



UNIVERSITY *of the*
WESTERN CAPE

FACULTY OF LAW

MPHIL MINI-THESIS

**INCONSISTENCY IN THE IMPLEMENTATION OF THE
RESPONSIBILITY TO PROTECT DURING HUMANITARIAN
CRISES: THE CASE OF LIBYA AND SUDAN**

UNIVERSITY *of the*
WESTERN CAPE

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‘Submitted in partial fulfilment of the requirements for the MPhil degree in the Faculty of
Law of the University of the Western Cape’

PLAGIARISM DECLARATION

I, Mfundo Mahlakanipane Sabioson Nkosi declare that the work presented in this mini-thesis is original. It has never been presented to any other Institution of higher learning. Where the works of other people have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the MPhil Degree in International Human Rights Law.

Signed.....

Date.....

Supervisor: Mr. A. Dube



Signed.....

Dated.....

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ABSTRACT

The aim of this mini-thesis is to examine the inconsistency in the implementation of the responsibility to protect (RTP) principle during armed conflicts with specific focus on the case of Libya and Darfur. Furthermore the mini-thesis scrutinizes the criteria which are utilized universally and questions whether the principle is determined by factors such as economics, politics and location depending on each crisis. The significance of this mini-thesis derives from the need to make a contribution to the new interventionism debate and contribute to the growing literature on the doctrine of the RTP especially when it comes to the inconsistencies during its application which seems to be on the rise especially in the African continent. The mini-thesis was guided by the following assumption that there are inconsistencies when it comes to the application of the RTP under humanitarian law.

The mini-thesis also embarks on an enquiry into the legal aspects of the RTP doctrine and the legal status of humanitarian intervention. It is worth noting that the RTP doctrine does not concentrate on every human rights violation or abuse of power, even when these are very serious as in the case of Sudan. It certainly does not empower or establish an obligation on the international community to respond by over-riding the offending state's sovereignty. The initial intention of the RTP was aimed at preventing mass attacks or large scale violations involving genocide, war crimes, ethnic cleansing and crimes against humanity. It is greatly disappointing to note that the international community at large tends to overlook the more severe crises which have more casualties and turn their eyes on less serious humanitarian crises. This raises concern about the extent of the inconsistency in the application of the RTP. The question that begs an answer therefore is why intervene in Libya and not Darfur?

In conclusion to this mini-thesis I came to the realization that inconsistencies within the application of the RTP exist because humanitarian intervention under the RTP has a massive political element which affects implementation. The RTP is often used as a justification for states to act in conflicts when there is no domestic support for more direct political intervention. Thus, I believe that intervention can never be completely humanitarian driven until the five RTP precautionary principles are used as a guideline or criteria for interventions.

ABBREVIATIONS

Keywords: NATO, Humanitarian intervention, United Nations Charter, African Union, United Nations Security Council, Human rights, Genocide, War crimes, Responsibility to protect (RTP), State Sovereignty.

Acronyms

| | |
|-------|---|
| AMIS | African Union Mission in Sudan |
| AU- | African Union |
| AUC | African Union Commission |
| AUPS | African Union Peace and Security Council/Peace and Security Council |
| CA | Constitutive Act |
| DPA | Darfur Peace Agreement |
| ICC | International Criminal Court |
| ICSS | International Commission on Intervention and State Sovereignty |
| NATO | North Atlantic Treaty Organisation |
| SLM/A | Sudan Liberation Movement/Army |
| RTP | Responsibility to Protect |
| UNAIM | United Nations Hybrid Mission in Darfur |
| UNSC | United Nations Security Council |
| UN | United Nations |



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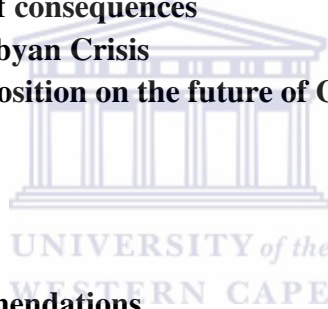
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CHAPTER ONE

1. Introduction

The last decades we have witnessed a development in the international arena towards new norms and standards, designed to protect civilians during humanitarian crises.¹ This notion became known as the responsibility to protect (RTP) and has become established since the turn of the millennium. At the same time we can observe a change in the behaviour during war by the western powers, where territorial conquest is no longer the main objective. Instead wars are fought for values, and are more humane in their nature.² This mini-thesis seeks to outline and probe the inconsistencies that exist in the implementation of the RTP principle. It is further clarified with reference to two instances where the RTP norm was applied, and where it failed to deliver on its mandate, namely the intervention during the Libyan crisis and the Sudanese crisis that still continues to date with no stability in sight.

The crisis in Darfur begs the question whether the RTP principle should be used, or admit its defeat. There have been reports of ‘large-scale loss of life due to deliberate state action, neglect or inability to act, or a failed state situation’³ and voices arguing for humanitarian interventions are in abundance. In this mini-thesis reference was also made to the ‘Arab Spring’, especially in Libya, which has been another instance where NATO used force to prevent human suffering using the RTP principle.⁴ Other countries affected by the revolutionary fervour may be included; there was no reference to Syria, despite the ongoing internal armed conflict, and the widespread condemnation from the international community. This is a result of the fact that the events in Syria are still unfolding, which would force the study to be more speculative than hoped in respect of the inconsistencies of the application of the RTP.

The end of the Second World War in 1945 saw the birth of the United Nations (UN). The UN succeeded the League of Nations created in 1919 after the First World War.⁵ The UN was

¹ Ramesh T *The United Nations, Peace and Security* (2006)65.

² Pattison J *Whose responsibility to protect? The Duties of Humanitarian Intervention* Journal of Military Ethics (2008) 7 (hereafter *Whose responsibility to protect*).

³ Ramesh T *The United Nations, Peace and Security*, Cambridge University Press, Cambridge (2006) 258-261.

⁴ Pollack M *The Real Military Options in Libya* (2011), available at www.brookings.edu/opinions/2011/0309_libya_pollack.aspx (accessed 1 January 2012).

⁵ Chamberlin W, Hovet T & Hovet E *A Chronology and Fact Book of The United Nations 1941-1976* (1976)12.

founded to save future generations from the horrors of war crimes and human rights violations that occur during armed conflicts.⁶ The maintenance of peace and security is the highest priority of the UN and peacekeeping missions are tasked to meet this challenge. Despite the creation of the UN to maintain world peace and stability and to prevent the world from moving towards another global conflagration, a look at the international scene for the past two decades has strongly revealed that armed conflicts (both international and internal) have continued to spring up here and there in the world and has blighted the lives of millions of civilians.⁷

The RTP is a principle that aims to protect the world's most vulnerable populations from the most heinous international crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. In recent decades, armed conflict has blighted the lives of millions of civilians.⁸ The serious violations of international humanitarian and human rights law are common in many armed conflicts and in certain circumstances; some of these violations may even constitute genocide, war crimes or crimes against humanity. As a result of these ongoing circumstances the use of military intervention through the UN birthed the RTP principle.

Like most norms and principles, the RTP is bound to see its capacity to deliver on its intended goals tested by real experience. Since the inception of the RTP by member states at the UN General Assembly in 2005,⁹ a number of cases have helped define the boundaries of its application. Well before Libya, the RTP had already made a discrete difference in a number of cases; from the most cited example of the political and diplomatic response to the outbreak of ethnic violence in Kenya in early 2008, the irregular response to signs of ethnic cleansing in Kyrgyzstan in the summer of 2010 and the more forceful regional and international efforts in Guinea at the end of that year.¹⁰ The challenge faced in Libya was of a high magnitude. The crisis rapidly escalated to a point where the UN Security Council had to

⁶ UN Charter, Article 1(1), available at <http://www.un.org/en/documents/charter/chapter1.shtml> (accessed 4 October 2013).

⁷ International Armed Conflicts are conflicts between two or more states and Non-International Armed Conflicts are defined as conflicts between Governmental Authorities of a State and organized armed groups in the framework of that State.

⁸ Findlay T *The Use of Force in UN Peace Operations* SIPRI, Stockholm (2002) 208.

⁹ UNGA Resolution 1674, available at www.un.org/News/Press/docs/2006/sc8710.doc.htm (accessed 19 December 2011).

¹⁰ Norton-Taylor R *Nato Ends Military Operations in Libya* The Guardian (2011) available at <http://www.theguardian.com/world/2011/oct/31/nato-ends-libya-rasmussen> (accessed 28 December 2011).

consider the use of military force to halt mass atrocity crimes that were already occurring as the Gaddafi regime used tanks, aircraft and troops to suppress mass protests.¹¹

The aim of the RTP doctrine when it was endorsed and adopted at the UN General Assembly 2005 world summit was to halt genocides like those in Rwanda and Bosnia.¹² This is the main reason advanced by those who favour the doctrine of the RTP in justifying the air strikes in Libya.¹³ It is said that the international military intervention (SMH) in Libya was to protect the people of the country and not to end Gaddafi's life.

The military intervention in Libya was viewed as a victory for the RTP doctrine by many commentators, even though some critics of the doctrine said it was used for political objectives and not purely humanitarian purposes.¹⁴ The RTP doctrine clearly states that if a state fails to protect its citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity,¹⁵ it becomes the international community's responsibility to do so and the use of military force by the international community can be utilized if peaceful measures prove inadequate.¹⁶

It is this provision that the doctrine's supporters point to for justifying the air strikes in Libya by some Western countries, including the USA.¹⁷ Shortly after the intervention in Libya the word from the UN was that the international military intervention in Libya was not about

¹¹ Dunne T & Gifkins J *Libya and R2P: norm consolidation or a perfect storm?* Open Democracy (2011), available at www.opendemocracy.net/tim-dunne-jess-gifkins/libya-and-r2p-norm-consolidation-or-perfect-storm (accessed 14 April 2012).

¹² United Nations General Assembly, *2005 World Summit outcome document, A/60/L.1*, 15 September 2005, Article 138 (hereafter cited as UNGA, *2005 World Summit outcome*). The text of this document is available at www.daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement (accessed 12 September 2012).

¹³ Bellamy A *Responsibility to protect: The Global Effort to End Mass Atrocities* (2009) 71.

¹⁴ 'Statement to the Security Council by Navi Pillay, High Commissioner for Human Rights (Libya)', January 25, 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11779&LangID=E> (accessed 13 April 2012).

¹⁵ Traynor I & Watt N *Libya No-Fly zone leadership squabbles within NATO* The Guardian (2011), available at <http://www.theguardian.com/world/2011/mar/23/libya-no-fly-zone-leadership-squabbles> (accessed 25 December 2011).

¹⁶ Evans G *The responsibility to protect: Rethinking Humanitarian Intervention*, (2004) 84.

¹⁷ Glen P *Paradigm Shifts in International Justice and the duty to Protect; in search of an action principle* University of Botswana Law Journal (2010) 24, available at http://www.pulp.up.ac.za/pdf/2011_02/2011_02_f_chapter2.pdf (accessed 4 October 2013).

bombing for democracy or Gaddafi's head.¹⁸ The protection of the people of Libya was advanced as a legal, moral, political, and military justification for the intervention in Libya.¹⁹

In addition those who favour the RTP doctrine also point to regional backing for the no-fly zone from organizations such as the Arab League, the Gulf Cooperation Council, and the Organization of the Islamic Conference, stressing its international legitimacy.²⁰ The international intervention in Kosovo is often mentioned as the standard example of humanitarian intervention. In 1999 several Western nations, without a Security Council resolution, led NATO to war with the then President of Yugoslavia, Slobodan Milosevic, in order to end the campaign of repression against ethnic Albanians in the Serbian province of Kosovo.²¹ The intervention into Kosovo was conducted by air which saved financial costs as well as the lives of ground soldiers. In addition, the intervention was conducted without the full support of the Security Council. Both Russia and China opposed the intervention into Kosovo. This meant that the USA could not win a resolution with the backing of the UN. The Security Council did pass resolutions stating that what was occurring in Kosovo was a threat to peace.²² However, it did not authorize military force.²³

The Darfur conflict is an ongoing violent conflict set in western Sudan which has left ensuing debates at the Security Council over determining whether or not 'genocide' was unfolding in Darfur. It is important to note that no decisive action has been taken to protect thousands of Sudanese who are being massacred by their Government. It is also noteworthy that some situations are viewed as more crucial than others in terms of intervention. The Janjaweed along with other militia groups including the Sudanese Liberation Army are responsible for

¹⁸ Norton-Taylor R 'NATO will not put troops on ground in Libya' *The Guardian* (2001), available at <http://www.theguardian.com/world/2011/aug/24/nato-will-not-put-troops-ground-libya> (accessed 12 September 2012).

¹⁹ See 'Holding Libya Together: Security Challenges After Qadhafi', *Middle East/ North Africa Report No. 115, International Crisis Group*, available at <http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/libya/115-holding-libya-together-security-challenges-after-qadhafi.aspx> (accessed 14 December 2011).

²⁰ *UN Security Council Report of the assessment mission on the impact of the Libyan crisis on the Sahel region 7 to 23 December 2011*, S/2012/42, (18 January 2012) available at www.securitycouncilreport.org/pdf (accessed 13 April 2012).

²¹ Richard F 'Humanitarian Intervention after Kosovo' 2006.

²² UN Security Council Resolution 1244 of 10 June 1999 and the Report of the Secretary General Pursuant to Paragraph 10 of the Security Council Resolution 1244 of 12 June 1999.

²³ De Waal A *No Such Thing as Humanitarian Intervention: Why We Need to Rethink How to Realize the 'responsibility to protect' in Wartime* *Harvard International Review* (27 March 2007), available at <http://www.globalpolicy.org/component/content/article/154/26062.html> (accessed 17 August 2013).

attacks against civilians. According to UN estimates, the Janjaweed²⁴ have killed over 200,000 people. According to Minority Rights Group International (MRG) Executive Director Mark Lattimer:

‘This level of crisis, the killings, rape and displacement could have been foreseen and avoided ... Darfur would just not be in this situation had the UN systems took the necessary action together after Rwanda: their action was too little too late thus it brings us to the question of whether the application of the RTP is applied inconsistently’²⁵

1.2 The Purpose of the Study

This mini-thesis seeks to outline the inconsistency in the implementation of the RTP during humanitarian crises with specific focus on the case of Libya and Darfur. In addition the researcher also investigated whether there was a certain benchmark which was applied universally or whether the application of the principle is determined by factors such as economics, politics and location depending on each crisis. The issue of the inconsistency of the application of the RTP is an international socio-political problem which leads to many questions regarding the effectiveness and objectives of the RTP by those who apply it such as NATO. In this regard the purpose is directed by the research question as well as the objectives of the study influenced by this broad purpose. It is vital that this study elucidates and discerns patterns and tendencies of military intervention under the RTP doctrine from the 1990s and recent ones.

1.3 Statement of the Problem

Seems like there are irregularities when it comes to the application of the RTP principle by western powers and the UN. It is important to highlight that the RTP doctrine does not address every human rights violation or abuse of power, even when these are very serious, and it certainly does not empower or establish an obligation on the international community to respond by over-riding the offending state’s sovereignty.²⁶ The RTP calls forth action to prevent mass attacks or large scale violations involving genocide, war crimes, ethnic cleansing and crimes against humanity. However, the international community tends to overlook the more severe crises which have more casualties and turn their eyes on less

²⁴ The Janjaweed is a militia group that has reportedly received extensive Government support.

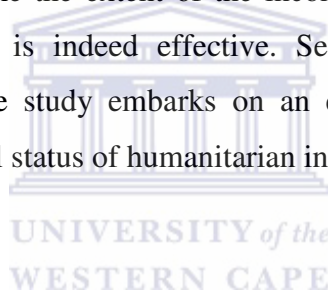
²⁵ Srinivasan S *Minority Rights, Early Warning And Conflict Prevention: Lessons from Darfur* Minority Rights Group International, (2006) 32.

²⁶ Robinson P *The CNN Effect: The Myth of News, Foreign Policy and Intervention* (2002) 177.

serious humanitarian crises. This makes one think, to what extent the inconsistency of the RTP goes?²⁷ The questions that beg answers are: why intervene in Libya and not Darfur?²⁸ Are decisions on the RTP made according to clear criteria and principles; or whether the doctrine is invoked only to advance big power interests in those countries where they decide to intervene? The RTP and humanitarian intervention as a whole have become part of the international political landscape. The act of military intervention is carried out by a range of different actors with different interests and motives; they are recurrent features in global politics. Their impact on world politics is tremendous. They reshape borders, topple Governments, they cause heavy inter-state flows of people and refugees, and they do indeed fulfil their designed purpose of rescuing millions of people from oppressive Governments and, sometimes, bring the leaders of these Governments to justice.

1.4. Objectives of Mini-thesis

Firstly the study seeks to examine the extent of the inconsistency in the application of the RTP and whether the doctrine is indeed effective. Secondly it seeks to outline what constitutes the RTP. Thirdly the study embarks on an enquiry into the legal aspects of military intervention and the legal status of humanitarian intervention.



1.5. Research Questions

This mini-thesis was guided by the research topic and the following research questions:

- Does a right to intervene on humanitarian grounds exist legally?
- Does the RTP serve its purpose under humanitarian law?
- What are the criteria for humanitarian intervention under the RTP?
- How has the RTP doctrine been implemented over the past two decades?

1.6. Research Hypothesis

The mini-thesis was guided by the following assumption: There are inconsistencies when it comes to the application of the RTP under humanitarian law. This was due to the fact that neither the UN nor any state has the necessary willpower to bring peace in the non-international armed conflicts or simmering conflicts in Iraq, Somalia, Sudan, Afghanistan and

²⁷ Evans G 'From Humanitarian Intervention to R2P', keynote address to symposium on humanitarian intervention University of Wisconsin, Madison (March 2006).

²⁸ Mkwate M & Ogbuna O *African Union wants Inclusive Government in Libya* The Herald. (23 September 2011) available at <http://www.herald.co.zw> (accessed 10 September 2012).

Chad, yet some other humanitarian crisis have received quick attention and humanitarian intervention from the international community such as Libya.

1.7. Rationale of Study

The significance of this mini-thesis derives from the need to make a contribution to the new interventionism debate and contribute to the growing literature on the doctrine of the RTP especially when it comes to the inconsistencies during its application.

1.8. Literature Review

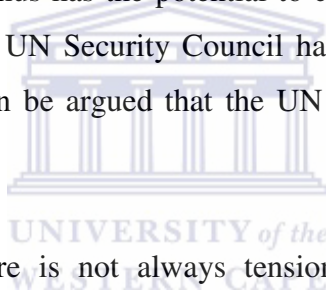
To gather in-depth knowledge of research conducted on the RTP doctrine and the inconsistencies on the application of this doctrine especially in the case of Libya and Darfur, the mini-thesis analysed scholarly works by different authors who wrote on this field. For the most part, these publications deal with military intervention from an analytic perspective, thus outlining the evolutionary trail of military intervention. An overview of the literature follows, where the earlier development of the interventionist debate will be discussed, as well as criteria for humanitarian intervention and its legal aspects.

The crisis in Darfur started in February 2003 when two rebel groups emerged in Darfur to challenge the National Islamic Front (NIF) Government. The Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) claim that the Government of Sudan discriminates against Muslim African ethnic groups in Darfur and has methodically targeted these ethnic groups since the early 1990s.²⁹ The Government of Sudan dismisses the SLA and JEM as terrorists. The conflict centres on the three African ethnic groups, the Fur, Zaghawa, and Massaleit, in opposition to nomadic Arab ethnic groups. Intermittent hostilities between the largely African-Muslim ethnic groups and the Arab inhabitants of Darfur can be traced back to the 1930s and most recently surfaced in the 1980s. Consecutive Governments in Khartoum have long neglected the African ethnic groups in Darfur and have done very little to prevent or contain attacks by Arab militias against non-Arabs in Darfur.³⁰

²⁹ International Coalition for the responsibility to protect *Crisis in Darfur*, available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur> (accessed 20 October 2012).

³⁰ Williams PD & Bellamy AJ *The responsibility to protect and the Crisis in Darfur* Security Dialogue (2005) 36.

Addressing an audience at the Rwandan genocide memorial in Geneva in 2004, former UN Secretary General Kofi Annan speaking of ethnic cleansing in Darfur, said that ‘the international community cannot stand idle’ in the face of such widespread human rights violations.³¹ In this address, Annan unequivocally referred to the mounting humanitarian crisis in Darfur, calling on the international community to take action.³² At the time when Annan delivered his speech, approximately 30 000 people were already dead and about a million had fled their homes, with 200 000 of those forced into refugee camps in Chad.³³ The fact-finding missions sent into Darfur and Chad by the UN and Human Rights Watch provided further evidence of systematic crimes, killings, rape, and forced displacement perpetrated predominantly by the Sudanese Government and the Janjaweed militia.³⁴ According to the 1948 Genocide Convention,³⁵ once the UN acknowledges that the goings on in that particular place amount to genocide, it has to act. The dilemma for the UN is that if it does act upon this, it may not receive the military, political and financial means it would need to act, from its member states. Thus has the potential to create a perception of illegitimacy. Notwithstanding differences, the UN Security Council has gradually called for greater UN involvement in the crisis.³⁶ It can be argued that the UN is aware of its limitations in this crisis.



Welsh holds the view that there is not always tension between state sovereignty and humanitarian intervention, because in some instances there have been no Government that could give consent as was in Somalia,³⁷ or when indirect consent has been given by a Government that has realized its inability to prevent ongoing human suffering as was the case in Burundi.³⁸ In the case of Darfur during 2006 and 2007, there were attempts to stem the

³¹ Kofi Annan’s address to the UN Commission on Human Rights, Geneva, 7 April 2004, UN News Service, available at <http://www.un.org/apps/news/printnewsAr.asp?nid=10377> (accessed 12 October 2012).

³² Clough M *Darfur: Whose responsibility to protect?* Human Rights Watch, New York (5 March 2005) available at <http://hrw.org/wr2k5/darfur/darfur.pdf> (accessed 5 October 2012).

³³ Williams PD & Bellamy AJ *The responsibility to protect and the Crisis in Darfur*, note 30 above.

³⁴ Slim H ‘*Dithering Over Darfur? A Preliminary Review of the International Response* International Affairs’ (2005) 80.

³⁵ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 and came into force on 12 January 1951.

³⁶ Zissis C *Darfur Crisis Continues* Council on Foreign Relations (4 May 2006) available at <http://www.cfr.Org/publication/10600/Darfur.html> (accessed 27 August 2012).

³⁷ Welsh JM ‘*Humanitarian Intervention and International Relations*’ (2004) 72.

³⁸ Kristina P *The African Unions Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the responsibility to protect* Institute for Security Studies, Pretoria (2005) 8.

violence, but ceasefires were not respected.³⁹ An effort by the UN to establish a peacekeeping force to replace the AU force on station was rejected by the Sudanese Government, whose approval is needed before the implementation of any form of assistance. Additional suggestions on a composite force, consisting of both UN and African Union (AU) troops were also dismissed by Khartoum. It was not until the summer of 2007 that a UN force was allowed to enter Darfur, but violence continued in spite of this.⁴⁰ In those cases where the state is unwilling or unable to fulfil its obligations, the international community has the responsibility to intervene and to reassert order. Under the RTP, in circumstances where the international community must intervene, it is not with the purpose of overthrowing a Government, but rather with the purpose of preventing or ending unneeded loss of life and establishing an order by which the state may continue to provide for human security.⁴¹

The study by Welsh is similar to my mini-thesis since it also focuses on the legal aspects of the implementation of the RTP doctrine. Duner explains that the justification for humanitarian intervention is deeply rooted on moral and ethical arguments. He states that ‘a war is a just war if it is waged in defence of human rights’ thus humanitarian interventions are ethically justified in appropriate cases.’⁴² The author goes on to mention the ‘just cause’ threshold which is perhaps the most important requirement under the RTP. The International Commission on Intervention and State Sovereignty has defined ‘just cause’ in very specific terms. These terms include: Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, or acts of terror or rape.⁴³ For intervention to be justified under the RTP a conflict must be able to meet these requirements.

In relation to the Darfur crisis, O’Neill holds that the Sudanese Government has continually disregarded all attempts from the international community to halt these crimes against

³⁹ *The Genocide in Darfur-Briefing Paper*, Save Darfur Coalition, Washington DC available at <http://savedarfur.org/pages/background/> (accessed 12 November 2012).

⁴⁰ Pattison J *Whose responsibility to protect?*(2008) 7.

⁴¹ O’Hanlon M ‘*Expanding Global Military Capacity for Humanitarian Intervention*’ (2003) 3.

⁴² Duner B ‘*Violence for Human Rights* The International Journal of Human Rights’(2001) 5.

⁴³ *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa (2001).

humanity, and has showed a lack of political will to stop the killings.⁴⁴ Instead, the 7000 troops committed to providing protection to these citizens have proven inadequate when faced with the well-armed janjaweed militias.⁴⁵ Regarding the just cause criteria, the current human rights situation in Darfur meets this requirement on the first prong; a large-scale loss of life exists within the Darfur region of Sudan, and the Sudanese Government has shown that it is unwilling to halt, or perhaps is implicit in the commission of these crimes. Thus, in this case, the just cause requirement has been met yet the UN Security Council has failed to take any decisive action to protect the people of Darfur while the opposite was done in the Libyan case.

Rice calls for a repetition of Kosovo by the USA to solve the crisis in Darfur, where a humanitarian intervention should be launched even if a mandate cannot be obtained via the Security Council. Rice further states that a mandate should prove unlikely, since especially China has invested heavily in Sudan's oil assets, and can veto any resolution.⁴⁶ The action Rice supports should however preferably be multilateral, with support from NATO and the African Union if possible.⁴⁷ South Africa's position on the Darfur conflict has surprised and disappointed activists and officials calling for a strong international response to one of world's most severe humanitarian and human rights crises.⁴⁸ In 2006, for example South Africa opposed a resolution critical of Khartoum's notorious conduct in Darfur, supporting instead a weaker resolution that excluded any reference to follow-up action by the Council and to the Sudanese Government's duty to protect civilians.⁴⁹ In 2007, in its capacity as a newly elected member of the UN Security Council, South Africa backed Sudan in rejecting

⁴⁴ O'Neill WG *The responsibility to protect Darfur* available at <http://www.csmonitor.com/2006/0928/p09s01-coop.html>, (accessed 2 February 2011).

⁴⁵ United Nations Peace and Security Section of the Department of Public Information in cooperation with the Department of Peacekeeping Operations, *UNAMID African Union/United Nations Hybrid operation in Darfur* (September 2012), available at <http://www.un.org/en/peacekeeping/missions/unamid/facts.shtml> (accessed 5 November 2009).

⁴⁶ Nathan L *Draft Resolution Calls for 26,000-Strong African Union-UN Peacekeeping Force for Darfur* International Herald Tribune, (11 July 2007). See 'Opposition to Darfur Resolution' BBC News, 17 July 2007, available at <http://news.bbc.co.uk/2/hi/africa/6902400.stm> (accessed 7 December 2012).

⁴⁷ Rice SE 'Dithering on Darfur: U.S. Inaction in the Face of Genocide' *Testimony before the Senate Foreign Relations, April 27, 2007, The Brookings Institution* (2007) available at http://www.brookings.edu/~media/Files/rc/testimonies/2007/0411africa_rice/20070411.pdf (accessed 28 October 2012).

⁴⁸ Human Rights Watch, 'South Africa's Troubling Foreign Policy', letter to the South African Deputy Minister of Foreign Affairs, 31 December 2007, available at <http://hrw.org/english/docs/2007/12/31/safric17721.htm>, (accessed 17 October 2012).

⁴⁹ Department of Foreign Affairs 'Banquet Remarks of the President of South Africa, Thabo Mbeki, in Honour of the President of Sudan, Omar Hassan Ahmed El Bashir: Tuynhuys, Cape Town, November 6, 2007', available at www.dfa.gov.za/docs/speeches/2007/mbek1107.htm (accessed 19 November 2012).

the option of sanctions against combatants who attack civilians and obstruct peace efforts and against parties to the conflict that refuse to co-operate with UNAMID, the UN-AU peacekeeping force in Darfur.⁵⁰

Hottinger mentions that the biggest obstacle in finding a solution in Darfur is lack of commitment from Washington.⁵¹ This is thought to stem from the fact that the USA does not want to risk their work in the settlement between southern Sudan and Khartoum. This means that Darfur has a lower priority in USA foreign policy towards Sudan. I agree in part with Hottinger's notion on USA foreign policy towards Sudan but still the UN in its own capacity with the support of the member states can act. To date human rights violations continue in Darfur with no solution in sight and the sincerity of NATO's intentions in the Libya campaign remains questionable.⁵² For example, why would NATO members rush into a military campaign to remove Gaddafi from power and not do the same in Darfur or Syria where civilians continue to be killed by incumbent regimes? Was Gaddafi a worse dictator than Al Assad in the Syrian case or Omar Al-Bashir.

Prunier argues that a NATO led operation might lead to another Iraq or Somalia, where coalition forces would be bogged down for a long time with unsure chances of success. According to him there is no quick-fix solution to the problem as Sudan has a complex conflict which can be traced back a long time.⁵³ The general debate regarding Darfur is not, therefore if there is a state-sanctioned humanitarian catastrophe taking place, as that has been established by most observers. It is rather a question about the method of choice by the international community in preventing this situation from continuing, with current practical support for a military intervention, other than peacekeeping forces, being low.

The primary criticism of the RTP in its current form and its failure to resolve the Darfur crisis is that the five permanent members of the UN Security Council are permitted to retain their

⁵⁰ Wasil A 'South Africa's Stance on Darfur May Tarnish Its Anti-Oppression Legacy', *Sudan Tribune*, 22 July 2007.

⁵¹ Hottinger JT 'The Darfur Peace Agreement: expectations unfulfilled' (2006) 18.

⁵² Ibid.

⁵³ Prunier G *Darfur's Sudan Problem* open Democracy (2006) available at http://www.opendemocracy.net/democracy/africa/democracy/darfur_conflict_3909.jsp (accessed 18 October 2012).

veto power in this issue.⁵⁴ Although the document encourages the five permanent members to ‘agree not to apply their veto power, in matters where their vital state interests are not involved,’ this suggestion is not binding.⁵⁵ In a Council that is frequently divided because of the disputes between the five permanent members, it is highly possible that the exercise of veto power will subvert the Security Council’s ability to react effectively and appropriately to humanitarian crises.

The Arab Spring struck Libya with all its force in the middle of February 2011. Protests against the decade-long rule of Gaddafi erupted on the Libyan streets, but were met with violence from the regime. The protests soon evolved into a civil war, and the better equipped Governmental forces, armed with tanks and aircrafts, were pitted against poorly armed and at times unarmed rebels. Gaddafi’s troops used excessive force when suppressing the rebellion, spurring a storm of protests from the international community.⁵⁶ In response to this, the UN presented a resolution aimed at protecting the civilian population, Resolution 1973.⁵⁷ This resolution authorized the establishment of a no-fly zone over Libya and permitted the use of all necessary measures to protect civilians.

The use of force in Libya to protect civilians also brought to the fore reservations against the enforcement of Pillar 3 of the RTP principle. While there is consensus on Pillar 1 which stipulates that each individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. Pillar 2 highlights the responsibility of the international community to assist states through capacity building other states that are willing, but weak and unable, to uphold their Pillar 1 of the responsibilities principles, it is the ambiguous and open-ended nature of the third pillar responsibility of the international community to take collective action in a timely and decisive manner.⁵⁸ This then

⁵⁴ International Commission on Intervention and State Sovereignty *The responsibility to protect: Research, Bibliography, Background* International Development Research Centre, Ottawa (2001).

⁵⁵ International Commission on Intervention and State Sovereignty *The responsibility to protect : Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa (2001).

⁵⁶ For more on this, see http://irnglobal.com/?page_id=30120 (accessed 5 October 2013).

⁵⁷ Resolution 1973 of 17 March 2011 and the report of the Secretary General of 12 November (S/RES/2011/6498).

⁵⁸ Pillar 1, states that ‘each individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity.’ This Pillar 1 (of 3) of the R2P doctrine. Pillar 2 edges the commitment of states to assist through capacity building other states that are willing, but weak and unable, to uphold their Pillar 1 responsibilities. Finally, Pillar 3 is activated when states are manifestly failing or unwilling to protect their citizens.

prevents the international community from taking timely collective action.⁵⁹ Pillar 3 includes responses both through pacific measures under Chapter VI and Chapter VIII of the UN Charter and in the event of peaceful means proving to be inadequate, the Security Council can resort to coercive measures under Chapter VII. This is where the bone of contention lies, with consensus often lacking within the Council on the issue of when is the time ripe to sanction military intervention.

Barkawi argues that it 'reignited also the neo-conservative belief that democracy can be exported by military means'. He further adds that the possibility of military intervention in Libya setting a precedence should be viewed with concern because 'it is becoming increasingly legitimate to use military power in the global South without taking responsibility for the political and human aftermath'.⁶⁰ It is important to note that in the Libyan crisis peaceful means to resolve the standoff were not explored; those who voted for resolution 1973 understood that they were voting for air strikes to protect civilians. The RTP doctrine promotes the use of force as the last resort. It is worth keeping in mind that the intervention was anything but a last resort. Sanctions, including an arms embargo, had hardly been put in place when the bombs began to fly. There was no attempt to use peaceful means to protect civilians such as gaining safe passage out of Benghazi.⁶¹ The rebels wanted no negotiation that might lead to Gaddafi stepping down in exchange for amnesty or a safe haven abroad.⁶² The coalition became the fighting arm of the rebellion, installing a new regime amidst serious questions about their intentions and capabilities.

Akonor suggests that the effectiveness of African solutions for African problems can certainly be questioned in the case of Libya.⁶³ However, while the Libyan problem had grown

⁵⁹ The three pillar-approach to RTP was set out in Secretary-General Ban Ki-moon's 2009 Report on Implementing R2P, available at [http://responsibilitytoprotect.org/SGRtoPEng%20\(4\).pdf](http://responsibilitytoprotect.org/SGRtoPEng%20(4).pdf) (accessed on 27 August 2012) 45-56.

⁶⁰ Barkawi T 'Intervention without responsibility', *Aljazeera.com*, 23 November 2011, available at <http://www.aljazeera.com/indepth/opinion/2011/11/20111121161326433590.html> (accessed 18 August 2012).

⁶¹ Robert CJ *Opinion: How to Save Lives in Libya, Establish a Humanitarian Corridor Where Libyans Can Avoid Violence* Globalpost, available at <http://www.globalpost.com/dispatch/news/opinion/110311/liba-united-nations-gaddafi> (accessed 13 March 2011).

⁶² Mark T *Libyan Rebels Protest Over African Union Peace Mission* The Guardian, available at <http://www.guardian.co.uk/world/2011/apr11/libya-rebels-protest-peace-mission/print> (accessed 11 April 2011).

⁶³ Akonor K *The African Union's mistake of policy and principle*. Inter Press Service. (10 June 2011), available at <http://www.ips.net> (accessed 24 October 2012).

to proportions where civilians were no longer safe, it was not NATO that was supposed to intervene in Libya, rather, it was the AU. As correctly pointed out, 'Article 4(h) of the AU act gives the AU the right to intervene forcibly in one of its member states with regards to war crimes, genocide and crimes against humanity'.⁶⁴ I agree with Akonor's view because when the AU presented a peaceful road map on a resolution on the Libyan crises it was ignored by various western states and the UN.

Akonor further questions why the AU would go through the longer path via the UN when they could intervene directly in Libya. The major problem with the continental body is the insistence of its members on the respect of the territorial sovereignty of constituent countries. Instead of rushing to help the people of Libya under RTP and Article 4(h), the AU was busy defending values of sovereignty, independence and brotherhood. This type of action by the AU weakens the organisation and creates room for the more decisive groups like NATO to assume responsibility. In fact the AU could have lost the respect of the NTC as a result of its indecisiveness in taking action against Gaddafi.⁶⁵ I strongly agree with Akonor's view because the heads of states of most African member states practice a similar leadership style as Gaddafi and supporting the AU ideology of sovereignty, independence and brotherhood will in future assist them in any intervention by the UN if they fail to protect their citizens.

Smith's view is that the intervention by western powers in the Libyan crisis was arguably initiated for profit making purposes. Being the country with the sixth largest oil reserves in the world, Libya became an automatic target for destabilisation, especially when there is so much competition for access to African resources between the US led western block on the one and China on the other hand.⁶⁶ Libya's historically hostile relationship with the west, worsened by involvement of the country's secret agents in the Lockerbie airplane bombing, Gaddafi's aborted nuclear weapons programme and his penchant for nationalisation, always pointed to a future of uncertainty, though relations had just begun to thaw somehow.⁶⁷ It is

⁶⁴ Ibid.

⁶⁵ 'AU 'ignored' over Libya crisis', BBC Hard Talk (25 March 2011), available at <http://news.bbc.co.uk/2/hi/programmes/hardtalk/9436093.stm> (accessed 5 November 2012).

⁶⁶ Smith P 'Probe Libya's fire sale' *The Africa Report* Number 34 (October 2011) 4.

⁶⁷ Obbo CO 'No-fly zone strikes terror in leaders' hearts', *The East African*, 28 March 2011 available at <http://www.theeastafrican.co.ke/news/No+fly+zone+strikes+terror> (accessed 25 August 2012).

therefore not surprising that at the earliest opportunity, Gaddafi, undependable as he was, had to be taken out of the way.⁶⁸

Klein states that any military operation that is aimed primarily at regime change, even if that regime is guilty of gross human rights violations, cannot accurately be said to be in accordance with RTP. Military operations are only in accordance with the RTP if they are authorized by the UN Security Council and designed to prevent or halt the four mass atrocity crimes.⁶⁹ Overthrow of a regime is not, in and of itself, a legitimate objective. However, disabling the capacity of Gaddafi's regimes to harm its own people was seen by many as essential to discharging the mandate of protection.

Cilliers and Sturman argue that sovereignty has often been used to protect leaders at the expense of citizens.⁷⁰ The Constitutive Act of the AU allows for intervention without the approval of the target state in a way that the Organisation of African Unity (OAU) system of absolute consensus never did. Guaranteeing that intervention is effectual is as imperative as the decision of when and why to intervene. Sanctions, criminal prosecutions and military interventions are the broad options available to the AU. The authors' views are similar to mine in my analyses of the legality of the RTP since I questioned the effectiveness of the AU in regard to humanitarian intervention and its lack of affirmativeness on how intervention will be authorised as well as on mechanisms for its implementation.

Harhoff states that some of the criteria for humanitarian intervention are that there is a massive, or large-scale and outrageous violation of international humanitarian standards committed against civilians during an internal conflict in a state.⁷¹ In addition Wheeler states that it is advantageous to ensure that a large number of the international community supports such an intervention in order to gather support instead of opposition to the intervention which

⁶⁸ BBC News, 15 April 2011. See story 'Libya letter by Obama, Cameron and Sarkozy.' The leaders observed that '... it is impossible to imagine a future for Libya with Gaddafi in power ... Gaddafi must go and go for good.'

⁶⁹ Klein N *The Shock Doctrine: 'The rise of Disaster Capitalism'* (2007) 71.

⁷⁰ Cilliers J & Sturman, K 'The Right Intervention: Enforcement Challenges for the African Union' *African Security Review* (2002) 11.

⁷¹ Harhoff F *Unauthorized Humanitarian Interventions-Armed Violence in the Name of Humanity?* Nordic Journal of International (2001) 65.

may lead to condemnation of the operation.⁷² Terry also contributed to the issue of criteria by mentioning that nations involved in the intervention can only target humanitarian abuses, addressing other political objectives or interests take an intervention out of humanitarian category.⁷³ I agree with the authors because their above views are crucial to the centre of my mini-thesis because in investigating the inconsistencies of the application of RTP one must analyze the criterion of military intervention.

1.9 Research Methodology

The study was conducted using comparative desktop research. The information used was obtained from primary sources such as treaties, protocols, draft laws, reports, and relevant secondary sources, particularly text books, journal articles, internet resources and other materials that are relevant to humanitarian law with special focus on military intervention (RTP doctrine). In relation to the legality of the RTP a study of legislation and case law was carried out.⁷⁴ The UN Charter, more precisely Article 2(4) and Chapter VII, was starting point for the study of the legal status of humanitarian intervention. In addition, a study of various conventions and declarations adopted on the basis of human rights was conducted.⁷⁵ Reports by the International Commission on Intervention and State Sovereignty were also reviewed. This mini-thesis was not based on fieldwork or questionnaires. The foregoing literature review underscores what research has been done, thus demonstrating how intervening countries sanctioned intervention and demarcating how intervention has evolved. Contemporary literature on military intervention in intrastate conflicts also informs this study.

1.10 Limitations and Potential Problems of Study

This mini-thesis sets out to outline and probe the inconsistencies that exist in the implementation of the RTP principle and to evaluate as to what extent those inconsistencies are at. Two instances were selected where the RTP norm was applied, and where it failed to deliver on its mandate, namely the intervention during the Libyan crisis and the Darfur crisis that still continues to date with no stability in sight. In addition the mini-thesis focused on the study and analysis of the implementation of the RTP under international humanitarian law. It

⁷² James T *Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism* The Army Lawyer (August 2004) 40.

⁷³ Ibid.

⁷⁴ Brownlie I *International law and the use of force by states* (1963) 30.

⁷⁵ *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa (2001).

has been chosen to rather limit this mini-thesis to intervention on humanitarian grounds and thus delve into the issue of individual or collective self-defence under Article 51 of the United Nations Charter thus the exploration into legal aspects of the RTP was limited. The focuses was on humanitarian interventions by the use of force and discuss intervention through peaceful means or other humanitarian actions of a more general character thus outlining the extent of inconsistencies in the application of the RTP.

The mini-thesis therefore commence from the war in Kosovo, which effectively paved the way for NATO's military humanitarian efforts but this analysis was brief because the primary locations of the mini-thesis is the case of Libya and Darfur. The end of the examined period was the situation in Libya. During this time-span, the following events were examined:

- The crisis in Darfur. This is due to the fact that this crisis has often been used as an argument where the RTP should either be used, or admit its defeat. There have been reports of 'large-scale loss of life due to deliberate state action, neglect or inability to act, or a failed state situation'⁷⁶ and voices arguing for a humanitarian intervention are in abundance.
- The Arab Spring and especially Libya. This is because it has been another instance where NATO used force to prevent human suffering. The other countries affected by the revolutionary fervour could also be included, but to further restrict the number of actors limited the study to Libya.

1.11 Structure of mini-thesis

The mini-thesis is divided into five chapters. Chapter one covers the research problem, aim and methodology as well as some literature on military intervention by delineating the concept of military intervention within the wider interventionist debate under the RTP doctrine. The second chapter of the mini-thesis presents the basic principles of the RTP through the spectrum of the international and regional legal frameworks. An examination of different philosophical viewpoints of the RTP and if it serves its purpose in its current form. The chapter raises and answers the first and second research questions identified above.

⁷⁶ Ramesh T *The responsibility to protect: Norms, Laws and the Use of Force in International Politics* (2011) 150.

The third and fourth chapter raises and answers the third and fourth research questions posed above. Chapter three describes and the criteria for humanitarian intervention. Chapter four focuses on the implementation of the RTP doctrine. In other words, this chapter explores the actual implementation of the RTP and how it has been applied in the last two decades; this is done by making reference to numerous humanitarian crises cases. An analysis and evaluation of the evolution of the RTP is made in this chapter. The fifth and final chapter contains a conclusion and some recommendations.



CHAPTER 2

The basic principles and legality of the RTP

2.1 Introduction

To respond to the research questions sufficiently, I have selected two case studies, these being the cases of Libya and Sudan. I selected these two cases from a practical point in order to support and prove my critical opinion that there is an inconsistency in the implementation of the RTP during humanitarian crises. The Libya and Sudan cases both occurred after the establishment of the RTP norm, yet in the case of Sudan the international community was very hesitant to react and intervene using the RTP norm. In the Libya case, however, the international community was not hesitant at all to make use of the norm. The cases thus show important similarities and differences which makes the comparison very interesting. This chapter seeks to outline the basic principles of the RTP doctrine and discuss the legality of the doctrine as well as how it has been applied.

2.2 The basic principles of the RTP

The RTP doctrine is based on the idea that sovereignty is not a privilege, but a responsibility which focuses on preventing and halting four core crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing.⁷⁷ The RTP can be thought of as having three parts. Firstly, 'a state has a responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing'.⁷⁸ states will still have control over their own territories. Secondly, 'if the state is unable to protect its population on its own, the international community has a responsibility to assist the state by building its capacity'. This is still within the boundaries of state sovereignty. Thirdly, 'if a state is manifestly failing to protect its citizens from mass atrocities and peaceful measures are not working, the international community has the responsibility to intervene first diplomatically or economically, and as a last resort with military force'.⁷⁹

⁷⁷ Gierycz D 'From Humanitarian Intervention to responsibility to protect' 2010.

⁷⁸ ICISS *On the responsibility to protect* (2001) <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed 11 January 2013).

⁷⁹ Ibid.

2.2 Elements of RTP

The three elements of RTP as outlined in the ICISS report are the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. According to the Commission, the responsibility to prevent is the most important element of RTP. The responsibility to prevent lies first with the sovereign states and the local communities within those states. However, when needed and appropriate the international community should offer support to these efforts. The argument behind prevention is that it helps to eliminate the need for intervention at a later stage which will save lives and precious resources.⁸⁰

2.2.3 Prevention as a first element of RTP

The first element of the RTP is developing more robust early warning systems. The Commission acknowledges that there are Non-Governmental organizations, such as the International Crisis Group (ICG), that are exclusively devoted to conflict analysis and providing early warnings to policy makers. However, early warning systems need to be far more standardized, and the UN and regional bodies should have permanent and coordinated early warning systems in place.⁸¹ When analyzing the first element of the RTP it is noteworthy that:

‘Firstly, there has to be knowledge of the vulnerability of the situation and the risks associated with it so called ‘early warning’. Secondly, there has to be understanding of the policy measures available that are capable of making a difference the so-called ‘preventive toolbox’. And thirdly, there has to be, as always, the willingness to apply those measures the issue of ‘political will.’⁸²

In this fragment on the responsibility to prevent it is worth noting that in most instances it is the lack of political will and not the lack of information as the main problem for example the atrocities in Sudan are well documented.

There should be efforts at both the national and international level to address root causes of conflict, which can include marginalization of minorities, violation of political and human rights, and poverty. Prevention of the root causes of conflict may involve addressing political needs, economic deprivation, strengthening legal institutions, and making structural reforms to the military. Political reform may involve capacity building assistance, facilitating power-

⁸⁰ ICISS Report, 19.

⁸¹ ICISS Report, 21.

⁸² ICISS Report, 20.

sharing deals, and supporting freedom of the press and civil society. In terms of economic reform, the ICISS specifically cites international trade reform and access to major markets for developing nations in addition to traditional development assistance. Legal reform involves a standard set of activities, such as strengthening the judiciary and rule of law in addition to fostering the development of robust legal protections for marginalized groups. Finally, security sector reform may also fall under efforts designated as prevention and can involve any number of activities from professional development education for officers, demobilization programs, and tightened control over weapons.⁸³

Even though military prevention measures form part of prevention under the RTP elements, this is solemnly utilized when implementing the RTP norm. This can take place in the form of deployment of a UN Preventative Force. An example of such an endeavour is in the Democratic Republic of Congo, where a preventative force has been successfully deployed to help keep the peace by the UN since 2005. All of these measures aim to prevent conflict and mass atrocities before they occur, but in the event that preventative measures fail, RTP mandates that the international community must react and put a stop to atrocities.⁸⁴

2.2.4 Responsibility to react as second element of RTP

The RTP clearly states that a responsibility to react is vital to situations of undeniable need for human protection. When preventive measures fail to resolve or control the situation and when a Government is unable or unwilling to rectify or restore the situation, then interventionary measures by other members of the international community of states may be required. These coercive measures may include political, economic or judicial measures and only in severe cases they may also include military action. As a matter of principle, in the case of reaction just as with prevention, less intrusive and coercive measures should always be considered before more coercive and intrusive ones are applied such as military intervention.⁸⁵

Political and diplomatic sanctions are the first stage of measures that can be taken to react to a crisis. Broad sanctions can hurt already vulnerable populations, so targeted sanctions

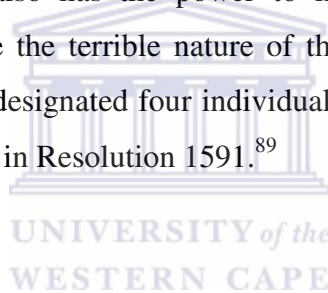
⁸³ ICISS Report, 23

⁸⁴ Cooper RH & Kohler JV (ed) *Responsibility to protect: The Global Moral Compact for the 21st Century* (2009) 30.

⁸⁵ ICISS Report, 23.

against individuals or perhaps sanctions against certain industries that are known to be fuelling the conflict are viewed as the better option,⁸⁶ such as in the case of Liberia where the country was engaged in a civil war from 1989 to 2003. In 2000, the UN accused Liberian president Charles G. Taylor of supporting the Revolutionary United Front (RUF) insurgency in neighbouring Sierra Leone with weapons and training in exchange for diamonds.⁸⁷ In 2001, the UN applied sanctions on the Liberian diamond trade with Resolution 1343 of 7 March 2001.⁸⁸

The responsibility to react as second element of the RTP norm promotes the use of sanctions, but it is vital to outline that this is very difficult to enforce and requires broad international support. On rare occasions there is at times adequate consensus within the international community to impose universal sanctions. For example, under Security Council Resolution 1591 there is a Sudan Sanctions Committee that is responsible for monitoring a UN imposed arms embargo on Darfur and also has the power to impose targeted sanctions against individuals. To date, and despite the terrible nature of the crisis and levels of violence in Darfur, the Committee has only designated four individuals for asset freezes and travel bans under the authority given to them in Resolution 1591.⁸⁹



⁸⁶ Sarah S 'From Prevention to Response: Using Military Force to Oppose Mass Atrocities,' in Robert IR ed *Mass Atrocity Crimes: Preventing Future outrages* (2010) 60.

⁸⁷ Cendrowicz L 'Lies and Rumors': Liberia's Charles Taylor on the Stand' *TIME* (14 July 2009) available at <http://www.time.com/time/world/article/0,8599,1910365,00.html> (accessed 10 March 2012).

⁸⁸ Resolution 1343 of 5 March 2001 and the report of the Secretary General of 7 March (S/RES/1343 (2001). The resolution demanded that the Liberian Government end its support for rebels in Sierra Leone and expel RUF members from its country; end financial and military support; cease import of rough diamonds; freeze RUF assets and ground Liberia-registered aircraft operating within its jurisdiction until a proper registration system was in place. Furthermore, the President of Liberia Charles Taylor was asked to allow the United Nations Mission in Sierra Leone (UNAMSIL) freedom of movement in the country and return seized weapons and equipment; release all abductees and enter their fighters into disarmament, demobilization and reintegration programmes. It demanded that all states in the region take action to prevent armed attacks against neighbouring countries that could contribute to the destabilisation of the situation at the borders between Guinea, Sierra Leone and Liberia.

⁸⁹ United Nations, 'Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan,' UN Security Council Sanctions Committees, available at <http://www.un.org/sc/committees/1591/> (accessed 12 February 2012).

2.2.5 Criteria for military intervention under the RTP

In the event where the international community has attempted to utilize all the other measures but has failed to end the human suffering or end human rights violation the ICISS recommends that military action should be utilized to save human lives, but only in extreme cases and when certain other criteria have been met. Six criteria must be taken into account when considering the possibility of military intervention. These are as follows:

- i. the right authority,
- ii. just cause,
- iii. right intention,
- iv. last resort,
- v. proportional means, and
- vi. reasonable prospects of success.⁹⁰

There are very few circumstances where military action would be justified and therefore meet the just cause criteria, and these are large-scale loss of life including genocide, mass killings, or ethnic cleansing (genocidal intent is not relevant).

These situations that fall under the just cause criteria include crimes defined in the 1948 Convention on the Prevention and Punishment of Genocide,⁹¹ crimes against humanity or war crimes as defined by the Geneva Conventions, state collapse leading to civil war or mass starvation, or overwhelming natural disasters.⁹² Right authority entails authorization from the UN Security Council, which is designed to ensure that the intervention is being undertaken with the right intentions. It should be noted that ICISS only goes so far as to state that in ideal circumstances UN approval will be given. However, in subsequent discussions regarding RTP it is inferred that any intervention would have to be authorized by the UN Security Council.

⁹⁰ ICISS Report, 32.

⁹¹ Convention on the Prevention and Punishment of Genocide 1949 and Article 7 of the Rome Statute of 17 July (1998).

⁹² 'A More Secure World: Our Shared Responsibility' Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 56-57, para.2 01 (2004), available at <http://www.un.org/secureworld/report>. hereinafter High Level Panel Report), (accessed 30 June 2013).

Meeting the criterion of right intention essentially mandates that there can be no ulterior motive for intervention beyond relieving humanitarian suffering and promoting international security. In order to meet the last resort criterion there must be no reasonable expectation that other measures, such as sanctions or diplomatic negotiations, could end the conflict. Taking into account the last resort criteria on the Sudan case, the UN Security Council placed numerous sanctions on the Sudanese Government yet failed to implement further action, such as military intervention under the RTP norm, to stop human rights violations that continue to take place in the Darfur region of Sudan. On 30 July 2004 the UN Security Council adopted Resolution 1556 (2004), imposing sanctions on Sudan in response to the ongoing humanitarian crisis and widespread human rights violations, including continued attacks on civilians. These sanctions were later modified and strengthened with the adoption of Resolution 1591 (2005),⁹³ which expanded the scope of the arms embargo and imposed additional measures including a travel ban and an assets freeze on individuals such as President of Sudan Omar Hassan Ahmad Al-Bashir.

The enforcement of the arms embargo was strengthened by Resolution 1945 (2010).⁹⁴ Even though the Government of Sudan has continued its hostile behaviour towards its people, no military intervention has occurred. This is in contrast to the situation in Libya where just after a few months of non-compliance by the Government of Gaddafi, military intervention occurred. This clearly displays the inconsistency in the implementation of the RTP doctrine.

Ultimately, the intervention must involve proportional means and follow all norms of humanitarian law, and there must be a reasonable belief among policy-makers that

⁹³UN Security Council Resolution 2091: Expansion of the scope of the arms embargo on the Sudanese Government, S/RES/2091, (11 November 2005), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2091%282013%29. (accessed 2 June 2013). In this Resolution, the Security Council sought the full and timely implementation of the final phase of the Comprehensive Peace Agreement signed in 2005, including the attractiveness of unity and a referendum on their right to self-determination in Southern Sudan. It was committed towards a peaceful solution to the conflict in Darfur, and welcomed the restoration of Chad–Sudan relations in January 2010 with regard to accusations of support of rebel groups in each other's territory. Acting under Chapter VII of the United Nations Charter, the Council extended the mandate of the expert panel monitoring the arms embargo was extended until October 19, 2011, which was originally established by Resolution 1591 (2005). It was asked to report on its work and coordinate activities with the African Union – United Nations Hybrid Operation in Darfur (UNAMID). All countries, United Nations agencies, the African Union and others were urged to co-operate with the expert panel by providing information when requested. Regional states in particular were required to report on steps they had taken to implement measures contained in resolutions 1556 (2004) and Resolution 1591.

⁹⁴ Patrick W 'No Quick Way to Enforce ICC Warrant for Bashir' *Reuters* (5 March, 2009), available at <http://uk.reuters.com/article/2009/03/05/sudan-court-enforcement-idUKN0533860520090305> (accessed 19 August 2013).

intervention will succeed in ending suffering and perhaps more importantly will not escalate or enlarge the crisis.⁹⁵ It is vital to note that ICISS does not stipulate any parameters for how to determine if the 'reasonable prospects for success' criteria is met which leaves the criteria to the interpretation of whoever wishes to implement such intervention and leaves it open to misuse. The language on the appropriate response to mass atrocities defined by ICISS was well considered. It is meant to change the tone of the humanitarian intervention debate and move away from the extreme of either upholding sovereignty or basic humanitarian principles. Therefore when an RTP situation comes before the UN Security Council, the members of the Council, especially the five permanent members, will have to publicly defend their positions.⁹⁶ By creating standard benchmarks for action, ICISS believed states could be more effectively pressured by the public and other players in the international community to respond in a decisive and timely manner.⁹⁷

The hypothesis made by ICISS is that if states are presented with the facts of a crisis, the international community will come to a unified position.⁹⁸ Sadly this has not been the case. For example, while the AU had a clear peaceful diplomatic road map to the Libyan crisis, the UN Security Council and NATO opted for a more aggressive approach to resolve the crises which was military intervention. In addition, even if states agree on the facts of a situation, there is not a reasonable expectation that states will agree on the threshold criteria.⁹⁹ There could be difference in schools of thoughts over the criteria of last resort and reasonable prospects. The element of the responsibility to react is very controversial and will remain so for years to come.

2.2.6 The final element of RTP- Responsibility to rebuild

The final element of RTP, responsibility to rebuild, is more widely embraced by the majority of states. The international community should aid with rebuilding if needed and close cooperation with local people. This may mean staying in the country for some time after the initial purposes of the intervention have been accomplished. Too often in the past the

⁹⁶ High-Level Panel Report, note 88 above, para. 202.

⁹⁷ Shigekane R 'Reform of the Security Council Veto' in University of California, *The responsibility to protect (R2P): Moving the Campaign Forward*, Human Rights Center, Region, politics and globalisation program, international human rights law clinic (2007).

⁹⁸ Bellmay A 'Whither the responsibility to protect? Humanitarian Intervention and the 2005 World Summit,' *Ethics and International Affairs* (2006) 20.

⁹⁹ ICISS Report , 35-37

responsibility to rebuild has been insufficiently recognized, the exit of the interveners has been poorly managed and the commitment to help with reconstruction has been inadequate. Countries have also found themselves at the end of the day still wrestling with the underlying problems that produced the original intervention action. It is of great importance to note that there is an increased responsibility if a military intervention has taken place. The ICISS outlines the three areas that need to be addressed in a rebuilding effort; these include security, judicial processes, and development.¹⁰⁰ Making reference to the Libyan case; retaliation attacks,¹⁰¹ torture, and random arrests remain pervasive on the part of both Gaddafi loyalists and opposition forces, further undermining the responsibility to rebuild and constructive reconciliation attempts. The establishment of an independent investigative commission, as envisaged by the TNC along the lines of South Africa's Truth and Reconciliation process, will be paramount in holding perpetrators of abuses accountable, compensating victims, and healing the wounds of a bitter past.

2.3 The Legality of the RTP

The legality of the RTP is a sensitive matter. It is worth noting that the RTP is only a political non-binding norm and not legally binding under international law. The exercise of the RTP depends on the kindness of the international community, regional organizations and individual member states. The failure to adequately respond to the most atrocious crimes against humanity leads to a special and important commitment to protect the human population from genocide, war crimes, ethnic cleansing taken by world leaders during the United Nations 2005 World Summit. The international community was convinced that it could no longer ignore the changing conditions of wars and crimes against humanity.¹⁰² There is still much opposition against the RTP legality. Those opposed to the legality of the RTP doctrine remain convinced that humanitarian intervention should remain illegal, because of the principle of state sovereignty (as stated by the World Summit, General Assembly, the Security Council and the UN Secretariat) must be respected.

¹⁰⁰ Ban, Ki-moon 'Report of the Secretary General – Early warning, assessment and the responsibility to protect' (UN A/64/864, 14 July 2011), available at <http://www.responsibilitytoprotect.org/N1045020%281%29.pdf> (accessed 19 August 2013).

¹⁰¹ Donatella R 'Tales of terror as rockets fall on Benghazi', Amnesty International LiveWire (10 March 2011) available at <http://livewire.amnesty.org/2011/03/24/tales-of-terror-as-rockets-fall-on-benghazi/> (accessed 10 March 2013).

¹⁰² 'Crisis in Syria' International Coalition for the responsibility to protect (2012), available at www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria (accessed 5 February 2012).

2.3.1 The idea of state sovereignty as outlined in UN charter

Sovereignty has come to signify the legal identity of a state in international law. It is a concept which provides order, stability and predictability in international relations since sovereign states are regarded as equal, regardless of size or wealth. The principle of sovereign equality of states is enshrined in Article 2(1) of the UN Charter. Internally, sovereignty signifies the capacity to make authoritative decisions with regard to the people and resources within the territory of the state.¹⁰³ Generally, however, the authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements.¹⁰⁴ A condition of any one state's sovereignty is a corresponding obligation to respect every other state's sovereignty. This is embodied in the norm of non-intervention as enshrined in Article 2(7) of the UN Charter.

A sovereign state is empowered in international law to exercise exclusive and total jurisdiction within its territorial borders.¹⁰⁵ There are exceptional arrangements between states for cases of completing jurisdiction; other states have the corresponding duty not to intervene in the internal affairs of a sovereign state. If that duty is violated, the victim state has the further right to defend its territorial integrity and political independence. For example, the consensus in international law is that a state does not have any obligation to surrender an alleged criminal to a foreign state, because one principle of sovereignty is that every state has legal authority over the people within its borders. Such absence of international obligation, and the desire for the right to demand such criminals from other countries, has caused a web of extradition treaties or agreements to evolve. When there is no extradition agreement in place, or when applicable extradition agreements are inapplicable, a sovereign may still request the expulsion or lawful return of an individual pursuant to the requested state's domestic law. This can be accomplished through the immigration laws of the requested state or other facets of the requested state's domestic law. Similarly, the penal procedure codes in many countries contain provisions allowing for extradition to take place in the absence of an extradition agreement. Sovereigns may, therefore, still request the expulsion or lawful return of a fugitive from the territory of a requested state in the absence of an extradition treaty. In

¹⁰³ Evans G & Sahnoun M *The responsibility to protect*, Foreign Affairs (2001) 101.

¹⁰⁴ ICISS Report, 12.

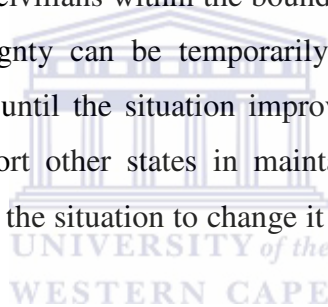
¹⁰⁵ Oldemienen M *Non-intervention or responsibility to protect?* available at <http://www.e-ir.info/2012/01/14/non-intervention-or-responsibility-to-protect/> (accessed 10 October 2013). See also ICISS Report, 12.

the era of decolonization, the sovereign equality of states and the correlative norm of non-intervention received its most emphatic affirmation from the newly independent states. The UN Charter in Article 2(7) seems to be clear. It states:

‘Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially the domestic jurisdiction of any state’.

Yet an appeal to Chapter VII of the UN Charter has allowed the UNSC to facilitate intervention in the interest of international peace and security. The recent UN-supported actions taken against Bosnia,¹⁰⁶ Libya,¹⁰⁷ and Somalia¹⁰⁸ are supported by this point of view.¹⁰⁹

Even though both the UNSC and the UN Secretariat advocate for respect for sovereignty, this is not an absolute right. States can only enjoy full sovereignty on condition they respect and protect the human rights of their civilians within the boundaries of their state. When the state fails to do so, then its sovereignty can be temporarily interfered with for the sake of international peace and security until the situation improves. The international community has a duty to protect and support other states in maintaining their commitment to their civilians and otherwise engage in the situation to change it for the better.¹¹⁰ However, neither



¹⁰⁶ UN Security Council Resolution 2019 on authorization to establish for a further period of 12 months a multinational stabilization force (EUFOR) in Bosnia and Herzegovina as a legal successor to stabilization force (SFOR) (16 November 2011), available at: <http://www.refworld.org/docid/4ee8a38d2.html> (accessed 23 June 2013).

¹⁰⁷ UN Security Council Resolution 1973 on the expansion of the scope of the arms embargo on the Sudanese Government (11 March 2011) available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973%282013%29. (accessed 2 June 2013). On 19 March 2011, a multi-state coalition began a military intervention in Libya to implement United Nations Security Council Resolution 1973, which was taken in response to events during the war, and military operations began, with US and British naval forces firing over 110 Tomahawk cruise missiles, the French Air Force, British Royal Air Force, and Canadian Royal Canadian Air Force undertaking sorties across Libya and a naval blockade by Coalition forces.

¹⁰⁸ UN Security Council Resolution 794 on the creation of the Unified Task Force in Somalia. (S/RES/1973 (11 March 2011), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973%282013%29. (accessed 10 June 2013). United Nations Security Council resolution 794, adopted unanimously on 3 December 1992, after reaffirming resolutions 733 (1992), 746 (1992), 751 (1992), 767 (1992) and 775 (1992), the Council expressed grave concern at the deteriorating situation in Somalia and authorized the creation of the Unified Task Force (UNITAF) to create a ‘secure environment’ in order to provide humanitarian assistance to the civilian population. The current resolution determined that the magnitude of human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance’ constituted a threat to international peace and security.

¹⁰⁹ Von Hippel K ‘The Non-intervention Norm Prevails: An Analysis of the Western Sahara’ (1995) 33.

¹¹⁰ Ramesh T *The responsibility to protect- norms, laws and the use of force in International Politics* (2011)21.

the 2001 Report nor the 2005 Resolution on the RTP are legally binding documents. The RTP doctrine is strictly speaking a political agreement and not yet a legally binding norm.¹¹¹

In addition, the RTP norm as articulated in the 2005 World Summit Outcome addresses some of these legality requirements, but falls short on others. The inclusion of the RTP in the World Summit Outcome serves some aspects of the promulgation requirement. While it did not promulgate the norm into law, it did publicize the foundations upon which a legal norm would grow and set the parameters for further normative debate.¹¹² In turn, the fact that the World Summit Outcome tied the RTP to a set of established international crimes speaks to a number of the legality requirements. Compared to the formulations of triggering events in the ICISS and High Level Panel reports, the World Summit Outcome's linking of the responsibility to existing legal categories significantly enhances the clarity of the triggering events and scope of the norm.

2.3.2 Threat to peace under UN Charter

Chapter VII of the UN charter provides the legal basis for military intervention by the UNSC in situations where a 'threat to peace', a 'breach of the peace' or an 'act of aggression' is at hand.¹¹³ According to Article 24(1) of the Charter the UNSC carries out the responsibility of maintaining international peace and security on behalf of the member states and decisions taken by the UNSC is binding upon the member states.¹¹⁴ Affirmative votes of nine of its fifteen members including the concurring votes of the Permanent members; the USA,¹¹⁵ the United Kingdom, France, China and Russia,¹¹⁶ is needed to reach a decision within the UNSC.¹¹⁷ However, established practice indicates that abstention by one or more Permanent Members does not prevent a decision from being made.¹¹⁸

¹¹¹ Colleen M 'Lon Fuller and the Moral Value of the Rule of Law' *Law and Philosophy* (2005) 24.

¹¹² 2005 World Summit Outcome, GA Res. 60/1, paras.1 38-39 (24 October 2005).

¹¹³ Article 39, UN Charter (1945).

¹¹⁴ Article 25, UN Charter (1945).

¹¹⁵ The Outcome Document states: '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 V II, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.

¹¹⁶ Nanda V *The Protection of Human Rights: Will the UN Human Rights Council and the Emerging New Norm 'responsibility to protect Make a Difference'?* (2007) 35.

¹¹⁷ Article 27(3) UN Charter (1945).

¹¹⁸ Danish Institute of International Affairs *Humanitarian Intervention. Legal and Political Aspects* Danish Institute of International Affairs, Copenhagen (1999). The UN Security Council passed Resolution 1973, which created the legal framework for the creation of a 'no-fly zone' over Libya and demanded an immediate ceasefire

When a serious situation has arisen posing a possible threat to international peace and security, a series of decisions must be addressed by the UNSC. According to Article 39 of the UN Charter, the existence of a 'threat to peace', 'a breach of the peace' or an 'act of aggression' needs to be decided upon in addition to what would be appropriate measures in response to the situation at hand. Non-military measures such as economic sanctions may be sufficient and are always preferred as the initial form of intervention. According to Article 41 of the UN Charter when referring to necessary measures this could also include the use of military force.¹¹⁹ In accordance with Article 42 of the UN Charter, military force is only to be used when non-military measures 'would be inadequate or have proved to be inadequate'. If military enforcement action is decided upon, Article 43 stipulates that special agreements are to provide the UNSC with the forces necessary to carry out the action. For example The African Union and UN Hybrid operation in Darfur, referred to by its acronym UNAMID was established on 31 July 2007 with the adoption of UNSC Resolution 1769.¹²⁰

Legal scholars such as Damrosch argue that using the UN Charter's Article 39 'threat to the peace,' as a justification of the RTP military intervention is questionable because massive human rights violations do not necessarily entail threats to peace and security.¹²¹ Instead economic sanctions and other non-forcible measures are quite acceptable methods for enforcement of the full range of international human rights law, whether or not the human rights violations in question endanger international security. Yet in practice such measures are always overlooked for military intervention as was the case in Libya. Advocates of the RTP have claimed the legality of the doctrine by the unanimous interpretation of Article 39 of the UN Charter.

and an end to attacks on civilians by armed forces loyal to Colonel Muammar Gaddafi. The UN General Secretary said that these attacks might indeed constitute 'crimes against humanity'. The Security Council imposed a ban on all flights over the country's airspace and tightened its existing sanctions on the Gaddafi regime and its supporters. Permanent members: Russia, China Non-permanent members: Germany, Brazil, India abstained from supporting this resolution.

¹¹⁹ International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN Doc. A/56/10 (2001).

¹²⁰ UN Security Council Resolution 5727 of 10 June 2007 and the report of the Secretary General of 31 June (S/2007/5727).

¹²¹ L Damrosch 'Commentary on Collective Military Intervention to Enforce Human Rights' in Damrosch and Scheffer (eds) Law and Force (2010) 219.

Generally the legality of the RTP doctrine begs the question of: which of the two is more important: Sovereignty or human rights? The RTP gives priority to human rights and contradicts the Westphalia norm of sovereignty by claiming that sovereignty is not absolute and binding, but a privilege that states earn when they protect their civilians.¹²² The ICISS stated: ‘The RTP has come to be seen as an instrument that can strengthen the capacity of weak states to fulfil their sovereign responsibilities to their own citizens’.¹²³ It is vital to mention that in the RTP doctrine we have such a norm in which the international community can act when gross human rights violations occur, but in practice we hardly apply the RTP in its intended form.

2.3.3 The African Union and the RTP

From the onset the AU displayed massive determination towards bettering the lives of the African people especially when it came to human rights violation. Unlike their predecessor the organisation of OAU which lacked both the statutory authority and institutional capacity to intervene in matters related to peace and security. This was apparent with their failure to intervene in the tyranny of Idi Amin’s Uganda in the late 1970s and the 1994 Rwandan genocide. In addition the OAU further failed to address human rights violations in the continent by their support for and emphasis on the principles of national sovereignty and non-interference. The AU demonstrates a fundamental shift from the OAU policy of non-interference to one that embraces international co-operation and recognises the superiority of the UN Charter in peace and security.¹²⁴ It has also adopted various engagement alternatives, from mediation, to using force to intervene in specific circumstances.

The AU exhibited significant support for the RTP when through Article 4(h) of its Constitutive Act it institutionalised the AU’s right to intervene in a member state ‘in respect of grave circumstances: war crimes, genocide and crimes against humanity’. In addition, as members of the UN,¹²⁵ African states have also endorsed the RTP principle in the General

¹²² Van der Laan M.A ‘*The Giant and the Dwarf: The responsibility to protect norm- successful on paper, worthless in practice- A critical reflection on four human rights cases*’ University of Leiden (2012)15, available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/19225/Thesis%20Political> (accessed 10 October 2013).

¹²³ *Idem*.

¹²⁴ African Union Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2003.

¹²⁵ Finnemore M *The Purpose of Intervention: Changing beliefs about Intervention* (2003) 78.

Assembly's World Summit Outcome Document (2005) and, more recently,¹²⁶ in Security Council Resolution 1674 (28 April 2006).¹²⁷

To further display their determination towards promoting peace, security, and stability on the continent, the AU amended the Constitutive Act to introduce a new ground of intervention by recognising the rights of the AU to intervene upon the recommendation of the Peace and Security Council when there is a serious threat to legitimate order,¹²⁸ for the purpose of restoring peace and stability in a member state of the AU.¹²⁹ Commentators have criticised the amendment, especially in regards to the meaning of the phrase 'serious threats to legitimate order', contrasting the justifications of war crimes, crimes against humanity and genocide,¹³⁰ the definitions of which are provided for in the statutes of the international criminal tribunals for Rwanda and Yugoslavia.¹³¹ They have further been clarified by the jurisprudence of these two tribunals. However the concept on intervention justified by a serious threat to legitimate order is not defined anywhere.¹³² It can therefore be assumed that a *legitimate order* can only result from a free and fair election which allows the majority to determine whom they wish to govern them. However, what constitutes a free and fair election is itself a highly debatable issue in the African continent. One can cite a classical example is

¹²⁶ *UN Summit Outcome Document*, UN doc, A/Res./60, UN Summit Outcome Document (24 October 2005) 138-140.

¹²⁷ UN Security Council Resolution 1674 on The protection of civilians in armed conflict (11 March 2011), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1674%282013%29. (accessed 22 June 2013).

¹²⁸ Baimu E & Sturman K *Amendment to the African Union's Right to Intervene: A shift from Human security to regime security* African Security Review (2003) 12.

¹²⁹ Constitutive Act of the African Union (2000), Article 3(f).

¹³⁰ War Crimes refers to, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. *Crimes against humanity* refers to 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. Unlike crimes against humanity, genocide has been codified and its definition is not generally subject to debate. The Statutes of the ad hoc Tribunals for the former Yugoslavia and for Rwanda adopted verbatim the definition of genocide found in Article 2 of the 1948 Convention on the prevention and punishment of the crime of genocide: 'Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.'

¹³¹ Stedman SJ *The New Interventionists* Foreign Affairs' (1993) 72.

¹³² Baimu, E & Sturman K *Amendment to the African Union's Right to Intervene: A shift from human security to regime security* African Security Review (2003) 12.

Zimbabwe's 2002 presidential elections and this bears testimony to the contentious nature of what constitutes free and fair elections in Africa.¹³³

The events in Kenya following the 2007 presidential elections provide another illustration to this debate.¹³⁴ Adding to the controversy is the question relating to what constitutes a threat to legitimate order. Are peaceful demonstrations by people demanding political changes to be considered a threat to legitimate order justifying intervention by the AU? This begs the question of whether this provision could have helped President François Bozizé the former president of Central African Republic or Gaddafi former president of Libya when rebels attempted to topple them from power to get assistance from the AU, in order to crush uprisings against their regimes.¹³⁵

It is also a matter of concern that the RTP within the African context is vulnerable to exploitation in order to legitimise the pursuit of the self-interest of western states and former colonial masters are often economically and politically powerful, as well as militarily stronger. Poor and failing states in the African continent often fall prey to interventionist tendencies disguised under the RTP. It can be argued, from this perspective that the supposed universal humanitarian values amount to nothing less than the new scramble for African resources by western states.¹³⁶ For example, after the NATO military intervention in Libya scores of Western companies received deals in the oil sector from the new regime.¹³⁷ In summary even though the AU seems to embrace the RTP they have not been able to fully internalise the doctrine to the degree that the organisation is willing to challenge the sovereignty of one or more of its powerful members; even if that member has engaged in norm violating behaviour. Undoubtedly, such a stance is not limited to the AU only. Despite a draft of UN Security

¹³³ Baimu E & Sturman K 'Amendment to the African Union's Right to Intervene: A shift from human security to regime security' *African Security Review* (2003)12.

¹³⁴ The 2007–08 Kenyan crisis was a political, economic, and humanitarian crisis that erupted in Kenya after incumbent President Mwai Kibaki was declared the winner of the presidential election held on December 27, 2007. Supporters of Kibaki's opponent, Raila Odinga of the Orange Democratic Movement, alleged electoral manipulation. This was widely confirmed by international observers, perpetrated by both parties in the election. In addition to staging several nonviolent protests, opposition supporters went on a violent rampage in several parts of the country, most noticeably in Odinga's homeland of Nyanza Province and the slums of Nairobi, part of his Langata constituency. Police shot a number of demonstrators, including a few in front of TV news cameras, causing more violence directed toward the police.

¹³⁵ Ibid.

¹³⁶ Belloni R *The Tragedy of Darfur and the Limits of the responsibility to protect* Ethnopolitics (2006) 5.

¹³⁷ Chipaika R 'The Libya Crisis: The Militarisation of the New Scramble and More' *International Journal of Humanities and Social Science* (2012) 8.

Council resolutions passed under Chapter VII of the UN Charter, no state has seriously acted toward humanitarian intervention in Darfur. In this sense, the RTP principle has yet to be fully internalised anywhere in the world.

2.4 Conclusion

The legality of the RTP as seen from the preceding paragraphs is a highly debatable concept. The UN Charter and the Constitutive Act of the AU make mention of a duty to intervene, but fail to list humanitarian grounds as one of the reasons for intervention. Both instruments list threat to global peace and security as a ground for intervention, with the AU Constitutive Act going further to list the existence of a serious threat to legitimate order as a ground for intervention after recommendation from the Peace and Security Council. Human rights violations do not necessarily entail a threat to international peace and security and there is therefore no need for military intervention. Economic and other non-forcible measures can be employed. The absence of humanitarian grounds in the UN Charter and the Constitutive Act of the AU as justification for intervention in the international affairs of a state does not, legally speaking, grant it legality. In other words, legally speaking, the right to intervene on humanitarian grounds do not exist. Chapter 3 will examine the implementation of the RTP further by exploring the case of Sudan and the role played by the UN and AU in terms of conflict resolution.

CHAPTER THREE

3. The Sudan case: Failed intervention or inappropriate application of RTP?

The previous chapters have largely expounded on the RTP doctrine and outlined the core principles and elements of the doctrine. In the light of the research questions posed in the first chapter, the current chapter takes on the debate of the implementation of the RTP further by exploring the case of Sudan and the role played by both the UN and AU in terms of conflict resolution. In other words this chapter assesses how the RTP doctrine was implemented in this particular case.

3.1 Background to the Sudan Conflict

The crisis in the Darfur region of Sudan became violent in 2003. However, tensions had been festering for years because of the political and economic marginalization of western Sudan by the Government in Khartoum. The starting date of the conflict is hard to determine as the underlying causes have been there for a long time, especially the question regarding resources. As with the conflict in the south which recently led to the creation of South Sudan, the principal issue was that Khartoum seized the revenues from the resource-rich parts of the country.¹³⁸ During 2003 the rebels managed to score several important victories against the Governmental army, forcing the regime in Khartoum to rethink its strategy. The Government in Khartoum responded brutally by deliberately undertaking a campaign to ethnically cleanse African tribes.¹³⁹ In response to the attacks by the Darfur rebel groups, the Government launched counter-attacks against civilian populations using both conventional military forces and local Arab militias. In fact the Sudanese Government was reported to be privately funding the Arab rebel groups with arms.¹⁴⁰ The Government would equip the Arab militias,

¹³⁸ El-Battahani A 'A complex web: politics and conflict in Sudan Accord' (2006) 12.

¹³⁹ Nash KL 'responsibility to protect: Evolution and Viability' A thesis submitted to the Faculty of Graduate School of Arts and Sciences of Georgetown University in partial fulfilment of the requirements for a degree of Master of Arts in Conflict Resolution, Washington DC (10 May 2010) 35. See also Tubiana J *Land and Power: the Case of the Zaghawa* (2008) available at <http://africanarguments.org/2008/05/28/land-and-power-the-case-of-the-zaghawaw/> (accessed 2 September 2013). The conflict centres on the three African ethnic groups, the Fur, Zaghawa, and Massaleit, in opposition to nomadic Arab ethnic groups. Intermittent hostilities between the largely African-Muslim ethnic groups and the Arab inhabitants of Darfur can be traced back to the 1930s and most recently surfaced in the 1980s. Consecutive Governments in Khartoum have long neglected the African ethnic groups in Darfur and have done very little to prevent or contain attacks by Arab militias against non-Arabs in Darfur.

¹⁴⁰ Williams PD & Bellamy AJ 'The responsibility to protect and the Crisis in Darfur' *Security Dialogue* (2005) 36.

and they would ride into a village and destroy anything left after the completion of a Government aerial bombardment.¹⁴¹

The consequences of this violence for the people of Darfur have been catastrophic. Deaths resulting from the conflict have been estimated at anywhere from 300 000 to 500 000 and 2.8 million Darfuris have fled their homes due to conflict.¹⁴² It has been difficult for humanitarian workers to maintain a constant presence in the region because of harassment by the Government.¹⁴³ In addition, the rapid deterioration in the humanitarian situations in many parts of Darfur led to outright shortages in basic supplies, such as food and medicine.¹⁴⁴ Beyond the immense tragedy of the loss of lives is the loss of livelihoods. When the militias sweep into villages they methodically burn homes and agricultural land, poison wells, destroy food stocks, and kill livestock. These actions represent the destruction of all the resources that villagers have amassed over generations and will make it immensely difficult for them to adequately provide for themselves and their families.¹⁴⁵

The humanitarian situation has been further exasperated due to food shortages caused by the conflict, and there have been reports that the Sudanese Government relocated Arab populations to areas and settlements previously occupied by other groups.¹⁴⁶ The former residents had been driven away by Government forces and Janjaweed rebel groups supported

¹⁴¹ International Crisis Group ‘*Conflict History: Sudan,*’ International Crisis Group, available at www.crisisgroup.org/home/index (accessed 17 February 2013).

¹⁴² *Darfur Genocide* World without Genocide available at www.worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide (accessed 5 September 2013).

¹⁴³ Alhaji MS & Johnstone I *Peacekeeping in Sudan: The Dynamics of Protection, Partnerships and Inclusive Politics* Center on International Cooperation (May 2007). See also Reeves E *Humanitarian Conditions in Darfur: The most recent reports reveal a relentless deterioration* Sudan Tribune (10 February 2013), available at www.sudantribune.com/spip.php?article45480 (accessed 2 September 2013).

¹⁴⁴ Save Darfur Coalition ‘*The Genocide in Darfur-Briefing Paper,*’ Save Darfur Coalition, available at www.savedarfur.org/pages/background/ (accessed 9 March 2013).

¹⁴⁵ Reeves E *A Long Day’s Dying: Critical Moments in the Darfur Genocide* The Key Publishing House Inc, Toronto, Canada (2007) 3.

¹⁴⁶ Clough M *Darfur: Whose responsibility to protect?* Human Rights Watch (March 2005), available at www.hrw.org/wr2k5/darfur/darfur. (accessed 12 May 2013).

by the state and became internally displaced persons.¹⁴⁷ An AU force has been stationed in Darfur for 9 years, after being first deployed in June 2004.¹⁴⁸

As a result of all the atrocities committed by the Sudanese Government on 4 March 2009, ICC judges issued an arrest warrant for Sudanese President Omar Hassan al Bashir. The warrant holds that there are reasonable grounds to believe Bashir is criminally responsible for five counts of crimes against humanity and two counts of war crimes.¹⁴⁹ The charges relate to alleged attacks by Sudanese security forces and pro-Government militia in the Darfur region of Sudan during the Government's six-year counter-insurgency campaign.¹⁵⁰ The ICC warrant states that there are reasonable grounds to believe attacks against civilians in Darfur were a core component of the Sudanese Government's military strategy, which involved attacks which were widespread and systematic, and that Bashir acted as an indirect perpetrator.¹⁵¹ Regardless of the initiatives shown by the AU notably by deploying troops to restore a secure situation throughout Darfur, underpinned by a political settlement and allowing a safe environment for the return of internally displaced persons (IDPs) and refugees;¹⁵² the support of organisations such as the EU and NATO which helped the AU expand its peacekeeping mission in Darfur by providing airlift for transport of additional peacekeepers into the region and by training AU personnel,¹⁵³ the international response to curb the violence in Darfur has been ineffective. The international presence on the ground is still insufficient and the violent continues.¹⁵⁴

¹⁴⁷ Ismail O & Jones L *Neglecting Darfur* The Enough Project, Washington DC (September 2010) 3. available at www.enoughproject.org/files/NeglectingDarfur.pdf (accessed 2 September 2013). See also Gramizzi C & Tubiana J *Forgotten Darfur: Old Tactics and New Players* Small Arms Survey, Graduate Institute of International and Development Studies, Geneva (2012), available at www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP-28-Forgotten-Darfur.pdf (accessed 5 September 2013).

¹⁴⁸ Prunier G *Darfur's Sudan Problem* (14 September 2006) [available at www.opendemocracy.net/democracy-africa/democracy/darfur_conflict_3909.jsp](http://www.opendemocracy.net/democracy-africa/democracy/darfur_conflict_3909.jsp) (accessed 6 March 2013).

¹⁴⁹ *Situation in Darfur, Sudan, in the Case of The Prosecutor v. Omar Hassan Ahmad Al Bashir (Omar AL Bashir) Warrant of Arrest for Omar Hassan Ahmad Al Bashir* March 4, 2009 available at www.icc-cpi.int/iccdocs/doc/doc639078.pdf (accessed 9 March 2013).

¹⁵⁰ Dague T *Sudan: The Crisis in Darfur and Status of the North-South Peace Agreement* CRS Report for Congree (Prepared for Members and Committees of Congress) (2007) 45.

¹⁵¹ Arieff A, Margesson R & Browne M A *International Criminal Court Cases in Africa: Status and Policy Issues* CRS Report for Congress (prepared for Members and Committees of Congress) (2 April 2010)11, available at www.amicc.org/docs/RL34665_20100402.pdf (accessed 2 September 2013).

¹⁵² Sorbo GM & Tjonneland E *The African Union: towards a new architecture for peace, democracy and development?* Ministry of Foreign Affairs, Oslo, Norway (2008).

¹⁵³ *NATO assistance to the African Union*, available at www.nato.int/cps/en/natolive/topics_8191.htm (accessed 3 September 2013).

¹⁵⁴ Gramizzi C & Tubiana C 'Forgotten Darfur: Old Tactics and New Players Small Arms Survey,' *Graduate Institute of International and Development Studies, Geneva* (2012) 2.

3.2 International response to and debate on the crisis in Darfur

At first, the Darfur crisis was ignored by the international community for almost a year. There was barely any reaction on the part of the international community, which had constantly misconstrued the Sudanese armed conflict, interpreting it to be a religious conflict and not a racial one.¹⁵⁵

South Africa is viewed as a leader in the African continent and has placed itself in pole position as a role model of democracy. During the leadership of former president Thabo Mbeki the position of the ANC Government in South Africa seemed to be silent and did very little with regards to condemning the inhumane deeds the Sudanese Government was committing in Darfur. Many in the west have easily pointed out that if Africans themselves care less about African victims of the Darfur catastrophe, why should the rest of the world care.¹⁵⁶ For example Abdelbagi Jibril, Executive Director of the Darfur Relief and Documentation Centre, laments as follows: 'Because of its glorious history, the position of the ANC Government in South Africa, in support of the crimes the Sudanese Government continues to commit in Darfur, disturbs the victims of this tragedy more than the positions of China, Egypt, Algeria, Russia and other friends of Sudan.'¹⁵⁷

South Africa's position on the Darfur conflict has disappointed the international community especially those who were calling for a strong international response to what has been called the world's most severe humanitarian and human rights crises. In the past in the UN Human Rights Council, South Africa has consistently tried to weaken efforts to address this conflict; for example: in 2006, South Africa opposed a resolution critical of Khartoum's notorious conduct in Darfur, supporting instead a weaker resolution that excluded any reference to follow-up action by the Council and to the Sudanese Government's duty to protect civilians.¹⁵⁸ In 2007, in its capacity as a newly elected member of the UNSC, South Africa

¹⁵⁵ Prunier G 'The Politics of Death in Darfur' *Current History* (2006) 105.

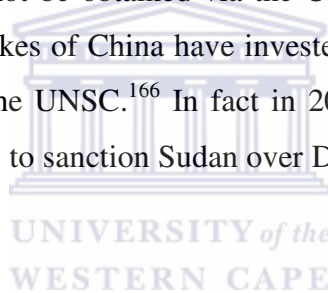
¹⁵⁶ Human Rights Watch, 'South Africa's Troubling Foreign Policy', letter to the South African Deputy Minister of Foreign Affairs, 31 December 2007, available at www.org/english/docs/2007/12/31/safric17721.htm (accessed 17 January 2013), See also Jibril A *South Africa and Darfur- fact sheet* Pambazuka News, Issue 321 (27 September 2007) available at www.pambazuka.org/en/category/media/43487 (accessed 3 September 2013).

¹⁵⁷ Jibril A *South Africa and Darfur- fact sheet* Pambazuka News, Issue 321 (27 September 2007) available at www.pambazuka.org/en/category/media/43487 (accessed 3 September 2013).

¹⁵⁸ United Nations Office, 'Human Rights Council Notes with Concern Serious Human Rights and Humanitarian Situation in Darfur', Press Release, Geneva, 28 November 2006.

backed Sudan in rejecting the option of sanctions against combatants who attack civilians and obstruct peace efforts and against parties to the conflict that refuse to co-operate with UNAMID,¹⁵⁹ the UN-AU peacekeeping force in Darfur.¹⁶⁰ On face value, South Africa's position during that time on Darfur and relations with Sudan might have seemed confusing and inappropriate, inconsistent with South Africa's historical struggle against oppression, its constitutional values and its foreign policy commitment to the promotion of human rights and democracy.¹⁶¹

Many scholars and supporters of the RTP have called for a stronger response by the international community in response to the situation in Darfur,¹⁶² some even going so far as to argue that the RTP norm should be utilized as a full military intervention regardless of Khartoum's objections.¹⁶³ Susan Rice, the US Ambassador to the UN called for a repetition of Kosovo styled intervention by the USA, where a humanitarian intervention should be launched even if a mandate cannot be obtained via the UNSC.¹⁶⁴ This suggestion by Rice would seem unlikely, since the likes of China have invested heavily in Sudan's oil assets,¹⁶⁵ and can veto any resolution at the UNSC.¹⁶⁶ In fact in 2007, China blocked efforts by the USA and other Western countries to sanction Sudan over Darfur crisis, claiming pressure and



¹⁵⁹ UN Security Council, Resolution 1779, 5727th mtg (28 September 2007), UN Doc S/RES/1779 (2007), available at www.un.org/ga/search/view_doc.asp?symbol=S/RES/1779%282007%29 (accessed 10 June 2013).

¹⁶⁰ 'Draft Resolution Calls for 26,000-Strong African Union-UN Peacekeeping Force for Darfur', *International Herald Tribune*, 11 July 2007; and BBC News, 'Opposition to Darfur Resolution', 17 July 2007, available at <http://news.bbc.co.uk/2/hi/africa/6902400> (accessed 7 December 2012).

¹⁶¹ Department of Foreign Affairs, *Strategic Plan, 2003-2005* (March 2004)14, available at www.dfa.gov.za (accessed 25 January 2013).

¹⁶² Slim H *Dithering over Darfur? A Preliminary review of the International Response* International Affairs, Vol.80, No.5 (2004) 811-828, Williams PD & Bellamy AJ *The responsibility to protect and the Crisis in Darfur* Security Dialogue (2005)3. See also Belloni R *The Tragedy of Darfur and the Limits of the 'responsibility to protect'* Ethnopolitics (2006) 5.

¹⁶³ Bjorkenrud J *To R2P or not to R2P? That is the question. NATO's possibility and will to intervene militarily during a humanitarian crisis* Department of Political Science, Lund University (2011)1-29.

¹⁶⁴ *Military Intervention is Necessary to Stop Darfur Crisis* pbs newshour (2008) available at www.pbs.org/newshour/bb/africa/july-dec06/darfur_11-17.html (accessed 3 September 2013).

¹⁶⁵ <http://www.hrw.org/reports/2003/sudan1103/26.htm> (accessed 21 June 2013). No other time in the history of China has oil become so necessary to keep its economy booming and the nation a superpower. In its always active search to find new investments in oil, China found Sudan to be a reliable source back in 1996. Already an arms supplier to many Sudanese administrations, the Chinese Government increased its sales when the concept of oil was added to the deal. No longer were simple rifles sold to the Sudanese army, but China began producing and shipping helicopters, artillery, tanks and aircraft to the very eager Government in Khartoum.

¹⁶⁶ Macfarlane R 'Why has China been vilified by the West for its engagement in Darfur and to what extent is this justified?' *Journal of Politics & International Studies* (2012)8. See also China threatens to veto UN Darfur resolution over oil sanctions *Sudan Tribune* (18 September 2004), available at www.sudantribune.com/spip.php?article5500 (accessed 4 September 2013).

sanctions will not help resolve problems- but trade would.¹⁶⁷ The only way Rice's suggestion could work is through multilateral arrangements, with support from NATO and the AU if possible. In contrast to Rice, Prunier is of the view that a military intervention using the RTP would do more damage than good in Darfur.¹⁶⁸ According to him a NATO led operation might lead to another Iraq or Somalia, where coalition forces would be shattered with little chance of success. Overall it can be stated that there is no quick-fix to the problem as Sudan has a complex conflict which can be traced back a long time.

3.3 Analysis of Darfur based on the Precautionary Principles of RTP

It is vital that a method be formulated to analyse various cases of human rights abuses and also to determine if intervention using RTP, especially the use of non-consensual military force is necessary. When addressing the case of Darfur, I opted to focus on five principles stipulated by the International Commission on Intervention and State Sovereignty, that must be met for a non-consensual military intervention to be a viable option and if the Darfur situation meets these conditions.¹⁶⁹

3.3.1 The Principle of seriousness of Harm

On this principle, one must ask if the harm to a certain population of the nation is serious enough to warrant a military intervention under the RTP and if the situation has raised to the level of one of the four crimes namely genocide, war crimes, crimes against humanity, and crimes of aggression?¹⁷⁰

3.3.1.1 The Principle of Proper Purpose

The question under this principle is does any military intervention have the right intention behind it? This means that the primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is

¹⁶⁷ *China blocks effort to sanction Sudan over Darfur crisis* CANWEST (20 May 2007) available at www.canada.com/topics/news/world/story.html?id=4bb2ff74-12a6-4a92-a3c4-2bf5cec1481 (accessed 4 September 2013).

¹⁶⁸ Prunier G *Darfur's Sudan Problem* (2006) available at www.opendemocracy.net/democracy/africa_democracy/darfur_conflict_3909.js (accessed 2 March 2013).

¹⁶⁹ International Commission on Intervention and State Sovereignty *The responsibility to protect : Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa (2001).

¹⁷⁰ Ibid

better assured with multilateral operations, clearly supported by regional opinion and the victims concerned (the Sudanese people).¹⁷¹

Genocide should be the most heinous of war crimes, and the easiest to prevent and prosecute. But whether acts are classified and persecuted as genocidal depends upon a careful parsing of Articles II and III of the 1948 Convention on the Prevention and Punishment of Genocide. Article II describes two elements of the crime of genocide: (1) the mental element, meaning the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,’ and (2) the physical element, including killing members of a group, causing serious bodily or mental harm to members of a group, deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or part, imposing measures intended to prevent births within a group, and forcibly transferring children of one group to another.¹⁷²

A war crime must include both 1 and 2 to be called ‘genocide.’ Article III of the Genocide Convention describes five punishable forms of the crime of genocide: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; any attempt to commit the act; and complicity in genocidal acts.¹⁷³ The Genocide Convention protects national, ethnical, racial, and religious groups, with each group being listed in the Convention. Intent to engage in genocidal acts may be inferred from a pattern of coordinated Acts, however difficult to prove. Moreover, intent is construed as being not necessarily the same as motivation. It is the intent to commit the acts and the commission of the acts that are critical. Admittedly, ‘intent’ is difficult to prove. Indeed, the UN’s International Commission of Inquiry on Darfur found it taxing, unlike the lawyers of the Bush administration and the USA Congress, to demonstrate ‘intent’ in Darfur and thus to sustain a probable indictment of genocide.¹⁷⁴ Likewise, if Pol Pot were merely killing fellow Cambodians with little interest in their ancestries, perhaps the horrific killing fields there technically did not breach the Genocide Convention because no specific internal group was being targeted for destruction.

¹⁷¹ Ibid.

¹⁷² The 1948 Convention on the Prevention and Punishment of Genocide available at www.preventgenocide.org/genocide/officialtext (accessed 15 September 2013).

¹⁷³ Robert M. ‘Schindler’s Fate: Genocide, Ethnic Cleansing, and Population Transfers’ *Slavic Review*, (1996) 9.

¹⁷⁴ Cherif M ‘Crimes against Humanity,’ *Crimes of War Guide*, available at www.crimesofwar.org/ (accessed 15 February 2010).

When critically analysing the situation in Darfur the first and second principles apply. The situation in Darfur qualifies as genocide and gross human rights violations continue. The Rome Statute defines the crime of genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.¹⁷⁵

During 2004 and 2005, the UNSC received monthly reports about violence on the ground (involving the burning of villages, massacres of civilians including women and children, rape, and forced displacement) and adopted several resolutions condemning the violence, calling for negotiations, commending the efforts of the AU, and urging member states to provide the AU with resources, but largely stopped short of becoming directly engaged on the ground. There were two notable exceptions to this pattern, however. One was the establishment in September 2004 of an international commission of inquiry to determine whether genocide and crimes against humanity were being committed in Darfur, a step that would set off the chain of events leading to the UNSC referral of Sudan to the ICC in March 2005,¹⁷⁶ and the subsequent indictment by the ICC of several Sudanese leaders, including, in March 2009, of its president. The other, with little practical impact but with some symbolic meaning, was the imposition of sanctions. As always, the inner-dynamics of the UNSC were no simple matter. Members were largely in agreement that atrocities in Darfur were unacceptable. Most were willing to express this sentiment in statements and resolutions. But as far as taking measures went, significant differences quickly surfaced. China had invested in Sudan over recent years and maintained a lot of business interests in the country, especially as a purchaser of Sudanese oil, so it was no surprise that she quickly emerged as the strongest advocate of a softly-softly approach. Russia was also largely reluctant to take strong

¹⁷⁵ Core crimes defined in the Rome statute of the International Criminal Court, available at www.iccnw.org/documents/FS-CICC-CoreCrimesinRS.pdf (accessed 12 July 2013).

¹⁷⁶ Commission on Human Rights, report of the 60th session, 15 March – 23 April, (2004) 383-388.

measures against Sudan. Islamic members at the time, Algeria and Pakistan, in 2004 only tended to show solidarity with Khartoum.¹⁷⁷

Thus, these countries abstained on resolutions which packed more of a punch, such as the establishment of the investigation into Darfur atrocities, sanctions and the eventual referral of Sudan to the ICC (on this last resolution, Russia voted in favour, while the US abstained due to the Bush administration's strong aversion towards the international court). Algeria was initially reluctant to acknowledge a problem in Darfur (among the speakers in the debate during which the UNSC adopted its very first Darfur resolution in June 2004, Algeria was the only country that didn't so much as utter the word).¹⁷⁸ During its remaining time on the Security Council, Algeria tended to abstain on resolutions introducing specific measures, and was probably the Council member who was most vocal in supporting the view that Darfur was an African issue, backing the AU first and foremost, as well as respecting the views of the Sudanese Government.¹⁷⁹ The political narrative began to change after a few months. Initially, the situation in Darfur was largely seen as a campaign by the Government and its allies against the civilian population of the region in which the rebel movement played only a marginal role. Gradually, however, developments in Darfur started being seen more as a classic, symmetrical conflict for which mediation would be the most appropriate tool, and a peace agreement the ultimate goal, with accountability becoming a much less central issue.

The North-South agreement was signed in early 2005 and a few months later a UN peacekeeping operation in Sudan known as UNMIS was established to facilitate implementation. With atrocities continuing in Darfur and with the AU's Darfur mission proving manifestly unable to provide the desired levels of protection, by late 2005 some Council members (mostly Western, with some African support), began suggesting a transition from the AU to a UN operation and the creation of a single UN mission that would

¹⁷⁷ Ian Johnstone, and Alhaji Bah. *Peacekeeping in Sudan: The Dynamics of Protection, Partnerships and Inclusive Politics* (2007) Occasional Paper. New York: Center on International Cooperation,

¹⁷⁸ It must be emphasized that not all the problems creating inaction were created by narrow self-interest: e.g. the US and UK were impeded by a post-Iraq weakening of their status as 'norm-carriers', and they also had investment in sustaining the separate North-South Sudan Comprehensive Peace Agreement. Bellamy, 'Trojan Horse?' 45-51; Traub, *Unwilling and Unable*, 6-7, 13-15.

¹⁷⁹ African Union Peace and Security Council, 45th meeting Communique, 12 January 2006, PSC/PR/Comm.(XLV).

cover all of Sudan, including Darfur.¹⁸⁰ The UNSC proceeded to request the UN Secretariat to start contingency planning and to present it with options for this process. In the next several months, such requests were included both in presidential statements and in resolutions.¹⁸¹ The UN Secretariat, reluctant to deploy another operation, argued for the need for a peace agreement prior to any deployment. A succession of joint assessment missions with the AU followed as the peace negotiations in Abuja dragged on without results; waiting for results from the next assessment mission and from the peace talks became an almost permanent feature of UNSC discussions on Darfur at the time.¹⁸²

Furthermore large-scale loss of life exists within the Darfur region of Sudan, and the Sudanese Government has shown that it is unwilling to halt, or is perhaps implicit in the commission of these crimes.¹⁸³

3.3.1.2 The principle of last resort

This principle seeks to explore whether all other available options have been exhausted. The question asked here is: Have all other non-military options under the RTP been exhausted? Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded or have failed.¹⁸⁴

It is fair to suggest that the situation in Darfur does not meet the third principle. There are other non-military tools that could be employed and some have, such as broader sanctions, targeted sanctions against Government leaders, or military actions short of an invasion, such

¹⁸⁰ The politicization and apparent corrupting of the UNHRC's reports and resolutions on the Sudan. Bellamy, 'Trojan Horse?'. 41; Traub, *Unwilling and Unable*, 8. The AU's processes and actions were, if anything, at least as ineffectual and politicized as the SC's: see the account in: Traub, *Unwilling and Unable*, 16-21; though Carment and Fischer locate the AU's deficiencies more at the level of capacity: Carment and Fischer, 'The Role of Regional Organisations', 285-6. The now defunct Human Rights Commission's failures were numerous and egregious: for a brief overview, see Nanda, 'The Protection of Human Rights', 358, while the evaluations of the Human Rights Council are more mixed: *Ibid.*, 359-364.

¹⁸¹ Breau, 'The Impact of the responsibility to protect on Peacekeeping', 464, who finds Darfur an exception to willingness elsewhere to engage in robust peace support operations: Breau, 'The Impact of the responsibility to protect on Peacekeeping', 452-4. With similar concerns regarding R2P and Darfur see Ian Johnstone and Alhaji Bah, *Peacekeeping in Sudan: The Dynamics of Protection, Partnerships and Inclusive Politics*, vol. Occasional Paper (New York: Center on International Cooperation, 2007) 5

¹⁸² Durch T 'Cross-Cutting Issues in Protection of Civilians for UN Peace Operations' (2009) 2.

¹⁸³ Joseph T & William O 'The Changing Nature of American Power' (1990) 251.

¹⁸⁴ Bagnoli C 'Humanitarian Intervention as a Perfect Duty', in Nardin T & William M (eds.) *Humanitarian Intervention Nomos XLVII* (2006) 40.

as a no fly zone.¹⁸⁵ For example on 29 March 2005 and 25 April 2006, the UNSC issued Resolutions 1591 and 1672,¹⁸⁶ respectively, condemning the continued violations of human rights and international humanitarian law in Sudan's Darfur region and, in particular, the continuation of violence against civilians and sexual violence against women and girls. The measures imposed against Sudan pursuant to UNSC resolutions included; a prohibition on the export of arms and related material to any person in Sudan, a prohibition on the provision to any person in Sudan, of technical assistance related to arms and related material;¹⁸⁷ and a travel ban and asset freeze against persons designated by the 1591 Committee.¹⁸⁸ Despite all these attempts the human rights violations still continue in Darfur.

3.3.1.3 The principle of proportional means

By this principle, the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective and meet the defined goals of the mission.¹⁸⁹ The military intervention will only be regarded as proportional in the event it meets this criteria. In other words, the intervention must involve proportional means and follow all norms of humanitarian law, and there must be a reasonable belief among policymakers that intervention will succeed in ending suffering and perhaps more importantly will not escalate or enlarge the crisis.¹⁹⁰ Military operations should be the

¹⁸⁵UN Security Council Resolution 1973 (adopted on 2011) available at www.un.org/News/Press/docs/2011/sc10200.doc.htm. (accessed 19 June 2013).

¹⁸⁶ McCormack, T & Kleffner, K 'Yearbook of International Humanitarian Law, (2009) 9. Cambridge University Press. 296. UN Security Council Resolution 1672, adopted on 25 April 2006, after recalling resolutions 1556 (2004), 1591 (2005), 1651 (2005) and 1665 (2006) on the situation in Sudan, the Council imposed travel and financial sanctions on four Sudanese individuals over their involvement in the conflict. It was the first time sanctions had been adopted against individuals in the region. The measures, imposed under Chapter VII of the United Nations Charter, were placed on Sheikh Musa Hillal, a leader of the Sudanese Government backed Janjaweed militia in Darfur, and Major General Mohamed Elhassen, commander of Sudan's western military region. Sanctions were also placed on two rebel commanders: Gabriel Abdul Kareem Badri of the National Movement for Reform and Development, and Adam Yacub Shant, head of the Sudan Liberation Movement/Arm. This resolution is in line with coercive measures such as political, economic or judicial measures and only in severe cases they may also include military action.

¹⁸⁷ UN Security Council Resolution 1591, (adopted on 20 March 2005) para 3(d).

¹⁸⁸ UN Security Council Resolution 1672 (Adopted on 25 April 2006) available at www.un.org/ga/search/view_doc.asp?symbol=S/RES/1591%20%282005%29. (accessed 15 May 2013.)

¹⁸⁹ International Commission on Intervention and State Sovereignty *responsibility to protect: Report of the International Commission on Intervention and State Sovereignty* International Development Research Centre Ottawa, Canada (2001) 37.

¹⁹⁰ Nash K 'Responsibility to protect: Evolution and Viability' Unpublished thesis submitted for the degree Master of Arts in Conflict Resolution Georgetown University (May 2010) available at <https://repository.library.georgetown.edu/bitstream/handle/10822/553268/nashKathryn.pdf?sequence=1> (accessed 14 May 2014).

minimum necessary to secure the objective.¹⁹¹ In the case of Darfur it is difficult to determine if a military mission would be of adequate scale and duration. This is compounded by the likely rejection of an armed intervention by the Government of Sudan. It is obvious that a large external civilian protection force would be required for the proportional means test to be satisfied.¹⁹²

3.3.1.4 The principle of balance of consequences

This principle poses the question: ‘Is there a reasonable belief that the military intervention will actually be able to end the ongoing atrocities and not make the situation worse?’ It is in other words a system of assessing prospects of success and the reasonableness of the intervention. Finally on the fifth principle it is difficult to predict if military intervention will bring an end to the civil war but one thing is certain that human rights violations can be reduced and civilians can be protect from the Government funded rebels. Evans identifies Darfur as ‘the classic contemporary case’ in which the balance of consequences is against coercive military measures,¹⁹³ in that intervention would put at risk the 2.5 million internally displaced people, and the North-South Comprehensive Peace Agreement.

3.4 The role of the United Nations in Darfur

In the case of the Darfur crisis, UN attempts for the prevention and removal of threats to the peace were weakened by the strong adherence to the principle of sovereignty as stated in the UN Charter and relied upon by the Sudanese Government. In addition to this constitutional dilemma for the functioning of the UN, the members of the UNSC have remained divided on the crisis and on which action to take. Sudan’s reluctance to accept proposals put forward by the UN remains a massive obstacle for a peaceful solution to the crisis. Unlike the USA, the UN has yet to refer to the crisis in Darfur as genocide. In fact no other permanent member of the UNSC has done so. In January 2005, an International Commission of Inquiry on Darfur, authorized by UNSC Resolution 1564 of 2004,¹⁹⁴ issued a report to the Secretary-General

¹⁹¹ Sidahmed AS, Soderlund WC and Briggs DE *The Responsibility to Protect in Darfur: The Role of Mass Media* (2010) 13.

¹⁹² Van Ardene-Van Der Hoeven A, Salih M, Grono N and Mendez JE *Explaining Darfur: Four Letters on the Ongoing Genocide* (2006) 45.

¹⁹³ Evans G *Responsibility to Protect* (2009), 45.

¹⁹⁴ UN Security Council, Resolution 1564 (18 September 2004), UN Doc S/RES/1564 (2004), available at www.un.org/News/Press/docs/2004/sc8191.doc.htm. (accessed 14 June 2013). UN Security Council Resolution 1564, adopted on 18 September 2004, after recalling resolutions 1502 (2003), 1547 (2004) and 1556 (2004), the Council threatened the imposition of sanctions against Sudan if it failed to comply with its obligations on

stating that the Government of the Sudan has not pursued a policy of genocide.¹⁹⁵ According to the 1948 Genocide Convention, once the UN acknowledges that it is genocide, it has to act.¹⁹⁶ Thus it is fair to assume that the UN fears not receiving the military, political and financial means it would need to act from its member states in order to bring an end to human suffering in Darfur, which could create an illegitimate UN.¹⁹⁷ In addition the UNSC has gradually called for greater UN involvement in the crisis.¹⁹⁸ It can be argued that the UN is aware of its limitations in this crisis.¹⁹⁹

Responding to pressure from the international community, the UNSC passed UNSC Resolution 1706, the first resolution to explicitly source the RTP doctrine.²⁰⁰ Although this resolution should have been regarded as a victory for the supporters of the RTP, it was largely ineffective in providing aid or ensuring the deployment of troops into the region. On 31 July 2007 the UNSC subsequently passed the Resolution 1769, which provided for the deployment of 26 000 troops from both the UN and the AU.²⁰¹ Nevertheless, only 14 804

Darfur, and an international inquiry was established to investigate violations of human rights in the region. The resolution, sponsored by Germany, Romania, the United Kingdom and United States, was adopted by 11 votes in favour to none against and four abstentions from Algeria, China, Pakistan and Russia. The abstaining countries expressed reservations about the threat of sanctions. It was the first time a Security Council resolution had invoked the Convention on the Prevention and Punishment of the Crime of Genocide by establishing the international inquiry.

¹⁹⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005) para 4.

¹⁹⁶ Theodor Meron, address to the ICD initiative on the 'Convention on the Prevention and Punishment of the Crime of genocide', Berlin, 12 May 2011. See also Article 8 of the Convention on the Prevention and Punishment of the crime of Genocide, entered into force on 12 January 1951, available at www.un.genocide-convention.org (accessed 12 July 2013).

¹⁹⁷ Prunier G *Darfur: The Ambiguous Genocide* (2007) 142.

¹⁹⁸ Bergholm L 'The African Union, the United Nations and civilian protection challenges in Darfur Refugee' (2010) Studies Centre, Oxford Department of International Development, University of Oxford.

¹⁹⁹ Zissis C *Darfur Crisis Continues* Council on Foreign Relations (4 May 2006), available at <http://www.cfr.org/publication/10600/Darfur.html> (accessed 27 January 2013).

²⁰⁰ UN Security Council, Resolution 1706 .5519th mtg (31 August 2006), UN Doc S/Res/1706 (2006), available at www.un.org/News/Press/docs/2004/sc8191.doc.htm (accessed 17 June 2013). UN Security Council Resolution 1706, adopted on August 31, 2006, after recalling previous resolutions on the situation in Sudan, including resolutions 1556 (2004), 1564 (2005), 1574 (2004), 1590 (2004), 1591 (2005), 1593 (2004), 1663 (2006), 1665 (2006) and 1679 (2006), the Council expanded the mandate of the United Nations Mission in the Sudan (UNMIS) to include deployments in Darfur to enforce the Darfur Peace Agreement. Strongly rejecting the resolution, Sudan had refused to participate in the Security Council session. Resolution 1706 was adopted by 12 votes in favour to none against and three abstentions from China, Qatar and Russia; all three said that while they supported the contents of the resolution, it lacked consent from Sudan. Given that the deployment was dependent on agreement from the Sudanese Government, the resolution marked the first time that a United Nations peacekeeping mission was authorised but failed to deploy. It was also the first armed conflict in which the Security Council had invoked the responsibility to protect resolution. On July 31, 2007, the adoption of Resolution 1769 finally authorised a peacekeeping mission for Darfur.

²⁰¹ UN Security Council, Resolution 1769(31 July 2007), UN Doc S/RES/1769 (2007), available at www.un.org/News/Press/docs/2004/sc8191.doc.htm (accessed 20 June 2013).

troops were eventually deployed by 31 October 2009. To date the violence continues while little is being done by the UN unlike in the Libyan case where military intervention was authorized in a matter of months.²⁰²

3.5 The African Union intervention in Darfur

The AU Act is the first international treaty to recognise the right to intervene for humanitarian purposes often referred to as humanitarian intervention.²⁰³ The Act provides, in Article 4(h), that the AU has the right to intervene in a member state, pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.²⁰⁴

In 2004 the AU Mission in Sudan (AMIS) was formed with a force of 150 troops. By mid-2005, its numbers had increased to about 7 000.²⁰⁵ This was an AU peacekeeping force operating primarily in the country's western region of Darfur with the primary objective of performing peacekeeping operations related to the Darfur conflict. The AMIS was authorized by UNSC Resolution 1564 but was not able to effectively contain the violence in Darfur.²⁰⁶ A more sizable, better equipped UN peacekeeping force was originally proposed for September 2006, but due to opposition from the Sudanese Government, it was not implemented at that time. AMIS' mandate was extended repeatedly throughout 2006,²⁰⁷ while the situation in Darfur continued to escalate, until AMIS was finally replaced by UNAMID on 31 December, 2007.²⁰⁸ In August 2004, the AU sent in 150 Rwandan troops to protect the ceasefire

²⁰² United Nations Peace and Security Section of the Department of Public Information in cooperation with the Department of Peacekeeping Operations, *UNAMID African Union/United Nations Hybrid Operation in Darfur*, November 2009, <http://www.un.org/en/peacekeeping/missions/unamid/facts.shtml> (accessed 19 February 2013).

²⁰³ Kuwali D 'The end humanitarian intervention: Evaluation of the African Union's right of intervention' *African Journal in Conflict Resolution* (2009) 9. 41-61 available at www.hks.harvard.edu/cchrp/pdf/AJCR_vol9_no1_2009.pdf (accessed 3 September 2013).

²⁰⁴ African Union. Article 4, Constitutive Act of the African Union, 2000.

²⁰⁵ See *The Situation in the Darfur Region of Sudan* African Union (December 2004-October 2005) available at www.africa-union.org/DARFUR/homedar.htm (accessed 3 September 2013).

²⁰⁶ UN Security Council, Resolution 1564 (18 September 2004), UN Doc S/RES/1564. available at www.un.org/News/Press/docs/2004/sc8191.doc.htm (accessed 21 June 2013). The UN Security Council expressed concern that the Sudanese Government had not fulfilled its commitments under Resolution 1556. The council praised the engagement of the AU in addressing the situation in the Darfur region. The Council also threatened the imposition of sanctions against Sudan if it failed to comply with its obligation on Darfur, and an international inquiry was established to investigate violations of human rights in the region.

²⁰⁷ Ibid

²⁰⁸ Ibid

monitors.²⁰⁹ It however, soon became apparent that 150 troops would not be enough, so they were joined by 150 Nigerian troops. During April 2005, the Government of Sudan signed a ceasefire agreement with Sudan People's Liberation Army which led to the end of the Second Sudanese Civil War.²¹⁰ The AU increased the AMIS force by 600 troops and 80 military observers. In July 2005, the force was increased by about 3 300 (with a budget of 220 million dollars). In April 2005, AMIS was increased to about 7000 (at a cost of over 450 million dollars).²¹¹

3.6 Summary of Sudan crises

The case of Darfur displayed the willingness of the AU to intervene, in contrast to the ensuing debates at the UNSC over naming the Darfur crisis genocide or not. The international reaction to the situation in Darfur struggled to meet the ideals enshrined in the RTP doctrine. However, forcible military intervention to stop the violence and establish protection for civilians was not possible. Instead, the international community's attempts to fully implement the elements of the RTP were through half measures and overblown promises. It is vital to state that the situation in Darfur applies for the first and second Precautionary Principles of RTP; the situation in Darfur equalises genocide and gross human rights violations continue.²¹² Furthermore large-scale loss of life exists within the Darfur region of Sudan, and the Sudanese Government has shown that it is unwilling to halt these. Perhaps it is implicated in the commission of these crimes. Any military intervention under the RTP would be undertaken for the right reasons. The implementation of non-military options for the prevention or peaceful resolution of the crisis has been explored to no avail and the just cause threshold has been met to constitute military intervention but the UNSC has not authorized this.

In addition multiple conflicts and lawlessness in Darfur, arising from the lack of an agreed and workable peace agreement, which in turn starts from the disloyalty and ruthlessness of the Sudan Government and the incompetence and arrogance of the leadership of the armed

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Boshoff H *The African Union Mission in Sudan: Technical and operational dimensions* African Security Review (2005) 14. Institute for Security Studies

²¹² *The Prosecutor v. Omar Hassan Ahmad Al Bashir (Omar Al Bashir)*, Second Arrest Warrant for Omar Ahmad Al Bashir) International Criminal Court (12 July 2010). See also *Report of the International Commission on Inquiry on Darfur to the United Nations Secretary General*, United Nations International Commission of Inquiry on Darfur (18 September 2004).

movements. This has proved to be a further hindrance to the proper implementation of the RTP. The UN and international donors were also unable to acknowledge the limitations of the peacekeepers' capacity and failed to invest the necessary effort into creating a workable peace agreement that could have facilitated UNAMID's mission, and did not deliver on key resources needed by the mission to fulfil its stated mandate thus it can be said that an inconsistency in the implementation of the RTP by the UNSC has failed the people of Darfur. The next case study on chapter 4 will cover the response by international actors to the 2011 Libyan uprising and the response that followed by the Libyan Government. It is valuable in highlighting the results the international community can achieve if the capacity building and early response RTP mechanisms are the primary drivers of policy.



CHAPTER FOUR

4. Making the case for RTP through the Libyan intervention

In the previous chapters I presented the debate on the implementation of the RTP by exploring the case of Sudan and the role played by the UN and AU in terms of conflict resolution. I also analysed the Sudan case using the precautionary principles of the RTP. I now turn to the case of Libya, on 23 October 2011; the National Transitional Council (NTC) declared the liberation of Libya and the official end of the war but in practice the fighting is still ongoing in Libya. The international community intervened in the internal armed conflict because it felt it had a responsibility to protect the Libyan citizens from being targeted and stop other gross human rights violations from taking place. It is noteworthy to see that the international community did apply the RTP doctrine. In this chapter I will examine the reasons for applying the RTP doctrine in the Libyan case and debate the implementation of the RTP further by exploring the case of Libya and the role played by the UN and AU in terms of conflict resolution.

4.1 Background to the Libyan Conflict

Gaddafi became the ruler of Libya in 1969. He abolished the Libyan Constitution of 1951, and adopted laws based on his own ideology 'The Green Book'.²¹³ He was supposed to leave office and give power to the people in 1977, but clung into power until 2011. During Gaddafi's rule Libya was theoretically a decentral, direct democracy state run according to his philosophy of The Green Book. Gaddafi often manipulated all spheres of Governmental structures to ensure his dominance. Despite his autocratic leadership style there were massive positives for the Libyan people under Gaddafi's rule for example; Libya had welfare systems allowing access to free education, free healthcare, and financial assistance for housing, access to fresh water across large parts of the country. Unfortunately the Government controlled every aspect of the daily life of the people.²¹⁴

²¹³ Hillstrom D *The Libyan No Fly Zone: responsibility to protect and International Law* (March 2011), available at <http://www.foreignpolicyjournal.com/2011/03/21/the-libyan-no-fly-zonerresponsibility-To-protect-and-international-law/> (accessed 11 March 2013).

²¹⁴ Claes J *Libya and the responsibility to protect* Center for Conflict Analysis and Prevention (March 2011), available at <http://www.usip.org/publications/libya-and-the-responsibility-protect> (accessed 14 March 2013).

The Libyan revolution which became a brutal internal armed conflict began with protests against Gaddafi's rule on 15 February 2011; in Benghazi where clashes with security forces that fired on the crowd. The protests escalated into a rebellion that spread across the country.²¹⁵ The protesters were armed with Molotov cocktails and stones against which the police responded with tear gas, water cannons, and rubber bullets. Libyan security forces fired live ammunition into the armed protesters.²¹⁶ The rebels were composed primarily of civilians, such as teachers, students, lawyers, and oil workers, and a contingent of professional soldiers that defected from the Libyan Army and joined the rebels. Throughout the conflict Gaddafi's administration had repeatedly asserted that the rebels included al-Qaeda fighters.²¹⁷ The opposition established an interim governing body, the NTC, which was recognized by the United Nations on 16 September 2011 and replaced the Gaddafi Government. Gaddafi remained at large until 20 October 2011, when he was captured and killed attempting to escape the country. The NTC declared the liberation of Libya and the official end of the war on 23 October 2011. The Libyan internal armed conflict was part of a bigger wave of protests going around in the Middle East at that moment and it was also known as the Arab Spring. The fighting took about half a year before it officially ended.²¹⁸

4.2 Application of the RTP or War for Profit?

The year 2011 saw the dawn of the Arab Spring in North Africa and some parts of the Middle East. In Tunisia it was responsible for the ousting of President Ben Ali from power. The notion of this revolution spread to Egypt accounting for the removal of President Mubarak from power. The revolutionary sensation continued to blow in Yemen, Syria and Bahrain. It is vital to note that in all these revolutions, the main objective was to depose dictatorial regimes and replace them with those that are more open and responsive to basic demands for human rights and democratic processes. Among all these countries, Libya was worst affected. Instead of the revolution smoothly deposing Gaddafi, he put up a fight of resistance, eventually turning the revolution into a full blown internal armed conflict between the Government and the rebels (revolutionaries). What distinguishes Libya and the other affected

²¹⁵ Claes J 'Libya and the responsibility to protect Center for Conflict Analysis and Prevention' (March 2011), available at <http://www.usip.org/publications/libya-and-the-responsibility-protect> (accessed 14 March 2013).

²¹⁶ International Coalition for the responsibility to protect, 2012, available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-Libya> (accessed 6 January 2013).

²¹⁷ International Coalition for the responsibility to protect, 2012, available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-Libya> (accessed 6 January 2013).

²¹⁸ Rothchild D and Zartman I *Sovereignty as Responsibility: Conflict Management in Africa* (1996) 22.

countries is that the UNSC overwhelmingly approved a resolution that eventually led to the imposition of a 'no-fly zone' over Libya, but giving NATO the responsibility to bomb strategic Government military installations.²¹⁹ When the UNSC passed Resolution (1973), this meant that NATO could deliberately aid rebels in their fight against Gaddafi under the RTP doctrine. Chapter VII of the UN Charter provides the legal basis for military intervention by the UNSC in situations where a threat to peace, a breach of the peace or an act of aggression is at hand.²²⁰ According to Article 24(1) of the Charter the UNSC carries out the responsibility of maintaining international peace and security on behalf of the member states and decisions taken by the UNSC is binding upon the member states.²²¹ It can be augured that UNSC displayed a biased implementation of the RTP since in their attempts to restore peace they never explored more peaceful option such as an UN peace keeping mission like in the case of Sudan.

It was also easier to acquire international consensus on Libya because of previous occurrences, such the 5 April 1986 bombing of the La Belle nightclub in West Berlin by Libyan agents, which killed three people and injured 229 people. Further, the Pan Am Flight 103 Lockerbie terrorist bombing which downed a Pan Am transatlantic flight from Frankfurt to the US on 21 December 1988, killing all 243 passengers and 16 crew on board contributed to the ease with which international consensus on Libya was garnered.²²² The bombing resulted in large sections of the aircraft being strewn over Lockerbie, Scotland, killing 11 more people on the ground. In 2003, Gaddafi accepted responsibility for the Lockerbie bombing and paid compensation to the families of the victims, although he maintained never having given the order for the attack.²²³

Even though the AU had a right to intervene in circumstances like the Libyan crisis pursuant to Article 4(h) of the AU Constitutive Act, such right was not invoked. However, the AU High-Level *ad hoc* Committee devised a roadmap for the peaceful resolution of the Libyan crisis. The roadmap was duly endorsed by the AU Assembly of Heads of state and

²¹⁹ United Nations Security Council 'Security Council approves 'no-fly zone' over Libya, authorising 'all necessary means' to protect civilians by vote of 10 in favour, with 5 abstentions' Press release, 17 March 2011

²²⁰ Article 39, United Nations Charter (1945).

²²¹ Article 25, United Nations Charter (1945).

²²² Simon T The secret wars of the CIA: New York (1989) 475.

²²³ Williams A 'Libya v. Syria: Is That the Question?' *Stanley Foundation* (2012) available at <http://www.stanleyfoundation.org/think/2012think2.html#Libya> (accessed 22 February 2013).

Government but the UNSC ignored these attempts by the AU and opted for their violent approach.²²⁴ According to the Report of the International Commission on Intervention and State Sovereignty, there are very few circumstances where military action would be justified and therefore must meet the just cause criteria, and these are large-scale loss of life including genocide, mass killings, or ethnic cleansing; genocidal intent is not relevant for military intervention. The Libyan case did not at all fit the profile of large-scale loss of life and only lasted for seven months where as the Sudan crisis has gone on for more than a decade yet the just cause precautionary has not been implemented under the RTP in that country.

4.3 International Response and Debate to the Libyan crises

From the start of the Arab spring most of the western media coverage of the events was biased against the Governments in power in the different countries. During the Libyan uprising the reporting was a one-sided view of the events, portraying the protest movement as entirely peaceful and repeatedly suggesting that the Government's security forces were unaccountably massacring unarmed demonstrators who presented no security challenge. This established a one-sided view of the international community and put all the blame on the Gaddafi regime while reality was that both sides committed crimes.

On 21 February 2011 the rebel opposition to the Gaddafi regime called on the UN to impose a no-fly zone on all of Tripoli to cut off all supplies of arms and mercenaries to the regime. On 19 March 2011 the military intervention in Libya on the basis of UNSC Resolution 1973 began. That same day, military operations began, with US forces and one British submarine firing cruise missiles, the French Air Force, USA Air Force and British Royal Air Force undertaking ground actions across Libya and a naval blockade was established by the Royal Navy.²²⁵

From the on-set it can be said that the biased coverage by the media and the violence portrayed against the rebels created support for a resolution somewhat quick, and even though some members of the UNSC did not vote in favour of it, they at least did not veto it.

²²⁴ Final Communique of meeting of the AU High-level *ad hoc* Committee on Libya, Pretoria, South Africa, 14 September 2011, South African Government Information, available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=21607&tid=42980> (accessed 22 February 2013).

²²⁵ Claes J 'Libya and the responsibility to protect' *Center for Conflict Analysis and Prevention* (1 March 2011), available at <http://www.usip.org/publications/libya-and-the-responsibility-protect> (accessed 7 March 2013).

Support from several Arab countries also gave the intervention legitimacy according to international law. There was little opposition to the resolution; for example South Africa opposed a military intervention.²²⁶

The USA was among the first to launch strikes in accordance with the resolution. After neutralizing large parts of Libya's air defence systems, the USA wanted to withdraw and hand over the leadership of the operation. The available options were either NATO, or a coalition of the nations taking part in the actual operations. An attempt to unify the military command of the air campaign first failed over objections by the French, German, and Turkish Governments. On 24 March 2011 NATO agreed to take control of the no-fly zone, while command of targeting ground units remained with coalition forces.²²⁷ Fighting in Libya ended in late October following the death of Gaddafi, and NATO stated it would end operations over Libya on 31 October 2011. Libya's new Government requested that its mission be extended to the end of the year, but on 27 October, the UNSC voted to end NATO's mandate for military action on 31 October.²²⁸

4.4 Analysis of the Libyan crises based on the Precautionary Principles of RTP

In addressing the case of Darfur and now with the Libyan case, I have opted to focus on the five principles that must be met for a non-consensual military intervention to be a viable option and whether the Libyan situation met these conditions.

4.4.1 Principle of seriousness of harm: under this principle one must ask whether the harm to the state or the population is serious enough to warrant a military intervention under the RTP and if the situation has raised to the level of one of the four core crimes namely genocide, war crimes, crimes against humanity, and crimes of aggression?²²⁹

Looking at the first principle one would raise the question why the intervention focused only on Libya and not Sudan? NATO and the UNSC constantly make reference to statements

²²⁶ Pollack KM *The Real Military Options in Libya* (2011) available at <http://www.brookings.edu/opinions/2011> (accessed 29 February 2013).

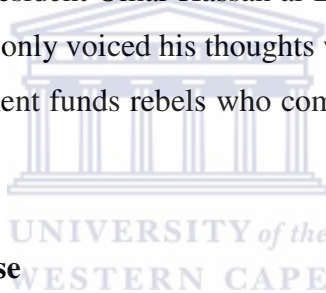
²²⁷ Hillstrom D *The Libyan No Fly Zone: responsibility to protect and International Law* (21 March 2011), available at <http://www.foreignpolicyjournal.com/2011/03/21/the-libyan-no-fly-zonerresponsibility-to-protect-and-international-law/> (accessed 9 March 2013).

²²⁸ *End of NATO operations*, The Guardian, available at <http://www.guardian.co.uk/world/2011/oct/31/nato-ends-libya-rasmussen?INTCMP=SRCH> (accessed 10 January 2013).

²²⁹ International Commission of on Intervention and State Sovereignty *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty* Ottawa, Canada (2001) 7, available at <http://www.iciss.ca/pdf/Commission-Report> (accessed 11 January 2013).

made by Gaddafi that he would go 'house to house' to cleanse the nation of 'cockroaches' and 'rats', as a justification for the first principle of the RTP. Such statements were viewed as incitement to commit crimes against humanity. Comparing Libya to Sudan, in May 2006 the International Commission of Inquiry on Darfur organized by UN concluded that 'the Government of the Sudan has not pursued a policy of genocide though international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be more serious and heinous than genocide'.²³⁰ One can also pose the question why it took the UN so long to even formally condemn the violence, and why there was no consensus whatsoever even concerning non-military coercive measures like targeted sanctions of the kind until 2007; but unlike the Libyan case where military intervention was unanimously agreed on at a stage when the intensity of Gaddafi regime's violence was much less than that of the Sudanese President Omar Hassan al- Bashir.

It is my opinion that Sudanese President Omar Hassan al-Bashir crimes against humanity are worse than that of Gaddafi's who only voiced his thoughts while he (al-Bashir) horrible deeds are well known that his Government funds rebels who commit genocide in the whole Darfur region to this day.



4.4.2 Principle of Proper Purpose

Secondly the RTP focuses if military intervention has the right intention behind it? This means that the primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned i.e. the Libyan people.²³¹

On the second principle, the engagement in Libya is obviously a hard talk point because the legitimacy of the mission is in doubt. The mission had two objectives first by the UNSC; its mandate for the operation was to protect civilians. The second one was that the Governments

²³⁰ Reeves E *Darfur 101* The New Republic (5 May 2006). ' a U.N. Commission of Inquiry (COI) report on Darfur concluded in January 2005 that there was 'insufficient evidence of genocidal intent' on the part of the NIF, though the commissioners' reasoning was embarrassingly flawed and the failure to conduct forensic investigations at all sites of reported mass ethnic murders was inexcusable. In addition, the COI badly confused the issues of motive and intent, deployed evidence in conspicuously contradictory fashion, and misrepresented the consequences of genocidal violence and displacement in Darfur.'

²³¹ Ibid.

with authority over NATO forces had declared that their policy goal is Gaddafi surrendering power. It is a difficult task to separate the one goal from the other. In addition the USA, UK and France, were determined to settle for nothing less than regime change, and did whatever it took to achieve that.²³² Further concerns were that the interveners rejected cease-fire offers that may have been serious, struck fleeing personnel that posed no immediate risk to civilians and locations that had no obvious military significance such as the compound in which Gaddafi's relatives were killed. This again brings us to the question of universality of the implementation of the RTP.²³³

4.4.3 The principle of Last Resort

The relevant question under this principle is whether other non-military options under the RTP been exhausted. Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would either not have succeeded or have failed.

It is fair to suggest that the situation in Libya does moderately meet the third principle. There are other non-military tools that were not employed, such as broader sanctions, targeted sanctions against Government leaders, arms embargos or military actions short of an invasion. In the Libyan case, Resolution 1973 came after Resolution 1970 had proved ineffective in deterring Gaddafi from violently suppressing the mass protests. Resolution 1970 was designed to call for restraint and to report any human rights abuses to the ICC.²³⁴ The UNSC obligated all UN member states to freeze without delay all funds, other financial assets and economic resources which were on their territories, which were owned or controlled, directly or indirectly, by the individuals or entities listed in resolution. Resolution 1973 was passed by the UNSC in March 2011 to authorise a no-fly zone for the protection of civilians. In a clear addition to the growing controversies of the use of force, Resolution 1973 mandated NATO to use 'all necessary means to protect civilians'. This elasticity could have contributed to NATO's involvement as an offensive force on the side of the rebels and the

²³² Barack Obama, David Cameron, and Nicolas Sarkozy, 'Libya's Pathway to Peace,' International Herald Tribune, 15 April 2011.

²³³ Ahmed R 'A bloody sight. NATO's leaders Protecting to kill, killing to protect' *Global Research* (2011), available at <http://www.globalresearch.ca/index.php?context=va&aid=26997> (accessed 17 February 2013).

²³⁴ Shah A 'Crisis in Libya' *Global issues* (2011) available at <http://www.globalissues.org/article/793/libya> (accessed 11 March 2013).

eventual defeat of the Gaddafi forces and Gaddafi's eventual death. Questions beg answers as to the sincerity of NATO's intentions in the Libya campaign or the quick implementation of resolution 1973. In addition, for example, why would NATO members rush into a military campaign to remove Gaddafi from power and not do the same in Sudan or Syria, where civilians continue to be killed by incumbent regimes? Was Gaddafi a worse dictator than al-Assad or al-Bashir in the cases of Syria and Sudan? This observation brings to mind the question as to why Western countries would want to liberate one country from the hands of a dictator while leaving other people suffering at the hands of similarly brutal regimes. Another is the generally, comprehensive support given to the rebel side in what rapidly became an internal armed conflict, ignoring the very explicit arms embargo in the process. This clearly signals double standards in the implementation of the RTP by UNSC.

It is important to note that the 'all means necessary' clause was immediately implemented in the form of a bombing operation. The operation was started by a campaign by French fighter jets.²³⁵ While the French air force was busy destroying Gaddafi's capacity to resist, Nicholas Sarkozy's Government began a diplomatic offensive aimed at building a strong relationship with the leadership of the NTC.²³⁶ Throughout the campaign, France played a critical role that is certain to model future relations between the two parties. Resolution 1973 all but militarised the new rush for African resources and not at all protection of human rights.

4.4.4 The principle of proportional means - The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective and meet the defined goals of the mission.²³⁷ In the case of Darfur it is difficult to determine if a military mission would be of adequate scale and duration.

The fourth principle of proportional means was met to a certain extent because military action in Libya was undertaken on the assumption that air-strikes would cause the Gaddafi regime to abandon its brutal tactics. NATO's decision to resort to air power emerged as the default option due to its perceived low risk and the political sensitivities surrounding the presence of

²³⁵ Charbonneau L and Hassan H 'France defends arms airlift to Libyan rebels,' *Reuters*, 30 June 2011, available at <http://www.reuters.com/article/2011/06/29/us-libya-idUSTRE7270JP20110629> (accessed 21 August 2013)

²³⁶ Smith P 'Probe Libya's fire sale' *The Africa Report* (2011) 4.

²³⁷ Ibid.

a foreign occupation force. The major issue is whether the subsequent military support that NATO gave to the Libyan rebels can be considered to be part of an operation authorized to protect civilians. However, the question that begs an answer is whether peace-keeping was not a better option since the AU had hinted such calls.²³⁸

4.4.5 The principle of balance of consequences

Is there a reasonable belief that the military intervention will actually be able to end the ongoing atrocities and not make the situation worse?

Finally on the fifth principle, military intervention has clearly been a failure in the Libyan case; instead it has turned the country into yet another failed intervention akin to Iraq or Afghanistan. Even though the military intervention brought an end to Gaddafi dictatorship, almost two years after the UNSC passed Resolution 1973, peace and democracy continues to remain elusive for the people of Libya. The country remains unstable, marred by a host of tribulations. There have been widespread media reports of frustration among Libyans with the pace of reforms since Gaddafi's fall.²³⁹ The NTC has been accused of lack of transparency and is unable to address issues of unity, reconciliation and inclusiveness owing to fact that the NTC is mired in its own divisions. The security situation in the country is worsening with every passing day. A media report observed that, 'the resentment and bitterness Gaddafi incubated is now bursting forth in general lawlessness.'²⁴⁰

4.5 The role of the UN in the Libyan Crisis

UNSC Resolution 1973 will stand out in history as it marked the first military implementation of the RTP doctrine. Military action in Libya was preceded by a range of tough non-military measures that sought to persuade the Gaddafi's regime to stop killing. On 26 February 2011 Resolution 1970 included the referral of the matter to the ICC, the imposition of an arms embargo, enforcement of a travel ban for certain individuals and freezing the assets of senior regime figures. These measures while coercive were peaceful in

²³⁸ Davis I, 'How good is NATO after Libya,' NATO Watch Briefing Paper, no.20, 8 September 2011, available at http://www.natowatch.org/sites/default/files/Briefing_Paper_No.20_NATO_After_Libya.pdf. See also, Daalder T and Stavridis P 'NATO's Success in Libya.' (accessed 24 October 2013).

²³⁹ 'Freed of Gaddafi, Libya's instability only deepens', *Al Arabiya News* (04 March 2012), available at <http://english.alarabiya.net/articles/2012/03/04/198447.html> (accessed 9 April 2013).

²⁴⁰ Bouckaert P 'Analysis: Libya's long road to disarmament', *IRIN News* (29 December 2011) available at <http://www.irinnews.org/Report/94559/Analysis-Libya-s-long-road-to-disarmament> (accessed 09 April 2013).

nature. However, none of these measures bore fruit. It was only when this chain of preventive measures failed that the use of force was finally considered under Resolution 1973.

The UNSC had expressed grave concerns about the violence in Libya and the use of force against the country's civilians. It also criticized the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan Government.²⁴¹ Two weeks after the adoption of Resolution 1970, on 17 March 2011 the UNSC passed Resolution 1973 which backed the use of all necessary measures to enforce no-fly zone over Libya which was followed by a NATO-led airborne military operation and those thousands of lives at imminent risk were questionably saved. Questions had been raised by some scholars in international law such as John and Ruggie who questioned whether the decision is in adherence to the provisions of the UN Charter.²⁴² The questions raised were for the right reasons because the Libyan case does not constitute an example of international threat as required by the UN Charter. It can be argued that internal abuses by states do not qualify as international threats and thus authorizing the military action in Libya does not conform to the provision of Chapter VII, where an exception to the principle of non-interference in domestic affairs is provided for. In addition, China and Russia, the two permanent members of the UNSC most averse to authorizing military intervention under Chapter VII of the UN Charter, had no special relationship with, or interests in, Libya. So, they had no reason to veto a collective action.

4.6 The AU's failure to take a position on the future of Gaddafi during its roadmap.

After the failures of the OAU in the past, African leaders recognized the scourge of conflicts in Africa as constituting a major impediment to the socio-economic development of the continent.²⁴³ They also noted that the need to promote peace security and stability are a prerequisite for the implementation of the continent's development and integration agenda.²⁴⁴

²⁴¹ 'Gaddafi defiant as state teeters', *Al Jazeera* available at <http://m.aljazeera.com/SE/20112235434767487> (accessed 23 September 2013), 'UN Council condemns force against Libya Protesters' *Al Arabiya News* (February 2011), available at <http://www.alarabiya.net/articles/2011/02/23/138819.html> (accessed 23 September 2013).

²⁴² John G & Ruggie J (ed) *Multilateralism Matters: theory and praxis of an institutional* (1993) 27.

²⁴³ Constitutive Act of the African Union (2000), preamble para. 9.

²⁴⁴ *Ibid.*

Whilst the AU is guided by the objective of promoting peace, security and stability on the continent²⁴⁵, it is also based on the principle of ‘respect for sanctity of human life’.²⁴⁶ The Constitutive Act of AU states that the Union had a right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity.²⁴⁷ Also, member states were given a right to request intervention from the Union in order to restore peace and security.²⁴⁸ Finally, the member states of the Union were enjoined to respect democratic principles, human rights, the rule of law and good governance.

The AU in its roadmap failed to pronounce itself on the future of Gaddafi in and after the negotiation of the political solution to the crisis. While, western permanent members of the UNSC (France, United Kingdom (UK) and the USA) were resolute in their demand that Gaddafi relinquish power,²⁴⁹ the AU was ambivalent on the issue at best. Asked if Gaddafi had to leave power, President Jacob Zuma was of the view that if Gaddafi had to go, the issues to be addressed were when, where and how that happens.²⁵⁰ At the 17th AU Summit meeting in Malabo, Equatorial Guinea, some African officials announced that Gaddafi should leave power for a democratic transition to take place. The final decisions of the Assembly on Libya refused to support a no fly zone. The AU being the only major organisation that had not called for the imposition of sanctions or a no-fly zone on Libya, the AU carried very little credibility especially with the rebels who saw themselves as liberators. This could to a degree explain why they were unenthusiastic about the AU’s political roadmap peaceful resolution.

It was the AU’s lack of clarity on the role of Gaddafi that held back the Union’s mediation efforts. After the establishment of the *ad hoc* Committee, the AU was trying to sell its roadmap to resolve the crisis in Libya to the two main protagonists: The Gaddafi Government and the NTC. The Committee was able to travel to Libya from 9 to 11 April 2011. It met with Gaddafi on 10 April, who accepted the AU roadmap on Libya including the specific issue of

²⁴⁵ Ibid, Article 3(f).

²⁴⁶ Ibid, Article 4(o).

²⁴⁷ Ibid Article 4(h).

²⁴⁸ Ibid, Article 4(j).

²⁴⁹ Story ‘Libya letter by Obama, Cameron and Sarkozy.’ *BBC News* (15 April 2011). The leaders observed that ‘... it is impossible to imagine a future for Libya with Gaddafi in power ... Gaddafi must go and go for good.’

²⁵⁰ ISS, *Peace and Security Council Protocol no. 25.10*.

the ceasefire and deployment of an effective and credible monitoring mechanism.²⁵¹ But when the Committee travelled to Benghazi the next day to meet the NTC, The two parties did not concur regarding a way forward. Despite extensive discussions between the Committee and the NTC there was no agreement due to a political condition put forward by the latter as a prerequisite for the urgent launching of discussions on the modalities for a ceasefire.²⁵² The political condition advanced by the NTC was that it could not negotiate an end to the crisis unless Gaddafi relinquished power. According to the NTC, Gaddafi and his Government had lost all legitimacy to govern the country and thus could not therefore be interlocutors in finding a solution to the crisis. Thus, the NTC refused to agree on the crucial issue of the cessation of hostilities.

Nevertheless, the AU Peace and Security Council and the *ad hoc* Committee have continued to pursue the implementation of the roadmap. At the end of May 2011, South African President Zuma, a member of the Panel travelled to Libya and met both belligerents. However, whilst Gaddafi's Government accepted his call to adopt the AU roadmap as the only solution to resolve the conflict, the NTC rejected the proposal arguing that it could not accept any settlement which did not entail the departure of Gaddafi. Also, ahead of the 17th AU Summit meeting in Malabo, Equatorial Guinea, the *ad hoc* Committee met twice, in Pretoria on 26 June and in Malabo on 30 June, and adopted a Framework Agreement on a Political Solution to the Crisis in Libya. The proposal was aimed at bringing the crisis to an end, to ensure the effective protection of the civilian population, including the provision of humanitarian support, and ushering in a political process that will make it possible to meet the legitimate aspirations of the Libyan people to democracy, rule of law, good governance and respect for human life. The framework was endorsed by the Assembly of Heads of State and Government at the Malabo Summit and was presented to both parties in the Libya crisis.²⁵³

²⁵¹ AU *Peace and Security Council 275th Meeting, PSC/MIN/COMM.2 (CCLXXV)*, 26 April 2011, para. 6. See also ISS, *Peace and Security Council Protocol no. 22*, ISS: Addis Ababa, May 2011. 11 (observing that Gaddafi fully accepted the AU's proposed roadmap).

²⁵¹ ISS, *Peace and Security Council Protocol no. 22*. 11.

²⁵³ AU, 'Official Presentation by the AU to the Libyan Parties of a Proposal on a Framework Agreement for a Political Solution to the Crisis in Libya,' *Press Release*, Malabo, 1 July 2011. See also AU, PSC 285th Meeting, *Press Statement, PSC/PR/PS/2. (CCLXXXV)*, 13 July 2011.

On Sunday 21 August, rebels launched an offensive to take Tripoli from Gaddafi's forces. They made rapid progress and by the end of the week had overrun much of the capital. Whilst Gaddafi went into hiding, he continued making radio broadcasts urging his followers to fight and take back the city.²⁵⁴ In the final communiqué of its 291st meeting, the Peace and Security Council declined to recognize the NTC as the legitimate authority in Libya.²⁵⁵ Citing Article 30 of the Constitutive Act of the AU which bars Governments which come to power through unconstitutional means from participating in the activities of the organisation, the Peace and Security Council reaffirmed its stand that all the stakeholders in Libya come together and negotiate a peaceful process.²⁵⁶ This position would involve the inclusion of elements from the Gaddafi regime to be part of the new Government.²⁵⁷ But again the fissures that have characterised the AU's intervention in the crisis continued. Whilst the *ad hoc* Committee and PSC deliberated on the need for the formation of an all-inclusive transitional mechanism to lead Libya in the interim as a new Constitution is drafted to provide for elections, the Governments of Ethiopia and Nigeria recognised the NTC as the authority in charge of Libya.²⁵⁸

4.7 Summary of Libyan crisis

The Libya crisis has caused many to question the ability of the AU to resolve conflicts on the continent without outside help. The fact that the three AU members in the UNSC voted for Resolution 1973 for the establishment of a no-fly zone and the consequent bombardment of Libya by NATO implies that the AU does not trust its own capacity to deal with conflicts of the magnitude in Libya. China noted that it had not exercised its veto out of its respect for the AU and the Arab League.²⁵⁹ By voting for Resolution 1973, the AU had shown its capitulation to Western pressure and in doing that it was unwittingly giving NATO the

²⁵⁴ Butagira T 'Libyan rebels corner Gaddafi', *Daily Monitor*, 26 August 2011, 4. See also Vaughan J 'AU calls for 'inclusive' transition in Libya', *Agence France Press* (AFP), 26 August 2011.

²⁵⁵ AU, Communiqué of the 291st Meeting, Addis Ababa, 27 August 2011.

²⁵⁶ *Ibid.*, para. 5.

²⁵⁷ The South African Government issued a press release upon President Zuma's return from the Addis Ababa meeting and explained that 'there is more than one group that claims authority and support in Libya, and a solution will need to include all of them. They must all come together and negotiate a peaceful process that will lead to the formation of an inclusive transitional Government and democracy in Libya.' See South African Government (Pretoria), 'President Jacob Zuma returns from African Union PSC meeting', 27 August 2011 at <http://allafrica.com/stories/201108270016.html> (accessed 3 January 2013).

²⁵⁸ Tesfa-Alem Tekle, 'African union snubs new revolutionary masters', *Sudan Tribune*, 26 August 2011 at <http://allafrica.com/stories/201108270009.html> (accessed 4 January 2013).

²⁵⁹ Akonor K 'The African Union's mistake of policy and principle' *Inter Press Service* (2010) available at <http://www.ips.net> (accessed 7 April 2013).

responsibility to deal with an African conflict. The effectiveness of African solutions for African problems can certainly be questioned in the case of Libya. However, while the Libyan problem had grown to proportions where civilians were no longer safe, it was not NATO that was supposed to intervene in Libya, rather, it was the AU. As previously stated Article 4(h) of the AU act gives the AU the right to intervene forcibly in one of its member states with regards to war crimes, genocide and crimes against humanity'. Why would the AU go through the longer path via the UN when they could intervene directly in Libya?

The AU's interventions in member states to resolve conflicts have suffered from inadequate and sometimes a lack of financial resources. The failure to fund the AU Observer Mission in Darfur, Sudan is very instructive. The AU due to lack of financial resources was forced to depend on donations to fund the mission and eventually was forced to concede UN's intervention there. In addition the UNSC appeared to give priority to the Arab League over the AU. But both organisations eventually came to feel as though their views were not heard.

Resolution 1973 explicitly recognized the important role of the Arab League states in matters relating to the maintenance of international peace and security in the region. The Council only 'took note' of the AU Peace and Security Council's decision to send the *ad hoc* Committee to Libya in its operative declaration of the resolution.²⁶⁰ In other words, the resolution recognized the primacy of the Arab League over the AU in the Libya crisis. It is necessary that Governments understand that the RTP norm seeks to protect civilians from genocide, war crimes, crimes against humanity and ethnic cleansing with a range of measures, of which military intervention is a last resort. At the same time, we must remind member states not to undermine the RTP norm by confusing civilian protection with other motives such as regime change or resource control which seem to have been the case in Libya.

The conventional account of Libya's conflict and NATO's intervention is misleading in several key aspects. First, contrary to Western media reports, Gaddafi did not initiate Libya's violence by targeting peaceful protesters. The UN and Amnesty International have

²⁶⁰ Kasaija P *The Principle of 'African solution to African Problems' under the spotlight: The African Union (AU) and the Libya Crisis* Open Society Institute, available at http://www.afrimap.org/english/images/paper/AfriMAP_NAfrica_Kasaija_EN.pdf (accessed 27 September 2013)

documented that in all four Libyan cities initially consumed by civil conflict in mid-February 2011 Benghazi, Al Bayda, Tripoli, and Misurata violence was actually initiated by the protesters. The Government responded to the rebels militarily but never intentionally targeted civilians or resorted to ‘indiscriminate’ force, as Western media claimed. Early press accounts exaggerated the death toll by a factor of ten, citing ‘more than 2,000 deaths’ in Benghazi during the initial days of the uprising, whereas Human Rights Watch (HRW) later documented only 233 deaths across all of Libya in that period.²⁶¹

Further evidence that Gaddafi avoided targeting civilians comes from the Libyan city that was most consumed by the early fighting, Misurata. HRW reports that of the 949 people wounded there in the rebellion’s initial seven weeks, only 30 were women or children, meaning that Gaddafi’s forces focused narrowly on combatants. During that same period, only 257 people were killed among the city’s population of 400,000 a fraction less than 0.0006 providing additional proof that the Government avoided using force indiscriminately. Moreover, Gaddafi did not perpetrate a bloodbath in any of the cities that his forces recaptured from rebels prior to NATO intervention including Ajdabiya, Bani Walid, Brega, Ras Lanuf, Zawiyah, and much of Misurata so there was virtually no risk of such an outcome if he had been permitted to recapture the last rebel stronghold of Benghazi. The conventional wisdom is also wrong in asserting that NATO’s main goal in Libya was to protect civilians. Evidence reveals that NATO’s primary aim was to overthrow Gaddafi’s regime, even at the expense of increasing the harm to Libyans. NATO attacked Libyan forces indiscriminately, including some in retreat and others in Gaddafi’s hometown of Sirte, where they posed no threat to civilians.²⁶²

Moreover, NATO continued to aid the rebels even when they repeatedly rejected Government cease-fire offers that could have ended the violence and spared civilians. Such military assistance included weapons, training, and covert deployment of hundreds of troops

²⁶¹ UN Human Rights Council, nineteenth session, ‘Report of the International Commission of Inquiry on Libya,’ A/HRC/19/68, advance unedited version, 2 March 2012.

²⁶² Kuperman, Alan J. ‘Lessons from Libya: How Not to Intervene.’ Policy Brief, Belfer Center for Science and International Affairs, Harvard Kennedy School, 13 September 2013.

from Qatar, eventually enabling the rebels to capture and summarily execute Gaddafi and seize power in October 2011.²⁶³

4.8 Conclusion

In closing this chapter it is vital to note that the failure of the UNSC to consider precautionary principles of the RTP has left many questioning NATO's intervention under the RTP doctrine in Libya. The intervention by NATO has led many to assume that the real ambitions of NATO were not simply about protecting civilians from a ferocious Gaddafi regime but to have access to Libya's oil, which they have already done, and to get profitable reconstruction contracts.²⁶⁴ It is reasonable to come to the assumption that hidden in all this supposed kindness by NATO is what we call 'disaster capitalism' spreading its tentacles to Africa and a militarisation of the new scramble for Africa's resources. Though Libya is a prospect for those world powers who made or are making profits from Iraq and Afghanistan to further line their pockets, many will further view interventions in the African continent as questionable and resource driven rather than the UN trying to fulfil its responsibility of world peace.²⁶⁵

It is unfortunate that numerous experts in international humanitarian Law have praised NATO's 2011 intervention in Libya as a humanitarian success for averting a bloodbath in that country's second largest city, Benghazi, and helping to eliminate the dictatorial regime of Gaddafi. These proponents accordingly claim that the intervention demonstrates how to successfully implement the RTP doctrine in practice. Indeed, the top USA representatives to the transatlantic alliance declared that NATO's operation in Libya has rightly been hailed as a model intervention.²⁶⁶ A more precise assessment, however, reveals that NATO's intervention did more harm than good; it increased the duration of Libya's internal armed conflict by about six times and its death toll by at least seven times, while also intensifying

²⁶³ 'NATO Chief Urges Quick UN Deal on Libya,' Straits Times, (17 March 2011); available at www.straitstimes.com/BreakingNews/World/Story/STISStory'646287.html. *Emphasis mine*. (accessed 14 October 2013).

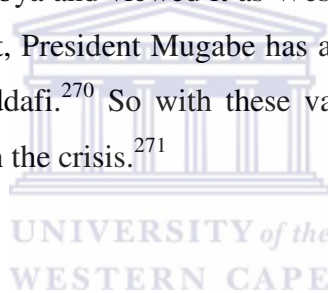
²⁶⁴ Kuwali D 'responsibility to protect: Implementation of Article 4(h) Intervention The Hague' Martinus Nijhoff (2010) 302.

²⁶⁵ Klein N *The Shock Doctrine: The rise of Disaster Capitalism* (2007) 90.

²⁶⁶ Crawford G, Timothy W and Alan J. Kuperman, (eds) *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion, and Civil War* (2006) 89.

human rights abuses, humanitarian suffering, Islamic radicalism, and weapons proliferation in Libya and its neighbours. If this is a ‘model intervention,’ then it is a model of failure.²⁶⁷

The AU’s role in the Libyan crisis was exposed, the fissures within the AU members and thus the failure of the organization to mount a united front in the matter.²⁶⁸ In this regard, three positions emerged among the members to deal with the situation. The first position advanced by inter alia Uganda, South Africa and to an extent Kenya,²⁶⁹ accepted UN Resolution 1973 in principle but was critical of the way the NATO countries were conducting their operations in Libya. To these countries, NATO’s operations went beyond the contours of Resolution 1973 and in effect were part of ‘regime change doctrine’. The second position advanced by the likes of Rwanda, supported the NATO attacks on Libya. President Kagame in particular, is reported to have argued that the Libyan situation had degenerated beyond what the AU could handle. The third position, advanced by the likes of Zimbabwe, Algeria and Nigeria opposed NATO’s operation in Libya and viewed it as Western countries using the UN to get rid of the Gaddafi regime. In fact, President Mugabe has accused NATO of being a terrorist organization fighting to kill Gaddafi.²⁷⁰ So with these varied positions, the AU could not mount an effective intervention in the crisis.²⁷¹



²⁶⁷ Kuperman, Alan J. ‘The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans,’ *International Studies Quarterly* (2008) 52.

²⁶⁸ Charles Onyango Obbo, ‘No-fly zone strikes terror in leaders’ hearts’, *The East African*, 28 March 2011 available at <http://allafrica.com/stories/201103280142.html> (accessed 25 February 2013).

²⁶⁹ Kenya’s Vice President, Kalonzo Musyoka was quoted observing in Parliament that ‘he preferred negotiations with Gaddafi rather than the aerial bombardments by the French, British and United States forces.’ He said this was his personal view and thus it was not clear if it was that of the Government too. Cited in *ibid*.

²⁷⁰ ‘Zimbabwe: Dictatorship out of fashion’, *Radio Netherlands Worldwide (RNW)* (23 August 2011), available at <http://allafrica.com/stories/201108240023.html> (accessed 20 February 2013).

²⁷¹ The indictment of President Bashir by the International Criminal Court (ICC) in March 2009 also elicited varied positions within the AU. Whilst the position of the organization is not to cooperate with the court to execute the arrest warrant, individual members of the organization such as Botswana, South Africa and Uganda broke ranks and stated that they would arrest the Sudanese leader and hand him to the ICC, if they ever get a chance. Thus the AU’s position on the matter sounds hollow.

CHAPTER FIVE

General conclusion and recommendations

5.1 General conclusion

From the onset this mini-thesis aimed to demonstrate the inconsistencies in the implementation of the RTP doctrine during humanitarian crises with a specific focus on the cases of Libya and Sudan. In the previous four chapters I have discussed the RTP doctrine and outlined the core principles and elements of the doctrine. I further presented the debate on the implementation of the RTP by exploring these two cases and the role played by both the AU and UN in terms of conflict resolution.

In the light of the research questions posed in the first chapter, the current chapter aims at concluding and providing recommendations on how best to minimize the inconsistencies in the implementation of the RTP doctrine during humanitarian interventions. NATO's intervention in Libya teaches us vital lessons when it comes to the incorrect implementation of the RTP. Firstly, potential interveners should beware of half-truths and the opposition propaganda. If Western countries had accurately perceived Libya's initial internal armed conflict as Gaddafi using discriminate force against violent tribal, regional, and radical Islamist rebels NATO would have most likely not implemented its counterproductive intervention.

The second lesson is that military intervention as a last resort can cause a backlash by escalating rebellion which is what happened in Libya. This is because some sub-state groups or rebel groups believe that by violently provoking state retaliation, they can attract international attention to help them achieve their political objectives, including regime change. The resulting escalation, however, magnifies the threat to non-combatants before any potential intervention can protect them. Thus, the prospect of humanitarian intervention, which is intended to protect civilians, may instead put them in danger through a moral hazard dynamic. To reduce this tendency, it is essential to avoid the implementation of the RTP in ways that reward rebels, unless the state is targeting non-combatants. A final lesson is that intervention initially motivated by the desire to protect civilians is prone to expanding its objective to include regime change, even if doing so magnifies the danger to civilians, contrary to the interveners' original intent. That is partly because intervening states, when

justifying their use of force to domestic and international audiences, demonize the regime of the country they are targeting. This demonization later inhibits the interveners from considering a negotiated settlement that would permit the regime or its leaders to retain some power, which typically would be the quickest way to end the violence and protect non-combatants. When analyzing the Libyan case with regards to the UN Resolution 1973, the goal of the intervention, was to protect Libyan civilians. However, it was also clear that many of the coalition members were also hoping for regime change as a desired outcome whether or not this was one of the overtly stated goals of the action. Before the NATO intervention the USA President Obama had already stated that Gaddafi must go a further sign that the intervention was always aimed at regime change rather than humanitarian grounds which are in line with the principles of the RTP.²⁷² Such lessons from NATO's use of force in Libya suggests the need for considerable caution and a comprehensive exploration of alternatives when contemplating if and how to conduct humanitarian military intervention under the RTP because clearly the Libyan case displays massive inconsistencies in the implementation of the RTP by the UNSC.

With regards to the Sudan case it is worth noting that there are strategic religious dimensions to the conflict in Darfur, but these need to be clarified to make sense of the recommendation below. The North-South conflict in Sudan since 1956 pitted Arab Muslims (north) against Black Christians (south); but the case of Darfur is different because the National Islamic Front (NIF) that controls the Government of Sudan is engaged in a large-scale violence against Darfuris who are mostly Africans, but also Muslims. Therefore, considering the Islamist roots of the NIF and al-Bashir's regime, the AU should counter its religious basis for power by strategically and diplomatically making the case that another Muslim-versus-Muslim conflict would shadow the sectarian violence in Iraq. Also, the looming civil war among Palestinians is an affront to Islam and the unity of the 'ummah' or Muslim world.²⁷³ This is important since the NIF balks at claims of rape by Janjaweed members, or at least Government support for it, as impossible and 'un-Islamic'. This requires the inclusion of predominantly Muslim African nations such as Libya, Egypt, Tunisia, Algeria, and others who also hold seats in both the Arab League and the AU to use their influence in discussions

²⁷² Chesterman S 'Leading from Behind': The responsibility to protect, the Obama Doctrine, and Humanitarian Intervention after Libya', *Ethics & International Affairs* 25 no. 3 (2011) 280.

²⁷³ Al-Baqir al-Afif Mukhtar 2007. The Crisis of Identity in Northern Sudan: A Dilemma of a Black People with a White Culture. A paper presented at the CODESRIA African Humanities Institute.

with Sudan to compel the al-Bashir regime to ensure the protection of the Darfuris against rape, torture, murder and ethnic cleansing by other Muslims. The same can be said of Christian-on-Christian violence, as was the case in Rwanda. In the end, the various actors in the Darfur crisis, especially states, are only likely to act when compelled by either positive or negative incentives to change their behaviour; and in contemporary international politics, only the USA has the capability and credibility of action to effectively engage the various actors to resolve the Darfur crisis. The painful reality for Africans is that in the realist world of politics, countries, including the USA, never choose to intervene for humanitarian purposes, but rather for their national interests at the time.²⁷⁴

One may question if the RTP factors into the national interest of the USA, Russia, China and other capable major powers who are directly or indirectly involved with the Government of Sudan? The answer is simply no for now. Therefore, the RTP, especially protection of Africans, falls to the AU. Its potential for doing well is boundless. At the least, the AU can succeed in establishing optimism and override the sense of inevitability of crisis which has framed the way Africans and non-Africans have viewed the continent for decades.²⁷⁵

Its premise of Pan-Africanism and unity can be a way for the AU to convince Sudan to take strong steps to end the terror of the Janjaweed and prepare for a viable end to the conflict. In the meantime, 'focusing on stabilizing Darfur in terms of, security, political, and humanitarian assistance efforts must be supported by adequate funding and logistical support' by African states, resolving African crises especially South Africa, Nigeria, Tanzania that have professed a desire to see an end to the violence in Darfur. The AU has the tools it needs to become a solid entity in mediating African issues. It gains strength from the collective desire to uphold the RTP principle enshrined in both the UN and AU pronouncements. For the international community, especially members of the EU, NATO and the UN and for capable states such as the USA, the AU has shown the desire to uphold the RTP. This is evidenced by their willingness to supply the troops for peace enforcement; but the AU lacks what those groups and nations have – robust and credible logistical equipment like helicopters, weapons and money to pay an over-stretched, underpaid, and unprepared African force to succeed in an action that is clearly the collective responsibility of the international

²⁷⁴ Blitzer W The Situation Room Cable News Network 12 June 2007.

²⁷⁵ Muriithi T *The African Union: Pan- Africanism, Peace building and Development* (2005) 46.

community if the UN Charter is to remain credible. For the AU, success can occur through logistic and financial support for the proposed hybrid UNMIS/AMIS force as well as the restart of peace talks as specified above.

I have come to the conclusion that inconsistencies within the application of the RTP exist because humanitarian intervention under the RTP is influenced by political considerations and this affects its implementation. The RTP is often used as a justification for states to act in conflicts when there is no domestic support for more direct political intervention. It also allows states to intervene in the name of a higher purpose. The decision to intervene in most cases is heavily weighted by the values and political position of the intervening states which is in most instances western states. Thus, I believe that intervention can never be completely humanitarian driven until the five RTP precautionary principles are used as a guideline or criteria for interventions.

5.2 Recommendations

Since the Darfur crisis is an African problem with global implications, a basic responsibility for the AU would be to boldly and unequivocally label the crisis in Darfur as ethnic cleansing/genocide. This would include labelling the crisis a grave situation and a crime against humanity, a clear warning to the Khartoum-based Sudanese Government and the Janjaweed leadership that failure to stop the large-scale violence will leave them open to charges of crimes against humanity consistent with the provisions of the ICC Statute.²⁷⁶ This would have two immediate results: first, it would activate Article 4(h) of the AU's Constitutive Act requiring the organization to take action; and secondly, it would avoid the definitional conflict over the term genocide and compel African Governments to clearly identify their support for the AU's Constitutive Act to which they are signatories. With clear identification of the crisis as genocide/ethnic cleansing and with the presence of robust military intervention for purposes of establishing a cease-fire in the region, the AU should then place travel restrictions on the top leaders of the Government of Sudan and rebels responsible for atrocities, except for travel related to negotiation and resolution of the conflict. The strategy should include: freezing the bank accounts of all affected individuals

²⁷⁶ Clement E. 2007. Once Bitten, Twice Shy: The Evolution of U.S. Policy on the Crisis in the Darfur Region of Sudan. Paper presented at the annual meeting of the International Studies Association (ISA), Chicago, IL, 28 February - 3 March 2007.

and groups, imposing sanctions on Sudanese companies deemed to be complicit in any atrocities that the AU is attempting to bring to an end and compensating those whose actions help bring an end to large-scale violence.²⁷⁷

One of the vital contributions of the ICISS report relates to how it deals with military action as a coercive measure to guarantee the protection of civilians. Apart from clarifying that military intervention must be a last resort, the report identifies precautionary principles such as proportional means and reasonable prospects. If these principles are respected, it will represent an important step forward in addressing the fears of the country's most reluctant to forget the principle of non-interference. As an absolute priority of the RTP, international organizations and states should make an effort to fill the gap between rhetoric and the resources for conflict prevention. There must be strategies to implement the RTP with measures such as the creation of early warning mechanisms, support of academic institutes and NGOs and capacity building of mediators. In this sense, it is necessary to support the initiative of the ICISS co-chair and others to create a Global Coalition for the RTP. The efficient implementation of the RTP by organizations such as the AU shows the universal power of the principle. Moreover, the increasing inclusion of the protection of civilians in the mandates of peace missions represents a positive step. However, these advances in the implementation of the principle result useless if they are not accompanied by the allocation of resources and the creation of capacities.

The Darfur experience shows the complex situations in which missions that aim mainly at protecting civilians are carried out. Even though the response of the AU was positive, the international community has to learn from the consequences of not manifesting a unified political commitment from the beginning. The extremely unstable situation of civilian in Darfur is due, in part, to the late and insufficient response of the international community. Nevertheless, Darfur also shows the difficulties in approving coercive measures against a sovereign Government. It can be argued that in some cases inaction is the result of caution. Resistance from the AU and others to apply economic sanctions to Khartoum is a good example of this. In some situations, there is greater loss than gains by applying coercive measures.

(Word count 28120)

²⁷⁷ Levitt J .The Peace and Security Council of the African Union, the Use of Force and the United Nations Security Council: The Case of Sudan. In: Niels B & Schrijver N (eds), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (2005) 16-41.

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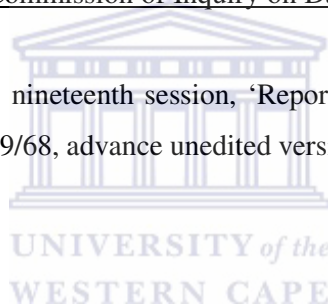
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