention.[716] He argues that humanitarian intervention is a moral duty. Pluralists regard the rule of sovereignty as inviolable and a preemptory rule of international society. Solidarists, on the other hand, claim global ethical and legal values permit a right of intervention in extreme cases. They argue "diverse communities can and do reach agreement about substantive moral standards and that international society has moral agency to uphold those standards." [717]

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[713] Wheeler 2000 *ibid* at 11.
[714] Wheeler 2000 *ibid* at 38.
[715] Wheeler 2000 *ibid* at 12.
[716] Wheeler 2000 *ibid* at 12.
[717] Bellamy 2004 *supra* note 688 at 19 and see Hedley Bull "The Grotian Conception of International Society" in Herbert Butterfield and Martin Wight, eds. *Diplomatic Investigations*. (London: Allen and Unwin, 1966) 51-73 Teson 1996 in Bellamy at 219.

In *Saving Strangers*, Wheeler suggests that pluralism in the international arena has been overcome through the recognition of the norm of 'humanitarian intervention.'[718] Humanitarian intervention exposes the conflict between order and justice.[719] Pluralists fear that states acting on their moral principles will weaken the international order. Bull, however, sees the need to protect individual wellbeing. Realists, as discussed in Chapter Five, raise further objections: humanitarian intervention will become a doctrine the strong will use against the weak.[720] Unless there are vital interests at stake, states will not risk their own soldiers' lives -- the best we can hope for is a situation where the "promotion of national security also defends human rights; and, states have no right to risk their soldiers' lives for strangers -- citizens are the exclusive responsibility of the state and outsiders have no duty (or right) to intervene even in the case of lawlessness."[721]

On the idealist side, we are really talking about an ethic of ideal values under the label of 'responsibility.' This standard must include a clear concept for legitimate multinational intervention in instances of gross human rights violations in the form of mass atrocities. These encompass fundamental human rights such as the right to life and liberty.[722] The Responsibility to Protect principle represents a shift in the norms of international relations from the rights of states to claim sovereignty as authority toward a new moral stance of sovereignty as responsibility. State responsibility obliges the state to assure a minimum standard of human rights, not only internally, but within other states. According to the ICISS, sovereignty implies a dual responsibility – internal and external. The challenge, however, is that both must adopt at

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[718] Wheeler 2000 *supra* note 298.
[719] Wheeler 2000 *ibid* at 28.
[720] Wheeler 2000 *ibid* at 29.
[721] Wheeler 2000 *ibid* at 30.
[722] Cooper and Kohler 2009 *supra note 298* at 134.

least some sort of rudimentary universality to be implementable and can easily come into conflict with one another.

For some, questions of legitimacy have been treated as irrelevant or moralizing propaganda and the moral or legal dimensions of policy tend to be ignored. The horizons of hierarchy must be replaced by horizons of necessity. But if we are among those who do accept the value of moral reasoning, how do we ascertain that motives exist and what they are or should be?

Bellamy outlines three Augustinian tests to ascertain motives: explore the reasons the state gives; compare them with other potential explanations for its actions; and, infer intentions from acts – what measures are taken, for instance, to reduce the risk to non-combatants?[723] For example, if some infer the motivation is oil, is it sufficient to conclude if the US obtains most of the oil that that was the motivation all along? Or if China or Russia abstained in the resolution is it because they are trying to assure the oil for themselves? And so the question of motivation in a particular instance, apart from the normal deliberation of humanitarian intervention and the morality of such, is a complex one and hard to verify.

To what extent does the process used in addressing the legitimacy matter? When determining the legitimacy of any action in response to human atrocities, I argue it is necessary to have broad agreement and collective action. The action must be UN-sanctioned rather than it being unilaterally devised or a coalition of willing states. To be legitimate it must have the

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[723] Bellamy 2004 *supra* note 688.

authorization of the Security Council. Within the UN the persuasive authority of the Secretary General that must be initiated.[724]

It is my contention that individual nations or coalitions of nations, like NATO, can perhaps act more quickly than the UN, but such actions should not be said to achieve full legitimacy. The UN, as imperfect as it may be, is in the best position at present to allow its members to maintain the necessary rules and legal options that are required to fulfill legitimacy. By doing so, the credibility of the UN may be maintained and thus its legitimacy recognized. Legitimate actions require cooperation, and the UN is best poised to reach agreement, to monitor the action and ultimately to participate in rebuilding (the latter topic to be discussed in more detail later in this chapter and the concluding chapter).

Where there is likely to be a great deal of disagreement, such as in the acceptance or implementation of the Responsibility to Protect, there needs to be an institution of some form of governance that can ensure the fairest deliberations available to achieve a collective decision that all member states and others will regard as binding upon them. UN actions offer the best chance of legitimacy – the right to make a ruling with morally binding force (even in the face of the few who may disagree).   International organizations and NGOs also have the power to influence and/or to shame which sometimes works to discourage nations from breaking the rules, which can work for or against humanitarian intervention.

The ICISS and Chesterman (2001) also agree that if we are to achieve both legality and legitimacy, developing a consensus on military intervention involves the full collective

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[724] Gareth Evans, "The Responsibility to Protect: From an Idea to an International norm' at 22 in Richard H. Cooper, and Juliette Voinov Kohler *Responsibility to Protect The Global Moral Compact for the 21st Century* (New York: Palgrave Macmillan, 2009) at 26.

mechanisms of the UN.[725] While there may be problems in acquiring consensus, the objective

becomes not to find alternatives to the Security Council as a source of authority, but to make the

Security Council work effectively and fairly.   The Secretary General should assist by providing

clarification of the actions expected from intervening forces.[726] The decision must include active

consultation with the Global South and must be transparent.   Decisions must be made on a case

by case basis according to whether the criteria has been met; i.e., actual or threatened large-scale

loss of human life, human atrocities, ethnic cleansing or war crimes.

The fact that the Permanent Five have veto power, as has been discussed earlier, and can block

intervention and other UN actions for narrow political reasons is nevertheless recognized as a

major impediment in cases of the possible implementation of the responsibility principle.[727]

This problem is exacerbated by the fact that the Security Council is viewed by some states as

unrepresentative and a poor proxy for 'international will.'[728] But it does not necessarily mean

that any movement toward implementation will fail. In fact I will argue in relation to Libya that

it is a case where it has been implemented even with the veto capability.

Those who argue in favor of a right of humanitarian intervention have frequently asserted that it

predates the Charter. Chesterman concludes that the notion of humanitarian intervention which

emerged in the nineteenth century was not necessarily a legal right but was mainly a matter of

politics, policy, or morality.[729] My own argument is that for humanitarian intervention in the

form of the Responsibility to Protect to be deemed as legitimate in the first instance, it must have

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[725] Chesterman 2001 *supra* note 195.

[726] Cooper and Kohler, *supra* note 645 at 134.

[727] See Romeo Dallaire and the Will to Intervene. http://www.usip.org/events/mobilizing-the-will-intervene

[728] For more on the contingent nature of Security Council authority, see Ian Hurd, "Legitimacy, Power, and the Symbolic Life of the UN Security Council", (2002) 8(1) *Global Governance*: 35-51.

[729] Chesterman, 2001 *supra* note 195.

agreement by the United Nations Security Council, and must not take place as a unilateral or even regional action alone. In order to reach such a decision, there must be an agreement among UN members that it is necessary. With anything less, the principle will lose its legitimacy. This means that the situation must be deemed to be consistent with one of the four Responsibility to Protect categories of genocide, human atrocities, ethnic cleansing or war crimes. In summary, military intervention according to the principle of the Responsibility to Protect requires not only a consideration of its place as a moral principle but of the legal process.

Independent actions tend to threaten the legitimacy of the UN in international relations. In terms of the authority of the UN and legitimacy – at the international level these are sometimes at odds. The basis of authority is the state but the authority is usually seen as centralized and legitimacy rests within the UN framework even though there is no enforcement capacity.[730] There is a real need for both authority and legitimacy at the international level. To achieve this, one needs to unpack authority in connection with the UN – "its institutionalization, its role, its third-party status and its decentralized constitution,"[731] particularly in the context of the sovereign equality of states and self-determination of peoples.   There is a contradiction apparent in that the state is being challenged at the same time as it remains the source of international authority.[732]

In spite of its lack of pure authority, one of the organizations that helped to move the institutionalization of international authority in the past was the League of Nations which led to the development of the UN and the movement toward a system of global governance. "In this process, the UN, member states, and international institutions in general became involved in the regulation of international interactions among states, regional organizations, civil society, the

[730] Coicaud *supra* note 707 in Charlesworth, 2010 at 67
[731] Coicaud *ibid* in Charlesworth, 2010 at 68.
[732] Coicaud *ibid* in Charlesworth, 2010 at 70.

private sector, and individuals in a multitude of domains." [733] This helped to lead to the growth

of NGOs and a more horizontal and interactive form of authority. Factoring in civil society

expertise and opinion contributes to the credibility of the UN. The UN increasingly factors in

inputs from the outside world.

Since the early 1990s the UN Security Council has gained more authority and occupies a greater

role in managing humanitarian crises and peacekeeping involving the use of force. Ian Hurd

refers to the Security Council as a prime location of "international sovereignty." [734] It can thus be

seen as a governing authority with a power over states. The UN is unique in terms of its role as a

normative, moral and political entity. "This authority and the function associated with it have

the overall purpose of determining, communicating and fulfilling, where possible, the various

facets of international legitimacy in service of the socialization of the international realm."[735]

Doubts are still expressed, however, about the absence of due process in the UN, its exclusive

membership, and the hegemony of some states.[736] Nevertheless, it holds the potential to express

a global version of good will for the entire international community.[737] Thus, the negotiations

and disputes occurring among various actors in the disaggregated world order helps to determine

legitimacy.[738]

III.   Legitimacy Applied

In order to assess the Libyan intervention, the next portion of the Chapter establishes a

framework against which to test the Responsibility to Protect actions. This framework is based

[733] Coicaud *ibid* in Charlesworth, 2010 at 73.
[734] Ian Hurd, "After Anarchy, Legitimacy and Power in the United Nations Security Council" p. 187 in Coicaud in Charlesworth, 2010 *supra* note 656 at 78).
[735] Coicaud *ibid* in Charlesworth, 2010 at 74.
[736] Coicaud *ibid* in Charlesworth, 2010 at 78-79.
[737] Coicaud *ibid* in Charlesworth, 2010 at 80.
[738] Coicaud *ibid* in Charlesworth, 2010 at 85.

on a number of known and recognizable criteria in relation to military force. Evans, for

example, suggests there are five criteria that are required to determine whether a certain situation

is indeed a proper case for a UN-mandated mission:[739]

> Seriousness of Harm: Is the threatened harm to state or human security sufficient to justify the use of military force?[740]Is there a threat of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law?
>
> Proper purpose: Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question?
>
> Last Resort: Has every non-military option been explored?
>
> Proportional Means: Are the scale, duration and intensity of the planned military action proportional to the threat?
>
> Balance of Consequences: Is there a reasonable chance of the military action being successful? The consequences of the action should not be worse than the consequences of inaction.[741]

Similarly, Wheeler and the Just Cause framework claim that the responsibility to intervene is

justified when the following six 'precautionary principles' have been met: (just cause, legitimate

authority, right intention, last resort, proportional means and reasonable prospects.) And again,

similarly, the ICISS report itself establishes five tests: right cause, right intention, right

authority, last resort, proportionate means, and reasonable prospects to support moral principles.

Table 3 below outlines these three positions. As such, they represent three different, but

reasonably parallel guidelines that have been proposed in the literature to determine the

legitimacy of humanitarian interventions.

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[739] Gareth Evans, "Responsibility to Protect: From an Idea to an International norm" p. 22 in Richard H.Cooper, and Juliette Voinov Kohler R*esponsibility to Protect The Global Moral Compact for the 21ˢᵗ Century* (New York : Palgrave Macmillan, 2009).
[740] Evans 2009 *ibid* at 23.
[741] Evans 2009 *ibid* at 23- 24.

Table 5. Military Intervention Framework

Just War Framework and Wheeler	Evans	ICISS Report
1. just cause (a 'supreme humanitarian emergency'), 2. last resort, 3. proportional use of force; and 4. a high probability of achieving a humanitarian outcome	1. Proper Purpose; 2. Seriousness of Harm; 3. Last Resort; 4. Proportional Means; 5. Balance of Consequences	1. right cause; right intention; 2. last resort; 3. proportionate means; 4. reasonable prospects to support moral principles 5. right authority;

Taken together, these constitute a framework for assessing the appropriateness of a

Responsibility to Protect intervention in a particular case: just or right cause and proper purpose

including motivation and intent; last resort; proportional means of use of force; balance of

consequences – a high probability of achieving a humanitarian outcome; right authority; and,

added by myself, due process. Anthony Arend and Robert Beck add an additional criteria for a

military intervention to meet if it is to be exempted from the ban on force in Article 2(4); i.e., it

must not involve a regime change. This concern bears great significance in the case of Libya, and

is a common criticism. Regime change will thus be discussed in more detail later when we apply

the legitimacy framework. However, I do not include this qualification in my own determination

of legitimacy and I will explain why I do not.

Just cause occurs only in those extraordinary situations where large numbers of civilians in

another state are in imminent danger of losing their life or facing appalling hardship, and where

the indigenous forces are not able or willing to stop the extreme violation of human rights.[742]

Right or just cause exists when the only hope of saving lives depends on outsiders coming to the

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[742] Wheeler 2000 *supra* note *298* at 4.

rescue and involves those sorts of human atrocities that 'shock the conscience of mankind.'[743] In assessing the just or right cause, I would suggest it is important to also consider motivations and intent. We can also consider these in relation to the final outcome and the criterion of 'success' and ask "Is it the ostensibly humanitarian 'outcome' of the intervention or the humanitarian motivations of the interveners that legitimate the act?"[744] Does it matter about the motivations if the outcome is good? What if it is conducted with moral zeal but results in worsening that situation for those in need?

In reaching a determination of last resort, all other appropriate avenues must have been explored. Forms of conflict resolution such as mediation, negotiation, sanctions and the like must have been considered and/or tried and failed. In terms of the balance of consequences, one expects that on balance more lives will have been saved by the intervention than were taken. We also note that it can never be known in advance "that more lives will be saved by intervention than will be lost by it..."[745] It is wrong, therefore, to judge a humanitarian intervention only by its outcome. As long as there is no contradiction between the motives and the character and conduct of the intervention, even a failure can be defined as humanitarian, but not necessarily a success.[746] This will be an important point when we discuss the intervention into Libya.

Justifications for the action that are often put forward may include one or more of the following: the anti-interventionist regime is out of sync with modern notions of justice -- I would suggest this is not sufficient reason to intervene but it is potentially influential; without air strikes there would have been a large refugee movement that threatened the peace and security of other regions; thousands more civilians would have died; all peaceful means have been tried (this is

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[743] Wheeler 2000 *ibid* at 34.
[744] Bellamy 2004 *supra* note 688 at 217.
[745] Wheeler 2002 *supra* note 298 at 36.
[746] Wheeler 2002 *ibid* at 40.

really a reference to last resort); it is better to uphold basic principles selectively than not at all --

this usually addresses criticisms that the application of the Responsibility to Protect is

inconsistent and that there is no absolute standard; and, the NATO action was supported -- air

strikes largely conformed with international humanitarian law.[747]

Criticisms, on the other hand, may include arguments that the intervention was not morally

justified; i.e., caused more harm than good; did not use the alternative means that were available;

violated international humanitarian laws by bombing of civilian targets; there was little support

for action in the third world; it was not necessary; there was not just cause; and, there was not a

situation of a deteriorating, complex and extraordinary nature, requiring an immediate

response.[748]

IV.   The Libyan Intervention, 2011

As the thesis intends to illustrate, it is one thing to have the Responsibility to Protect approved at

the international level, as it was in 2005, and followed up and supported in several venues

including the UN. It is another thing entirely to see it implemented in its third pillar form. Such

an implementation, therefore, has historical and legal significance. The Libyan intervention

makes it a landmark international case for study. To bring the principle to fruition has taken a

myriad of players and has required a major international momentum. Now that such an

implementation has occurred, we are in the unique position of being able to assess its legitimacy

according to some or all of the criteria established above. The Libyan intervention proves it can

happen.

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[747] Chapter 10. B.S. Chimni, *Sovereignty, Rights, and Armed Intervention: A Dialectical Perspective*, 2010 *supra* note 435 at 318.
[748] Chimni 2010 *ibid* at 319.

The first step in the three part Responsibility to Protect doctrine is to prevent, using diplomatic, economic, and humanitarian measures, and, only if necessary, the last resort is to take more coercive measures authorized by the Security Council. A range of these measures were adopted through the Human Rights Council, General Assembly, Security Council, Arab League, African Union, and Gulf Cooperation Council in the case of Libya. At the next level, if the first set of coercive measures fails, it becomes time to react. The response from Libya, which was essentially to ignore softer measures, pushed the UN to react in a stronger and harder way. The continuing threat to the population pushed the international community to react.' The Responsibility to Protect intervention in the Libyan case was invoked extensively by civil society, the media and government officials including the Security Council, the General Assembly and the Human Rights Council (HRC) as the conflict escalated. What follows is a series of analyses, op-eds, interviews and articles outlining arguments in favor (and opposed) to the Responsibility to Protect in the case of Libya, which responds to many of the points raised and questions asked in the framework introduced in the beginning of this chapter on assessing 'legitimacy.

This account of the Libyan humanitarian crisis and the determination of the legitimacy of the subsequent action on the part of the UN will cover the activities of the UN, regional organizations, influential individuals and member states to bring about humanitarian intervention in Libya. The text will show how actions, commentary, political and moral pressure and analyses can be considered through a lens of legitimacy and how they respond to the major framework of just cause, last resort, right authority, proportionality and reasonable prospects as outlined earlier as well as the sixth criterion of due process.

The context for the UN action in the case of Libya corresponds to the three pillar approach of the

Responsibility to Protect described previously[749] -- states must protect their populations from

mass atrocities. When necessary it is the responsibility of the international community to assist

states in protecting populations. The international community must respond in a timely and

decisive manner to imminent threats of mass atrocities with a broad range of measures, including

both peaceful and military measures, when states are unwilling or unable to meet their

responsibility.

In Libya, the progression moved rapidly as the situation itself gave little opportunity for

preventive or softer measures. Very little warning of the uprising was known and therefore the

crisis situation almost unpredictable. The result was a rather swift response catapulting the UN

into a 'third pillar' type of reaction.[750] These steps were climbed rapidly. The political crisis in

Libya, which began on February 14, 2011 with peaceful mass protests, caught the attention of the

international community. Security forces opened fire on the peaceful crowd in Tripoli beginning

February 20, 2011, killing and injuring an unknown number of persons.

The situation seemed to be approaching a full scale civil war with a split between forces loyal to

one side or the other. The country also appeared to be dividing along tribal and regional

lines. There was clearly no quick or easy way out. While it was at this point recognized that

imposing a no-fly zone, bombing airfields or arming the rebels could tilt the balance of power in

the rebels' favour, it was considered unlikely that it would defeat the Gaddafi regime. There were

also fears it might create a difficult dilemma regarding whether the international community

should become more involved or watch a protracted stalemate. It could also bring in Libya's

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[749] Secretary-General Ban Ki-moon's The Report of the Secretary General, "Implementing the Responsibility to Protect", 12 January 2009.
[750] The Report of the Secretary General, 2009 *ibid.*

neighbours and compromise prospects for democratic development in other areas, making any decision complex and extremely challenging.

On February 23, the Peace and Security Council of the African Union Communique dispatched a mission to Libya to investigate the conflict.[751] The United Kingdom and Switzerland froze financial assets, and imposed travel bans and sanctions.[752] The US government also began to move warships toward Libya. France, the UK and the US started to discuss the possibilities of imposing a "no fly zone" with the approval of the Security Council.[753] Three human rights organizations, the Egyptian Initiative for Personal Rights (EIPR), Human Rights Watch, and INTERIGHTS, submitted a joint request to The African Commission on Human and Peoples' Rights on February 24, 2011, asking it to impose measures against the Libyan government that would end its human rights abuses, including the killing of hundreds of people who participated in largely peaceful protests by state security forces and mercenaries.[754] Ban Ki-moon, the UN Secretary-General, advised on February 25 that more than 1,000 people had been killed and that massive waves of refugees fleeing to neighboring countries amounted to a humanitarian crisis.[755] He reported on crimes committed in Libya, warning that fundamental issues of peace and security were at stake.[756] Ms. Pillay (High Commissioner for Human Rights) advised "that under international law, any official at any level ordering or carrying out atrocities and attacks

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[751] African Union Peace and Security Council February 23, 2011. http://www.au.int/en/sites/default/files/PSC%20Communique%20on%20the%20situation%20in%20Libya.pdf (accessed July 24, 2011).

[752] New York Times, "U.S. Prepares Military Options on Libya." http://www.nytimes.com/2011/03/01/world/africa/01military.html?_r=2 (accessed July 24, 2011)

[753] France International News "Rebels Fend Off Attack by Libyan Forces in East Libya" March 2, 2011. http://www.france24.com/en/20110302-gaddafi-forces-seize-eastern-town-rebels-brega-violent-clashes-libya (accessed July 24, 2011).

[754] Human Rights Watch "Libya: Africa's Rights Bodies should act now "February 25, 2011. http://www.hrw.org/en/news/2011/02/25/libya-africa-s-rights-body-should-act-now (accessed July 25, 2011).

[755] Ban Ki-moon, "Remarks to Security Council Meeting on Peace and Security in Africa" UN News Centre, February 25, 2011. http://regulation.upf.edu/ (accessed July 23, 2011.

[756] Remarks to Security Council Meeting on Peace and Security in Africa, Office of the Secretary-General. 25 February 2011.

could be held criminally accountable and widespread and systematic attacks against the civilian

population could amount to crimes against humanity."[757]

Ban Ki-moon, in a speech to the Security Council on Peace and Security in Africa, stated that his

Special Advisers on the Prevention of Genocide and the Responsibility to Protect had:

> reminded the national authorities in Libya, as well as in other countries facing large-scale
> popular protests, that the heads of State and Government at the 2005 World Summit
> pledged to protect populations by preventing genocide, war crimes, ethnic cleansing, and
> crimes against humanity, as well as their incitement.[758]

The Human Rights Council met on February 25, 2011 and opened a special session on "the

situation of human rights in the Libyan Arab Jamahiriya."[759] It was reported that actions taken by

the Libyan authorities were illegitimate and unlawful under international law.

The Group of Friends on the Responsibility to Protect on February 25th also expressed its grave

concern regarding human rights violations committed in Libya, possibly leading to crimes

against humanity if the violence against civilians continued.[760] In doing so, it reiterated

paragraphs 138 and 139 of the World Summit Outcome document (A/RES/60/1), and the

responsibility for individual countries and the international community to protect populations

from genocide, war crimes, ethnic cleansing and crimes against humanity. The Group of Friends

called upon the government of Libya to meet its Responsibility to Protect its population and all

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[757] United Nations Human Rights "Human Rights Council situation of human rights in Libya" February 25, 2011 http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10766&LangID=E (accessed July 25, 2011).
[758] Remarks to Security Council Meeting on Peace and Security in Africa, Office of the Secretary General, 25 February 2011 *supra* note 756.
[759] United Nations Human Rights "Human Rights Council debates situation of human rights in Libya" February 25, 2011 http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10766&LangID=E (accessed July 23, 2011).
[760] The Group of Friends is an informal cross regional group of UN member states that share a common interest in the responsibility to protect (R2P) and advancing this norm within the UN-system.

the relevant bodies of the United Nations to take appropriate measures to realize the international community's commitment to the Responsibility to Protect.[761]

The Canadian politician Irwin Cotler and Jared Genser, writing in the New York Times on 28 February 2011, argued the firm response to the situation in Libya was aided by Gaddafi's targeting of civilians, his comments demonstrating both his intent and disconnection from reality, and the large defection of his ambassadors, military and civil servants.[762] Such action was giving the international community more and more reason to believe that there was sufficient, necessary or 'just cause' to take more dramatic action. Gareth Evans, former Australian foreign minister, President Emeritus of the International Crisis Group and author of 'The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All', wrote in the Financial Times, 27 February 2011 that states cannot deny their Responsibility to Protect their people from crimes against humanity. When a state fails to protect its citizens it is the responsibility of the international community to take timely and decisive collective action through the United Nations Security Council. However, these measures fall short of the threat or use of military force which he concluded would be necessary to stop the killing. He also understood this was a very difficult call since declaring a no-fly zone is not a soft option and would mean being prepared to shoot down jets and helicopter gunships that breach it. Sanctions, embargoes and the diplomatic isolation of Mr. Gaddafi were considered to be only a minimum of what was then required; however it was understood military options should always be a last resort, but cannot be

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[761]Ministry of Foreign Affairs in Denmark "Statement by the Group of Friends on responsibility to protect on the situation in Libyan Arab Jamahiriya" February 28th, 2011. http://www.missionfnnewyork.um.dk/en/menu/statements/StatementbytheGroupofFriendsonResponsibilitytoProtect onthesituationintheLibyanArabJamahiriya.htm?WBCMODE=PresentationUnpublished (accessed July 25, 2011)
[762] Irwin Cotler, and Jared Genser "Libya and the Responsibility to Protect" New York Times, February 28, 2011 (hard copy only).

excluded in extreme cases.[763] Romeo Dallaire and Hugh Segal in the Ottawa Citizen 25

February 2011 also joined the appeals.[764]

The international community was aroused by the words pronounced by Gaddafi, "I will fight to

the last drop of my blood," and his references to protesters as "cockroaches" and blaming Libya's

unrest on foreigners. Gaddafi threatened to "cleanse Libya house by house."   Dallaire and Segal

agreed Canada, with a loud and clear moral voice, must abhor what U.S. Senators John McCain

and Joe Lieberman had described as "crimes against humanity." It must demonstrate its

Responsibility to Protect Libyans by endorsing a recommendation that an international arms and

military technology embargo to prevent the sale and further delivery of equipment or support to

Libyan security forces must be imposed, at the same time avoiding commercial sanctions that

would adversely affect civilians.[765]

Having concluded that there were grave problems in Libya with the actions of the government,

the Human Rights Council adopted Resolution S-15/2 which required:[766]   1) the Libyan

government to cease all human rights violations; 2) an international commission of inquiry to be

dispatched to Libya; and recommended 3) that the General Assembly suspend Libya from the

Council.[767] On March 1, the General Assembly unanimously suspended Libya's membership in

the Council.[768] Some key features of this resolution are that it called upon the Government of

Libya to: meet its Responsibility to Protect its population, to immediately put an end to all

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[763] Reference to article Rachman, Gideon *Better for Libya to Liberate Itself* Financial Times February 28, 2011 http://www.ft.com/intl/cms/s/0/0cbcfb3a-4377-11e0-8f0d-00144feabdc0.html#axzz1THrRwYHO (accessed July 27, 2011) and Gareth Evans, No-fly zone will help stop Gaddafi's carnage February 27, 2011.
[764] Liberal Senator Roméo Dallaire commanded the United Nations Assistance Mission for Rwanda (UNAMIR). Conservative Senator Hugh Segal is former chair and current member of the Senate Committee on Foreign Affairs.
[765] Romeo Dallaire, and Hugh Segal, Ottawa Citizen, 28 February 2011.
[766] Human Rights Council Resolution S-15/2 on the situation of human rights in Libya.
[767] UN Human Rights Council "15th Special Session – The situation of human rights in the Libyan Arab Jarahariya" February 25, 2011 http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/15/index.htm (accessed July 23, 2011).
[768] Al Jazeera "Libya Suspended from Rights Body" March 2, 2011. http://english.Al Jazeera.net/news/africa/2011/03/201131202637185959.html (Accessed July 23, 2011)

human rights violations, to stop any attacks against civilians, and to fully respect all human rights and fundamental freedoms, including freedom of expression and freedom of assembly. "It must release all arbitrarily detained persons"; "... ensure the safety of all civilians and refrain from any reprisals against people who have taken part in the demonstrations; and, guarantee access to human rights and humanitarian organizations including human rights monitors."[769]

An interim opposition government was established in Libya under the leadership of former Justice Minister Mustafa Abdul Jalil[770] in order to temporarily communicate with foreign governments and to act as a transitional Head of Government after the departure of Gaddafi.[771] The Benghazi-based National Transitional Council (NTC) got together for the first time on March 5, 2011 as the opposition. This Council declared itself the sole national representative of Libya and got the attention of the world. France, on March 10, became the first country to acknowledge the Transitional National Council.[772] Over time they began to be recognized by the rest of the international community as well. The Parliament of Europe also adopted a Resolution recognizing the Interim National Council as officially representing the Libyan opposition.[773] The Resolution asked for financial and human resources to be made available to support a robust international humanitarian operation.[774]

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[769] Human Rights Council Resolution S-15/2 *supra* note 766.
[770] CNN World, February 26th, 2011 http://articles.cnn.com/2011-02-26/world/libya.protests_1_moammar-Gaddafi-moammar-Gaddafi-quryna?_s=PM:WORLD (accessed July 23, 2011).
[771] Christian Science Monitor "Opposition declares new Libya Government as Qaddafi hangs on." http://www.csmonitor.com/World/Middle-East/2011/0227/Opposition-declares-new-Libya-government-as-Qaddafi-hangs-on/(page)/2 (accessed July 23, 2011).
[772] "France Recognizes Libya's Rebel Council as Sole Representative" BNO News, March 10, 2011.
[773] European Parliament Resolution 10th March 2011 on the Southern Neighborhood and Libya in particular. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0095+0+DOC+XML+V0//EN&language=EN (accessed 10 July 2011).
[774] *Ibid.*

The United Nations High Commissioner for Refugees (UNHCR) reported on 1 March, 2011 that

70,000 to 75,000 civilians fled to Tunisia and a similar number to Egypt; with tens of thousands

stuck at the Tunisian border.[775] The UNHCR had been attempting to help the refugee

population;[776] but the security situation surrounding Tripoli was considered too dangerous for

humanitarian agencies to assess the need for medicine and supplies.[777] Luis Preval, Institute for

Security Studies, advised that people fleeing from Libya are "protected by the non-derogable

right of non-refoulement" and as a result cannot be forcibly returned to a territory where their life

or physical safety are at risk for political reasons.

> The 1951 Convention on the International Status of Refugees, the European Convention of
> Human Rights, the Charter of Fundamental Rights of the European Union (EUCFR) and a
> whole set of EU Directives are unequivocal in establishing the right of individuals not to be
> forcibly expelled, whether directly or indirectly, back to the place where they may suffer
> persecution. This right has been widely and consistently interpreted by national and
> international courts as an absolute right.[778]

Preval called on the EU to ensure the ability of those citizens fleeing in the case of an enactment

of the Responsibility to Protect.

 The UN's Human Rights Council on 11 March named a panel of experts to visit Libya in order

to prepare a full report to the Council in June. The United Nations Office for the Coordination of

Humanitarian Affairs (OCHA) and Amnesty International were also concerned about those

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[775] The UNHCR – "UNHCR steps relief efforts as huge numbers flee Libya to Egypt and Tunisia" March 1, 2011 http://www.unhcr.org/4d6cf13d9.html (accessed July 23, 2011).
[776] Al Jazeera "Chaos at Libyan-Tunisian border" March 1, 2011. http://english.Al Jazeera.net/news/africa/2011/03/201131173333877886.html (accessed July 23, 2011).
[777] Al Jazeera "Gaddafi forces battle rebels" http://english.Al Jazeera.net/news/africa/2011/02/2011228191419265337.html (accessed July 23, 2011).
[778]Luis Preval, ISS Analysis "Mass Exodus and the Responsibility to protect under European and International Law: The Case of Libya" February 2011 http://www.iss.europa.eu/uploads/media/Mass_exodus.pdf (accessed July 25, 2011).

stranded within Libya with reports of intensifying violence toward the opposition.[779] On 13

March, Human Rights Watch advised that Gaddafi's "security forces were brutally suppressing

all opposition…UN agencies were shut out from Libya preventing humanitarian access."[780]

On March 12th The Arab League made a critical decision to request the UN Security Council to

impose a no-fly zone to protect civilians from Gaddafi.[781] The Secretary General of the Gulf

Cooperation Council on March 8 referred to "crimes against humanity." [782] The League of Arab

States had already suspended Libya as a member on 22 February 2011 and reminded the Security

Council that the protection of large-scale violence against civilians was within its remit. It called

on the Council to take responsibility. The Arab support for a no-fly zone was an important factor

in the decisions that were made in the UN and helped a great deal to counter accusations of the

motivation of self-interest of Western states.

It was felt the UN Security Council needed to impose sweeping sanctions on Gaddafi, his family

and those in the regime responsible for the repression, by freezing assets. It was also agreed that

it should also refer the leaders of Libya to the International Criminal Court (ICC) for an

immediate investigation into possible war crimes and crimes against humanity and establish a

no-fly zone under Chapter VII of the UN Charter and enforced, perhaps by NATO, over Libya to

prevent air attacks against civilians. They applauded the Arab League's suspension of Libya

from participating in its meetings and noted positively the number of Libyan diplomats and high-

level aides who had resigned and continued to defect.   The Responsibility to Protect is about the

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[779] Amnesty International "Fear Grows for Libyan migrants as Thousands Leave" 2 March 2011.
http://www.genocideintervention.net/our_programs/corporate_responsibility.
[780] Human Rights Watch "Libya: End Violent Crackdown in Tripoli" March 13, 2011.
http://www.hrw.org/en/news/2011/03/13/libya-end-violent-crackdown-tripoli
[781] Al Jazeera "Arab States seek Libya no fly zone" March 12, 2011. http://english.Al
Jazeera.net/indepth/features/2011/07/201171173732684155.html
[782] Bloomberg Business Week "Oil rich Gulf state condemn Libya killings" March 8, 2011.
http://www.businessweek.com/ap/financialnews/D9LQTPBO0.htm

world responding when a civilian population is under attack - either from its own government or because its government lacks the means or will to protect it. Libya was a clear examples of a civilian population under threat.

As indicated, the early legitimate measures intended to isolate Gaddafi within the United Nations rules and regulations were slow, and proved to be insufficient to protect civilians against Gaddafi's forces in the long run. As an important next step and in response to the growing humanitarian crisis the UN Security Council unanimously adopted Resolution 1970 (2011) on February 26, 2011. Under Article 41 of the Charter's Chapter VII, the Council authorized all Member States to seize and dispose of military-related material banned by the text and to facilitate humanitarian and related assistance in Libya. In the Resolution the Security Council imposed an arms embargo, asset freezes, and travel bans. In a striking move, the Resolution also referred the case to the International Criminal Court.[783, 784] Resolution 1970 explicitly invoked Libya's "responsibility to protect" and requested that the International Criminal Court investigate reports of crimes against humanity. The Prosecutor of the ICC, Luis Moreno-Ocampo decided on March 2, 2011 to launch an investigation.[785] The Council also decided to establish a new committee to monitor sanctions, and to respond to violations, and to designate the individuals subject to the targeted measures which were listed in an Annex to the Resolution.[786] Marianne

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[783] UNSC Resolution 1970 imposing sanctions on Libya. 26 February 2011
http://www.voltairenet.org/article168645.html
[784] Human Rights Watch "Libya: End Violent Crackdown in Tripoli" March 13 2011 *supra* note 96.
http://www.hrw.org/en/news/2011/03/13/libya-end-violent-crackdown-tripoli
[785] "Investigator to Open an Investigation in Libya" March 3, 2011. http://www.icc-cpi.int/NR/exeres/3EEE2E2A-2618-4D66-8ECB-C95BECCC300C.htm (accessed July 24, 2011).
[786] Security Council Press Release "In Swift Decisive Action Security Council Imposes Tough Measures on Libyan Regime Adopting Resolution 1970 in Wake of Crackdown on Protesters" February 26, 2011.
http://www.un.org/News/Press/docs/2011/sc10187.doc.htm (Accessed July 24, 2011) Official Resolution 1970.
http://www.icc-cpi.int/NR/rdonlyres/2B57BBA2-07D9-4C35-B45E-EED275080E87/0/N1124558.pdf

Ducasse-Rogier wrote regarding the significance of the resolution.[787] She stated in the case of Darfur, Kenya, Guinea and Ivory Coast, where civilian populations were the target of human rights' violations, the Responsibility to Protect was seldom invoked. This, for her, suggested why UN Security Council Resolution 1970 was so significant.[788] By referring the situation in Libya to the ICC, it also sent a clear signal to leaders that the UN Security Council will bring the Responsibility to Protect to the forefront in the punishment of gross human rights abuses through the Courts, another avenue available to the international community. The UNSC Resolution on 26 February 2011 explicitly invoked the Responsibility to Protect and began the process of the implementation of the Responsibility to Protect principle in its "hardcore" form. The Resolution cited the Libyan regime's responsibility to protect its own population. The UN had to be cautious at the same time not to open itself to criticism that it was taking Libyan sovereignty lightly or that it was promoting a 'neo-colonialist project'.[789]

At the same time warnings were being sent to the Gaddafi government. On March 7, 2011 Secretary-General Ban Ki-moon spoke with Libyan Foreign Minister Musa Kusa and reminded him that authorities in Tripoli "must uphold their responsibility to protect the country's citizens and to heed the Libyan people's legitimate aspirations to live in dignity and peace."[790]

 International anxiety grew and it became clear to those outside that the numbers of refugees and Internally Displaced Persons (IDPs) were rising as the humanitarian crisis worsened in spite of Resolution 1970. On March 11, UNHCR advised that 230,000 people had fled the violence thus

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[787] Netherlands Institute of International Relations 'Clingendael', Senior Training and Research Fellow on 9 March 2011.
[788] UN Security Council Resolution 1970. http://www.un.org/News/Press/docs/2011/sc10187.doc.htm
[789] Jim Michaels, "Is the US Missing a Window of Opportunity in Libya" USA Today, March 10, 2011. http://www.usatoday.com/news/world/2011-03-09-Libya-Gaddafi_N.htm?csp=34news (Accessed July 13, 2011)
[790] UN News Centre "Top Officials Call for Urgent Access to Libyan Areas Affected by Violence." http://www.un.org/apps/news/story.asp?NewsID=37692&Cr=libya&Cr1=

far.[791] Scores of anti-government protesters were arrested and some detainees were said to have been subjected to torture. The location and fate of many detainees was unknown.

The International Crisis Group on 10 March 2011 called for a complete ceasefire to be followed by negotiations to secure a transition to a post-Qaddafi, legitimate and representative government. In their view, nothing should be allowed to pre-empt or preclude the search for a political solution with military intervention used only as a last resort, with the goal of protecting civilians at risk. Nevertheless, on March 8 NATO began a 24-hour aerial surveillance over Libya to help determine whether to institute a no-fly zone over Libya.[792] A no-fly zone is considered a hard option because it involves taking out air defences, bombing runways and destroying aircraft that breach it.[793]   Colonel Gaddafi accused the West of colonial intentions.[794]

On Monday 13 March 2011 the Security Council began deliberations on a draft UN Security Council Resolution led by the UK and France. The crisis in Libya brought about a world-wide debate regarding member states' commitment to the 2005 agreement on the Responsibility to Protect and action beyond that taken to date.   There were growing calls for a no-fly zone and Security Council approval under Chapter VII and military enforcement capabilities. Had the international community now reached a point where more drastic and harder measures must be employed as a last resort? It was duly noted that military intervention should be viewed as a last resort under the Responsibility to Protect, and other measures available to the international community were discussed, including surveillance and monitoring, humanitarian assistance,

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[791] UNHCR, The Office of the UN High Commissioner, for Refugees UN Refugee Agency, "UNHCR says evacuation flights not keeping pace with arrivals from Libya" News Stories 11 March 2011. http://www.hotmail.com/ (accessed 10 July 2011).
[792] World News Guardian.co.uk NATO Weighs Libya no fly zone options, March 8, 2011.
[793] BBC News Africa "Viewpoint: Overwhelming Moral Case for Military Path" March 8, 2011. http://www.bbc.co.uk/news/world-africa-12676248 (accessed 14 March 2011).
[794] World News Guardian.co.uk Gaddafi threatens armed resistance against no fly zone 9 March 2011. http://www.hotmail.com/

enforcement of the arms embargo and sanctions. One of the key criteria was that any intervention should have a clear legal basis from the UN, and in this case should occur in cooperation with African and Arab States.

A no-fly zone would mean banning military flights by government forces through Libyan airspace. Military flights violating the ban would then risk being shot down by international forces. Gaddafi, of course, would use this to say that external actors were supporting insurgents (another frequent criticism of international intervention). The question was who would impose such a zone; the most likely possibility being the North Atlantic Treaty Organization (NATO). It was also understood such action would have to be passed by a United Nations resolution.[795] A speech made by Gaddafi saying that "he would rather die a martyr than to step down along with his calls for his forces to attack and "cleanse Libya house by house until protestors surrender," raised the concerns of the international community even further. It was clear that the Libyan government planned further killing of the civilians.' The responsibility to protect the Libyan people clearly needed to be shifted from Libya to the international community.

The Human Rights Network –Uganda recommended that:

> African states should refer to the principle of 'no-indifference' in Article four of the AU Constitutive Act and immediately intervene in ending massacres of civilian population in Libya; Libyan authorities and the belligerents should allow immediate access for international human rights monitors and humanitarian agencies; and, the UNSC should draw on its powers under Chapter VII of the UN Charter by taking appropriate non-military and military action to restore peace and security for the people of Libya.[796]

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[795] African Conflict Prevention Program (ACPP) – Pretoria ACPP Daily briefings 08 March 2011 http://www.issafrica.org/uploads/08March2011.pdf (accessed July 12, 2011)
[796] Human Rights Network – Uganda (HURINET – Uganda) Ndifuna Mohammed, Chief Executive Officer, Letter "A call for upscaling Responsibility to Protect Mechanism in the Libya Situation, 28 March 2011. http://responsibilitytoprotect.org/Hurinet%20Uganda%20LIBYA_%20Statement.pdf

Genocide Alert, based in Koln, Germany, launched an email campaign calling for action in Libya directed at the German government (who has a seat on the Security Council); i.e. Chancellor Merkel and foreign minister Guido Westerwelle, as well other relevant politicians in Germany.[797]

 Another article published by Genocide Alert referred to the international community's responsibility to protect civilians from mass atrocities committed by Muammar Gaddafi. The article pointed to the Responsibility to Protect's three pillars, including the responsibility to prevent, and measures that could/should be taken to prevent mass atrocities. It suggested that if these efforts had failed, however, more comprehensive measures needed to be taken.[798]

Ramesh Thakur wrote in The Star on 13 March 2011 regarding the situation.[799]   In contemplating the implementation of the Responsibility to Protect in Libya, and one might say in consideration of reasonable proposals, Thakur's article addressed three criteria: "military capacity, legal authority and political legitimacy." He was certain that military operations would entail four activities: "surveillance and monitoring, humanitarian assistance, enforcement of the arms embargo and enforcement of a no-fly zone."[800] He understood that only the West had the military capability needed. He noted the rebels had been calling for a no-fly zone. One concern, he had, however, was with regard to mission creep and the fear of the interveners being seen as Western imperialists. He recommended legal authorization from the UN Security Council

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[797] Email campaign. http://genocide-alert.de/libyen/aktion.php

[798] Genocide Alert "The Responsibility to Protect the International Community. http://www.genocide-alert.de/htdocs/contenido/cms/front_content.php?idcat=99&idart=295

[799] Ramesh Thakur wrote in The Toronto Star on 13 March 2011.(*http://politicalscience.uwaterloo.ca/profiles/prof-thakur.htm*) (Note: Ramesh Thakur, professor of political science at the University of Waterloo, was the Responsibility to Protect Commissioner and a principal author of its report. He is adjunct professor, Institute of Governance, Ethics and Law at Griffiths University in Australia.

[800] Ramesh Thakur, Acting Responsibly to Protect Libyans The Star March 11, 2011. http://www.thestar.com/opinion/editorialcartoon/article/952805--acting-responsibly-to-protect-libyans (accessed July 13, 2011).

should be restricted to the four military tasks listed above. The United States were very reluctant to support such a resolution, but he suggested their opposition could be overcome if and as it became clear that the Arab, Islamic and African nations, as well as the mass of defecting Libyan diplomats, supported prompt and effective action to protect Libyan civilians, oust Gaddafi and promote democratic reforms.[801]   In the case of Libya the inclusion of Arab bodies was an important issue in the legitimacy of Security Council's decision.

Some, however, argued that the proposal crossed the boundaries of legitimate humanitarian intervention, touching on taboo areas in military humanitarian intervention in the form of proposals for regime change. For example, in 'Foreign Policy' James Traub wrote on 11 March 2011 that effective action was impossible in Burma, Sudan, Zimbabwe and elsewhere so long as the neighbors insisted on protecting an abusive tyrant.

> The goal, of course, would not be to induce Qaddafi to come to the negotiating table -- a Hitler-like *Götterdämmerung* is much more likely -- but to damage and demoralize his forces and thus tip the scales between the government and the rebels. [802]

This, as we can see, verges on recommendations for regime change, although it is not explicitly stated. Taub was also in favor of force as the 'right thing' because force could stop Gaddafi, 'a ruthless tyrant' from killing his own people. It would also be to America's benefit because the United States would be liberating Arab peoples and would gain the approval of the Arab world. He stressed the Gulf Cooperation Council, the Arab League and the Organization of the Islamic Conference had all called for a no fly zone over Libya.[803]

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[801] Thakur 2011 *ibid.*
[802] Thakur 2011 *ibid.*
[803] James Taub, "Stepping In" Foreign Policy March 11, 2001.
http://www.foreignpolicy.com/articles/2011/03/11/stepping_in?page=0,0 (Accessed July 13, 2011)

Iftekhar Ahmad Chowdury and Yang Razali Kassim wrote on March 9 about the situation in Libya.[804] They argued the efforts to bring about 'regime change' in Libya need not be a 'back–door' endeavour. There is a real need to end the human sufferings of the Libyan people. Considering the Responsibility to Protect, all peaceful means to resolve the crisis have proved futile. Collective action through the Security Council can be supported legally, morally, and in practical terms. It is a situation ripe for the application of the principle of the Responsibility to Protect.

One aspect in support of the lack of total neutrality occurred in the first resolution, naming and blaming Gaddafi, and announcing the call for his arrest. In a BBC interview, Gareth Evans argued the moral case for the Responsibility to Protect. It was his view that a no-fly zone would be extremely effective in addressing the imbalance of power, while arming people on the ground would risk escalating the conflict.

In response to the escalation of violence between government forces and the armed opposition, international civil society groups, including ICG,[805] Human Rights Watch[806] and the Global Centre for the Responsibility to Protect[807] beyond the U.S. alone also increased urgent calls for action, noting the compelling obligation of the international community to prevent and halt mass atrocities. The Gulf Cooperation Council met on 7 March and requested that the "UN Security Council take all necessary measures to protect civilians, including enforcing a no-fly zone over

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[804] Iftekhar Ahmad Chowdury is Senior Research Fellow at the Institute of South Asian Studies (ISAS). He was formerly ambassador to the UN. Yang Razali Kassim is a Senior Fellow with the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University, Singapore.
[805] Arbour, Louise International Crisis Group Open Letter to the Security Council on the Situation in Libya http://www.crisisgroup.org/en/publication-type/media-releases/2011/open-letter-unsc-libya.aspx (accessed July 27, 2011) 16 March 2011.
[806] Africa Portal, Libya:Ambiguities over the interpretation of UN Resolution 1973 Causing Global Consternation 23 March 2011 http://allafrica.com/stories/201103230883.html (accessed July 27, 2011).
[807] Global Centre for the responsibility to Protect "Time for Decision" 14th March, 2011. http://globalr2p.org/media/pdf/Libya_Time_for_Decision_14_March_2011.pdf (Accessed July 27, 2011).

Libya." They also condemned the "crimes committed against civilians, the use of heavy arms and the recruitment of mercenaries" by the Libyan government.[808]

The Arab League barred Libya from taking part in its meetings and also called on the Security Council to impose a no-fly zone on Libya to protect the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States. It also commended other states like Oman and Bahrain for the non-violent way they were dealing with their own protests. These statements were very important since Western countries and NATO had indicated they would not use coercive options without approval from regional organizations.[809]

 As a result of the increased pressure from the international community and rising threats to the civilian population and follow-up to Resolution 1970, the Security Council on 17 March voted on Resolution 1973, calling for a no-fly zone as well as a ceasefire. The resolution also included an arms embargo, travel bans and asset freezes.[810] The resolution emphasized the responsibility of the Libyan authorities to protect the Libyan population and *c*onsidered that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population amounted to crimes against humanity. The resolution authorized Member States acting in cooperation with the Secretary-General, "to take all necessary measures, (…) to protect civilians and civilian populated areas under threat of attack (…) while excluding a foreign

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[808] Keyrouz, Wissam AFP: Gulf States back Libya No-fly zone" March 7, 2011 http://www.google.com/hostednews/afp/article/ALeqM5jRu1VXz2KQyUHoqOAAUYFhCgRCkg?docId=CNG.491 04d077a72cbffeafe9d3689e92793.ba1 (accessed July 27, 2001).

[809] Hadid, Diaa "Arab League asks UN for Libya No fly zone" Huffpost World March 12, 2011. http://www.huffingtonpost.com/2011/03/12/arab-league-asks-un-for-libya-no-fly-zone_n_834975.html (accessed July 27, 2011.

[810] ICRP http://responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3267-un-security-council-resolution-1973-2011-on-libya-calls-for-no-fly-zone (accessed July 27, 2011).

occupation force of any form on any part of Libyan territory…" as a means of ensuring

proportionality. Secretary General Ban Ki-moon stated that Resolution 1973

> affirms, clearly and unequivocally, the international community's determination to fulfill its responsibility to protect civilians from violence perpetrated upon them by their own government.[811]

Boots on the ground and a foreign occupation force were, however, expressly excluded.

Coercive military action was therefore allowed to take two forms, namely "all necessary

measures" to enforce a no-fly zone, and "all necessary measures … to protect civilians and

civilian populated areas under threat of attack."[812] 'All necessary measures' in this instance

allowed for the removal of the perpetrator, Gaddafi, which was ultimately necessary for success

since no other less coercive measure had been successful.

The language of this resolution was clear in prescribing the scope and limits of what should be

done. In the case of enforcing the no-fly zone, Resolution 1973 allows the destruction, by aircraft

or missile, of any loyalist jet or helicopter that takes off, any pro-Gadhafi forces' anti-aircraft

batteries or missile-launch sites, and the disabling of any airstrip. And, as for the wider mandate

to protect civilians, the Resolution allowed airborne attacks against tanks or troop columns

advancing on Benghazi or other rebel-held towns, and any concentrations of forces within those

areas that pose a direct and immediate threat to Gaddafi's opponents. Any military action

designed specifically to target or ensure a rebel victory in a civil war, or even to achieve a more

open and responsive system of government in Libya was not explicitly in the terms of the

Resolution. In fact, neither is it part of the moral first principles of the "Responsibility to

Protect" doctrine approved by the U.N. General Assembly in 2005. One or more of these results

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[811] UN News Centre "Ban welcomes Security Council authorization of measures to protect civilians" 18 March 2011 http://www.un.org/apps/news/story.asp?NewsID=37809&Cr=Libya&Cr1 (accessed 27 July 2011).
[812] UN News Centre 2011 *ibid.*

might, conceivably, occur but it cannot be its stated objective. Three African countries on

the Security Council - Nigeria, South Africa and Gabon - supported the resolution. The support

of Arab States most likely prompted China, Russia, Germany, India and Brazil to abstain,

permitting the Resolution to pass.[813]

In spite of news that Libyan authorities declared a cease-fire, fighting continued. Most of Libya

remained off limits to aid workers and thousands of people escaped to neighboring countries.[814]

On 24 March, the UN Human Rights Council reported that "hundreds of persons have been taken

to undisclosed locations where they might have been submitted to torture or other cruel, inhuman

or degrading treatments or executed." [815] Such treatment would certainly constitute crimes

against humanity. Two days after the Resolution was adopted, on Saturday 19 March, a military

operation called Operation Odyssey Dawn (a coalition of American, French and British forces)

launched airstrikes against Libyan air defenses, tanks, armored personnel carriers and other

military hardware. The coalition now also included Denmark, Canada, Italy, Qatar, Belgium,

Spain, Norway, and the United Arab Emirates.[816] Plans were also being made to have NATO

take over the mission.[817]

 President Obama authorized the U.S. Armed Forces to enforce the no-fly zone and expressed

pride in being part of a coalition that were "prepared to meet their responsibility to protect the

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[813] Security Council SC 10/200 ""Security Council approves no-fly zone over Libya, authorizing all necessary measures to protect civilians, by vote of 10 in favour with five abstentions" 17 March 2011. http://www.un.org/News/Press/docs/2011/sc10200.doc.htm (accessed July 27, 2011).
[814]Alert Net "Libyans Lack access to Food, Health Care" 22 March 2011. http://www.trust.org/alertnet/news/libyans-lack-access-to-food-health-care-aid-agencies/ (accessed 29 July 2011); UNHCR "Fighting in eastern Libya leaves thousands internally displaced" 22 March 2011. http://www.unhcr.org/4d88bc3f9.html (accessed 29 July 2011).
[815] UN Human Rights Council Report "Libya: Wave of enforced disappearances may amount to crimes against humanity, warns UN expert" 24 March 2011 http://reliefweb.int/node/393322 (accessed 29 July 2011).
[816] UN News Centre, "Speedy Decisive International action to protect civilians in Libya is vital" 24 March 2011 http://www.un.org/apps/news/story.asp?NewsID=37885&Cr=Libya&Cr1= (accessed 24 March 2011).
[817] Al Jazeera "NATO to police Libya No fly zone" 25 March 2011 http://english.Al Jazeera.net/news/africa/2 011/03/2011324221036894697.html (accessed 29 July 2011).

people of Libya and uphold the mandate of the international community." On 24 March, the US announced that it was transferring command and control to NATO with the limited mandate of a no fly zone.[818]

The endorsement of Resolution 1973 represents a historic event in support of the Responsibility to Protect principle agreed to in 2005 and sets a major precedent for the UN Security Council and the Responsibility to Protect. Gareth Evans, Sydney Morning Herald, 24 March 2011 responded to Resolution 1973 with caution, however, regarding the aspect of proportionality.[819] Evans was careful to point out that *w*hile the result of the military action may be to kill Gaddafi or force him into exile, or to ensure rebel victory in a civil war, or to achieve a more open and responsive system of government in Libya, it is not the explicit legal objective of UN Resolution 1973. It also follows legally and morally from these first principles that once the threat to civilian populations has ended the military action should stop.[820]

Needless to say, controversy began to take place over the implementation and enforcement of the United Nations Security Council (UNSC) mandated no-fly zone in Libya. Some, including the African Union (AU), have argued that more than just a no fly zone had been imposed which exceeds the intentions and objectives of UNSC resolution 1973. Concerns were raised that the protection of civilians by "any means necessary" allowed for mission creep and ulterior motives including the possibility of regime change along with self-interest. If it were to be shown that the

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[818] Al Jazeera *Ibid.*
[819] Gareth Evans was Australian Foreign Minister from 1988 to 1996.
[820] Gareth Evans, "When intervening in a conflict stick to the UN Script," National Times, 24 March 2011. http://www.smh.com.au/opinion/politics/when-intervening-in-a-conflict-stick-to-un-script-20110323-1c6kz.html accessed July 30, 2011.

no-fly zone attacks were causing too many civilian deaths the credibility of the action would be seriously undermined.[821]

Concerns were being raised by the UNHCR that States may be considering steps to arm the rebels, or take actions toward regime change which go beyond Resolution 1973 which made clear that measures using "all necessary measures" to protect civilian areas from attack by Libyan government forces should only take place while civilians were under threat. [822] In terms of civilian protection it is notable that NATO officials warned rebels that if they endangered civilians they may also be subject to attack. In that sense, Resolution 1973 does not distinguish between civilians who support Gaddafi and those who support the rebels.[823]

Ian Davis, Director of NATO Watch, wrote in NATO Watch, 31 March 2011, that concerns continued to be expressed regarding the fact that what started out as an action that observed the majority of the norms of international law and multilateral consultation was now in danger of changing. [824] US, French and British muscle and talk of regime change, arming the rebels and even assassinating Gaddafi could break international consensus. Reference to Resolution 1973 itself, however, established an imbalance. While of course the intent of the United Nations resolution is to be neutral in its saving of civilians, the use of the term "all necessary measures" and the call for the arrest of Gaddafi for crimes against humanity suggest the intervention was slanted toward the opposition forces.[825] This does not conflict, however, with it being the last,

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[821] Allafrica.com "Libya: Ambiguities over the interpretation of UN Resolution 1973 causing global consternation" 23 March 2011 http://allafrica.com/stories/201103230883.html 23 March 2011 (accessed July 30, 2011).

[822] UNHCR "North Africa Situation" http://www.unhcr.org/pages/4d7755246.html (accessed August 1, 2011).

[823] Tom Shanker, and Charlie Savage "NATO warns Libyan Revels Not to attack civilians" New York Times, March 31, 2011.
http://www.nytimes.com/2011/04/01/world/africa/01civilians.html?pagewanted=1&_r=3&ref=world (accessed August 2, 2011).

[824] Dr. Ian Davis, NATO Watch, March 31, 2011

[825] Dr. Ian Davis, *ibid*.

and 'legitimate' resort in my view, nor does it extend beyond the principles of the Responsibility to Protect and the UN resolution.   The intervention and the subsequent regime change itself can be defended according to the Responsibility to Protect and according to the means necessary to protect civilians. Ramesh Thakur, on 21 March 2011 suggested that Security Council Resolution 1973 was the first UN-sanctioned combat operation since the 1991 Gulf War.[826] I would add that it was a successful intervention. As I will argue below, genocide was averted. Also, many Libyan diplomats defected and joined the calls for the protection of Libyan civilians and the ousting of Gaddafi to allow for democratic reforms.

V.   Consequences of the Intervention

As part of these deliberations the Security Council expressed confidence that the action would succeed. While not necessarily part of the framework, one of the real challenges in determining the legitimacy of this intervention comes in assessing whether the military action was a success. When analyzing the outcome, there will always be questions about whether the number of deaths would have been higher or lower if Libyans had been left to their own devices, which is virtually an impossible question to answer. More importantly, however, will be to recognize it as "an 'intervention based on principle' and not as the 'petro-imperialist' plot that Gaddafi claim[ed] it to be."[827] There is also the question of how much weight should actually be placed on the outcome if the intervention is 'right'. And what if the outcome is good but the intentions were self-serving? One of the frequent questions will be whether the intent was to change the Libyan regime. If in fact it was, even though regime change is not considered a legitimate goal of

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[826] Ramesh Thakur, The Toronto Star" 21 March 2011.
[827] Brian Whitaker, "The Difference with Libya" Guardian.co.uk 23 March 2011, http://www.guardian.co.uk/commentisfree/2011/mar/23/libya-bahrain-yemen-un-responsibility-protect (accessed 31 July 2011).

humanitarian intervention, will getting rid of Gaddafi be considered in the final analysis as a success if it was ultimately the only way to protect civilians from a brutal dictator who was eventually replaced by a democratic governing body. I suggest that when a military intervention occurs as a last resort, and when all other conflict resolution 'neutral' strategies have been explored or tried, the intervention may be pushed into a less neutral zone. If, for example, as in Libya, the state is the perpetrator of the looming genocide – the interveners may be forced to take sides.

The final stage of the Responsibility to Protect military action regards rebuilding. The Libyans were likely to need support – but not interference. This stage requires a political-diplomatic approach, which allows for the transitional government to govern themselves. Some might consider pushing the Responsibility to Protect beyond the boundaries of the resolution would be self-defeating. Gareth Evans, for example, in The Daily Star 25 March 2011 claimed that "legally, morally, politically and militarily," the military intervention in Libya had only one purpose – to protect Libyans from Gaddafi. When that job is done the military intervention should end. Regime change should be implemented by the Libyans themselves. [828]

According to the chosen framework, the question of whether Resolution 1973 and subsequent action according to due process is still important to a determination of its legitimacy. I have suggested that no determination of the legitimacy of a Responsibility to Protect action can be complete without a legal assessment. We can establish the legality of the intervention according to the fact that it was passed by a UNSC resolution and follows the legal interpretation of the Responsibility to Protect according to Articles 138 and 139 of the UNGA agreed to in 2005. International humanitarian law governs the conduct and responsibilities of nations and

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[828] Gareth Evans, The Daily Star, 24 March 2011 http://www.dailystar.com.lb/#axzz1I1JpCHaa (accessed 31 July 2011).

individuals during war and conflict, in relation to one another and to protected persons (civilians). It constitutes the legal corpus of the Hague Conventions (1989 and 1907) and the Law of Geneva (1863). Together they set the basis for *jus ad bellum,* the right to the use of force in the context of humanitarian intervention and jus *in bello,* the legitimate modalities for the use of force*,* together forming international law governing acceptable practice to be followed in war and armed conflict.   The most important provision of the Geneva Conventions in terms of humanitarian intervention is the fourth convention relative to the Protection of Civilian Persons in Time of War (first adopted in 1949, based on parts of the 1907 Hague Convention). With the adoption of additional protocols to the Geneva Conventions, the two streams of law converged. One of the indicators of the future support for the Responsibility to Protect can be gleaned from the public reaction as revealed through the media and other sources.

Hans Geiser, a former UN diplomat*,* wrote in the Trinidad Express Newspaper 27 March 2011 that the Resolution regarding "the Responsibility to Protect" is a historic event.[829]
Juan Cole argues, as I do, the intervention in Libya was prosecuted in a legal way: it was demanded by the people being attacked, it included the support of the Arab League and was authorized by the UN Security Council (UNSC) Resolution. The risk of a civilian mass murder was real.[830]
Geiser argues that the Security Council has taken legitimate enforcement measures specifically in line with and in support of the principle to protect innocent civilians and is not in violation of the Charter provision and therefore does not render the resolution null and void. "We are

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[829] Hans Geiser, "A Chink of the armour in sovereignty" Trinidad Express Newspaper March 27, 2011 http://www.trinidadexpress.com/commentaries/A_chink_in_the_armour_of_sovereignty-118752319.html (August 6, 2011) **[Geiser 2011].**
[830] Juan Cole "An open letter to the Left on Libya" Informed Comment March 27, 2011. http://www.juancole.com/2011/03/an-open-letter-to-the-left-on-libya.html in http://www.natowatch.org/sites/default/files/Libya_-_NATO_must_stick_to_the_R2P_script.pdf

reminded that one of the main roles of the UN in relation to the Charter is the progressive

development of international law, and this is precisely what took place."[831] According to the

Charter Article 27/3 an affirmative vote by nine members is required for decisions including the

concurring votes by the permanent members, and in fact this took place.[832]

However, the Responsibility to Protect does not create a legally binding obligation in itself.

Rather, it appeals to the "ethical conscience."[833] Needless to write, compelling moral action is

more uncertain than a legal obligation as the thesis has argued throughout. Although the

Responsibility to Protect has not yet reached the status of *lex lata,* each legitimate case can be

said to contribute to customary law.

Its status as soft law this helps to explain why the international community fails to act in certain

cases today and in the past. The protection of human rights is not always viewed as a compelling

argument. One approach is to try to argue that it is in the state's self-interest to act; however,

this only tends to aggravate non-Western nations by suggesting to them that self-interest is the

basis of the Western states' action rather than actions based on moral premises….creating a

Catch-22 situation.[834] In terms of determining legitimacy, as suggested, the extent of any UN

endorsement for the Responsibility to Protect in any resolution must be very clearly passed at the

UN on the basis of humanitarian principles.

One of the main questions, however, is how such agreement is achieved. The success of a

Responsibility to Protect decision requires a combination of knowledge of the specific situation,

history, an appreciation and respect for the ethical and moral principle involved and collective

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[831] Geiser 2011 *supra* note 829.
[832] Geiser 2011 *ibid.*
[833] Coicaud Chapter 2 in Charlesworth, 2010 *supra* note 656 at 64.
[834] Coicaud Chapter 2 in Charlesworth, 2010 *ibid* at 66.

legitimate action. The legal issues are important but can only be resolved in the transnational environment with the assistance of the global network of key players. Without sufficient resources to take effective action, the knowledge of mass human rights abuses may not be a sufficient deterrent.

Daniel Pipes, the Director, Middle East Forum, 7 March 2011 raised an important point by asking whether the Libyan intervention would set a precedent and become common law. Would it mean that international forces all over the world would intervene when governments attack their own populations? In considering this question, we need to remember that approval for the Responsibility to Protect was approved to be on a case by case basis. Most, I believe, would not want to see a law which allowed it to be implemented on a basis of convenience or custom alone.[835] At the same time the fact that it is made on a case by case basis, leading to what can be perceived as inconsistencies, is not a justification for shelving it, especially if one wants to establish its legality. Irwin Cotler stated in his New York Times Op-Ed, "Libya and the Responsibility to Protect" that the situation in Libya "is a test case for the Security Council and its implementation of the Responsibility to Protect doctrine. …It is our collective responsibility to ensure the Responsibility to Protect is an effective approach to protect people and human rights."[836]

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[835] "Does the UN Have a Responsibility to Protect Libyans?" The Mark March 7, 2011. http://www.themarknews.com/articles/4244-does-the-un-have-a-responsibility-to-protect-libyans (accessed July 14, 2011).

[836] New York Times "Libya and the Responsibility to Protect" http://www.nytimes.com/2011/03/01/opinion/01iht-edcotler01.html?_r=3 (accessed July 23, 2011). Irwin Cotler is a member of the Canadian Parliament and a former minister of justice. Cotler and Jared are co editors of the forthcoming "The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Times."

On March 2, 2011, Ramesh Thakur commented on Libya.[837] He noted the language of the Responsibility to Protect refers to state inability or unwillingness as the catalyst for the international Responsibility to Protect to be called to action. Often the state itself is in fact the perpetrator of atrocities when security forces, meant to protect people, are instead let loose in a killing spree.   That was the situation in Libya, where many had already been killed and a carnage was feared. Reminding readers of the history of the Responsibility to Protect, Ramesh Thakur concluded it provided the normative and political arguments necessary to deal militarily with Gaddafi's human rights abuses. The UN and the West needed to overcome the stain of being passive spectators in Rwanda and Srebrenica. He argued the crisis had exceeded the threat level and the world needed to respond to the challenge. "Libya is the perfect opportunity to convert the noble sentiments and words into deeds."[838]

Tim Dunne wrote in the Interpreter on 3 March 2011, and referred to Srebrenica as a place where the world permitted atrocity crimes to occur.[839] Dunne expressed optimism that the UN Security Council Resolution of 26 February calling for 'decisive action' and 'tough measures' against the Gaddafi regime was a move in the right direction. This was the first time in his view that the Responsibility to Protect was invoked in its hard core form in a Security Council resolution against a specific country. As an illustration of the role of the international community in furthering the norm, Dunne takes note of a strongly worded letter to the US president, calling for

[837] Ramesh Thakur, "UN Must Prevent Libyan Slaughter" March 2, 2011. http://www.therecord.com/opinion/editorial/article/495508--un-must-prevent-libyan-slaughter (Accessed July 26, 2007).

[838]Ramesh Thakur, "It's time for the UN to hold Gaddafi responsible and invoke doctrine of 'responsibility to protect' March 1, 2011 http://www.thestar.com/opinion/editorialopinion/article/946306--we-have-a-duty-to-stop-libyan-slaughter (accessed July 26, 2011).

[839] Professor of International Relations and Director of Research in the Asia-Pacific Centre for the Responsibility to Protect, University of Queensland.

decisive action.[840] It was signed by forty policy analysts, and included prominent neo-conservatives associated with the George W. Bush Administration such as Robert Kagan, William Kristol and Paul Wolfowitz, who was deputy-defence secretary under Bush. The letter demands that the US and NATO develop operational plans to command Libyan waters and air space.

Questions have been raised about how the engagement in Libya will affect long-term support for the Responsibility to Protect. Another question pertains to the consistent application of the Responsibility to Protect to other contexts as mentioned. An important point to remember is that all states have an obligation to protect their own citizens from atrocities, and the Responsibility to Protect has a number of measures available (diplomatic, economic, political), with the use of force being used only as a last resort.

Sheri P Rosenberg[841] wrote on 4 April 2011 regarding the situation in Libya.[842] When economic sanctions and travel bans failed to stop Gaddafi's "no mercy" policy the Security Council moved to military action as a last resort. Although it is still being questioned by some, there seems to be little doubt that the world powers were motivated to and intended to protect innocent lives during the threat of massacres in Libya. The approval of this action, however, has served to raise controversy again over military intervention which is perceived as another instance of imperialism.

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[840]"Foreign Policy Experts Urge President to take action to halt violence in Libya"   Foreign Policy initiative website February 25, 2011 http://www.foreignpolicyi.org/content/foreign-policy-experts-urge-president-take-action-halt-violence-libya-0 (accessed July 26, 2011).
[841] Professor Sheri P. Rosenberg is a UNAOC Global Expert and the director of the Holocaust and Human Rights Programme at Cardozo Law School. Global Experts (www.theglobalexperts.org) is a project of the United Nations Alliance of Civilisations.
[842] Sheri P. Rosenberg, "The Responsibility to Protect": Libya and Beyond" April 11, 2011 http://gulf-times.com/site/topics/article.asp?cu_no=2&item_no=425616&version=1&template_id=46&parent_id=26 (accessed August 8, 2011).

Critics need to be reminded that the Responsibility to Protect is a moral principle that is not exclusively about military intervention. The R2P doctrine makes it clear that protecting populations from mass atrocities involves a progressive action by states, including preventing mass atrocity, reaction to the threat or occurrence of mass atrocity, and, if military action is taken as a last resort at the final stage the goal is to build a durable peace. And there are indeed times when military action as a last resort, as was the case in Libya, becomes the only way to stop a potential bloodbath and avoid another Rwanda. Rosenberg reminds the reader that the moral principles imbedded in the Responsibility to Protect doctrine should be seen not only as military action, however, but as prevention. And again, military intervention must remain as "the exception not the rule."[843] On April 1, 2011, Michael Abramowitz[844] stated that actions by the international community reveal an important shift in thinking over the past two decades regarding preventing mass atrocities.[845] The last twenty years has shown changes in policies by civil society and governments that support the world's collective capacity to respond to genocide or threats of genocide which include the creation of an Office of Genocide Prevention at the United Nations; a new International Criminal Court in The Hague, the adoption of a doctrine of Responsibility to Protect at the United Nations (invoked in Libya); and steps by individual governments to strengthen their ability to detect and react to potential genocide. One

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[843] Rosenberg, 2011 *Ibid.*

[844] Michael Abramowitz directs the Committee on Conscience at the U.S. Holocaust Memorial Museum, which co-convened the US Genocide Prevention Task Force.

[845] Scott Wilson, "Obama: U.S. had responsibility to act in Libya" The Washington Post March 28, 2011. http://www.washingtonpost.com/politics/obama-us-had-responsibility-to-act-in-libya/2011/03/28/AF6fkFrB_story.html (accessed August 8, 2011).

such step has been taken by the United States in the creation of the US Office of the Special Adviser on the Prevention of Genocide.[846]

David Chandler has written widely in this area.[847] On 19 April 2011 he suggested in Today's World, the bombing of Libya cannot readily be grasped in the traditional terms of the state interests of Realpolitik In 2011, the debate over the 'humanitarian' bombing of Libya demonstrates that we have moved into more of an emerging global cosmopolitanism of human security.[848] Chandler argues this is humanitarian intervention in a different political or legal framework than in the 1990s. The Libya campaign should not be posed as intervening in state sovereignty, but rather should be posed in the post-humanitarian language of capacity-building and good governance, with the purpose of strengthening the Libyan state through enabling the forces of democracy.[849] The last chapter of the thesis will address itself to the matter of governance and what it means for a world order based on responsibility rather than the sovereignty of the nation state alone.

VI.   The Significance of the Libyan Intervention

Much has been written already of the significance of the Libyan intervention and the future of the Responsibility to Protect and of Libya. A meeting of leaders from thirty-five governments and NGOs took place in London, England on 29 March, 2011, to discuss implementation of Resolution 1973, the humanitarian needs of the Libyan people, and the future of

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[846] Michael Abramowitz, "Libya intervention shows shift in thinking about mass atrocities" The Washington Post April 1, 2011 http://www.washingtonpost.com/opinions/libya-intervention-shows-shift-in-thinking-about-mass-atrocities/2011/04/01/AFTI2wJC_story.html (accessed August 8, 2011).
[847] Professor of International Relations at the University of Westminster, London and editor of the Journal of Intervention and Statebuilding.
[848]David Chandler, "There's nothing good about the war in Libya" Spiked 19 April 2011 http://www.spiked-online.com/index.php/site/article/10441/ (accessed September 23, 2011) **[Chandler 2011].**
[849] Chandler 2011 *ibid.*

Libya.[850] Conference participants agreed that Gaddafi's government must be held accountable for its brutal use of force.[851] A contact group was considered with close coordination to be maintained with the UN, AU, Arab League, Organization of the Islamic Conference (OIC), and EU.

The Transitional National Council was also present and provided a statement entitled "A Vision of Democratic Libya" which expressed the Council's commitment to "a civil society that recognizes intellectual and political pluralism and allows for the peaceful transition of power through legal institutions and ballot boxes; in accordance with a national constitution crafted by the people and endorsed in a referendum."[852] It was suggested, however, that without a negotiated agreement allowing for an orderly transition to a post-Qaddafi legitimate political order, the future would be uncertain. It is beyond the scope of this thesis, however, to examine the situation in Libya post conflict in depth and I have not included it in my criteria for legitimacy or success. The last chapter, however, will address the need for general concerns of justice after a conflict ends (*ius post bellum*) and future governance.

 I have taken the Libyan intervention as an appropriate case study of the implementation of the Responsibility to Protect in an international as well as a global governance environment which includes a multitude of actions. When Special Adviser Edward Luck was asked if the military intervention in Libya provides an example of the implementation of the Responsibility to Protect, he confirmed it was and that Resolutions 1970 and 1973 of the United Nations Security Council

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[850] International News "New Libya Contact Group to provide political direction" http://www.france24.com/en/20110329-london-creation-libyan-contact-group-post-gaddafi-un-african-union-arab-league (access August 1,2011).
[851] Press Centre, "London Conference on Libya: Chair's statement." http://ukun.fco.gov.uk/en/news/?view=News&id=574646182 (accessed August 2, 2011).
[852]Tim Shipman, "Libya: David Cameron ready to arm rebels as air strikes continue until Gaddafi goes", Mail Online 30 March 2011 http://www.dailymail.co.uk/news/article-1371056/Libya-David-Cameron-ready-arm-rebels-air-strikes-continue-Gaddafi-goes.html (accessed September 30, 2011).

referenced it. He also indicated this was indeed the first time that the Security Council employed the provisions of Chapter VII of the Charter to implement the Responsibility to Protect. From Andrew Thompson's view, for example, Libya came the closest to "meeting the test." He clearly saw Libya as an historical example of the implementation of R2P. He commented "On balance, if you are looking for a case on which to hang the Responsibility to Protect, Libya comes the closest."[853] From my own analysis, I would agree with these conclusions.

To help with reaching a conclusion with regard to the legitimacy of the intervention, those interviewed as part of the qualitative study of the Responsibility to Protect were also asked to gauge whether the Libyan intervention was legitimate and whether it was a success. In the first instance, respondents were asked their opinion on whether the Libyan intervention could be regarded as a success for the Responsibility to Protect. A definition of success was not provided and the respondents were primarily left to create their own criteria. While in some cases there may be some overlap between the question of successful intervention and legitimacy, the two questions were treated somewhat independently. Some of the suggested terminology for defining success entailed the measurement of success, including 'meeting the goal or mandate of the action', or 'meeting the test'.

On the whole, measuring success was regarded as close to impossible. Nevertheless, Mark Sedra clearly saw a positive; i.e. that,

> the intervention did avert potential massacre. There was a clear danger to a lot of
> civilians and it was imperative to act. It was a fairly limited intervention with no ground

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[853] Andrew Thompson, interview, Centre for International Governance and Innovation, Waterloo, Ontario, November 2, 2011.

forces. In that sense it was successful in spite of the overarching question of how you judge success.[854]

Ian Davis saw the Libyan intervention as "leaning towards the success end of the spectrum", although he hesitated to go so far as to call it a "model intervention."[855]

One route to providing a judgment was to ask whether further mass atrocities were prevented including the slaughter of civilians in Benghazi.[856] Another criterion used to define success was the multilateral nature of Security Council endorsement. The matter of regime change was perhaps the most controversial and generally judgments were clouded. Those interviewed generally felt that regime change was not a cine qua non for the Responsibility to Protect and that it should only happen if a country is failing to protect its citizens or is perpetuating the violence.

Nami Kikoler looked at it from both a practical and a moral perspective.

> The reality is that in certain situations there are times when the leadership may themselves be a serious threat and there may be a need for regime change, but the Responsibility to Protect should not be used as an excuse to invade or oust the leader of a country. We also shouldn't care about the governance structure per se and whether a government is democratic or not, but we must care about atrocities.[857]

Andrew Thompson even went so far as to read "regime change" into the resolution. From his point of view the reference to "all necessary means" opened that door. Respect for human rights law and trials is important for a definition of a successful government, and Andrew Thompson

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[854] Mark Sedra interview, Centre for International Governance and Innovation, Waterloo, Ontario, November 2, 2011.

[855] Interview with Andrew Thompson *supra note 853.*

[856] Jillian Siskind, interview, Canadian Lawyers for International Human Rights, Toronto, Ontario, October 26, 2011 and November 23, 2011.

[857] Naomi Kikoler, Interview, Global Centre for the Responsibility to Protect at the City University of New York, New York, November 9, 2011.

commented for this to be a successful government to replace Gaddafi the government must uphold respect for human rights. "Trials and so on are necessary," he said.[858]

Kyle Matthews suggested the principles of just war are important. "Military force can only be used when you have a reasonable expectation of success."[859] Timeliness was also a consideration. Naomi Kikoler concluded "On the whole it had probably been a positive effort. It shows that the international community and the Security Council can work together and act quickly."[860] One of the measures in the case of Libya (difficult if not impossible to quantify) was whether mass human rights violations were prevented. "In spite of the difficulty in determining this, many referred to this as a criterion of success. Andrew Thompson, for example, asked "Were mass human rights violations prevented? On balance 'yes'. How do we know when there is a human rights violation taking place? – the answer for the Council was when NGOs send out early warnings as well as UN agencies that sound the alarm."[861]

David Welch commented affirmatively "If the main goal was to keep the Libyan government from slaughtering civilians then it was a success. They were rolling toward Benghazi. The opposition did not have trained fighters. They did in fact protect civilians so they met their mandate." [862] Naomi Kikoler agreed with this view, saying there was likely to have been a massacre in Bentghazi. She also stated

> I think we generally feel that lives were saved in Benghazi. It is important to emphasize
> the fact that the international community responded in large part because they believed

[858] Andrew Thompson interview, *supra* note 853.
[859] Kyle Matthews interview, *supra* note 671.
[860] Naomi Kikoler interview, *supra* note 857.
[861] Andrew Thompson interview, *supra* note 853
[862] David Welch, interview, Centre for International Governance and Innovation, Waterloo, Ontario, November 2, 2011.

civilians were at risk of mass atrocities.   They responded in a timely and decisive way.
There are lessons to be learned from the international response.[863]

Just War criteria were often referred to in relation to success. Timeliness was also a
consideration. In my view, success, apart from legitimacy of the action, is determined by the fact
that thousands were likely saved which was the primary objective of the intervention. It is not, I
stress, a matter of what happens later, after the objective has been reached. In other words, this
definition does not include an indeterminate period of time.

VII.   Was the Libyan Intervention Legitimate?

There is an important passage in the ICISS report that deals with legitimacy.

> The authority of the UN is underpinned not by coercive power, but by its role in the
> application of legitimacy. The concept of legitimacy acts as the connecting link between
> the exercise of authority and the recourse to power. Attempts to enforce authority can
> only be made by the legitimate agents of that authority. Collective intervention blessed
> by the UN is regarded as legitimate because it is duly authorized by a representative
> international body; unilateral intervention is seen as illegitimate because self-
> interested.[864]

Most of those interviewed agreed that the implementation of the Responsibility to Protect in
Libya could be regarded as legitimate. However, they had some concerns regarding the role of
the ICC and the change in regime which somewhat clouded the issue for them. Jillian Siskind
stated in terms of the legitimacy of the intervention "The Libyan government was obliged to
protect its own people and was therefore in violation of international law when it did not. Many
states were willing to intervene to protect Libyan citizens."[865] Kyle Matthews suggested the

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[863] Naomi Kikoler interview, *supra note* 857.
[864] Article 6.9 ICISS, *The Responsibility to Protect* I.1.5 International Commission on Intervention and State
Sovereignty (ICISS) December 2001, International Development Research Centre, Ottawa, at 11. http://www.idrc.ca
[865] Jillian Siskind interview, *supra* note 856.

principles of just war are important. "Military force can only be used when you have a

reasonable expectation to succeed."[866]

Andrew Thompson referred to the six tests in the original ICISS document and commented that

there was

> an imminent threat of a massacre; reasonable prospect of success -- Libya is not a big
> country so without boots on the ground NATO could neutralize Gaddafi resources; the
> right intention – the aim of the intervention in Libya was to prevent large scale loss of
> life; and, the right authority. Only with a very liberal reading of the resolution, however,
> could regime change be read into it. Russia agreed to a no fly zone, although they never
> agreed to getting rid of Gaddafi.[867]

The efficacy of the reference to the ICC was questioned, however, with reference to the Libyan

intervention as to whether it helped or hindered the intervention. Ian Davis suggested

> On the one hand the ICC is one aspect of international law and accountability that brings
> the perpetrator to trial. On the other hand, the decision to bring Gaddafi to trial in the
> Hague backed him and his supporters into a corner. It meant he had to find a refuge in a
> country which does not support the ICC process, or be provoked into fighting until the
> finish, which may have prolonged the conflict.

 "On balance," he said "I would still rather see an indictment where appropriate."[868]

Kyle Matthews exhibited some skepticism regarding the legitimacy of killing Gaddafi in relation

to the mandate.

> While the Security Council resolution itself was saying all necessary means, I think that
> is different from saying we are going to go and kill Gaddafi - yet the compound was
> targeted. I think they were trying to locate him and take him out of the picture. There is
> evidence for that. The Security Council resolution was left vague deliberately.[869]

On the other hand, he ultimately showed support for the action by stating

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[866] Kyle Matthews, Interview, Montreal Institute for Genocide and Human Rights Studies, Montreal, Quebec, November 12th, 2012.

[867] Andrew Thompson Interview Nov. 2, 2011 CIGI *supra* note 853.

[868] Ian Davis interview, *supra* note 617.

[869] Kyle Matthews interview, *supra* note 588.

Susan Rice, the US Ambassador to UN reported on military convoys moving toward Benghazi to an assault against thousands of people. I think when you have a leader that refuses to step down, uses military force to commit violence against unarmed civilians and that goes to the public radio and TV channels and says he plans to destroy them you have an obligation to act. The real issue we have to think about and ask ourselves 'Can we leave someone like this in power?' 'Will civilians be protected if someone like this is left in place?'[870]

Jillian Siskind also expressed some concern as to the possibility that "when states are putting their own citizens at risk, regime change may be the only logical recourse available. I agree with Siskind on this point, as indicated earlier. The problem is that regime change brings with it a whole host of other difficulties. In a situation like Libya there was very little choice as to who is going to take over power. Ian Davis in fact commented "If we are going to support rebels we need to understand this group might be left in power."[871]

Bill Graham felt that getting the Arab League and the UN on side was a way of gaining proper legitimacy. He raised some important questions that he said surface when we think about legitimacy; for example, what sort of interventions do we want? What are we building in terms of instruments? What are we going to do if we do not intervene? It is not just a military matter. There is reconstruction - diplomacy, and policies to stabilize and rebuild societies. What justifies intervention? What are the threshold criteria? What is the effect of technology? Why not just send a drone? What does that do to the issue of international legitimacy? All of these questions are appropriate for us to ask.[872]

Jillian Siskind accepted that there was a legitimate reason to intervene. "We can criticize it now seeing the problems in hindsight, but ultimately it was a legitimate action."[873] For David Dewitt,

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[870] Kyle Matthews interview, *ibid.*
[871] Jillian Siskind interview, *supra* note 856.
[872] Bill Graham, "Ten Years After the ICISS: Reflections for the Past and Future of the Responsibility to Protect" Munk Centre, November 12th, 2011: Keynote Speech.
[873] Jillian Siskind Interview, *supra* note 856.

those countries that voted in favour of the resolution to set up a no fly zone in Libya did so because they had weighed the evidence that supported the findings of a significant level of mass violence. One could argue that an implementation of the Responsibility to Protect must be based on clear evidence according to a strict set of criteria that large numbers of people have been systematically abused and the regime is unable or unwilling to stop it. Alternatively, It must be a systematic policy not to act and by not acting allowing the continuation of some structural violence.[874]

Mark Sedra considered just war theory and noted the intervention "involved Arab League support regional support and broad support of the UN Security Council."[875] Carolyn McAskie clearly believed the Libyan intervention was legitimate. She added that actions with a view to creating peace and security were legitimate in her view. This is also the intention of the framers of the Charter. If the Security Council is charged with working on behalf of the broader membership to intervene and decides this is the place to do that it has to be a legitimate decision. She added "That does not prevent it from being a bad decision."[876]

Marion Arnaud also supported the notion that authorization is legal if it is granted by the Security Council. This is what it takes in international law. A Security Council resolution makes it legal. The application of the no fly zone in Libya was ultimately legitimate. Were the tactics broader than the mandate? Was it about regime change? How do you separate it from "all necessary measures"? One wonders why the Security Council included language like that

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[874] David Dewitt, interview, Centre for International Governance and Innovation, Waterloo, Ontario, November 2, 2011.
[875] Mark Sedra interview, Centre for International Governance and Innovation, Waterloo, Ontario, November 2, 2011.
[876] Carolyn McAskie, Interview December 8, 2011.

which left the door open for multiple interpretations. There are very different arguments on these points. [877]

VIII.   Summary and Conclusions

The conclusions that I draw from this analysis and the opinions of those professionals interviewed is that, given the circumstances in Libya, with its own leader killing protesters and threatening more killing in actions amounting to war crimes and human atrocities, the movement toward hard and coercive intervention according to the Responsibility to Protect principle had just cause. The agreement to implement the military operations in Libya had the right intention to protect civilians from a state that was already killing and was about to slaughter masses of its citizens. The resolution was agreed to as the last resort and was proportionate. It was also a legal process with the right authority invoked. The Resolution also enforced sanctions while explicitly excluding a foreign occupation force of any form on any part of Libyan territory. Also, by considering the possible underlying motives of those making the decision, my analysis concludes the action was motivated primarily by humanitarian concerns rather than the self-interest of states.

In considering 'right authority,' I conclude that in addition to the formal approval of the UN Security Council there existed the backing of the Arab League, the Organization of the Islamic Conference, the Gulf Cooperation Council, the requests from the Libyan rebel leaders themselves and a myriad of civil society representatives. The confluence of these different organizations and people established the legitimacy of the authority for the military operations.

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[877] Marion Arnaud, interview, International Coalition for the Responsibility to Protect, New York, Dec. 5, 2011.

On the matter of proportionate means, the purpose of a no fly zone and of excluding a foreign occupation was to maintain proportionality between the regime's violence and that of the rebels and to allow Libya to remain in charge of its own destiny without the presence of boots on the ground.   Nevertheless, it does seem that there is a fine line in this case between efforts to stop Gaddafi from slaughtering civilians and the apparent support of the rebels' efforts toward regime change. I would suggest on the issue of force to prevent mass atrocities, it is very difficult, if not impossible, for external bodies to maintain neutrality and a complete balance of impartiality. In this sense it is not what we would like to see as conflict resolution.   It is a difficult task from the air to police conflicts neutrally; siding with the rebels may have been the only intervention strategy that made operational sense. However, it is likely the Security Council never would have officially endorsed intervention on behalf of the rebels, so intervening governments felt compelled to cast the entire operation in terms of neutral civilian protection. This dynamic introduces a significant legitimacy problem for the Responsibility to Protect.[878] This is in fact one way in which the International Criminal Court can be helpful. It is, of course, necessary to have evidence.   It is not like mediation or negotiation as forms of conflict resolution where the third party does not take sides.

A remaining criterion in assessing the intervention is "the reasonable prospects for success." Gaddafi and his forces remained committed to maintaining their power, even as it diminished. The outcome moved quickly in the direction of the NTC. It seems that the situation was assessed and determined to be doable. Obviously the outcome, the cessation of the killing and the prevention of genocide as the criterion for success supports this.

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[878] David Bosco "Humanitarian Inquisition" Foreign Policy, 1 September 2011, http://www.foreignpolicy.com/articles/2011/09/01/humanitarian_inquisition?page=full (accessed 27 September 2011).

After the intervention, the National Transitional Council (NTC) began the transition process and assumed governance responsibilities, discussing the formation of a unity government in Libya and the re-building of the country. The UN Security Council approved a US-led proposal to unfreeze $1.5 billion (US) in August to begin the process of re-building the country in the past-Gaddafi era. [879] The Arab League also officially supported the rebels as Libya's new authority.[880] NTC leader Mahmoud Jibril declared on 24 August that there would be free legislative and executive elections in Libya in eight months.[881]

Secretary-General Ban Ki-moon, in remarks on 24 August 2011, acknowledged that over the past year the Responsibility to Protect had become an operational reality. According to Ban Ki-Moon, our responsibility as an international community is to help the people of Libya realize their aspirations. The United Nations would be involved in ensuring post-conflict assistance in all key areas, including economic recovery, elections, human rights, transitional justice and the drafting of a new constitution.[882]

Yet the historical context presents difficulty for the task of rebuilding. The new Libyan leadership faces four decades of an autocratic regime that failed to build genuine state institutions. The challenge is to establish an "inclusive and representative transitional governing body; address immediate security risks; and find an appropriate balance between the search for

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[879] World powers rush to rebuild Libya Al-jazeera, 24 August 2011 http://english.Al Jazeera.net/news/africa/2011/08/2011824133818320979.htmll (accessed September 24, 2011).
[880] Libyan rebels advance on Gaddafi hometown on Sirte" BBC News Africa, http://www.bbc.co.uk/news/world-africa-14661783 (accessed 29 September 2011).
[881] Amnesty International, "Both sides in Libya conflict must protect detainees from torture" 25 August 2011. http://www.amnesty.org/en/library/asset/MDE19/030/2011/en/9610bd0a-2e8a-4e5b-a3bc-347e87f14871/mde190302011en.html (accessed September 24, 2011).
[882] Secretary General Ban Ki-Moon UN News 24 August 2011. http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1271 (accessed 24 September 2011).

accountability and justice and the imperative of avoiding arbitrary score-settling and revenge."[883]

Libya's rulers will need to urgently turn their attention to political legitimacy, security, law and

order, and transitional justice and reconciliation.   Significant international work should go into

helping provide sustenance and shelter to those in need.[884]

In places where they haven't existed building institutions is a complicated enterprise. It is clear

that those other than the U.S. and Europe will have to take on many of the development and

diplomatic tasks required for a transition from authoritarian ways to a more open and fair society

if that is the direction to be maintained.   Libyans do have access to oil resources, but rebuilding

needs skills and capacity in a variety of economic, social and governance tasks.[885]

Rachel Gerber (The Stanley Foundation) suggests saying "It's not your business" is no longer an

acceptable argument to give the international community when it comes to internal violence

targeted at civilians.   The Responsibility to Protect is proving to be a dynamic policy framework

that is meant to adjust and adapt as best it can to complex situations involving human atrocity. It

has been shown that compelling moral sentiments can be moved to meet the messy realities of

the world and they should continue to do so.

Although many have classified the campaign in Libya as a mistake because of the complexity,

we need to understand and accept intervention to protect civilians inevitably involves some error.

Civilian protection is not a simple endeavor. Translating a sense of responsibility into effective

policies requires an ability to adapt and create.   It is more reasonable to say we have

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[883] Libya: Ensuring a smooth and peaceful transition into a post Qaddafi era" International Crisis Group Brussels 23 August, 2011 http://www.crisisgroup.org/en/publication-type/media-releases/2011/libya-ensuring-a-smooth-and-peaceful-transition-into-the-post-qaddafi-era.aspx (accessed September 24, 2011).
[884] Libya: Ensuring a smooth and peaceful transition into a post Qaddafi era" *ibid.*
[885] Lloyd Axworthy, "In Libya we move toward a more humane world" The Globe and Mail, August 23, 2011. http://www.theglobeandmail.com/news/opinions/opinion/in-libya-we-move-toward-a-more-humane-world/article2138221/ (accessed October 6, 2011).

accomplished more by doing than by a response of inaction in the face of mass violence. Some

governments seem to understand this problem, and remain committed to preserving the

Responsibility to Protect.[886] My own position on the Responsibility to Protect emphasizes this

even more. In my view the doctrine represents a critically important advance in human security.

It was developed in response to tragedies such as Rwanda and Bosnia and other such human

catastrophes and we cannot afford to let our commitment lapse or be destroyed by unnecessary

fears or wrongheaded interests.

As a primary mover in the Responsibility to Protect, what now is the role for Canada in Libya

and elsewhere? According to the World Federalist Movement Canada, the international

community applauded Resolution 1973 as an illustration of the application of the doctrine of the

Responsibility to Protect and as a necessary measure to prevent a humanitarian crisis in the city

of Benghazi. The World Federalist Movement Canada stated that Canadian parliamentarians,

and any renewed House of Commons motion, should develop 'benchmarks' for success for

Canada, NATO, and the international community in Libya.[887] Furthermore, Canada, through its

government, civil society and industry, can help with drafting a constitution, advising on the

creation of an inclusive, pluralistic parliamentary system, supporting human rights, and

generating economic growth so that young Libyans at last have a future.[888] Lloyd Axworthy

expressed his support for the UN-mandated operation in Libya in combination with popular

democratic forces within Libya. He sees this as a "resetting of the international order toward a

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[886] The Stanley Foundation, The Trials and Tests faced by R2P, August 2011.
http://www.carnegiecouncil.org/resources/journal/25_3/index.html
[887] World Federalist Movement Canada "Parliamentary Debate regarding Canada's Engagement in Libya: Benchmarks for Success" June 2011 http://www.worldfederalistscanada.org/LibyaCdnParl%27msEnFr.pdf (accessed August 15, 2011).
[888] Paul Heinbecker, "Plenty Credit around Gaddafi Fall" The Montreal Gazette, August 23, 2011 http://www.montrealgazette.com/news/Plenty+credit+around+Gaddafi+fall/5291961/story.html (accessed September 25, 2011).

more human, just world.' It means immediate and appropriate action as called for in the

Responsibility to Protect."[889]

Anne-Marie Slaughter, former Director of Policy Planning for the State Department in the U.S.,

notes intervention in Libya has not been perfect, delivering indirect and patchy protection and

putting the region's long term stability in the hands of fractious, inexperienced and untrained

rebels is uncertain. [890] I believe the main challenge for the norm is to give credit to the United

Nations (and NATO) for success in Libya. This determination of success is not intended to be

measured by events taking place in Libya after the initial intervention in 2011 and the change in

leadership. A lot has happened since then and it is not the intention of the thesis to analyse the

results of any *post bellum* action. However, this is certainly a question for further research and

consideration of the obligations of this and any Responsibility to Protect intervention.

One of the concerns that have been raised as a result of the application of The Responsibility to

Protect in the case of Libya is why the Security Council has only intervened in Libya when there

are other situations that involve violence to the civilian population to the extent of human

atrocity. For example, Brian Whitaker asks why Libya and not Yemen or Bahrain or other

places with all the popular uprisings that are happening in the Middle East and with all the

civilians being killed or injured. I would suggest Syria today is and has been of the most serious

concern.[891] While the international community is contemplating its Responsibility to Protect the

thousands of civilians at the mercy of its leader, any sort of resolution has been criminally slow.

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[889] Axworthy, Lloyd "In Libya we move toward a more humane world" *supra* note 885.
[890] Slaughter, Anne Marie "Was the Libyan intervention really an intervention" The Atlantic, August 26, 2011 http://www.theatlantic.com/international/archive/2011/08/was-the-libyan-intervention-really-an-intervention/244175/ (accessed September 26, 2011).
[891] The Guardian, 23 March 2011.

One suggestion is that the lack of respect for Muammar Gaddafi was a source of motivation in Libya. Certainly his outright threats to kill his opposition contributed to the decision. But that would not seem to be the only reason for treating Libya differently. The support of the Arab States was also a contributing factor, along with the fact that the rebels themselves asked for a no-fly zone. The veto has also been used to block action in the Security Council regarding Syria and tensions have only increased between Russia and the West. It is known that Russia has clear interests in Syria. But these are simple answers on my part – the conflict in Syria is a tragedy that deserves a comprehensive analysis which must be left for another time.

In response to the question of what it was in Libya that prompted the Resolution, Luck said in an interview "there seemed to be crimes against humanity, that is, widespread and systematic attacks on the population with the knowledge of the authorities." [892] The air attacks on peaceful protesters were outrageous. Nevertheless, the Security Council tried sanctions first - but the Gaddafi regime kept advancing. Finally, there was valid reason to believe that "a bloodbath in Benghazi was imminent" which fulfilled the first test – here was just cause.

It is clear, nevertheless, that the Responsibility to Protect cannot be universally applied and that mistakes and adjustments will have to be made when it is applied. [893] A debate on the Responsibility to Protect within the UN General Assembly last September suggests that governments recognize this and remain committed to preserving the Responsibility to Protect, as in my view they should.[894]

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[892] International Peace Institute, Interview with Special Adviser Edward Luck, 28 March 2011 http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3369-international-peace-institute-interview-with-special-adviser-ed-luck (accessed October 4, 2011).

[893] Rachel Gerber, "The trials and tests faced by R2P" The Stanley Foundation August 2011 http://www.stanleyfoundation.org/articles.cfm?ID=694 (accessed 26 September 2011).

[894] General Assembly holds third interactive dialogue on the role of regional and sub-regional arrangements in implementing the Responsibility to Protect, Wednesday, 13 July 2011 http://www.wfm-igp.org/site/general-assembly-holds-third-dialogue-R2P-focuses-role-regional-organizations (accessed September 26, 2011).

In another interview with Edward Luck, Special Advisor on the Responsibility to Protect, conducted by Bernard Gwertzman and reported in the Council on Foreign Relations on September 2011, Luck commented on Libya. He stated Libya represents an important precedent -- with respect to Resolution 1970[895] which talked about sanctions, and sending Gaddafi and some of his people to the International Criminal Court, and then in Resolution 1973[896] which talked about all necessary measures to protect populations -- all of which invoked the Responsibility to Protect. The principle was agreed upon and it was clear that a government that attacks peaceful protesters with military force is not a condition of normal governance and is not acceptable.

What is yet to be seen is how Libya evolves after the military intervention in the long term and whether it is able to control its own destiny at the time. European Council President Herman Van Rompuy stated "Reconciliation and transition must be a Libyan-led process.[897] NTC leaders also met with Special Advisor to the Secretary-General for Post-Conflict Planning for Libya at the start of September, and requested UN post-conflict assistance in elections, transitional justice, and reconciliation.[898] On 26 August, 2011 Ban Ki-moon met with representatives from the African Union, European Union, Arab League, and Organization of the Islamic Conference, and asked them to help deliver a democratic transition to a new government.[899] The NTC moved

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[895] UN Security Council 1970, Libya Council on Foreign Relations, 26 February 2011 http://www.cfr.org/libya/un-security-council-resolution-1970-libya/p24957 (accessed 26 September 2011).
[896] UN Security Council Resolution 1973, Libya Council on Foreign Relations March 17, 2011 http://www.cfr.org/libya/un-security-council-resolution-1973-libya/p24426 (accessed 26 September, 2011).
[897] Herman Van Rompuy, "Message to the Paris Conference on Libya," 1 September 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/124490.pdf (accessed 27 September 2011).
[898] Ian Martin, "New authorities outline priorities for UN support to post-conflict Libya", UN News Centre, 1 September 2011, http://www.un.org/apps/news/story.asp?NewsID=39463&Cr=libya&Cr1= (accessed 27 September 2011).
[899] "Ban seeks urgent deployment of UN Mission to help Libya rebuild" UN News Centre, 26 August 2011, http://www.un.org/apps/news/story.asp?NewsID=39396 (accessed 27 September 2011).

forward.[900] Human Rights Watch called for countries to help secure resources and urge the NTC to train police, build judicial institutions, and protect all individuals, particularly those vulnerable to revenge attacks.[901] Nevertheless, we do know today serious problems remain.

As stated, it is not the task of this thesis to analyze the status of Libya after the ending of the conflict but rather only to assess it as a case of the implementation of the Responsibility to Protect under extreme circumstances. I leave that as a follow up research study to the thesis. A judgment of the legitimacy of the intervention should not, however, be based on the long term results of the intervention, although I do recognize there is a responsibility on the part of the interveners not to simply walk away. The intervention in Libya was designed to avert the threatened massacre of regime opponents in the capital of Benghazi and was successful in meeting its mandate. Although the sole criterion is not whether lives were saved, and the other legitimacy criteria employed are also important, the fact that the motivation was humanitarian and a large number of lives were indeed saved is in my view one the weightiest of the six criteria. Until recently, insistence that the UN could not intervene in any matter that was "essentially within the jurisdiction of any state" prevented the intervention into state-generated violence against civilians by the UN Security Council.[902] The Libyan intervention constitutes a dramatic new benchmark for its application.

 David Hillstrom raised the broader point that there is now a tangible case through the process and the consequences of accepting 'the Responsibility to Protect' as a guiding principle in

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[900] "Libya's new leaders pledge elections, order" France 24 03 September 2011, http://www.france24.com/en/20110903-libyas-new-leaders-pledge-elections-order-0 (accessed 27 September 2011).
[901] "Libya Contact Group: Put rights at top of Agenda" Human Rights Watch August 31, 2011 http://www.hrw.org/news/2011/08/31/libya-contact-group-put-rights-top-agenda (accessed 27 September 2011).
[902] Rachel Gerber, "Beyond Libya: A world ready to respond to mass violence" The Stanley Foundation, September 2011, http://www.stanleyfoundation.org/resources.cfm?id=462 (accessed September 27, 2011).

international affairs which can be subjected to scrutiny (as I have done in this document).[903] He

recommended solidifying the framework for the Responsibility to Protect further with a written

legal document to govern future decisions.

This chapter has developed a framework for the assessment of the legitimacy of a military

intervention after the action has taken place. The objective was to test the Libyan intervention

against this framework within the current international legal and political environments. It

concludes that Libya stands up to such a test. Whether future changes in process may occur, the

final question on Libya will be on what the decision in favor of the Responsibility to Protect

means for and to the international community as a collective and as part of an emerging form of

governance. In response to questions of non-interventions elsewhere, one could argue "just

because you can't do the right thing everywhere doesn't mean you shouldn't do the right thing

somewhere."[904]

Linked to the question of the assessment of the prospects for success, as suggested, is the

question of the future of the Responsibility to Protect principle itself. There are clearly weighty

implications for the norm of the Responsibility to Protect moving forward.[905] However, in my

view criticism of the Libyan intervention should not deter the international community from in

the important work it has done with regards to the Responsibility to Protect and the protection of

civilians from mass atrocity. Instead, the intervention should be used to learn the strengths,

weaknesses, pitfalls and successes of the Responsibility to Protect action.

Tim Dunne, Research Director for the Asia-Pacific Centre for the Responsibility to Protect

in August 2011 focussed on what he labelled as the 'revolution in moral consciousness' that is

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[903] David Hillstrom, 21 March 2011, Foreign Policy Journal.
[904] Ian Davis, 2011*supra* note 617.
[905] Bosco, David "Did Libya kill R2P? Not Likely" The Multilateralist 15 July, 2011
http://bosco.foreignpolicy.com/posts/2011/07/15/did_libya_kill_r2p_not_likely (accessed August 17, 2011).

symbolized by the doctrine of Responsibility to Protect (R2P).   Libya can be used as a

successful example of the Responsibility to Protect mandate with the transfer of full sovereignty

– over land and air – back to the Libyan people.[906] Maligned by some, seen as a positive step

forward in atrocity prevention by others, one may conclude the Responsibility to Protect was

transformative and prevented further atrocities at that time. The effort to build a new Libya

whose government is representative, which meets the basic aspirations of its people and avoids

the settling of past scores remains critical. The magnitude of this challenge ought not to be

underestimated. After the end of the no fly zone and the application of the Responsibility to

Protect Lloyd Axworthy wrote that the hard work for the international community was just

beginning in Libya. He suggested the third crucial element, rebuilding Libya on a democratic,

stable foundation – was yet to come (although as pointed out this was not specified as a goal of

the resolution and therefore not part of the analysis).[907]

Chapter ten brings the discussion to a close and moves on to consider the future of the

Responsibility to Protect. It also identifies gaps in the literature where further research and

investigation would be beneficial.

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[906] Tim Dunne, R2P ideas in brief: Vol. 1 No. 1 (2011) Asia Pacific Centre for the Responsibility to Protect
http://www.r2pasiapacific.org/R2P%20Ideas%20in%20Brief%20Libya%20%20Vol%201%20No%201%202011.pdf (accessed September 24, 2011).
[907] Axworthy 2011 *supra* note 885.
http://www.theglobeandmail.com/news/opinions/opinion/in-libya-we-move-toward-a-more-humane-world/article2138221/ (accessed October 6, 2011).

Chapter Ten: After the Fighting Stops

The real and lasting victories are those of peace
and not of war. (Buddha)

This dissertation has considered the evolving norm of the Responsibility to Protect with respect

to its two main aspects. The first is that states have a Responsibility to Protect their own

populations from mass atrocities – specifically genocide, war crimes, ethnic cleansing and crimes

against humanity. This duty is founded in international law in a range of established international

and regional human rights conventions and is endorsed in the General Assembly's 2005 World

Summit Agreement. No state denies this duty.[908] Nor do they deny that the society of states may

rightfully hold states to account for the performance of this duty under Chapter VII of the UN

Charter. The second aspect is that bystander states of the 'international community.' ".. have not

simply a right but a collective responsibility to assist host states in protecting their populations

and to act to protect these populations in situations where the host state is manifestly failing to do

so."[909] While the full principle was approved in the World Summit Outcome document in 2005,

it remains difficult to implement.

The issue has been whether the principle of the Responsibility to Protect is working - is it being

accepted and endorsed as either an international norm, soft law (*lex ferenda*) or international

hard law (*lex lata*) in a global governance environment; and what are the impediments to and

factors that support and enhance its implementation? Are there cases where it has been

implemented and what factors support it or have stood in its way? Which factors are most

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[908] Luke Glanville, "The Responsibility to Protect Beyond Borders" (2012) 12:1 Human Rights Law Review, 1-32, at 3 **[Glanville 2012].**
[909] Glanville 2012 *ibid* at 3-4.

influential? And, ultimately, is it a principle worthy of endorsement or is it a flawed principle, no longer deserving of continued support?

The research and discussions have referenced the tension between the principles of state sovereignty and state responsibility to the individual; the legality and legitimacy of humanitarian intervention; the self-interest of states and altruistic principles; the inclusion of nongovernmental actors as players in global governance and the balance of power between states and NGOs in the international community; and, finally the UN and its institutional authority for resolving conflicts. The research investigates the significance of each issue as it influences the evolution of the norm in transnational law and any attempts to implement the principle of the Responsibility to Protect. Through the analysis of its history and development along with the case study in Libya 2011, my study serves as an analysis of how a fundamental and yet controversial international norm can be created, promoted, accepted and ultimately implemented in a transnational environment, regardless of the many impediments that stand in its way. It also illustrates how a concept or idea can be transformed to eventually become law.

Even though the Responsibility to Protect has been controversial, we have seen from this study that it has gained considerable support over the past decade, and has been successfully utilized at least once, and invoked many more times. With the aid of NGOs, norm entrepreneurs and the United Nations it has rightfully established itself within an international set of legal norms that holds human rights as sacrosanct.

Further, the Responsibility to Protect is evolving. It has not yet reached the level of customary law or *lex lata*. As soft law, it is not only a legal and political doctrine, it is also a moral one which stands to protect civilians in conflict in the case of the failure of states to protect their own

population. It is based on human rights principles and humanitarian legal principles concerned

with the rights of the individual. Nevertheless, in the efforts of the international community

obligations to protect civilians in failing states, the response is frequently impeded by politics

and the self-interest and sovereignty of states.   The development of international law in the case

of the Responsibility to Protect has been highly dependent on norm entrepreneurs, some of

whom were or are in government or international organizations and many who were not tied to

any government structure. In consequence, NGOs are often in a better position to advocate for

moral values, being less constrained by political interests. As a result of their support and

activity, NGOs become an important aspect of global governance in instances of internal conflict

situations that threaten the peace and stability of states and of the human rights principle.

Regardless of impediments, the Responsibility to Protect is implementable. It is not a flawed

principle but an essential one in today's environment of intra state conflict. State sovereignty

must give way to state responsibility when citizens are in extreme jeopardy. The United Nations

is the appropriate seat for international decisions regarding the Responsibility to Protect.

Key theoretical findings are that the logic of appropriateness, idealism, constructivism,

liberalism, solidarism and structuralism provide better and more plausible explanations of the

international community's need to rely on moral values than do the logic of consequences,

pluralism, or realism. In addition, the way that actors perceive the motivations of other decision

makers influence their own decisions and may work to impede their efforts to save civilians.

The development of the norm of the Responsibility to Protect has been described from a

theoretical perspective through the former theoretical perspectives as well as through the lens of

norm entrepreneurship as well as through the accounts of critical scholars involved in the early

stages in the formulation and writing of the ICISS report and its ultimate acceptance by the

United Nations General Assembly have been sought and taken into account. The analysis of these theoretical premises illustrates that different perceptions of the norm can influence how actors respond when making decisions regarding the implementation of the Responsibility to Protect. The study also demonstrates how the norm goes on to survive in today's global environment through a community of actors, including but not limited to the UN and their adherence to certain basic humanitarian principles.

Key methodological findings are that we can reach a deeper understanding of how norms work if we investigate not only the actions but the thinking and motivations of significant actors who contribute to their development and implementation.

I.   The Sovereignty/Responsibility Debate

The norm of state sovereignty has been the cornerstone of international law and states have the right to self defense and non-intervention.[910] Thus any discussion of the Responsibility to Protect must contend with state sovereignty. The dissertation describes how this foundation has shifted from the absolute right of the state to the responsibility of the state toward its own citizens and those of other states. By accepting responsibility, states forfeit their rights when they are not exercising their sovereignty according to established rules. This normative shift has accompanied a shift in the nature of conflict itself - from interstate conflict being most common in the past to the current situation with armed intrastate conflict being the main source of violence - making the responsibility to protect civilians an even more relevant principle.

In considering the sovereignty/responsibility debate and legal context for the development of the norm, I consider the new and shifting principle of responsibilities within the UN with respect to

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[910] Currie, John 2008 *supra* note 19.

self-determination, sovereign equality, protection of fundamental human rights, and the prohibition against the invasion into another state's territory through forceful intervention. This latter principle has been a strong force for the maintenance of the status quo and the authority and the rights of the state. While sovereign states bear primary responsibility for their own citizens, they have not taken and do not always take responsibility for them consistently.[911] As a result, in embracing the concept of the Responsibility to Protect, states agreed that if a state fails in its responsibility to its own citizens, the responsibility and authority shifts to the international community.

The sovereignty/responsibility debate is often couched in the concept of humanitarian intervention and is caught on the horns of the frequently conflicting principle of sovereignty and state interest versus the normative ideal of the protection of civilians under threat.[912] In part, because the main state players are often Western countries, the Security Council, NATO, the CSCE, the EU and the G-7/8, concerns are often expressed regarding the self-interest of states in the context of the suspicion of Western interventionism. An underlying assumption in some of the scholarly and political debates is the realist perspective that interested parties cannot be trusted or relied upon to act in the interest of other national citizens and not in their own geopolitical interests. This conflict particularly plays itself out in the international arena at

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[911] Anne Orford, "Lawful Authority and the Responsibility to Protect" in Richard Falk, Mark Juergensmeyer and Vesselin Popovski, *Legality and Legitimacy in Global Affairs* (Oxford: Oxford University Press, 2012) at 248-9. Also while the early Minority Treaties and diplomatic protections were recognized as important for minority rights and as an important step in the protection of minorities and human rights by bringing the subject to an international forum., they were subject to much criticism and considered unenforceable and thus tended to be ignored along with the decline of the League of Nations in the 1930s. The League Council, charged with enforcing the various minority treaties, often failed to act upon complaints from minorities. See Carole Fink, "The minorities question at the Paris Peace Conference" in *The Treaty of Versailles: A Reassessment after 75 Years*, Manfred Franz Boemeke, Gerald D. Feldman, Elisabeth Gläser (eds.), Cambridge University Press, 1998.

[912] Humanitarian intervention in the thesis is defined as intervention without the authority of the UN and has been differentiated from the Responsibility to Protect military intervention with Security Council authorization.

meetings of the Security Council where the states find themselves prone to deadlock as a manifestation of the imbalance of power among states and states own self-interest. The quest for a disinterested regime, which seeks a neutral, principled and unbiased international organ represents a serious challenge.

I have suggested that 'universal' norms such as the Universal Declaration of Human Rights and various conventions, including the Genocide Conventions and the Geneva Convention to name a few, that have already become part of the ethos of the United Nations and international law, and have been endorsed in recent legal, cultural and social history have laid the foundations for the Responsibility to Protect doctrine. In doing so I have expressed a view that these norms overall should take precedence over actions taken in self-interest by western and non-western states alike.[913] However, how the Responsibility to Protect and the self-interest of states along with state sovereignty plays out in cases of human atrocity and whether the principle becomes a reality when the international community is faced with the death of thousands of civilians is a major subject of the thesis.

Some try to resolve the sovereignty/intervention contradiction by transcending the parochial interest of state politics, perhaps using the notion of cosmopolitan interest, and the notion that a fair interventionist regime is in everybody's interest in the quest for global governance.[914] I take

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[913] For example, the UN Charter, the Universal Declaration of Human Rights and various conventions, including the Genocide Conventions and the Geneva Convention to name a few.

[914] See Thomas W.Pogge, Cosmopolitanism and Sovereignty" (October 1992) 103 Ethics: 48-75; Richard Bellamy, and Dario Castiglione "Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Union" in Daniele Archibugi, David Held and Martin Kohler *Re-imagining Political Community* (California: Stanford University Press, 1998) p. 152; and Patterson, Dennis "Cosmopolitanism and Global Legal Regimes" EUI Law Department (unpublished and undated).

the position that adherence to the human rights legal agreements and ultimately moral values are required to trump self-interest if the Responsibility to Protect doctrine is to be implemented, particularly since its legal status is unclear and there are no mechanisms to enforce it. I go further still to say this principle is necessary in a world where conflict frequently reflects the deadly potential of the mass murder of innocents. I even take a further step by demonstrating that this approach can in fact be effectively applied.

Barriers frequently remain, however, and must be challenged. There is no doubt that the notion of state responsibility outside its borders represents a shift, and frequently an unwelcome shift, from the principle of state sovereignty, autonomy and the principle of non-intervention. The action in the Security Council particularly illustrates how important sovereignty remains as states vote for or veto resolutions which may affect their responsibilities for civilians at risk.

Along with this shift from state sovereignty to a conception of state responsibility is a shift in the underlying principle of state rights to non-interference. This shift may be considered as a move away from states acting purely in their self-interest to a more humanitarian purpose involving the consideration of the individual, human rights and the rights of civilians to be protected from humanitarian atrocities, genocide, war crimes and ethnic cleansing. While there may be debate about the universality of these principles and the adherence to their supremacy across the international and transnational network, they have come to form a principal set of operational categories within the legal and normative complexity of their environment.

While the Responsibility to Protect is now imbedded in humanitarian international law, it has not achieved the status of codified law and there is no mechanism to enforce it. Since it must be

invoked on a case by case basis, there exists the possibility that it could become customary law but to date the only clear instance of its application in its hard core form has been in Resolutions 1970 and 1973 of the Security Council in the case of Libya in 2011. Security Council resolutions have been cited to illustrate the instances of the Security Council's reference to its terms in other instances as well. I have found, by conducting an analysis of the application of the principle in Libya that there is little doubt of its having been effective in shortening the conflict. I thus regard it as representative of a successful case of the implementation of the Responsibility to Protect. Chapter Nine examined not only the legality but the legitimacy of its enactment in Libya. By applying a just war theoretical framework plus the principles imbedded in the Commission's original report, along with the criteria of legality, the thesis has demonstrated the legitimacy and success of the action in Libya at the time of the 2011 crisis. Considerations of not only the legality of the actions but the legitimacy of the actions help to define the authority of the Responsibility to Protect and future possibilities for the implementation of the norm in a somewhat weak legal context.

The reference in the Outcome Document to a case by case basis, however, weakens the legality of the responsibility to protect as far as requirements of generality, clarity and constancy over time are necessary for customary law.[915] Calls for a more representative Security Council speak to the concern about generality. Clarity requirements are also addressed by calls for criteria to judge when action needs to be taken. Further guidelines beyond the general significance to the four general categories would significantly enhance the legality of the norm by subjecting case by case decisions to over-arching criteria that identify the extreme and exceptional cases. This

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[915] Jutta Brunnee, and Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?* (2010) 2 Global Responsibility to Protect, 191-212.

would enable a reasoned judgment.[916] The wording 'on a case-by-case basis' would seem to reflect the hesitation on the part of the international community to commit the Council to a firm duty to act.

An important aspect of the development of the norm is that states are not the sole actors and to some extent share their power with civil society and nongovernmental and non-state actors in a global context.

The thesis has demonstrated that nongovernmental actors (NGOs) are a very important part of not only the development of the norm but in its being kept alive in the current transgovernance context. In some ways NGOs have more freedom and flexibility than states in acknowledging the necessity of action, in dealing with state governments and non-armed state actors and in ascertaining the views and problems of people on the ground. They have been important actors in the development of the Responsibility to Protect norm and continue to be critical in its sustainability today. The thesis identifies certain key actors and documents their historical participation through the application of the theory of norm entrepreneurship. Key organizations and senior staff have been selected and approached in an effort to provide a thick description of their role as norm entrepreneurs in the evolution of the norm.

II.   The Theory and the Practice

In particular, I have considered the Responsibility to Protect in terms of its legality and legitimacy by applying the literature in the fields of legal theory, international relations, international law and political science and as a form of norm entrepreneurship which includes the

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[916] Jutta Brunnee, and Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?* (2010) 2 Global Responsibility to Protect, 191-212 at 205 [**Brunee and Toope 2010**].

significant contribution of NGOs and civil society. This is intended to increase our understanding

of the functions, origin and meaning of the relevant rules and institutions and to encourage the

consideration of future developments and institutional designs that will be able to deal with

anticipated prospects for a peaceful resolution (or at least an approved agreement in the form of a

legal document.) [917] The focus on the Responsibility to Protect as a centrepiece of multilateral

efforts is justified by the central role the ICISS and the UN and other norm entrepreneurs have

played in the creation and dissemination of a new norm. In this case the new norm is one where

state responsibility trumps individual state sovereignty and pure state self-interest.

In order to consider an emerging norm a success, concrete measures must be implemented

multilaterally (that is, states must change their behavior in tangible ways). As Glanville argues,

"While the legal force of key international statements on the 'responsibility to protect' principle

may be weak at best, the international court of justice and the international law commission have

offered bold declarations in recent years which do point towards the gradual development of

legal duties for the extraterritorial protection of populations."[918] The concept of the

Responsibility to Protect has been used recently by NGOs, states, and international organizations

in response to crises in Libya, Syria and Yemen and has been referred to in numerous UN

Resolutions as documented earlier in the thesis as material evidence of its evolution. (See

discussion on resolutions Chapter Eight).

Peter Uvin argues that changes in discourse do have an impact on the real world by helping to

determine what actions are considered as acceptable and by creating incentives and by

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[917] Ratner, and Slaughter *2004 supra* note 376 at 376.
[918] Luke Glanville, *supra* note 908 at 908.

influencing what expectations dominate. [919] The thesis has focussed on those changes in discourse that particularly surround the Responsibility to Protect. Even though there are no enforcement mechanisms, norms can effect critical action.[920]

III.   Moral and Legal Issues in International Relations

Although complicated, it is necessary to pursue processes and outcomes in the implementation of the Responsibility to Protect are key. Issues such as 'trust,' and 'justice' also emerge as important when considering processes and outcomes. One overriding question in implementing the Responsibility to Protect decisions in order to respond to crises is how to deal with negative beliefs - misperceptions, suspicion, mistrust–not only between powerful states in the Security Council but between groups in conflict within the country in need of assistance. The key to success in both cases involves the development of trust and an appreciation of differences and perspectives between powerful states in the Security Council and between groups within the conflict situation. Powerful opponents may have their own factions within. Agreements, for example, must be seen to be "just and practical to the parties involved and to the society at large."[921]

According to Buchanan's moral theory of the 'Natural Duty of Justice,' we all have a duty to help ensure that all people have access to institutions that protect their basic rights (basing this on each person's obligation to treat every person equally in terms of concern and respect.)[922] This raises the question of how we factor in the wishes of the local population and the rights of individuals within that society after the fighting ends (*ius post bellum*). The intellectual tradition found in democratic liberalism does address some of these issues. Tidwell speaks to his

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[919] Peter Uvin, "On High Moral Ground: The incorporation of Human Rights by the Development Enterprise" Vol. XVII (2002) Praxis The Fletcher Journal of Development Studies.
Van Rompuy, Herman "Message to the Paris Conference on Libya", 1 September 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/124490.pdf (accessed 27 September 2011).

[921] Senator George J. Mitchell, *Supra* note 372.
[922] Buchanan, 2003 *supra* note 373.

perception of democratic liberalism by suggesting some of the same principles apply; e.g., the notions of representation, good governance and the maintenance of legitimacy. [923],[924]

In terms of the Libyan conflict, giving consideration to the non-state actors' issue of self-determination requires principles of democracy and the rights of persons to be governed by democratic norms. In some way this resembles Buchanan's moral theory of the 'Natural Duty of Justice'[925] and raises the importance of including the wishes of the local population in the process of ending the conflict and asks how we go about doing that. The question of the forms of governance in multi-ethnic societies, and the matter of global security and sovereignty need to be a primary consideration. If we consider the role of the United Nations in particular, we realize the necessity of its participation in all stages of the Responsibility to Protect.

IV.   The Role of the United Nations, the Security Council and the Legal Status of the Responsibility to Protect

"The High-Level Panel Report, the Report of the Secretary General, and the Outcome Document postulate that coercive collective action is to be undertaken through the Security Council."[926] The main documents concerning R2P do not deal with the question, however, regarding compliance.[927]

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[923] Alan C. Tidwell, 1998/2003 *Conflict Resolved? A Critical Assessment of Conflict Resolution* (Continuum: London).xi for his comments on "positive peacemaking. **[Tidwell 2003].**

[924]John Burton, (1986) *History of CR* Linus Pauling (Ed.) World Encyclopedia of Peace, Vol. 1, Oxford. Permagon Press at 6 **[Burton 1986].**

[925] Buchanan 2003 *Supra* note 373.

[926] High Level Panel Report, para. 203 ("by the Security Council"), Report of the Secretary-General, para. 135 ("Security Council may"), Outcome Document, para. 139 ("through the Security Council").

[927] Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 Am. J. Int'l. 99.

The veto in the Security Council as described in the thesis can be one of the more entrenched impediments to the use of the principle in circumstances of serious conflict. The fact that there is no overarching authority in international law and particularly no mechanism to oversee and enforce decisions made in the UN Security Council continues to hinder the implementation of the Responsibility to Protect. This leads to what I believe to be a key impediment to the implementation of the Responsibility to Protect – the existence of the veto and its use to support or obstruct the passing of crucial resolutions in the Security Council. The self-interest of states and realist perspectives still underlie much of the political reality in terms of failure of the Security Council to act when a crisis erupts. In an atmosphere of suspicion and mistrust, it is very difficult for states with the right of veto in the Security Council to come to an agreement. The history and reasons for the veto have been presented in the thesis and alternatives that might aid in achieving the appropriate power balance are considered in this Chapter. Old and new shadows of mistrust overhang divisions between the East and the West and between the North and South, with long term suspicions hampering the vote even in serious situations where many civilians are suffering and in fact dying in large numbers.

In the case of Libya and the resulting resolutions, Russia and China abstained and the resolution passed. In the case of Syria in 2012, Russia and China have virtually vetoed all efforts to implement any aspect of the responsibility of the international community to protect the thousands of civilians who were being killed. The basis of the disagreement would seem to be the self-interest of those states, but also their lack of trust of the other countries' intentions or motivations towards humanitarian principles – including even those softer sanctions such as economic embargoes. Fear of regime change and imperialist motivations fuel opposition to

intervention and there is no arbiter or mediator to bring them to a resolution of their differences.

The thesis raises the problem of the capricious use of the veto in the Security Council. The ICISS

report recommends

> a code of conduct for the use of the veto with respect to actions that are needed to stop or
> avert a significant humanitarian crisis. The idea essentially is that a permanent member,
> in matters where its vital national interests were not claimed to be involved, would not
> use its veto to obstruct the passage of what would otherwise be a majority resolution.[928]

The history of the veto and the reasons for its persistence as presented in Chapter Five helps to

show why the veto is important. It also suggests fair decisions need not be prevented or

impeded. The Security Council needs to have the unhampered opportunity to make a decision

and not abdicate from its responsibility to protect.[929] I myself do not advocate for the

elimination of the veto, only for its judicious use. Eliminating the possibility of a veto in the

case of genocide or human atrocities is also an unlikely and highly controversial option, which

would require strong advocacy in the face of state sovereignty. Ideally it should not be necessary

for the principle to be effective.

 While the Responsibility to Protect is not yet a legal prescription, there is some general

agreement that it is based on established legal obligations and legal doctrine in international law,

as well as being dependent on the mobilization of political will. At the moment there is no

punishment for inaction and thus R2P can only be operationalized if states are inclined to do

so."[930] In the event that a situation erupts of intra-state crisis and the state is unwilling or unable

to address it, there is no guarantee that the international community will respond through the

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[928] ICISS Article 6.21*supra* note 6.
[929] Conference on Council reform in May 1994, co-sponsored by Global Policy Forum and the International NGO Network on Global Governance.
[930] Frank Berman, "Moral Versus Legal Legitimacy' in Charles Reed and David Ryall (eds.) The Price of Peace (Cambridge, U.K. Cambridge University Press, 2007) at 161.

Security Council.[931] The sanctioning of action appears to 'depend more upon a coincidence of national interest than on procedural legality.'[932] Antonio Cassese states and the thesis accepts the argument that the Security Council tends to remain selective.[933] The ICISS proposed a 'code of conduct' to overcome this selectivity.[934] The use of the veto weakens the potential for consistent decision-making and the calls for the non-use of the veto also raises legality considerations.[935]

Ultimately, the Responsibility to Protect will not emerge as a global legal norm unless there is consistent practice.[936] Nevertheless, the responsibility to protect has been increasingly supported by globally-shared understandings in spite of its critics and the Outcome Document along with civil society support and Security Council resolutions and all the other material evidenced in this dissertation provides a platform for efforts to build up its legality.   One might question whether, if the Security Council fails, the burden shifts back to individual states? What happens to the three substantive components of the Responsibility to Protect (responsibility to prevent, react, rebuild) as a positive duty to act under international law.

 The need to create a Council where the voices of less powerful members can be heard and can have a serious influence is great. The credibility and legitimacy of the Council as a source of international law is often raised. In spite of this the number of formal Council meetings have grown significantly to the point that the Council is now virtually in daily session. Paul suggests enlarging the Council with non-permanent members in order to achieve better representation of

[931] Aidan Hehir, *The Responsibility to Protect in International Political Discourse: Encouraging statement of intern or illusory platitude?* December *20, 2011* Vol. 15 No. 8 The International Journal of Human Rights 1331-1348.
[932] Simon Chesterman, Just War or Just Peace? *supra* note 195, 165.
[933] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), 347 **[Cassese 2005].**
[934] ICISS, *supra* note 6.
[935] Lon Fuller, "Human Interaction and the Law" in Lon Fuller, The Principles of Social Oder. Kenneth Winston (ed.) (Durham, N.C. Duke University Press, 1981) p. 235 [**Fuller 1981**].
[936] Brunee and Toope 2010 248 *supra* note at 916.

regions, and of diverse kinds of states – poor as well as rich, small as well as large, which can

then create a Council that can act credibly and legitimately.[937] Those who support the status quo

often insist that the most powerful countries must be given special privileges at the UN, to keep

them involved in the organization. Critics argue the power balances have shifted. Many

reformers, like Colombia, New Zealand, Zimbabwe and Malaysia, would like to limit or do away

with the veto and even with permanent membership itself.[938]

The power of the veto has been intensely controversial since the drafting of the UN Charter in

1945. Yet, without the veto privilege the United States and Russia would probably not have

accepted the creation of the United Nations. Many years later there is still an active debate

regarding the role of the Security Council, its membership and its work.[939] In a speech to the UN

General Assembly a bloc of small countries put forward a recommendation that urged the

Permanent Members (P5) of the UNSC to agree to refrain from using their veto power in the

case of genocide, crimes against humanity and war crimes.[940],[941] The idea of this kind of

restraint on the Council's veto power in situations of mass atrocities was in fact expressed in the

ICISS 2001 report. The Report stated

> ...it is unconscionable that one veto can override the rest of humanity on matters of grave
> humanitarian concern. Of particular concern is the possibility that needed action will be
> held hostage to unrelated concerns of one or more of the permanent members – a
> situation that has too frequently occurred in the past. [942]

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[937] James A. Paul*, General Analysis on the Security Council Veto* (Global Policy Organization) August 23 2011
(http://www.globalpolicy.org/security-council/security-council-as-an-institution/the-power-of-the-veto-0-
40/general-analysis-on-the-security-council-veto.html. [**Paul 2011**].

[938] Hasmy Agam, Deputy Secretary General of the Malaysian Ministry of Foreign Affairs in a speech to the General
Assembly.

[939] Paul 2001 *supra* note 937.

[940] May 18, 2012 "A Responsibility not to Veto? The S5, the Security Council and Mass Atrocities" ICRtoP blog.

[941] 4 April Speech to the UNGA, 2005 World Summit *supra note* 69.

[942] ICISS Report *supra* note 6 Article 6.20, page 51.

The ICISS report itself recommended that the UNSC agree to a "code of conduct" with regards to their veto power.

Citizens for Global Solutions (CGS), an ICRtoP member, has further explored the idea of a code of conduct, and their recommendations were presented in the UN Secretary-General's (UNSG) 2009 report. Ban Ki-moon stated

> Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them 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.[943]

The majority of the five Permanent Members are 'western' and four out of five are 'industrialized' countries. The four-fifths of the world living in the 'non-western' part has only one voice – China – among the Permanent Members. It would seem important that the Council should be more broadly representative. A single veto-wielding power can stop an international response dead in its track and could totally frustrate the will of the overwhelming majority of the international community.[944]

It could be argued that this is evidenced recently by the situation in Syria where China and Russia have employed their veto powers more than once to block Council's attempt to resolve the crisis. In the document regarding the responsibility not to veto, this vote against action in Syria is "widely believed to have been employed as an expression of their respective national interests in the situation, and their concerns over the implementation of Resolution 1973 in

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[943] Ban Ki-moon UN Secretary-General's (UNSG) 2009 report, *Implementing the Responsibility to Protect supra note 78.*
[944] Paul 2011 *supra* note 937at 18.

Libya."[945] Russia argues differently. Draft texts need to be approved by each permanent member before any draft resolution can be adopted. In fact many draft resolutions are never presented to Council for a vote owing to the knowledge that a permanent member would vote against its adoption. It is unlikely, however, that any of the P5 would accept a reform of the UN Charter that could be detrimental to their own national interests.

The veto was put in place to provide the Council with both executive and diplomatic functions. However, the law can be abused by the permanent members when interpreting resolutions, and casting vetoes which permits them to abdicate the responsibilities for peace and security. This undermines the authority of the Council.[946] "In general terms of legality and legitimacy Security Council approval is the golden fleece that powerful states seek to justify not only coercive non defensive action, but also other actions that infringe on a state's sovereignty."[947] The Security Council is concerned to establish a "positive peace, a peace where protection of human rights is combined with security."[948] The Council is a political body which receives its discretion from the Charter. Legally precarious decisions also erode the authority of the Security Council.

Strong support also exists for the status quo. One coalition – Uniting for Consensus – which was led by Italy, South Korea and Pakistan opposed any additional permanent members. In the meantime, in response to public demand Canada continued its support of the UN and its efforts toward making it more representative of the world's regions while at the same time opposing the addition of new permanent members.[949] Concerns about inconsistency also undermine the

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[945] "A Responsibility not to veto," May 18, 2012.
[946] Nigel D. White, "The Will and Authority of the Security Council after Iraq," 17 (2004) Leiden Journal of International Law. 645-672 at 646 **[White 2004].**
[947] White 2004 *ibid* at 650.
[948] White 2004 *ibid* at 651.
[949] Adam Chapnick, "UN Security Council Reform and Canadian Foreign Policy: Then and Now: (2006) 13.1 Canadian Foreign Policy, 81 at 89 **[Chapnick 2006].**

legitimacy of the Council and of the binding character of its resolutions. Some reformers hope that if the General Assembly asserts its own role in the UN system, it can help balance the power of the permanent members in their Council. They also encourage citizen groups and political movements to voice their concerns.

The 'Uniting for Peace' resolution by the General Assembly, and the interpretations of the Assembly's powers that became customary international law as a result, was expected to bring greater flexibility. By adopting A/RES/377 A, on 3 November 1950, over two-thirds of UN member states declared that, according to the UN Charter, the permanent members of the UNSC cannot and should not prevent the UNGA from taking any and all action necessary to restore international peace and security, in cases where the UNSC has failed to exercise its "primary responsibility" for maintaining peace.[950] Such an interpretation sees the UNGA as being awarded "final responsibility"—rather than "secondary responsibility"—for matters of international peace and security, by the UN Charter.

In spite of the original Commission's willingness to accept the Security Council's failure to reach a decision on the Responsibility to Protect and in its place to see the alternative of a coalition action, I have expressed my concern that the legitimacy of such an action would be lost. In my view, only the UN should be able to authorize military action on behalf of the entire international community. It is recognized of course that the UN does not have its own military in which case NATO is likely to be called upon to act, but this is not the same as unilateral or even coalition action taken outside the UN authority.

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[950] A/RES/377 3 November 1950 http://unispal.un.org/UNISPAL.NSF/0/55C2B84DA9E0052B05256554005726C6 *Uniting For Peace*

If the Responsibility to Protect were to become hard law, it would significantly affect decision-making in the Security Council. Brunee and Toope claim "Security Council decisions would have to meet the requirements of the responsibility to protect, and would be measured against the criteria of legality."[951] However, Stahn suggests

> If the responsibility to protect were indeed a primary legal norm of international law, it would be logical to assume that such violations should entail some form of legal sanction in case of noncompliance. This specific type of violation, the breach of a positive duty, is not addressed as such by the regime of the Law of State Responsibility. Nor has it been conclusively determined whether and under what conditions inaction by an international organization may entail international legal responsibility. One might argue that a state's noncompliance with a duty 'to protect' might trigger a certain right, or even duty, of third parties to protest against this inaction. Yet it is difficult to imagine what legal consequences noncompliance by a political body like the Security Council should entail.[952]

It is clear that while changes may be desired and must be pursed, they are difficult to bring into fruition. This increases pressures for unilateral or coalition actions to occur which undermine the legitimacy of the Responsibility to Protect and the Security Council itself.

It is for this reason that I reemphasize the importance of making the moral choice in the absence of hard law – states need to act cooperatively and in the interests of the civilians placed in serious jeopardy. In essence a code of conduct already exists in the form of the Responsibility to Protect – it requires states to act responsibly toward others and not to allow their self-interest to obstruct their decision making.

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[951] Brunee and Toope 2010 *supra* note 916 at 212.
[952] Stahn 2007 *supra* note 70 at 117-8.

V. Conflict Resolution

If we consider the Responsibility to Protect in a broader theoretical context and according to the report of the Commission there is an opportunity to consider the place of conflict resolution in the implementation of the principle in the international and transnational milieu of today. In doing so I remind the reader that not all applications of the Responsibility to Protect need be military in nature. Conflict resolution ranges from doing nothing in the face of conflict to war. I would like to consider the Responsibility to Protect as a tool or mechanism within this range that has been created and maintained by the international system to deal with conflict within a specific set of circumstances.

There can be no doubt that the UN, like its forerunner the League of Nations, has sought (with limited success) to create alternative methods for resolving disputes. It has offered some glimmer of alternatives to the traditional models of handling conflicts; for example, the UN Charter provides for the use of mediation and conciliation in the resolution of disputes, but it has failed to provide any true systematic method for their resolution. Also, the track record of the UN in resolving conflicts has been poor and it has been argued that the organization has provided a model showing the alternatives to be avoided.[953]

One of the most serious challenges for the international community is dealing with internal conflict or state failure or both when accompanied by mass atrocities. This is the kind of situation the Responsibility to Protect was designed to address.[954] Within the theoretical framework of conflict resolution and the ICISS spectrum of prevention, reaction and rebuilding, concerned states and international actors must focus on techniques, skills and methods of

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[953] Tidwell, 2003 *supra* note 955 at 2.

[954] Bruce Jones, Carlos Pascual and Stephen John Stedman *Power and Responsibility: Building International Order in an Era of* T*ransnational Threats, (*Washington DC: Brookings Institution Press, 2009) at 192 **[Jones 2009].**

prevention, management, resolution and transformation. The means of prevention and resolution to conflict can vary immensely, depending on the type, complexity, duration, and level of violence, among other factors, that pertain. Some conflicts are about justice and right and wrong and require a public and adjudicative resolution through the ICC or other such legal acts while other conflict situations can potentially be resolved by the parties themselves-- some require a cease fire, a treaty, a handshake or an apology.[955] Many, while they may require much time, communication, external assistance, expertise and intervention by outside parties, are not necessarily beyond settlement without coercion. The Responsibility to Protect uses military intervention as a last resort when other methods such as sanctions, mediation, negotiation and conflict resolution techniques do not work.

When attempting to reach such a decision, the international community must ask a number of basic questions: what are the sources of the conflict; do the parties have the will and the capability to end the conflict themselves; what methods exist for handling or resolving the conflict; and, what action is recommended (maintaining the status quo and a management position being considered as one form of action)? [956] Other questions include: what stage is the conflict at; is it "ripe" for intervention; are outsiders involved; and, what type of conflict is it? These questions are illustrative of the approaches that scholars and practitioners in conflict resolution may take. Their consideration in the prevention or resolution of conflict before it reaches a point of genocide or war crimes becomes part of the Responsibility to Protect's contemplation of action.

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[955] see Alan C.Tidwell, 1998/2003 *Conflict Resolved? A Critical Assessment of Conflict Resolution* (Continuum: London).xi for his comments on "positive peacemaking." **[Tidwell 2003].**
[956] Tidwell 2003, *ibid.*

Much has been written on methods or techniques for resolving disputes and conflicts.[957] These approaches can come into play at an earlier phase of conflict or later, when such methods have failed, intervention has occurred and the conflict is ending. Conflict resolution can also be relied upon after the fighting has stopped and parties need to regroup and address next steps. While the discipline of International Relations has and continues to be focused on sovereign states, power, politics, and the military, Zartman considers how conflict resolution can provide a counter balancing measure with its emphasis on the means of resolution and transformation.[958] As the field of conflict resolution has moved forward, there is more of a trend toward looking at long term perspectives, including the prevention of intractable conflicts and the transformation of protracted conflicts into tractable ones.[959] In the case of the Responsibility to Protect, a range of dispute resolution tools can be employed before reaching a decision to intervene militarily, as well as after any military intervention ends. However, while the importance of techniques such as negotiation and mediation must not be ignored, it is not within the scope of the thesis to consider them in depth. Further attention to this area is certainly essential and would be fruitful for further work on the Responsibility to Protect, bearing in mind that too many frustrated and prolonged attempts to settle the conflict without the threat of coercion can result in thousands more deaths in the interim - Syria being a case in point.

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[957] See Gareth Evans, "International Conflict Resolution" (Mar 2005) 2 New Zealand International Review; 6-11; Pierre Hassner, "Intervention in Local Conflicts: Crisis Management and Conflict Resolution Since the Cold War" 53.5 (Oct/Nov 2011) *Survival* 185; Eileen Babbit, "The Evolution of Conflict Resolution: From Cold War to Peacebuilding" (Oct 2009) 25.4 N*egotiation Journal*; 539-550; Carrie Menkel-Meadow, "The Next Generation: Creating Peace Processes in the Middle East" (Oct 2009) 25.4 *Negotiation Journal* 569-586.
[958] I. William Zartman, Ed. (2007) *Peacemaking in International Conflict* (Washington, D.C.: United States Institute of Peace, 2007) at 41 **[Zartman 2007].**
[959] Zartman, 2007 *ibid* at 35.

VI.   Rebuilding After the Violence Stops

With respect to the UN and the international community, it is also important to consider what the

scholars of the field and the practitioners seem to have neglected concerning the Responsibility

to Protect. As described earlier in the work, there are three components to the principle as it was

proposed by the ICISS report: (1) prevention (2) reaction and (3) rebuilding. Much of the

analysis has been geared toward the most controversial aspect of the principle, that of 'reaction'

as it was approved in the UN document, but little attention has been paid to the third dimension

of 'rebuilding'. A critical dimension of conflict resolution comes when the fighting stops. Here

we ask: What is the responsibility of the international community? This aspect of intervention

has been raised in Chapter Nine of the thesis in relation to Libya. I would suggest that no action

determined to be a legitimate military application of the principle is complete if it has not given

consideration to post-conflict peacebuilding. The application of the Responsibility to Protect also

involves a responsibility to address conflict in the long-term, which in my view is the follow up

to intervention that has not been given sufficient attention by those advocates for the

Responsibility to Protect.[960] While responsibility for practical and political reasons must be

limited, this is an area that deserves further investigation and consideration while carefully

walking the line between imperialism and welcome support.

The question of responsible action takes us back again to the original report. What happens after

the fighting has stopped? Should the international community now be absolved of any further

responsibility? Needless to say, of course, 'rebuilding' or 'peace building' is controversial as a

further form of intervention with the threat again to some of neocolonialism and "mission creep."

In discussing the responsibility of the interveners to rebuild, I again return to the

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[960] Stein, Janice Gross, ed. 1989 *Getting to the Table: The Process of International Prenegotiation.* Baltimore: John Hopkins University Press in Zartman 2007 *supra* note 958 at 35.

recommendations of the ICISS report itself. Article 5.5 refers to the Secretary General's

description of the nature of and rationale for post-conflict peace building in his 1998 report

which gives a description of a clear post-intervention strategy. The Security Council defines

post-conflict peace-building as activities that are taken after the conflict has ended to ensure

peace and prevent a new round of armed confrontation.[961] The Secretary General notes this

involves more than purely diplomatic and military action, and that an integrated peace building

effort is needed to address the various factors which have caused or may be stimulating conflict.

Peace building is a complex undertaking which may involve the development of national

institutions ensuring fair elections, promoting human rights where abuses have existed, providing

programs that allow for the reintegration and rehabilitation of citizens, as well as establishing

development conditions. Although peace building does not replace ongoing humanitarian and

development activities in countries emerging from crises, it does aim to reduce the risk of

violence again being triggered and "contribute to creating conditions most conducive to

reconciliation,   reconstruction and recovery."[962]

In article 5.6, the ICISS notes that the Secretary-General's report goes on to describe in more

detail what is needed in the aftermath of conflict and/or intervention:

> Societies which have emerged from conflict have special needs. To avoid a return to
> conflict while laying a solid foundation for development, emphasis must be placed on
> critical priorities such as encouraging reconciliation and demonstrating respect for human
> rights; fostering political inclusiveness and promoting national unity; ensuring the safe,
> smooth and early repatriation and resettlement of refugees and displaced persons;
> reintegrating ex-combatants and others into productive society; curtailing the availability
> of small arms; and mobilizing the domestic and international resources for reconstruction

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[961] *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa* Report of
the Secretary General 1998.
[962] Article 5.5 ICISS Report *supra* note 6.

and economic recovery. Each priority is linked to every other, and success will require a concerted and coordinated effort on all fronts."[963]

The Report itself raises matters of concern such as reconciliation and the resettlement of refugees that are important areas for research which need to be expanded upon in relation to the Responsibility to Protect and rebuilding. The availability of small arms is a contentious issue also, not only in terms of disarmament, but as an area deserving of attention prior to and during any conflict which demonstrate the potential for escalation.

Hartzell and Hoddie suggest civil war analysts frequently attribute the arming of sub-state actors as due to feelings of insecurity. Non-state actors tend to be unwilling or unable to trust government authorities and thus take up their own arms. The response of the authorities, however, is that they are not sure whether this is in defense or a sign of an impending attack, and as a result prepare themselves for attack, leading to a spiraling arms race and the potential for war.[964]   International relations scholars refer to this phenomenon as "the security dilemma" and it is most often used to describe intrastate conflicts. In the post-conflict period, each group is wary of the other in terms of their motivation to hold troops and weapons in reserve, preventing them from taking the necessary disarmament steps (a form of security dilemma).

Three critical areas that form the basis of a rebuilding strategy are security, justice and economic development. Post-conflict societies need security and freedom from violence for all their members, regardless of where they stood in relation to power. "Adequate security forces are needed to uphold the peace and enforce law and order immediately after a conflict." [965]

Ultimately peace builders must turn over responsibility to local actors but they may need help in

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[963] 1998 report on *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa* in ICISS Report Article 5.6.
[964] Caroline Hartzell,; and Matthew Hoddie, "From Anarchy to Security: Comparing Theoretical approaches to the process of disarmament following civil war" 27:01 Contemporary Security Policy, 155-167 at 155 **[Hartzell and Hoddie]**.
[965] Jones *supra* note at 954 at 196.

setting up problem solving mechanisms.[966] In post-conflict situations, revenge killings and even

reverse ethnic cleansing may occur. Avery important issue in the post military intervention phase

relates to the disarmament, demobilization and reintegration of local security forces.

Reintegration takes time but is necessary and represents an element of restoring the country to

law and order. This must be accompanied by rebuilding national armed forces and police,

"integrating as far as possible elements of the formerly competing armed factions or military

forces. The reintegration process is especially important in the reconciliation and the re-

establishment of the state once the external forces leave."[967]

Walter and Hartzell provide two competing approaches for resolving civil war.[968] Walter's

solution is in peacekeepers/peace enforcers and third party assistance. The form the third party

would take depends on the context of the peace agreement. If power is fairly balanced, third

parties only need to verify compliance. If power imbalances exist, third parties will need to

secure the safety of weaker parties with military capacity. Hartzell and Hoodie characterize this

"as a neorealist means of resolving civil conflict" since it relies on the threat of force. Power

rather than trust is the key.[969] For Hartzell and Hoddie the solution is in the construction of

power sharing and power dividing institutions, disarmament and rebuilding state authority with

greater emphasis on peace agreements.

Barbara Walters suggests that lack of success of civil war settlements are frequently due to the

inability of parties to the conflict to adhere to the peace agreements. Too many settlement treaties

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[966] Jones *ibid* at 196.

[967] The ICISS Report *supra* note 6 Article 5.9.

[968] Barbara Walter, "The Critical Barrier to Civil War Settlements" (1997) Vo. 51 International Organization,, No. 3, 353-364; Caroline Hartzell, "Explaining the Stability of Negotiated Settlements to Civil Wars," (1999) Vol. 43, No. 1. Journal of Conflict Resolution, 3-22; Caroline Hartzell, and Matthew Hoddie, "Institutionalizing Peace: Power Sharing and Post Civil War Conflict Management," (2003) Vol. 47, No. 2 American Journal of Political Science, 318-322 **[Hartzell and Hoddie 2003].**

[969] Hartzell, and Matthew 2003, *ibid* 964.

include opportunities for exploitation.[970] There are four dimensions of government power that need to be addressed: political (positions within government itself), military (authority within the armed forces), territorial (opportunities for self-governance among regional groups) and economic (access to government resources). Hartzell and Hoodie hypothesize that the more there are power sharing institutions the better disarmament will work.[971]

The second area, justice and reconciliation, requires a properly functioning judicial system, including both the courts and the policy, which sometimes makes it necessary to have transitional arrangements for justice. Another issue is that the legal rights of refugees or returnees from ethnic or other minorities. Laws must require protection of proper rights. A number of areas must be developed; for example removing administrative and bureaucratic obstacles for those returning, ending the culture of impunity for known or suspected war criminals and the fair use of property laws.[972] Refugees will require access to health, education and basic services, and they must be allowed to participate in improved systems of "promoting good governance, and long-term economic regeneration of the country."[973]

The third area -- the overall recovery of the country -- is an important part of peace building. Just as the Responsibility to Protect is concerned with human rights in its protection of civilians in armed conflict, so too is the responsibility to rebuild. [974]   Development helps to raise the populations of developing countries out of poverty. Marks looks at development

> as a sub branch of international human rights law dealing with the legal norms and
> processes through which internationally recognised human rights are applied in the

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[970] Barbara Walters, in Hartzell and Hoddie 2003 *ibid.*
[971] Hartzell and Hoddie 2003 *ibid* at 161.
[972] Article 5.17 ICISS *supra* note 6.
[973] Article 5.18 ICISS *ibid.*
[974] Stephen P. Marks, "Human Rights and Development" Sarah, Joseph and Adam McBeth (Eds.) Research Handbook on International Human Rights Law (Cheltenham: Edward Elgar Publishing Limited, 2010) at 167.

context of national and international policies, programmes and projects relating to economic and social development.[975]

Development and human rights come together in efforts to rebuild communication.

I also addressed the matter of rebuilding in my interviews. The responses varied. A number of interviewees expressed skepticism toward the concept of rebuilding while others were far more supportive. Kyle Matthews, for example, pointed out the significance of resources to post-conflict rebuilding:

> Libya has enormous oil wealth, and foreign workers have fled. There is a lack of civilian knowledge with no checks and balances, no civil society. They are going to have elections but they have no experience in building political parties. It will be necessary to prevent abuses and another strong man from taking power.[976]

In my interview with Jillian Siskind, she suggested that rebuilding has to start before the military operation with work on the ground, and support for opposition groups. It requires the development of democracy building exercises, human rights groups, and civil rights organizations – all those things are needed to build a society from the ground up. She also noted NGOs play a key role in the rebuilding exercise. [977]

Naomi Kikoler felt it was important to take the long term into account and to take measures to ensure a country does not fall back in terms of these kinds of crimes. She suggested the Responsibility to Protect has to be more than just a crisis response at the moment, although she acknowledged just being able to respond to crises is a positive thing.[978]

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[975] Marks 2010 *ibid* at 168.
[976] Kyle Matthews, Interview, Montreal Institute for Genocide and Human Rights Studies, Montreal, Quebec, November 12th, 2012.
[977] Jillian Siskind, interview, Canadian Lawyers for International Human Rights, Toronto, Ontario, October 26, 2011 and November 23, 2011.
[978] Naomi Kikoler, Ten Years After the ICISS: Reflections for the Past and Future of the Responsibility to Protect Munk Centre November 12th, 2011.

Some of those interviewed expressed some caution regarding rebuilding and were not

enthusiastic about the idea of the Responsibility to Protect maintaining responsibility for the post

conflict period.

David DeWitt, for example, suggested:

> There is a responsibility, even an obligation in R2P action. There is a logic to the three parts
> but it seems they are very different things, not only in terms of action but in terms of intent.
> The decision to intervene is based on the failure to prevent so that the situation escalates
> until there is a legal determination that it is appropriate under R2P for the international
> community to intervene using particular kinds of instruments. It is a very different decision
> to then say 'Now we are providing the resources to contribute to rebuilding.' It is by
> definition clearly a different set of instruments with different goals. Unless it comes with
> some clearly specified criteria about completion it can be problematic. It is potentially a
> never end sink. It must be justified.[979]

Mark Sedra went on to say: "If you tear down someone's house you are responsible to build a

new structure."[980] Over time it becomes the responsibility of the occupant to get furniture and do

renovations. He also affirmed Libyans' own responsibility after the 2011 intervention toward

peace building.

> Libyans have to put in the security and justice institutions... If Libya falls apart in ten
> years it is not the fault of the Responsibility to Protect. The immediate response was to
> protect. Is it part of the Responsibility to Protect's responsibility to support the
> reconstruction effort?   That sets a pretty high standard."[981]

David Petrasek also spoke with skepticism toward rebuilding, suggesting:

> Asserting the principle in terms of prevention and rebuilding is just a smokescreen in
> order to sugar the pill. In terms of UN post-conflict efforts and all the rebuilding efforts
> and all the work done to prevent a situation from becoming genocide, none of it has been
> strengthened by R2P. What they wanted to do was assert the principle to use force. I do
> not know anyone who thinks it is good...[982]

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[979] David Dewitt, interview, Centre for International Governance and Innovation, Waterloo, Ontario, November 2, 2011.
[980] Mark Sedra, Interview, CIGI, University of Waterloo, Waterloo, Ontario November 2, 2011.
[981] Mark Sedra interview *ibid.*
[982] Petrasek, David interview, University of Ottawa, June 27, 2011.

He went on to answer the question of whether rebuilding is really part of the Responsibility to Protect. In his view this takes it too far: "... we might like to see democracy and unless we get that we think we have failed so that we go in with all of our government structures. It does not seem to me that is what is intended by R2P."[983] Clearly, as suggested earlier, post-conflict peacebuilding is a controversial topic which requires much additional thought, research and cautious contemplation regarding the role of the Responsibility to Protect after the immediate crises is responded to successfully.

VII.   Responsible Sovereignty

As we can see, sovereignty issues arise not only at the military intervention stage with the presence of the intervener but also at the post-conflict stage. Any reconstruction and rehabilitation program must take sufficient account of local priorities and local personnel and the ability of the country to resume responsibility for its own government. Nevertheless, I believe it is important to help in the months that follow. International authorities must take steps "to set up a political process between the conflicting parties and ethnic groups in a post-conflict society that develops local political competence within a framework that encourages cooperation between former antagonists." [984] The local community must resume responsibility, however, to maintain the legitimacy of the government and the ruling parties. This does not necessarily mean democratization, however.

There are always those who will be suspicious that intervention has been a form of neo-colonial imperialism. This suspicion is one of the most significant impediments to the implementation of the norm and we must work to reassure those skeptics that the motivations of the international

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[983] David Petrasek interview *ibid.*
[984] Article 5.30 ICISS *supra* note 6.

community are not tainted with ulterior motives.   Chapter Nine of the thesis laid out the

threshold and the precautionary criteria that must be satisfied in the Responsibility to Protect

cases – just cause, right intention, last resort, proportional means and reasonable prospects and

shows how the determination of legitimacy needs to be made by the wider international

community for the Responsibility to Protect to evolve as a lifesaving principle. The principle

behind the Responsibility to Protect norm is that the international community accepts

responsibility for conflict situations elsewhere that threaten global security.[985]

Rebuilding international order requires responsible sovereignty, a principle which means states

have obligations and duties towards their own citizens as well as other sovereign states.

Responsible sovereignty is a core principle in restoring international order which implies an

obligation to help weakened states to obtain the capacity to govern for themselves – in other

words a 'responsibility to build." [986] Jones et al note that during the Cold War the United

Nations and regional organizations generally did not try to prevent or mediate civil violence

within states. Now they suggest the UN should have not only a leadership role in mediating an

end to the violence but should be involved in post conflict peacekeeping. [987] Jones cautions that

countries recovering from civil war are at risk of conflict breaking out again within the first five

years of following the peace agreement."[988] Therefore responsible sovereignty means keeping

the peace and mediating the conflict along with institutions that operate according to the rule of

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[985] Bruce Jones, Carlos Pascual and Stephen John Stedman *Power and Responsibility: Building International Order in an Era of* T*ransnational Threats, (*Washington DC: Brookings Institution Press, 2009 at 175 **[Jones, Pascual and Stedman 2009]**.
[986] Jones, Pascual and Stedman 2009 *ibid* at 9.
[987] Jones 2009 *ibid* at 12.
[988] Jones 2009 *ibid* at 173.

law.[989] The role of regional actors is also important in this regard. Regional groups can be more effective than the UN in preventing a further outbreak of conflict. [990]

One problem in peace making is how to interact with non-state actors.[991] Many of contemporary conflicts are between states and non-state armed groups (NSAGs), and within NSAGs. What has not been addressed is the role of NGOs in dealing with NSAGs in the Responsibility to Protect and in the protection of civilians. Non-state armed actors may be defined as "groups that are armed and use force to achieve their objectives and are not under state control."[992] The identification of a legitimate non-state entity to negotiate with can be a problem. In the case of Libya the NTO was recognized fairly early on and in Syria there is now some movement to recognize various constituents of the opposition. In my view the identification of a non-state entity broadens the range of options available to deal with the conflict (although the role of the state and the determination of its ability to protect its own civilians is also of great significance).

An important area, not explored at this point but pinpointed for further research, is the difference between the interactions of states versus NGOs with non-state armed actors (NSAGS). NSAGs usually operate outside of the national legal framework in fragile or failed states and are not acknowledged as legitimate actors. Nevertheless, they frequently acquire control over a large portion of the population. Sometimes they even become the *de facto* government. Differentiating between 'acceptable protagonists' and 'unacceptable terrorists' is a complex issue. NSAGs usually want to be part of a peacemaking enterprise, and those that have been

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[989] Jones 2009 *ibid* at 172.
[990] Jones 2009 *ibid* at 181.
[991] Jones 2009.
[992] Claudia Hofmann, "Engaging Non-State Armed Groups in Humanitarian Action" 13(3) Sept. 2006 International Peacekeeping, 196-409 at 397 **[Hoffman 2006].**

identified as 'acceptable' should be involved in disarmament and demobilizations efforts.[993] One

of the complexities, however, is that if the interveners engage in formal talks with them, this will

likely give them recognition and legitimacy. On the other hand, NGOs have more freedom to

communicate with them and there is increased opportunity for interaction between NSAGs and

NGOs with regard to education and monitoring processes.[994] Unlike states, NGOs can engage

non-state actors without their being attributed with international status. They can also help to

solve problems by using a 'soft humanitarian approach' on such issues as landmines, weapons

and child soldiers.

When peace has been achieved it is often followed by peacekeepers. This may provide a

platform for post-conflict stabilization or peace building.[995] Peacekeeping operations can play a

significant role in efforts towards security and reconstruction. Military alliances like NATO can

provide cooperative frameworks. The United Nations has no stand-by forces.[996] People will

inevitably need to be trained in new forms of governance. The main challenge is to put together

something that can be sustained according to the rule of law after the peacekeepers leave.

Economic alternatives also need to be available, and armed groups need to be demobilized and

reintegrated into society.[997]   According to an index of state weakness in 2008, many of the failed

states are among the poorest in the world.[998] NGOs may also became involved in peace building

and the development of good governance. Jones draws particular reference to the Center for

Humanitarian Dialogue based in Geneva (HD Center) and the European Union, and their

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[993] Hoffman 2006 *ibid* at 397.
[994] Hofmann 2006 *ibid* at 397.
[995] Jones 2009 *supra* note 954 at 184.
[996] Jones 2009 *ibid* at186-87.
[997] Jones 2009 *ibid* at 188.
[998] Rice and Patrick, Index of State Weakness, in Jones 2009 *ibid* at 240.

contributions.[999] What this means in terms of responsibility is that there is a further moral obligation, and a soft legal position of responsibility to others.

Civil society also needs to become more openly and actively involved to protect the society from power abuses. The root issues that led to the outbreak of the violence may be "exclusion from the political process, corrupt justice systems, massive poverty, resource disputes and income equality."[1000] The UN has a Peacebuilding Commission which was formally created in 2005 in order to coordinate peace building activities; however, it maintains no oversight over peace building and has limited personnel which weakens its role in conflict management systems.[1001] The UNDP is designed to provide support for the rule of law, governance and political transitions and to form a bridge between the UN's Peacekeeping Operations, the World Bank, and other development organizations.[1002] Finally, any reforms in the UN peacekeeping measures – prevention, mediation, peace building – must take care to preserve north-south shared interests in conflict management.[1003]

I realize these are tough and costly decisions in light of what may already be happening in the U.S. and elsewhere – a kind of intervention fatigue can set in prompted not only by a lack of domestic support and resources but by criticisms of Western bias towards intervention in Muslim countries. Hopefully, however, the United Nations and international legal agreements to protect human rights will continue to spur the international community in the crucial direction of 'saving strangers.'

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[999] Jones 2009 *ibid* at 176.
[1000] Jones 2009 *ibid* at 189.
[1001] Jones 2009 *ibid* at 192.
[1002] Jones 2009 *ibid* at 265.
[1003] Jones 2009 *ibid* at 203.

VIII.   Gender Violence and the Responsibility to Protect

As I review the literature on the Responsibility to Protect, I find another important area that merits further research; i.e. that of women in conflict and the Responsibility to Protect. While much has been written already on gender violence in international criminal law and the centrality of women's bodies since 2011 and in the study of women in Afghanistan, the literature on the Responsibility to Protect and that of gender violence do not speak to one another. I am particularly interested in addressing what I see as the Responsibility to Protect and its relevance to rape and sexual abuse as a form of genocide, and the responsibility to intervene in order to protect women during war. The International Tribunal for Rwanda, established in 1994 by the UN, for example, found rape to be genocide, which is defined as Common Article Three and Protocol II in the Geneva Conventions dealing with war crimes in internal conflicts. In the trial of Jean Paul Akayesu the Trial Chamber held that rape, which it defined as a "physical invasion of a sexual nature committed on a person under circumstances which are coercive, and sexual assault, constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group." [1004] The trial court found that sexual assault formed an integral part of the process of destroying the Tutsi ethnic group. In this case, rape was systematic and had been perpetrated against Tutsi women, manifesting the specific intent required for those acts to constitute genocide. This has helped to advance the world's legal treatment of rape and sexual violence.[1005] Clearly women need to be recognized as an important part of states' responsibility in the areas where they are most vulnerable.

[1004] *The Prosecutor v. Jean Paul Akayesu (ICTR-96-4-T).*
[1005] The New York Times, September 5, 1998 "When Rape Becomes Genocide."

IX.   Concluding Comments

In doing this work, the thesis has demonstrated the significance of sovereignty as the basis of international law after World War II. It has also shown the way in which it has evolved in relation to the Responsibility to Protect and in the context of global governance. Sovereignty has come to be more invested in people than the state.[1006] Human rights have gained significance in the responsibility of sovereign states toward their own and others. Can we say this is a universal value? While modern legal theorists may reject the universality of international laws (and sometimes even their validity) we might ask what country is prepared to defend their own or others sovereign right to commit war crimes, genocide, human atrocities or ethnic cleansing. An important dimension of transnational governance discussed in the thesis is the role of not only hard governance in the form of international organizations like the UN, but soft power or soft governance in the form of NGOs and their influence in information gathering, and advocating for the implementation of the Responsibility to Protect. The thesis has provided the reader with the views of many of these NGOs on issues pertaining to law, morality, justice, and the place of military intervention and beyond.

Concerns have been raised regarding the Responsibility to Protect as a neo-colonialist enterprise -- two questions in particular are pertinent to ask in this regard: If humanitarian intervention is a neo-colonialist form of intervention, how should we respond to a Srebrenica (Bosnia, 1995) or a Rwanda? Surely no legal principle such as sovereignty should be permitted to provide a shield against crimes against humanity. Should a state's political independence and sovereignty provide a licence to kill their own citizens? The answer is obviously 'No.' The better answer in fact lies

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[1006] Dennis Patterson, *Cosmopolitanism and Global Legal Regimes* EUI Law Department (unpublished and undated).

at the heart of the principle of the Responsibility to Protect – it requires the international community to cooperate when the necessity arises and to come to responsible decisions to avoid atrocities and gross human suffering.

In summary, after much research, analysis and thought, I have become committed to the need for and validity of the principle of the Responsibility to Protect in all three of its aspects: prevention, reaction and rebuilding. I consider myself a champion of the need to protect civilians from genocide, war crimes, ethnic cleansing and human atrocity when states are unable or fail to do so. At the same time, I recognize the work necessary to address the tough issues that face its implementation and encourage further efforts to imbed the principle firmly within the processes and structures of the United Nations, and international law, particularly in terms of human rights, conflict prevention and resolution and the protection of civilians. This work is necessary to aid in the legal operationalization of the doctrine in future.

The supportive work of NGOs and the dedicated work of these bodies in the global environment becomes even more important - we ought to nurture and encourage them.   I also encourage the pursuit of options for member states to implement the principle domestically in order to build their society's resilience to the occurrence of atrocity crimes. I also support new initiatives, such as the 'Accountability, Coherence and Transparency' (ACT) which was launched by a group of states to partly address, within the broader work on Council reform, the much contested proposal of the use of the veto by calling on the P5 to refrain from using this power negatively in situations where the Responsibility to Protect crimes and violations are imminent or ongoing and urgent action is required. Time, procrastination and opposition can mean thousands of lives lost while the members of the Security Council consider their next election or what best serves their

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interest - - time on which the lives of many innocent men, women, children and the elderly

utterly depend.

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APPENDIX A: INTERVIEW QUESTIONS

1. What are your primary objectives?
2. How do you go about achieving them?
3. What are the criteria for membership in your organization?
4. What do you think is the motivation for members to join?
5. What is your relationship with the State?
6. What role does loyalty to the state play?

They were asked, regarding impediments and the place of moral principles:

7. What do you think are the impediments to the implementation of R2P?
8. How do they impede?

Regarding the question of legality/legitimacy and the moral imperative, interviewees were asked:

9. Is intervention (and R2P) a moral entity or a legal entity and what does this mean in terms of implementation?
    a. What role does human values, ethics play your work;
    b. In that of the state – do the views differ?

To understand in greater detail the role of NGOs in global governance, interviews included the following questions:

10. How do you go about trying to influence decisions at the national, international level?
11. What kind of documents, texts do you use?
12. Do you feel your work makes a difference?
13. Why did you become involved?
14. What is your interaction with other
    a. NGOs; interest or civil groups
    b. the UN; other global governance organizations (ggos)
    c. your government?
15. Do you feel you contribute to democracy and legitimacy at the transnational level?

To discover how the different aspects of R2P (prevention, reaction, rebuilding) are viewed and/or advocated for, interviewees were asked

16. What is your position on the three different aspects of R2P?
17. Do you focus on all, one or two, and which ones; Why?
18. What is your role in rebuilding?

19. Who should be involved in the reconstruction – the UN, those who did the damage, neighboring states?
20. What about the ICC? How important is the ICC in the implementation of the Responsibility to Protect?

APPENDIX B: LETTER OF INTRODUCTION

Dr xxx

Date

Dear Dr. xxx,

I am writing to you with regard to my research to be carried out through the auspices of the Osgoode Law School at York University in Toronto to request permission to conduct an interview with you regarding my doctoral thesis topic.   It is anticipated that this interview would take approximately one hour or less of your time.

The dissertation research involves a study of the emerging international norm of 'The Responsibility to Protect' (R2P) which states that citizens must be protected in cases of *human atrocities, war crimes and genocide* where states have failed to do so. It includes questions on the role of non-state actors, the United Nations, and past and current government individuals who have knowledge of the past and current support for the principle.

This research project has been reviewed and approved for compliance to research ethics protocols by the Human Participants Review Subcommittee (HPRC) of York University. If you wish, the details of our interview would be kept confidential and your comments would remain unattributed. At the completion of my doctoral work, the records of your interview would be destroyed. Once completed, you would be entitled to read the thesis and any other work that I produce related to this topic.

I would like to assure you that participants have the right not to answer any question or to withdraw at any time. If a participant chooses to withdraw from the study, all data generated as a consequence of their participation shall be destroyed.

 If you have any questions with regard to this request and my current status, please feel free to contact Lisa Bunker Manager, Graduate Studies Osgoode Law SROSS 867 Osgoode Hall. She can be reached by email at lbunker@osgoode.yorku or my supervisor, Dr. Annie Bunting. Should you have any ethical concerns the regarding the ethical concerns of this research, you may address them to the Manager of the Office of Research Ethics, York University, 309 York Lanes, phone 416-736-5914.

I look forward to talking with you on November 10th.

Sincerely,

Carolyn H. Filteau
PhD Candidate, Osgoode Law School

Email: chfilteau@sympatico.

Participant' Signature   Date:

_____   _____

Researcher's Signature   Date:

_____   _____

APPENDIX C: SAMPLE THANK YOU LETTER

Dr. xxx

Date

Dear xxx,

Thank you so much for talking with me on xxx and for sharing your thoughts and experience with the Responsibility to Protect. I really enjoyed our conversation and came away with new insights and a much richer understanding of the situation as it is playing out in the "real world" of international relations. You also provided some new perspectives and very helpful ideas that will benefit my research - which I will be most happy to share with you when the thesis is complete. Your thoughts about the Libyan and other on the ground situations are especially useful to me.

Once again, many thanks for your candour, the subtlety and the completeness of your responses. It has been a great pleasure to talk to you and I thank you for leaving open possible future discussions. .

Kindest regards,

Carolyn Filteau
PhD Candidate
Osgoode Law School

APPENDIX D: INTERVIEW DETAILS

Amnesty International – New York and Geneva http://www.amnesty.org/en/contact/542

- London http://www.amnesty.org/en/contact
- Article http://www.amnesty.org/en/library/asset/MDE19/011/2011/en/569f0509-c3db-433f-b023-89aea68dde8e/mde190112011en.pdf

Asia Pacific Centre for the Responsibility to Protect. University of Queensland

Berghof Conflict Research http://www.berghof-conflictresearch.org/en/about/geschichte

Canadian Centre for International Justice
Office in New York, Geneva and Others.
Rue de varenbemi, 5th floor
1202 Geneva, Switzerland
Tel: 41 22 312 2550
Email: geneva@ictj.org

Canadian Institute for Applied Negotiation (CIAN) http://www.ciian.org/contact_us1.shtml
Dacre, Ontario

Canadian Lawyers for International Human Rights (CLAIHR) 66 Wellington Street West, Toronto Ontario Jillian Siskind, President

Carnegie Council New York http://www.carnegiecouncil.org/about/staff/index.html

Centre for Global Ethics and Politics http://globalr2p.org/media/pdf/R2P.Ministerial2011.pdf
Thomas Weiss,   Prof. Carol C. Gould, Director, The Ralph Bunch Institute, 365 Fifth Avenue, Suite 5203, New York, N.Y. 10016-4309 Telephone 212 (817) 1940
Centre for International Innovation in Governance (CIGI) http://www.cigionline.org University of Waterloo, previously Ramesh Thakur –Louise Frechette   David Dewitt, David Welch, Mark Sedra http://www.cigionline.org/person/mark-sedra

Centre for Mediation Dialogue http://www.hdcentre.org/ GENEVA Switzerland

Citizens for Global Solutions. "Creating a U.N. Emergency Capacity: The United Nations Emergency Peace Service," *Citizens for Global Solutions*, Washington, DC
<http://www.globalsolutions.org/issues/uneps>

Coalition for the International Criminal Court - http://www.iccnow.org/ -

Coordinadora Regional de Investigaciones Económicas y Sociales (CRIES), Argentina

East Africa Law Society, Tanzania

Geneva Academy of International Humanitarian Law and Human Rights
Villa Moynier, Rue Lausanne 120B - CP 67 - 1211 GENEVA 21

Academy Secretariat: Tel. +41 (0) 22 908 44 83 - info@adh-geneve.ch
Students Office   : Tel. +41(0) 22 908 44 88 - students@adh-geneve.ch
Fax +41(0) 22 908 44 99 Sent email January 10, 2012 to info adh

Geneva Centre for Security Policy – Geneva, Switzerland http://www.gcsp.ch/About-Us/Contact
Khalid Koser.

Genocide Intervention Network. "Conflict at Risk Network," *Genocide Intervention Network*,
 http://www.genocideintervention.net/contact_us Washington, DC
http://www.genocideintervention.net/responsibility_protect.

Global Action to Prevent War New York *Global Action to Prevent War*
866 UN Plaza, Suite 4050
New York, NY 10017
www.globalactionpw.org
melina@globalactionpw.org
+1 212 818 1815

Global Centre for the Responsibility to Protect at the City University of New York
http://globalr2p.org/   365 Fifth Avenue, Suite 5203, 212-817-2104 New York - Article
http://globalr2p.org/media/pdf/Libya_Time_for_Decision_14_March_2011.pdf
http://globalr2p.org/contact/ Telephone 212-817-2104

Jaclyn D Streitfeld-Hall Research Associate
Global Centre for the Responsibility to Protect
Ralph Bunche Institute for International Studies
365 Fifth Avenue, Suite 5203
New York, NY 10016-4309
www.globalr2p.org
Also Book Launch Ralph Bunche Inst. Dec. 5th 5:00 PM Church Center 777 UN Plaza.

The Graduate Institute, Centre for Conflict, Development and Peacebuilding, Geneva
http://graduateinstitute.ch/ccdp

Human Rights Watch New York

Human Rights Watch Geneva Contact   http://www.hrw.org/en/contact-us#Geneva

[Initiatives for International Dialogue](), The Philippines

International Coalition for the Responsibility to Protect.

International Commission Jurists – GENEVA – Secretary General, Louise Doswald Beck

International Committee of the Red Cross GENEVA [http://www.icrc.org/eng/who-we-are/contacts/index.jsp]() Jelena Pejic Legal Adviser

International Council of Voluntary agencies Geneva [http://www.globalhumanitarianplatform.org/ghp.html]() [http://www.icva.ch/secretariat.html]()

International Crisis Group [http://www.crisisgroup.org/]() Headquarters in Brussels but offices elsewhere as well Louise Arbour, President and CEO

ICG New York - [http://www.crisisgroup.org/en/about/contact.aspx]()

420 Lexington Avenue, Suite 2640, New York (see map)
[http://www.crisisgroup.org/en/about/contact.aspx]() email [newyork@crisisgroup.ca]()

International Parliamentary Committee for prevention of genocide. Art Eggleton recommended by Jillian Siskind [http://www.aegistrust.org/Parliamentary-work/appg-genocide-prevention.html]() and the UK http://www.aegistrust.org/Parliamentary-work/parliamentary-campaign-to-strengthen-uk-law-on-international-crimes.html

[International Refugee Initiative](), New York and Uganda

Kairos Canada. "Strategic Direction and Program Plan for KAIROS 2006-2010," Kairos Canada, slide 7, [http://www.kairoscanada.org/]() Doesn't look useful

Kofi Annan Foundation Geneva http://kofiannanfoundation.org/contact
Montreal Institute for Genocide and Human Rights Studies.
<[http://migs.concordia.ca/W2I/about_w2i.htm]()>Frank Chalk, Director of MIGS, Professor of History, Concordia University [http://www.migsr2pconference.com/speakers]()

W2i Project Kyle Matthews email: [kylematt@alcor.concordia.ca]() The Will to Intervene Project (MIGs S– The Montreal Institute for Genocide and Human Rights Studies)
[http://migs.concordia.ca/W2I/W2I_Project.html]()
Tel.: (514) 848-2424 ext 5729 or 2404
Fax: (514) 848-4538

Kyle Matthews
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The Will to Intervene Project
The Montreal Institute for Genocide and Human Rights Studies
Concordia University

1455 de Maisonneuve Blvd West
Montreal, Quebec, Canada
H3G 1M8

NATO Watch UK Contact Ian Davis http://www.natowatch.org/contact

Dr. Ian Davis
Director, NATO Watch
17 Strath, Gairloch
Ross-shire IV21 2BX, UK
Tel: +44 (0)1445 712649; e-Fax: +44 (0)700 601 7404
Mobile: +44 (0)7887 782389
Skype: iandavis1960
email: info@iandavisconsultancy.com
www.natowatch.org

Oxfam International Different countries – Canada in Ottawa Sent email October 20, 2011

International Coalition on the Responsibility to Protect ICRtoP Listserv Web:
www.responsibilitytoprotect.org

Marion Arnaud
Senior Outreach Officer
International Coalition for the Responsibility to Protect
708 Third Avenue, 24th Floor
New York, NY 10017
212.599.1320 x8528
fax 212.599.1332
www.responsibilitytoprotect.org

Contact New York http://www.responsibilitytoprotect.org/index.php/contact-us c/o World
Federalist Movement - Institute for Global Policy, 708 Third Avenue, 24th Floor, New York Tel:
1-212-599-1320

Responsibility to Protect," World Federalist Movement – Institute for Global Policy,
<http://www.wfm igp.org/site/igp/programs/r2pcs> (accessed November 2 2010). New York
rtop-included-in-security-council-resolution-on-the-protection-of-civilians-initiative-for-
international See ten years after conference in Toronto ICR2P http://www.wfm-
igp.org/site/igp/programs/r2pcs

 IDRC
 http://www.idrc.ca http://www.idrc.ca/EN/AboutUs/Contact/Pages/default.aspx

Interparliamentary Group – London http://www.bgipu.org/contact.htm Referred by Kyle
Matthews He can give you contact.

Project Ploughshares – Waterloo Ernie Regehr, former executive director. Current ED is John Siebert. Based in Menonite Community in Waterloo http://www.ploughshares.ca/ contact http://www.ploughshares.ca/contact

The Stanley Foundation. Iowa, http://www.stanleyfoundation.org/ Rachel Gerber

Tom Lantose Human Rights Commission – Washington DC referred by Kyle Matthews http://tlhrc.house.gov/contact.asp

The West Africa Civil Society Institute, Ghana

United Nations Association in Canada, Toronto and elsewhere http://www.unac.org/en/index.asp http://to.unac.org/contact-us/

UN Office of the High Comissioner for Human Rights GENEVA http://en.wikipedia.org/wiki/Office_of_the_United_Nations_High_Commissioner_for_Human_Rights

The United States Institute of Peace http://www.usip.org/contact Washington, D.C. Contact Jason Gluck re Libya Peace brief email: jgluck@usip.org; telephone 202-429-3886

University of Cardoza - University of Cardoza School of Law. New York Evidentiary standards. Trying to come up with evidentiary standards and legal criteria. . Contact Daniel Stewart This project founded by the Australian Government. Sharon Rosenburg.

W2i Project The Will to Intervene Project (MIGs S– The Montreal Institute for Genocide and Human Rights Studies) http://migs.concordia.ca/W2I/W2I_Project.html

World Federalist Movement Canada. Ottawa http://www.worldfederalistscanada.org/contact.html
World Federalist Movement-Institute for Global Policy, New York and The Hague – speak to Bill Pace, 708 Third Avenue, 24th Floor, New York 100171 212 599 1320 CALL

Individuals

1) ***David Dewitt,*** *V*ice-President of Programs, *Center for International Governance Innovation, 57 Erb Street West, Waterloo, Ontario, Canada N2L 6C2* **ddewitt@cigionline.org; telephone 519-885-2444 x 292**

2) ***David Welch*** *Balsillie School of International Affairs, 67 Erb Street West, Waterloo, On N2L 6C2*

3) ***Lucie Edwards****, Balsillie School of International Affairs,*

4) ***Carolyn McAskie***
   Wakefield, QC

5) **Elissa Golberg**
   Ambassador and Permanent Representative to the United Nations and the Conference on Disarmament | Ambassadeure et représentante permanente auprès des Nations Unies et de la Conférence du désarmement
   elissa.golberg@international.gc.ca

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   Telephone | Téléphone: 41 (0) 22 919 9216
   Facsimile | Télécopieur: 41 (0) 22 919 9254
   Avenue de l'Ariana 5, 1202 Genève, Suisse
   Government of Canada | Gouvernement du Canada

APPENDIX E: GLOSSARY

ACT   Accountability, Coherence and Transparency

AU   African Union

CGS   Citizens for Global Solutions

CIGI   Centre of International Governance

CLAIHR   Canadian Lawyers for International Human Rights

ECOSOC   Economic and Social Council

GATT   General Agreement on Tariffs and Trade

GCSPS   Geneva Center for Security Policy Studies

HD   Center for Humanitarian Dialogue

HRW   Human Rights Watch

ICC   International Criminal Court

ICG   International Crisis Group

ICISS   International Commission on the Responsibility to Protect

ICR2P   International Coalition on the Responsibility to Protect

ICRC   International Committee of the Red Cross

IGO   International Organizations

IMF   International Monetary Fund

KLA   Kosvo Liberation Army

MIGS   Montreal Institute for Genocide and Human Rights Studies

MS   Member State

NATO   North Atlantic Treaty Organization

NGO   Nongovernmental Organization

NSAG   Non-state armed groups

OIC	Organization of the Islamic Conference
OSCE	Organization for Security and Cooperation in Europe
P5	Permanent Members
PDD	Presidential Decision Directive
PESD	Bush doctrine of pre-emptive self defense
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNA	United Nations Association
UNAMIR	UN Assistance Mission for Rwanda
UNDP	United Nations Development Programme
UNMISS	United Nations Mission in the Republic of South Sudan
W21	Will to Intervene Project
WFM-IGP	World Federalist Movement- Institute for Global Policy
WMD	weapons of mass destruction