

**THE RESPONSIBILITY TO PROTECT IN THE CONTEXT OF THE NATO
INTERVENTION IN LIBYA IN 2011: A HUMAN RIGHTS ANALYSIS**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE MAGISTER PHILOSOPHIAE (MPhil) IN INTERNATIONAL AND HUMAN
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DECLARATION

I Khayalandile Lwando Mthamo declare that **The Responsibility to Protect in the Context of the NATO Intervention in Libya in 2011: A Human Rights Analysis** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used have been indicated and acknowledged as complete references.

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DEDICATION

I dedicate this piece of academic work to my late grand-father Mbuyiselo Mthamo.



ACKNOWLEDGEMENTS

Firstly, I would like to acknowledge all those who made it possible for me to complete this thesis. Particularly, I would like to thank my supervisor Prof. Benyam Mezmur without whom none of this would have been possible. Prof., thank you for believing in me even when I doubted myself and for your insightful comments. Lastly, I give thanks to my parents Mandla and Nonceba Mthamo and my siblings Norrie, Nosana and Mabush for their invaluable support through the academic process.



KEY WORDS

Responsibility to Protect (R2P)

Human rights

Libya

Politics

North Atlantic Organisation Treaty (NATO)

Regional organisations

Self-interests

Sovereignty

United Nations

United Nations Security Council



ABBREVIATIONS

AU African Union

GCC Gulf Cooperation Council

LAS Arab League of States

NATO North Atlantic Treaty Organisation

OIC Organisation OF Islamic Cooperation

R2P Responsibility to Protect

UN United Nations

UNSC United Nations Security Council



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1.1 BACKGROUND

The international human rights architecture experienced a shift from states to individual rights within a state. This is mainly informed by the fact that states committed human rights atrocities against their own civilians. This necessitated a shift from an emphasis on sovereignty and non-interference to intervention on grave human rights violations. Article 2 of the UN Charter calls for respect of sovereignty and discourages the use of armed force against the territorial integrity

of any state.¹ To reinforce this position, the United Nations (UN) member states adopted the Responsibility to Protect (R2P) doctrine through the UN World Summit outcome document in 2005. This document effectively gave the international community the right to intervene into the affairs of a member state if the state is failing to halt human rights abuses within its territory.

However, although the ideals embodied by both the UN Charter and the World Summit Outcome document envisaged an amicable resolution of conflicts, this has not been the case in practice. The problem lies in the actual implementation of both stipulations. One of the major causes of this is the politicization of human rights which is due to geo-politics of the North/South. Luengo-Cabrera asserts that the selective application of the R2P undermines the normative ideals of the Human Security Discourse as it suggests that states are driven by *realpolitik*² considerations rather than by a genuine concern for the security of the communities in danger.³ This has an adverse effect on the protection of human rights by the parties entrusted with that mandate. Furthermore, Yazbek asserts that international law is necessarily and inevitably intertwined with politics, policy, diplomacy and the real world consequence of action.⁴

The upholding of a human rights culture is pivotal to the economic prosperity of any region and therefore the geo-politics that impede on this are an area of concern. The UN World Outcome Summit document explicitly recognises the importance of regional organisations in conflict resolution. In the case of Libya there were various regional organizations who were involved. This emanates from the fact that Libya held multiple memberships in different regional organizations. However, for the purposes of this paper the focus is on all the regional

1 UN Charter.

2 Real Politik is politics or diplomacy based primarily on considerations of given circumstances and factors, rather than explicit ideological notions or moral and ethical premises.

3 Luengo-Cabrera 'Human Security Discourse and Humanitarian Intervention: A Critical Evaluation' (2011) Partnership for Research in International Affairs and Development Policy Paper 13.

4 Yazbek C 'After Libya & Syria: R2P's Normative Utility and Future Application' (2014) Undergraduate dissertation University of Adelaide 4.

organizations in general and the African Union (AU) in particular and its role in the Libyan conflict.

As noted above, the advent of the R2P may be linked to Article 2 of the UN Charter which prohibits the use of force and interference in states internal affairs, even by the UN itself.⁵ Therefore the R2P confers the United Nations Security Council (UNSC or Security Council) with the obligation to sanction the use of force in instances of gross human rights violations.⁶ Importantly, R2P neither justifies forced regime change nor calls for bringing about democracy and enforcing human rights by the use of armed intervention.⁷ Accordingly, in paragraph 119 the Outcome document declares that it is for the Security Council to determine whether enforcement measures are necessary in the event of states manifestly failing to protect their citizens.⁸ However, its application has been characterised by controversy due to state interests, geo-politics and commercial interests. This paper is mainly concerned with the protection of human rights.

Human rights application knows no boundaries at least in principle. Human rights law is the branch of international law that concerns itself with human security both during war and peace time. Gasser correctly point out that human rights apply everywhere, every time and in every situation.⁹ Shelton and Buergenthal define international human rights law as the law concerned with the protection of individuals and groups against violations of their internationally guaranteed rights and with the promotion of these rights.¹⁰ Since the mid-20th century, the 5 UN Charter.

6 World Summit Outcome Document 2005.

7 Kuwali D 'Responsibility to Protect: Why Libya and not Syria?' (2012) *Policy and Practice Brief* 3.

8 Bellamy AJ 'The Responsibility to Protect and the Problem of Military Intervention' (2008) 84 *International Affairs* 629.

9 Gasser HP 'International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion?' (2002) 150.

10 Shelton DL & Stewart DP *International Human Rights in a Nutshell* (2009) GW Law Faculty Publications & Other Works 1.

protection of human rights has gained increasing importance within the international community, particularly in circumstances where humanitarian violations have occurred within the territorial boundaries of a single sovereign state.¹¹ The conception of the R2P doctrine expedited the UN agenda for international human rights protection. Meanwhile, ever since its adoption in 2005 the R2P was only ever fully invoked against Libya in 2011.

1.2 PROBLEM STATEMENT

Despite the human rights instruments developed by the UN to curb human rights abuses, human rights atrocities are still a common occurrence. Accordingly, the international community has taken measures which purport to ensure international protection of human rights. Human rights have now become a mainstream part of international law, and respect for human rights a central subject and responsibility of international relations.¹² According to Thakur goals of promoting human rights and democratic governance, protecting civilian victims from humanitarian atrocities and punishing governmental perpetrators of mass crimes have become more important.¹³ Among these measures is the adoption of the R2P by the UN. The R2P entails that a state has the primary responsibility to protect its citizenry from human rights violations failing which, the international community is obliged to intervene.¹⁴

The international community is currently grappling with the issue of military intervention in the protection of human rights. This is regrettable in the sense that the international community had pledged to never again be passive when human rights abuses occur. To affirm their commitment

11 Berman D & Michaelsen C 'Intervention in Libya: Another Nail in the Coffin for the Responsibility to Protect' (2012) 14 *International Community Law Review* 339.

12 The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (2001) International Development Research Centre 7.

13 Thakur R 'R2P after Libya and Syria: Engaging Emerging Powers' (2013) 36 *The Washington Quarterly* 64.

14 The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (2001) International Development Research Centre.

to their pledge the international community adopted the R2P concept. The R2P serves as a framework within which the UNSC can conduct a military intervention. The Libyan intervention of 2011 is significant for an analysis of the R2P. This is linked to the fact that the UNSC encountered challenges with its authorisation of the use of force after the Libyan intervention. The repercussions of this are being felt in Syria where the government commits human rights violations with impunity.

An analysis of the failures of the R2P implementation will be of greater significance in this paper because it will appear to be a reason for the international community's failure to intervene in Syria because there is a geopolitical or Cold War question that is still not yet addressed in the politics of the UNSC in relation to the humanitarian intervention in Africa. This issue led to indifference when it comes to common issues of international human rights law in the global stage post the WW II era. Henceforth, it is imperative for the UN or regional organizations to firstly exhaust all other means before embarking on an intervention campaign that uses force.

However, as the scope of military intervention is too broad, this paper concerns itself with the UNSC sanctioned and NATO led military intervention in Libya in 2011. This encompasses the politics involved in the formulation of Resolution 1973 and its actual implementation. This is approached from a human rights perspective. This is informed by the notion that some states use human rights protection as an excuse to interfere in the internal affairs of sovereign states.

1.3 LITERATURE REVIEW

Berman and Michaelsen argue that since the mid-20th century, the protection of human rights has gained increasing importance within the international community particularly in circumstances where humanitarian violations have occurred within the territorial boundaries of a single sovereign state.¹⁵ However, this has been met with criticism by UN member states especially those states from the developing world. According to Dunne and Gelber the contestation around

15 Berman D & Michaelsen 'Intervention in Libya: Another Nail in the Coffin for the Responsibility to Protect' (2012) 14 *International Community Law Review* 339.

humanitarian interventions flows directly from the tension between the legitimacy attributed to universal human rights and deep seated norms associated with sovereignty and non-aggression.¹⁶

In accordance with this, the drafters of the R2P took these concerns about sovereignty into consideration. According to Adams rather than compromising sovereignty, R2P harnesses the notion of sovereignty as responsibility and seeks to respond to extreme crises in a way that is both legitimate and legal.¹⁷ However, the AU's shift from non-interference to non-indifference happened before the adoption of the R2P concept by the UN 2005 World Summit.¹⁸ In essence what R2P did was to internationalize the notion of interference in the internal affairs of a sovereign state that is failing in its human rights protection duties. For Gumedze R2P is a notion which seeks to challenge the traditional understanding of state sovereignty by allowing regional organizations to intervene in cases where serious human rights violations are taking place.¹⁹

Bellamy argues that governments are given considerable leeway to use force against rebels before triggering R2P.²⁰ Furthermore, the R2P makes it clear that sovereignty entails responsibility on the part of the state to provide for the security of its citizens.²¹ However, in

16 Dunne T & Gelber K 'Arguing Matters: The Responsibility to Protect and the Case of Libya' (2014) 6 *Global Responsibility to Protect* 1.

17 Adams S 'Libya and the Responsibility to Protect' (2012) Global Centre for the Responsibility to Protect 12.

18 Ntahiraja B 'The Global and the Regional in the Responsibility to Protect: Where does authority lie?' (2012) 419 *Journal Jurispudence* 431.

19 Gumedze S 'The African Union and the responsibility to protect' (2010) 10 *African Human Rights Law Journal* 137.

20 Bellamy AJ 'The Responsibility to Protect and the Problem of Military Intervention (2008) 84 *International Affairs* 632.

21 Powell K 'The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect (2005) 119 *Institute for Security Studies* 7.

Libya, when the war seemed lost to the rebels, the Arab League invited non-Arab countries to impose a no-fly zone in Libya. Moreover, the US pushed a UN Resolution authorizing the use of force which resulted in the Security Council passing a resolution authorizing a broad use of force.²²

Meanwhile Kieh argues that the case of responsibility to protect, first and foremost is a matter of state responsibility because prevention begins at home and the protection of populations is a defining attribute of sovereignty.²³ Reisman asserts that international law still protects sovereignty but not surprisingly, it is the people's sovereignty rather than the sovereign's sovereignty.²⁴

The issue of overriding state sovereignty pursuant to the R2P is illustrated in the Libyan conflict. According to Granville, prior to the adoption of Resolution 1973, the Security Council had never authorized military intervention in the affairs of a functioning sovereign state without its consent for the purpose of civilian protection.²⁵

In an international state system characterized by sensitivity concerning the issues of sovereignty and non-interference, the concept of R2P was viewed cautiously. This is partly informed by the fact that state foreign policies are primarily driven by national interests. This in turn inevitably leads to mistrust among state actors. Brunnee and Toope argue that the R2P carries the potential for significant change in pivotal but difficult area of international law and politics, which is a use of force to address massive human rights violations in member states.²⁶

22 Samples J 'Lessons and Warnings From the Libyan Intervention' (2012) *International Affairs* 40.

23 Kieh GK 'The African Union, The Responsibility to Protect and Conflicts in Sudan's Darfur Region' (2013) *Michigan State International Law Review* 5.

24 Reisman WM 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *The American Journal of International Law* 869.

25 Granville L 'Intervention in Libya: From Sovereign Consent to Regional Consent' (2013) 14 *International Studies Perspectives* 326.

However the number of states that acknowledged the R2P brings a positive effect pertaining to the acceptance of R2P. Significantly, 191 states committed themselves to the principle that the rule of non-intervention is not sacrosanct in cases where a government commits genocide, mass killings and large scale ethnic cleansing within its borders.²⁷ But this also has some restrictions imposed upon it. The fact that positive outcomes are very limited pertaining to the use of military force in human rights crises; the principles of seriousness of threat, proper purpose, last resort and proportional means and balance of consequences.²⁸ These principles serve to guard against the abuse of the R2P by [powerful] state actors against weak states. According to Saxer, as a political instrument, the R2P attempts to overcome the divisive North-South debates over humanitarian interventions and build a broad consensus on how the international community can deal with cases of mass atrocities occurring in internal conflicts.²⁹

In regard to this, Thakur argues that the inconsistent practice, double standards, and the sporadic nature of Western powers interest in protecting human rights shows that noble principles are often convenient cloaks for hegemonic interests.³⁰ Furthermore Luenga-Cabrera points out that by applying R2P powerful states can justify interest-driven interventions under the guise of humanitarianism when they deem that a sovereign state is not respecting a minimum standard of human rights and security.³¹

26 Brunnee J & Toope 'Norms, Institutions and UN Reform: The Responsibility to Protect' (2006) 2 *Journal of International Law and International Relations* 122.

27 Wheeler NJ 'A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit' (2005) 2 *Journal of International Law and International Relations* 95.

28 O'Connell ME 'The Counter-Reformation of the Security Council' (2005) 2 *Journal of International Law and International Relations* 111.

29 Saxer M 'The Politics of Responsibility to Protect' (2008) 2 *FES Briefing Paper* 2.

30 Thakur R 'R2P after Libya and Syria: Engaging Emerging Powers' (2013) 36 *The Washington Quarterly* 66.

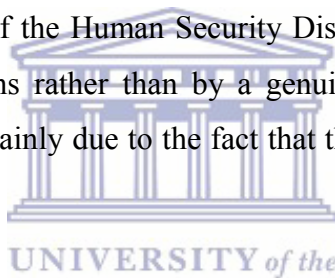
31 Luengo-Cabrera 'Human Security Discourse and Humanitarian Intervention: A Critical Evaluation' (2011) *Partnership for Research in International Affairs and*

This signifies a deficit in the principles of R2P and its practical application. Domestici-Met argues that during the protracted crises in Libya, the official objective quickly shifted to removing Gaddafi from power.³² Furthermore, Leebaw observes that human rights have become a standard part of the justification for the external use of force by states against other states.³³

In principle the R2P makes it clear that sovereignty comes with responsibility on the part of the state regarding the security of its citizens³⁴ and this implies that hostilities in a state must reach a threshold before the UN member states can act. How this threshold is determined is a matter of contention among the member states. For instance, in Libya protests quickly turned violent partly because of the regime's crackdown and partly because an armed opposition group was quickly established under the Interim National Transitional Council (NTC).³⁵

In accordance with this, Luengo-Cabrera asserts that the selective application of the R2P undermines the normative ideals of the Human Security Discourse as it suggests that states are driven by realpolitik considerations rather than by a genuine concern for the security of the communities in danger.³⁶ This is mainly due to the fact that the UN is against the unlawful take-

Development Policy Paper 10.



32 Domestici-Met M 'Protecting in Libya on Behalf of the International Community' (2011) 3 *Goettingen Journal of International Law* 876.

33 Leebaw B 'Justice, Charity or Alibi? Humanitarianism, Human Rights, & Humanity Law (2014) 5 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 262.

34 Powell K 'The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect (2005) 119 *Institute for Security Studies* 7.

35 Williams PD & Bellamy AJ 'Principles, Politics, and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force (2012) 18 *Global Governance* 274.

36 Luengo-Cabrera 'Human Security Discourse and Humanitarian Intervention: A Critical Evaluation' (2011) *Partnership for Research in International Affairs and Development Policy Paper* 13.

over of legitimate governments. To affirm this is the observation by Omorogbe that the UN had failed to authorize intervention in many African civil conflicts.³⁷ This may be attributed to the fact that states are entrusted with the primary responsibility to protect the security of their citizens.³⁸

However, Luengo-Cabrera advocates that the reason why the mobilization of international resources to intervene in Libya was larger and available in a short period relative to Darfur epitomizes the notion that the normative predicaments of the international community are being applied inconsistently.³⁹ In Libya NATO ignored the restrictions against targeting Gaddafi directly in a transparent effort at regime change rejected any willingness by the Gaddafi regime to negotiate a ceasefire, intervened in the internal civil wars and supplied weapons to the rebels.⁴⁰ This despite the fact that intervention as a military action aimed at ending serious violations of human rights, without first obtaining permission from national authorities is considered as contravening norms established by international law.⁴¹ According to Dersso the Libyan case demonstrated that in cases where the interests of dominant global powers were involved Africa cannot pursue its peace and security agenda independently.⁴²

37 Omorogbe EY 'The African Union, Responsibility to Protect and the Libyan Crises' (2012) 59 *Netherlands International Law Review* 148.

38 Wheeler NJ 'A Victory for Common Humanity? The Responsibility to Protect after 2005 World Summit' (2005) 2 *Journal of International Law and International Relations* 97.

39 Luengo-Cabrera 'Human Security Discourse and Humanitarian Intervention: A Critical Evaluation' (2011) Partnership for Research in International Affairs and Development Policy Paper 13.

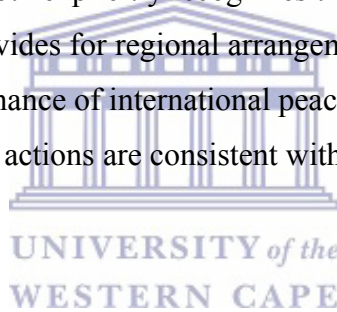
40 Thakur R 'R2P after Libya and Syria: Engaging Emerging Powers' (2013) 36 *The Washington Quarterly* 70.

41 Thibault JF 'R2P and the Debt of the International Community' (2012) 24 *Journal of Social Justice* 210.

42 Dersso S 'The quest for Pax Africana: The case of the African Union's peace and security regime' (2012) 12 *African Journal on Conflict Resolution* 42.

It is an indisputable fact that human security is the gist of international human rights law. In accordance with this Waithira argue that peace and security are inextricably linked to the protection and promotion of human rights.⁴³ Thus, the concept of R2P and its subsequent implementation is of utmost importance regarding the protection and promotion of human rights. The R2P encompasses three elements of conflict resolution which are prevention, reaction and rebuilding. It is prudent to operationalize the first element of prevention as it limits the use of force in conflict resolution. This emanates from the notion that conflict prevention is vital for human rights protection.⁴⁴ Thus it is imperative for the UN or regional organizations to firstly exhaust all other means before embarking on an intervention campaign using force.

The operationalization of R2P relies heavily on better collaboration between the UN and organizations at the regional and sub-regional levels. This is entrenched in the UN Charter and R2P Outcomes Document which both explicitly recognizes the role of regional organizations.⁴⁵ Chapter VII of the UN Charter provides for regional arrangements or agencies (to deal) with such matters relating to the maintenance of international peace and security provided that such arrangements or agencies and their actions are consistent with the Purposes and Principles of the United Nations.⁴⁶



43 Waithira NM 'Ships Passing in the Night? Opportunities to Integrate the African Peer Review Mechanism Early Warning Findings within the African Union Peace and Security Architecture (A Thesis submitted in partial fulfillment of the requirements of the LLM (Human Rights and Democratisation in Africa) of the University of Pretoria , 2009) 10.

44 Waithira NM 'Ships Passing in the Night? Opportunities to Integrate the African Peer Review Mechanism Early Warning Findings within the African Union Peace and Security Architecture (A Thesis submitted in partial fulfillment of the requirements of the LLM (Human Rights and Democratisation in Africa) of the University of Pretoria, 2009) 10.

45 Welsh J 'Implementing the "Responsibility to Protect" (2009) 1 *Policy Brief* 6.

46 UN Charter.

According to Juma, regional human rights system remains one of the greatest achievements in the internationalization of human rights.⁴⁷ Also, the spirit of the AU Constitutive Act strongly implies that the AU, not the Security Council, may assume primary responsibility in cases of crimes against humanity, war crimes and genocide in Africa.⁴⁸ This emanates from the fact that the failures of the UN in the face of some of Africa's most profound security challenges reinforced a desire for greater autonomy and African solutions to African problems approach to peace and security on the continent.⁴⁹

However, Libya's overlapping memberships of various regional organizations resulted in confusion as to which regional organization had the authority to intervene. Granville argues that in the case of Libya there were several organisations with reasonable claims to be the voice of the region, and while the LAS, GCC and OIC each called for the establishment of a no-fly zone; the AU firmly rejected foreign military intervention in any form.⁵⁰ Eventually, the Arab League's call for the Security Council to impose a no-fly zone over Libya proved crucial in generating political support for outside military intervention.⁵¹ The reason for this was that the AU's political approach was in open conflict with the NATO and UN military strategy.⁵²

47 Juma D 'Provisional Measures under the African Human Rights System: The African Court's Order against Libya' (2011) 30 *Wisconsin International Law Journal* 345.

48 Dyani-Mhango N 'Reflections on the African Union's Right to Intervene' (2012) 38 *Brooklyn Journal of International Law* 11.

49 Powell K 'The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect' (2005) The North-South Institute 17.

50 Granville L 'Intervention in Libya: From Sovereign Consent to Regional Consent' (2013) 14 *International Studies Perspectives* 339.

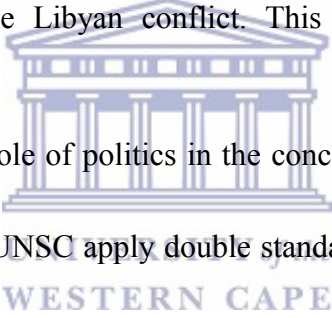
51 Omorogbe EY 'The African Union Responsibility to Protect and the Libyan Crises' (2012) 59 *Netherlands International Law Review* 158.

52 Ntahiraja B 'The Global and the Regional in the Responsibility to Protect: Where does authority lie?' (2012) 419 *Journal Jurispudence* 438.

Pommier observes that it is interesting to note that the resolutions assign a central role to a regional organization, the League of Arab States, for the implementation of measures related to the protection of the civilian population and the no-fly zone.⁵³ According to Morris, what proved crucial to the passing of the resolution was the level of regional support for a more robust UNSC report.⁵⁴ This epitomizes the primary role delegated to regional organizations as envisaged by the UN Charter pertaining to the protection of human rights. Moreover, international responses to protection crises are most effective when there is a strong partnership between the UN and relevant regional organizations.⁵⁵ Samples argue that as the rebels cause seemed lost, the Arab League invited non-Arab nations to impose a no-fly zone in Libya.⁵⁶

1.4 RESEARCH QUESTIONS

This study seeks to determine: what was the role of responsibility to protect pertaining to the protection of human rights in the Libyan conflict. This is underpinned by the following questions:

- 
- (i) What was the specific role of politics in the conceptualisation and application of the R2P in Libya?
 - (ii) To what extent did the UNSC apply double standards in its application of the R2P in Libya?
 - (iii) What are some of the lessons learnt from the Libyan intervention from the perspective of the R2P and Human rights?

1.5 RESEARCH METHODOLOGY

53 Pommier B 'The use of force to protect civilians and humanitarian action: The case of Libya and Beyond' (2011) 93 *International Review of the Red Cross* 1067.

54 Morris J 'Libya and Syria: R2P and the spectre of the swinging pendulum' (2013) 89 *International Affairs* 1272.

55 Bellamy AJ & Williams PD 'The new politics of protection? Cote d'Ivoire, Libya and the responsibility to protect' (2011) 87 *International Affairs* 848.

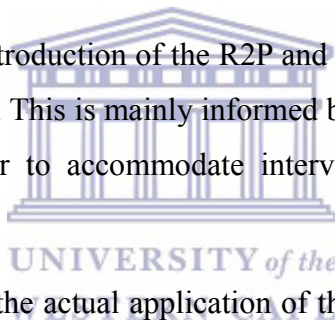
56 Samples J 'Lessons and Warnings From the Libyan Intervention' (2012) *International Affairs* 40.

The methodology for this research paper will consist of library research and document analysis, focusing, among others, on books, journals, UN Resolutions, newspaper articles and internet sources. Thus, the study is to utilize a combination of both primary and secondary sources as a means of achieving its objectives. Primary sources will be in the form of UN Resolutions and secondary sources will entail the literature relevant to the study, academic papers, journal articles and books. Both print and online media are to be used, and views expressed in the newspaper articles are to be taken to represent the perspectives of the person quoted in them or writing them, as appropriate.

1.6. CHAPTER OUTLINE

Chapter one, which is this Chapter, provides, among others, the background, research questions, and methodology of this paper.

Chapter 2 aims to delve into the introduction of the R2P and its subsequent re-envisioning of the sacrosanct principle of sovereignty. This is mainly informed by the redressing of sovereignty as a responsibility not a right in order to accommodate intervention in the internal affairs of a sovereign state.



Chapter 3- purports to investigate the actual application of the R2P in Libya by the UN through the auspices of NATO. This is pivotal in the sense that Libya was the first case where the R2P was operationalized through the use of force. Thus the chapter will interrogate this and its implications on future application of the R2P by the international Community

Chapter 4- completes the study with conclusions and recommendations

CHAPTER 2

THE RESPONSIBILITY TO PROTECT AND THE PRINCIPLE OF SOVEREIGNTY

2.1 INTRODUCTION

The sacrosanct principle of sovereignty is one of the cornerstones of international law. Sovereignty is sacrosanct based on its conceptualisation by the Treaty of Westphalia. This is imperative for the maintenance of international peace which is one of main objectives of the UN. Sovereignty is pivotal for international peace because it is premised on the notion of equality and mutual respect among member states. Accordingly, Article 2 of the UN Charter calls for the respect of a member state's sovereignty and non-interference in a member state's internal affairs.⁵⁷ However, the atrocities committed during World War II and the human rights abuses committed by governments against their own people necessitated for the re-conceptualisation of sovereignty.

Maogoto argue that the development of a corpus of human rights law, particularly in reaction to the revulsions of World War II accelerated the re-conceptualisation of sovereignty to transcend the responsibility of the territorial nation-state and to become an international legal concern.⁵⁸ This was in turn conceptualised as the Responsibility to Protect (R2P). This chapter is concerned with the introduction of the R2P and its re-envisioning of the sacrosanct principle of sovereignty.

2.2 THE WESTPHALIAN CONCEPTION OF SOVEREIGNTY

The Peace of Westphalia ended the Thirty Years War in 1648 and added a new chapter of state sovereignty to the modern history of international law.⁵⁹ Thus, this signalled the introduction of the traditional notion of sovereign equality. Sovereign equality is the core principle, the cornerstone of international relations; one nation is equal to another and cannot without its consent cede its sovereignty.⁶⁰ Furthermore, the Peace of Westphalia like the UN Charter was

57 UN Charter.

58 Maogoto JN 'Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept' in Jacobsen T, Sampford C & Thakur R (eds.) *Re-envisioning Sovereignty: the end of Westphalia?* (2008) 212.

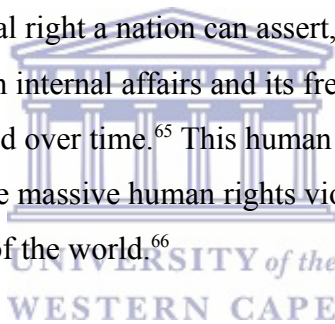
59 Masahiro M 'Sovereignty and International Law' (2012) University of Aichi 2.

60 Schiedel II DF 'When Great Powers Clash: Reforming the United Nations to Better Serve a Chaotic World' (2015) 15 *Journal of International Business and Law* 158.

founded upon an agreed set of principles that provided for the delimitation of territories and the establishment of rules of conduct between them.⁶¹ From the Peace of Westphalia onwards, sovereignty became a cardinal principle of international law.

Chandramathi correctly points out that the notion of sovereignty in international law is just about identical with the history of International Law itself.⁶² This Westphalian model of sovereignty does not specify a state's relationship to its own population, making the responsibility to protect's fundamental tenet, that states possess a legally-binding duty to protect their populations from mass atrocities, superficially revolutionary.⁶³ In accordance with the Westphalian Treaties notion of national sovereignty, states are not legally allowed to intervene in the domestic affairs of each other.⁶⁴

However, Maogoto asserts that although the international community has consistently recognised sovereignty as the most fundamental right a nation can assert, complete autonomy of the sovereign state in managing its own internal affairs and its freedom from outside interference and unsolicited intervention has changed over time.⁶⁵ This human rights challenge to sovereignty was borne out of a moral response to the massive human rights violations that were committed a number of times in different parts of the world.⁶⁶



61 Moses J 'Sovereignty as irresponsibility? A Realist critique of the Responsibility to Protect' (2013) 39 *Review of International Studies* 120.

62 Chandramathi MV 'Sovereignty- Modern Approach to a Regressive Concept' (2016) 6 *International Journal of Political Science, Law and International Relations* 18.

63 Van Landingham R 'Politics or Law?' The Dual Nature of the Responsibility to Protect' (2012) 41 *Denver Journal of International Law and Policy* 66.

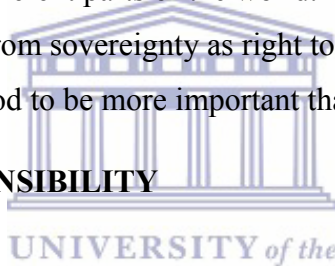
64 Norooz E 'Responsibility to Protect and its applicability in Libya and Syria' (2015) 9 *Vienna Journal on International Constitutional Law* 10.

65 Maogoto JN 'Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept' in Jacobsen T, Sampford C & Thakur R (eds.) *Re-envisioning Sovereignty: the end of Westphalia?* (2008) 212.

The pivotal lesson of this period was how to reconcile state sovereignty, as reflected in the United Nations Charter's non-interference principle and prohibition against the use of force, with the urge to stop mass human rights abuses within the territories of other nation-states which were either perpetrating such abuses or failing to stop them.⁶⁷ In response to this, the international community created a legal framework consisting of declarations, treaties, and principles which created international human rights law emphasizing the duty of States to respect, protect and ensure rights.⁶⁸

The advent of human rights called for the limiting of state sovereignty more especially pertaining to individual human rights. This is partly due to the notion that states respect for human rights usually prevents both intra-state and interstate conflicts.⁶⁹ Also, the human rights challenge to sovereignty emanated from a moral response to the massive human rights violations that were committed a number of times in different parts of the world.⁷⁰ This necessitated a shift in the conceptualization of sovereignty, from sovereignty as right to sovereignty as a responsibility. In the R2P human rights are understood to be more important than state sovereignty.⁷¹

2.3 SOVEREIGNTY AS RESPONSIBILITY



66 Kumar R 'Corruption and Transparency in Governance and Development: Reinventing Sovereignty for Promoting Good Governance' in in Jacobsen T, Sampford C & Thakur R (eds.) *Re-envisioning Sovereignty: the end of Westphalia?* (2008) 252.

67 Van Landingham R 'Politics or Law? The Dual Nature of the Responsibility to Protect' (2012) 41 *Denver Journal of International Law and Policy* 70.

68 Rishmawi M 'The Responsibility to Protect and Protection of Civilians: The Human Rights Story' (2010) UN *Office of the High Commissioner for Human Rights*.

69 Gumedze S 'The African Union and the responsibility to protect' (2010) 10 *African Human Rights Law Journal* 136.

70 Kumar R 'Corruption and Transparency in Governance and Development: Reinventing Sovereignty for Promoting Good Governance' in in Jacobsen T, Sampford C & Thakur R (eds.) *Re-envisioning Sovereignty: the end of Westphalia?* (2008) 252.

The mass atrocities committed by states against their civilian population necessitated for the redressing of the concept of sovereignty in order to accommodate intervention by the UN in the internal affairs of a member state where human rights violations occur. Humanitarian intervention is one of the most contested norms in international law. The contestations around humanitarian interventions flow directly from the tension between the legitimacy attributed to universal human rights and deep seated norms associated with sovereignty and non-aggression.⁷² Thus, by turning the protection of civilians into a responsibility, the hope is that R2P offers a way of transcending the political differences that can lead to inaction in the face of a humanitarian crisis.⁷³

Bogliolo points out that the clear tension between the principle of state sovereignty and the progressing demand for respect to human rights has led to the re-conceptualisation of what security and sovereignty mean.⁷⁴ Vidmar asserts that traditionally, international law was a state-centric system which did not pay much attention to factors other than the interests of sovereign states.⁷⁵ However, this *status quo* experienced some challenges brought about by the reformation of the global state system. According to Ludsin, globalisation challenges traditional notions of sovereignty in large part because states are finding it difficult to control the flow of information, resources and even problems across their borders.⁷⁶

71 Lahoud J *The Responsibility to Protect in Syria: A Motive Analysis of GIBSA* (unpublished Masters in International Administration and Global Governance thesis, University of Gothenburg, 2014) 8.

72 Dunne T & Gelber K 'Arguing Matters: The Responsibility to Protect and the Case of Libya' (2014) 6 *Global Responsibility to Protect* 1.

73 Hobson C 'Responding to Failure: The Responsibility to Protect after Libya' (2016) 44 *Millennium: Journal of International Studies* 4.

74 Bogliolo L 'The Responsibility to Protect and the Legality of Using Force' (2009) 8 *Human Security Journal* 19.

75 Vidmar J 'International Community and Abuses of Sovereign Powers' (2014) 35 *Liverpool Law Review* 194.

The calls for the re-envisioning of sovereignty were first explicitly advocated by the then UN Secretary-General Kofi Annan in an article titled “Two Concepts of Sovereignty”. According to Annan “state sovereignty, in its most basic sense, is being redefined not least by the forces of globalisation and international co-operation and states are now widely understood to be instruments at the service of their peoples, and not vice versa”⁷⁷. This implies that Annan was arguing for a shift from the traditional conceptions of sovereignty to a people’s sovereignty.

This emanates from the notion that states were perceived to commit atrocities against their own people while hiding behind sovereignty. Also, due to the high priority put on state sovereignty for the sake of global peace, governments committed massive human rights violations and genocide in some cases with no response from the international community.⁷⁸ In response to these the International Commission on Intervention and State Sovereignty was formed.

2.3.1 International Commission on Intervention and State Sovereignty (ICISS)

Annan’s call was heeded by the international community through the formation of the International Commission on Intervention and State Sovereignty (ICISS) in 2001 which was an initiative of the Canadian government. The ICISS purported to re-envision sovereignty in order to enable the international community to intervene in instances whereby a state commits human rights abuses against its citizens. The subsequent report from the ICISS titled *The Responsibility to Protect* had three core elements which are

- (i) The responsibility to prevent which seeks to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.

76 Ludsin H ‘Returning Sovereignty to the People’ (2013) 46 *Vanderbilt Journal of Transnational Law* 106.

77 Annan K ‘Two Concepts of Sovereignty’ *The Economist* 16 September 1999 available at <http://www.economist.com/node/324795> (Accessed 01 August 2016).

78 Zounmenou D, Motsamai D & Nganje F ‘Perspectives on Conflicts and Conflict Resolution in Africa’ Research Paper of the Wilson Centre’s African Program and Leadership Project (2012) *Southern Voices in the Northern Policy Debate Initiative* 14.

(ii) The responsibility to react which seeks to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention and

(iii) The responsibility to rebuild which seeks to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.⁷⁹

The ICISS report sought to bridge the gap between intervention and sovereignty by introducing a complementary concept of responsibility, under which responsibility is shared by the national State and the broader international community.⁸⁰ Also, the ICISS Report affirmed the notion that sovereignty entails not just rights, but insisted that it also encompassed a State's responsibility to protect civilian populations within and outside borders. Furthermore, the ICISS suggested replacing the terminology of humanitarian intervention from right to intervene with responsibility to protect in order to shift the focus of the discussion to the perspective of those needing or seeking support rather than of those contemplating intervention.⁸¹

Thus, the ICISS report aspired to reconcile the gap between intervention and sovereignty by introducing a complementary concept of responsibility, under which responsibility is shared by the national State and the broader international community.⁸² In doing this, the ICISS sought to

79 Report of the International Commission on Intervention and State Sovereignty 2001- *The Responsibility to Protect* (2001).

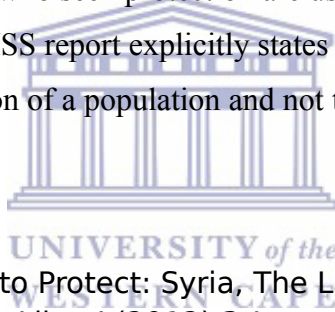
80 Stahn C 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101*The American Journal of International Law* 103.

81 Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this? 2015 available at [http://www.academia.edu/24403156/Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?](http://www.academia.edu/24403156/Was_NATO's_intervention_in_Libya_justified?_Was_it_successful?_What_criteria_are_you_using_to_judge_this?) (Accessed on 8 September 2016).

82 Bogliolo L 'The Responsibility to Protect and the Legality of Using Force' (2009) 8 *Human Security Journal* 22.

accommodate the diverse viewpoints of the UN member state pertaining to humanitarian intervention. Since intervention is one of the most contentious issues in international law, the influence of political strategy is even more pronounced in the Responsibility to Protect context.⁸³ Another key element in the ICISS report is the focus on the responsibility to protect and not the right to intervene as justification for intervention with human protection purposes.⁸⁴

Another pivotal aspect of the ICISS report is the notion that the responsibility to protect encompasses not only the responsibility to react, but most importantly the responsibility to prevent and the responsibility to rebuild.⁸⁵ Thus, if military intervention is used as a last resort, an accompanying responsibility arises to rebuild the state by addressing the underlying causes of harm that necessitated the intervention.⁸⁶ However, concerning the use of force as a last resort Kielsgard asserts that it is difficult to envisage how more violence will resolve human rights violations because the very people who seek protection are usually the most vulnerable to outside military action.⁸⁷ Moreover, the ICISS report explicitly states that the objective of any military intervention should be the protection of a population and not the defeat of a state.⁸⁸



83 Cronogue G 'Responsibility to Protect: Syria, The Law, Politics, and Future of Humanitarian Intervention Post-Libya' (2012) 3 *International Humanitarian Legal Studies* 159.

84 ICISS Report.

85 Report of the International Commission on Intervention and State Sovereignty 2001- *The Responsibility to Protect* (2001).

86 Report of the International Commission on Intervention and State Sovereignty 2001- *The Responsibility to Protect* (2001).

87 Kielsgard MD 'Evolving Human Rights Methodology: Have Incursions into State Sovereignty Gone Too Far?' (2013) 22 *Tulane Journal of International and Comparative Law* 61.

88 Chandramohan B 'Fighting the Logic of Inviolable State Sovereignty' (2012) 37 *New Zealand International Review* 17.

Regrettably, the ICISS enjoys no legal status under international law. It therefore has no binding effect on states. The contents of the ICISS were integrated in the World Summit Outcome document adopted the UN General Assembly in 2005.

2.3.2 Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change

In 2004 the then Secretary-General of the UN Kofi Annan established a High-Level Panel whose primary objective was to ascertain a way in which UN member states can work together towards collective security. In regards to sovereignty, the Report made it clear that whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of state sovereignty, today it clearly carries with it the obligation of a state to protect the welfare of its own peoples and meet its obligations to the wider international community.⁸⁹

Thus, concerning sovereignty, the Report aligned itself with the position of the ICISS on sovereignty and therefore affirmed the notion that the international community respected the people's sovereignty rather than the state's sovereignty. It also emphasizes that the responsibility for the well-being of human beings is shared between the state and the international community, and the operational content of the responsibility to protect is remarkably restrict to the UN Security Council.⁹⁰

The Report reiterated the pivotal fact that the primary focus should be on assisting the cessation of violence through mediation and other tools and the protection of people through such measures as the dispatch of humanitarian, human rights and police missions and force if it needs to be used should be deployed as a last resort.⁹¹ This probably was emphasised in order to appease those members of the UN who were opponents of the use of force in international relations. However, in Libya the response of the international community was executed within a

⁸⁹ United Nations Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change 2004- *'A more secure world: Our shared responsibility'* (2004) para. 29.

⁹⁰ Payandeh M 'With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Lawmaking' (2012) 35 *The Yale Journal Of International Law* 469.

short period of time. This left little space for mediation initiatives by regional organisations like the AU. There is the notion that in the Libyan intervention force was used prematurely not as an option of last resort as envisaged by the Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change.

The Report went further and argued that in deciding whether or not to authorise the use of force, the Council should adopt and systematically address a set of agreed guidelines, going directly not to whether force can legally be used but whether as a matter of good conscience and good sense, it should be.⁹²This was in order to curb the potential abuse of the R2P principle by the powerful states against their weaker counterparts.

Furthermore, in contrast to the ICISS Report, which recommended an alternative operational system, the High-Level Panel Report did not envisage that an international responsibility to protect could be invoked by the General Assembly under the "Uniting for Peace" procedure or through regional or sub-regional organizations in the absence of Security Council authorization;⁹³ rather it focuses that a collective international responsibility to protect is only exercisable by the UN Security Council.

2.3.3 The 2005 World Summit Outcome Document

After the UN World Summit the UN General Assembly passed Resolution 60/1. The World Outcome Summit document is particularly relevant in the context of the R2P. This is due to the fact that in the World Outcome Summit 191 states committed themselves to the principle that the rule of non-intervention is not sacrosanct in cases where a government commits genocide, mass

91 United Nations Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change 2004- 'A more secure world: Our shared responsibility' (2004) para. 201.

92 United Nations Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change 2004- 'A more secure world: Our shared responsibility' (2004) para.205.

93 Report of the International Commission on Intervention and State Sovereignty 2001- The Responsibility to Protect (2001).

killings and large scale ethnic cleansing within its borders.⁹⁴ The mere fact that such a significant number of UN member states openly endorsed the notion of R2P gave hope for its future. Also, the outcome document was the first formally and universally endorsed document on a comprehensive international role for the protection of populations beyond existing state obligations.⁹⁵

This culminated in the re-envisioning of sovereignty as an absolute, to sovereignty as a responsibility. The significance of this shift is the fact that a responsibility implies a duty which is more helpful than viewing intervention as a right, which implies the discretion of states to either take action or not.⁹⁶ Also, it is argued that the R2P seeks to reinforce one of the essential elements of statehood and sovereignty; the protection of people from organised violence.⁹⁷

The Outcome document locates the authorisation of the use of force in the Security Council. However, the Outcome document refused to consider what should happen if the Security Council fails to act and even failed to acknowledge that possibility.⁹⁸ This may be premised on the notion that if the R2P becomes an accepted and binding international norm, the more powerful developed states will also lose part of their sovereignty to the international community in the form of their decision-making sovereignty.⁹⁹ Thus this deliberate omission may be based on the state's defence of their self-interests.

94 World Summit Outcome Document.

95 Murthy CSR & Gerrit K 'International Responsibility as Solidarity: The Impact of the World Summit Negotiations on the R2P Trajectory' (2016) 30 *Global Society* 39.

96 Kabau T 'The Responsibility to Protect and the Role of Regional Organisations: An Appraisal of the African Union's Interventions' (2012) 4 *Goettingen Journal of International Law* 77.

97 Luck E 'Sovereignty, Choice and the Responsibility to Protect' (2009) 1 *Global Responsibility to Protect* 14.

98 Mohamed S 'Taking Stock of the Responsibility to Protect' (2012) 48 *Stanford Journal of International Law* 328.

According to Luck one of the things that unites states in their approach to R2P is that they are all concerned about preserving their national sovereignty, just in different ways.¹⁰⁰ Furthermore, while the society of states is global in scope, different regions interpret different norms and values in different ways.¹⁰¹

In Paragraphs 138-140 of the Outcome Document, Heads of State and Government unanimously affirmed that each individual State has the responsibility to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing, including the prevention of such crimes.¹⁰² They further agreed that States should assist others States in exercising their responsibility.¹⁰³ In addition, they affirmed that the international community has the responsibility to take actions using peaceful means to protect populations from massive human rights violations; and when a State fails to protect its population from such violations, they agreed to take collective action, in a timely and decisive manner, through the UN Security Council, in accordance with the Charter.¹⁰⁴

In the deliberations on R2P leading up to the summit, some of the permanent member states of the UNSC were hostile to the notion of humanitarian intervention as an obligation of the international community. This is epitomized by a letter from US Ambassador to the UN John Bolt in which he wrote that the US does not accept that the UN, SC or individual states have an obligation to intervene under international law and that language which focuses on the obligation

99 Oldemenien M 'Non-Intervention or Responsibility to Protect' E-International Relations 14 January 2012 available at <http://www.e-ir.info/2012/01/14/non-intervention-or-responsibility-to-protect/> (Accessed on 17 June 2016).

100 Luck E 'Sovereignty, Choice and the Responsibility to Protect' (2009) 1 *Global Responsibility to Protect* 21.

101 Granville L 'Intervention in Libya: From Sovereign Consent to Regional Consent' (2013) 14 *International Studies Perspectives* 339.

102 UN World Summit Outcome Document.

103 UN World Summit Outcome Document.

104 UN World Summit Outcome Document.

or responsibility of the international community must be avoided and instead assert that we are prepared to take action.¹⁰⁵ Subsequent to this there was no stated obligation to act, only a call for preparation to take action.¹⁰⁶

Also, the wording used in paragraphs 138-140 dedicated to the Responsibility to Protect remains vague and even though the word “Responsibility” is used, which would imply an obligation, paragraph 138 goes on to say that “the international community should as appropriate encourage and help States to exercise this responsibility and support the UN in establishing an early warning capability”.¹⁰⁷ This may have been done in order to accommodate the differing views of the member states in relation to the concept of R2P.

Furthermore, it stated that the collective responsibility to protect should be exercised when a state manifestly fails to protect its populations.¹⁰⁸ This is a vague and ambiguous threshold to meet than the “unable or unwilling” threshold that was endorsed up until the World Summit. Also, the Outcome Document narrowed the scope of protection in that it offered protection specifically against genocide; war crimes, ethnic cleansing and crimes against humanity and other gross violations of human rights were off the agenda.¹⁰⁹ So, by limiting the trigger events to these crimes gives clear limits to when the responsibility may be invoked, avoiding the broad definitions from the ICISS report.¹¹⁰

105 Bolt JR Letter to the UN on R2P 2005.

106 Dietrich JW ‘R2P and Intervention in Libya’ (2013) 5 *Journal of Alternative Perspectives in the Social Sciences* 328.

107 UN General Assembly Resolution 60/1 2005 World Summit Outcome Document.

108 UN World Summit Outcome Document.

109 Abulof U ‘*The Responsibility to Protect at 10: The Challenge of Protecting the World’s most Vulnerable Populations*’ (2015) Brandeis University 3.

110 Rose SJ ‘Moving Forward with the Responsibility to Protect: Using Political Inertia to Protect Civilians’ (2014) 37 *Boston College International & Comparative Law Review* 237.

More importantly, the World Summit ignored the law developed by regional organisations and the final report did not take into consideration the strong reactions to the ICISS proposal on that issue submitted to the General Assembly by those regional organisations before the Summit.¹¹¹ This occurred despite the fact that R2P is a notion that seeks to challenge the traditional understanding of state sovereignty by allowing regional organisations to interfere in cases where serious human rights violations are taking place.¹¹² Furthermore, the Outcome document refused to consider what should happen if the Security Council fails to act and even failed to acknowledge that possibility.¹¹³

The international community is allowed to interfere in the internal affairs of a sovereign state through the exercise of its Chapter VII powers. However, this was not the intended purpose of Chapter VII. According to Murgatroyd Chapter VII was intended to augment the sovereignty of states and protect them from external aggression and unwanted intervention, not to intervene in their domestic affairs and as such humanitarian interventions subvert the very purpose for which the Chapter was written.¹¹⁴

This change in the interpretation of the Chapter VII powers can be attributed to the assertion by Walling that “while norms of sovereignty and human rights have been a central concern of the UN since its founding, their conceptual meaning has changed over time”.¹¹⁵ Also, although the UN Charter was orientated toward protecting the sanctity of sovereignty and non-intervention as

111 Ntahijara B ‘The Global and the Regional in the Responsibility to Protect: Where does authority lie?’ (2012) 419 *The Journal Jurispudence* 431.

112 Gumedze S ‘The African Union and the Responsibility to Protect’ (2010) 10 *African Human Rights Law Journal* 137.

113 UN General Assembly Resolution 60/1 2005 World Summit Outcome Document.

114 Murgatroyd BM ‘How are rules of intervention relevant to the current culture of humanitarian interventions?’ available at <http://www.academia.edu/18587698/> (Accessed on 28 August 2016).

115 Walling CB ‘Human Rights Norms, State Sovereignty and Humanitarian Intervention’ (2013) Paper Prepared for the Ford Security Seminar, Gerald R. Ford School of Public Policy 4.

enshrined in Articles 2 (4) and 2 (7) it contained important references to the protection of human rights, particularly in Articles 1 (3) and 55 that imposed limits regarding a state's freedom in its treatment towards its citizens.¹¹⁶

Moreover, the criteria for military intervention as espoused by the ICSSS and High-Level Panel Report were not explicitly endorsed by the Outcome document. This implies that the discretion pertaining to the use of armed force is accorded to the UNSC. The outcome document sidelined the question of interventions without state consent, leaving it to the Security Council, where intervention sceptic China and Russia possessed a veto, to determine the course of action in a given situation.¹¹⁷ This is problematic especially when one considers the complexities pertaining to the use of force in the UNSC. In this regard, Weiss argue that the World Summit approved "R2P-lite" that is, without specifying the criteria governing the use of force and insisting upon Security Council approval.¹¹⁸

This vagueness of the Outcome Document allowed for the abuse of the R2P by some of the UN member states. A case in point is the Russian government's use of the provisions of the Outcome Document to argue that it was exercising its responsibility to protect its fellow citizens who it alleged were facing threats of genocide through its military operations in Georgia.¹¹⁹ This prompted the UN Secretary-General Ban Ki-Moon in his 2009 Report on Implementing the Responsibility to Protect to clarify what the responsibility to protect entails in detail.

2.3.4 UN Secretary-General Report on Implementing the Responsibility to Protect

116 Luengo-Cabrera J 'Human Security Discourse and Humanitarian Intervention: A Critical Evaluation' (2011) Partnership for Research in International Affairs and Development Policy Paper 9.

117 Murthy CSR & Gerrit K 'International Responsibility as Solidarity: The Impact of the World Summit Negotiations on the R2P Trajectory' (2016) 30 *Global Society* 47.

118 Weiss TG 'R2P After 9/11 and the World Summit' (2006) 24 *Wisconsin International Law Journal* 750.

119 Welsh J 'Implementing the 'Responsibility to Protect' (2009) 1 *Policy Brief* 7.

In 2009 the then newly elected UN Secretary-General Ban Ki-Moon published a report on the implementation of the R2P aptly titled *Implementing the Responsibility to Protect*. In this report the Secretary-General pointed out that the Responsibility to Protect consisted of three mutually reinforcing pillars:¹²⁰

- (i) The responsibility of each individual state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and their incitement.
- (ii) The responsibility of the international community to encourage and help states to exercise this responsibility and to help states build capacity to protect their populations, as appropriate.
- (iii) The responsibility of the international community to be prepared to take collective action, in a timely and decisive manner in accordance with the United Nations Charter, on a case-by-case basis, and in cooperation with relevant regional organizations as appropriate, should the above preventive means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

2.4 SOVEREIGNTY AS A PEOPLE'S SOVEREIGNTY

Ludsin argues that while traditionally the international community treated the state or the government acting on its behalf as the sovereign, domestic and international law supports the shift of sovereignty to the people.¹²¹ Article 1 (2) of the UN Charter states that the purposes of the UN are to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.¹²² The reconfiguration of sovereignty as a people's sovereignty is linked to the human right to self-determination. Also, Article 1 of the International Covenant on Civil and Political Rights (ICCPR) declares that [a]ll peoples have the right of self-determination. By

120 UN Secretary-General, *Implementing the Responsibility to Protect*, UN Document A/63/677, January 12, 2009.

121 Ludsin H 'Returning Sovereignty to the People' (2013) 46 *Vanderbilt Journal of Transnational Law* 113.

122 UN Charter.

virtue of that right they “freely determine their political status and freely pursue their economic, social and cultural development”.¹²³

By the end of the World War II the notion of sovereignty based on the will of the people had become established as one of the conditions of political legitimacy for a government.¹²⁴ This is embodied by Article 21 (3) of the Universal Declaration of Human Rights which states that “the will of the people shall be the basis of the authority of government”.¹²⁵ Also, in recent years non-violent civil resistance or people power movements have become widespread, impacting the international order and challenging the international community to rethink how it conceptualises sovereignty in international law.¹²⁶

Thus the R2P signalled a shift from a state centric view of the international state system to a more people centred approach. For Basaran the R2P is a doctrine that challenges the long established understanding that human rights are ultimately a profoundly national question rather than an international matter.¹²⁷ This occurs in a context of inaction by the international community in cases of massive human rights violations perpetrated by states against their own people. Furthermore, the rise of human rights law led to a contradiction in the international legal regime in that individual rights were elevated into the realm of international law, but traditional principles of state sovereignty remained.¹²⁸

123 ICCPR.

124 Sassen S *Losing Control? : Sovereignty in an age of Globalisation* (1996) 2.

125 Universal Declaration of Human Rights.

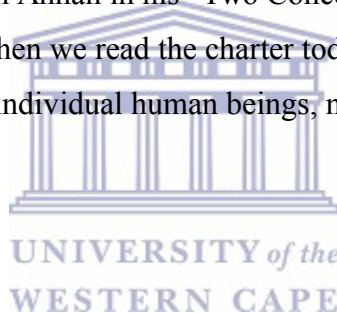
126 Wilson EA “People-Power” and The Problem of Sovereignty in International Law’ (2016) 26 *Duke Journal of Comparative and International Law* 553.

127 Basaran HR ‘Responsibility to Protect: An Explanation’ (2014) 36 *Houston Journal of International Law* 583.

128 Chandramohan B ‘Fighting the Logic of Inviolable State Sovereignty’ (2012) 37 *New Zealand International Review* 18.

Bellamy argues that where sovereign states are either unwilling or unable to protect the fundamental freedoms of their population, sovereignty and human rights come into conflict.¹²⁹ To remedy this, the R2P occasionally requires the infringement of the territorial sovereignty of a state in order to promote its popular sovereignty.¹³⁰ Thus rather than compromising sovereignty, the R2P harnesses the notion of sovereignty as responsibility and seeks to respond to extreme crises in a way that is both legitimate and legal.¹³¹

Moreover, the R2P is an equalizer that helps opposition groups in sovereign countries as it is the new instrument that allows opposition groups to challenge sovereign states.¹³² Thus, the massive human rights abuses by governments against their own citizens necessitated for the international community to consider the will of the people more than that of the state. Sovereignty is increasingly defined, not as a licence to control those within one's borders, but rather as a set of obligations towards citizens.¹³³ Kofi Annan in his "Two Concepts of Sovereignty" speech alluded to this when he pointed out that 'when we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them'.¹³⁴



129 Bellamy AJ *GLOBAL POLITICS AND THE RESPONSIBILITY TO PROTECT: From words to deeds* (2011) 2.

130 Piiparinen T 'Responsibility to Protect: The Coming of Age of Sovereignty-Building' (2013) 15 *Journal of Civil Wars* 382.

131 Adams S 'Libya and the Responsibility to Protect' (2012) Global Centre for the Responsibility to Protect Occasional Paper Series No.3 12.

132 Basaran HR 'Responsibility to Protect: An Explanation' (2014) 36 *Houston Journal of International Law* 583.

133 Parliamentary Hearing at the United Nations, New York (2008) 2.

134 Annan K 'Two Concepts of Sovereignty' *The Economist* 16 September 1999 available at <http://www.economist.com/node/324795> (Accessed 01 August 2016).

According to Kumar sovereignty ought to ensure that the state has the capacity to govern and is able to exercise its powers and use its resources for the benefit of its people.¹³⁵ This implies that in order for a state to be recognised as sovereign, it must fulfil its human rights obligations to its people. For Wilson R2P it is an attempt to bring the international conception of sovereignty more in line with the domestic one by creating a form of sovereignty wherein the state is responsible to the needs and rights of its populations.¹³⁶

However, as ideally as it is the notion of popular sovereignty is susceptible to misuse or abuse. In this regard Reisman argue that in some circumstances the banner of popular sovereignty can become a fig leaf for its suppression by foreign intervention, especially when governments bent on intervention maintain stables of alternative local leaders who can be brought forward to authorise intervention at the appropriate time.¹³⁷ Furthermore, all available evidence indicates that NATO's primary objective was to help the rebels overthrow Gaddafi even if this escalated and extended the civil war and thereby magnified the threat to Libyan civilians.¹³⁸ However, the re-conceptualisation of sovereignty was not the first time in Libya. In 2006, the UNSC had adopted Resolution 1706 on Darfur which had the protection of civilians as its objective. The difference between Darfur and Libya is that the UN peacekeeping mission had obtained the consent of the Sudanese government while in Libya the intervention was carried out without the consent of the Libyan government.

2.5 CONCLUSION

135 Kumar R 'Corruption and Transparency in Governance and Development: Reinventing Sovereignty for Promoting Good Governance' in in Jacobsen T, Sampford C & Thakur R (eds.) *Re-envisioning Sovereignty: the end of Westphalia?* (2008) 253.

136 Wilson EA "People-Power" and The Problem of Sovereignty in International Law' (2016) 26 *Duke Journal of Comparative and International Law* 576.

137 Reisman WM 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *The American Journal of International Law* 875.

138 Kuperman AJ 'A Model Humanitarian Intervention? Re-Assessing NATO's Libya Campaign' (2013) 38 *International Security* 115.

This Chapter has examined the introduction of the Responsibility to Protect and what it entails. It has also scrutinised the impact of R2P vis-à-vis the sacrosanct principle of sovereignty. The advent of the R2P has led to the realignment of sovereignty in order to accommodate external interference in the internal affairs of a sovereign state in order to halt human rights abuses perpetrated by the state against its own civilians. The Chapter that follows considers the actual application of the R2P using the NATO led UN intervention in Libya as a case study. The Chapter also purports to interrogate the implications of the Libyan intervention pertaining to the future application of the R2P by the international community.



THE RESPONSIBILITY TO PROTECT IN THE CONTEXT OF THE NATO INTERVENTION IN LIBYA IN 2011

3.1 INTRODUCTION

The notion of humanitarian intervention is arguably one of the most contentious issues in contemporary international law. This emanates from the historically sacrosanct principle of sovereignty.¹³⁹ However, the human rights atrocities committed by states against their own citizens necessitated for the UN to redefine the concept of sovereignty in order to accommodate humanitarian intervention in the affairs of a member state that is failing in its duties to protect the human rights of its citizenry. This is epitomised by the Responsibility to Protect doctrine which

¹³⁹ See 2.4 in Chapter 2 for a more detailed discussion of the principle of sovereignty.

aims to facilitate the intervention of the international community in the domestic affairs of a member state.¹⁴⁰ The R2P in itself is a noble plan of action pertaining to human rights abuses but the problem lies in its actual implementation. This chapter which is the core of this thesis purports to analyse the application of the R2P in Libya in 2011 and the underlying issues that serve as a challenge for it be viewed as a legitimate principle of international law.

3.2 BACKGROUND TO THE LIBYAN INTERVENTION

On February 15, riots broke out in the city of Benghazi following the arrest of a human rights activist, which then turned into a conflict against the government with the protestors ultimately calling for Gaddafi's resignation.¹⁴¹ The Libyan protests quickly turned violent partly because of the regime's crackdown and partly because an armed opposition group was quickly established under the Interim National Transitional Council (NTC).¹⁴²

The response of the Libyan government was in accordance with the notion that governments fight to maintain their legitimacy as this is the law of sustaining power.¹⁴³ This signaled the beginning of the escalation of violence leading to the adoption of two resolutions of the United Nations (UN) Security Council and a military intervention of foreign forces in Libya to 'protect the civilian population'.¹⁴⁴ However, it is argued that contrary to most mainstream Western

140 For a detailed discussion of the R2P see 2.3.1 above.

141 Libya: Timeline of Key Events Since February 2011, UN Integrated Regional Information Networks: Humanitarian News and Analysis available at <http://www.irinnews.org/report.aspx?reportid=92410> (Accessed 27 September 2016)

142 Williams PD & Bellamy AJ 'Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force (2012) 18 *Global Governance* 275

143 Asante MK 'Toward African freedom in Libya and beyond' *The New York Amsterdam News* 24-30 March 2011 12.

144 Pommier B 'The use of force to protect civilians and humanitarian action: The case of Libya and Beyond' (2011) 93 *International Review of the Red Cross* 1064

reporting, many Libyan protestors were armed and violent from the first day of the uprising, in February 2011 in Benghazi.¹⁴⁵

As a result of the unrest in Libya, the Security Council passed Resolution 1970 on February 26, 2011, which invoked the Council's Chapter VI powers and when the situation deteriorated, the Security Council passed Resolution 1973 on March 17, 2011, which sanctioned the imposition of a no-fly zone over Libya and authorized states to "take all necessary measures to protect civilians and civilian-populated areas under threat of attack".¹⁴⁶ Thus, following the request of the LAS, OIC and GCC, the Security Council willingly authorised military intervention against a non-consenting sovereign state for the express purpose of protecting civilians.

3.3 THE UNSC's RESPONSE TO THE LIBYAN CONFLICT

Intervention as a military action aimed at ending serious violations of human rights, without first obtaining permission from national authorities has generally been considered as contravening norms established by international law.¹⁴⁷ Accordingly, Article 2 (4) of the UN Charter explicitly states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".¹⁴⁸

The international community, the UN and various regional organisations initiated several diplomatic efforts which sought to amicably resolve the Libyan conflict.¹⁴⁹ However, the

145 Kuperman AJ 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign' (2013) 38 *International Security* 109

146 Hehir A 'The Permanence of Inconsistency: Libya, the Security Council and the Responsibility to Protect' (2013) 38 *International Security* 138

147 Thibault JF 'R2P and the Debt of the International Community' (2012) 24 *Journal of Social Justice* 210.

148 UN Charter.

149 Adams S 'Libya and the Responsibility to Protect' (2012) Global Center for the Responsibility to Protect Occasional Paper Series 7.

hostilities intensified despite of those efforts. Gaddafi's description of the protestors as cockroaches, his promise to cleanse Libya house by house and his threat to attack Benghazi and show its residents no mercy provided clear evidence of the regime's intent to commit mass atrocities¹⁵⁰ and prompted a more formal response by the UN. On the 22 of February 2011 UN Secretary-General Ban Ki-Moon issued a statement in which he stated that he was shocked and disturbed by accounts that Libyan authorities fired on demonstrators and declared that the attacks which constitutes serious violations of international humanitarian law must stop immediately.¹⁵¹

Nevertheless, hostilities continued to escalate in Libya. On the 25 of February, the UN Human Rights Council established a commission of inquiry to investigate the situation and urged the General Assembly to suspend Libya from the Human Rights Council which it did on 1 March.¹⁵² The Libyan debacle was then elevated to the Security Council as the supreme body when it comes to military intervention.

It is advocated 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.¹⁵³ Chapter VII allows the UNSC to override one of the core traditional guarantees that international law gives to sovereign states which is non-interference in domestic affairs.¹⁵⁴ This is the international law aspect which permitted the UN under the auspices of NATO to intervene in Libya.

150 Williams PD & Bellamy AJ 'Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force' (2012) 18 *Global Governance* 278.

151 Ki-Moon B Secretary-General Outraged SG Calls for Immediate End to Violence in Libya, UN Press Release SG/SM/13408, AFR/2119 available at <http://www.un.org.za> (Accessed on 18 March 2016).

152 Williams PD & Bellamy AJ 'Principles, Politics, and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force' (2012) 18 *Global Governance* 276.

153 Nkosi M *Inconsistency in the Implementation of the Responsibility to Protect During Humanitarian Crises: The Case of Libya and Sudan* (A thesis Submitted in partial fulfilment of the requirements for the MPhil degree in the Faculty of Law of the University of the Western Cape, 2014) 60.

Humanitarian intervention is one of the most contentious principles of international law.

Humanitarian intervention is premised on the notion that governments and others can respond with force to serious and grave human rights violations that are internal to another state.¹⁵⁵

Humanitarian intervention is the right of other states within the global system to intervene in the internal affairs of another state.¹⁵⁶

This led to the formation of the ICISS to address the problems inherent in the humanitarian intervention concept.¹⁵⁷ Also, the form of intervention as envisaged by the R2P is multi-dimensional. This is due to the fact that the R2P consists of a prevention, reaction and rebuilding elements.¹⁵⁸ Under R2P the use of force is an option of last resort when all other pacifist measures for the resolution of the conflict have failed.¹⁵⁹

Furthermore, humanitarian intervention was only likely when states felt obliged to act, be it for humanitarian or self-interested reasons.¹⁶⁰ This left a vacuum where the international community witnessed massive human rights violations and where states did intervene, it was based on self-interests and the results were disastrous. The R2P sought to close the vacuum by creating a framework for intervention authorised by the UN.

154 Vidmar J 'International Community and Abuses of Sovereign Powers' (2014) 35 *Liverpool Law Review* 195.

155 Martin R 'Walzer and Rawls on Just Wars and Humanitarian Interventions' in Lee SP (ed) *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory* (2007) 80.

156 See note 89 above.

157 See 2.3.1 in Chapter 2 for a more detailed discussion of humanitarian intervention.

158 See note 87 ICISS Report.

159 ICISS.

160 Bellamy AJ 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20 *Ethics and International Affairs* 145.

3.3.1 UN Resolution 1970

The UNSC issued Resolution 1970 which demanded an immediate end to violence, urged Libya to act with utmost restraint, to respect human rights, to ensure safety of all foreign nationals, to allow safe passage of humanitarian and medical supplies, and lift media restrictions and referred the situation to the ICC.¹⁶¹ This is permitted by Article 13(b) of the Rome Statute which provides that “a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”¹⁶² Thus, Article 13 (b) allows for the ICC to exercise jurisdiction over States which are not parties to the Rome Statute. This was the situation with Libya which was not a signatory to the Rome Statute but was nevertheless referred to the ICC by the UNSC.

The ICC from its inception was envisaged to be complementary to the R2P. It is argued that the ICC is invoked before military intervention in the hope that this would prevent the commission of large-scale human rights abuses.¹⁶³ In Libya, the UNSC had complied with this observation through its referral of the Libyan case to the ICC in Resolution 1970. However, in this case the ICC referral and its subsequent issuing of warrants of arrest for Gaddafi, his family and some high-ranking members of the Libyan government did not deter the Libyan government from embarking on its campaign against dissidents and committing alleged human rights abuses in the process.¹⁶⁴ This may be attributed to the notion that the ICC is ineffective in preventing atrocities due to its lack of the capacity to enforce its arrest warrants without cooperation from states.¹⁶⁵

¹⁶¹ UNSC Resolution 1970.

¹⁶² Rome Statute.

¹⁶³ Vinjamuri L ‘Deterrence, Democracy and the Pursuit of International Justice’ (2010) 24 *Ethics and International Affairs* 198.

¹⁶⁴ ICRtoP ‘The Crisis in Libya’ available at <http://www.responsibilitytoprotect.org/index.php/crisis/crisis-in-Libya> (Accessed on 06 July 2016).

¹⁶⁵ Pankhurst D ‘Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualizing Reconciliation, Justice and Peace’ (1999) 20 *Third World Quarterly* 249.

The Rome Statute confers to the ICC the authority to pursue matters involving non-state parties when that matter has been referred to it by the UNSC exercising its Chapter VII powers regardless of whether the state of the perpetrator is not a party to the Rome Statute, and the events did not occur on the territory of a state party.¹⁶⁶ The political decision to refer the situation in Libya to the ICC resulted from a convergence of strategic interests among the UN Security Council members and the perception that the Court could be used as a tool of coercive diplomacy to help bring about an end to the conflict.¹⁶⁷ Thus, the ICC referral was used as a means to apply diplomatic pressure on Libya. However, the politicization of the ICC by some of the permanent members of the UNSC and the perceived resultant selective justice has resulted in doubt about the credibility and legitimacy of the court.¹⁶⁸ In this regard, Mamdani argues that the realization that the ICC specifically targeted African crimes and mainly on crimes committed by opponents of the US has raised concerns among Africans about politicized justice and the relationship between law and politics.¹⁶⁹

This part of the resolution focused on the domestic sphere of the Libyan conflict. Resolution 1970 also imposed Chapter VII sanctions on Libya, namely an arms embargo, strengthened with a call upon states to inspect all cargo, that may, upon reasonable ground to believe, contain prohibited items; a travel ban against 16 Libyan officials listed in Annex 1 of the Resolution

166 Dube BA 'Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa' (A Thesis submitted in fulfilment of the requirements for the degree Doctor Legum in the Faculty of Law of the University of the Western Cape, 2015) 126.

167 Smith MA 'The Emergence of International Justice as Coercive Diplomacy: Challenges and Prospects' (2012) Harvard Human Rights Program Working Paper no.2 available at <http://www.law.harvard.edu/programs/hrp/documents/Smith.pdf> (Accessed 18 May 2017).

168 Brown S 'The Politicization of International Criminal Law' available at <http://www.kentlaw.edu/faculty/bbrown/classes/IntlOrgSp07/CourseDocs/IVOnthePoliticizationofInternationalCriminalLaw.pdf> (Accessed on 9 June 2017).

169 Mamdani M 'The New Humanitarian Order: Is the ICC's "responsibility to protect" really just an assertion of neo-colonial domination? (2008) *The Nation* Available at <https://www.thenation.com> (Accessed on 28 October 2016).

among them Gaddafi himself some of his family members and military leaders involved in violence and an asset freeze against six designated individuals listed in Annex II of the Resolution; Gaddafi, four of his sons and one daughter.¹⁷⁰

On 17th March 2011, as the conflict escalated in Libya and due to the failure of its authorities to comply with the cease fire in Resolution 1970 (2011), the Council adopted Resolution 1973 (2011) which imposed measures stated under Chapter VII of the Charter.

3.3.2 UN Resolution 1973

Regardless of Resolution 1970 the Libyan conflict escalated and this prompted the Security Council to authorize the use of armed force in order to resolve the conflict in Libya. This resort to the use of force came through the passage of Resolution 1973 which sanctioned the use of military intervention under the guise of humanitarian intervention to justify armed intervention in the internal affairs of a sovereign state. Security Council passed Resolution 1973 on March 17, 2011, which sanctioned the imposition of a no-fly zone over Libya and authorized states to “take all necessary measures to protect civilians and civilian-populated areas under threat of attack.”¹⁷¹

Notably, the phrase all necessary measures is the language used by the UNSC to authorise the use of force under Chapter VII, Article 42 of the UN Charter.¹⁷² More importantly, the Resolution 1973 omitted to define what “all necessary measures” entail or which actions are permitted according to the wording and subsequently not permitted and this left the resolution susceptible to abuse. Resolution 1973 consists of three main objectives for the use of force; an arms embargo, a no-fly zone and to protect civilians.¹⁷³

170 UNSC Resolution 1970.

171 UNSC Resolution 1973.

172 Williams PR & Popken C ‘Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity’ (2011) 44 *Case Western Reserve Journal of International Law* 233.

173 UNSC Resolution 1973.

3.4 THE UNSC AND THE DOUBLE STANDARDS IT APPLIED IN THE IMPLEMENTATION OF THE R2P IN LIBYA

There is the notion that the Libyan intervention was motivated by factors other than the protection of human rights and R2P. Francioni and Bekker points out that in spite of its poor human rights record, Libya had been elected as a member of the UN Human Rights Council in 2010.¹⁷⁴ Also the official records of the UNSC deliberations over Resolution 1973 gives little support to assertions that R2P was a major influencing factor on decisions over the most appropriate form of intervention.¹⁷⁵ The NATO's intervention in Libya is a case of the West's double standards because intervention has been ruled out in other Middle Eastern states such as Bahrain and Yemen whose rulers are friends of the United States.¹⁷⁶

Furthermore massive human rights violations had been reported in Sudan and there had been no subsequent invocation of the R2P by the UNSC. The application of the R2P is ultimately dependent on whether the members of the Permanent 5 have a collective interest or are at least not opposed to halting a particular looming or actual mass atrocity.¹⁷⁷

Under the UN Charter the authorisation of the use of force is embedded in Article 24. This study concerns itself with Article 24 1 and Article 24 2 of the UN Charter. Article 24 1 states that:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

174 Francioni F & Bekker C 'Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali' (2013) 15 *Transworld Working Paper* 6.

175 Morris J 'Libya and Syria: R2P and the Spectre of the swinging pendulum' (2013) 89 *International Affairs* 1272.

176 Chandramohan B 'Fighting the Logic of Inviolable State Sovereignty' (2012) 37 *New Zealand International Review* 17.

177 Hehir A 'The Permanence of Inconsistency: Libya, the Security Council and the Responsibility to Protect' (2013) 38 *International Security* 139.

This is substantiated by Article 24 2 which states that:

In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.¹⁷⁸

In the Libyan conflict the UN followed this procedure accordingly.

Luengo-Cabrera advocates that the reason why the mobilization of international resources to intervene in Libya was larger and available in a short period relative to Darfur epitomizes the notion that the normative predicaments of the international community are being applied inconsistently.¹⁷⁹ This occurs in the context that, Gaddafi had managed to insult and alienate many leaders across the Middle East and Africa; his regime's previous support for international terrorism had alienated the West and his erratic posturing had eroded his credibility with much of the rest of international society.¹⁸⁰

Dobos argue that some oppressive governments become the targets of military intervention while the political sovereignty of other equally oppressive regimes is left intact.¹⁸¹ This selective application of the R2P erodes the credibility and legitimacy of the principle among member states. This is an issue of concern in the context that, other considerations that might come into play involving the erroneous application of the R2P such as the desire to punish aggressors may

178 UN Charter.

179 Luengo-Cabrera ' Human Security Discourse and Humanitarian Intervention: A Critical Evaluation' (2011) Partnership for Research in International Affairs and Development Policy Paper 13.

180 Williams PD & Bellamy AJ 'Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force (2012) 18 *Global Governance* 281.

181 Dobos N 'Consistency in the Armed Enforcement of Human Rights: A Moral Necessity' (2011) 8 *Journal of Moral Philosophy* 94.

all erode the moral intentions inherent in the protective purpose of the R2P.¹⁸² Also, it was hoped that the R2P may create a level playing field where the reaction to all types of humanitarian crises would be the same.¹⁸³

However, regardless of the fundamental shift pertaining to decision making and behaviour in the UNSC, humanitarian intervention remains a rare and selective event.¹⁸⁴ Moreover, although this selectivity by the SC in its interventions does not affect the legality of military interventions but it does call into question its legitimacy.¹⁸⁵

3.5 THE ROLE OF POLITICS IN THE LIBYAN INTERVENTION

Politics is an integral part of the international system. This is informed by the fact that states are interest driven, which means that they strive to achieve what's best for them regardless of the consequences for other states. Yazbek asserts that international law is necessarily and inevitably intertwined with politics, policy, diplomacy and the real world consequence of action.¹⁸⁶ The problematic aspect of this is that states have diverse interests but are members of one body, the UN. This is a major cause of conflict among the UN member states especially in relation to decision making. The cause of this is the fact that decision making is underpinned by politics instead of being undertaken for the mutual benefit of all the member states concerned.

182 Bazirake JB & Bukuluki P 'A Critical reflection on the conceptual and practical limitations of the responsibility to protect (R2P)' (2015) 19 *The International Journal of Human Rights* 1023.

183 Basaran HR 'Responsibility to Protect: An Explanation' (2014) 36 *Houston Journal of International Law* 610.

184 Walling CB Human Rights Norms, State Sovereignty and Humanitarian Intervention (2013) Paper prepared for the Ford Security Seminar, Gerald R. Ford School of Public Policy 2.

185 Payandeh M 'The United Nations, Military Intervention and Regime Change in Libya' (2012) 52 *Virginia Journal of International Law* 398.

186 Yazbek C 'After Libya & Syria: R2P's Normative Utility and Future Application (2014) Undergraduate dissertation University of Adelaide 4.

Since intervention is one of the most contentious issues in international law, the influence of political strategy is even more pronounced in the Responsibility to Protect context.¹⁸⁷ Morris asserts that in relation to the use of force, it will always be politics all the way down and decisions will always be contingent and subject to case by case basis.¹⁸⁸ UNSC practice has indeed proven this to be true. This may be partially attributed to states safeguarding their self-interests. The international community's response to alleged or clear occurrences of mass atrocity crimes is contingent upon the Security Council's will, which is heavily informed by political exigencies.¹⁸⁹ This politicisation of the R2P has had dire consequences for the doctrine and its legitimacy.

In fact, the politicisation of the R2P is contrary to the aims and objectives of the principle. It aggravates the geo-politics inherent in the international state system. Saxer points out that as a political instrument, the R2P attempts to overcome the divisive North-South debates over humanitarian interventions and build a broad consensus on how the international community can deal with cases of mass atrocities occurring in internal conflicts.¹⁹⁰ This was more clearly pronounced during the intervention in Libya. Henderson argue that in Libya the national interests of the non-permanent and permanent members did in fact coincide or at least were not sufficiently offended to prevent the passage of the resolution, therefore permitting a resolution to be adopted authorising the use of force to protect civilians and civilian populated areas.¹⁹¹

187 Cronogue G 'Responsibility to Protect: Syria, The Law, Politics and Future of Humanitarian Intervention Post-Libya' (2012) 3 *International Humanitarian Legal Studies* 159.

188 Morris J 'Libya and Syria: R2P and the Spectre of the swinging pendulum' (2013) 89 *International Affairs* 1282.

189 Yazbek L 'After Libya and Syria: R2P's Normative Utility and Future Application' (2014) University of Adelaide 8.

190 Saxer M 'The Politics of Responsibility to Protect' (2008) *FES Briefing Paper* 2.

191 Henderson C 'The Arab Spring and the Notion of External State Sovereignty in International Law' (2014) 35 *Liverpool Law Review* 185.

Moreover, Luengo-Cabrera asserts that the selective application of the R2P undermines the normative ideals of the Human Security Discourse as it suggests that states are driven by *realpolitik* considerations rather than by a genuine concern for the security of the communities in danger.¹⁹² The Libyan conflict occurred amidst an already ongoing conflict in Sudan. Libya 2011 is not the first time when R2P was referred to by the UN Security Council—previous Security Council resolutions on Sudan (Darfur) and Côte d’Ivoire also used R2P language.¹⁹³ The fundamental difference in the application of the R2P in the three cases is the time it took the international community to authorize the use of force through pillar three of the R2P. In Libya it took less than one month and just one prior resolution for the SC to authorize the use of force to protect civilians.¹⁹⁴

According to Guiora geo-politics recognizes the notion that global markets and global security has an impact on domestic economy and domestic security alike.¹⁹⁵ This implies that in the international system of states each state has a vested interest in the effective functioning of the international system. This is informed by the fact that what occurs in another state, especially if that state is endowed with resources has an adverse effect on the other states within the system. Oil is Libya’s main natural resource, and the country sits on reserves estimated at 48bn barrels, the largest in Africa.¹⁹⁶ Therefore the R2P is susceptible to being used in order to secure the interests of the Permanent 3 (US, UK and France) within the global community of states. This is

192 Luengo-Cabrera ‘ Human Security Discourse and Humanitarian Intervention: A Critical Evaluation’ (2011) Partnership for Research in International Affairs and Development Policy Paper 13.

193 Popovski V ‘The Concepts of Responsibility to Protect and Protection of Civilians: ‘Sisters, but not Twins’ (2011) 7 *Security Challenges* 7.

194 Williams PR & Popken C ‘Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity’ (2011) 44 *Case Western Reserve Journal of International Law* 227.

195 Guiora A ‘Humanitarian Intervention and Sovereignty Under the Umbrella of Geo-Politics’ (2013) 34 *University of Pennsylvania Journal of International Law* 425.

196 Libya: Battle for Oil Resources (2016) *Africa Research Bulletin* 20862.

affirmed by the assertion by Okibe that it is apparent that politics and national interests dominate deliberations on the application of the R2P.¹⁹⁷

Furthermore, the geographic location of Libya was another major contributing factor to the NATO led intervention. In this regard, the French Defence Minister Jean-Yves Le Drian pointed out that Libya is the gateway to Africa and Europe.¹⁹⁸ This implies that both Africa and Europe had vested interests in Libya due to the fact that what happens in Libya would inevitably affect them. The R2P in essence was designed to avert situations like this. According to Saxer the R2P as a political instrument attempts to overcome the divisive North/South debates over humanitarian interventions and build a broad consensus on how the international community can effectively deal with cases of mass atrocities occurring in internal conflicts.¹⁹⁹

However, the Libyan conflict has demonstrated the complexities of this in practice. Also the Arab League's support of the intervention in Libya also encouraged Russia and China to allow the armed intervention and pursue their own diplomatic goal of appeasing members of the Arab League whose countries have significant natural resources.²⁰⁰ This proved critical for the passing of Resolution 1973. There is also the argument that UK, France, and Italy had seriously banked on the Libyan oil reserves.²⁰¹ Furthermore, the situations in which the Security Council authorized the use of force after Libya concerning conflicts on the African continent that in

197 Okibe HB 'Non-Intervention and the Responsibility to Protect in Humanitarian Crisis: The Role of United Nations Permanent Members' (2015) 5 *International Journal of Advanced Legal Studies and Governance* 86.

198 Libya: No Military Solution (2014) *Africa Research Bulletin* 20287 2014.

199 Saxer M 'The Politics of Responsibility to Protect' (2008) 2 *FES Briefing Paper* 2.

200 Cronogue G 'Responsibility to Protect: Syria The Law, Politics and Future of Humanitarian Intervention Post-Libya' (2012) 3 *International Humanitarian Legal Studies* 142.

201 Norooz E 'Responsibility to Protect and its applicability in Libya and Syria' (2015) 9 *Vienna Journal of International Constitutional Law* 39.

contrast to the crisis in Syria did not involve significant geopolitical interests for those countries that would oppose the use of force because of sovereignty concerns.²⁰²

The Libyan conflict was partly motivated by personal issues against Gaddafi as a person. The fundamental difference between Gaddafi and Syria's Assad was the fact that Gaddafi was politically isolated while Assad has strong ties to two superpowers.²⁰³ Colonel Gaddafi had a controversial character and was confrontational which earned him many enemies who wanted him gone at all costs. Kuperman points out that all available evidence indicated that NATO's primary objective was to help the rebels overthrow Gaddafi even if this escalated and extended the civil war and thereby magnified the threat to Libya's civilians.²⁰⁴ This occurred in the context that Gaddafi had attempted to block the presence of the NATO in the Mediterranean Sea by influencing the Malta government to deny access to air and naval facilities to NATO forces.²⁰⁵

Furthermore, Gaddafi had managed to insult and alienate many leaders across the Middle East, and Africa; his regime's previous support for international terrorism had alienated the west and his erratic posturing had eroded his credibility with much of the rest of international society.²⁰⁶ Moreover, Gaddafi had advocated that Nigeria be dismembered into several countries; supported the Eritrean president against Ethiopia, occupied the Aouzou strip of Chad between 1972-87, and financed and armed JEM, the largest Darfur rebel organisation, against the Sudanese

202 Brockmeier S, Stuenkel O & Tourinho M 'The Impact of the Libya Intervention Debates on Norms of Protection' (2015) 30 *Global Society* 130.

203 Cronogue G 'Responsibility to Protect: Syria The Law, Politics and Future of Humanitarian Intervention Post-Libya' (2012) 3 *International Humanitarian Legal Studies* 152.

204 Kuperman AJ 'A Model Humanitarian Intervention? Reassessing NATO's Libyan Campaign' (2013) 38 *International Security* 115.

205 Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical analysis of NATO's Intervention in Libya' (2012) 2 *Conflict Trends* 48.

206 Williams PD & Bellamy AJ 'Principles, Politics, and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force' (2012) 18 *Global Governance* 281.

Government.²⁰⁷ This counted against Gaddafi when it came to the decision to implement Resolution 1973.

Furthermore, it was also easier to garner support against the Libyan regime due to 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.²⁰⁸ 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.²⁰⁹ Also, it is significant to note that in Libya it took less than one month and just one prior resolution for the Security Council to authorize the use of force to protect civilians.²¹⁰

Gaddafi confiscated Italian assets, transformed foreign banks to Libyan joint stock companies, withdrew Libyan reserves from British banks, nationalized British Petroleum (BP), and mandated that all foreign firms operating in Libya's oil fields convert to partnerships with the government with the latter holding 51 percent of ownership.²¹¹ This inevitably resulted in deep seated resentment of Gaddafi as a person by the West. Thus, the NATO led intervention in Libya in 2011 presented the aggrieved Western states with a much needed opportunity to deal with Gaddafi decisively at whatever cost. Iyi argues that the Libyan civilians became dispensable in

207 De Waal A 'African Roles in the Libyan Conflict of 2011' (2013) 89 *International Affairs* 367.

208 Plachta M 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare' (2001) 12 *The European Journal of International Law* 126.

209 Williams A 'Libya v. Syria: Is That the Question?' Stanley Foundation (2012) available at <http://www.stanleyfoundation.org/think/2012think2.html#Libya> (Accessed on 18 September 2016).

210 Williams PR & Popken C 'Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity' (2011) 44 *Case Western Reserve Journal of International Law* 227.

211 Nmona V 'Power and Force: Libya's Relations with the United States' (2009) 26 *Journal of Third World Studies* 140.

the pursuit of regime change, and NATO chose aerial bombardment that resulted in scores of civilian deaths.²¹²

In this context politicisation refers to the contestations around the interpretation of the R2P by the UNSC in the Libyan intervention. The UNSC is in itself a political body and therefore its decisions cannot be devoid of politics. The politicisation referred to here pertains to the politicisation of humanitarian law under the R2P. According to Article 24(1) of the UN 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.²¹³ Also, Chapter VII of the UN Charter allows for the Security Council to override one of the core traditional guarantees that international law gives sovereign states which is non-interference in domestic affairs.²¹⁴ Thus, the UNSC is the primary legal body that is entrusted with the authorisation and implementation of the use of force in international law. More importantly, the R2P explicitly support the notion that the use of force must be sanctioned by the UNSC.²¹⁵

In 2009 the then Secretary-General of the UN Ban Ki-Moon issued a report titled *Implementing the Responsibility to Protect*. The report outlines three fundamental pillars of the R2P:²¹⁶

- (i) The responsibility of each individual state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and their incitement.

212 Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical analysis of NATO's Intervention in Libya' (2012) 2 *Conflict Trends* 48.

213 Article 25, United Nations Charter (1945).

214 Vidmar J 'International Community and Abuses of Sovereign Powers' (2014) 35 *Liverpool Law Review* 195.

215 For a more detailed discussion of the fact that the R2P supports the notion that the use of force must be sanctioned by the UNSC see the discussion in 2.3.3 above.

216 UN Secretary-General, *Implementing the Responsibility to Protect*, UN Document A/63/677, January 12, 2009.

(ii) The responsibility of the international community to encourage and help states to exercise this responsibility and to help states build capacity to protect their populations, as appropriate.

(iii) The responsibility of the international community to be prepared to take collective action, in a timely and decisive manner in accordance with the United Nations Charter, on a case-by-case basis, and in cooperation with relevant regional organizations as appropriate, should the above preventive means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

The language used in the Third pillar of the R2P is another contentious issue regarding the implementation of the R2P in Libya through Resolution 1973. The third pillar of the R2P encompasses a two-pronged approach where the international community has to assess primarily, whether one of the four crimes has been committed and secondly, whether the state in question is manifestly failing to protect the population from these crimes.²¹⁷ However, some scholars argue that it does not matter what phrase is used, the decision to react is a political choice based on things other than a manifest failing, such as the national interest, sovereignty and the complexities of intervention.²¹⁸ As a result of this, the lack of clarity regarding a manifest failing did not prevent a consensus on Libya.²¹⁹

In Libya the national interests of the non-permanent and permanent members did in fact coincide or at least were not sufficiently offended to prevent the passage of the resolution, therefore

217 UN Secretary-General, Implementing the Responsibility to Protect, UN Document A/63/677, January 12, 2009.

218 Gallagher A 'A Clash of Responsibilities: Engaging with Realist Critiques of the R2P' (2012) 4 *Global Responsibility to Protect* 346.

219 Gallagher A 'What Constitutes a 'Manifest Failing'? : Ambiguous and Inconsistent terminology and the Responsibility to Protect' (2014) 28 *International Relations* 436.

permitting a resolution to be adopted authorising the use of force to protect civilians.²²⁰ This in itself is commendable but the problems lie in the motives behind the resolution and in its actual implementation.

It is my contention that the Libyan intervention was triggered by other factors rather than by the R2P. An affirmation of this is the fact that the official record of the UNSC deliberations over Resolutions 1973 gives little support to assertions that the R2P was a major influencing factor on decisions over the most appropriate form of intervention.²²¹ This implies that the R2P is susceptible to misuse by members of the UNSC in pursuit of their own agendas. Moreover, the international community's response to alleged or clear occurrences of mass atrocity crimes depends on the Security Council's will, which is heavily informed by the political exigencies.²²² This is exemplified by the ineffectiveness of the UNSC in halting the human rights atrocities in Bosnia, Rwanda and Sudan. This does not bode well for the R2P pertaining to its legitimacy among the UN member states.

The R2P is essentially a political commitment.²²³ It is a political commitment in the sense that in the 2005 World Summit the R2P was endorsed only in principle by the member states of the UN. This ensured that it had no legally binding effect on the member states. This has caused some problems for the doctrine of R2P due to the fact that some states have cited the R2P while pursuing their own political objectives. It is in this context that some of the permanent members of the UNSC had politicised the R2P. This politicisation of the R2P especially in Libya has had dire consequences for its future operationalization.

220 Henderson C 'The Arab Spring and the Notion of External State Sovereignty in International Law' (2014) 35 *Liverpool Law Review* 185.

221 Morris J 'Libya and Syria: R2P and the spectre of the swinging pendulum' (2013) 89 *International Affairs* 1272.

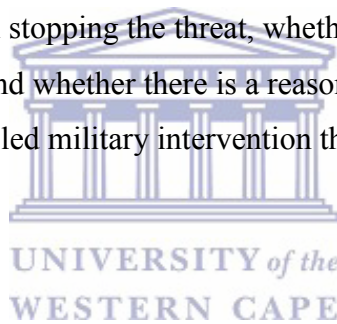
222 Yazbeck C 'After Libya and Syria: R2P's Normative Utility and Future Application' (2014) University of Adelaide 8.

223 Iyi JM 'The Roles of the UN and the AU in the Operationalisation of R2P in Africa: Towards Legal and Institutional Complementarity' (2016) *Kazan Journal of International Law and International Relations* 40.

3.6 THE IMPLEMENTATION OF RESOLUTION 1973 BY THE NATO IN LIBYA

The UNSC entrusted the North Atlantic Treaty Organisation (NATO) with the actual implementation of Resolution 1973 on Libya. On 19 March 2011 the military intervention in Libya commenced, with US forces and one British submarine firing cruise missiles, the French Air Force, USA Air Force and British Royal Air Force undertaking military actions across Libya and a naval blockade was established by the Royal Navy.²²⁴

O'Connell points out that given the very limitations on the benefit of military force to be of any positive use in human rights crises the principles of seriousness of threat, proper purpose, last resort and proportional means and balance of consequences.²²⁵ Furthermore, the UN Secretary-General suggested that the SC should adopt a common position on how to assess the seriousness of the threat, the proper purpose of the proposed military action, whether means short of the use of force might plausibly succeed in stopping the threat, whether the military option is proportional to the threat at hand and whether there is a reasonable chance of success.²²⁶ Thus it is imperative to analyse the NATO led military intervention through the aforementioned principles.



3.6.1 Seriousness of the threat

According to this principle, military intervention for human protection purposes is an exceptional and extra-ordinary measure and in order for it to be warranted, there must be serious and irreparable harm about to occur to human beings, or imminently likely to occur.²²⁷ In the case of Libya, Gaddafi's description of the protestors as cockroaches, his promise to cleanse Libya house

224 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 on 15 October 2016).

225 O'Connell ME 'The Counter-Reformation of the Security Council' (2005) 2 *Journal of International Law and International Relations* 111.

226 UN Secretary-General, Implementing the Responsibility to Protect, UN Document A/63/677, January 12, 2009.

by house and his threat to attack Benghazi and show its residents no mercy provided clear evidence of the regime's intent to commit mass atrocities.²²⁸ Also, the imminent destruction of Benghazi and the explicit threat by the government to perpetrate atrocities together with its history of human rights abuses epitomised the urgency of the threat.²²⁹

Gaddafi had made verbal threats against his opposition. Moreover, these threats were regarded as serious by the international community in the sense that prior to the Rwandan genocide the perpetrators had used the word cockroaches when describing their victims. Based on this, the international community then overreacted in its response to the Libyan conflict. This is because early warnings that showed a threat of commission of mass atrocities was conceived with a response within the R2P framing that would have been only warranted if actual mass atrocities had already been underway in Libya.²³⁰

3.6.2 Proper purpose

The principle of proper purpose entails that the primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering.²³¹ This is pivotal in order for the R2P to gain legitimacy among UN member states. However, all available evidence indicates that NATO's primary objective was to help the rebels overthrow Gaddafi even

227 Report of the International Commission on Intervention and State Sovereignty 2001- *The Responsibility to Protect* (2001).

228 Williams PD & Bellamy AJ 'Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force (2012) 18 *Global Governance* 278.

229 Williams PD & Bellamy AJ 'Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force (2012) 18 *Global Governance* 288.

230 Bazirake JB & Bukuluki P 'A critical reflection on the conceptual and practical limitations of the responsibility to protect (R2P)' (2015) 19 *The International Journal of Human Rights* 1024.

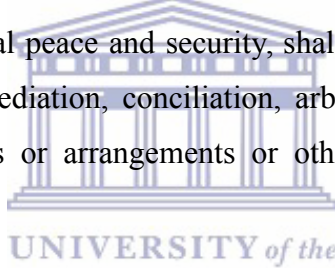
231 Report of the International Commission on Intervention and State Sovereignty 2001- *The Responsibility to Protect* (2001).

if this escalated and extended the civil war and thereby magnified the threat to Libya's civilians.²³² This is in light of the notion that if an intervention is driven by national self-interests, it is likely that the means used to prosecute it will not be conducive to a positive humanitarian outcome.²³³ Subsequently, Libyan civilians became dispensable in the pursuit of regime change and NATO chose aerial bombardments that resulted in scores of civilian deaths.²³⁴

3.6.3 Last Resort

The Criteria of last resort entails that every diplomatic and non-military option for the prevention and peaceful resolution of the humanitarian crisis must have been explored.²³⁵ This implies that all pacifist means to the resolution of a conflict must have been exhausted before the decision to intervene militarily. Accordingly, Article 33 of the UN Charter stipulates that:

the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.²³⁶



In Libya, the UNSC had complied with the measures conferred to it under Chapter VII of the UN Charter which aims for a pacifist settlement of disputes. The problem lies in the time and effort given to Chapter VI approach to the resolution of the conflict. This is epitomised by the

232 Kuperman AJ 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign' (2013) 38 *International Security* 115.

233 Bogliolo L 'The Responsibility to Protect and the Legality of Using Force' (2009) 8 *Human Security Journal* 30.

234 Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical analysis of NATO's Intervention in Libya' (2012) 2 *Conflict Trends* 48.

235 Report of the International Commission on Intervention and State Sovereignty 2001- *The Responsibility to Protect* (2001).

236 UN Charter.

time it took the UNSC to shift from Resolution 1970 to Resolution 1973 which authorised the use of armed force to resolve the conflict in Libya.

From the wording in Article 42 it is clear that measures provided for in Article 41 should be exhausted before the UNSC can consider if the measures provided for in Article 41 'would be inadequate or have proved to be inadequate' in accordance with Article 42. Thus, it can be deduced from this, that the international community should actively help states to meet their responsibilities, not just respond when they fail and pursue a range of other steps before considering direct intervention.²³⁷ Contrary to this, the AU High-Level Committee in conformity with Resolution 1973 of the UNSC requested permission for the flight carrying its delegation to enter Libya on 20 March 2011 for purposes of fulfilling its mandate but was denied permission regardless of the fact that both parties in the Libyan conflict had agreed to the proposed dialogue.²³⁸ The reason for this was that the AU's political approach was in open conflict with the NATO and UN military approach.²³⁹

Moreover, the UNSC did not exhaust all the measures intended for a pacifist resolution of the conflict, even as espoused by Resolution 1973. Resolution 1973 explicitly emphasises the role of regional organisations. In Libya, there were several organisations with reasonable claims to be the voice of the region and while the LAS, GCC and OIC each called for the establishment of a no-fly zone, the AU firmly rejected foreign military intervention in any form.²⁴⁰ Nevertheless, the Arab League's call for the SC to impose a no-fly zone over Libya proved crucial in generating political support for outside military intervention.²⁴¹

237 Report on Witton Park Conference: *Implementing the Responsibility to Protect: The Role of Regional and Sub-Regional Partners* (2008).

238 Sithole A 'The African Union Peace and Security Mechanism's crawl from design to reality: Was the Libyan Crisis a depiction of severe limitations' (2012) *Accord* 118.

239 Ntahijara B 'The Global and the Regional in the Responsibility to Protect: Where does authority lie?' (2012) 419 *The Journal Jurispudence* 438.

240 Granville L 'Intervention in Libya: From Sovereign Consent to Regional Consent' (2013) 14 *International Studies Perspectives* 339.

The two main regional organisations in the Libyan conflict were the African Union and League of Arab States. The LAS position was that of an intervention through an imposition of a no-fly zone while the AU's stand was that of a pacifist settlement of the dispute through a political dialogue. The UN rejected the AU roadmap to peace in Libya and under the influence of the US, UK and France supported by other NATO members, decided to heed the call by the Council of the Arab League for the imposition of a no-fly zone.²⁴²

3.6.4 Proportionality

The fourth criterion is that of proportionality. This stipulates that any military response must be proportional to the scale of the threat.²⁴³ This means that the international community must apply the necessary force to avert the threat and not force excessively. Meanwhile, in the Libyan conflict while NATO did defend Benghazi, it also went far beyond that by embarking on actions that pursued regime change which resulted in the loss of civilian life.²⁴⁴ The enforcement of a no-fly zone limited the Libyan forces capacity but the NATO proceeded with aerial bombardment of Libya. This may be partly attributed to the fact that Resolution 1973 did not specify the particular objective of the authorisation or when it expired.²⁴⁵ This opened a gap for potential abuse of Resolution 1973 by the permanent three in pursuit of their own agendas.

241 Omorogbe EY 'The African Union, Responsibility to Protect and the Libyan Crisis' (2012) LIX *Netherlands International Law Review* 158.

242 Sithole A 'The African Union Peace and Security mechanism's crawl from design to reality: Was the Libyan crisis a depiction of severe limitations?' (2012) *Accord* 114.

243 Report of the International Commission on Intervention and State Sovereignty 2001- The Responsibility to Protect (2001).

244 Fisk T *Military Intervention and the Responsibility to Protect in Libya and Kosovo* (A thesis submitted to the University Honors Program in partial fulfillment of the requirements for the Honors Diploma, Southern Illinois University, 2016) 8.

245 Payandeh M 'The United Nations, Military Interventions, and Regime Change in Libya' (2012) 52 *Virginia Journal of International Law* 383.

Furthermore, this gave credence to the notion that Resolution 1973 all but militarised the new rush for African resources and not at all the protection of human rights.²⁴⁶

3.6.5 Balance of Consequences

According to the balance of consequences criteria, there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.²⁴⁷ In this regard, it is argued that not only did the intervention in Libya fail to put Libya in a better position, the intervention also likely extended the war, therefore increasing the suffering and harm to civilians.²⁴⁸ Judging from the current situation in Libya, one can deduce that the NATO intervention did more harm than good. According to Ban Ki-Moon, the third pillar of R2P embodies a dual element as the international community has to assess primarily whether one of the four crimes has been committed and whether the state in question is manifestly failing to protect the population from these crimes.²⁴⁹ However, Gallagher argues that regardless of what phrase is used, the decision to react is a political choice based on things other than a manifest failing, such as the national interest, sovereignty and complexities of intervention.²⁵⁰

3.7 THE ROLE OF THE UNSC AND AU IN THE LIBYAN INTERVENTION

246 Nkosi M *Inconsistency in the Implementation of the Responsibility to Protect During Humanitarian Crises: The Case of Libya and Sudan* (A thesis Submitted in partial fulfilment of the requirements for the MPhil degree in the Faculty of Law of the University of the Western Cape, 2014).

247 Report of the International Commission on Intervention and State Sovereignty 2001- The Responsibility to Protect (2001).

248 Fisk T *Military Intervention and the Responsibility to Protect in Libya and Kosovo* (A thesis submitted to the University Honors Program in partial fulfilment of the requirements for the Honors Diploma, Southern Illinois University, 2016) 11.

249 UN Secretary-General, *Implementing the Responsibility to Protect*, UN Document A/63/677, January 12, 2009.

250 Gallagher A 'A Clash of Responsibilities: Engaging with Realist Critiques of the R2P' (2012) 4 *Global Responsibility to Protect*.

The Libyan intervention was riddled with complexities and chiefly among these was the fact that there were numerous role players involved. There was the UN as the international body tasked with the maintenance of peace within and among member states. Then there were the regional bodies in the form of the African Union, League of Arab States, Gulf Cooperation Council and the Organisation of Islamic Cooperation. However, hence geographically Libya is in Africa the AU is the primary body tasked with continental peace-keeping. The fact that Libya subscribed to various organisations with diverse ideological orientations caused problems for Libya especially when it comes to the NATO intervention.²⁵¹

3.7.1 The UNSC

The UNSC is the primary body in international politics where authoritative decisions are made about what constitutes threats to international peace and security the legitimate source of sovereign authority and the purpose of military force.²⁵² This is conferred by Article 42 under Chapter VII of the UN Charter. Article 42 declares that “should the SC consider measures provided for in Article 41 would be inadequate, it may take such action by air, sea or land forces as may be necessary”.²⁵³ So, obviously the Libyan conflict fell under its mandate and it was obliged to act. The actual problem lies in how it dealt with issue of Libya.

The Libyan conflict is an exception in that prior to the adoption of Resolution 1973, the SC had never authorised military intervention in the affairs of a functioning sovereign state without its consent for the purpose of civilian protection.²⁵⁴ Article 42 of the UN Charter allows for the use

251 Granville L ‘Intervention in Libya: From Sovereign Consent to Regional Consent’ (2013) 14 *International Studies Perspectives* 339.

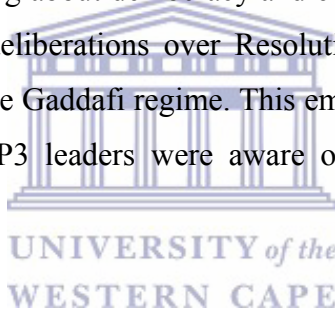
252 Walling CB ‘Human Rights Norms, State Sovereignty and Humanitarian Intervention’ (2013) Paper Prepared for the Ford Security Seminar, Gerald R. Ford School of Public Policy 4.

253 UN Charter.

254 Granville L ‘Intervention in Libya: From Sovereign Consent to Regional Consent’ (2013) 14 *International Studies Perspectives* 326.

of force but only as a measure of last resort.²⁵⁵ However, in Libya it took less than one month and just one prior resolution for the SC to authorise the use of force to protect civilians.²⁵⁶ In this regard, Hehir points out that many states condemned the hypocrisy of the Western states epitomised by their inaction over oppression in the Middle East, especially Saudi Arabia's military support for the government of Bahrain during its crackdown on pro-democracy protestors.²⁵⁷ In the background to this is the notion that regarding the use of force it will always be politics all the way and decisions will always be contingent and subject to case by case basis.²⁵⁸

Furthermore, the official record of the UNSC's deliberations over Resolution 1973 gives little support to assertions that R2P was a major influencing factor on decisions over the most suitable form of intervention.²⁵⁹ This may partly be due to the fact that the R2P neither justifies forced regime change nor calls for bringing about democracy and enforcing human rights by the use of armed intervention.²⁶⁰ In its SC deliberations over Resolution 1973 the Permanent 3 did not explicitly call for the removal of the Gaddafi regime. This emanates from the fact that during the drafting of Resolution 1973 the P3 leaders were aware of the fragility of the international



255 UN Charter.

256 Williams PR & Popken C 'Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity' (2011) 44 *Case Western Reserve Journal of International Law* 227.

257 Hehir A 'The Permanence of Inconsistency: Libya, the Security Council and the Responsibility to Protect' (2013) 38 *International Security* 139.

258 Morris J 'Libya and Syria: R2P and the spectre of the swinging pendulum' 92(13) 89 *International Affairs* 1282.

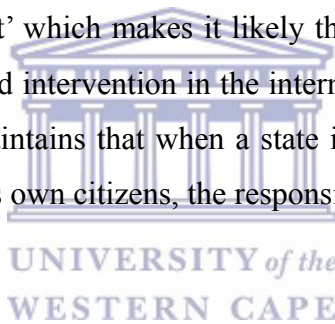
259 Morris J 'Libya and Syria: R2P and the spectre of the swinging pendulum' 92(13) 89 *International Affairs* 1272.

260 Kuwali D 'Responsibility to Protect: Why Libya and not Syria' (2012) *Policy Brief* 3.

consensus in support of their military action and knew that openly pursuing regime change would endanger that consensus.²⁶¹

This is illustrated by the fact that on its 3082nd Foreign Affairs Council meeting on the 20 April 2011, the Council repeated its call on Colonel Gaddafi to relinquish power immediately.²⁶² This was reiterated by Foreign Secretary William Hague following the Libya Contact Group meeting in Doha that Gaddafi and his regime had lost all legitimacy and he must leave power allowing the Libyan people to determine their future.²⁶³ This occurred despite the fact that Chapter VII was intended to augment the sovereignty of states and protect them from external aggression and unwanted intervention, not to intervene in their domestic affairs.²⁶⁴ This evaluation of illegitimacy of a state by external agents has connotations of colonialism.

Zongze laments the lack of a criteria by which to judge if a country is unwilling or unable to execute its responsibility to protect' which makes it likely that it would become another excuse for some countries to impose armed intervention in the internal affairs of other countries.²⁶⁵ This is called for by the R2P which maintains that when a state is unwilling or unable to protect its population or indeed is targeting its own citizens, the responsibility to protect is transferred to the international community.



261 De Waal A 'African roles in the Libyan conflict of 2011' (2013) 89 *International Affairs* 368.

262 Council of the European Union Council Conclusions on Libya, 3082nd Foreign Affairs Council Meeting, Luxembourg 12 April 2011.

263 Statement by Foreign Secretary William Hague following the Libya Contact Group meeting in Doha 13 April 2011.

264 Murgatroyd BM 'How are rules of intervention relevant to the current culture of humanitarian interventions?' available at <http://www.academia.edu/18587698/> (accessed on 28 August 2016).

265 Zongze, R' Responsible Protection', China Institute of International Studies (15 June 2012) available at: http://www.ciis.org.cn/english/2012-06/15/content_5090912.htm (accessed 20 June 2012).

3.7.1.1 The pursuit of regime change by UNSC/ NATO led coalition of states

There is the notion that UK, US and France collectively referred to as the Permanent 3 (P3) from the beginning had the removal of Gaddafi from power as their objective. However, during the drafting of Resolution 1973 the P3 leaders were cognisant of the fragility of the international consensus in support of their military action and thus understood that explicitly calling for regime change would jeopardise that consensus.²⁶⁶ It was only after the intervention had commenced that the intervening states openly affirmed that the final objective of the military operation was regime change.²⁶⁷ However, forceful regime change in some cases breaches on pivotal principles of international law such as sovereignty, the prohibition of intervention and international law's general neutrality with regard to the internal political structure of a state.²⁶⁸

To illustrate NATO and its allies provided military aid to the rebels even as the rebels repeatedly rejected the government's cease-fire offers which would have ended the violence and spared civilian lives.²⁶⁹ Furthermore NATO airstrikes targeted Gaddafi forces and military sites, while the rebels received air coverage as well as arms and ammunition supplied primarily by France, actions which overstepped the UN mandate.²⁷⁰ This occurred despite the fact that there is no general rule of international law that allows a State to support rebels in overthrowing a government, even if this government is responsible for gross human rights violations.²⁷¹

3.7.2 The AU in the Libyan Intervention

266 De Waal A 'African roles in the Libyan conflict of 2011 (2013) 89 *International Affairs* 368.

267 Payandeh M 'The United Nations, Military Intervention and Regime Change in Libya' (2012) 52 *Virginia Journal of International Law* 382.

268 Payandeh M 'The United Nations, Military Intervention and Regime Change in Libya' (2012) 52 *Virginia Journal of International Law* 389.

269 Kuperman AJ 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign' (2013) 38 *International Security* 115.

270 Nuruzzaman M 'Human Security and the Arab Spring' (2013) 37 *Strategic Analysis* 60.

Under the AU treaty law the Peace and Security Council (PSC) is the primary organ that deals with the use of force by the AU as directed by the AU Assembly. In the African context the PSC is the body entrusted with the sanctioning of military intervention by the AU. This authority is conferred upon the PSC by Article 4 (h) of the AU Constitutive Act. Article (4) sanctions the right of the Union 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.²⁷² Article 4(h) purports to allow the AU to resolve conflicts more effectively on the continent by by-passing the principle of non-interference in the internal affairs of member states.²⁷³ Also, it must be noted that the AU's shift from non-interference to non-indifference happened before the adoption of the R2P concept by the UN 2005 World Summit.²⁷⁴

The AU was born in part out of a belief that the international community and particularly the UN Security Council did not sufficiently attend to African needs and that African solutions were needed to African problems particularly in cases of violent conflict and human rights abuses.²⁷⁵ However, in the instance of Libya, the supremacy of the AU pertaining intervention in African matters was superseded by NATO and the UN. This occurred in spite of the observation by Omorogbe that the UN General Assembly and Security Council might not have the same appreciation of the nature and development of conflict situations as a regional organization.²⁷⁶

3.7.2.1 Regional Organisations and the UNSC in Libya

271 Corten O & Koutroulis V 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of jus contra bellum jus in bello' (2013) 18 *Journal of Conflict & Security Law* 64.

272 AU Constitutive Act.

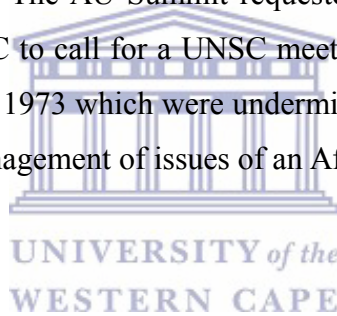
273 Kioko B 'The Right of intervention under the African Union's Constitutive Act': From non-interference to non-intervention' (2003) 85 *IRRC* 817.

274 Ntahiraja B 'The Global and the Regional in the Responsibility to Protect: Where does authority lie?' (2012) 419 *Journal Jurisprudence* 431.

275 Sarkin J 'The Role of the United Nations, the African Union and Africa's Sub-regional organisations in dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53 *Journal of African Law* 18.

Article 52 (3) under Chapter VIII declares that “the Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.”²⁷⁷ In this Article the UN Charter emphasizes the importance of peaceful conflict resolution driven by regional organizations. This is partly informed by the fact that regional organizations were better positioned to fully understand the dynamics of conflicts and how to protect civilians and preserve regional peace and security.²⁷⁸

It is imperative to note that the level of support by regional organizations for a more robust response by the UNSC was essential for the passing of Resolution 1973.²⁷⁹ The 3 African states in the UNSC Gabon, Nigeria and South Africa voted in favour of the no fly zone.²⁸⁰ However, differences started to emerge over the implementation of the resolution by the NATO led international community of states. The AU Summit requested the African Group in New York and African members of the UNSC to call for a UNSC meeting to re-assess the implementation of the UNSC resolutions 1970 and 1973 which were undermining the AU efforts and causing the AU to feel marginalized in the management of issues of an African country.²⁸¹



276 Omorogbe EY 'The African Union, Responsibility to Protect and the Libyan Crises' (2012) *Netherlands International Law Review* 154.

277 UN Charter.

278 Granville L 'Intervention in Libya: From Sovereign Consent to Regional Consent' (2013) 14 *International Studies Perspectives* 330.

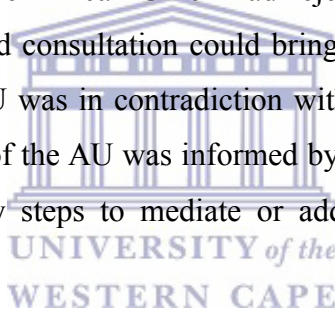
279 Morris J 'Libya and Syria: R2P and the spectre of the swinging pendulum' (2013) 89 *International Affairs* 272.

280 Omorogbe EY 'The African Union, Responsibility to Protect and the Libyan Crises' (2012) *Netherlands International Law Review* 159.

281 Sithole A 'The African Union Peace and Security mechanism's crawl from design to reality: Was the Libyan crisis a depiction of severe limitations' (2012) *Accord* 117.

However, the adoption of Resolution 1970 by the UNSC meant that the actions of the AU in the Libyan conflict would be subject to the actions of the UNSC, as the UNSC has the primary responsibility for maintaining international peace and security.²⁸² Thus, the AU's failure to interpret, qualify and communicate adequately what was taking place in North Africa particularly in Libya, provided NATO and the Arab League the opportunity to undermine it.²⁸³ This hegemonic behavior by the NATO in Libya might have dire consequences for the future implementation of the R2P. According to Iyi cases such as Libya could further alienate states from the UN system where they already complain about marginalization in decision making processes especially in matters that concern Africa.²⁸⁴

In relation to the Libyan conflict the SC had recognized the role of regional organizations. In paragraphs 4 and 8 of Resolution 1973 of 2011 explicitly recognizes the role of regional organizations.²⁸⁵ In this context, the African Union had rejected military intervention in Libya and stressed that only dialogue and consultation could bring solutions in Libya.²⁸⁶ This pacifist approach to the conflict by the AU was in contradiction with the military approach adopted by the UNSC. The pacifist approach of the AU was informed by the fact that regional organizations and governments have taken many steps to mediate or address conflict situations across the African continent.²⁸⁷



282 Apuuli KP 'The African Union's notion of 'African Solutions to African Problems' and the crises in Cote d'Ivoire (2010-2011) and Libya (2011)' (2012) 12 *African Journal on Conflict Resolution* 147.

283 Zounmenou D, Motsamai D & Nganje F Perspectives on Conflicts and Conflict Resolution in Africa' Research Paper of the Wilson Centre's African Program and Leadership Project (2012) Southern Voices in the Northern Policy Debate Initiative 18.

284 Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical analysis of NATO's Intervention in Libya' (2012) 2012 *Conflict Trends* 47.

285 UNSC Resolution 1973.

286 Ulfstein G & Christiansen HF 'The Legality of the NATO Bombing in Libya' (2013) 62 *International and Comparative Law Quarterly* 161.

However, in the case of Libya the UNSC under the auspices of NATO chose to sideline the AU. Eventually, the Arab League's call for the Security Council to impose a no-fly zone over Libya proved crucial in generating political support for outside military intervention.²⁸⁸ The reason for this was that the AU's political approach was in open conflict with the NATO and UN military strategy.²⁸⁹ Furthermore, the Libyan case had demonstrated that although African states enjoy membership of the UN and AU, the AU and UNSC can adopt radically different approaches to a regional conflict where crimes against humanity are being committed.²⁹⁰

The AU devised a Road Map aimed at finding an amicable solution to the Libyan crisis. The Road Map was adopted by the PSC at the 265th meeting of the AU Heads of States and Governments on 10 March 2011. The Road Map called for:

- (a) Immediate cessation of hostilities
- (b) Cooperation of the concerned Libyan authorities to facilitate the timely delivery of humanitarian assistance to needy populations;
- (c) Protection of foreign nationals, including the African migrant workers living in Libya; and
- (d) Dialogue between the Libyan parties and establishment of a consensual and inclusive transitional government

287 Sarkin J 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organisations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53 *Journal of African Law* 11.

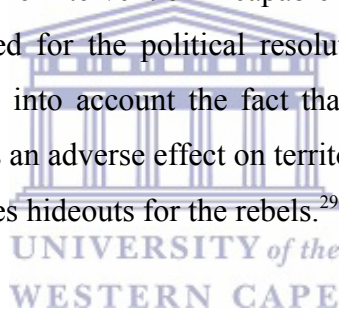
288 Omorogbe EY 'The African Union Responsibility to Protect and the Libyan Crises' (2012) *Netherlands International Law Review* 158.

289 Ntahiraja B 'The Global and the Regional in the Responsibility to Protect: Where does authority lie?' (2012) 419 *Journal Jurisprudence* 434.

290 Kabau T 'The Responsibility to Protect and the Role of Regional Organisations: an Appraisal of the African Union's Interventions' (2012) 4 *Goettingen Journal of International Law* 79.

On the 10th of April 2011 the AU Ad hoc committee met Gaddafi and he accepted the AU Road Map on Libya including the specific issue of the cease-fire and deployment of an effective and credible monitoring mechanisms.²⁹¹ Nevertheless, the Libyan government's declarations of cease-fire and willingness for negotiation were dismissed as a deliberate ploy by Gaddafi to buy time and shield himself from the escalating military assault targeting him and his government.²⁹² This dismissive approach by the UNSC towards the AU Road Map disregarded the fact that the Road Map was designed as a way for the Brother Leader to relinquish power in a time frame of months, handing over to an inclusive interim government that would pave the way for elections.²⁹³ Moreover, Security Council Resolution 1973 had demanded the immediate establishment of a cease-fire and an end to all violence.²⁹⁴

However, the NATO countries were determined to use military means as the only solution to the conflict in Libya which rendered the intervention incapable to allow for the implementation of the road map that the AU outlined for the political resolution of the crisis in Libya.²⁹⁵ This approach by NATO failed to take into account the fact that the borders of African states are porous and conflict in one state has an adverse effect on territories of neighbouring states through influx of refugees and even provides hideouts for the rebels.²⁹⁶



291 Apuuli KP 'The African Union's notion of 'African Solutions to African Problems' and the crises in Cote d'Ivoire (2010-2011) and Libya (2011)' (2012) 12 *African Journal on Conflict Resolution* 149.

292 Dersso SA 'The quest for Pax Africana: The case of the African Union's peace and security regime' (2012) 12 *African Journal of Conflict Resolution* 41.

293 De Waal A 'African roles in the Libyan conflict of 2011' (2013) 89 *International Affairs* 370.

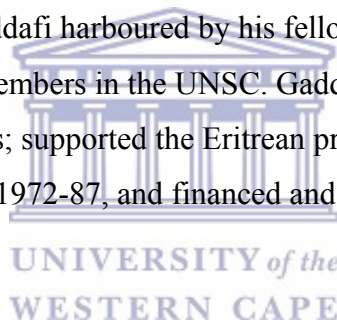
294 Dogachan D 'The responsibility to protect: its rise and demise' (2017) 2 *Journal of Liberty and International Affairs* 78.

295 Dersso SA 'The quest for Pax Africana: The case of the African Union's peace and security regime' (2012) 12 *African Journal of Conflict Resolution* 41.

Also, the lack of unity among African states has often been responsible for the perceived failure by the AU to attain a common position on critical issues.²⁹⁷ This has inevitably affected the voting pattern of African states in the UNSC. Pertaining to the Libyan conflict, the three African states on the SC at that time, South Africa, Nigeria and Gabon voted in favour of no-fly zone²⁹⁸ which was contradictory to the AU position of a pacifist settlement of the conflict.

This is paradoxical when one considers the fact that Resolution 1973 would not have been adopted if two of the three African states had chosen to faithfully reflect the position of the AU in their voting, ensuring that the resolution falls short of the required nine affirmative votes.²⁹⁹ A plausible explanation of this behaviour by AU members is the fact that the AU PSC unlike the UNSC lacks the practical authority to issue binding resolutions on member states and neither can it influence behaviour through the use of the carrot and sticks approach.³⁰⁰

Also personal grudges against Gaddafi harboured by his fellow African leaders played a role in the voting pattern of the African members in the UNSC. Gaddafi had advocated that Nigeria be dismembered into several countries; supported the Eritrean president against Ethiopia, occupied the Aouzou strip of Chad between 1972-87, and financed and armed JEM, the largest Darfur



296 Botei E 'How can the African Union improve on its Function of being the 'African Solution to Africa's Problems' with Regard to Conflict Resolution? (2015) 4 *American International Journal of Social Science* 43.

297 Sithole A 'The African Union Peace and Security mechanism's crawl from design to reality: Was the Libyan crisis a depiction of severe limitations?' (2012) *Accord* 122.

298 Omorogbe EY 'The African Union, Responsibility to Protect and the Libyan Crises' (2012) 59 *Netherlands International Law Review* 159.

299 Bellamy AJ & Williams PD 'The new politics of protection? Cote d'Ivoire, Libya and the responsibility to protect' (2011) 87 *International Affairs* 846.

300 Botei E 'How can the African Union improve on its Function of being the 'African Solution to Africa's Problems' with Regard to Conflict Resolution? (2015) 4 *American International Journal of Social Science* 42.

rebel organisation, against the Sudanese Government.³⁰¹ This is one of the causes of the diverging views among African leaders regarding Gaddafi's regime which translated into a lack of coherence within the African continent.³⁰² This amongst others culminated in the three African members in the UNSC voting for the adoption of Resolution 1973, which was contrary to the position of the AU.

3.8 THE IMPLICATIONS OF THE LIBYAN INTERVENTION FOR THE FUTURE APPLICATION OF THE R2P

The manner in which the NATO intervention was executed in Libya has not done much to entrench the R2P norm among UN member states. This is contrary to the stated objectives of the UN. The R2P was developed as a mechanism in order to allow the UN to intervene in cases of human rights abuses by UN member states. Thus, the de-legitimisation of the R2P by the actions of NATO in Libya threatens one of the most important purposes of the UN, which is human rights protection.

3.8.1 The impact of the NATO intervention on Libyan civilians

UNSC Resolution 1973 emphasises the fact that the intervention is primarily intended for the protection of civilians above all else.³⁰³ However, the NATO intervention has had dire consequences especially for the Libyan civilians whom NATO had purported to protect. Zounmenou et.al asserts that although civilian protection during armed conflict has become a universal norm, its operationalization has also been equally challenging and highly contested.³⁰⁴

301 De Waal A 'African Roles in the Libyan Conflict of 2011' (2013) 89 *International Affairs* 371.

302 Sithole A 'The African Union Peace and Security Mechanism's crawl from design to reality: Was the Libyan Crisis a depiction of severe limitations' (2012) *Accord* 122.

303 Resolution 1973.

304 Zounmenou D, Motsamai D & Nganje F Perspectives on Conflicts and Conflict Resolution in Africa' Research Paper of the Wilson Centre's African Program and Leadership Project (2012) *Southern Voices in the Northern Policy Debate Initiative* 17.

This was illustrated by the Libyan intervention and how it was conducted. Also, contrary to its stated aims, NATO forces have killed many civilians and violated human rights in the pretext of protecting civilians.³⁰⁵ A case in point is the observation by the Human Rights Watch that NATO bombs hit two family compounds, one of them hosting displaced persons and this was followed by another bomb that struck outside one of the compounds as neighbours and relatives were retrieving the wounded and dead.³⁰⁶

Furthermore, it is argued that whenever an intervention is driven by national interests, it is likely that the means used to prosecute it will not be conducive to a positive humanitarian outcome.³⁰⁷ In Libya NATO had abandoned its civilian protection mandate and instead pursued regime change even at the cost of civilian lives which was the initial reason for the intervention.³⁰⁸ This has an adverse effect pertaining to the future application of the R2P. Furthermore, the application of R2P to legitimise an intervention that is not aimed at helping victims of oppression or human rights violations but by the want of resources or dominion over the state in crisis must not happen if the doctrine is to retain any credibility.³⁰⁹

Subsequently, as developments in Libya and the Sahel region have shown if the AU Plan was given a chance and support the Libyan crises could have been resolved with less destruction and

305 Nuruzzaman M 'Human Security and the Arab Spring' (2013) 37 *Strategic Analysis* 60.

306 Human Rights Watch *World Report 2012: Libya* available at <http://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya> (Accessed 20 May 2017).

307 Dobos N 'Consistency in the Armed Enforcement of Human Rights: A Moral Necessity' (2011) 8 *Journal of Moral Philosophy* 95.

308 Fisk T *Military Intervention and the Responsibility to Protect in Libya and Kosovo* (unpublished thesis submitted to the University Honors Program in partial fulfillment of the requirements for the Honors Diploma, Southern Illinois University, 2016) 8.

309 Oldemenien M 'Non-Intervention or Responsibility to Protect' *E-International Relations* 14 January 2012 available at <http://www.e-ir.info/2012/01/14/non-intervention-or-responsibility-to-protect/> (Accessed on 15 March 2016).

the fallout that resulted from the military approach could have been prevented with countries like Mali being spared from the crisis.³¹⁰ This is premised on the notion that regional organisations best understood the dynamics of conflicts and crises and were best placed to know how to protect civilians and preserve regional peace and security.³¹¹

This was the reason why the AU was more aligned with a peace-keeping approach stating that military intervention in Libya posed a serious threat to peace and security in that country and region as a whole.³¹² However, the NATO ignored the AU's position of a pacifist settlement of the Libyan conflict despite the provisions of Chapter VI of the UN Charter which calls for a pacifist settlement of disputes. This occurred despite the fact that peace and security are inextricably linked to the protection and promotion of human rights.³¹³

The repercussions of the Libyan civil war were more detrimental for the African migrants in Libya. Kuperman asserts that the victorious rebels perpetrated scores of reprisal killings and expelled 30,000 mostly black residents of Tawerga on grounds that some had been mercenaries for Qaddafi something that had never happened under Gaddafi's rule.³¹⁴ Thus, the NATO intervention had managed to ignite feelings of resentment towards their fellow African brothers. The NATO intervention in Libya created an ethnic war amongst the civilian population of Libya.

310 Derso S 'The quest for Pax Africana: The case of the African Union's peace and security regime' (2012) 12 *African Journal on Conflict Resolution* 41.

311 Granville L 'Intervention in Libya: From Sovereign Consent to Regional Consent' (2013) 14 *International Studies Perspectives* 330.

312 Domestici-Met M 'Protecting in Libya on Behalf of the International Community' (2011) 3 *Goettingen Journal of International Law* 866.

313 Waithira NM *Ships Passing in the Night? Opportunities to Integrate the African Peer Review Mechanism Early Warning Findings within the African Union Peace and Security Architecture* (unpublished thesis submitted in partial fulfillment of the requirements of the LLM (Human Rights and Democratisation in Africa), University of Pretoria, 2009) 10.

314 Kuperman AJ 'Lessons from Libya: How Not to Intervene' (2013) *Quarterly Journal: International Security*.

The Libyan political structure collapsed after the intervention which gave rise to lawlessness and human rights abuses. The first elected prime minister was removed in less than a month by a no confidence vote and almost immediately after victory rebels were engaging in reprisal killings among other human rights abuses against suspected Qaddafi supporters.³¹⁵ This highlights the negative impact caused by the NATO intervention in Libya pertaining to human rights.

3.8.2 The ramifications of the NATO intervention in Libya on the authorization of the use of force by the UNSC

The pursuit of regime change in Libya by NATO under the guise of human rights protection has proven to be a major set-back for the UNSC's unanimity over authorization of the use of force. Also, the manner in which the UNSC authorized NATO intervention in Libya had a spill-over effect on Syria. NATO's intervention on behalf of Libya's rebels also encouraged Syria's formerly peaceful protesters to switch to violence in mid-2011, in hopes of attracting a similar intervention.³¹⁶ However, that envisaged intervention never materialized. This is epitomized by the deadlock in the UNSC over the application of the R2P in Syria.

The major causal factor of this stalemate in the UNSC is the continuous exercise of the veto rights by Russia and China in the UNSC. This derives from Article 27 (3) of the UN Charter which declares that decisions of the Security Council on all matters shall be an affirmative vote of nine members including the concurring votes of the permanent members.³¹⁷ This vetoing of resolutions against the Syrian government of President Assad by Russia and China is partly informed by self-interests. Lahoud asserts that Syria's strong allies in the UNSC, Russia and China vetoed against such measures which is to be expected as the both share strategic and economic interests in Syria while the US, UK and France push for drastic measures.³¹⁸

315 Fisk T *Military Intervention and the Responsibility to Protect in Libya and Kosovo* (A thesis submitted to the University Honors Program in partial fulfillment of the requirements for the Honors Diploma, Southern Illinois University, 2016).

316 Kuperman AJ 'Lessons from Libya: How Not to Intervene' (2013) *Quarterly Journal: International Security*.

317 UN Charter.

In the case of Russia the reasons for the veto are both economical and geo-political. This is informed by the fact that during the Cold war, the Soviet Union was Syria's major supplier and the Syrian government allowed the Kremlin to establish a naval base at Tartus which remains a key component of Russia's plan to rebuild a global military presence.³¹⁹ Also, the position of BRICS of which Russia is a member is that Syria's sovereignty and territorial integrity must be respected and any action must be in line with the UN Charter principles of non-interference in internal affairs.³²⁰

Interestingly, the situation in Syria is similar to the situation in Libya that precipitated the NATO military intervention to create a no-fly zone, which was authorized by the UN Security Council on March 17, 2011.³²¹ This projects the UNSC as being inconsistent and selective in its authorization of the use of force for human protection purposes. Furthermore, the Syrian situation highlights the Security Council's limitations in intervening in a timely and decisive manner, even when the most heinous crimes against humanity are being committed under the watch of the international community.³²²

The perceived overstepping of the SC mandate in Libya by NATO has had a negative effect on the Syrian civilians. This emanates from the notion that NATO's misinterpretation and application of the UNSC mandate in Libya hindered the international community's efforts to

318 Lahoud J *The Responsibility to Protect in Syria: A Motive Analysis of GIBSA* (unpublished Masters in International Administration and Global Governance thesis, University of Gothenburg, 2014) 4.

319 Adams S 'Libya and the Responsibility to Protect' (2012) Global Centre for the Responsibility to Protect Occasional Paper Series no.3, 16.

320 Norooz E 'Responsibility to Protect and its applicability in Libya and Syria' (2015) 9 *Vienna Journal on International Constitutional Law* 39.

321 Buckley CA 'Learning from Libya, Acting in Syria' (2012) 5 *Journal of Strategic Studies* 82.

322 Kuperman AJ 'Lessons from Libya: How Not to Intervene' (2013) *Quarterly Journal: International Security*.

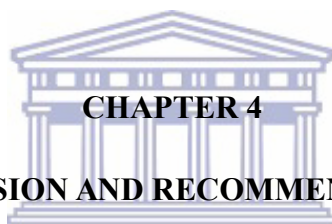
respond to the repression in Syria.³²³ This rendered the Syrian civilian population vulnerable to human rights abuses committed by the government. Furthermore, citing the Libyan intervention, Russia and China have repeatedly vetoed even moderate resolutions aimed at addressing the Syrian war that are critical of the Assad repression, effectively inhibiting the UNSC from addressing the conflict.³²⁴ The Syrian government forces continue with its indiscriminate aerial bombardments of its opponents. However, this could have been averted if the UNSC members took decisive action and enforced a no-fly zone aimed solely at protection of civilians.

3.9 Conclusion

This Chapter has examined the execution of the reactive element of the R2P and its impact on the future operationalisation of the R2P regarding human rights protection. The manner in which the international community under the auspices of NATO conducted its military intervention in Libya has had dire repercussions for the R2P. This is mainly epitomized by the deadlock in the UNSC over intervention in Syria. This situation emanated from the misuse of the R2P in Libya by NATO to effect regime change. The lack of a rigid framework guiding UNSC sanctioned intervention exposes the R2P to abuse. Regional organizations must take the lead with the support of the international community when it comes to conflict resolution.

323 Najem TP, Soderlund WC, Briggs ED, Cipkar S 'Was R2P a viable option for Syria? Opinion content in the Globe and Mail and the National Post, 2011-2013 (2016) 71 *International Journal* 439.

324 Zunes S 'Lessons and False Lessons From Libya' (2013) 25 *Peace Review: A Journal of Social Justice* 592.



CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

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4.1 Conclusion

The Responsibility to Protect is one of the innovative concepts by the international community designed to assist the UN in dealing with conflicts in the 21st century. The actual problem lies in its implementation by the international community. This is due to the diverse cultural, political ideologies and self-interests of the member states of the UN. However, the unification of the member states is one of the stated objectives of the UN. It is imperative for the UN to set clear guidelines for the implementation of the R2P.

The stated aim of this paper is to assess the role played by the responsibility to protect pertaining to the protection of human rights in the conflict that occurred in Libya 2011. The research questions asked were: What is the role of politics in the conceptualisation and application of the R2P in Libya? The research also asked as to what extent did the UNSC apply double standards in its application of the R2P in Libya? The last question is what are some of the lessons learnt from the Libyan intervention from the perspective of the R2P and Human rights?

This has been done through the examination of the R2P with a particular focus on its second element, which is the responsibility to react. The responsibility to react is widely interpreted as the authorisation of the use of force through the UNSC. The focus is on the responsibility to react because that is what the international community relied on in their military intervention in Libya under the R2P. The application of the R2P by the international community is observed in the context of the conflict in Libya in 2011. This emanates from the notion that Libya is the first case regarding the application of the use of force in the protection of civilians against a sovereign state without the consent of the host state.

The international community had introduced the concept of the R2P through the ICISS report which provided a detailed and clear account of what constitutes the R2P. This was followed by the then UN Secretary-General Kofi Annan report titled the Report of the General-Secretary's High-Level Panel on Threats, Challenges and Change. In this report the UNSG sought to reinforce the legitimacy of the R2P elaborating on the controversial aspects of the R2P in order to appease those members that viewed the R2P with suspicion. The High-Level Panel had proposed that the UNSC must agree on the criteria for the use of force and proposed the principles of seriousness of the threat, proper purpose, last resort, proportional means and balance of consequences. These initiatives culminated in the adoption of the R2P by the General Assembly through the unanimous adoption of the World Summit Outcome document. However the content of the R2P as adopted by the General Assembly is said to be ambiguous as compared to the ICISS conception of the R2P.

The military intervention in Libya was made possible through the re-conceptualisation of sovereignty as a responsibility not a right. This re-conceptualisation of sovereignty was first demonstrated in the case of Sudan. In the preamble of Resolution 1706 on Sudan, the Security Council recalled Resolution 1674 (2006) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document. In turn, this enabled the UN through the UNSC to intervene through the implementation of the R2P. However, the implementation of the R2P has been a major point of contention among the international community. These contestations played out in the Libyan conflict in 2011.

The R2P also located the notion of sovereignty to the people. Sovereignty is now viewed as a state's obligation towards its citizens. If a government fails in this aspect it loses its sovereign legitimacy. Through the conception of sovereignty as a people's sovereignty, individual rights surpass a state's sovereignty in international law. This is in line with the human right to self-determination which allow for people to freely determine their political and socio-economic status.

The NATO under the auspices of UNSC had a mandate to protect civilians against human rights abuses by the Libyan government in compliance with the principles of the R2P. It is contended that instead of carrying out its civilian protection mandate, NATO went beyond that in pursuit of its own agendas. NATO openly pursued regime change regardless of the suffering caused to civilians whom they were supposed to protect. There is also the argument that NATO led coalition of states ignored any efforts at pacifist settlement of the conflict by regional organisations particularly the AU.

Regional organisations occupy a pivotal position pertaining to conflict resolution. This is due to the fact that regional organisations are better placed to fully comprehend the dynamics of a conflict within a particular region. Also a conflict within one state inevitably affects its neighbouring states. The UN Charter recognises the role of regional organisations in maintaining peace. In Libya it is probable that if NATO led countries had given support to the implementation of the AU Road Map, the situation might have been different. Thus, it is of paramount importance that the UN when implementing the R2P should work in concert with the relevant regional organisations

The abuse of the R2P has had dire consequences regarding the future implementation of the R2P. The main abuse committed by NATO was going beyond its mandate and openly pursuing regime change in Libya. Part of this is the politicisation of the R2P by the powerful states in the UNSC in pursuit of their self-interests. Russia and China have used their veto powers in the UNSC to prevent any resolution against the government of Syria. The victims of this have been the civilians in Syria, where the UNSC has reached a deadlock over how to intervene in the conflict.

4.2 Recommendations

Based on the above conclusion, the international community in its implementation of the R2P needs to act objectively in order to achieve its stated aims. This is informed by the fact that politicisation and pursuit of self-interests by UN member states purportedly acting under the R2P has an adverse impact on the legitimacy of the R2P. To avert this, there must be clear guidelines on how to operationalise the R2P doctrine. These guidelines would be the basis on which all UNSC interventions would be judged. The guidelines should clarify should be clear on the threshold of when to commence with intervention and when to relent. This would assist in maintaining consistency and coherence regarding the implementation of the R2P.

A military intervention is a destructive undertaking. It is destructive for both the state and the people in that state. That is why it is imperative for the UN to sanction the use of force as an option of last resort. The UN Charter under Chapter VI emphasises the importance of a pacifist settlement of disputes. Also the UN should put great effort in the prevention element of the R2P through the pursuit of an amicable solution to a conflict. The Libyan conflict in 2011 and the way NATO had conducted its military intervention is an example of a detrimental effect of the use of force. Libya is more unstable than it was before the intervention.

Also, there must be clear coordination between the voting pattern of AU members in the UN. That is, the position of the AU should be reflected in the voting patterns of the AU members in the UN. This was one of the major errors committed by the AU member states. The AU was against any form of military intervention in Libya but the three African countries in the UNSC Gabon, Nigeria and South Africa voted in favour of the no-fly zone in Libya.

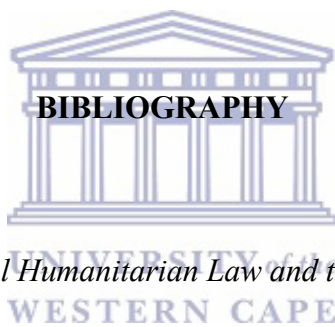
The UN Resolutions authorising the use of force should be clear and concise especially pertaining to the mandate and time-frame of the intervention. Moreover, the UN should closely monitor the use of force so as to ensure that there is no excessive use of force. This serves to curb the abuse of the R2P by the superpowers in order to pursue their own agenda. The misuse of the R2P in Libya in 2011 has caused serious problems for the UNSC regarding the authorisation of the use of force to protect civilians.

The International Criminal Court (ICC) needs to be strengthened in order to fulfil its role. The ICC should be granted the powers to enforce its arrest warrants with or without cooperation from states. This would then allow it to effectively execute its mandate independently. The ICC should

be independent from the political body that is the UNSC if it is to maintain its legitimacy as an international legal authority. This is premised on the fact that some countries already perceive the ICC as being used to meet the political objectives of some of the permanent members of the UNSC.

The issue of the reformation of the UNSC is a point of contention among UN member states. The main point of contention is that the composition of the UNSC should reflect the geographical diversity of member states. One of the objectives of the reforms is to circumvent the deadlocks characteristic of the UNSC when it pertains, especially on the use of force. This is informed by the fact that the UNSC is the primary body tasked with decision making on all matters pertaining to international peace and security. The UNSC currently composes of nine members out of which five of them enjoy permanent membership. It would be proper to grant permanent membership status to all member states seconded by their respective regional organisation. This would culminate in a representative UNSC.

The General Assembly (GA) is the most democratic institution of the UN. This ideally positions the GA as the body in which decisions relating to world peace should be taken. One of its primary objectives is the maintenance of international peace and security. Thus, it is imperative that conformity with the decisions of the GA should be properly enforced. The GA should be conferred with powers that would allow it to override the UNSC in some cases, like for instance when the UNSC reaches a deadlock in voting. This would be to the advantage of civilians who suffer the most from the inaction of the UNSC during humanitarian crises. At present the GA is barred from interfering in the work of the UNSC unless requested to do so by the UNSC.



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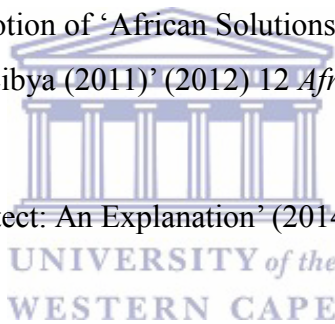
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