City University of Hong Kong

School of Law

LW 4635 Independent Research

Research Topic: Legality of use of force in Libya under International Law

Name: Chan Ka Hang Louie

Contents

Introduction

Colonel Gaddafi's 47 years reign in Libya ended on 20th October 2011. He was killed by rebel forces despite an arrest warrant issued from the International Criminal Court for crimes against humanity, murder and persecution.[1] The Libyan incident has resulted in 30,000 casualties.[2]

On 26th February, 2011, the Security Council determined that the mass atrocities perpetrated by Libyan authorities constituted a threat to international peace and security. [3] Evidence of continuing mass atrocities was proffered by the High Commissioner of Human Rights to the Security Council on 25 February 2011, which led to the adoption of Resolution 1970.[4] Resolution 1973,[5] which acts on the findings of Resolution 1970, was passed on 17th March, 2011, authorising the use of force against Libyan authorities.

Prior to the enactment of Security Council Resolution 1970, the High Commissioner for Human Rights, Navi Pillay observed on 25th February 2011, that mass atrocities are

[1] Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011, ICC-01/11, p. 6; Apps, Peter, Death of Libya's Gaddafi avoid awkward trial, Reuters News, London, 20th October, 2011.
[2] Libya: Estimated 30,000 Died in War: 4,000 Still Missing, Huffington post, 8 September 2011, http://www.huffingtonpost.com/2011/09/08/libya-war-d-died_n_953456.html
[3] Security Council Resolution 1970 (2011), Adopted by the Security Council at its 6491st meeting, on 26 February 2011, S/RES/1970, p. 2; United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VII.
[4] Navi Pillay, "Situation of Human Rights in the Libyan Arab Jamahiriya: Statement by Navy Pillay," UN High Commissioner for Human Rights (Human Rights Council - 15th Special Session - Geneva, 25 February 2011)
[5] Security Council Resolution 1973 (2011), Adopted by the Security Council at its 6498th meeting, on 17th March 2011, S/RES/1973 (2011). Paragraph 4.

imminent as the Gaddafi Regime plan to crackdown demonstrations launched by Libyan citizens.[6]

The use of force in Libya was authorised by the Security Council under resolution 1973 for the protection of civilians. This resolution and its concurrent press release[7] show that the Security Council is doing so through the exercise of its powers under chapter VII of the UN Charter in light of the Responsibility to Protect doctrine ("R2P" Doctrine).

The analysis of the legality of the use of force in Libya is of three fold. First, to define what is the R2P doctrine and on what should be the criteria of legitimacy for R2P under international law? Second, to what extent was SC resolution 1973 legitimate under international law? Third, to what extent was NATO's military conduct consistent with R2P?

What is R2P?

Origins of the Responsibility to Protect doctrine

R2P consists of the duty to prevent, react and rebuild the disaffected from mass atrocities including genocide, war crimes, ethnic cleansing and crimes against

[6] Navi Pillay, UN High Commissioner for Human Rights on 25 February 2011 in Geneva, as he states that "Although reports are still patchy and hard to verify, one thing is painfully clear: in brazen and continuing breach of international law, the crackdown in Libya of peaceful demonstrations is escalating alarmingly with reported mass killings, arbitrary arrests, detention and torture of protestors. Tanks, helicopters and military aircraft have reportedly been used indiscriminately to attack the protestors. According to some sources, thousands may have been killed or injured."

[7] "Many expressed hope that the resolution was a strong step in affirming the responsibility of States to protect their people as well as the legitimate role of the Council to step in when they failed to meet that responsibility." As provided in Security Council Press Release, SC/10187/Rev.1, at 6491th session 26 February 2011, "In swift, decisive action, security council imposes tough measures on Libyan Regime, adopting resolution 1970 in Wake of Crackdown on Protestors.

humanity.[8] As secretary-general Ban Ki Moon have stated, the R2P consists of three pillars of right, first, the protection responsibilities of the State, second, International assistance and capacity –building and third, timely and decisive response.[9]The R2P was developed and recognized largely based on the failure of the SC resolutions in preventing mass atrocities from occurring.[10] It is a doctrine drawn up by the International Commission on Intervention and State Sovereignty in which the R2P doctrine was officially recognised at the *2005 World Summit Outcome Resolution,* where the doctrine was reiterated.[11]

[8] This doctrine originates from The International Commission in Intervention and State Sovereignty (2001) *available at http://www. Iciss.ca/pdf/Commission-Report.pdf:* The Secretary-General, *Report of the Secretary-General's High Level Panel on Threats, Challenges, and Change delivered to the General Assembly,* U.N. Doc. A/59/565 (December 8 2004); the Secretary-General, *In Larger Freedom Towards Development, Security and Human Rights for All, delivered to the General Assembly,* U.N. Doc/ A/59/2005 (May 21 2005); Gareth Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All (2008); Alex J. Bellamy, A Responsibility to Protect: The Global Moral Compact for the 21st Century (Richards H. Coper & Juliette Voinov Kohler eds., 2009); The Secretary-General, *Implementing the Responsibility to Protect,* U.N . Doc. A/63/677 (Jan 21, 2009).

[9] Cf. generally at the ICISS Report.

[10] As reaffirmed by Ban-Ki Moon in his report on Implementing Responsibility to Protect that the Rwandan Genocide and Srebrenica Massacre were the main thrusts for the outcry for Responsibility to Protect.

[11] *2005 World Summit Outcome Resolution,* G.A. Res. A/RES/60/1, paragraph 138-139, U.N. Doc. A/RES/60/1 (October 24 2005) Where the relevant paragraphs states that "138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.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, ion 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 and ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crime, 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."

The doctrine gave rise to the international community, a secondary duty to prevent and to react against mass atrocities by imposing necessary sanctions in a timely and decisive manner. According to the International Commission on Intervention and State Sovereignty, such positive duty is triggered when the State itself, who holds the primary responsibility to protect, is either unable or unwilling to do so. By adopting the R2P doctrine, SC has taken up the responsibility to react to the mass atrocities in Libya, it is also provided in the doctrine that there is a responsibility to rebuild Libya's capacity to prevent future mass atrocities.

According to the ICISS, R2P doctrine seek to answer the "heightened expectations for collective action following the end of the Cold War,"[12] due to the absence of a legal norm to prevent mass atrocities from occurring, this is especially when the government of the disaffected state itself is unable or unwilling to observe this responsibility, e.g. Rwanda, Bosnia, Kosovo and Somalia.

In broad principle of international law, R2P doctrine symbolizes the conflict between state sovereignty and human rights. While the Principle of non-intervention and equality of states used to limit human rights developments, people's right to self-determination and the need for international co-operation to maintain international peace and security seem to enjoy a greater priority in the R2P doctrine.[13]

The R2P doctrine despite its emphasis on the respect of state sovereignty and its humanitarian purpose, it is still in direct conflict with the various articles of the UN

[12] ICISS Report 1.4.

[13] When a situation is determined to be of threat to international peace and security, the rationale behind such determination is often considered as great signs for an emerging international legal norm. This is especially the case after the SC's failure to properly prevent and react against mass atrocities in Rwanda, Srebrenica, Kosovo and Somalia.

Charter. Military intervention using R2P as the justification arguably breaches article 1(1) for failing to suppress or resolve breaches of international peace by peaceful means[14] 2(4) for use of force against the territorial integrity and political independence of disaffected state[15] and 2(7) where matters are essentially within the domestic jurisdiction of the state.[16] There are two exceptions to prohibition on the use of force, namely, when SC considers that non-military sanctions are inadequate or prove to be inadequate for maintaining and restoring international peace and security[17] and of self-defence.[18] The use of force in Libya was authorised by the SC under article 42.

How does R2P doctrine apply to Crimes against Humanity?

According to the 2005 World Summit Outcome, states owe their responsibility to protect civilians from genocide, war crimes, ethnic cleansing and crimes against humanity. In the absence of SC's authorisation, R2P doctrine could not have been applied in situation of crimes against humanity as justification for use of force as it is neither a treaty obligation nor an established customary international law rule to do so.

[14] 1.To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

[15] Article 2(4) of the UN Charter.

[16] Article 2(7) of the UN Charter provides that: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."

[17] Article 42 of the UN Charter provides that: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

[18] Article 51 of the UN Charter provides that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, 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 to the Security Council and shall not in any way affect the authority and responsibility of 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."

The term Crimes against Humanity was first codified under the Nuremberg Charter article 6(c), where "crimes against humanity: namely, murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal ,whether or not in violation of the domestic law of the country where perpetrated."[19] A more recent source of international criminal law on crimes against humanity can be found in the Rome Statute.[20] Despite the recognition of the International Criminal Court by this statute, paragraph 8 of the Preamble of the Rome Statute of the International Criminal Court emphasises that "nothing in this [Rome] Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State."[21]

The lack of a treaty obligation to use force against Crimes against Humanity further undermines the ICISS's reasoning when attempting to justify the existence of an R2P obligation under doctrinal international law for use of force against crime against humanity.[22] As none of the cited treaties directly support the R2P doctrine for intervention in imminent humanitarian crisis (with the exception of genocide as

[19] Charter of the International Military Tribunal article 6(c) in Volume 1 of Trial of the Major War Criminals Before the international Military Tribunal 10, 11 (1947). In a Protocol signed on October 6, 1945, the common before "or persecutions" in the text above replaced the semicolon that appeared there in the original text adopted in London on August 8, 1945.

[20] UN General Assembly, Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998, A/CONF. 183/9, The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. This version of the Statute incorporates changes made to it by the procés-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

[21] Preamble of the Rome Statute.

[22] In Chapter 2 of the ICISS Report, it was claimed that R2P is found in existing treaty law and customary international law rules such as "responsibility of the Security Council, specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law."

specifically codified under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide),[23] no provisions in the Nuremberg Charter, Rome Statute of the International Criminal Court, Universal Declaration of Human Rights 1945, [24] International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights of 1966 support military intervention for any extent of crimes against humanity anticipated or committed in the absence of self-defence or SC authorisation.

Article 30 of the UDHR in particular, states that "nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

There are no general implication for a state to use force other than in situation of self-defence and upon SC's act of imposing adequate sanctions against threat to international peace and security. In this context, one may argue that the Libyan situation in 2011 falls within the scope of the Security Council's lawful enforcement against a threat to international peace and security.

[23] Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951 which 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 which they undertake to prevent and to punish."

[24] Article 30 of the Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), which provides that: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." This provision in its plain and ordinary meaning suggests that however serious Gaddafi's regime was in violation of human rights, States may not rely on grave violation of citizens' right to life as a reason for humanitarian intervention.

The purpose of the Geneva Conventions and the Hague Conventions is made solely for the regulation of conducts of war.[25] They have neither expressly nor impliedly provide any justification for the enforcement against crimes of the most serious nature through the use of military force. Their applicability are only limited to existing parties of the armed conflict (*Jus in Bello)* and does not extend to the justification of beginning an armed conflict itself (*Jus ad Bellum).*

The positive duty to prevent is only provided under the *lex specialis* of the Genocide Convention article 1.[26] The positive duty to prevent crimes against humanity therefore, remains a duty that arises out of "moral urgency"[27], not law. Some argue as far as to disregard Rwanda and Srebrenica as evidence of R2P in situation of Crimes against Humanity.[28]

[25] Article 1(4) of the International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, which provides that The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."; and in Article 1(1) and 1(2) of International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 which provides that This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts; International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

[26] Article 1 of the Genocide Convention.

[27] Rosenburg, Sheri, "Responsibility to Protect: A Framework for Prevention," in Bellamy, Alex J., Davies, Sara E. and Luke Glanville, *The Responsibility to Protect and International Law*, Martinus Nijhoff Publishers, Leiden, 2011, p.191.

[28] Ndiaye B.W., "Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories, Extrajudicial,

In response to the lack of a treaty obligation to be enforced against crimes against humanity, Crimes against Humanity Initiative was launched on 2010 led by Professor Leila Nadya Sadat.[29] On August 2010, a Proposed International Convention on the Prevention and Punishment of Crimes against Humanity was published.[30] If this document comes into force as a treaty, than pursuant to article 8 of the proposed convention, the R2P in crimes against humanity would become a treaty obligation.[31]

Under article 8, states are to be bound by a primary responsibility to "endeavour to take measures in accordance with its domestic legal system to prevent crimes against humanity"[32] and a right to "call upon competent organs of the UN or a regional organization to take such action in accordance with the UN Charter as they consider

---

summary or arbitrary execution addendum," 11 August 1993, E/CN.4/1994/7/Add.1., "Report of the Secretary-General pursuant to General Assembly resolution 53/35: The Fall of Srebrenica," 15 November 1999. P.57

[29] The Crimes against Humanity Initiative is led by "Professor Leila Nadya Sadat is the Henry H. Oberschelp Professor at Washington University School of Law and Director of the Whitney R. Harris World Law Institute. She will be the Alexis de Tocqueville Distinguished Fulbright Chair at the University of Cergy-Pontoise in Paris, France in spring 2011. Sadat is an internationally recognized authority and prolific scholar. She is the author of the award-winning The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. Her most recent articles include: A Rawlsian Approach to International Criminal Justice; On the Shores of Lake Victoria: Africa and the International Criminal Court; Understanding the Complexities of International Criminal Tribunal Jurisdiction; and The Nuremberg Paradox. Sadat was a delegate to the 1998 Rome Diplomatic Conference and the 2010 ICC Review Conference in Kampala, Uganda. She has held leadership positions in many organizations and is a member of the American Law Institute."

[30] Proposed International Convention on the Prevention and Punishment of Crimes against Humanity dated August 2010 and as amended on February 2012, is available online through website: http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf, last visited on 13th April, 2012. It pertains both the state responsibility and individual criminal liabilities for the perpetration of Crimes against Humanity. The proposed convention further provides direction as to the capacity building, ways to prevent and an obligation of reporting crimes against humanity.

[31] Article 8(1) of the proposed convention provides that: "Each State Party shall enact necessary legislation and other measures as required by its Constitution or legal system to give effect to the provisions of the present Convention and, in particular, to take effective legislative, administrative, judicial and other measures in accordance with the Charter of the United Nations to prevent and punish the commission of crimes against humanity in any territory under its jurisdiction or control."

[32] Article 8(12) of the proposed convention provides that: "12. Each State Party shall endeavour to take measures in accordance with its domestic legal system to prevent crimes against humanity. Such measures include, but are not limited to; ensuring that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law.

appropriate for the prevention and punishment of crimes against humanity."[33] This is implicitly, embodies the responsibility to prevent and to react under the R2P doctrine.

From the above analysis, it is argued that since the proposed convention have yet to be in force, the proposed convention remains as a persuasive document to support the moral urgencies to react against crime against humanity. Further, it is neither expressed nor implied in existing treaties and international documents that permit an R2P military intervention in crimes against humanity, thus, at the time of the Libyan crisis in 2011, the R2P was adopted in the absence of any treaty support.

The test for establishing an existing rule of customary international law remains onerous as consistent and wide state practice and well-defined *opinio juris* has to be present. For example, despite the explicit wordings of the GA Resolution 2625, counter-terrorist movements were only legally recognised arguably, after the event of 9/11, which was finally adopted as part of the legal reasoning in *Congo v. Uganda* at the ICJ in 2005.[34] This example shows how new found doctrines can remain dormant for a long time before a specific event which acts to crystallise such doctrine.

There is insufficient state practice for a right to military intervention in times of domestic mass atrocities. Although it is undisputed that the concept of sovereignty is no longer absolute, the Iraq war in 1990, Bosnia in 1993, Somalia in 1993 and Rwanda in

[33] Article 8(13) an 8(14) of the proposed convention, States Parties may call upon the competent organs of the United Nations to take such action in accordance with the Charter of the United Nations as they consider appropriate for the prevention and punishment of crimes against humanity; States Parties may also call upon the competent organs of a regional organization to take such action in accordance with the Charter of the United Nations as they consider appropriate for the prevention and punishment of crimes against humanity.

[34] *Armed Activities on the Territory of the Congo, (*Democratic *Republic of the Congo v. Uganda)* Judgment, I.C.J. Reports 2005, paragraph 162.

1994 all reflects states' reluctance to use force in internal mass atrocities regardless of its dire humanitarian situation.[35]

For example, Srebrenica in 1993, specifically under Security Council Resolution 836(1993), the SC and international community show reluctance to use force despite reasonable anticipation of genocide in Srebrenica have led to a tragic result.[36] With minimal state consensus[37], and despite actual authorisation of use of force (in terms even more explicit than that of the SC resolution 1973),[38] sanctions were not properly enforced and the military strength was so infinitesimal that the safe areas were bombarded regardless of UN presence. The prevention of the mass atrocities in

[35] Iraq, S.C. Resolution 660, UN SCOR, 45th Session adopted at 2932nd Meeting at 19, UN Doc. S/RES660 (1990), Somalia, S.C. Res. 733, UN SCOR, 47th Session, adopted at 3039th Meeting, U.N. Doc. S/RES/733 (1992) and Rwanda, S.C. Resolution 872, UN SCOR, adopted at 48th Session, 3288th Meeting, U.N. Doc. S/RES/872 (1993).

[36] "With a consensus absent in the Council, lacking a strategy, and burdened by an unclear mandate, UNPROFOR was forced to chart its own course. There was only limited support for a 'robust' enforcement policy by UNPROFOR. UNPROFOR thus chose to pursue a policy of relatively passive enforcement, the lowest common denominator on which all Council members more or less agreed." (Yasushi Akashi, who was appointed Special Representative of the Secretary-General in January 1994)
"I believe we are faced with two options, if we are to save the lives of the people trapped in Srebrenica. The first is to immediately enhance international presence, including that of UNPROFOR, in order to turn the enclave into an area protected by the United Nations, and inject life-sustaining assistance on a scale much greater than being permitted at the moment. … Failing that, the only other option would be to organise a large-scale evacuation of the endangered population in Srebrenica." Press Release regarding words from Mrs. Ogata in the Fall of Srebrenica (S/25519)

[37] Para 42 of Srebrenica Report, "Despite this unprecented flow of resolutions and statements, however, consensus within the Security Council was limited. There was general agreement on the need for action, but less agreement as to what action was appropriate. The Secretary-General understood that the Council was able to reach consensus on three broad areas, namely, the need to alleviate the consequences of the war; the need to contain the conflict; and the need to promote the prospects for a negotiated peace settlement."

[38] Operational paragraph 9 and 10 of Security Council Resolution 836 (1993) "Authorises the force, in additional to mandate defined in resolution 770(1992) of 13 August 1882 and 776 (1992), in carrying out the mandate defined in paragraph 5 above, acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of the Force or of protected humanitarian convoys; Decides that… Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and the Force, all necessary measures, through the use of air power, in and around the safe areas in Bosnia and Herzegovina,, to support the Force in the performance of its mandate set out in paragraphs 5 and 9 above.

Srebrenica did not fail on incapacity; it failed due to reluctance to use force to deter attacks on safe areas.

Such reluctance has the effect of negating resolution 836's authorization of use of force.[39] As presence of the peacekeeping forces of UNPROFOR were clearly of no deterrent effect to the attacking Serb forces as approximately 1,000 shells continued to land in the safe area each day usually, into civilian-inhabited areas, often in ways calculated to maximise civilian casualties, sometimes at random, and only occasionally for identifiably military purposes since 6 April 1992[40] and continued until Operation Deliberate Force in August 1995.[41] Worst when the SC resolution failed to take effect as the UNPROFOR Commander in Bosnia and Herzegovina opposed the approach of launching air-strikes against the Serb forces despite the Markale Massacre.[42] It was not until when situation went too bleak than that the Commander of UNPROFOR request for NATO's air strikes. On 11 July 1993, the air support was delayed and Srebrenica thus fell without its prompt intervention.[43] The incident was concluded by Human Rights Watch that "responsibility to protect the "safe area" in Srebrenica and its

[39] SC Resolution 836 as mentioned in UN General Assembly, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, ("Srebrenica Report"), 15 November 1999, A/54/549.
[40] Srebrenica Report, para. 93.
[41] The Markale Massacre on 5 February 1994 consists of two mortar rounds which the first exploded in the Markale marketplace in downtown Sarajevo killing 68 people, mostly, Bosniac civilians, and injuring over 200 while the second one killed 10 people while queuing for water in the Dobrinja area of Sarajevo. Srebrenica report, para. 117.
[42] The Secretary-General of UN wrote to the Secretary-General of NATO as follows: "I should be grateful if you could take action to obtain, at the earliest possible date, a decision by the North Atlantic Council to authorize the Commander-in-Chief of NATO's Southern Command to launch air strikes, at the request of the United Nations, against artillery or mortar positions in or around Sarajevo which are determined by UNPROFOR to be responsible for attacks against civilian targets in that city" (S/1994/131, annex.)
[43] Srebrenica Report, para. 297 to 317.

inhabitants at a time when Bosnian Serb forces were overrunning it, holding Dutch U.N. soldiers hostage, and executing the enclave's residents."[44]

The Srebrenica incident constitutes an extremely strong moral commitment for the international community to prevent and punish mass atrocities, albeit, the lack of doctrinal international law to support such policy compared with a rather abundant source of treaty and state practice which happens to counter-argue R2P's legitimacy, most notably, the lack of a convention against Crimes Against Humanity and the existence of article 2(4) of the UN Charter.

One may further consider the Rwandan situation in 1994. Where the United Nations Assistance Mission for Rwanda (UNAMIR) was established to assist and restore the living conditions of the disaffected civilians. [45] On 17th May 1994, despite SC's determination of this incident as a threat to international peace and security, the UNAMIR was only to be authorise to use force for self-defence[46] Nowhere in the resolution have the SC determined the need for military force which could have been adequately justified for the purposes of enforcing the arms embargo which was imposed in the same resolution.[47] Rwanda was only offered with the option of cooperating with

[44] Conclusion by Human Rights Watch, "The Fall of Srebrenica and the Failure of U.N. Peacekeeping ," 1 October 1995, D713.
[45] UN Security Council, Security Council Resolution 909 (1994) Adopted by the Security Council at its 3358th meeting, on 5 April 1994, 5 April 1994, S/RES/909 (1994).
[46] UN Security Council, *Resolution 918 (1994) Adopted by the Security Council at its 3377th meeting, on 17 May 1994*, 17 May 1994, S/RES/918, where the preamble provides that: ""the situation in Rwanda, which has resulted in a the death of many thousands innocent civilians, including women and children, the internal displacement of a significant percentage of the Rwandan population, and the massive exodus of refugees to neighbouring countries, constitutes a humanitarian crisis of enormous proportions."
[47] Part B of the operational part of the UN Security Council Resolution 918(1994) which provides that 13. Decides that all States shall prevent the sale or supply to Rwanda by their nationals or from their territories or using their flag vessels or aircraft of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts; 14 Decides also to establish, in accordance with rule 28 of the provisional rules of procedure of the Security Council, a Committee of the Security Council consisting of all the members of the Council, to

the United Nations Assistance Mission for Rwanda, whose duties as a UN mandate, highly restricted in its military capabilities and resources.

There is no *opinio juris* for a right to military intervention in times of domestic mass atrocities. Some may interpret from the 2009 Statement made by Secretary-General of UN Ban Ki-Moon on the implementation of the Responsibility to Protect that the law on use of force have been developed as to encompass situation of all four international crime categories.[48] It was argued that this is because the sentimental address of past atrocities by the Secretary-General shows that no distinction was drawn between the means and methods of enforcement against Genocide, War Crimes, Crimes against Humanity and Crime of Aggression, therefore, the Genocide Convention in 1948 should not barricade contemporary law in applying the R2P to disaffected states with the anticipation of crimes against humanity being perpetrated. This opinion seem to have been put into practice in the way the Security Council decides to intervene for purpose of protecting civilians in the recent Libyan Crisis in 2011.[49]

---

undertake the following tasks and to report on its work to the Council with its observations and recommendations: (a)To seek from all States information regarding the action taken by them concerning the effective implementation of the embargo imposed by paragraph 13 above; (b) To consider any information brought to its attention by States concerning violations of the embargo, and in that context to make recommendations to the Council on ways of increasing the effectiveness of the embargo; (c) To recommend appropriate measures in response to violations of the embargo imposed by paragraph 13 above and provide information on a regular basis to the Secretary-General for general distribution to Member States.

[48] Paragraph 3 of Report of the Secretary-General, Implementing the responsibility to protect, Sixty-third session, agenda items 44 and 107, A/63/677, 12 January 2009, which provides that "it should be underscored that the provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in well-established principles of international law. Under convention al and customary international law, States have obligations to prevent and punish genocide, war crimes and crimes against humanity… It should also be emphasized that actions under paragraphs 138 and 139 of the Summit Outcome are to be undertaken only in conformity with the provisions, purposes and principles of the Charter of the United Nations. In that regard, the responsibility to protect does not alter, indeed it reinforces the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.

[49] SC Resolutions 1970 and 1973 authorised non-military and military sanctions under Chapter VII of the Charter respectively for the purpose of protection of civilians while acknowledging the R2P doctrine as the aim of the operation.

Distinguished from the legal intention of states to prosecute and punish Crimes against Humanity by way of legal enforcement, past decisions of the ICTY, ICJ, GA resolutions seems to suggest that such criminalisation does not extend to a justification for military intervention in the domestic affairs of the disaffected state.

This is illustrated by the ICTY and the ICJ show that the *jus cogens* nature of right to life assist the laws of crimes against humanity in forming an exception to the prohibition on the use of force. As *ICTY Furundzija Case* states that "one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in ta territory under its jurisdiction… This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every state has the right to prosecute and punish the authors of such crimes." [50]

The implication of this case simply reflects that extradition is not necessary where the domestic courts may have universal jurisdiction to trial against suspects within its territory of torture as one of form of crimes against humanity. Such universal repression against Crimes against Humanity cannot be seen as a definitive support to an *opinio juris* to allow the use of force against Crimes against Humanity. This is further supported by the fact that Judge Higgins' opinion in the *Arrest Warrant case* of 11 April 2000 (Democratic Republic of Congo v. Belgium) and *Oppenheim's International Law*

[50] Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, paragraph 156 (December, 10, 1998).

both suggests that there is no general rule of positive international law that allows states "the right to punish foreign nationals for crimes against humanity in the same way as they are entitled to publish acts of piracy."[51]

It is further submitted that the *opinio juris* to punish and prosecute Crimes against Humanity must not be misinterpreted as the same *opinio juris* to use military force against perpetrators of Crimes against Humanity. Thus, even if General Assembly Resolution 2583(XXIV) of 1969,[52] GE Assembly Resolution 2712(XXV) in 1970,[53] 2840 (XXVI)[54] and in General Assembly Resolution 3074[55] and most recently, in General Assembly resolution 60/147 in December 2005[56] all suggest of the need to

[51] *Arrest Warrant Case*, opinion of Judges Higgins, Kooijmans & Buergenthal, paragraph 45 and 52.

[52] Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity (Question of Punishment), G.A. Res. 2583(XXIV), 24 U.N. GAOR Supp. (No.30), U.N. Doc. A/RES/2583(XXIV) December 15, 1969) "To take the necessary measures for the thorough investigation of war crimes and crimes against humanity, as defined in Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and for the detention, arrest, extradition, and punishment of all war criminals who have not yet been brought to trial or punished."

[53] Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, G.A. Res. 2712(XXV), 25 U.N. GAOR Supp. (No. 28) U.N. Doc. A/RES/2712 (XXV) (December 15, 1970.) "to take measures, in accordance with recognised principles of international law, to arrest such persons and extradite them to the countries where they have committed war crimes and crimes against humanity, so that they can be brought to trial and punished in accordance with the laws of those countries."

[54] Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, G.A. Res. 2840 (XXVI) (1971), G.A. Res. 2840(XXVI), 26 U.N. GAOR Supp. (No.29) at 88, U.N. Doc. A/RES/2840(XXVI)(December 18, 1971). "refusal by states to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognised norms of international law."

[55] Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, G.A. Res. 3074(XXVIII), 28 U.N. GAOR Supp. (No. 30) at 78-79, U.N. Doc. A/RES/3074(XXVIII) (December 3, 1973). "Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial, and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons."

[56] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; G.A Res. 60/147, U.N. Doc. A/RES/60/147 (December 16, 2005), where the Preamble provides that "International law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs." And principle 4 provides that "In cases of gross violations of international human right law and serious violations of international humanitarian law

prosecute and punish crimes against humanity, none of the above have suggested measures more than of international cooperation in extradition and prosecution of those suspects.

On policy, R2P interventions should be conduct with high moral sensitivity. It is a doctrine that has been formed over countless victims of mass atrocities. It is clear that omission and purely peaceful assistance does not sound for the removal of mass atrocities when they are of threat to international peace and security, steps should be taken to refine the R2P doctrine instead of arguing about its legal existence.

As the purpose of R2P is to alleviate the human sufferings from mass atrocities arising out of an the unwillingness or the inability of a disaffected state to protect its own people, the development of R2P should not be seen as an increased opportunity for Security Council permanent members to turn countries that are liberated in their favour.

The R2P doctrine also carries the inherent dilemma. Should there be a definitive yardstick for determining a R2P situation? Neither the sole reliance of the four documents, namely, the 2001 ICISS report, 2004 Kofi Annan's speech, world summit outcome resolution in 2005 and Secretary General Ban-Ki Moon's Statement in 2009 provide a sufficiently defined criteria of legitimacy for implementing R2P. Nor does the disregard of the above four documents reflect the true position in international law development, It is suggested that the criteria of legitimacy should be left flexible. This is because the former, will lead to capricious application of the R2P, as R2P

---

constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations, and if, found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations."

interventions were all justified by different ways of interpreting the four documents and the latter remains overly passive in developing legal norms against mass atrocities.

The best solution is to read the ICISS report jointly with doctrinal international law. The synthesis of the two brings about a balanced and consistent approach in handling a relatively new legal concept such as the R2P. This also generates a greater prospect for the international community to agree with the R2P. If SC authorised R2P interventions are undertaken in accordance with doctrinal international law, the SC may attract greater international cooperation, which will in turn, strengthen the collective security system for the maintenance of international peace and security.

What are the criteria of legitimacy in the R2P doctrine?

In order to establish an R2P situation, it was suggested by the ICISS report that the criteria of legitimacy must be met cumulatively. Arguably, the five criteria form the *jus ad bellum* military intervention under R2P doctrine. The criteria include the proof of seriousness of harm, proper purpose, last resort, proportional means and reasonable prospect.[57] Further, the ICISS report suggests that the SC is the right authority for implementing R2P because of its role as authorised by the UN Charter to act as the international institution to maintain international peace and security.[58]

[57] ICISS, the Responsibility to Protect, pp. xii, 35-37; Report of the High-Level Panel on Challenges, Threats and Change, A More Secure World: Our shared responsibility, 2004, pp. 66-67, 106-07; Kofi Annan, In Larger Freedom" towards development, security and human rights for all, report of the Secretary-General at Fifty-ninth session, 21 March 2005, A/59/2005, pp.43, 83.

[58] Paragraph 4.33 of Report of the International Commission on Intervention and State Sovereignty, December 2001("ICISS Report") Published by the International Development Research Centre, Ottawa, Canada, provides that: "The primary purpose of the intervention must be to halt or avert human suffering. Any use of military force that aims from the outset, for example, for the alteration of borders or the advancement of a particular combatant group's claim to self-determination, cannot be justified. Overthrow of regimes is not, as such, a legitimate objective, although disabling that regime's capacity to harm its own people may be essential to discharging the mandate of protection – and what is necessary to achieve that disabling will vary from case to case. Occupation of territory may not be able to be avoided,

On seriousness of harm, under doctrinal international law, it is highly arguable that there are no general legal rights for states to use force against Crimes against Humanity situations.[59] This could be due to the lack of a treaty obligation, and with unprecedented state practice which is marked with ambiguous statements which can hardly be considered as an *opinio juris*.

As the father of the R2P, Gareth Evans himself admitted that when the international law in to be seen narrowly, "there will always be good and compelling legal arguments why the Genocide Convention just does not reach many of the cases we morally want it to – resulting in propaganda victories again and again for those who least deserve to have them as claims or charges are reduced by commissions or courts from genocide to "only" crimes against humanity."[60] As he further gave the example of Darfur, where scholars have argued that Darfur is a clear example whereby the term genocide, "properly understood, does have application to a much wider range of crimes against humanity, and remains the best linguistic vehicle for energizing mass support and high-level governmental support for effective action in response to newly emerging atrocity situations, the hard truth is that this approach is a lost cause."[61]

---

but it should not be an objective as such, and there should be a clear commitment from the outset to returning the territory to its sovereign owner at the conclusion of hostilities or, if that is not possible, administering it on an interim basis under UN auspices."

[59] Cf. African Union, Report of the African Union: High Level Panel on Darfur (AUPD), 29 October 2009, PSC/AHG/2(CCVII).

[60] Page 3, Gareth Evans, "Crimes against Humanity and Responsibility to Protect", Sadat (ed.) *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, 2011. As Evans go further as to state that "Crimes Against Humanity" is broad enough conceptually to embrace certainly genocide and ethnic cleansing (if not war crimes, which we will continue to have to refer to separately, but that does not seem a problem. It is a concept with an intellectual and international law pedigree going back a century. Linguistically, the phrase "crimes against humanity" is surely rich and powerful enough for it to carry the moral and emotional weight we want it to. Quite apart from all the good technical reasons for having a new Crimes Against Humanity Convention, the campaign to adopt it should put the concept of crimes against humanity right back on the central pedestal where it belongs."

[61] Ibid.

Scheffer proposed that a substantiality test is to be employed, which is a test which originates out of various ICTY decision is the answer to the extent of which crimes against humanity must be proved in order to trigger an R2P situation.[62] He relied on the second prong of the test for a crime against humanity in the *Prosecutor v. Blaskic* case to suggest that these criteria should be invoked, namely, the proof of crime anticipated to have a very large scale with preparation to use up significant public or private resources under the command of a high-level political or military authority with a political objective.[63] Under doctrinal international law, this test cannot be the sole trigger to invoke R2P in form of an exception to the prohibition on the use of force.

On proper purpose, ICISS stress in its report that the purpose of military intervention under R2P doctrine is to alleviate human suffering. Any ulterior motives of invasion or overthrowing of a regime are not the aims of the R2P. Other than two motives as mentioned, it is also customary international law principle that the sovereignty of natural resources is not to be infringed by way of military intervention.[64]

---

[62] David Scheffer, "Crimes Against Humanity and the Responsibility to Protect", Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, Cambridge, 2011, Page 310

[63] Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, paragraph 203 (March 3, 2000); as applied in Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T, Judgment paragraph (March 31, 2003), which provides that "The systematic character refers to four elements which … may be expressed as follows: [1] the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; [2] the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; [3] the preparation and use of significant public or private resources, whether military or other; [4] the implication of high-level political and/.or military authorities in the definition and establishment of the methodical plan.

[64] For example, it will be unlawful for member states to abuse the legal personality of the Security Council for the purpose of obtaining natural resources (GA 1803), to assist national liberation movements which are merely internal, and thus, do not satisfy the armed attack requirement under article 51 of the UN Charter. GA resolution 1803 (XVII) Permanent sovereignty over natural resources, Adopted at 1194th Plenary meeting, 14 December 1962, where it was declared under principle 7 that "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and Hinders the development of international co-operation and the maintenance of peace."

As to the criteria of necessity and proportionality, Oppenheim's international law, a highly persuasive text provides that "a state may be justified in intervening in the affairs of another state. In such cases the intervening state is nevertheless subject to certain limitations as to the manner and circumstances of its intervention: in particular, it must act consistently with the prohibition against the use or threat of force laid down in the United Nations Charter, its actions must be proportional to the circumstances occasioning the intervention, and other means of remedying the situation (such as diplomatic representations) must be shown to have failed or to be so unlikely to succeed as to make recourse to them unnecessary.

The fifth criterion, of reasonable prospects is a pragmatic test. As it was suggested by the ICISS that, "military actions can only be justified if it stands a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place. Military intervention is not justified if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all."

Is SC resolution 1973 a legitimate application of R2P and doctrinal international law?

What were the legal justification for the authorisation of use of force in SC 1970 and 1973?

The legal justification for the authorisation of use of force was for "the protection of civilians and civilian populated areas from threat of attack in Libyan Arab

Jamahiriya."[65] Other than that, it was further authorised that use of force is permitted to enforce compliance with the ban on flights as necessary.[66] For states who voted for SC resolution 1973, states such as Columbia,[67] Portugal[68] and Nigeria[69] have reflected their inclination to the R2P doctrine. Even Brazil who abstained to its adoption have acknowledged the existing duty to protect civilians, it just does not consider military intervention the right measure for the Libyan situation.[70]

Though it could be argued that the use of force would have been legitimate regardless of reference to the R2P because of the coexistence of other factors, which may alone, justify as threat to international peace and security. For example, in both the preambles

[65] Security Council Resolution 1973 (2011) Adopted by the Security Council at its 6498th meeting, on 17 March 2011, S/RES/1973, where in principle 4, "[the Security Council] Authorizes Member States that have notified the Secretary-General acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council"

[66] SC Resolution 1973 in principle 8. [the Security Council] authorizes Member States that have notified the Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6 above, as necessary, and requests the States concerned in cooperation with the League of Arab States to coordinate closely with the Secretary General on the measures they are taking to implement this ban, including by establishing an appropriate mechanism for implementing the provisions of paragraphs 6 and 7 above."

[67] Press Release by the Security Council at 6498th Meeting (Night), "Security Council Approves 'No-Fly Zone' over Libya, authorising 'All Necessary Measures" to protect civilians, by vote of 10 in favour with 5 abstentions, 17 March 2011, SC/10200 where Columbia stated that "his delegation was convinced that the purpose of the new resolution was essentially humanitarian and was conducive to bring about conditions that would lead to the protection of civilians under attack from a regime that had lost all legitimacy. The Council had acted because the government, through its actions, gad shown that it was not up to protecting and promoting the rights of its people."

[68] Ibid, where Portugal stated that "he affirmed that today's resolution addressed his country's priorities, including protecting civilians, facilitation of unimpeded humanitarian aid promotion of a national dialogue and guarantees for the territorial integrity and independence of Libya."

[69] Ibid, where Nigeria stated that "the resolution had been necessitated by the persistently grave and dire situation in Libya. "the current State of affairs leaves an indelible imprint on the conscience and compels to act," she said, adding that her delegation's persistent calls for peace were rooted in the need to ensure the protection of civilians and the delivery of humanitarian assistance to those most in need, many of whom were Nigeria nationals.

[70] Ibid, where Brazil stated that "her delegation's vote today should in no way be interpreted as condoning the behaviour of the Libyan authorities or as disregard for the need to protect civilians and respect for their rights."

of the resolutions, it was expressed and reiterated that the SC is concerned at the "plight of refugees forced to flee the violence in Libyan Arab Jamahiriya." Mere reference of the refugees issue seems to be overstated by President Obama of the United States of America as the reason for military intervention in Libya. The reason why the international community have chosen to intervene is not solely for the prevention of "a strategic calamity that could have sent droves of refugees into Egypt and Tunisia"; it is of the protection of all civilians and properties of civilian in Libya in the spirit of the R2P.

The Charter of the United Nations prohibits States' use of force save from the situation of self-defence and authorization by the UN Security Council.[71] It is undisputed that the Libyan conflict falls within the latter, where NATO was authorised by the SC under Security Council Resolution 1970 and 1973, to take all necessary measures for the protection of civilians in Libya.[72]

Despite the SC's ultimate authority to circumvent article 2(7) of the UN Charter when determining threat to international peace and security and to impose sanctions it considers appropriate, the SC is still subject to the scrutiny of the ICJ should a question of international law arises as it is "a subject of international law and capable of

[71] Use of force is generally prohibited under article 2(4) and 2(7) of the UN Charter, with the exceptions of article 42 and 51 of the UN Charter, namely, upon Security Council's authorisation and self-defence respectively. The situation in Libya was authorised by the SC upon passing of SC resolution 1973 under Chapter VII of the UN Charter; thus, it falls within the article 42 exception.
[72] SC Resolution 1973 in particular under principle 4 and 8.

possessing international rights and duties"[73] and "a political body, charged with political tasks of an important character." [74]

A military intervention in the domestic affairs of a state is also a breach under article 2(7) of the UN Charter. A resolution passed under Chapter VII of the UN Charter however, can be circumvent by the Security Council as article 2(7) expressly state that it will not affect the exercise of SC's power under Chapter VII. The SC is bound by Article 24(2) of the UN Charter to act in accordance with the purpose and spirit of the UN Charter. Therefore, the SC's authorisation is only legitimate if R2P doctrine was adopted to serve its purpose to maintain international peace and security.

Whether the authorisation meet with the criteria of legitimacy as defined?

According to Resolution 1970, Libyan authorities were not accused of crimes of Genocide, thus, the Genocide Convention's duty to prevent (and to punish) was not triggered. Despite the status of Crimes against humanity as *jus cogens* violations, article 41 of the ILC Draft Articles on State Responsibility codifies that states at most have a duty to cooperate to bring to an end serious breaches of *jus cogens* norms through lawful means. However, none of the above extends the legal boundaries of having to enforce *jus cogens* through unlawful means. In other words, these articles do not absolve the legal obligation to justify the lawfulness of the use of force.[75]

[73] *Reparations for Injuries Suffered in the Services of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports, page 179.
[74] Ibid.
[75] Article 41 of the ILC Articles.

Assuming the truthfulness of the allegation that Gaddafi was undertaking a brutal and illegal suppression of the rebellion,[76] the seriousness of harm criterion has been satisfied as it constitutes actual or imminently apprehended use of military force against civilians, not just to opposition forces and violation of international criminal law (i.e. crimes against humanity).

The second criterion of proper purpose was arguably satisfied as the resolution purports to protect the innocent civilian population. However, in a more cynical review, it could be construed as motivated by a design to oust an unpopular dictator through military force. The latter would be a violation of international law under article 2(4) and 2(7) of the UN Charter. Furthermore, assuming the overarching purpose is to protect the civilian population (by enforcement of a no-fly zone), why does the resolution provide such broad powers? Paragraph 4 and 8 authorise NATO forces to take *"all necessary measures…"*[77] instead of a more limited authority to only enforce a no-fly zone. Such authority is only likely to aggravate the conflict and pose a greater threat to the civilian population. Moreover, despite the apparently proper purpose for the use of force, these broad military powers effectively breach the third criterion. That is, to use force only as the last resort.[78]

The last three criteria politically, have raised the greatest concern. When authorising the use of force in Libya, five states abstained in the Security Council, including permanent

[76] Maria Golovnina, and Patrick Worsnip, *Qaddafi Orders Storming of Benghazi; UN Meets*, Arabnews.com, Mar. 18, 2011, http://arabnews.com/middleeast/article320780.ece.
[77] Security Council Resolution 1973 (2011), Paragraph 4.
[78] The requirement of the authorisation of use of force only as the last resort is not only embedded in Article 42 of the UN Charter, various ICJ cases such as Nicaragua v. United States, Congo v. Uganda, Legality of the Threat of Use or Use of Nuclear Weapons, Oil Platform case and Israeli Wall Opinion all point to the principles of necessity and proportionality in any use of force. This is further supported by Caroline Opinion prior to the enactment of the UN Charter.

members Russia and China for legitimate reasons. Particularly, Germany, Russia and China raised their concern about the necessity, proportionality of the use of force and on a reasonable prospect, whether the intervention would have made the Libyan conflict worsen. They were generally concerned about the possible effect of worsening the Libyan conflict.[79] Questions were left unanswered, such as, "*how would military sanctions be enforced?" "By whom would they be enforced?"* and *"what would the limits of engagement be?"*[80] Germany was particularly concerned about the pre-existing sanctions and the need for enforcing them, which they considered a superior option to a protracted military conflict.[81]

A common trait between R2P and the pre-emptive self-defence is the principle of immediacy. Any use of force under doctrinal international law speak of the requirement for necessity and proportionality, which is analogous to the requirement for military actions in R2P to be used as the last resort and to ensure that the use of force is proportionate to the aims and objectives of R2P.

Necessity is an established doctrine under customary international law that requires a state to prove that the use of force must be necessary because the threat is imminent and such military action is the last resort. According to the ICISS, the test for last resort "does not necessarily mean that every such option must literally have been tried and failed: often there will simply not be the time for that process to work itself out. But it

[79] Li, Baodong, Security Council President, representative of People's Republic of China, statement made at Security Council 6498th Meeting (Night), 17 March 2011, SC/10200.
[80] Churkin, Vitaly, representative of Russian Federation, statement made at Security Council 6498th Meeting (Night), 17 March 2011, SC/10200.
[81] Wittig, Peter, representative of Germany, statement made at Security Council 6498th Meeting (Night), 17 March 2011, SC/10200.

does mean that there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded."[82]

Mary Ellen O'Connell describes the temporal implementation of Security Council Resolution 1973 as *"sanctions, including an arms embargo, had hardly been put in place when the bombs began to fly."*[83] No attempts were made to provide safe passage and the rebels, upon knowledge of NATO's military aid, were empowered to initiate no negotiation with Gaddafi, which potentially could have ended the conflict in March rather than in September.[84]

The SC should have authorised military force only as the last resort. Even if SC is not bound by the customary international law rule of necessity and of the ICISS's version of the R2P doctrine, it should act within the UN Charter's framework. Article 42 of the Charter requires the SC to consider article 41 sanctions as inadequate before authorising the use of force. In this respect, a token transition from non-military sanctions to military actions as evident in SC resolution 1970 to 1973 does not seem to be the purpose and spirit of the UN Charter. Since resolution 1973 was adopted only 20 days after resolution 1970, it is highly questionable as to the extent in which the authorities under the Gaddafi regime could have done in 20 days while trying to suppress the opposition force *thuwar*, to cooperate with the travel ban, asset freeze, arms embargo, and to halt the national troops to a stop from any military or law enforcement actions.

---

[82] ICISS report, para. 4.37.

[83] Mary Ellen O'Connell, "How to Lose a Revolution", October 2011, e-International Relations, http://www.e-ir.info/?p=14481&cpage=1#comment-37793.

[84] See Robert C. Johansen, *Opinion: How to Save Lives in Libya, Establish a Humanitarian Corridor Where Libyans Can Avoid Violence*, Globalpost, Mar. 13, 2011, http://www.globalpost.com/dispatch/news/opinion/110311/liba-united-nations-gaddafi; Rob Crilly, *Libya: Benghazi about to Fall…Then Came the Planes*, Telegraph, Mar. 20, 2011, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8393843/Libya-Benghazi-about-to-fall…-then-came-the-planes.html.

Additionally, the Security Council failed to take into account the proportionality and reasonable prospect criterion. Proportionality as established customary international law from the *Caroline* where the response must be proportionate to the threat pre-empted.[85] The Human Rights Council ignored this criterion as well as it conceded that they were in no position to comment on such.[86]

This is because SC resolution 1973 is silent on the both of these criteria. It is arguable to say that principle 4 of the resolution, which spoke of the prohibition of the use of ground forces, constitutes a proportionate consideration in response to the threat. This argument cannot sustain. As evident by recent military technological development, it makes no different in lethality between the uses of air or ground troops. On the other hand, it is questionable as to whether the laser-guided bombs and GPS-guided bombs used by NATO during the Libyan conflict were proportionate to the aim of protection of civilians.

As to the reasonable prospect consideration, the SC resolution could have explained at greater length as to the possible atrocities as incited by Gaddafi's regime in March 2011. For instance, by showing evidence of war crimes and intention of genocide, the SC resolution could have had greater legitimacy and thus, reduce the vagueness and uncertainty of states' determination to support R2P in Libya. In this respect, the SC has failed to consider the reasonable prospect of protecting civilians and civilian populated areas.

---

[85] *The Caroline,* Bassett Moore, John; Wharton, Francis e.a. (1906). A Digest of International Law. Volume 2. Government Printing Office. pp. 25, 409 & 410.

[86] Human Rights Council, Agenda item 4 at the Seventeenth session, on Human rights situation that require the Council's attention, dated 1st June 2011, titled: "Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya," A/HRC/17/44. ("June 1st Report"), paragraph. 234.

Even if the SC has the power to deviate from treaty and customary international law, was such deviation made for the purpose of maintaining international peace and security?

By authorising the use of force with reference to the R2P, the SC has not only enabled the international community's scrutiny of such authorisation under doctrinal international law, but also, the implied consent to embrace the whole of the R2P doctrine. This would include the human rights implications to prevent and to rebuild the disaffected regions of the Libyan conflict.[87] This is even so when the Security Council has wide powers under Chapter VII to determine situations as threat to international peace and security[88] and to impose sanctions it deems adequate for the maintenance of international peace and security.[89] In determining the purposes and principles of the UN Charter, Simma's commentary suggests that elements of peace may include human rights and particularly the right to self-determination. This further suggests that gross violation of human rights may constitute a threat to peace pursuant to article 39 of the

[87] ICISS Report Chapter 5 on the Responsibility to Rebuild, specifically, under 5.19, the ICISS suggests that "A final peace building responsibility of any military intervention should be as far as possible to encourage economic growth, the recreation of markets and sustainable development. The issues are extremely important, as economic growth not only has law and order implications but is vital to the overall recovery of the country concerned. A consistent corollary of this objective must be for the intervening authorities to find a basis as soon as possible to end any coercive economic measures they may have applied to the country before or during the intervention, and not prolong comprehensive or punitive sanctions."

[88] Judge Weeramentary describes the function of article 39 as one that involves both factual findings and the weighing of political considerations which could not be legally measured. in his Separate Opinion in Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional measures, ICJ Rep 1992, at 176.

[89] *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in Prosecutor v. Tadic*, Case No IT-94-1-AR72, 10 October 1995, Appeals Chamber, at paragraph 29; Simma, Bruno, (ed.), The Charter of United Nations, A Commentary (Oxford, Oxford University Press, 1994), , 615.

UN Charter.[90] This question however extends to whether the military intervention has successfully prevented this threat to international peace and security.

Further, it is in the interest of the international community to review promptly on SC's authorisation, especially when R2P concerns the application of "coercive force in extreme situations", "the credibility, authority and effectiveness of the UN in advancing the R2P must be consistent with existing international law.[91] The effect of a failure in implementing the R2P in situations such as Darfur may result into irreparable damage to the reputation and the authoritativeness of the United Nations, and thus, demoralize international community's determination to prevent and punish perpetrators of mass atrocities. The incident in Darfur was considered as a "half-baked" attempt of the R2P application.[92] It was a situation where non-military sanctions was authorised and has been put in place in Darfur, however, the peacekeeping missions failed even to allow ICRC to provide humanitarian assistance in conflict zones due to the absence of necessary military measures.

Overall, it is arguable that the authorisation of the use of force in Libya under SC resolution 1973 is illegitimate when scrutinised with the criteria of legitimacy of the R2P doctrine and doctrinal international law because the SC have failed to observe the criteria of last resort, proportionate means and reasonable prospect. It is suggested however, that the resolution could have been adopted with greater consistency with

[90] Simma, 50.
[91] "The credibility, authority and hence effectiveness of the United Nations in advancing the principles relating to the responsibility to protect depend, in large party, on the consistency with which they are applied. This is particular true when military force is used to enforce them. In that regard, Member States may want to consider the principles, rules and doctrine that should guide the application of coercive force in extreme situations relating to the responsibility to protect." (para 62 of Sec Genr statement)
[92] Cf. African Union, Report of the African Union: High Level Panel on Darfur (AUPD), 29 October 2009, PSC/AHG/2(CCVII).

international law in two ways. The resolution could have been better reasoned and planned.

In reasoning, SC resolution 1973's adoption of the R2P and its connection with Libya as a threat to international peace and security situation is vague. In the absence of sufficient aims and goals, permanent member states of the SC became divided as to when, where and how should R2P be applied. Bad precedents in the implementation of the R2P doctrine may also affect its future practice. As state practice forms an element of customary international law, capriciousness arising out of the absence of norm or even deliberate abuse of R2P interventions may subject the R2P doctrine to overreaching or alienation of member states' impression of its original intent to protect civilians.

In planning, the SC should be put greater weight on the human rights implications of the R2P. In the resolutions, it could have delegated NATO or other states to deal specifically on the responsibility to rebuild Libya's capacity to prevent mass atrocities. So far, it has been counter-intuitive for SC to adopt Resolution 2009 and 2017 months after the Libyan conflict and just to begin humanitarian and human rights aid in such a delayed manner.

To what extent was NATO's military conduct consistent with R2P?

Other than issue of the legitimacy of the SC's resolution, the commission have referred to the principle held in the Israeli Wall Advisory Opinion, where it has "looked into

both violations of international human rights law and relevant provisions of international humanitarian law, the *lex specialise* that applies during armed conflict."[93]

Whether proper investigation has been done against all alleged war crimes by NATO?

The Geneva Conventions governs the conduct of NATO's use of force in Libya. Despite SC's authorisation of use of force, NATO's conduct can only be legal if it abides by the principle of distinction,[94] proportionality[95] and use of discriminate weapons.[96] The analysis below is based on the official sources of information provided two investigation reports which are published in June 1st 2011 and March 2nd 2012 by the International Commission on Inquiry on Libyan Arab Jamahiriya.

The International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya ("Commission of Inquiry") is in charge of investigating both the actions of Gaddafi's forces, Thuwar and

[93] Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004,

[94] Hague Regulations, Article 25 which provides that "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited"; and Additional Protocol I of the Four Geneva Conventions, Article 48 which provides that: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

[95] Additional Protocol I of the Four Geneva Conventions, Article 51(5)(b) where it states that "Among others, the following types of attacks are to be considered as indiscriminate: (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" and Article 57(2)(a)(iii) further provides that: "With respect to attacks, the following precautions shall be taken (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"

[96] Additional Protocol I of the Four Geneva Conventions, Article 51(4) provides that: "4. indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction; cf. Article 8(2) of the Rome Statute reaffirms the violation of the above international humanitarian law as War Crimes.

NATO, which the Commission of inquiry have acknowledged that "a separate coexisting international armed conflict commenced with external military action pursuant to Security Council resolution 1973 (2011) for which the norms of international humanitarian law relating to international armed conflicts are applicable."

Proper investigation has to be conducted before NATO's actions can be made answerable to the international community. Regardless of NATO's motives and intentions, its use of force must be subject to the scrutiny of international humanitarian law, and it has the burden to discharge any allegations of its violation of international humanitarian law.

At the same time, NATO, pursuant to Article 146 of the Fourth Geneva Convention, there is an express duty for states to investigate war crimes allegedly committed by their nationals or armed forces.[97] This duty is inviolably part of the non-derogable right to life of men,[98] a general principle of international law and domestic law.[99] This duty has been commonly adopted by member states of the ICCPR.[100]

[97] Article 146 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949, U.N.R.S. No. 973, vol.75, p. 587 provides that "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949. Also cited in First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; and ICRC Customary Rule 158, "States must investigate war crime allegedly committed by their nationals or armed forces, or on their territory, and if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."

[98] General Comment No. 6 of the ICCPR, 1982. Article 6 of the ICCPR.

Pursuant to Resolution S-15/1, the Human Rights Council established the International Commission of Inquiry, which is then requested "to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, establish the facts and circumstances of such violations and of the crimes perpetrated and where possible, to identify those responsible, to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable."[101] Base on this obligation, the Commission was tasked to report upon completion of its investigation in Libya. A preliminary report was made on 15 June 2011, which was then subsequently replaced by the actual report dated 2 March 2012.

---

[99] Paragraph 4 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL (2005), annexed to UN General Assembly resolution 60/147 of 16 December 2005, provides that "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations."

[100] In Military Manuals of individual states, such as in *Leyes de Guerra*, PC-03-01, Publico, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, 23 April 1990, paragraph 8.06 (Argentina's Law of War Manual) which provides that "At the request of one of the parties to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the [1949 Geneva] Conventions. If an agreement is not reached as to the procedure of investigation, the parties shall agree to elect an arbitrator who shall decide the procedure to be followed." In Canada, Canada's Code of Conduct for CF Personnel, Office of the Judge Advocate General, 4 June 2001, Rule 11, paragraph 3 (2001) provides that "It is essential that any alleged breaches of these rules [of the Code of Conduct] and the Law of Armed Conflict be investigated rapidly in as impartial a manner as possible. An impartial investigation will not only assist in bringing violators to justice, thereby maintaining discipline, but will also provide the best opportunity to clear anyone who has not acted improperly. In most cases that investigation will be carried out by the military police or National Investigation Service." In Russia, *Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation*, Ministry of Defence of the Russian Federation, Moscow, 8 August 2011, paragraph 86 provides that: "Penal prosecution of persons who have committed war and other crimes during an armed conflict shall be exercised on the basis of Russian legislation via investigation and conviction pronounced by a court offering the essential guarantees of independence and impartiality." In France, Article L. 212-2 of the Code of Military Justice (2006) provides that: "The authorities qualified to engage in prosecution and, if they have received the assignment to do so, the commissioners of government take or have [others] take all necessary measures for the investigation and the prosecution of offences relevant for the jurisdictional competence of the armed forces."

[101] UN Human Rights Council, Report of the Human Rights Council on its fifteenth special session, 25 February 2011, A/HRC/S-15/1.

The NATO owes an international obligation to ensure full compliance with international humanitarian law and international human rights law during the Libyan conflict. Under international humanitarian law, the NATO must follow the principles of distinction, proportionality and to use only discriminate weapons in accordance with the military objective.

On principle of distinction, NATO should at all times distinguish between civilians and combatants. Attacks may only be directed against combatants, not against civilians.[102] It is provided in the March 2012 report that the international commission have investigated two NATO airstrikes which damaged civilian infrastructure and where no military target could be identified.

On principle of proportionality, NATO may not "launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and military advantage anticipated."[103] It was reported that the single largest case of civilian casualties from a NATO airstrike in Libya too place in town of Majer on 8 August 2011 where NATO bombs killed 34 civilians and injured 38.

The principle against use of indiscriminate weapons condemns the use of weapons which could have caused unnecessary suffering.[104] The general public is only provided with a "glossary of weapons used in Libya" under Annex V of the March 2nd Report. In

[102] Hague Regulations, Article 25; Additional Protocol I of the Four Geneva Conventions, Article 48.
[103] Additional Protocol I of the Four Geneva Conventions, Article 51(5)(b) and Article 57(2)(a)(iii).
[104] Additional Protocol I of the Four Geneva Conventions, Article 51(4) provides that: "4. Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

the annex, it was stated that NATO airstrikes primarily consist of 3644 laser-guided bombs and 2844 GPS-guided bombs. As both weapons are capable of precision strikes and does not inflict clustered effects, it is unlikely that NATO will be alleged for use of indiscriminate weapons.

Despite the apparent effort of investigation by the international commission, the correspondence from NATO to the International Commission of Inquiry on Libya shows that the March 2nd 2012 do not reflect product of proper investigation.

First, NATO informs the Commission of Inquiry that it has been "unable to confirm the existence" of its report of investigations into allegations of NATO strikes amounting to indiscriminate attacks against civilians. The absence of such data is inconceivable as NATO airstrikes consist of the use of laser-guided bombs and GPS-bombs, which are both intelligent weapons which their firing records could have been retrieved.

Second, in the absence of reliable information, the Commission of Inquiry fails to corroborate sufficient physical evidence to verify what was provided by NATO on 23 January 2012, which consist of a list of admitted international humanitarian law rules and a list of "individual incidents" which were either justified in the absence of evidence or supported by random and irretrievable sources.[105]

An example of random and irretrievable sources includes the mere assertion that battle damage assessment was conducted,[106] sometimes, even just by the immediate impression of the result of the attack mentioned by the aircraft delivering the weapon.[107]

[105] Commission on Inquiry on Libya, March 2nd Report, Annex II, Correspondence from NATO to the International Commission of Inquiry on Libya, Page 7 of the letter dated 23 January 2012.
[106] Ibid. Concerning eight strikes took place in the Tripoli region on 8 and 10 May.

It was further stated in NATO's letter that the bombing in 12-13 May of the Marsa El Brega Residence and Command Bunker Facility was a legitimate target as it was confirmed by "an engineer who design and constructed the command bunker facility publicly confirmed that it was used by Gaddafi."

The "engineer" and "battle damage assessment" made by the person who delivered the weapon falls below the minimal standard of proof in evidence under any given jurisdiction of civilised nations. An example of the admissibility of evidence can be drawn from the *Congo v. Uganda* case, where it was held that even newspaper articles has to be corroborated before it can become admissible.[108] Thus, a source in which NATO self-provided and is so obscure in its nature and status that it should not be treated as the evidence for not having violated international humanitarian law.

Third, NATO has attempted to circumvent the Commission of Inquiry's duty to properly investigate on NATO's actions. Not only have NATO on 15 February 2012 bluntly stated that it is not within the Commission of Inquiry's mandate to investigate on NATO's actions, NATO has "accordingly request that, in the event the Commission elects to include a discussion of NATO actions in Libya, its report clearly state that NATO did not deliberately target civilians and did not commit war crimes in Libya."[109] Worst is when NATO themselves have admitted that if these allegations are reported,

---

[107] Ibid.23 April 2011 concerning five deliberate strikes at command and control and ammunition bunkers, as mentioned in NATO's letter dated 23 January 2012.

[108] Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), International Court of Justice (ICJ), 3 February 2006, paragraph 298, where it was provided that: "The Court considers that Uganda has not produced sufficient evidence to show that the Zairean authorities were involved in providing political and military support for specific attacks against Ugandan territory. The bulk of the evidence submitted consists of uncorroborated Ugandan military intelligence material and generally fails to indicate the sources from which it is drawn."

[109] Commission on Inquiry on Libya, March 2nd Report, Annex II, Correspondence from NATO to the International Commission of Inquiry on Libya, Page 7 of the letter dated 15 February 2012.

than NATO would have violated international humanitarian law, just that they do not want to publicise their actions.[110]

It is well established customary international law that international organisations such as NATO can be attributed with international responsibly. The Draft articles on Responsibility of International Organisations[111] and particularly, the Behrami case[112] in European Court of Human Rights held that NATO is capable of being held liable for violations of international law. This is especially the case when NATO is in effective control of the OUP at all relevant times of operation. Since the operation was planned and instigated, undertaken and commanded by NATO which is further approved by the NATO's chief-in-command, war crimes proven are thus, attributable to NATO.

Fourth, NATO tried to dissuade the Commission of Inquiry from investigating further as they assert that they have no legal obligation to provide compensation for damage occurring in the course of lawfully-conducted military activities. On fairness, it is implausible to state that the Opposition force "Thuwar" is subject to the Commission of Inquiry's scrutiny while the NATO is not.

[110] In the letter on 15 February 2012, it was stated that "We[NATO] would be concerned, however, if "NATO incidents" were included in the Commission's report as on a par with those which the Commission may ultimately conclude did violate law or constitute crimes. We note in this regard that the Commission's mandate is to discuss "the facts and circumstances of … violations [of law] and … crimes perpetrated.

[111] Draft articles on the Responsibility of International Organisations, Article 5 provides that"The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct." International Law Commission, Report of the International Law Commission, 59th session (7 May-5 June and 9 July-10 August 2007), 2007, A/62/10.

[112] Grand Chamber decision as to the admissibility of Application no. 71412/01 by Agim Behrami and Bekir Hehrami against France and Application no. 78166/01 by Ruzhdi Saramati against France, Germany and Norway

On compensation, it is customary international law that a state is at fault upon violation of international law, where a secondary duty to compensate the victim state thus arise, as supported by the *Chorzow Factory*[113] and the *Reparation* case.[114] Thus, NATO's action is only consistent with international law if it has both assisted and compensated for what was investigated and proved as violations of international law during the conflict in Libya.

NATO is thus urged to cooperate as the duty to proper investigation is supported by treaty, customary international law and general principles of laws that are embedded in military manuals, domestic legislations and government policies of civilised nations.

What is the responsibility to rebuild and why SC and NATO are bound by it?

From the suggestion, recognition and implementation of the R2P doctrine, the responsibility to rebuild had been an inalienable part of the R2P spirit. Arguably, such responsibility is the key element which distinguishes an R2P intervention from a humanitarian intervention.

On 2001, it was first suggested by the ICISS that the use of military force is only a small part of the entire campaign in fighting against international crimes. Most have focused on the issue of sovereignty and use of force, but little was drawn onto the human rights side of the R2P. It is essential in the R2P spirit and under treaty and customary international law for the international community to provide assistance as to humanitarian needs, and to help to re-establish necessary economic systems and social communication channels of Libya.

[113] *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, page 21, and *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, page 29.
[114] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, page 184.

This has been echoed in the ICISS Report, where particularly under paragraph 5.20 and 5.21, as it is provided that "the intervening authorities have a particular responsibility to manage as swiftly and smoothly as possible the transfer of development responsibility and project implementation to local leadership, and local actors working with the assistance of national and international development agencies." And "This is not only of importance for long-term development purposes, but also represents a positive reinforcement for short run security measures of the kind discussed above: a positive contribution is provided by a simultaneous effort at training the demobilized for new income generating activities as well as the implementation of social and economic reintegration projects. The sooner the demobilized combatants are aware of their future options and opportunities, and the sooner the community has concrete and tangible demonstrations that civilian life can in fact return to normality under secure conditions, the more positive will be their response in relation to disarmament and related issues."

As R2P was subsequently mentioned in the 2005 World Summit Outcome, the resolution provides that "we [the international community] 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."[115]

On 2009, in Secretary General Ban-Ki Moon's statement, the actual determination of the United Nations in implementing the responsibility not only to protect, but to rebuild. As the Secretary-General said: "What are most needed, from the perspective of the responsibility to protect, are assistance programmes that are carefully targeted to build

[115] Paragraph 139 World Summit Outcome Resolution.

specific capacities within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect….. a cumulative process of country-to-country, region-to-region and agency-to-agency learning is needed on prevention, capacity-building and protection strategies in order to gain a keener and more fine-tuned sense of how various strategies, doctrines and practices have fared over the years."[116]

Secretary General Ban-Ki Moon's statement in implementing and operationalize the R2P doctrine as indicated above is a clear indication of the UN's dedication to embrace R2P in its entirety.

This leads to the second question, who are specifically bound by such the responsibility to rebuild? It is undisputed that the Human Rights Council, as the successor of the Human Rights Commission, is the treaty body empowered under the ICCPR and ICESCR to ensure international cooperation in the prevention of arbitrary deprivation of right to life, specifically under General Comment 6.[117] In affirming this duty, the High

[116] Paragraph 44 of Ban-Ki Moon Secretary-General's report on implementing responsibility to protect.

[117] Office of the High Commissioner for Human Rights, CCPR General Comment No. 06: The right to life (article 6): 1982/04/30 provides that:

1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.

3. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the

Commissioner for Human Rights stated that the Human Rights Council and its mechanism are to help end violence in Libya and hold those perpetrating the atrocities accountable vigorously through the use of all means available.[118]

As argued above, however, the sole power of the Human Rights Council is incapable of handling the responsibility to rebuild Libya. In the absence of a clear direction and mandate, the international community is slow in rebuilding Libya. It was not until 16 September 2011 where the freezing of assets was lifted so that the National Transitional Council could have access to their governmental funds for the resumption to tend to humanitarian needs, fuel, electricity and water for strictly civilian uses, production of hydrocarbons, establishment of public structures and for facilitating banking mechanisms.[119]

A critical analysis to the rebuilding strategies in Libya

The spirit of R2P entails a "genuine commitment to helping to build a durable peace, promoting good governance and sustainable development,[120] which are arguably, the necessary qualities for a state to prevent future mass atrocities. In rebuilding Libya, it is

---

utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.
4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

[118] "There can be no doubt about the need for action by this Council now. The Human Rights Council and its mechanisms should step in vigorously to help end violence in Libya and hold those perpetrating the atrocities accountable. The Council should use all means available to compel the Libyan Government to respect the human rights and heed the will of its people", Speech by Navi Pillay, UN High Commissioner for Human Rights on 25 February 2011 in Geneva.

[119] Principle 16 of SC Resolution 2009 S/RES/2009 (2011), Adopted by the Security Council at its 6620th meeting, on 16 September 2011.

[120] ICISS 5.1

necessary to analyse what are short-term and long-term goals in which human rights implications are expected from the R2P doctrine.

In short-term, R2P doctrine suggests that the intervening authorities are to assist rebuilding of the disaffected state right after the end of the intervention. As to the long-term goals in rebuilding Libya, a comprehensive and proper administered mandate under the UN was recommended. It is argued that SC and NATO have failed to observe adequately the short term needs of the disaffected in Libya particularly, the failure to offer protection to Gaddafi and those who were perceived as his loyalists from being tortured and killed. While the subsequent establishment of "United Nations Support Mission in Libya" as the UN mandate to administer the development of Libya is a significant sign to respect the responsibility to rebuild under the R2P doctrine, the SC could have established such earlier so as to save more lives.

In the initial adoption of the R2P in the Libyan situation, the responsibility to rebuild has neither been mentioned nor implied in the wordings of SC resolution 1970 and 1973. Thus, NATO was not ordered to prepare for any post-conflict efforts to rebuild Libya. It was not until 1st June, 2011, where the responsibility to rebuild had been recommended by the Commission of Inquiry as a responsibility of the international community. After three months and a half, the SC have finally decided on 16 September 2011 to establish a "United Nations Support Mission in Libya" to assist and support Libyan national efforts.[121] Seeing the progress of the UNSMIL in rebuilding Libya,

[121] Principle 12 of SC Resolution 2009 (2011) S/RES/2009 provides that: "12. Decides to establish a United Nations Support Mission in Libya (UNSMIL), under the leadership of a Special Representative of the Secretary-General for an initial period of three months, and decides further that the mandate of UNSMIL shall be to assist and support Libyan national efforts to: (a) restore public security and order and promote the rule of law; (b) undertake inclusive political dialogue, promote national reconciliation, and embark upon the constitution-making and electoral process; (c) extend state authority, including through

UNSMIL was authorised the additional role in the "coordination and consultation with the transitional Government of Libya and assisting and supported Libyan national efforts to address the threats of proliferation of all arms." mention of such responsibility to rebuild which the United Nations should lead the international community to work on.

It is argued that the SC resolutions could have been better drafted so as to mandate NATO or the Human Rights Council to be prepared for expeditious assistance to rebuild Libya. Since SC resolutions 1970 and 1973 in February and March of 2012 have neither ordered NATO nor established any UN mandate to rebuild Libya, chaos have taken the lives and liberties of many despite the end of the conflict.

As observed by the Commission of Inquiry, although the armed conflict has ended, violation of human rights continues to rampant in Libya. As the supporters of the *Thuwar* rejoice in the liberated cities of Libya, crimes against humanity continues to threaten lives and liberties of Gaddafi loyalists and those who were affiliated with the Gaddafi regime. Having the post-conflict Libya left with a deteriorated legislative framework and a judiciary that lacked independence to hold security institutions accountable since Gaddafi era, it is only reasonable to if the resolutions in March could have established the UNSMIL much earlier so as to allow for immediate administrative and governmental advice. Doing so could have prevented crimes against humanity from being further perpetrated due to the disorganisation or the inability of the National

---

strengthening emerging accountable institutions and the restoration of public services; (d) promote and protect human rights, particularly for those belonging to vulnerable groups, and support transitional justice; (e) take the immediate steps required to initiate economic recovery; and(f) coordinate support that may be requested from other multilateral and bilateral actors as appropriate" The preamble reaffirms that "the United Nations should lead the effort of the international community in supporting the Libyan-led transition and rebuilding process aimed at establishing a democratic, independent and united Libya, welcoming the contributions in this regard of the Secretary-General's 26 August high-level meeting of regional organisations and the 1 September Paris Conference, and welcoming also the efforts of the African Union, Arab League, European Union and the Organization of the Islamic Cooperation."

Transitional Council to unify opposition forces in Libya at the immediate end of the conflict. A clear example of the lack of a proper justice system is evident from the arbitrary deprivation of life through the summary execution of Muammar and Mutassim Gaddafi by unknown forces.

As to the long-term goals in rebuilding a better Libya for its people, the United Nations and the international community have the common responsibility to rebuild Libya to prevent future mass atrocities. As suggested in the ICISS Report, the duty to rebuild consist of five aims, (1) Conflict-sensitive development analysis, (2) Indigenous mediation capacity, (3) Consensus and dialogue, (4) Local dispute resolution capacity and (5) Capacity to replicate capacity.

So far, the Human Rights Council have attempted to satisfy aim 1, 2 and 3 as the Council have worked hard on establishing communication platforms with the National Transitional Council. However, aim 4 and 5 seemed to have been left out by the actions of the international community when the Council is reluctant to resume human rights development within Libya, which is possibly due the political instability to do so at this moment.

As Judge Philippe Kirsch, the chairperson of the Commission of Inquiry states, that "The dawn of a new era provides an opportunity for the National Transitional Council and the future interim Government in Libya to make a break from that past by establishing laws and reconstructing state institutions based on respect for human rights and the rule of law; Building a new state on a strong foundation of human rights will address the aspirations of the Libyan people who struggled during the last 42 years

against injustice and oppression." It is a highly encouraging moment for Libya given the support by the international community.

The Report of the Working Group on The Universal Periodic Review on Libyan Arab Jamahiriya, which was published on 4 January 2011, a document which has been quickly shrouded by the smokescreen of R2P operations, that the Gaddafi regime was in fact, on its way to undertake human rights reforms in compliance with the Human Rights Council's suggestions. According to the January 2011 report, Gaddafi's human rights policies did show signs and hope for a better Libya.[122] This duty has now been passed onto the National Transitional Council of Libya, which must now coordinate closely with the Human Rights Council in implementing these human rights reforms.

On policy, although NATO has not been ordered to rebuild Libya, for the sake of its credibility, reliability and as the harbinger of the R2P doctrine, NATO should have at least attempted to take on the leading role in doing so.

Conclusion

The date of 17 March 2011 marks yet another milestone in the development of the R2P doctrine. Despite the apparent absence of a legal norm in support of the R2P doctrine in the present; the legitimacy of use of force in Libya can still be measured against existing doctrinal international law relevant to the criteria of legitimacy as set out by the ICISS.

[122] Pursuant to paragraph 94-96 of the January 2011 universal periodic report on Libya, Libya have received 66 recommendations from international community, in which Libya have considered 4 of them, agreed and are in process of reform, 30 under consideration and have disagreed with the rest. To a great extent, this shows that the Libyan authorities, despite the reputation of Gaddafi's oppressive regime, it is still on a negotiable relationship with the Human Rights Council.

Arguably, the criteria of last resort, proportionate means and reasonable prospects were inadequately addressed by the SC. SC resolution 1973 could have been better reasoned and planned. As a better reasoned resolution will be subject to less capriciousness on the part of the executing bodies and a better planned resolution could have allowed more prompt reply to humanitarian needs.

It is recommended that NATO should strictly comply with the international humanitarian law. In order to do so, NATO must cooperate with the Commission of Inquiry in assisting investigation of all allegations of violation of international humanitarian law and to properly compensate victims of its violations. Failing to comply often devastates the perpetrating organisation' own credibility. As a result of that, other member states of the Security Council may become less supportive to future R2P interventions.

It is further recommended that the international community, especially the intervening international organisations or nations in the future should observe the responsibility to rebuild at its own initiative. This is to ensure that civilians of disaffected states will not only be protected from the alleged mass atrocities, but to also, to temporarily assume the capacity in preventing mass atrocities before a proper UN mandate is put into place of the disaffected states.

Bibliography:

Treaties

- Charter of the International Military Tribunal article 6(c) in Volume 1 of Trial of the Major War Criminals Before the international Military Tribunal 10, 11 (1947)
- Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951
- Draft articles on the Responsibility of International Organisations, International Law Commission, Report of the International Law Commission, 59th session (7 May-5 June and 9 July-10 August 2007), 2007, A/62/10.
- Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907
- International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609
- Proposed International Convention on the Prevention and Punishment of Crimes against Humanity dated August 2010 and as amended on February 2012, is available online through website: http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf, last visited on 13th April, 2012.
- Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998, A/CONF. 183/9
- the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949, U.N.R.S. No. 973, vol.75
- the International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949
- The Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)
- United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VII

Cases

- Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004
- Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002,
- Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), International Court of Justice (ICJ), 3 February 2006
- Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in Prosecutor v. Tadic, Case No IT-94-1-AR72, 10 October 1995, Appeals Chamber
- Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9
- Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17
- Grand Chamber decision as to the admissibility of Application no. 71412/01 by Agim Behrami and Bekir Hehrami against France and Application no. 78166/01 by Ruzhdi Saramati against France, Germany and Norway

- Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, paragraph 203 (March 3, 2000); as applied in Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T, Judgment paragraph (March 31, 2003)
- Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, paragraph 156 (December, 10, 1998)
- Reparations for Injuries Suffered in the Services of the United Nations, Advisory Opinion, 11 April 1949, ICJ Reports
- The Caroline, Bassett Moore, John; Wharton, Francis e.a. (1906). A Digest of International Law. Volume 2. Government Printing Office. pp. 25, 409 & 410
- Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011, ICC-01/11

Security Council Resolutions

- Security Council Resolution 660, UN SCOR, 45th Session adopted at 2932nd Meeting at 19, UN Doc. S/RES660 (1990)
- Security Council Resolution 733, UN SCOR, 47th Session, adopted at 3039th Meeting, U.N. Doc. S/RES/733 (1992)
- Security Council Resolution 872, UN SCOR, 48th Session, 3288th Meeting, U.N. Doc. S/RES/872 (1993)
- Security Council Resolution 909, Adopted by the Security Council at its 3358th meeting, on 5 April 1994, 5 April 1994, S/RES/909 (1994)
- Security Council Resolution 918, Adopted by the Security Council at its 3377th meeting, on 17 May 1994, 17 May 1994, S/RES/918(1994)
- Security Council Resolution 1970, Adopted by the Security Council at its 6491st meeting, on 26 February 2011, S/RES/1970 (2011)
- Security Council Resolution 1973, Adopted by the Security Council at its 6498th meeting, on 17th March 2011, S/RES/1973 (2011).
- Security Council Resolution 2009, Adopted by the Security Council at its 6620th meeting, on 16 September 2011, S/RES/2009 (2011).

General Assembly Resolutions

- General Assembly Resolution 1803 (XVII) Permanent sovereignty over natural resources, Adopted at 1194th Plenary meeting, 14 December 1962
- General Assembly Resolution 2583, Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity (Question of Punishment), G.A. Res. 2583(XXIV), 24 U.N. GAOR Supp. (No.30), U.N. Doc. A/RES/2583(XXIV) December 15, 1969)
- General Assembly Resolution 2712, Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, G.A. Res. 2712(XXV), 25 U.N. GAOR Supp. (No. 28) U.N. Doc. A/RES/2712 (XXV) (December 15, 1970)
- General Assembly Resolution A/RES/3074(XXVIII), Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, G.A. Res. 3074, 28 U.N. GAOR Supp. (No. 30) at 78-79, U.N. Doc. A/RES/3074(XXVIII) (December 3, 1973)
- General Assembly Resolution A/RES/60/1, 2005 World Summit Outcome Resolution, G.A. Res. A/RES/60/1, paragraph 138-139, U.N. Doc. A/RES/60/1 (October 24 2005)
- General Assembly Resolution2840, Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, G.A. Res. 2840 (XXVI)

(1971), G.A. Res. 2840(XXVI), 26 U.N. GAOR Supp. (No.29) at 88, U.N. Doc. A/RES/2840(XXVI)(December 18, 1971)
- General Assembly Resolution60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; G.A Res. 60/147, U.N. Doc. A/RES/60/147 (December 16, 2005)

Archives of the United Nations

- Churkin, Vitaly, representative of Russian Federation, statement made at Security Council 6498th Meeting (Night), 17 March 2011, SC/10200
- Commission on Inquiry on Libya, March 2nd Report, Annex II, Correspondence from NATO to the International Commission of Inquiry on Libya, Page 7 of the letter dated 23 January 2012
- Li, Baodong, Security Council President, representative of People's Republic of China, statement made at Security Council 6498th Meeting (Night), 17 March 2011, SC/10200.
- Office of the High Commissioner for Human Rights, CCPR General Comment No. 06: The right to life (article 6): 1982/04/30
- Report of the Secretary-General, Implementing the responsibility to protect, Sixty-third session, agenda items 44 and 107, A/63/677, 12 January 2009
- The Secretary-General, Implementing the Responsibility to Protect, U.N . Doc. A/63/677 (Jan 21, 2009)
- the Secretary-General, In Larger Freedom Towards Development, Security and Human Rights for All, delivered to the General Assembly, U.N. Doc/ A/59/2005 (May 21 2005)
- The Secretary-General, Report of the Secretary-General's High Level Panel on Threats, Challenges, and Change delivered to the General Assembly, U.N. Doc. A/59/565 (December 8 2004)
- UN General Assembly, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, ("Srebrenica Report"), 15 November 1999, A/54/549
- UN Human Rights Council, Report of the Human Rights Council on its fifteenth special session, 25 February 2011, A/HRC/S-15/1
- Wittig, Peter, representative of Germany, statement made at Security Council 6498th Meeting (Night), 17 March 2011, SC/10200

Books and Publications

- African Union, Report of the African Union: High Level Panel on Darfur (AUPD), 29 October 2009, PSC/AHG/2(CCVII).
- Alex J. Bellamy, A Responsibility to Protect: The Global Moral Compact for the 21st Century (Richards H. Coper & Juliette Voinov Kohler eds., 2009)
- Article L. 212-2 of the Code of Military Justice (2006), France
- Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional measures, ICJ Rep 1992
- Code of Conduct for CF Personnel, Office of the Judge Advocate General, 4 June 2001
- David Scheffer, "Crimes Against Humanity and the Responsibility to Protect", Leila Nadya Sadat (ed.), Forging a Convention for Crimes Against Humanity, Cambridge University Press, Cambridge, 2011

- Gareth Evans, "Crimes against Humanity and Responsibility to Protect", Sadat (ed.) Forging a Convention for Crimes Against Humanity, Cambridge University Press, 2011
- Gareth Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All (2008)
- Human Rights Council, Agenda item 4 at the Seventeenth session, on Human rights situation that require the Council's attention, dated 1st June 2011, titled: "Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya," A/HRC/17/44. ("June 1st Report"), paragraph. 234.
- ICISS, the Responsibility to Protect, pp. xii, 35-37; Report of the High-Level Panel on Challenges, Threats and Change, A More Secure World: Our shared responsibility, 2004
- in Leyes de Guerra, PC-03-01, Publico, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, 23 April 1990
- Mary Ellen O'Connell, "How to Lose a Revolution", October 2011, e-International Relations, http://www.e-ir.info/?p=14481&cpage=1#comment-37793
- Ndiaye B.W., "Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories, Extrajudicial, summary or arbitrary execution addendum," 11 August 1993, E/CN.4/1994/7/Add.1., "Report of the Secretary-General pursuant to General Assembly resolution 53/35: The Fall of Srebrenica," 15 November 1999
- Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation, Ministry of Defence of the Russian Federation, Moscow, 8 August 2011
- Simma, Bruno, (ed.), The Charter of United Nations, A Commentary (Oxford, Oxford University Press, 1994)

Newspaper articles and press releases

- Apps, Peter, Death of Libya's Gaddafi avoid awkward trial, Reuters News, London, 20th October, 2011
- Conclusion by Human Rights Watch, "The Fall of Srebrenica and the Failure of U.N. Peacekeeping ," 1 October 1995, D713
- Libya: Estimated 30,000 Died in War: 4,000 Still Missing, Huffington post, 8 September 2011, http://www.huffingtonpost.com/2011/09/08/libya-war-d-died_n_953456.html
- Maria Golovnina, and Patrick Worsnip, *Qaddafi Orders Storming of Benghazi; UN Meets*, Arabnews.com, Mar. 18, 2011, http://arabnews.com/middleeast/article320780.ece
- Navi Pillay, "Situation of Human Rights in the Libyan Arab Jamahiriya: Statement by Navy Pillay," UN High Commissioner for Human Rights (Human Rights Council - 15th Special Session - Geneva, 25 February 2011)
- Press Release by the Security Council at 6498th Meeting (Night), "Security Council Approves 'No-Fly Zone' over Libya, authorising 'All Necessary Measures" to protect civilians, by vote of 10 in favour with 5 abstentions, 17 March 2011, SC/10200
- Rob Crilly, *Libya: Benghazi about to Fall…Then Came the Planes*, Telegraph, Mar. 20, 2011, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8393843/Liby a-Benghazi-about-to-fall…-then-came-the-planes.html

- Security Council Press Release, SC/10187/Rev.1, at 6491th session 26 February 2011
- See Robert C. Johansen, *Opinion: How to Save Lives in Libya, Establish a Humanitarian Corridor Where Libyans Can Avoid Violence*, Globalpost, Mar. 13, 2011, http://www.globalpost.com/dispatch/news/opinion/110311/liba-united-nations-gaddafi